

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
) Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)
) ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic)
Repository at Yucca Mountain) April 6, 2010
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**ERRATA SHEET FOR REPLY BRIEF OF THE STATE OF SOUTH CAROLINA
ON ITS PETITION TO INTERVENE**

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ATTORNEYS for Proposed Intervenor,
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The State of South Carolina, proposed intervenor, submits the following errata list to correct several clerical errors in its reply brief in support of its Petition to Intervene. The corrections set forth below were in earlier drafts of the Reply Brief, but were inadvertently lost through a file saving error that resulted in the Reply Brief having to be reconstructed.. A corrected version of the brief is appended hereto.

1. Page 5, first full paragraph, next to last line: “such an actions” should read “such actions.”

2. Pages 8-9, sentence beginning with “In the present case” should read as follows:

In the present case, however, and as set forth above, formal and concrete information about DOE’s plan to withdraw the license application was not available until (at the earliest) DOE’s February 1, 2010, announcement that it would soon file a motion to withdraw the application, or its January 29, 2010, press statements to the same effect.

3. Page 11, fourth line. The following sentence should be added at the end of the paragraph:

South Carolina also incorporates by reference the contention set forth in the Reply of the State of Washington that the NWPA’s process is intended to deliver a substantive result.

Respectfully submitted,

Signed (electronically) by Kenneth P. Woodington

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State of South Carolina

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NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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) Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)
) ASLBP No. 09-892-HLW-CAB04
(License Application for Geologic)
Repository at Yucca Mountain) April 5, 2010 (corrected April 6, 2010)
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**REPLY BRIEF OF THE STATE OF SOUTH CAROLINA
ON ITS PETITION TO INTERVENE (CORRECTED VERSION)**

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STATEMENT

The State of South Carolina, proposed intervenor, submits the following reply brief in support of its Petition to Intervene. Specifically, this brief replies to arguments made in Answers filed by the NRC Staff, the State of Nevada, Clark County, Nevada, and the Joint Timbisha and Shoshone Tribe.

Summary of contentions of DOE and opponents to intervention.

A. The Department of Energy.

South Carolina would first note that DOE, in its response to all pending petitions for intervention, has elected not to oppose the petitions.¹ As noted on p. 2 of DOE's response, "States and State subdivisions, affected tribes and NARUC should be able to present their differing view of the law on this issue in this unique proceeding." Indeed, this matter is *sui generis*, being the only instance of a Commission licensing proceeding that has been Congressionally mandated for a specific facility pursuant to legislation whose purpose was to address an issue of concern to the entire nation. DOE correctly has recognized the fact that this case is the only one of its kind. Its position on this matter should be given weight, especially since DOE would be the primary opponent of the proposed intervenors on the legal issues presented.

B. The NRC Staff.

The NRC Staff has not opposed South Carolina's standing. Likewise, after a balancing analysis, the NRC Staff has offered its view that South Carolina's petition should be regarded as timely. The NRC Staff's only contention of substance is that the contentions that South Carolina

¹ South Carolina agrees with DOE's characterization of South Carolina's proposed intervention as involving only legal issues that will not cause undue delay.

seeks to raise should be regarded as inadmissible because those contentions do not address issues relating to “applicable safety, security, and technical standards. . . .” This contention will be addressed herein.

The NRC Staff also raises an issue relating to South Carolina’s LSN compliance, but those issues have been resolved by South Carolina’s compliance, also as discussed herein.

C. Nevada.

Nevada’s arguments are somewhat the converse of those of the NRC Staff, in that Nevada argues lack of standing and timeliness on the part of South Carolina, but does not challenge the admissibility of South Carolina’s contentions, except for one hypothetical possibility discussed herein.

Like the NRC Staff, Nevada also mentions the now-resolved issue of LSN compliance.

D. Other opponents of intervention by South Carolina.

Clark County, Nevada, and the Joint Timbisha and Shoshone Tribe have both filed documents incorporating the substance of Nevada’s opposition. Clark County has offered an additional comment on timeliness that will be addressed below.

