

September 29, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository)	)	09-877-HLW-CAB02
	)	09-878-HLW-CAB03
	)	09-892-HLW-CAB04

NRC STAFF ANSWER TO "MOTION" OF WILLIAM PETERSON

Pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.323(c) and the Revised Second Case Management Order, dated July 6, 2007, as adopted by CAB Case Management Order #1, dated January 29, 2009, the staff of the U.S. Nuclear Regulatory Commission (Staff) hereby files this answer to the "Motion" filed September 22, 2009, by William Peterson (Petitioner). See Motion (Sep. 22, 2009). For the reasons set forth below, the NRC staff opposes the Motion in that Petitioner has not satisfied the requirements for admission as a party to this proceeding, he is not a party entitled to discovery or any other relief, and he has not met the procedural requirements for motions.

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the Yucca Mountain Repository License Application to the NRC, seeking authorization to construct a geologic repository at Yucca Mountain, Nevada, in accordance with the provisions of 10 C.F.R. Part 63. See Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348

(June 17, 2008); Yucca Mountain; Notice of Receipt and Availability of Application; Correction, 73 Fed. Reg. 40,883 (July 16, 2008). After the Staff docketed the License Application,<sup>1</sup> the Commission issued a “Notice of Hearing and Opportunity to Petition for Leave to Intervene” on October 17, 2009, which was published in the *Federal Register* on October 22, 2008.<sup>2</sup> The Notice of Hearing required any person whose interests might be affected by this proceeding and who wished to participate as a party to file a petition for leave to intervene, in accordance with 10 C.F.R. § 2.309, within 60 days of the notice’s publication and to demonstrate compliance with the Licensing Support Network (LSN) requirements of 10 C.F.R. §§ 2.1003 and 2.1012. See Notice of Hearing, 73 Fed. Reg. at 63,030.

Three Construction Authorization Boards (CABs or Boards) were established to preside over the petitions to intervene and requests to participate in this licensing proceeding. U.S. Department of Energy; Establishment of Atomic Safety and Licensing Boards, 74 Fed. Reg. 4477 (Jan. 26, 2009). On June 19, 2009, the Chief Administrative Judge established Construction Authorization Board 04 to preside, among other things, over matters concerning new or amended contentions. See Establishment of Atomic Safety and Licensing Board; Department of Energy, 74 Fed. Reg. 30,644 (June 26, 2009).

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<sup>1</sup> Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 53,284 (Sept. 15, 2008).

<sup>2</sup> *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); In the Matter of U.S. Department of Energy (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008) (Notice of Hearing).

On September 22, 2009, Petitioner filed the instant motion asking the Board to find that his proposed spent nuclear fuel facilities would provide an immediate solution to “the SNF problem,” and seeking discovery of privileged NRC Staff documents. See Motion at 5.

### DISCUSSION

In his filing, Petitioner provides an overview of what he describes as the “300-year [spent nuclear fuel] disposal solution,” involving a combination of reprocessing and storage. See Motion at 2-5. Arguing that his proposed solution would accomplish the goals of the proposed high-level waste repository at Yucca Mountain, see *id.* at 5, Petitioner “moves that the Atomic Safety and Licensing Board find that building four or five 300-year type SNF storage facilities would immediately fix the SNF problem for the utilities, could be built sooner and cost less than the cost of finishing [the proposed repository at Yucca Mountain] . . . .” *Id.* at 5. Additionally, he seeks to compel the NRC Staff to produce “documents asserted as privileged.” *Id.*

Although Petitioner does not explicitly seek permission to intervene in this proceeding, his request for a factual finding by the Board, his reference to himself as a “Third Party License Applicant,” see *id.* at 1, and his discovery request, see *id.* at 5, suggest that he seeks to participate as a party in this proceeding. Thus, it would appear that the Motion is an intervention petition.

If Petitioner’s filing is a petition to intervene, it fails to satisfy—or even to address—the Commission’s rules governing nontimely intervention filings, and Petitioner neither demonstrates standing nor proffers an admissible contention. See *generally* 10 C.F.R. § 2.309(a), (c), (d), (f). Petitioner has also failed to demonstrate LSN compliance pursuant to 10 C.F.R. §§ 2.1003 and 2.1012. In addition, the requests that the Board compel the Staff to produce privileged documents and to issue a finding of fact, see Motion at 5, similarly fail to satisfy the procedural requirements for motions. See 10 C.F.R. § 2.323(a). In short, because Petitioner has not been admitted to the proceeding, he may not participate in discovery or

demand a finding of fact. See 10 C.F.R. § 2.315(a). Therefore, as more fully argued below, the Board should deny the Motion.

