

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

ASLBP NO. 09-892-HLW-CAB04

April 5, 2010

**STATE OF WASHINGTON'S REPLY TO ANSWERS OF THE
STATE OF NEVADA, NRC STAFF, U.S. DEPARTMENT OF ENERGY,
AND CLARK COUNTY, NEVADA**

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I. INTRODUCTION

The State of Nevada, Clark County (Nevada), and the NRC Staff have filed substantive answers opposing the State of Washington's Petition for Leave to Intervene in this matter.¹ The Department of Energy (DOE) and all other parties to this matter either do not oppose Washington's intervention,² express no opinion on the intervention,³ or have chosen not to answer. Nevada challenges Washington's intervention on standing, discretionary intervention, late-filed intervention, and LSN compliance grounds. Clark County argues that Washington has not met late intervention requirements. The NRC Staff does not oppose Washington's standing to intervene and agrees Washington meets the NRC requirements for late-filed petitions, but argues that Washington has failed to present any admissible contentions.⁴ Washington files this reply to demonstrate that the arguments against Washington's intervention are without merit. Washington's intervention should thus be granted.

II. STANDING [10 C.F.R. § 2.309]

Nevada argues that Washington's petition fails to establish standing to intervene. As outlined in Washington's petition, the time-critical mission of retrieving waste from the Hanford Nuclear Reservation's aging and unfit single-shell tanks is, through a series of interrelated and interdependent actions, tied to construction of a Waste Treatment Plant that is itself tied to the

¹ With the exception of some additional late intervention argument by Clark County, Nevada's arguments have been adopted without additional argument or authority by the Native American Community Action Council, Clark County, and the Joint Timbisha Shoshone Tribal Group. Washington thus replies to all these parties' adopted arguments when replying to Nevada.

² The following parties filed answers indicating they either support or do not oppose Washington's intervention are: DOE; Nye County (NV); and the "Four Nevada Counties." The Nuclear Energy Institute and White Pine County (NV) did not file answers, but indicated during pre-filing consultation that they did not oppose Washington's intervention.

³ The following parties filed answers indicated that they express no opinion on Washington's intervention: Eureka County (NV) and Inyo County (CA).

⁴ The NRC Staff also indicate that Washington should not be admitted to the proceeding until it has certified to LSN compliance. NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (NRC Staff Answer) at 8-9.

Yucca Mountain repository project. Terminating the Yucca Mountain project will cause significant regulatory, administrative, and technical issues to be revisited at Hanford. Any resulting delay to the Hanford tank retrieval mission will, among other things, affect Washington's interest as the owner of lands and waters potentially affected by further releases of Hanford's high-level tank waste; confound Washington's interest as a regulator in enforcing Hanford's compliance with hazardous waste laws; and affect Washington's interest as a sovereign acting on behalf of its citizens and environment. *See* State of Washington's Petition for Leave to Intervene and Request for Hearing (Washington Petition) at 2-7.

Nevada makes no attempt to argue that these facts fail to demonstrate an "injury in fact" causally tied to this proceeding. *See* Answer of the State of Nevada to The State of Washington's Petition to Intervene (Nevada Answer) at 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC ____ (May 11, 2009) (slip op) at 9 (relating judicial standing concepts to 10 C.F.R. § 2.309(d)(1)). Instead, Nevada attempts to argue that Washington's intervention—which is to specifically oppose DOE's attempt to summarily terminate this proceeding with prejudice, before the merits are ever reached—constitutes a "purely procedural" interest that is somehow insufficient to convey standing.

While Washington's interest is indeed in seeing that this proceeding not be summarily terminated, this interest is not "purely procedural." Congress enacted the Nuclear Waste Policy Act (NWPA) to establish a process for addressing the nation's problem of accumulated spent nuclear fuel and high-level waste.⁵ *See* 42 U.S.C. § 10131(a)(2) (finding that accumulated waste

⁵ Under 42 U.S.C. § 10107(b)(2), DOE has elected to utilize the proposed Yucca Mountain repository for disposal of defense-related high-level radioactive waste.

from reprocessing spent fuel is a national problem); 42 U.S.C. § 10131(b)(1) (stating NWPA’s purpose is to “establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste. . .”). In doing so, Congress recognized that even by 1982, decades had already been wasted on ineffective efforts to address this problem. *See* 42 U.S.C. § 10131(a)(3) (“Federal efforts during the past 30 years to devise a permanent solution to the problems . . . have not been adequate”).

The NWPA’s process, then, is intended to deliver a substantive result: a disposal solution for waste such as that stored in Hanford’s tanks.⁶ Washington—as much as any person or entity in the country—is squarely within the zone of interest of that process. *See, e.g., U.S. Dep’t of Energy*, 69 NRC ___ (slip op) at 74 (“NEI represents those who are not only within the zone of interests of the NWPA but also are the intended beneficiaries of that Act”). Because the substantive result of the NWPA process is to benefit Washington (among others), Washington’s interest in maintaining the process goes beyond a “purely procedural” concern. The concrete concerns outlined above and in Washington’s petition are directly tied to this process.

DOE’s motion threatens to terminate the NWPA’s process before the merits of the Yucca Mountain license application are reached and before there is any alternative at hand, either in law or in fact. While DOE has convened a Blue Ribbon Commission to examine alternatives to Yucca Mountain and recommend possible amendments to the NWPA, this does not substitute for a process already provided by law. At this juncture, there is only one prospective geologic repository approved by Congress—Yucca Mountain—and there are no alternatives in the fold.