E. Other responses.

Parties electing to take no position on South Carolina’s petition include Eureka County, Nevada, and Inyo County, California.

By communication prior to the filing of South Carolina’s petition, three parties, White Pine County, Nye County, and the Nuclear Energy Institute, advised that they did not oppose the petition.

The Four Nevada Counties have made a filing indicating that they do not oppose the petitions of South Carolina and others “so long as they have met the requirements for intervention set forth in 10 C.F.R. § 2.309 or, alternatively, 10 C.F.R. § 2.315.”

ARGUMENT

1. South Carolina’s Petition was timely filed, in view of the recentness of the events that prompted the filing.

Only Nevada and Clark County have challenged the timeliness of the proposed interventions of South Carolina and others.

Nevada begins by arguing that South Carolina was “on notice” that a motion to withdraw would be filed when President Obama, then a presidential candidate, commented in September 2008 that the Yucca Mountain project “should be abandoned.” (The motion to withdraw, of course, was not filed until President Obama had been in office for over year.) From this, Nevada argues, prospective intervenors such as South Carolina became subject to a duty to seek to intervene in this matter by December 22, 2008, or otherwise be deemed untimely.

If South Carolina had sought to intervene in order to challenge a campaign promise, as Nevada essentially argues, any opponent to such intervention would undoubtedly have argued that that the statement on which such an intervention would have been based was hypothetical and completely unripe for adjudication. Nevada offers no suggestion as to how a proposed intervenor could possibly have succeeded in responding to that argument.

The Supreme Court has often held that concrete, formal action is needed before an agency action will be deemed ripe for review:

As this Court has previously pointed out, the ripeness requirement is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been

formalized and its effects felt in a concrete way by the challenging parties.”

Ohio Forestry Ass’n, Inc. v. Sierra Club, 523 U.S. 726, 732-733 (1998), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967)(emphases added).

In the present case, the cited campaign statements are far from the kind of formal or concrete actions that will be considered ripe for adjudication. Indeed, there are probably few statements that are as hypothetical or uncertain of ever becoming reality as campaign promises. Without disparaging any particular party or officer, it is simply a truism that even campaign promises made in good faith and with the utmost sincerity may never be kept, once the candidate assumes office and is required to deal with the realities of governing. In addition, campaign promises are often not entirely within the power of the promisor to keep, as in situations where approval of another branch of government is necessary. In the present case, of course, the campaign promise was kept, at least to the extent that power to do so lay with the Executive Branch. However, the reality of DOE’s eventual actions does nothing to eliminate the unripeness and generally hypothetical character of any earlier suggestions that such actions would be taken.

Nevada also cites several cases holding that “the institutional unavailability of a licensing related document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.” Nevada Answer, pp. 6, quoting *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, 17 NRC 1041, 1045 (1983)(emphasis added). In the present case, however, and as set forth above, formal and concrete information about DOE’s plan to withdraw the license application was not available until (at the earliest) DOE’s February 1, 2010, announcement that it would soon file a motion to

withdraw the application, or its January 29, 2010, press statements to the same effect.² Nevada's purported authorities are therefore inapplicable.³

Another line of inapposite authority cited by Nevada is found on p. 7 of its Answer. The cases there cited hold that a petitioner may not decline to intervene in reliance on the participation of others representing essentially the same interest. In the cases cited, the party who sought to intervene was held to have had no right to rely on a belief that another party, similarly situated, would not drop out of the case at some point. *See, e.g., Citizens for Fair Utility Regulation v. U.S. Nuclear Regulatory Com'n*, 898 F.2d 51, 55 (5th Cir. 1990)(potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so). That principle is not disputed in cases where the proposed intervenor and the existing party who had been relied on were essentially similar parties presenting similar contentions. Here, however, the party seeking to withdraw is not just another intervenor, but the applicant itself, the Department of Energy. DOE's responsibility under the NWPA was to file the licensing application. In so doing, as its cover letter of June 3, 2008, indicated, DOE was "seek[ing] construction authorization pursuant to 10 C.F.R. § 63.31 for a high-level radioactive waste repository at a geologic repository

