

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD
09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. 63-001
)
(High Level Waste Repository)) May 4, 2010

**STATE OF NEVADA'S ANSWER TO
PRAIRIE ISLAND INDIAN COMMUNITY'S PETITION TO INTERVENE**

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**STATE OF NEVADA ANSWER TO
PRAIRIE ISLAND INDIAN COMMUNITY'S PETITION TO INTERVENE**

On March 15, 2010, the Prairie Island Indian Community (PIIC or Community), a Federally-recognized Indian Tribe, filed a Petition to Intervene (Petition) in this proceeding.¹ For the reasons set forth below, the State of Nevada (Nevada) opposes PIIC's Petition. The Native Community Action Council (NCAC) joins in this Answer.

I. PRAIRIE ISLAND LACKS STANDING TO INTERVENE

For the reasons set forth below, PIIC has not established standing to intervene as a matter of right.

A. General Standing Principles

1. PIIC asserts that it represents energy users in the Community who have paid money into the Nuclear Waste Fund. Petition at 2, 5-6. PIIC argues further that all five members of the Tribal Council live within about five miles of the Prairie Island Nuclear Generating Plant ("PINGP") Independent Spent Fuel Storage Installation ("ISFSI"), that the Prairie Island Indian Reservation ("Reservation") is located immediately adjacent to the PINGP property, that the nearest Community residences are about 600 yards from the PINGP ISFSI, that about 250 Community members reside on or near the Reservation in the vicinity of the PINGP ISFSI, and that PIIC also owns and operates the Treasure Island Resort & Casino. Petition at 3-4. PIIC (and all of the above-identified properties) are located in the State of Minnesota.

This is all interesting, but the key question (apart from proximity and host government standing discussed in B and C below) is exactly how these interests would be affected by DOE's proposed withdrawal of its license application for geologic disposal of spent

¹ The Petition was signed and served on March 15, 2010, but the caption on page 1 includes the incorrect date of February 26, 2010.

nuclear fuel (SNF) at Yucca Mountain, which is located approximately 1700 miles away from the PIIC in the State of Nevada.. PIIC argues that "[t]he ISFSI site located in Petitioner's community, as with ISFSIs around the nation, have not been studied or approved as long-term or permanent SNF storage or disposal sites," and therefore that DOE's proposed withdrawal of its application for permission to dispose of spent nuclear fuel at Yucca Mountain in Nevada "creates major questions and unknowns, including the prospect that SNF will become stranded in the respective states in such a fashion as to create significant long-term environmental and safety risks, in addition to substantial financial risks and costs." Petition at 6. PIIC summarizes its interests as those of a "host community of SNF sites, and as representatives of their citizens having long-term enduring interests in the protection of public safety, the environment and natural resources, and to protect their long-term financial interests." Petition at 7-8.

2. However, generalized interests in or concerns about "major questions and unknowns" associated with the possibility of "stranded" spent nuclear fuel in "respective states," "enduring interests in the protection of public safety, the environment and natural resources," and protecting citizens' "long-term financial interests" are not sufficient for standing. They are indistinguishable from the generalized concern that an agency action "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations," which the U.S. Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727 (1972), characterized as a "mere 'interest in a problem'" that "is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." *Id* at 739. *Sierra Club* is frequently cited with approval by the Commission. *See, e.g., U.S. Department of Energy (Plutonium Export License)*, CLI-04-17, 59 NRC 357, 2004 NRC LEXIS 135, *11 (2004).

3. PIIC also argues that DOE's withdrawal of the application would lead to "extreme prejudice to Petitioner's interests, as it may forever foreclose siting a geological repository at Yucca Mountain...." Petition at 7. PIIC argues that withdrawal would result in "a detrimental effect to the health and safety of PIIC members and pose a risk to visitors to the reservation," and may have a "detrimental effect on the environment in which the PIIC is situated." Petition at 4. But a petitioner claiming party status as a matter of right must allege "a distinct and palpable harm." *E.g., Vermont Yankee Atomic Electric Company (Vermont Yankee Nuclear Power Station)*, CLI-96-01, 1996 NRC LEXIS 1, slip op. at 2. There is nothing distinct and palpable about PIIC's concerns here, even if they are construed as something more than a "mere interest in a problem." First, PIIC fails to acknowledge that, in its motion to withdraw, DOE "reaffirms its obligation to take possession and dispose of the nation's spent nuclear fuel and high-level nuclear waste." U.S. Department of Energy's Motion to Withdraw, March 3, 2010, at 1. This means that granting DOE's motion will not lead inevitably to "stranded" spent nuclear fuel, as PIIC presumes. PIIC's alleged injuries, to the extent they can be defined at all, require speculation that for decades, if not a century, DOE will continually default on its obligation to accept and dispose of spent fuel, with no intervening Congressional action. And, to compound the problem, PIIC tells us nothing about how or where releases or exposures may occur if the application is withdrawn.

These general allegations of injury should fare no better than a petitioner's assertions that it had "an interest in state and federal environmental laws and in the land, water, air, wildlife and other natural resources that would be affected by the license amendment" and had "members who live in the communities allegedly affected by the license amendment and who engage in work or recreational activities in the vicinity of the [activity to be licensed]."