⁶ In saying this, Washington recognizes that the ultimate licensing of a repository has never been guaranteed under the NWPA. The fact that the NWPA provides a blueprint for reaching those merits, however, is itself of value when the question of what to do with Hanford’s tank waste has been tied to having a plan for the end disposition of that waste.

And at this juncture, there is only one legal process in place for developing a geologic repository: that provided by the current NWPA. It is wholly speculative to expect that any alternative legal process will be in place within any identifiable timeframe.

Within this context, Washington satisfies all the requirements of standing: “injury in fact” (an invasion of a judicially cognizable interest that is concrete and particularized as well as actual or imminent); causation (that there be a causal connection between the injury and the conduct complained of; that the injury be fairly traceable to the challenged action); and redressability (that it be likely, and not merely speculative, that the injury will be redressed by a favorable decision). *See Bennett v. Spear*, 520 U.S. 154, 167 (1997). With respect to “injury in fact,” Washington has demonstrated its interest in maintaining the *process* of the NWPA based on its interest in the substantive result that process is intended to achieve: a disposal solution for Hanford’s high-level tank waste. The termination of the NWPA’s process, which is critically linked to the Hanford tank waste retrieval mission, will cause injury in fact to Washington. With respect to causation, there is a direct causal link between Washington’s injury (termination of the NWPA’s process, with resultant effects) and the conduct complained of (DOE’s motion). Finally, with respect to redressability, the relief Washington seeks (denial of DOE’s motion) will be secured with a favorable ruling against DOE’s motion.⁷

None of Nevada’s arguments defeat Washington’s standing. It does not matter that Washington seeks to weigh in only on the merits of DOE’s motion to withdraw, without filing its own substantive contentions on the license application. The disposition of DOE’s motion—which raises the fundamental issue of whether the proceeding itself should continue—represents

⁷ Nevada suggests that the “redressability” element of standing requires that a party show “there is a substantial likelihood the outcome will be favorable.” Nevada Answer at 1, n. 1. This novel formulation of the redressability standard is not expressed in the case Nevada cites for authority. *See Duke Power Co. v. Carolina Envir’l Study Group Inc.*, 438 U.S. 59, 78 (1978).

a distinct sub-issue within this proceeding. *See Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1134 (1981) (recognizing that a change in the focus of a proceeding from the substantive merits of an application to the conditions, if any, upon which an unresolved application may be withdrawn represents a “shift” of the proceeding, with different questions and standards at hand).⁸ Washington’s asserted injury in fact, causal link, and redress all relate to this distinct sub-issue. Nevada cites to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 (1992), for its ultimate proposition that “the assertion of a pure procedural interest is not sufficient for standing.” Nevada Answer at 2. *Lujan*, however, directly supports Washington’s standing to be heard on this sub-issue: “We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, *so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.*” *Lujan*, 504 U.S. at 573 n.8 (emphasis original and added).⁹ The fact that the sub-issue of concern is raised within a broader proceeding does not diminish Washington’s legitimate standing to oppose DOE on that sub-issue.

Similarly, if Washington obtains the relief it seeks, it does not matter that the larger proceeding will continue without Washington’s participation and that DOE’s application might ultimately be denied on the merits. While the NWPA’s process is intended to deliver a

⁸ Further, the Board’s own standing rules ask for a petitioner to describe the “possible effect of any decision *or order* that may be issued in the proceeding on the requestor’s/petitioner’s interest,” suggesting a petitioner need not show an interest in all substantive aspects of a proceeding. *See* 10 C.F.R. § 2.309(d)(1)(iv) (emphasis added).

⁹ Similarly, Nevada’s citation to *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998) is misplaced. In *Guerrero*, Hawaii and two territorial governments sought to enforce against the adequacy of reports submitted solely to Congress by the Office of Insular Affairs. The court determined that because no legal consequence flowed from the reports regardless of their adequacy, there was no effective redress to be had through judicial review. *Guerrero*, 157 F.3d at 1194-95 (“[O]nly Congress can [act on the reports], and nothing that we could order with respect to the reports or their adequacy can make Congress do anything”). The case did not turn on whether the governments’ procedural interest was sufficient to support standing. Indeed, the court noted that “*even assuming standing to request enforcement of the reporting obligation,*” standing could not be asserted for the different question of whether the reports were adequate. *Id.* at 1194 (emphasis added).

substantive result, that result has never been guaranteed by the Act. Even if the effect of a favorable ruling is only to keep the NWP process alive for another day, this relief is effective redress. As again noted by the *Lujan* Court:

[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Id. at n.7.

As expressed in Washington's petition, Washington believes that the ultimate determination of whether construction of the Yucca Mountain repository should be authorized should be decided on the merits of DOE's application. While the denial of DOE's application could most certainly bring about the same harms that Washington seeks to avoid with DOE's motion, this does not alter Washington's argument for standing. The fact that the Yucca Mountain license *might* ultimately be denied on the merits does not diminish the fact that, if granted, DOE's motion to end the NWP process short of a merits determination *will* have that effect today. DOE's motion threatens to prematurely end a process Congress has put in place to address one of the nation's most vexing and contentious issues. Washington has standing to oppose DOE's attempt to end that process.

III. DISCRETIONARY INTERVENTION [10 C.F.R. § 2.309(E)]

Washington has requested discretionary intervention in the event the Board finds Washington lacks standing. Washington Petition at 8. Nevada opposes such intervention.