² Nevada also cites *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, 18 NRC 112 (1983), *aff'd.*, 18 NRC 387 (1983). In that case, the action upon which the intervenor sought to base a contention became certain on February 23, 1983, even though no document reflecting that action was filed until May 26, 1983. The intervenor's motion, filed a few weeks after May 26, 1983, was denied as untimely because the relevant information had become available almost four months earlier. That case is therefore similar to the *Duke Power* case and unlike the present case, because in those cases, but not in this one, the information on which the contentions were based was made known in a much more concrete and formal manner than a campaign promise.

³ South Carolina also incorporates by reference the arguments made by the State of Washington under the portion of Washington's Reply Brief dealing with 10 C.F.R. § 2.309(c)(1)(i), including the arguments discussing Congressional actions and DOE statements in 2009, and the right of Washington (and South Carolina) to rely thereon.

operations area at Yucca Mountain. . . .” Because the duty to seek licensure of the Yucca facility was statutorily mandated, South Carolina and all other states, as well as the entire country, had a right to rely on DOE to pursue the license application in good faith to completion, that is, until it was either granted or until it was found, for scientific reasons, to be not capable of being granted. Nevada’s argument would require every entity interested in proper disposal of nuclear waste to intervene at the outset as sort of a provost guard to insure that DOE, on the front lines of the battle, did not retreat or desert. However, it has always been the duty of DOE to initiate and continue this proceeding, as opposed to being an original duty of the states to intervene to insure that the proceeding is not abandoned. Indeed, one of the Congressional findings in the NWPA was that nuclear waste disposal was “a national problem,” and that “the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment.” 42 U.S.C. § 10131(a)(2), -(a)(4). As a result, DOE was not just another interested party like the intervenors in the cases cited by Nevada. The issue of withdrawal therefore only became ripe for adjudication, and therefore subject to challenge, when it became clear that DOE, the applicant, intended to abandon its role as proponent of the Yucca Mountain repository license.

Clark County’s only additional argument is that the “DOE’s filing and prosecution of the License Application was always subject to potential rejection or dismissal by the NRC.” Clark County Answer, p. 3. This is true, but such rejection, in the absence of the kind of Motion to Withdraw that is now before the Commission, would only have occurred if the application were found not to meet applicable safety, security and technical standards. Indeed, the need to meet such standards was presumably the entire reason for Congress to order that the Yucca repository

be subject to Commission licensing review. The need for such review logically implied that a license could be denied, or at least, delayed until any safety issues were resolved. Clark County without foundation argues that South Carolina must have believed that the filing of the license application was tantamount to the issuance of a license. There is no reason to think that anyone, including South Carolina, believed that, but South Carolina and every state in the country did have a right to believe that DOE, changed by statute with presenting a license application, would pursue it in good faith and not abandon it. This abandonment, and the potential waste of over twelve billion dollars that would result, could not reasonably have been anticipated.

2. South Carolina has standing to intervene.

Nevada, essentially alone among the parties in this matter, has chosen to dispute the standing of South Carolina, as well as the standing of others. In making its arguments, Nevada utterly and completely ignores the statutory bases of standing asserted by South Carolina under the NWPA. Instead of discussing the recognition of the states' concerns that is found in the NWPA, Nevada instead contents itself with citing cases that pertain instead to relatively routine license applications for individual reactors. Nevada Answer, pp. 1-3. South Carolina reiterates its previous argument that if Yucca Mountain is abandoned, the situation would revert back to one in which South Carolina (and many other states) would again be a potential candidate for a disposition site for spent fuel and high level waste.⁴ The NWPA provides for extensive participation by states in the site selection and characterization process, a process that would be reopened for the first time since 1987 if the application in this matter is permitted to be

⁴ South Carolina had previously noted that it would be “on the list of candidate states for a waste disposal or storage facility.” Several parties have pointed out that there is no such “list.” What was meant, of course, is that South Carolina would again be a potential candidate for a site at which the ultimate disposition of spent fuel and high level waste would occur.