A. The Motion Fails to Satisfy the Rules Governing Nontimely Filing

In the Notice of Hearing, the Commission provided that intervention petitions must be filed no later than 60 days after the date of the publication of the notice in the *Federal Register*; intervention petitions were due on or before December 22, 2008. See Notice of Hearing, 73 Fed. Reg. at 63,030. Any petition to intervene filed after that deadline is nontimely and must demonstrate that it should be granted based upon a balancing of eight factors described in Commission's Rules of Practice:

- (1) Good cause, if any, for failure to file on time;
- (2) The nature of the requestor's/petitioner's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (3) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (4) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (5) The availability of other means whereby requestor's/petitioner's interest will be protected;
- (6) The extent to which the requestor's/petitioner's interest will be represented by existing parties;
- (7) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (8) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

See 10 C.F.R. § 2.309(c). See also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 563-64 (2005).

Petitioner filed the Motion nine months after the filing deadline had passed without addressing the factors delineated in § 2.309(c), particularly good cause and a showing that the

factors weigh in favor of granting his petition. Thus, the filing fails to comply with the rules governing nontimely filing and should be denied.

B. The Motion Fails to Demonstrate Standing and Proffer an Admissible Contention

In addition to meeting the requirements for nontimely filing, Petitioner must demonstrate that he has standing within the meaning of 10 C.F.R. § 2.309(d) and must proffer at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a).

Under the general standing requirements set forth in 10 C.F.R. § 2.309(d), a request for hearing or petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/ petitioner's interest.

10 C.F.R. § 2.309(d)(1).

The Commission has observed that the purpose of the standing inquiry is to determine “whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.” *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) (*citing Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978) and *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)). In order to demonstrate this stake, a petitioner must “(1) allege an ‘injury in fact’ that is (2) ‘fairly traceable to the challenged action’ and (3) is ‘likely’ to be ‘redressed by a favorable decision.’” *Id.*, CLI-94-12, 40 NRC at

71-72 (citations omitted). *See also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

The legal requirements governing the admissibility of contentions are well established and are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice. Specifically, an admissible contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). A contention may not be admitted unless it satisfies all of these factors.

*See Millstone*, CLI-05-24, 62 NRC at 567; *Private Fuel Storage*, CLI-99-10, 49 NRC at 325.

It is well established that these requirements are designed to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend

against or oppose. *See, e.g., Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

Further, as outlined in the Notice of Hearing, any person seeking to participate as a party in this proceeding must, in addition to the requirements of 10 C.F.R. § 2.309, demonstrate compliance with the Licensing Support Network (LSN) requirements of 10 C.F.R. §§ 2.1003 and 2.1012. *See* Notice of Hearing, 73 Fed. Reg. at 63,030. The LSN, which is accessible via the web, is the means by which discovery documents have been made electronically available since prior to submission of the DOE license application. *See* 10 C.F.R. §§ 2.1001, 2.1003. Section 2.1012 provides that no person will be granted party status without first demonstrating “substantial and timely compliance” with the material availability provisions in section 2.1003 at the time it files its petition to intervene. *See* 10 C.F.R. § 2.1012(b)(1). Pursuant to §§ 2.1003 and 2.1009, each potential party, interested government participant, and party is required to certify that it has identified and made available, via the LSN, the documentary material specified in § 2.1003 within 90 days after DOE initially certifies its document collection.<sup>3</sup>

Petitioner’s filing neither addresses the requirements described above nor satisfies them. He has not stated the nature of his right to participate under the Atomic Energy Act nor has he described the nature of his interest in the proceeding and how that interest may be impacted by the outcome. Accordingly, Petitioner has failed to demonstrate standing to intervene in this proceeding. He has likewise failed to articulate an admissible contention. The

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<sup>3</sup> A person initially denied party status under 10 C.F.R. § 2.1012(b)(1) may subsequently demonstrate compliance with § 2.1003 and gain admission to the proceeding, provided, of course, that the petitioner satisfies the nontimely intervention, standing, and contention admissibility rules in § 2.309. *See* 10 C.F.R. § 2.1012(b)(2),

pleading does not address any of the requirements for contention admissibility and does not raise a dispute with the Department of Energy's license application.<sup>4</sup>

Finally, Petitioner has failed to demonstrate "substantial and timely" compliance with the LSN requirements. He has neither addressed the documentary material provisions in § 2.1003 nor taken the procedural steps identified in § 2.1009.

