

March 29, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	
)	

NRC STAFF ANSWER TO STATE OF WASHINGTON'S
PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

INTRODUCTION

On March 3, 2010, the State of Washington ("Washington") filed a petition to intervene in the above-captioned proceeding. State of Washington's Petition for Leave to Intervene and Request for Hearing, dated March 3, 2010 ("Petition"). The petition was filed pursuant to 10 C.F.R. § 2.309, which requires a showing of standing and the proffering of an admissible contention. For the reasons set forth below, Washington did not submit an admissible contention, and therefore, its Petition should be denied. However, the Staff would not object to a request by Washington to participate under 10 C.F.R. § 2.315(c),¹ provided it certifies pursuant to 10 C.F.R. §§ 2.1003 and 2.1009, that it has made its documentary material available via the Licensing Support Network (LSN), or that it does not have any documentary

¹ The Staff notes that participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention under 10 C.F.R. § 2.309(f)(1), nor is it subject to the timeliness standards in § 2.309(c). Because Washington has requested participation as a party pursuant to 10 C.F.R. § 2.309 rather than as an interested government participant pursuant to § 2.315(c), the Staff addresses the § 2.309 requirements in this answer.

material.

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the "Yucca Mountain Repository License Application," ("LA") seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain. See Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008). On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions must be filed within 60 days. *U.S. Dep't of Energy (High-Level Waste Repository)*, CLI-08-25, 68 NRC 497 (2008); see also *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 (October 22, 2008).

Timely requests for a hearing were received from twelve petitioners: the State of Nevada; the Nuclear Energy Institute; Nye County, Nevada; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral; the State of California; Clark County, Nevada; the County of Inyo, California; White Pine County, Nevada; the Timbisha Shoshone Tribe; the Native Community Action Council (NCAC); the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation; and Caliente Hot Springs Resort, LLC; and two petitioners filed requests to participate as interested government participants: Eureka County, Nevada and Lincoln County, Nevada.² See *U.S. Dept. of Energy (High-Level Waste Repository)*, LBP-09-6,

² DOE filed answers to the intervention petitions on or before January 16, 2009. See *id.* at 379 n. 20. The Staff responded to the intervention petitions on February 9, 2009. NRC Staff Answer to Intervention Petitions, filed February 9, 2009 ("Staff Answer"). On or before February 24, 2009, ten (continued. . .)

69 NRC 367, 377-378 nn. 5-19 (2009). The three Construction Authorization Boards (CABs) designated to rule on the petitions granted 10 petitions to intervene, granted the interested governmental requests under § 2.315(c), and admitted all but 17 of the 318 proposed contentions. See *id.* at 499-500. Later, CAB-04 granted NCAC and the Joint Timbisha Tribal Group party status after both parties satisfied LSN certification requirements. Order (Granting Party Status to the Native Community Action Council), dated August 27, 2009 (unpublished) at 2; Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group), dated August 27, 2009 (unpublished) at 2.

Pursuant to "CAB Case Management Order #2," dated September 30, 2009 (unpublished), formal discovery began in the proceeding with the submission of initial witness disclosures by the parties on or before October 10, 2009. Discovery was limited to "Phase I" issues: contentions related the subject-matter of the first two volumes of the Staff's Safety Evaluation Report scheduled to be completed. Depositions were scheduled to begin on February 16, 2010. *Id.* at 7.

A DOE "Motion to Stay the Proceeding," filed on February 1, 2010 ("Stay Motion") stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010" Stay Motion at 1. The Stay Motion further stated that the proposed budget indicated that all DOE funding for Yucca Mountain would be eliminated in 2011.³ *Id.* Therefore, DOE stated its intent to withdraw

(. . .continued)

petitioners filed timely replies to the DOE and Staff answers. See 69 NRC at 379 n. 24.

³ The Stay Motion referenced statements in the proposed budget prepared by the Office of (continued. . .)

the license application by March 3, 2010, and requested a stay of the proceeding in order to avoid unnecessary expenditure of resources by the Board and parties. See Stay Motion at 2. CAB-04 granted a stay of the proceeding on February 16, 2010.