Such assertions were found to be insufficient for standing in *International Uranium (USA) Corporation (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, slip op. at 2 (2001). See also, *Commonwealth Edison Company (Zion Nuclear Power Station, Units 1 and 2)*, CLI-99-04, 49 NRC 185, slip op. at 5-6 (1999); *Atlas Corporation (Moab, Utah facility)*, LBP-97-9, 45 NRC 414, 425-26, slip op. at 7-8 (1997).

4. Moreover, because PIIC expresses concerns and interests with respect to the long-term storage of commercial spent nuclear fuel, it bears a special obligation not only to articulate a distinct and palpable and harm, but also to identify the approximate times when contamination and exposures may occur. In 10 C.F.R. § 51.23(a) "[t]he Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the license life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations." The Commission has proposed to extend the 30-year finding to 60 years. 73 Fed. Reg. 59551 (October 9, 2008). This suggests that the "significant long-term environmental and safety risks" of concern to PIIC (Petition at 6) will likely arise, if at all, decades, if not a century from now. Yet PIIC fails to mention 10 C.F.R. § 51.23(a) or even identify the approximate times when contamination and exposures may occur. Without such information, PIIC's alleged injuries, to the extent they may be defined with any precision at all, are not "actual or imminent," but "conjectural" or "hypothetical," quite like the injuries that were rejected for standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, 560 (1992) (an allegation that plaintiff would observe a species or habitat at some indefinite future date is insufficient for standing).

5. PIIC seeks to intervene in order to assert an alleged procedural right that the Yucca Mountain license application be considered fully on its merits. In such a procedural right case, a petitioner must establish that the procedural right at stake is designed to protect its concrete interests in the outcome of the agency proceedings.² For example, in *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004), the Court held that an association of energy marketers had standing to challenge an agency rule permitting illegal *ex parte* communications in its hearings because the association's members had concrete financial interests at stake and were participating as parties in hearings where the rule applied.

Even if PIIC had established that it had some distinct and palpable interest that would be affected if Yucca Mountain is not licensed, and offered more information about when the harms would occur, it has not sought to advance any of those interests by filing substantive contentions. If PIIC's procedural right is vindicated, the proceeding will continue, but PIIC will disappear from the scene, and any interests it may otherwise have possessed will be entirely at the mercy of the other parties who PIIC claims cannot represent its interests. Petition at 12. PIIC's interests (if any) may still exist but, insofar as the NRC proceeding is concerned, its interests will exist only in the abstract, subject to rejection or redefinition at the discretion of the NRC and the remaining parties. PIIC will no longer have the "concrete interest in the outcome of the proceeding" that the law on standing requires. In short, PIIC's injury is purely procedural and the assertion of a pure procedural interest is not sufficient for standing. *See Lujan v.*

² If this is not treated as a procedural rights case, then PIIC would be required to satisfy the redressability element of standing. To the extent that PIIC's injuries can be defined with any precision at all, it would appear that they could be redressed only if Yucca Mountain is licensed. Therefore, PIIC would be required to show that if the application proceeds, there is a substantial likelihood the outcome will be favorable and the license will be issued. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 78 (1978). Such a showing would be impossible to make.

Defenders of Wildlife, supra at 572-73. *See also, Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998).

6. Finally, it is apparent that PIIC is relying primarily on the concerns and interests of its members and, to some extent, the visitors to its reservation. However, "[l]ongstanding NRC practice also requires an organization to demonstrate that at least one of its members has authorized it to represent the member's interests." *Private Fuels Storage (Independent Spent Fuel Storage Installation)*, CLI-99-10, 49 NRC 318, 323 (1999). While this requirement may be relaxed for an Indian Tribe's representation of its members, *Northern States Power Company (Independent Spent Fuel Storage Installation)*, LBP-96-22, 44 NRC 138, 141, slip op. 3 (1998), it still applies to PIIC's purported representation of non-members, such as visitors to the reservation. PIIC has not established that any reservation visitor has authorized PIIC to represent him or her in this proceeding.

B. Proximity Standing

PIIC also believes that its proximity to the PINGP is sufficient for standing under NRC case-law. Petition at 4. But this proceeding is not about the licensing of the PINGP, as in the case PIIC cites, but about the licensing of Yucca Mountain in Nevada, more than one thousand seven hundred miles away. The Commission does not award proximity standing to petitioners located this distant from the activity to be licensed. This is because proximity standing depends on a simple presumption that the activity being challenged has such an obvious potential for radiological consequences to a petitioner that no further demonstration of harm or causation is required. *See International Uranium (USA) Corporation (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, slip op. at 2 (2001). When the activity to be licensed is many miles distant from a petitioner, there is no obvious potential for consequences, and a petitioner must demonstrate a distinct and palpable harm that is fairly traceable to the challenged activity. *See*

Tennessee Valley Authority (Sequoyah Nuclear Plant, Units 1 and 2, Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, slip op. at 4 (2002).

C. Standing Under 10 C.F.R. § 2.309(d)(2)

PIIC also claims that it has standing as a host community by operation of 10 C.F.R. § 2.309(d)(2). Petition at 5. PIIC is wrong.³ The cited rule relaxes standing requirements for governmental bodies and Indian Tribes only in "a proceeding for a facility located within its boundaries." This is not such a proceeding.