withdrawn. *See e.g.*, 42 U.S.C. §§10131(a)(6) (“State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel. . . .”) and 10134(a)(1)(F) (at the pre-site selection phase of the process, the Department must consider “the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views. . . .”). South Carolina also reiterates that that “Congress may enact statutes creating legal rights, the invasion of which creates standing. . . .” *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). For these reasons, it is clear that the Act creates standing in states, and especially in South Carolina, to contest an action that would have the effect of reopening the site selection process. Nevada’s disregard of the NWPA in making its argument on standing strongly suggests that Nevada has no answer to the Act’s conferring of standing on the states.

In addition, South Carolina has previously articulated the harm that could come to it if the Yucca Mountain repository is abandoned and the site selection process starts over at square one. DOE itself has issued a Final Environmental Impact Statement with the conclusion that not building the Yucca Mountain geologic repository could result in “widespread contamination at the seventy-two commercial and five DOE sites across the United States, with resulting human health impacts.” (DOE/EIS -- 0250, Section S.12). The five DOE sites include the Savannah River Site near Aiken, South Carolina, which houses foreign spent fuel as well as defense high level nuclear waste. Further, there are seven nuclear power plants in South Carolina, under licenses which invoke a Waste Confidence Ruling by the Commission, based on the fact that Yucca Mountain is being developed as a final resting place for spent nuclear fuel from the reactors. *See* Attachment 2 to Petition (Second National Report on Safety, DOE/EM0654, Rev.

1, October 2005, Annexes D-1, D-2.) South Carolina has an interest in this matter in insuring that the Yucca Mountain licensing proceedings continue, so that the spent fuel and other nuclear material now being temporarily stored in South Carolina will be safely placed in the Yucca Mountain repository. Nevada's only response to this is to argue that South Carolina has not shown how the continuation of the present licensing proceeding would redress the aforementioned potential injuries. The short and logical answer is that if the Yucca Mountain project is not licensed, the potential harms described in the documents above are more likely to occur, while they would not be likely to occur if the Yucca Mountain project is licensed. As a result, those potential harms are clearly redressable by a decision of this tribunal to continue the present proceeding and ultimately to license the site if it may be safely operated.

Nevada also seeks to construct an argument to the effect that South Carolina is asserting a purely procedural right which, Nevada claims, is insufficient to confer standing. Instead, though, the interest South Carolina asserts in having this proceeding continue to conclusion on its merits is exactly the kind of interest for which "procedural" standing was recognized in Nevada's primary authority cited for this point, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In that case, the Supreme Court held that

under 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.

504 U.S. at 573 n. 7. In the next footnote, the Court reiterated that "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." *Id.*, n.8. In the present case South Carolina, like the hypothetical plaintiff in the

Court's illustration, can enforce the right to have statutorily-required procedures followed, even though the ultimate outcome of following those procedures would not necessarily be favorable. This tribunal should give no credence to Nevada's attempt to make *Lujan* say exactly the opposite of what it actually says. South Carolina also incorporates by reference the contention set forth in the Reply of the State of Washington that the NWSA's process is intended to deliver a substantive result.

3. Other factors cited by Nevada.

Nevada also has undertaken an analysis of the factors for allegedly untimely petitions for intervention that are set forth in 10 C.F.R. § 2.309(c). Nevada Answer, pp. 8-11.⁵

a. Factor (ii)—Nature of Petitioner's right to be made a party.

Here Nevada primarily repeats its previous arguments on standing. Nevada adds that the proposed withdrawal of the Yucca Mountain LA would not affect South Carolina's sovereign interests in assuring that the nuclear material at the Savannah River Site does not contaminate the grounds, groundwater and highways that South Carolina owns nearby. This is simply incorrect. The sooner the Yucca Mountain repository is licensed, the sooner the nuclear material in South Carolina is moved elsewhere, and the sooner the risk of contamination is eliminated.