At the outset, Washington concedes that it overlooked addressing the three factors in 10 C.F.R. § 2.309(e)(2)(i)-(iii) in the discretionary intervention section of its petition. However, the 10 C.F.R. § 2.309(e)(2)(i)-(iii) factors are substantially the same as those found in the NRC's

test for late-filed petitions in 10 C.F.R. § 2.309(c)(1)(v)-(vii), which Washington did address in its petition. *See* Washington Petition at 12-13. No prejudice has resulted. In its Answer, Nevada does not contest the factors in 10 C.F.R. § 2.309(c)(1)(v) and (vi) and provides limited opposition on factor (vii). *See* Nevada Answer at 7-8. Washington addresses Nevada’s discussion of the factor in 10 C.F.R. § 2.309(c)(1)(vii) in Section IV.E, *infra*.

Beyond this, Nevada disputes that Washington will assist in the development of a sound record because in Nevada’s framing, the only germane “record” is the technical record on the underlying license application. Nevada’s narrow interpretation of the relevant “record” ignores that a distinct sub-issue has been created within this proceeding by DOE’s withdrawal motion. DOE’s motion has put substantial issues of law at issue within this proceeding, and with its interests and position Washington’s participation will ensure full briefing and argument on whether DOE’s motion should be granted. The *Portland General Electric* case, cited by Nevada, actually supports Washington’s position on this score. In that case, the NRC stated that “Permission to intervene should prove more readily available where petitioners show significant ability to contribute *on substantial issues of law or fact* which will not otherwise be properly raised or presented. . . .” *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2)*, CLI-76-27, 4 NRC 610, 617 (1976) (emphasis added).

The NRC has recognized that discretionary intervention is not limited only to those who will contribute to a sound record of technical information. Instead, discretionary intervention is to permit participation by petitioners who, despite not satisfying judicial standing criteria,

nevertheless “would have a valuable contribution to make to our decision-making process,” even if only on a single issue. *Id.* Washington will provide such a contribution.¹⁰

IV. NON-TIMELY INTERVENTION [10 C.F.R. § 2.309(C)]

Nevada and Clark County, Nevada argue that Washington’s petition for intervention should be rejected because Washington has failed to meet the NRC’s standard for late-filed petitions. Neither Nevada nor Clark County rebut Washington’s showing that non-timely intervention should be granted.

A. Late Intervention Standard [10 C.F.R. § 2.309(c)]

As discussed in Washington’s petition, the NRC allows for late-filed petitions to intervene and applies a multi-factor test to evaluate such petitions. *See* Washington Petition at 8-9. Under this test, NRC licensing boards have broad discretion and the “good cause” factor is most important. *Id.*

B. Good Cause [10 C.F.R. § 2.309(c)(1)(i)]

Nevada and Clark County both argue that Washington has failed to establish good cause for late intervention. Both parties erroneously characterize Washington’s motivation for not seeking intervention earlier. Both parties also ignore the objective facts supporting Washington’s good cause for now seeking intervention.

Prior to seeking intervention, Washington was neither “lulled into inaction” by the participation of other parties nor content that this proceeding was nothing more than a

¹⁰ The other cases cited by Nevada do not support the propositions asserted by Nevada. In *Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-671, 15 NRC 508 (1982) the petitioner sought intervention after the record was closed and sought to litigate a discrete *evidentiary* issue, not a legal issue. It was in this purely evidentiary context that the NRC provided its comment regarding a sound record. In *Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1)*, LBP-84-17, 19 NRC 878 (1984), the petitioner similarly sought intervention in the middle of the evidentiary hearing and sought to litigate evidentiary matters. These cases are simply consistent with the holding in *Portland General Electric* that a significant ability to contribute on issues of law or fact, as determined by the particular situation, is the relevant standard.

“procedural formality” with a pre-determined outcome. As indicated above and in Washington’s petition, Washington is not seeking intervention in order to take a position on the substantive merits of DOE’s license application. Washington was comfortable at the outset, and remains comfortable today, that those merits can and will be fully and fairly litigated by the existing parties to the proceeding. *See* Washington Petition at 9. Further, with respect to those merits, Washington has never expected that approval of DOE’s application is “predetermined.” *See* Washington Petition at 9 (“Washington was comfortable that the ultimate determination of *whether* construction of the Yucca Mountain repository should be authorized would be decided on the merits of DOE’s application” (emphasis added)). While Washington would welcome Yucca Mountain’s authorization *if appropriate*, Washington would no more support an inappropriate repository at Yucca Mountain than an inappropriate repository in its own state. To this point, Washington has thus not relied on any existing party to advance its interests. Instead, it has relied on the fact that the NWP’s *process* has been moving forward toward a resolution on the merits, as prescribed by Congress.¹¹ *See* 42 U.S.C. § 10134(b); 42 U.S.C. § 10134(d).