D. Standing Under 10 C.F.R. § 2.315(c)

If PIIC seeks to intervene pursuant to 10 C.F.R. § 2.315(c), such request should be denied for three reasons. First, PIIC has not made any showing of interest sufficient under Section 2.315(c) to support such an intervention. *See Exxon Nuclear Co., Inc. (Nuclear Fuel Recovery and Recycling Center)*, ALAB-447, 6. NRC 873, 1977 NRC LEXIS 15, at *4-7, 11, and 14; *Virginia Electric & Power Co. (Combined License Application for North Anna Unit 3)*, 68 NRC 294, 304, n.44 (2008). Second, PIIC has not designated a single representative as required under Section 2.315(c), and its appearance of counsel does not suffice in that regard. *See Entergy Nuclear Vermont Yankee LLC (Vermont Yankee Nuclear Power Station)*, 2008 NRC LEXIS 45, at *1, n.2. Third, PIIC has not identified any admitted contentions on which it seeks to participate under Section 2.315(c). CAB Order dated January 15, 2009. To the degree that PIIC relies upon its own proposed contentions to satisfy this requirement, it must also then demonstrate that those contentions satisfy the timeliness requirements of 10 C.F.R. § 2.309(b). *See Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage*

³ Section 189a(1)(A) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A), also cited here by PIIC, does not confer automatic standing on a host community. It confers standing only on a person "whose interest may be affected." As indicated in the text above, PIIC has not demonstrated such an interest.

Installation), LBP-02-23, 56 NRC 413, 2002 NRC LEXIS 218, *97; *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, LBP-83-30, 17 NRC 1132, 1983 NRC LEXIS 118, *9-10; *Project Management Corp. (Clinch River Breeder Reactor Plant)*, ALAB-354, 4 NRC 383, 1976 NRC LEXIS 29, *23, n.14. Having failed to address these three requirements in its Petition, PIIC should not be granted intervention status pursuant to 10 C.F.R. § 2.315(c).

II. DISCRETIONARY INTERVENTION

PIIC makes a weakly-supported attempt to justify intervention as a matter of discretion under 10 C.F.R. § 2.309(e). Petition at 8. Discretionary intervention is an "extraordinary procedure," 69 Fed. Reg. 2182, 2201 (January 14, 2004), and PIIC's case falls far short.

1. First, PIIC fails to address any of the factors in 10 C.F.R. § 2.309(e)(2), contrary to the express requirement that a person asking for discretionary intervention "shall address the following factors [in paragraphs (1) and (2)]."

2. Second, in addressing the factors in paragraph (1) of subsection (e), PIIC merely incorporates its earlier insufficient arguments for standing. As indicated above, PIIC's standing argument is insufficient. It is important to note in this regard that PIIC's only particularized interest is purely procedural. As argued above, PIIC has not sought to advance any of its interests by filing substantive contentions and, if its procedural right is vindicated, the proceeding will continue, but PIIC will disappear from the scene, and any interests it may otherwise have possessed will be entirely at the mercy of the other parties.

3. PIIC also incorporates its later argument on page 14 that it will assist in developing a sound record. The most important factor weighing in favor of discretionary intervention is whether the petitioner has demonstrated the capability and willingness to assist in developing a sound technical record. *Portland General Electric Company (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610, 616 (1976). In this regard, it is a

petitioner's ability to contribute sound evidence rather than its asserted legal skills that is of significance in evaluating and balancing this particular factor. *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-671, 15 NRC 508, 513 n. 14 (1982); *Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1)*, LBP-84-17, 19 NRC 878, 888 (1984). PIIC seeks only to raise legal issues, and even if DOE's withdrawal motion were to be denied, PIIC will be long gone when the time arrives for any evidence to be received. Petition at 14. Therefore, PIIC fails to make the required demonstration on the most important factor favoring discretionary intervention.

III. NON-TIMELY INTERVENTION

A. Factor (i) (Good Cause for Failure to File On Time)

PIIC concedes that its petition to intervene is late, but claims good cause for its failure to file on time. Petition at 9-11. There is no good cause here.

PIIC says that it "was supportive of DOE's action in completing and filing the license application, and believed that the license application ... would be consistently supported by DOE...." Petition at 9. PIIC asserts that DOE's February 1, 2010 notice that it would withdraw the application "could clearly not be reasonably foreseen" and "[h]ad the petitioner known that the applicant might reverse course for no apparent reason, Petitioner would have petitioned to intervene up front." Petition at 9-10. According to PIIC, the filing of DOE's motion to withdraw "now confirms that the interests of Petitioner are no longer aligned with DOE's position or actions." Petition at 10. There are two fatal flaws in PIIC's good cause argument.