Because the Motion does not demonstrate standing, proffer an admissible contention, or demonstrate LSN compliance, it should be denied.

C. The Motion Fails to Satisfy Procedural Requirements

The Motion seeks Board action on two matters: a factual determination by the Board that his proposed "solution" would "fix the [spent nuclear fuel] problem" and an order compelling the NRC Staff to produce privileged documents. See Motion at 5. The Board should deny the Motion because Petitioner is not a party, and thus not entitled to participate in this proceeding, and because the Motion fails to satisfy NRC rules governing motions and because it fails to comply with requirements for motions to compel imposed in the Fourth Case Management order.

Persons not admitted as parties to a proceeding may not participate beyond the limits stated in the NRC's Rules of Practice and the Notice of Hearing. See 10 C.F.R. § 2.315(a); Notice of Hearing, 73 Fed. Reg. at 63,032. Section 2.315(a) provides that persons who are not parties to a proceeding may make oral or written limited appearance statements at "the

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<sup>4</sup> The Commission has rejected Petitioner's attempts to participate in an earlier proceeding. See *generally Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-07, 59 NRC 111 (2004) (noting that a license proceeding is "not an open forum for discussing the country's need for energy and spent fuel storage"). The Commission affirmed the Board's rejection of his attempts to intervene "because he did not show good cause for late filing, did not have standing, and did not offer a single litigable contention." *Id.* at 112 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261 (2000)). Thus, Petitioner has previously been put on notice as to the Commission's rules governing petitions to intervene.



discretion of the presiding officer,” that the person “may not otherwise participate in the proceeding,” and that statements of non-parties are not considered evidence. See 10 C.F.R. § 2.315(a). Thus, NRC regulations preclude Petitioner’s Motion for the Board to compel discovery or to issue a finding of fact.

Even assuming, for the sake of argument, that the Board should entertain requests of a non-party, the Motion fails to provide any basis on which the Board could grant either of Petitioner’s requests. A motion must, among other things, “state with particularity the grounds and the relief sought,” and must include a certification that the moving party attempted in good faith to resolve the issues raised prior to filing the motion. See 10 C.F.R. § 2.323(b); Revised Second Case Management Order (July 6, 2007) (unpublished), at 14. A case management order issued in this proceeding also imposes additional requirements for motions to compel, such as the inclusion of an appendix A listing the LSN accession numbers, the privilege claimed for each document sought and the use of privilege terminology identified in the Revised Second Case Management Order and the Third Case Management Order. See Fourth Case Management Order (Oct. 5, 2007) (unpublished), at 4-5. See *also* Revised Second Case Management Order (July 6, 2007) (unpublished), at 5-6; Third Case Management Order (Aug. 30, 2007) (unpublished), at 1-3.

Petitioner’s Motion fails to meet the motion requirements described in § 2.323(b). First, the Motion does not describe with *any* particularity the grounds and relief sought. Notably, the Motion fails to identify which privileged documents Petitioner wishes the Staff to produce and does not articulate any rationale explaining why the Staff should produce them. Second, the Motion does not include the certification of good faith consultation required by § 2.323(b) and the Revised Second Case Management Order, nor could it, as Petitioner has not contacted the NRC Staff regarding this matter. Third, the Motion fails to comply with the appendix requirement identified in the Fourth Case Management Order.

Because Petitioner is not a party in this proceeding, and because the Motion lacks the necessary foundation and fails to satisfy pleading requirements, including the required certification of good-faith consultation, the Motion should be denied.

CONCLUSION

Petitioner has failed to satisfy the Commission's rules governing nontimely intervention, standing, and contention admissibility and has not certified LSN compliance. Additionally, as a non-party, Petitioner is not entitled to file motions before the Board, and his Motion otherwise fails to satisfy pleading requirements. Accordingly, the Motion should be denied.

Respectfully submitted,

**/Signed (electronically) by/**

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	)	09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO 'MOTION' OF WILLIAM PETERSON" in the above-captioned proceeding have been served on the following persons this 29<sup>th</sup> day of September, 2009, by Electronic Information Exchange.

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