On March 3, 2010, DOE filed its withdrawal motion, and Washington filed the instant Petition. The Staff's answer is set forth below.⁴

DISCUSSION

I. Standing

In order to demonstrate standing, a petitioner must satisfy the 10 C.F.R. § 2.309(d)(1) requirements and allege a particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. See, e.g., *Private Fuel Storage*, CLI-99-10, 49 NRC 318, 323 (1999). The Staff does not oppose Washington's standing to intervene in this proceeding. Washington argues that the remediation efforts related to the high-level radioactive tank waste, spent nuclear fuel, and capsules of cesium and strontium high-level waste at the Hanford site are linked to the Yucca Mountain project. Petition at 2-7. The waste at the Hanford site "poses a serious threat of irreversible environmental harm within Washington" and released waste has already contaminated soil and groundwater at the Hanford site. *Id.* at 3. Washington alleges that the potential harm resulting from "forever foreclos[ing] siting a deep

(. . .continued)

Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at <http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf>).

⁴ In this Answer, the Staff will follow the Boards' previous orders regarding the content of answers to intervention petitions. See "CAB Case Management Order #1," dated January 29, 2009 (unpublished) (slip op. at 2) (adopting provisions in previous Advisory Pre-License Application Presiding Officer (APAPO) orders relating to pleading requirements); *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-08-10, 67 NRC 450, 456 (2008) (limiting answers to addressing specific deficiencies in petitions and contentions).

geologic repository at Yucca Mountain” can be redressed by the Board’s denial of DOE’s motion. *Id.* at 7.

Because the Staff does not oppose Washington’s standing to intervene, the Staff does not address Washington’s argument in the alternative for discretionary intervention. See Petition at 8.

II. Nontimely Intervention

The standards set forth in 10 C.F.R. § 2.309(c)(1) outline a multi-factor balancing test to determine whether a nontimely filing should be entertained. The Commission has held that the first factor—whether there is good cause for failure to file on time—is the most important consideration. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005). A determination of whether there is “good cause” for nontimely filing requires an analysis of: (1) “why [the petitioner] could not have filed within the time specified in the notice of hearing” and (2) whether the petitioner “filed as soon as possible thereafter.” *Id.* at 564-65. However, a failure to show good cause is not dispositive. A petitioner’s compelling showing under the remaining factors may counsel in favor of permitting a nontimely filing. See *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-8, 67 NRC 193, 197-98 (2008).

A. Good Cause

With respect to this factor, Washington argues that, when petitions to intervene were due after the notice of hearing, it was satisfied that DOE’s license application would be adjudicated on the merits. Petition at 9. Washington alleges that (1) its good cause to intervene did not ripen until February 1, 2010 when Secretary Chu announced that DOE would discontinue its licensing effort and DOE filed a motion for a stay in this proceeding, *id.* at 10 (citations omitted), and (2) it quickly filed its petition for intervention within 30 days of the February 1, 2010 events, *id.* at 11. Because Washington’s nontimely contentions relate to DOE’s motion to withdraw its

license application, the Staff agrees that Washington could not file these contentions at the outset of the proceeding. See *Millstone*, CLI-05-24, 62 NRC at 564-65 (providing that good cause requires an analysis of why the petitioner could not file on time and whether the petitioner filed as soon as possible thereafter). The Staff does not dispute that Washington filed its petition promptly after the new information became available inasmuch as Washington filed within 30 days of that new information. Cf. 10 C.F.R. § 2.309(c)(1)(i) with 10 C.F.R. § 2.309(f)(2); see CAB Case Management Order #1, dated Jan. 29, 2009, at 3-4 (For purposes of complying with 10 C.F.R. § 2.309(f)(2), a new contention will be deemed timely if filed within 30 days of the date on which the new and material information first became available.).

B. Remaining 10 C.F.R. § 2.309(c) Factors

A balancing of the remaining factors in 10 C.F.R. § 2.309(c), along with Washington's good cause, favors the Board's allowing the late filing. The Commission has held that the remaining factors should not be equally weighted. See *Diablo Canyon*, CLI-08-8, 67 NRC at 197-98. "The extent to which the petitioner's participation will broaden the issues or delay the proceeding" and "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record" are the two most important factors.⁵ *Id.* Washington argues that its contentions will not broaden the issues that will be considered in the proceeding because it will only address whether DOE's motion to withdraw should be granted, an issue already before the Board. Petition at 13. Washington further argues that its intervention will not delay the proceeding because it will comply with all Board deadlines and the case is still in the discovery phase. *Id.* Washington's contentions do broaden the issues before the Board