1. First, it is apparent that PIIC relied on DOE to represent its interests and was disappointed when DOE changed its position. Long-standing and well-settled Commission precedent clearly holds that a petitioner may not justify intervening after the established deadline

by claiming it was lulled into inaction by the participation of other parties. *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir. 1990), *affirming Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-88-12, 28 NRC 605, 609 (1988); *Gulf States Utilities Company (River Bend Station, Units 1 and 2)*, ALAB-444, 6 NRC 760, 795-98, 1977 NRC LEXIS 25 (1977). In the latter case, the Union of Concerned Scientists attempted to replace the State of Louisiana after the State decided to withdraw from the proceeding, arguing that the organization and its members had been "lulled into inaction" by the State's previous participation. 6 NRC at 796. The Appeal Board rejected that argument, holding that the belated petitioners assumed the risk that the previous litigant's degree of involvement would not fulfill their expectations and that "a foreseeable consequence of the materialization of that risk was that it would no longer be possible to undertake [themselves] the vindication of [their] interests."6 NRC at 760, *82. *See also Easton Utilities Commission v. AEC*, 424 F.2d 847, 852 (D.C. Cir. 1970). Thus, back in December 2008, when petitions were due and PIIC decided not to intervene, PIIC assumed that DOE would fulfill PIIC's expectations, and PIIC took the risk that it might no longer be able to protect its interests if DOE changed its position. PIIC also assumed the closely related risk that DOE would fail to meet its burden of proof and the application would be denied on its merits.

2. Second, PIIC had an obligation to uncover and apply publicly available information in a timely manner. *Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-4, 37 NRC 156, 164-65 (1993); *Texas Utilities Electric Company (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-12, 36 NRC 62, 69-73 (1992); *Kansas Gas & Electric Company (Wolf Creek Generating Station, Unit 1)*, LBP-84-17, 19 NRC 878, 886 (1984). Even before petitions were due on December 22, 2008, it was well

known that President Obama was committed to abandoning the repository at Yucca Mountain. *See, e.g.*, a September 25, 2008 New York Times article quoting then-candidate Obama as saying that "the nuclear waste disposal efforts at Yucca Mountain have been an expensive failure and should be abandoned." *See Exhibit 1*. Thus, PIIC failed to uncover and apply information, publicly available before December 22, 2008, that the Administration (which necessarily includes DOE) would seek to abandon Yucca Mountain, which meant that a motion to withdraw the application would eventually be filed. *See* 10 C.F.R. § 2.107. This information was more than sufficient to put PIIC on notice that it should seek to participate in the proceeding in order to protect its interests if not within the established deadline, then at least as soon as possible thereafter.

3. It is not relevant that DOE's motion to withdraw was not actually filed until many months after the President's position became generally known. The Commission held in *Duke Power Co. (Catawba Nuclear Station, Units 1 and 2)*, CLI-83-19, 17 NRC 1041, 1045 (1983) 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." *Catawba* was followed in *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, LBP-83-42, 18 NRC 112 (1983), *affirmed*, ALAB-743, 18 NRC 387 (1983). The analysis in *Shoreham* is instructive. In *Shoreham* an organization filed an untimely petition to intervene to support the application and the applicant's emergency plan, which had been prepared and filed following the local government's repudiation of an emergency plan prepared by the applicant on its behalf and subsequent announcement that it would not prepare a new government plan. The petitioner argued that its duty to file promptly upon receipt of new and material information arose only with the filing of the applicant's plan,

the actual licensing document. The Licensing Board and Appeal Board both disagreed and denied the late petition, holding that the event triggering the petitioner's duty was the local government's earlier announcement that it would not prepare its own plan. That announcement signaled that the applicant would be filing its own plan and provided adequate information to support petitioner's intervention and contentions. As in *Shoreham*, PIIC's duty to file within a reasonable time was triggered not by the formal filing of licensing related documents (DOE's formal filing of the motion and its earlier formal notice that such a motion would be filed), but rather by earlier public announcements that clearly signaled what would follow.

B. Nature and Extent of Petitioner's Right to Be made a Party; Nature and Extent of Petitioner's Interest In the Proceeding; Effect of a Decision on Petitioner's Interest (Factors (ii) –(iv))

PIIC merely references its earlier arguments for standing, which Nevada argued above are not sufficient. It is worth emphasizing that an order denying DOE's motion to withdraw would not necessarily protect PIIC's substantive interest in safety, environmental protection, or economics because PIIC will not be participating in the proceeding if DOE's motion is denied and the license application may well be denied.

C. Availability of Other Means to Protect Petitioner's Interests (Factor (v))

Nevada agrees that this proceeding is the only appropriate forum for considering and deciding DOE's withdrawal motion. However, inasmuch as PIIC seeks only to raise legal issues, it may participate effectively before NRC by filing an *amicus* brief, and this factor cuts against PIIC. The Commission considered the availability of *amicus* participation as relevant in applying factor (v) in a very recent decision, *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2)*, CLI-10-12, __ NRC __ (March 26, 2010) (slip opinion at 11).

D. Extent to Which Petitioner's Interests Will be Represented By Existing Parties (Factor (vi))

PIIC's abstract interest in various problems may be shared by thousands if not millions of citizens all over the United States who live near nuclear installations and whose electric power rates are affected by payments into the nuclear waste fund. Their interests are represented by organizations that seek to advance Yucca Mountain, like NEI.⁴

E. Extent to Which Petitioner's Participation Will Broaden the Issues or Delay the Proceeding (Factor (vii))

PIIC argues that it will comply with all deadlines, will not delay the proceeding, and will not broaden the issues. Petition at 13. This is not correct. In its contentions PIIC seeks to raise several issues not raised in DOE's withdrawal motion, including whether DOE's actions are in compliance with the APA and NEPA and the effects on this proceeding of the Standard Contract. Petition at 14-34. This factor cuts against PIIC.