Nevada also argues that the one of the interests South Carolina seeks to protect is akin to a *parens patriae* claim that Nevada asserts cannot be made. However, as with its ignoring of the provisions of the NWSA regarding standing, Nevada also fails to mention, much less discuss, *Massachusetts v. EPA*, 549 U.S. 497, 518-519 (2007)(stating that in its capacity of "quasi-

⁵ Although it does not expressly so state, Nevada may also rely on these arguments to support its otherwise-unsupported argument, Nevada Answer, p. 4, Heading II, against discretionary intervention by South Carolina. If so, South Carolina incorporates these arguments by reference in support of its claim for discretionary intervention, as it did in its original Petition.

sovereign,” “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain”).

b. Factor (iii)—Nature of Petitioner’s other interests.

Under this heading, Nevada argues that South Carolina cannot claim that South Carolina has an interest in seeing that the material located in South Carolina is disposed of safely at Yucca Mountain. The basis for this argument is that it has yet to be determined whether safe storage is possible at Yucca Mountain. Nevada’s argument does not address South Carolina’s claim that it has a right under the NWPA to have DOE present the license application in good faith. As noted earlier, South Carolina does not seek a guaranteed outcome, but it does seek to have DOE perform its statutory duty of presenting the case in good faith.

Nevada also incorrectly appears to suggest that South Carolina is seeking to argue about whether the no-action alternative was adequately considered under NEPA. Nevada Answer, p. 10. However, South Carolina has not proposed a NEPA contention in this matter, so this argument by Nevada is simply unfounded.

c. Factor (iv)—Effect on Petitioner’s interests.

Under this heading, Nevada argues that the Commission should not grant South Carolina’s petition, because if the Commission were to rule against South Carolina’s position, South Carolina would then be able to appeal. The same is true for every party seeking to intervene in any type of proceeding, and is part of the reason why intervention will protect a party’s interest. It is accordingly entirely spurious for Nevada to claim that the possibility of an appeal from an adverse decision constitutes a reason to deny intervention.

d. Factor (v)—Availability of other means to protect Petitioner’s interests.

Here Nevada repeats the same spurious argument discussed immediately above, and adds that South Carolina can protect its interests in the next proposed disposal solution through participation in Congressional procedures. This argument is palpably without merit, because South Carolina seeks to intervene to protect its interests in the current Congressionally-mandated disposal solution, not a later one that Congress will not need to take up unless the present one is permitted to be abandoned.

e. Factor (vi)—Extent to which petitioner’s interests will be represented by existing parties.

Nevada admits that so far, no other State or government unit has been admitted to this case that will protect the interests of South Carolina. However, Nevada then argues that South Carolina’s interests will be protected by NEI. At present, however, NEI has filed nothing that addresses DOE’s motion to withdraw, so it is impossible to know what the position of NEI is with regard to the motion. Indeed, this tribunal has ordered that the parties need not file briefs in response to the motion to withdraw until after a decision has been made regarding the petitions to intervene. As a result, NEI’s presence in the case cannot be said to protect the interests of South Carolina.

f. Factor (vii)—Extent to which petitioner’s participation will broaden the issues or delay the proceedings.

Nevada argues that South Carolina’s proposed contentions will broaden the issues. This is simply not true, because the Commission will necessarily be required to determine whether DOE is authorized to request, and the Commission is authorized to grant, the motion to withdraw. Any issues raised by South Carolina are already part of the case as a result of DOE’s motion to withdraw.

g. Factor (viii)—Extent to which petitioner’s participation may assist in developing a sound record.

Finally, Nevada asserts that the only issue in determining whether participation might assist in developing a sound record is whether a petitioner has the ability to contribute sound evidence. Nevada Answer, p. 11. Once again, Nevada cites only inapposite authority. To be sure, if a party offers contentions that involve the development of factual issues and evidence in support thereof, a party's ability to supply good evidence has a bearing on the question. Here, however, South Carolina's proposed contentions are purely legal, and absent the intervention of South Carolina or others who will make similar arguments, the record could be devoid of legal advocacy opposing DOE's motion to withdraw. As a result, South Carolina's participation would contribute to the development of a sound record by insuring that the legal issues raised by the motion to withdraw are fully argued and litigated. *See In the Matter of Portland General Electric Co., et al. (Pebble Springs Nuclear Plant)*, 4 N.R.C. 610, 617 (1976).