⁵ Prior to the revision of 10 C.F.R. Part 2 in 2004, the standard addressing nontimely contentions was codified at 10 C.F.R. § 2.714(a)(1)(i)-(v). The two factors addressed in *Diablo Canyon* are now codified at 10 C.F.R. § 2.309(c)(1)(vii) and (viii), respectively.

because no existing party has raised the legal issues contained in Washington's contentions at this time; however, they may not delay the proceeding because existing parties may raise the same issues. Any potential delay may not be significant given that DOE wishes to withdraw its application. Therefore, this factor does not weigh for or against Washington. See 10 C.F.R. § 2.309(c)(1)(vii).

As to the extent to which Washington's participation may assist in developing a sound record, Washington asserts that its participation will "ensure full briefing and argument of whether DOE's motion should be granted." *Id.* at 14. However, Washington has not shown that it will substantially assist in developing a sound record, as it does not proffer any admissible contentions. See 10 C.F.R. § 2.309(c)(1)(viii). Therefore, this factor weighs against Washington.

The remaining five factors weigh in favor of Washington. With respect to Washington's right to be made a party to the proceeding, as discussed above, the Staff does not oppose Washington's standing as a matter of right in this proceeding. See 10 C.F.R. § 2.309(c)(1)(ii). Washington asserts that an order granting DOE's motion to withdraw its license application with prejudice could affect its interest in remediation of the Hanford site by making it less likely that the waste will be removed from the site and less likely that remediation will occur without significant additional costs. Petition at 5-6; see 10 C.F.R. § 2.309(c)(1)(iii), (iv). Washington claims that, while judicial review of certain DOE and NRC decisions is possible, this proceeding is the only one available to directly oppose DOE's motion to withdraw its license application. Petition at 12; see 10 C.F.R. § 2.309(c)(1)(v). Finally, Washington notes that it is a sovereign state with unique interests, and the only party besides DOE that has taken positions in support of the license application is the Nuclear Energy Institute, which represents commercial nuclear power operators, and does not represent the same interests as Washington. Petition at 12-13; see 10 C.F.R. § 2.309(c)(1)(vi).

After weighing the factors listed in 10 C.F.R. § 2.309(c)(1), with the consideration that the good cause factor is most important, the Staff finds the balance to be in favor of allowing Washington's nontimely filing.

III. Compliance with 10 C.F.R. § 2.1003

Pursuant to 10 C.F.R. § 2.1012(b)(1), a petitioner may not be granted party status under 10 C.F.R. § 2.309 or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the HLW proceeding under § 2.309 or § 2.315. *See also High-Level Waste Repository*, CLI-08-25, 68 NRC at 499-500. Section 2.1003 requires each potential party, interested government participant, and party to certify, in compliance with procedures implemented under § 2.1009, that it has made its documentary material available on the Licensing Support Network (LSN). In addition, a petitioner will not be found to be in substantial and timely compliance unless the petitioner complies with all of the orders of the Pre-License Application Presiding Officer (PAPO) regarding electronic availability of documents. *High-Level Waste Repository*, CLI-08-25, 68 NRC at 500.

A person denied party or interested governmental participant status pursuant to § 2.1012(b)(1) may request such status upon a showing of subsequent compliance with the requirements of § 2.1003. *Id.* at 500 n.1; *see also* Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,937 (April 14, 1989) (A person denied such status "may later come into compliance and be admitted to the hearing, assuming they meet all the requirements in § 2.1014 or 10 CFR 2.715(c) [currently 2.309 or 2.315(c)] for admission."). However, any such party or interested governmental participant subsequently admitted into the proceeding must take the proceeding as they find it and the proceeding shall not be delayed in order to accommodate any such party. *See High-Level Waste Repository*, CLI-08-25, 68 NRC

at 500 n.1; see also 54 Fed. Reg. at 14,937.

Because Washington has not yet certified, pursuant to §§ 2.1003 and 2.1009, that it has made its documentary material available, Washington should not be admitted to the proceeding until it has done so. See Washington Petition at 27 (stating it is following guidance documents provided by the LSN Administrator and intends to comply with § 2.1003).