F. Extent to Which Petitioner's Participation May Reasonably Be Expected to Assist In Developing a Sound Record (Factor (viii))

PIIC says that it will oppose DOE's motion on legal grounds. Petition at 14. Therefore its participation will be limited to legal issues.⁵ This factor cuts against PIIC because, as noted earlier, the "sound record" referred to here is the record on technical issues, not legal ones, and if this licensing proceeding continues, PIIC will be long gone when the time arrives for any evidence to be received.

⁴ It is worth noting in this regard that spent commercial nuclear fuel is stored at 72 locations in some two dozen states in the United States. DOE "Final Environmental Impact Statement for a Geologic Repository...at Yucca Mountain, Nye County, Nevada," February 2002 at 7-20, 7-36.

⁵ See also DOE's March 29, 2010 Responses to Petitions to Intervene at pp. 2, 4, where DOE notes that various petitioners, including PIIC, agree that they will oppose DOE's motion to withdraw "solely on legal grounds."

G. Summary

The Commission addressed the subject of late intervention petitions in a recent decision, *Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2)*, CLI-10-12, __ NRC __ (March 26, 2010). In this decision the Commission summarized its practice as follows:

The first factor – good cause – is accorded the greatest weight. Absent a showing of good cause, a non-timely petition will not be excused unless the petitioner makes a compelling showing on the remaining factors. A petitioner's showing must be highly persuasive; it would be a rare case where we would excuse a non-timely petition absent good cause.

Id. (slip op. at 4). As indicated above, PIIC not only makes no showing of good cause, but it fails to make any favorable showing, let alone a compelling showing, on any of the remaining factors. PIIC might be given the benefit of some weak showing on factor(vi), the extent to which PIIC's interests will be represented by existing parties, except that would presume incorrectly that PIIC had articulated some concrete and palpable interest that another party could define and then defend. PIIC's request for late intervention must be denied.⁶

IV. PIIC'S PETITION SHOULD BE DENIED BECAUSE IT HAS FAILED TO MEET THE LICENSING SUPPORT NETWORK REQUIREMENTS OF 10 C.F.R. PART 2, SUBPART J

A. The Regulatory Framework and the Licensing Board's Application Thereof

Despite PIIC's failure to petition to intervene in this proceeding in December 2008 as required by the Commission's October 2008 Notice of Hearing, it is obligated

⁶ The three cases cited in footnote 1 of PIIC's Petition do not undercut this conclusion. In *Duke Power Company (Amendment to Materials License SNM-1773)*, ALAB-528, 9 NRC 146 (1979) late intervention was allowed where the tardiness was only a matter of weeks and where, unlike here, all other factors favored intervention. In *Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, CLI-92-12, 36 NRC 62 (1992) late intervention was denied where, as here, there was no good cause for lateness and no compelling and favorable showing was made on the other factors. In *Consumers Power Company (Midland Plant, Units 1 and 2)*, LBP-82-63, 16 NRC 571 (1982), some late contentions were admitted and some others were disallowed in a fact-dependent analysis that cannot be compared to the case at hand in a useful way.

nonetheless to comply with the Licensing Support Network (LSN) requirements of 10 C.F.R.

Part 2, Subpart J before it can be admitted as a party. As specified in 10 C.F.R. § 2.1012(b)(1):

A person, including a potential party given access to the Licensing Support Network under this subpart, may not be granted party status under § 2.309, or status as an interested governmental participant under § 2.315, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the HLW licensing proceeding under § 2.309 or § 2.315.

For its part, § 2.1003(a)(1) requires the public availability on the LSN of "[a]n electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party."

The regulations in 10 C.F.R. Part 2, Subpart J (§ 2.1001) define the Documentary Material each entity must include in its LSN collection, including notably any information which it intends to cite or rely upon in support of its position; contrary information; and relevant reports and studies prepared on its behalf whether the party intends to rely on them or not. Those regulations also specify the details which must be implemented by an entity in creating its LSN collection, including (1) designation of the official responsible for compliance; (2) establishment of procedures to implement the requirements of § 2.1003; and (3) the conduct of training of staff for the implementation of those procedures (§ 2.1009(a)). Most importantly, § 2.1009(b) requires that the designated responsible official "shall certify . . . that the procedures specified . . . have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available."

In its May 11, 2009 Order (Identifying Participants and Admitted Contentions) the CAB quoted the foregoing § 2.1009 prerequisites to LSN compliance and added that the initial certification requirement referred to therein also embodied a good faith standard "that the

parties or potential parties have made every reasonable effort to produce all their documentary material." (*U.S. Department of Energy (High-Level Waste Repository)*, LBP-09-06, 2009 NRC LEXIS 68, at *26 (05/11/2009)). CAB went on to explain that the good faith standard applied as well to the establishment of procedures for the review and production, and to that review and production, as well. (*Id.* at *29).