Until recently, Washington has been justified in this reliance. Based on this, the objective facts support Washington’s good cause for late intervention. Nevada argues that Washington ignored, failed to heed, or failed to reasonably discover publically available

¹¹ For this reason, the cases cited by Nevada are inapposite on their facts and address wholly different grounds advanced by late-intervening parties. In *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), an entity sought to intervene after the Board dismissed a proceeding pursuant to a settlement that had already undergone public comment. As the court noted, the petition was filed more than nine years after the proceeding began. The petitioner argued it made a strategic decision early in the proceeding to withdraw due to financial constraints and rely on another party to represent its interests. The NRC ruled this did not establish good cause for late intervention. The NRC reached a similar decision in *Gulf States Utility Co. (River Bend Station, Units 1 & 2)*, ALAB-444, 6 NRC 760 (1977). There, a late intervener similarly relied on another party to represent its interests and was “lulled into inaction” by that particular party’s participation. Finally, in *Easton Utilities Comm’n v. AEC*, 424 F.2d 847 (D.C. Cir. 1970), the late petitioner attempted intervention six months after the Board had terminated the proceeding and five months after its initial decision. Again, the late intervener argued that it relied on another party and, when that party did not appeal the Board’s order, it sought intervention. Nevada cites these cases for a proposition not offered by Washington. Washington has not relied on other parties to represent its interests.

information that, in Nevada's view, put Washington on notice as early as late 2008 that DOE may seek license withdrawal. However, irrespective of any statements by the President while he was a candidate or President-elect, and irrespective of any press speculation, DOE continued to prosecute its congressionally mandated license application until February 1, 2010, when it filed a motion for stay and announced it would seek to dismiss its application with prejudice. DOE's fiscal year (FY) 2010 budget request demonstrated that it would continue with its Yucca Mountain license application. DOE's funding request for its Office of Civilian Radioactive Waste Management (OCRWM) includes the following:

- “The budget request includes the minimal funding needed . . . to continue participation in the Nuclear Regulatory Commission (NRC) license application (LA) process, consistent with the Nuclear Waste Policy Act.” Attachment 1 at 504.¹²
- “The Department is following the process and schedule outlined in the NWPA, as amended, to support the licensing review process underway by the U.S. Nuclear Regulatory Commission (NRC).” *Id.* at 505. “OCRWM’s budget request for FY 2010 provides support for the NRC licensing process” *Id.* “This effort will require sufficient technical, scientific, licensing, and legal resources, as appropriate for particular tasks, to ensure a full and fair process.” *Id.* at 506.

In addition, as Washington has already pointed out, Secretary Chu testified to Congress in conjunction with this request that DOE would continue to advance its application in this process.¹³ *See* Washington Petition at 10. Based on DOE's request and its stated justifications,

¹² Attached hereto as Attachment 1 is a true and correct copy of relevant excerpts of the *U.S. Department of Energy, FY 2010 Congressional Budget Request, Vol. 5, Nuclear Waste Disposal* (May 2009). The complete document will be made available on the LSN as Participant No. WAS-20100405-001.

¹³ Nevada's attempt to characterize Secretary Chu's May 2009 testimony as anything other than what he said is unpersuasive. *See* Nevada Answer at 5, n. 3.

Congress fully funded OCRWM in the amount requested by DOE, approximately \$197 million. *See* Pub. L. No. 11-85, 123 Stat. 2864, 2868 (Oct. 28, 2009).

The NRC has established that new regulatory developments and the availability of new information may constitute good cause for late intervention. *See* Washington Petition at 10-11. Here, the indisputable facts are that: (1) in its FY 2010 budget request, DOE requested nearly \$200 million to, among other things, allow it to continue its license application; (2) Secretary Chu testified that DOE intended to continue with its licensing application in 2010; and (3) Congress fully funded DOE's request. Washington was entitled to rely on these facts over any generalized statement or press speculation that Nevada may point to. The February 1, 2010 announcement of DOE's decision to irrevocably terminate this proceeding was both a new regulatory development and new information giving Washington good cause to now seek intervention in this proceeding.¹⁴

C. Remaining Factors

The NRC considers several other factors in analyzing whether a late-filing petitioner has met the test in 10 C.F.R. § 2.309(c)(1). Nevada indicates it does not take issue with factor 5 (availability of other means to protect petitioner's interests) and factor 6 (extent to which petitioner's interests will be represented by existing parties). *See* Nevada Answer at 7. Nevada appears to dispute the remaining factors.¹⁵

¹⁴ Neither Nevada nor Clark County dispute that Washington acted promptly to intervene once DOE's decision to seek irrevocable termination of this proceeding was announced. *See* Washington Petition at 11 (demonstrating that after this new information became available, Washington petitioned to intervene within 30 days of the availability).

¹⁵ Nevada's answer with respect to factor 7 is somewhat equivocal. *See* Nevada Answer at 7. Washington will nevertheless address this factor.

1. **The Nature and Extent of Washington’s Right under the Act to be Made a Party to the Proceeding [10 C.F.R. § 2.309(c)(1)(ii)]; the Nature and Extent of Washington’s Interest in the Proceeding [10 C.F.R. § 2.309(c)(1)(iii)]; and the Possible Effect of a Decision or Order by the NRC Affecting Washington’s Interest [10 C.F.R. § 2.309(c)(1)(iv)]**

Nevada’s arguments on all three of these factors relate to its standing argument. *See* Nevada Answer at 6-7. As such, Washington has already responded to those arguments above.

2. **Extent to Which Petitioner’s Participation Will Broaden the Issues or Delay the Proceeding [10 C.F.R. § 2.309(c)(1)(vii)]**

Nevada concedes that DOE’s pending motion has put at issue DOE’s authority under the NWPA to withdraw its application with prejudice. As described in Section V *infra*, Washington’s NEPA and APA contentions are similarly put at issue as a result of DOE’s motion, and are within the scope of that motion.

3. **The Extent to Which Washington’s Participation may Reasonably be Expected to Assist in Developing a Sound Record [10 C.F.R. § 2.309(c)(1)(viii)]**

Nevada argues that Washington’s participation fails this factor because Washington “will make absolutely no contribution to any technical record.” Nevada Answer at 8. Nevada’s point misses the mark. As described in Section III above, the relevant “record” at issue is the record upon which the Board will consider whether to grant DOE’s motion to withdraw its application with prejudice. Nevada does not take issue with Washington’s representation that its participation will assist this Board and ensure that there is full briefing and exploration of the issues related to DOE’s motion.