IV. Contention Admissibility

A. Contention Admissibility Requirements

The legal requirements governing the admissibility of contentions are well established, and are set forth in the Commission's Rules of Practice at 10 C.F.R. § 2.309(f)(1). To be admitted, a contention must satisfy the following requirements:

- (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) [P]rovide 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). Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissal of the contention. Changes to Adjudicatory Process,

69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *PFS*, CLI-99-10, 49 NRC at 325.

It is well established that the purpose of the contention rule is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.” 69 Fed. Reg. at 2202; see also *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519, 553-54 (1978). The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.” 69 Fed. Reg. at 2202.

The Commission has also noted that the “contention rule is strict by design.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsid. denied*, CLI-02-01, 55 NRC 1 (2002). Strict adherence to these requirements serves (1) to focus the proceeding “on real disputes susceptible of resolution in an adjudication”; (2) to put other parties sufficiently on notice of the issues “and thus give[s] them a good idea of the claims they will be either supporting or opposing”; and (3) to assure that the hearing process is “triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999).

Similarly, long-standing Commission precedent establishes that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues that may be contested as set forth in the *Federal Register* notice of hearing and comply with the requirements of former § 2.714(b) (subsequently restated in § 2.309(f)) and applicable Commission case law. See, e.g., *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 400 (1991). In addition to the requirements set out above, “no rule or regulation of the Commission .

. . is subject to attack . . . in any adjudicatory proceeding.” 10 C.F.R. § 2.335(a); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

B. Contentions

Washington states that its “contentions are raised in a different context than the contentions raised in reaction to an already-docketed license application” because its “contentions relate to a motion not yet filed.”⁶ Petition at 14. To the extent Washington may be asserting that the contention admissibility criteria in § 2.309(f)(1) do not apply, the Staff notes that Washington has not sought a rule waiver pursuant to § 2.335, nor has it addressed the requirements for waiving the applicability of § 2.309(f)(1).

As discussed further below, Washington has not submitted an admissible contention. However, the Staff would not object to its participation as an interested State pursuant to 10 C.F.R. § 2.315. If permitted to participate as an interested State, Washington could raise the arguments in its contentions in a brief in response to DOE’s Motion to Withdraw.

⁶ DOE filed its motion hours before Washington filed its Petition.

WAS-MISC-001 – UNDER THE NWPA, NEITHER DOE NOR THE NRC HAVE THE DISCRETION TO TERMINATE THE YUCCA MOUNTAIN LICENSING PROCESS WITH PREJUDICE

Whether under Section 114 of the NWPA, 42 U.S.C. § 10134(b) and 42 U.S.C. § 10134(d), DOE has authority to withdraw its construction authorization application with prejudice, and whether the NRC has discretion to grant such withdrawal.

Petition at 15. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

10 C.F.R § 2.309(f)(1)(iii): Scope of the Proceeding

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007). The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

Washington does not explain how WAS-MISC-001 relates to a safety, security or technical issue with the LA or NEPA. Instead, the contention states “[t]o the extent DOE’s

motion will be within the scope of this proceeding, so too will be Washington's opposition to DOE's motion based on the above contention." Petition at 17.

Washington essentially argues that if the Board considers DOE's motion as part of the proceeding, then Washington's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). The Commission's contention rules, however, do not appear to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding.⁷ Washington has not explained how WAS-MISC-001 relates to the safety, security, and technical aspects of the LA or the satisfaction of NEPA requirements. Therefore, WAS-MISC-001 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

⁷ Because participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention, the Staff would not object to a request from Washington to participate under § 2.315(c).

10 C.F.R. § 2.309(f)(1)(iv): Materiality

An admissible contention must assert an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding.” 10 C.F.R. § 2.309(f)(1)(iv). This requirement “means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258 (1997) (A contention regarding a decommissioning plan “must show some specific link between the alleged errors in the plan and the health and safety impacts they invoke.”). In the instant proceeding, a material contention, therefore, must be linked to NRC’s decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC’s adoption of the DOE EISs. In addition, the APAPO Board stated that this “requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention.” *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in WAS-MISC-001 is material to the findings NRC must make in the proceeding, Washington argues that the Board will need to rule on DOE’s motion, and Washington’s contention goes to whether DOE’s motion should be granted. Petition at 17. However, whether DOE or NRC has discretion to terminate the proceeding with prejudice under the NWSA is not material to the findings NRC would be required to make to determine “whether or not [DOE] will adequately protect the health and safety of the public and the environment” if granted a construction authorization. Furthermore, the contention’s only citations to a statute or regulation that has not been satisfied relate to the authority of DOE and NRC to terminate this proceeding, not the health and safety requirements

that an application must meet. Therefore, WAS-MISC-001 should not be admitted.