B. Inadequacy of PIIC LSN Compliance

PIIC acknowledges that a person seeking party status "must demonstrate 'substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation.'" Petition at 34. Despite that concession, PIIC has not filed a valid certification of LSN compliance in accordance with § 2.1009. Based upon the filings PIIC has made to date (PIIC April 30, 2010 Certification of LSN), PIIC has merely designated an official responsible for LSN compliance; it has apparently not established procedures for the implementation of its obligations to make documentary material publicly available pursuant to § 2.1003; nor conducted training of its staff regarding implementation of LSN procedures; nor made publicly available on the LSN a single bit of information. Nevada challenges PIIC's LSN compliance on **each** of the foregoing grounds.

PIIC states that it **will** ensure that all requirements for LSN certification will be completed (PIIC Cert. at 1). However, a future promise is not compliance. Moreover, PIIC acknowledged that it was required to demonstrate LSN compliance "at the time it requests participation." Petition at 34. PIIC should be held to the requirement of § 2.1003, which required compliance at the time of intervention. PIIC asserts only that it has been in communication with the LSN Administrator to obtain guidance (PIIC Cert. at 1). Indeed, PIIC contradicts itself. First, it states that it "has not identified" any documentary material. But, only three sentences later, it admits to the existence of documentary material, including PIIC's petition

to intervene and its contentions, an affidavit and attached documents. None of these are on the LSN. PIIC does not even have a link on the composite LSN to its purported website, while the composite LSN reflects 26 such links for other participating entities. (PIIC Cert. at 2). There is no indication that PIIC has taken any other step toward LSN compliance. CAB specifically reminded PIIC in its April 6, 2010 Order (fn 46) "to complete all steps to meet the agency's LSN regulations, including certifying that their LSN document collections are available." PIIC has ignored this specific mandate. To the degree that PIIC is allowed to demonstrate compliance at a later time, and assuming all other requirements for admission as a party in this proceeding are met, PIIC could then be admitted to the proceeding conditioned on accepting the status of the proceeding at the time of admission (10 C.F.R. § 2.1012(b)(2)).

Despite not making a single bit of information available on the LSN, PIIC asserts and relies upon a vast array of factual information in its intervention petition. This is precisely the information which every party is required to make publicly available via the LSN. Documentary Material (i.e., that which **must** be made publicly available on the LSN) includes all information on which a party intends to cite or rely in support of its position in the licensing proceeding. In subsection 5 of every one of its proposed contentions – the section headed "Concise Statement of Supporting Facts, Expert Opinions and References" – PIIC admits it will rely on facts or opinions asserted in the attached Affidavit of Ronald C. Callen. Petition at 21, 23, 26, 29 and 33. For its part, the affidavit is a compilation of factual information and expert opinions supporting PIIC's position and comprising some 24 pages, including the multiple factual documents on which it relies, some attached.

The affidavit purports to recite numerous factual matters, such as hearsay statements of various individuals, the amount of payments by various ratepayers to the Nuclear

Waste Fund, and the identity and location of various nuclear power plants. The scope of Mr. Callen's affidavit ranges from the inaccurate (that PIIC "represents the citizenry near the nuclear sites") (Aff. ¶15), to the grossly speculative (DOE's proposed action "is severely damaging to the public interest") (Aff. ¶3), to that which is totally irrelevant to the scope of this proceeding and the role of CAB (from the asserted ownership of SNF by limited liability corporations who are lightly capitalized (Aff. ¶16), to the purported risk to "host localities" where waste is stored because owners of SNF are corporate entities that can restructure themselves (Aff. ¶7), to questioning the wisdom of the Administration proposal to provide \$54 billion for loan guarantees for new nuclear construction (Aff. ¶14)). All of these matters of fact and opinion are recitations in an affidavit cited as the basis for facts and opinions by all five of PIIC's proposed contentions. Obviously, the affiant drew these myriad facts, details and statements from a variety of source documents, studies and reports. All of these underlying source documents (some attached to the affidavit), **and** the contentions themselves, are intended to be relied upon by PIIC and should be on its LSN database at such future time as it creates one.

Because PIIC has made no documentary material available on an LSN database in accordance with § 2.1003; because it has not indicated creating procedures, implemented them, or conducted training of its staff, all as required by § 2.1009; and because PIIC inevitably does have in its possession "information it intends to rely on in support of its position in the licensing proceeding" (i.e., documentary material) the petition of PIIC to intervene in this proceeding should be denied. Should intervention be granted, PIIC should be precluded from relying (in any briefing or hearing) on any information not publicly available in its LSN database.

V. CONTENTIONS

PIIC submits five contentions.