4. South Carolina's contentions are within the scope of the proceeding.

The NRC Staff, alone among parties presenting any form of opposition to South Carolina's petition, argue that South Carolina's contentions are not within the scope of the proceeding, because, according to the Staff, the scope of admissible contentions "is limited to whether the LA satisfies applicable safety, security, and technical standards" as well as whether certain NEPA requirements have been met. NRC Staff Answer at p. 14.

South Carolina would submit that the issue of whether DOE has statutory or constitutional authority to withdraw the LA in this case is one that is inherently a part of this proceeding. The fundamental flaw in the NRC Staff's reasoning is that it confuses the kinds of issues found in initial hearing notices and orders, that is, issues pertaining to the merits of a given LA, with issues that are "core" issues of the proceeding, such as whether the NRC has jurisdiction over the case, or in this case, whether DOE may seek, and the NRC grant, dismissal

with prejudice without considering the merits of the LA. The latter kind of issue is one that would not be expected to be found in the initial hearing notice and order, because if DOE had been of a mind at the outset not to seek a license for the Yucca Mountain facility, it would not have filed the LA in the first place. In other words, in the absence of any serious question about it at the outset, the issue of whether DOE was required to present the LA to its conclusion was not one that would logically have been found in a listing of issues pertaining only to the merits.

The situation is analogous to a federal court's power to determine its jurisdiction. A federal court cannot confer jurisdiction on itself simply by refusing to consider whether it has jurisdiction over a case. Likewise, the parties cannot confer jurisdiction on a federal court by claiming that the jurisdictional issue is incapable of review because it is "beyond the scope of the pleadings." Instead, the rule is that a court can and must look to evidence beyond the scope of the pleadings in order to determine whether it has jurisdiction in the case. *See, e.g., Williams v. U.S.*, 50 F.3d 299, 304 (4th Cir. 1995)(court may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning jurisdiction); hundreds of other cases to the same effect are cited in Wright and Miller, *Federal Practice and Procedure*, § 1350 n. 47.

In the same way, the initial hearing notice and order in the present case, whose clear purpose was only to define the "merits" issues in the case, should not be held to constrain the inquiry into whether DOE can withdraw the LA, any more than the pleadings in a civil case can prevent a federal court from reviewing issues pertaining to its jurisdiction, even when outside the pleadings. The rule invoked by the NRC Staff would be properly applied if South Carolina or another intervenor were to seek to add a new "merits" issue, such as a new environmental or

safety issue, but that rule has no application when the issue is not directly related to the merits, but rather is related to the power or ability of the tribunal to proceed with the case.⁶

South Carolina would also point out that if the issue of whether DOE may withdraw the LA is not one that South Carolina can contest, on the ground that it is outside the scope of admissible contentions, then for the same reason, it should be deemed to be an issue that DOE may not raise. However, this approach has nothing to commend it. If DOE is permitted to raise the new issue of whether it may withdraw the LA, then intervention should be permitted in order to contest that point.⁷ A short reference to each of South Carolinas' three contentions is set forth below:

**SOC-MISC-01-WITHDRAWAL OF APPLICATION WITHOUT CONGRESSIONAL
AUTHORITY**

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

**SOC-MISC-002—WITHDRAWAL OF APPLICATION IN VIOLATION OF
SEPARATION OF POWERS**

The NRC Staff's objection to SOC-MISC-002 appears solely based on the considerations discussed above, and has thus been addressed.

Nevada also, at least hypothetically, challenges this contention. Nevada also states, however, that it does not object to this contention if it is simply "another way of arguing that

⁶ The NRC Staff has made similar objections to the contentions of the State of Washington. South Carolina adopts and incorporates by reference the arguments of Washington with respect to the admissibility of those of Washington's contentions as are also raised by South Carolina.