10 C.F.R. § 2.309(f)(1)(vi): Genuine Dispute on a Material Issue of Law or Fact

An admissible contention must show that a “genuine dispute exists with the applicant/licensee on a material issue of law or fact,” identify either specific portions of, or alleged omissions from the application, and provide supporting reasons for the petitioner’s position. 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not directly controvert a specific portion of the application, or identify specific additional information that the petitioner alleges was improperly omitted, must be dismissed. *See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 247-48 (1992), *review declined*, CLI-94-2, 39 NRC 91 (1994).

Here, Washington asserts that there is a genuine dispute on a material of issue of law—whether DOE, through a grant from the Board, can withdraw its LA with prejudice. Petition at 17. Washington, however, does not dispute any portion of the LA or claim that information was improperly omitted from it. Therefore, WAS-MISC-001 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

Because WAS-MISC-001 does not meet the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

WAS-MISC-002 – IF THE NWPA DOES NOT PRECLUDE DOE FROM MOVING TO DISMISS ITS APPLICATION WITH PREJUDICE, DOE CANNOT MEET THE BOARD’S REQUIREMENTS FOR DISMISSAL WITH PREJUDICE

Whether DOE’s request to withdraw its construction authorization application with prejudice meets the Board’s standards for dismissal with prejudice, as articulated through prior Board decisions.

Petition at 18. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

10 C.F.R § 2.309(f)(1)(iii): Scope of the Proceeding

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC’s NEPA regulations have been met. 73 Fed. Reg. 63,029; see also *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA’s mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

Washington does not explain how WAS-MISC-002 relates to a safety, security or technical issue with the LA. Instead, the contention states “[t]o the extent DOE’s motion will be within the scope of this proceeding, so too will be Washington’s opposition to DOE’s motion based on the above contention.” Petition at 20.

Washington essentially argues that if the Board considers DOE’s motion as part of the

proceeding, then Washington's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). See *id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). The Commission's contention rules, however, do not appear to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. See 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding.⁸ Washington has not explained how WAS-MISC-002 relates to the safety, security, and technical aspects of the LA or the satisfaction of NEPA requirements. Therefore, WAS-MISC-002 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

10 C.F.R. § 2.309(f)(1)(iv): Materiality

An admissible contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). This requirement "means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether

⁸ Because participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention, as indicated earlier, the Staff would not object to a request from Washington to participate under § 2.315(c).

or not the license applicant will adequately protect the health and safety of the public and the environment." *Millstone*, LBP-08-9, 67 NRC at 431; see also *Yankee Nuclear*, CLI-96-7, 43 NRC at 258 (A contention regarding a decommissioning plan "must show some specific link between the alleged errors in the plan and the health and safety impacts they invoke."). In the instant proceeding, a material contention, therefore, must be linked to NRC's decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC's adoption of the DOE EISs. In addition, the APAPO Board stated that this "requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention." *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in WAS-MISC-002 is material to the findings NRC must make in the proceeding, Washington argues that the Board will need to rule on DOE's motion, and Washington's contention goes to whether DOE's motion should be granted. Petition at 20. However, whether DOE can satisfy the Board's requirements for dismissal with prejudice is not material to the findings NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Furthermore, the contention does not cite to a statute or regulation that has not been satisfied by reason of the issue raised in the contention. Therefore, WAS-MISC-002 should not be admitted.

10 C.F.R. § 2.309(f)(1)(vi): Genuine Dispute on a Material Issue of Law or Fact

An admissible contention must show that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact," identify either specific portions of, or alleged omissions from the application, and provide supporting reasons for the petitioner's position. 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not directly controvert a specific portion of the application, or identify specific additional information that the petitioner alleges was improperly omitted, must be dismissed. See *Rancho Seco*, LBP-93-23, 38 NRC at 247-48,

review declined, CLI-94-2, 39 NRC 91 (1994).