A. PHIC-MISC-01 – THE DOE SECRETARY'S ACTION IN FILING THE MOTION TO WITHDRAW IS UNLAWFUL UNDER THE NWPA AND THE STANDARD CONTRACT

Nevada objects in part. Nevada does not object to the admissibility of this contention insofar as it questions whether the Nuclear Waste Policy Act (NWPA) allows the NRC to accept a withdrawal of the license application. However, insofar as it questions compliance with the Standard Contract, Nevada objects as follows.

a. Statement of Issue (10 CFR § 2.309(f)(1)(i))

No objection.

b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))

No objection.

c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))

Nevada objects. This proceeding does not include questions regarding DOE's compliance with the Standard Contract because the NRC is not a party to that contract and compliance with that Contract is not specified as an issue in the Notice of Hearing, 73 Fed. Reg. 63029 (October 22, 2008), or in 10 C.F.R. Part 63.

d. Materiality (10 CFR 2.309(f)(1)(iv))

Nevada objects, for the reasons given in c. above.

e. Adequate Basis (10 CFR 2.309(f)(1)(v))

No objection.

f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

Nevada objects, both for the reasons given in c. above, and because DOE's withdrawal motion does not discuss the Standard Contract.

B. PHIC-MISC-02 – THE NRC (IN ADDITION TO THE DOE) DOES NOT HAVE THE DISCRETION TO TERMINATE THE LICENSE PROCEEDING, OR TO TERMINATE THE LICENSE PROCESS WITH PREJUDICE

Nevada objects to the admissibility of this contention as follows.

a. Statement of Issue (10 CFR § 2.309(f)(1)(i))

Nevada objects. This contention does not specify what law allegedly precludes the NRC from granting DOE's motion and it is therefore impermissibly vague, contrary to the express requirement in 10 C.F.R. § 2.309(f)(1)(i) that a contention statement must include "a specific statement of the issue of law...to be raised or controverted." *See also* LBP-08-10, "Memorandum and Order (Case Management Order Concerning...Contentions. . . ", at 6.

b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))

No objection.

c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))

Nevada objects. Insofar as this contention may question whether the Nuclear Waste Policy Act (NWPA) allows the NRC to accept a withdrawal of the license application, it is within the scope of the proceeding. However, the contention is beyond the scope of the proceeding if it questions compliance with the Standard Contract because the NRC is not a party to that contract and compliance with that Contract is not specified as an issue in the Notice of Hearing, 73 Fed. Reg. 63029 (October 22, 2008), or in 10 C.F.R. Part 63.

d. Materiality (10 CFR 2.309(f)(1)(iv))

Nevada objects, for the reasons given in c. above.

e. Adequate Basis (10 CFR 2.309(f)(1)(v))

No objection.

f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

Nevada objects, both for the reasons given in c. above, and because DOE's withdrawal motion does not discuss the Standard Contract.

C. **PIIC-MISC-03 – DOE'S MOTION SEEKING TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN REPOSITORY PROGRAM CONSTITUTES A VIOLATION OF NEPA**

Nevada objects to the admissibility of this contention as follows:

a. Statement of Issue (10 CFR § 2.309(f)(1)(i))

Nevada objects in part. Nevada does not object on specificity grounds to this contention insofar as it seeks to raise the pure legal question whether, to support its motion to withdraw, DOE must prepare an environmental impact statement that is separate from the statement it prepared to support its license application, regardless of the adequacy of the discussion of the no-action alternative in that statement.

However, if PIIC intends to challenge, either directly or indirectly, the adequacy of the discussion of the no-action alternative in that statement, then its contention is hopelessly vague and non-specific because no specific deficiency is alleged.

b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))

No objection, except as noted in a. above pertaining to the adequacy of the discussion of the no-action alternative.

c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))

Nevada objects in part. On NEPA issues, this proceeding, like all NRC proceedings, is limited in scope to whether NRC has complied with NEPA, and questions regarding other agencies' compliance with NEPA are outside of the scope of the proceeding. Whether DOE has complied with NEPA is only relevant insofar as NRC may seek to comply with NEPA by relying on an environmental statement prepared by DOE.

d. Materiality (10 CFR 2.309(f)(1)(iv))

Nevada objects in part. On NEPA issues, this proceeding, like all NRC proceedings, is limited in scope to whether NRC has complied with NEPA, and questions

regarding other agencies' compliance with NEPA are outside of the scope of the proceeding. Whether DOE has complied with NEPA is only relevant insofar as NRC may seek to comply with NEPA by relying on an environmental statement prepared by DOE.

e. Adequate Basis (10 CFR 2.309(f)(1)(v))

No objection.

f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

Nevada reservations with respect to whether this contention raises material issues that are within the scope of the proceeding apply here as well.

D. PIIC-MISC-04 – DOE'S DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION AND ITS DECISION AND MOTION TO WITHDRAW THE LICENSE APPLICATION WITH PREJUDICE SO AS TO TERMINATE THE YUCCA MOUNTAIN PROJECT (AND BOARD OR NRC APPROVAL OF SAID DECISIONS AND MOTION) IS (OR WOULD BE) ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

Nevada objects to the admissibility of this contention as follows:

a. Statement of Issue (10 CFR § 2.309(f)(1)(i))

Nevada objects. PIIC's brief discussion of basis includes allegations of non-compliance with the NWPA, NEPA, and the Standard Contract which appear to duplicate previous contentions and, without some explanation of what this contention adds, this contention is impermissibly vague. However, Nevada does not object on specificity grounds if the contention is limited to alleging that DOE's decision to request withdrawal is arbitrary and capricious under the APA, separate from other alleged statutory violations.

b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))

No objection.

c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))

Nevada objects in part. Whether, in considering DOE's withdrawal motion, NRC must or may consider DOE's stated reasons for seeking withdrawal is inextricably linked to NRC's consideration of the merits of that motion, and is best addressed in that context. However, in general, the NRC does not apply the APA to a federal agency applicant as if it were performing the function of a court on judicial review.