⁷ The Staff makes an unconvincing attempt to argue, Answer, p. 15, n. 11, that DOE and existing parties, but no others, should be able to litigate the motion to withdraw because the Commission's regulations permit it to address procedural matters and motions. However, the Staff offers no principled reason why the Commission should permit an existing party to interject a completely new issue into a case without offering an opportunity to others to intervene, when the proposed intervenors had no reason to seek to intervene until the new issue had been raised.

DOE's withdrawal of the application would contravene a matter decided by Congress when it enacted the NWPA." Nevada Answer, p. 17. Essentially, South Carolina seeks to argue under this contention that assuming Congress intended to order the Executive to present the Yucca Mountain LA in good faith and pursue it through resolution on the merits, then the Executive has no independent power to contravene the will of Congress.⁸ As a result, while South Carolina does not necessarily agree that this issue is completely duplicative of its first contention, South Carolina believes that the contention, as stated above, is one to which Nevada does not object. In any event, it is an appropriate contention because it goes to the power of the Executive to contravene what appears to be a clear Congressional requirement.

SOC-MISC-003—IF THE COMMISSION WERE TO GRANT DOE'S ANTICIPATED MOTION TO WITHDRAW THE APPLICATION, THAT GRANT WOULD EXCEED THE COMMISSION'S POWERS UNDER THE NWPA

The NRC Staff raises the only objection to SOC-MISC-003. The Staff's objection appears solely based on the considerations discussed above, and has thus been addressed.

5. South Carolina is in compliance with LSN requirements.

Nevada and the NRC Staff have argued that South Carolina must comply with LSN requirements before being permitted to intervene. This issue has been addressed. The South Carolina Attorney General's Office placed online an operational LSN site on March 30, 2010, and the NRC LSN Administrator, has advised the judges that such has occurred. Nevada argues that South Carolina must be in possession of certain documentary evidence, because it is cited or suggested in South Carolina's Petition. While there is little question that Nevada already has everything that South Carolina might offer, given the limited nature of the factual showing being

⁸ DOE appears to argue in its Motion to Withdraw that it does have some degree of discretion to withdraw the LA, contending that "Settled law in this area directs the NRC to defer to the judgment of policymakers within the Executive Branch." DOE Motion, p.4.

made by South Carolina, South Carolina will soon make several other documents available on the LSN. Those documents are discussed in the footnote.⁹

6. Alternative request for participation as a government participant.

Alternatively to South Carolina's petition to intervene, and only if the Commission were to decide that South Carolina has no such right, South Carolina would request to be able to participate as an interested government participant pursuant to 10 C.F.R. § 2.315(c) with respect to the issues described in its Petition.

CONCLUSION

For the foregoing reasons, the State of South Carolina respectfully submits that the Board should grant its Petition to Intervene, and permit further argument as necessary, both in writing and at a hearing, on the legal issues presented herein and in its Petition to Intervene.

Respectfully submitted,

Signed (electronically) by Kenneth P. Woodington

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⁹ In response to Nevada's contentions on pp. 14-15 of its Answer, South Carolina will supplement its LSN site with the following:

- Exhibit 1: Administration's recommended FY 2011 Budget
- Exhibit 2: Wright Affidavit (part of NURAC filing)(regarding amounts of money paid by South Carolina citizens)
- Exhibit 3: DOE Press Release, January 29, 2010

South Carolina has already attached, as Attachment 2 to its Petition, a DOE report showing the quantities of commercial spent nuclear fuel in the state. As to the need to have emergency preparedness plans, see *S.C. Code Ann.* § 25-1 450; *South Carolina Code of Regulations*, Chapter 58, Article 1, Division of Public Safety Programs.

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April 5, 2010 (corrected April 6, 2010)

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NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository))
)

Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the **ERRATA SHEET FOR REPLY BRIEF OF THE STATE OF SOUTH CAROLINA ON ITS PETITION TO INTERVENE, WITH CORRECTED BRIEF APPENDED**, dated April 6, 2010, have been served upon the following persons by Electronic Information Exchange.

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