V. CONTENTIONS [10 C.F.R. § 2.309(f)]

The NRC Staff argues that Washington's petition should be denied because none of the contentions Washington advances are admissible.¹⁶ NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing (NRC Staff Answer) at 1, 9-28. The Staff's argument is based on a simple logic chain:

1. Under 10 C.F.R. § 2.309, a person seeking to intervene must proffer at least one admissible contention.

2. An admissible contention is one that satisfies the factors in 10 C.F.R. § 2.309(f)(1), which among other things require that the contention relate to the scope of the proceeding (10 C.F.R. § 2.309(f)(1)(iii)); be material to the findings NRC must make to support the action involved in the proceeding (10 C.F.R. § 2.309(f)(1)(iv)); and demonstrate a genuine dispute with respect to a material issue of law or fact (10 C.F.R. § 2.309(f)(1)(vi)).

3. In this proceeding, the scope of admissible contentions has been defined by initial hearing notice and order to be whether DOE license application satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met.

4. Because none of Washington's contentions relate to whether DOE license application satisfies applicable safety, security, and technical standards or whether applicable requirements of NEPA and NRC's NEPA regulations have been met, Washington has failed to proffer at least one admissible contention.

¹⁶ The NRC Staff suggests that interested government participant status, pursuant to 10 C.F.R. § 2.315(c), would be appropriate for Washington. Washington has demonstrated that its petition to intervene as a party of right should be granted. However, should this Board deny Washington's petition, Washington would, without waiving any rights, accept participant status pursuant to 10 C.F.R. § 2.315(c).

See, e.g., NRC Staff Answer at 12.

While this logic chain would make sense if DOE were still prosecuting the merits of its license application, the chain fails to recognize that the original scope of the proceeding—as defined by the Board’s initial hearing notice and order—has now shifted 180 degrees as a result of DOE’s motion.¹⁷ DOE’s motion has shifted the “action that is involved in the proceeding” from a determination of the substantive adequacy of DOE’s application to a determination of whether that same application should be withdrawn with prejudice, without the substantive adequacy of the application ever being reached.¹⁸ Indeed, DOE’s motion makes no reference to the safety, security, or technical standards of its license application in justifying its request for withdrawal with prejudice. *See generally*, U.S. Department of Energy’s Motion to Withdraw (March 3, 2010) (DOE Motion) at 3. By the logic of the NRC Staff, DOE’s motion is itself outside the scope of the proceeding because it does not strictly concern “the adequacy of the Department of Energy’s request for construction authorization at Yucca Mountain.” *See U.S. Dep’t of Energy (High-Level Waste Repository)*, CLI-10-10, 71 NRC at __ (slip op. at 6).

The NRC Staff, however, “recognizes DOE’s Motion to Withdraw is an issue in the licensing proceeding that the Board and *admitted participants* will address.” NRC Staff Answer

¹⁷ For this reason, none of cases cited by the NRC Staff for the proposition that “the scope of issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order” are instructive in this case, because none of the cases considered the later-shifting circumstance of this case. *See* NRC Staff Answer at 12, *citing 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).

¹⁸ DOE’s motion asks the Board to dismiss DOE’s license application with prejudice in order to “provide finality in ending the Yucca Mountain project for a permanent geologic repository and [to] enable the Blue Ribbon Commission, established by the Department and funded by Congress, to focus on alternative methods of meeting the federal government’s obligation to take high-level waste and spent nuclear fuel.” U.S. Department of Energy’s Motion to Withdraw (March 3, 2010) at 3. The only justification DOE provides is that “the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of these materials.” *Id.* at 1.

at 13 (emphasis added.) This highlights the unjust effect of applying the NRC Staff's overly narrow interpretation of the contention requirement. No existing party can stake any greater claim to be heard on DOE's prejudicial withdrawal motion than Washington. If Washington's intervention is denied, the other parties will be heard based only on the happenstance that they had a reason to intervene at the outset of this proceeding, when DOE's different objective was to prosecute the technical merits of its application instead of terminate the NWSA's process.

Neither 10 C.F.R. § 2.309(f)(1), the Board's prior case precedent, nor the Board's own orders in this case require such a rigid, static view of the proceeding. First, the NRC Staff reads qualifiers into the terms of 10 C.F.R. § 2.309(f)(1) that do not exist in the regulation, maintaining, for instance, that 10 C.F.R. § 2.309(f)(1)(vi) requires showing "a genuine dispute with DOE on a material issue of fact or law *with respect to the LA* [license application]." NRC Staff Answer at 12 (emphasis added); *cf.* 10 C.F.R. § 2.309(f)(1)(vi).¹⁹ Second, as noted in the Board's May 11, 2009, Memorandum and Order, the strict language of 10 C.F.R. § 2.309(f)(1) must be applied *in context* when it comes to legal contentions:

Not all the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) necessarily apply to legal issue contentions. For example, a purely legal issue contention obviously need not allege "facts" under section 2.309(f)(1)(v).

¹⁹ 10 C.F.R. § 2.309(f)(1)(vi) provides: "In a proceeding other than one under 10 CFR 52.103, *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..." (Emphasis added.) Further, Washington's contentions *do* relate to the license application at issue. They relate to the fundamental question of whether *that application* should be withdrawn with prejudice.