Here, Washington asserts that there is a genuine dispute on a material issue of law—whether DOE can satisfy the Board’s standards for withdrawing its application with prejudice. Petition at 20. However, Washington does not dispute any portion of the LA or claim that information was improperly omitted from it. Therefore, WAS-MISC-002 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

Because WAS-MISC-002 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

WAS-MISC-003 – DOE DID NOT COMPLY WITH NEPA BEFORE DECIDING TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN PROJECT

Whether DOE's decision to irrevocably terminate the Yucca Mountain project, as expressed through its anticipated motion to withdraw its construction authorization with prejudice, was made without complying with National Environmental Policy Act (NEPA), 42 U.S.C. § 4321.

Petition at 21. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

10 C.F.R § 2.309(f)(1)(iii): Scope of the Proceeding

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 6). Recently, the Commission observed that a contention disputing the NWSA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

Washington itself questions whether the Board has jurisdiction to evaluate DOE's NEPA compliance with respect to its decision to terminate the Yucca Mountain project. Petition at 21. Although WAS-MISC-003 alleges that DOE has not complied with NEPA, it does not explain why the alleged failure "to comply with NEPA as part of a broader decision to irrevocably terminate the Yucca Mountain project" is an *applicable* NEPA requirement in this construction

authorization proceeding. Instead, the contention states “[t]o the extent DOE’s motion will be within the scope of this proceeding, so too will be Washington’s opposition to DOE’s motion based on the above contention.” Petition at 22.

Washington essentially argues that if the Board considers DOE’s motion as part of the proceeding, then Washington’s opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). See *id.* However, the Commission’s hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE’s Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will address. The Board has the power to “[r]egulate the course of the hearing and the conduct of the participants,” “[d]ispose of procedural requests or similar matters,” and “[d]ispose of motions,” 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). The Commission’s contention rules, however, do not appear to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. See 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding.⁹ Washington has not explained how WAS-MISC-003 relates to an applicable NEPA requirement. Therefore, WAS-MISC-003 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

10 C.F.R. § 2.309(f)(1)(iv): Materiality

An admissible contention must assert an issue of law or fact that is “material to the

⁹ As stated earlier, because participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention, the Staff would not object to a request from Washington to participate under § 2.315(c).

findings the NRC must make to support the action that is involved in the proceeding.” 10 C.F.R. § 2.309(f)(1)(iv). This requirement "means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment." *Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258 (A contention regarding a decommissioning plan "must show some specific link between the alleged errors in the plan and the health and safety impacts they invoke."). In the instant proceeding, a material contention, therefore, must be linked to NRC's decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC's adoption of the DOE EISs. In addition, the APAPO Board stated that this "requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention." *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in WAS-MISC-003 is material to the findings NRC must make in the proceeding, Washington argues that the Board will need to rule on DOE's motion, and Washington's contention goes to whether DOE's motion should be granted. Petition at 23. However, WAS-MISC-003 raises the issues of whether DOE's decision to terminate the Yucca Mountain project is subject to NEPA, and if so, whether the existing EISs are adequate for such a purpose. Petition at 21-22. The action involved in the instant proceeding is the grant or denial of a construction authorization, and Washington has not shown that WAS-MISC-003 is material to the grant or denial of a construction authorization. Therefore, WAS-MISC-003 should not be admitted.

10 C.F.R. § 2.309(f)(1)(vi): Genuine Dispute on a Material Issue of Law or Fact

An admissible contention must show that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact," identify either specific portions of, or alleged omissions from the application, and provide supporting reasons for the petitioner's

position. 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not directly controvert a specific portion of the application, or identify specific additional information that the petitioner alleges was improperly omitted, must be dismissed. *See Rancho Seco*, LBP-93-23, 38 NRC at 247-48, *review declined*, CLI-94-2, 39 NRC 91 (1994).

While WAS-MISC-003 does reference the FEIS, Washington does not argue that the FEIS is inadequate for the purpose of supporting a construction authorization decision. Petition at 22 & n.15 (“not suggest[ing] that Washington considers the EIS’s analysis of the Yucca Mountain alternative to be inadequate to inform NRC’s licensing process”). Washington references the FEIS to demonstrate that no existing NEPA document addresses the consequences of termination of the Yucca Mountain project. *Id.* at 21-22. However, Washington does not challenge the adequacy of the FEIS used to support the licensing of Yucca Mountain by asserting that it failed to address the consequences of termination of the Yucca Mountain project. Therefore, the contention does not present a genuine dispute regarding the FEIS at issue in this proceeding. Accordingly, the Board should not admit WAS-MISC-003.