U.S. Dep't of Energy, 69 NRC ___ (slip op) at 61.²⁰ Finally, NRC precedent has recognized that the fundamental nature of a licensing proceeding can change as the proceeding evolves. For instance, in *Puerto Rico Elec. Power Auth.*, 14 NRC 1125, the Commission recognized that a proceeding had “shifted” from the substantive merits of an application to the conditions, if any, upon which an unresolved application may be withdrawn, with different questions and standards at hand. *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. If DOE had included in its original application an express reservation to withdraw its application with prejudice at any time, for reasons unrelated to the technical merits of its application and for the purpose of precluding any future licensing of the Yucca Mountain repository, this reservation would surely be recognized as a proper subject of legal contentions. Just as surely, DOE’s interjection of the same issue at this point in the proceeding can and should be recognized as the proper subject of legal contention by interveners.

Washington’s contentions do not undermine the purpose of the contention rule. Washington’s contentions will not require the Commission to expend hearing resources on an issue that is not “appropriate for, and susceptible to, resolution in an NRC hearing.” *See* 69 Fed. Reg. at 2,202. Washington’s contentions are focused on “concrete issues” related to this action—whether the NWPAA and Commission precedent on withdrawal with prejudice allow the drastic termination of this proceeding that DOE seeks in its dispositive motion. *See* 69 Fed. Reg. at 2,202. Washington’s contentions are material to the findings the NRC now must make to support the action that is involved in the proceeding; namely, whether DOE should be

²⁰ The Commission was clear, in promulgating its contention requirements (originally 10 C.F.R. § 2.714(b)(2)), that “purely legal contentions . . . may be admitted as issues in the proceeding. However, they will not be part of an evidentiary hearing, but rather, will be handled on the basis of briefs and oral arguments.” 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (Notice of Final Rulemaking on changes to Part 2, including 10 C.F.R. § 2.714). The current rule, 10 C.F.R. § 2.309(f), “incorporate[s] the longstanding contention support requirements of former §2.714” 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004).

permitted to withdraw its application with prejudice. Finally, Washington's contentions do show a genuine dispute with DOE on a material issue of law with respect to the licensing application; namely, whether DOE and the Board have the authority to prevent the application from going forward at all.

Because DOE's motion has shifted the scope of this proceeding, and because Washington's contentions fall within this shifted scope, the Board should admit Washington's proposed contentions.

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

The NRC Staff raises the only objection to WAS-MISC-001. The Staff's objection appears solely based on the considerations discussed above, and has thus been addressed.

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

The NRC Staff raises the only objection to WAS-MISC-001. The Staff’s objection appears solely based on the considerations discussed above, and has thus been addressed.

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

The NRC Staff objects to contention WAS-MISC-003 on the same fundamental basis it objects to contentions WAS-MISC-001 and WAS-MISC-003. That basis of the Staff's objection has already been addressed above.

In addition, the NRC Staff notes of Washington's NEPA contention:

While WAS-MISC-003 does reference the [Yucca Mountain] FEIS, Washington does not argue that the FEIS is inadequate for the purpose of supporting a construction authorization decision. [Citation omitted.] Washington references the FEIS to demonstrate that no existing NEPA document addresses the consequences of termination of the Yucca Mountain project. [Citation omitted.] 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.

NRC Staff Answer at 23. Nevada takes the opposite tact, arguing that if it is Washington's intent to attack the adequacy of the FEIS to support this proceeding, Washington's contention is vague and non-specific. *See* Nevada Answer at 15. Nevada also asserts that "NEPA objections directed at DOE do not in themselves raise material issues" and it reserves objection as to whether WAS-MISC-003 raises material issues within the scope of this proceeding. *See* Nevada Answer at 15-16.

Washington has already noted that to the extent contention WAS-MISC-003 attacks whether *DOE* has complied with NEPA in deciding to irrevocably terminate the Yucca Mountain project, the merits of the contention may well be beyond the jurisdiction of the Board to consider. *See* Washington Petition at 21. Regardless, however, by asking the Board to grant its license withdrawal "with prejudice," DOE has asked the Board to employ its adjudicative discretion to apply a "particularly harsh and punitive term imposed upon withdrawal" that by the

Board's own precedent should be reserved for only unusual situations involving substantial prejudice to the opposing parties or the public interest in general if an application were to be re-filed. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 974 (1981); *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. In this one-of-a-kind proceeding, DOE is asking for withdrawal "with prejudice" in an attempt to preclude a license application compelled by the NWPA and relating to the only geologic repository site approved by Congress from ever being resurrected. Given the implications and the public interest at stake, Washington's contention that DOE has failed to comply with a procedural antecedent before requesting its relief is germane to the Board's consideration of whether it should grant such relief, even if the Board lacks authority to actually rule on the merits of that contention. *See Puerto Rico Elec.*, 14 NRC at 1134 (weighing public interest considerations in determining whether to condition that a withdrawal be "with prejudice"). Contention WAS-MISC-003 is thus within the scope of the proceeding; material to the findings the Board must make in ruling upon DOE's motion; and (Washington expects) a subject of genuine dispute by DOE.

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

The same considerations discussed with respect to contention WAS-MISC-003 also apply with respect to contention WAS-MISC-004. Washington has already noted that contention WAS-MISC-004, which involves the application of a judicial review standard, may well be beyond the jurisdiction of the Board to consider on the merits. *See* Washington Petition at 21. Regardless, however, by asking the Board to grant its license withdrawal “with prejudice,” DOE has asked the Board to employ its discretion to apply a “particularly harsh and punitive term imposed upon withdrawal” that by the Board’s own precedent should be reserved for only unusual situations involving substantial prejudice to the opposing parties or the public interest in general if an application were to be re-filed. *Philadelphia Electric Co.*, 14 NRC at 974; *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. In this one-of-a-kind proceeding, DOE is asking for withdrawal “with prejudice” in an attempt to preclude a license application compelled by the NWPA and relating to the only geologic repository site approved by Congress from ever being resurrected. Given the implications and the public interest at stake, Washington’s contention that DOE’s decision to irrevocably terminate the Yucca Mountain project is arbitrary and capricious is germane to the Board’s consideration of whether it should grant such relief, even if the Board lacks authority to actually rule on the merits of that contention. *See Puerto Rico Elec.*, 14 NRC at 1134 (weighing public interest considerations in determining whether to condition that a withdrawal be “with prejudice”). Contention WAS-MISC-004 is thus within the scope of the proceeding; material to the findings the Board must make in ruling upon DOE’s motion; and (Washington expects) a subject of genuine dispute by DOE.

VI. COMPLIANCE WITH 10 C.F.R. § 2.1012(B)(1) AND 10 C.F.R. § 2.1003

On April 1, 2010, the State of Washington completed its identification of documentary materials required by 10 C.F.R. § 2.1003 and made the same electronically available on the Licensing Support Network (LSN) in accordance with the requirements of 10 C.F.R. § 2.1011(b)(2). Documents provided with Washington's petition, attached to the Affidavit of Suzanne Dahl-Crumpler, have now been placed on the LSN (or were already in place on the LSN through the action of other parties to this proceeding). The State of Washington will continue to supplement its documentary material as required by 10 C.F.R. § 2.1003(e) and the Revised Second Case Management Order dated July 6, 2007.

Pursuant to 10 C.F.R. § 2.1012(b)(1), the State of Washington demonstrated its compliance by filing its LSN Initial Certification in this adjudicatory proceeding on April 2, 2010. This certification responds to the objection raised by Nevada, *see* Nevada Answer at 9-12, and the reservation noted by NRC Staff. *See* NRC Staff Answer at 8-9.

VII. CONCLUSION

For the foregoing reasons, Washington respectfully requests that its Petition for Leave to Intervene be granted.

DATED this 5 day of April, 2010.

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U.S. DEPARTMENT OF
ENERGY

**FY 2010 Congressional
Budget Request**

Environmental Management

**Defense Nuclear Waste
Disposal
Nuclear Waste Disposal**

Volume 5

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The Department of Energy’s Congressional Budget justification is available on the Office of Chief Financial Officer, Office of Budget homepage at <http://www.cfo.doe.gov/crorg/cf30.htm>.

For the latest details on the Department of Energy’s implementation of the Recovery Act, please visit: <http://www.energy.gov/recovery>

**Department of Energy
Environmental Management/
Defense Nuclear Waste/Nuclear Waste Disposal**

FY 2010 Congressional Budget

Nuclear Waste Disposal

Preface

OCRWM receives funds through two separate appropriation accounts, the Nuclear Waste Disposal and Defense Nuclear Waste Disposal appropriations. The overview narrative and detailed justification for the entire program, as supported by both accounts, is presented in the Nuclear Waste Disposal section of this budget request.

The FY 2010 budget request of \$197 million for OCRWM implements the Administration's decision to terminate the Yucca Mountain program while developing nuclear waste disposal alternatives. All funding for development of the Yucca Mountain facility would be eliminated, such as further land acquisition, transportation access, and additional engineering. The budget request includes the minimal funding needed to explore alternatives for nuclear waste disposal through OCRWM and to continue participation in the Nuclear Regulatory Commission (NRC) license application (LA) process, consistent with the provisions of the Nuclear Waste Policy Act. The Administration intends to convene a “blue-ribbon” panel of experts to evaluate alternative approaches for meeting the federal responsibility to manage and ultimately dispose of spent nuclear fuel and high-level radioactive waste from both commercial and defense activities. The panel will provide the opportunity for a meaningful dialogue on how best to address this challenging issue and will provide recommendations that will form the basis for working with Congress to revise the statutory framework for managing and disposing of spent nuclear fuel and high-level radioactive waste.

The OCRWM FY 2010 budget request is dedicated solely to supporting to the NRC LA process. Prior year activities that supported both the LA and other OCRWM activities have been scaled back to include only those elements specific to the LA and are, therefore, no longer included as distinct budget elements. The Program Direction budget has been restructured to support the LA activities. Finally, Project Support activities are limited to those required by law, regulation, or order for the operation of a federal program or essential to a full and fair license process.

Mission

The mission of OCRWM is to manage and dispose of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) in a manner that protects public health, safety, and the environment; enhances national and energy security; and merits public confidence.

Benefits

OCRWM is critical to enhancing the national and economic security goals of the nation, and the Nuclear Waste Policy Act of 1982, as amended, mandates its activities. The safe management of spent nuclear fuel and high-level radioactive waste must protect the health, safety and environment of the United States. This increases credibility and public confidence in nuclear safety and security, and it allows nuclear energy to remain a significant contributor to the country’s energy needs. The OCRWM program is also responsible for demonstrating progress in the cleanup of U.S. defense sites consistent with the mission of the DOE Office of Environmental Management as well as international nonproliferation goals, thereby supporting national security objectives, along with Department of Energy strategic goals.