Because WAS-MISC-003 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

WAS-MISC-004 – DOE’S DECISION TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN PROJECT IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

Whether DOE’s decision to irrevocably terminate the Yucca Mountain project, as expressed through its anticipated motion to withdraw its construction authorization with prejudice, is arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A).

Petition at 24. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

10 C.F.R § 2.309(f)(1)(iii): Scope of the Proceeding

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC’s NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA’s mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

Washington itself questions whether the Board has jurisdiction to evaluate DOE's compliance with the APA with respect to its decision to terminate the Yucca Mountain project.¹⁰ Petition at 24. Washington does not explain how WAS-MISC-004 relates to a safety, security or technical issue with the LA or NEPA requirements. Instead, the contention states "[t]o the extent DOE's motion will be within the scope of this proceeding, so too will be Washington's opposition to DOE's motion based on the above contention." Petition at 25.

Washington essentially argues that if the Board considers DOE's motion as part of the proceeding, then Washington's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). The Commission's contention rules, however, do not appear to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding.¹¹ Washington has not explained how

¹⁰ Washington did not cite to any provision of the Energy Reorganization Act, Nuclear Waste Policy Act, or Atomic Energy Act that would confer such authority on the NRC.

¹¹ Because participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention, the Staff would not object to a request (continued. . .)

WAS-MISC-004 relates to a safety, security, or technical aspect of the LA or an applicable NEPA requirement. Therefore, WAS-MISC-004 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

10 C.F.R. § 2.309(f)(1)(iv): Materiality

An admissible contention must assert an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding.” 10 C.F.R. § 2.309(f)(1)(iv). This requirement “means that there must be some significant link between the claimed deficiency [in the contention] and the agency’s ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment.” *Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258 (A contention regarding a decommissioning plan “must show some specific link between the alleged errors in the plan and the health and safety impacts they invoke.”). In the instant proceeding, a material contention, therefore, must be linked to NRC’s decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC’s adoption of the DOE EISs. In addition, the APAPO Board stated that this “requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention.” *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in WAS-MISC-004 is material to the findings NRC must make in the proceeding, Washington argues that the Board will need to rule on DOE’s motion, and Washington’s contention goes to whether DOE’s motion should be granted. Petition at 25. WAS-MISC-004 raises the issue of whether DOE’s decision to

(. . .continued)

from Washington to participate under § 2.315(c).

terminate the Yucca Mountain project is arbitrary and capricious under the APA. Petition at 24. However, whether DOE violated the APA in deciding to terminate the project is not material to the findings NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Therefore, WAS-MISC-004 should not be admitted.

10 C.F.R. § 2.309(f)(1)(vi): Genuine Dispute on a Material Issue of Law or Fact

An admissible contention must show that a "genuine dispute exists with the applicant/licensee on a material issue of law or fact," identify either specific portions of, or alleged omissions from the application, and provide supporting reasons for the petitioner's position. 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not directly controvert a specific portion of the application, or identify specific additional information that the petitioner alleges was improperly omitted, must be dismissed. *See Rancho Seco*, LBP-93-23, 38 NRC at 247-48, *review declined*, CLI-94-2, 39 NRC 91 (1994).

Here, Washington asserts that there is a genuine dispute on a material issue of law regarding whether DOE has "appropriately exercised whatever agency discretion it is afforded under the NWPA."¹² Petition at 25-26. However, Washington does not dispute any portion of the LA or EIS, nor does it claim that information was improperly omitted from either. Therefore, WAS-MISC-004 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

Because WAS-MISC-004 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

¹² Although Washington asserts the contention also raises DOE's failure to satisfy NEPA prior to implementing its decision, WAS-MISC-004 does not discuss NEPA. See Petition at 26.

CONCLUSION

Because Washington did not submit an admissible contention, the Board should deny Washington's petition to intervene, but it should allow Washington to participate pursuant to 10 C.F.R. § 2.315(c), if requested.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 29th day of March, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
U. S. DEPARTMENT OF ENERGY) Docket No. 63-001
)
(High-Level Waste Repository)) ASLBP No. 09-892-HLW-CAB-04
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO STATE OF WASHINGTON'S PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING" in the above-captioned proceeding have been served on the following persons this 29th day of March, 2010, by Electronic Information Exchange.

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