The Nation's commercial and defense SNF and HLW must be safely and permanently isolated to minimize the risk to human health and the environment. Effective management of these materials will ensure that our country enjoys a diverse source of energy options, remains competitive in the global economy, maintains national security, supports cleanup of weapons sites, continues operation of the U.S. Navy's nuclear-powered vessels, and advances our international non-proliferation goals. Ultimately, the success of the program ensures the safe and secure management of SNF and HLW currently located at more than 120 above ground sites within 75 miles of over 160 million Americans, and nearly every major waterway.

License Application and Defense

The Nuclear Waste Policy Act (NWPA) of 1982 made the Department of Energy (DOE) responsible for the permanent disposal of U.S. spent nuclear fuel and high-level nuclear waste. Following nine site recommendations, siting guidelines, and environmental assessments over several years, the 1987 NWPA amendments mandated one site for characterization. With the adoption of P.L. 107-200 in July of 2002, Yucca Mountain became the designated site for the national repository.

The Department is following the process and schedule outlined in the NWPA, as amended, to support the licensing review process underway by the U.S. Nuclear Regulatory Commission (NRC). On June 3, 2008, consistent with section 114(b) of the NWPA, the Department submitted a license application to the NRC. The NRC docketed the application on September 8, 2008 (73 Fed. Reg. 53284), and issued the Notice of Hearing and Opportunity to Petition for Leave to Intervene on the license application on October 22, 2008 (73 Fed. Reg. 63029). NRC's applicable regulations establish a detailed schedule for the conduct of the hearing process, including for the filing of petitions to intervene, discovery, summary disposition motions, the evidentiary hearing, proposed findings, appeals and a final decision by the Commission on the application. Section 114(d) of the NWPA requires NRC to issue a final decision approving or disapproving the issuance of construction authorization for the repository within three years; provided that, NRC may delay this deadline by an additional year pursuant to the procedures set forth in section 114(e) of the NWPA.

As stated in the preface, OCRWM's budget request for FY 2010 provides support for the NRC licensing process, and does not include any funding for any activities not directly related to supporting the NRC licensing process or required by law, regulation or order for the operation of a federal program or those being essential to a full and fair license process.

During FY 2010, the NRC staff will continue their review of the LA and will continue to submit to the DOE Requests for Additional Information (RAIs) resulting from their review. Additionally, the Atomic Safety and Licensing Board (ASLB) will continue the LA hearing process. Responding to questions from NRC and participating in the NRC licensing proceeding will require DOE effort in the following areas:

- Undertake additional preclosure and post-closure analytical activities, as required, to respond to potentially multiple rounds of highly technical, detailed NRC RAIs;
- Provide technical, scientific, and legal support for court challenges;
- Maintain and update the LA and supporting documents as issues resulting from contentions are resolved and RAIs are responded to;
- Ensure effective LA configuration control and consistency with supporting documents;
- Assist NRC in its review and acceptance of the Supplemental Environmental Impact Statement (SEIS) providing additional groundwater analysis;

- Preparation and review of depositions;
- Preparation of DOE witnesses and testimony for ASLB hearings;
- Addressing discovery, including derivative discovery;
- Preparation and response to interrogatories, and;
- Support for motions and other legal actions.

This effort will require sufficient technical, scientific, licensing, and legal resources, as appropriate for particular tasks, to ensure a full and fair license process.

Repository Design

Repository design activities will be conducted only to provide support for RAIs or contention responses or resolutions, documents, or information updates that affect the LA references or require notification to the NRC of changes in LA content, and to correct conditions that have a potential impact on the LA. All Repository design activities not directly in support of the NRC licensing process will be suspended in FY 2010.

Transportation

All transportation system development activities will be suspended in FY 2010.

Program Direction and Management

OCRWM federal staff will manage and perform critical LA support functions in the face of a reduction of more than 2,000 contractor staff in FY 2008 and FY 2009. Many of the functions currently performed by contractor support will now be absorbed into the work by federal staff. Federal staff are funded from the program direction subaccount. Federal employees will perform technical work representing the Department as the license applicant before the NRC, in meetings with the NRC staff, and the public licensing hearings. In addition, federal staff will provide support to the Department of Justice in litigation related to the NWP. Federal employees will perform mandatory activities required to comply with Federal laws, including the NWP, DOE Orders, and other government regulations. In FY 2010, federal employees will manage and operate the Yucca Mountain Site, performing only those activities at the site to continue to meet all applicable safety, security, and other regulatory requirements, in order to facilitate ongoing performance confirmation scientific data collections that directly support the NRC licensing process.

The requested funding will be used in part to reimburse the costs of DOE contractor contributions to defined-benefit (DB) pension plans as required by the Employee Retirement Income Security Act (ERISA), as amended by the Pension Protection Act of 2006 (PPA), and consistent with Departmental direction. The PPA amended ERISA to require accelerated funding of DB pension plans so that the plans become 100% funded in 2011. Most contractors that manage and operate DOE's laboratories, weapons plants, and execute environmental clean-up projects at various government owned sites and facilities are contractually required to assume sponsorship of any existing contractor DB pension plans for incumbent employees who work and retire from these sites and facilities. Increased contributions began to be required for some of these DB pension plans as a result of the downturn in investment values in FY 2009. Whether additional funding will be needed in future years will depend on the funded status of the plans based on plan investment portfolios managed by the contractors as sponsors of the DB pension plans.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

April 5, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the State of Washington's Reply to Answers of the State of Nevada, NRD Staff, U.S. Department of Energy, and Clark County, Nevada, have been served upon the following persons by Electronic Information Exchange.

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