To the extent that this contention seeks to raise issues regarding compliance with the Standard Contract, it is outside of the scope of this proceeding. This proceeding does not include questions regarding DOE's compliance with the Standard Contract because the NRC is not a party to that contract and compliance with that Contract is not specified

as an issue in the Notice of Hearing, 73 Fed. Reg. 63029 (October 22, 2008), or in 10 C.F.R. Part 63.

d. Materiality (10 CFR 2.309(f)(1)(iv))

Nevada objects in part, for the reasons in c. above.

e. Adequate Basis (10 CFR 2.309(f)(1)(v))

No objection.

f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

Nevada objects in part, for the reasons in c. above. Also DOE's withdrawal motion does not discuss the Standard Contract.

E. PIIC-MISC-05 – THE BOARD AND NRC SHOULD REJECT DOE'S MOTION, AND PLACE CONDITIONS ON ANY FUTURE CONSIDERATION OF DOE'S MOTION, TO ENSURE COMPLIANCE WITH APPLICABLE LAW

Nevada objects to the admissibility of this contention as follows.

a. Statement of Issue (10 CFR § 2.309(f)(1)(i))

Nevada objects. This contention is hopelessly vague. It seems to be a repetition of many of the arguments in PIIC-MISC-01 - PIIC-MISC-04, but these other contentions are not distinguished, and it is unclear what PIIC-MISC-05 adds. Moreover, the brief statement of basis is anything but that. It includes a long rambling discussion (really a harangue) about secret DOE decisions, an alleged need to formulate a process for DOE to explain its decision, the Blue Ribbon Commission, as well as brief mentions of the NWPA, NEPA, the Standard Contract, and the APA, without any discussion of how these should affect the NRC's decision on DOE's motion to withdraw.

b. Brief Statement of Basis (10 CFR § 2.309(f)(1)(ii))

Nevada objects for the reasons given in a. above.

c. Scope of the Proceeding (10 CFR § 2.309(f)(1)(iii))

Nevada objects in part. On NEPA issues, this proceeding, like all NRC proceedings, is limited in scope to whether NRC has complied with NEPA, and questions regarding other agencies' compliance with NEPA are outside of the scope of the proceeding. Whether DOE has complied with NEPA is only relevant insofar as NRC may seek to comply with NEPA by relying on an environmental statement prepared by DOE.

Also, the contention is beyond the scope of the proceeding if it questions compliance with the Standard Contract because the NRC is not a party to that contract and compliance with that Contract is not specified as an issue in the Notice of Hearing, 73 Fed. Reg.

63029 (October 22, 2008), or in 10 C.F.R. Part 63. Further, allegations about secret DOE decision-making, an alleged need to formulate a process for DOE to explain its decision, and the Blue Ribbon Commission, appear to raise questions that are also outside of the scope of this proceeding, because apart from a reference to the APA, PIIC fails to cite to any law applicable NRC's decision on DOE's withdrawal motion. However, the need for DOE to preserve records, Petition at 32-33, raises an issue within the scope of this proceeding.

d. Materiality (10 CFR 2.309(f)(1)(iv))

Nevada objects, for the reasons given in c. above.

e. Adequate Basis (10 CFR 2.309(f)(1)(v))

Nevada objects to the extent that PIIC fails to cite to any law applicable to NRC's decision on DOE's withdrawal motion.

f. Genuine dispute (10 CFR § 2.309(f)(1)(vi))

Nevada reservations with respect to whether this contention raises material issues that are within the scope of the proceeding apply here as well.

VI. **CONCLUSION**

Based upon the foregoing analysis of PIIC's standing, timeliness and LSN compliance, the petition of PIIC to intervene should be denied.

Respectfully submitted,

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Dated: May 4, 2010

Exhibit 1

SEPTEMBER 25, 2008, 11:13 AM

Obama's Science Quiz

By *JOHN TIERNEY*

The journal Nature managed to get answers to 18 questions about science policy from Senator Barack Obama, but not from Senator John McCain. You can read [the full text of Mr. Obama's answers here](#) along with summaries of what Mr. McCain has said in the past on these issues.

One of the biggest differences that emerges in the Nature answers, as in [previous answers to ScienceDebate08](#), concerns nuclear power. While Mr. McCain has previously called for building 45 new nuclear reactors by 2030, Mr. Obama sounds much more cautious:

It is unlikely that we can meet our aggressive climate goals if we eliminate nuclear power as an option. However, before an expansion of nuclear power is considered, key issues must be addressed, including security of nuclear fuel and waste, waste storage and proliferation. The nuclear waste disposal efforts at Yucca Mountain [in Nevada] have been an expensive failure and should be abandoned. I will work with the industry and governors to develop a way to store nuclear waste safely while we pursue long-term solutions.

What does a "long-term solution" mean? If this means waiting until there's a form of storage that will be safe for thousands of years — the hope for Yucca Mountain — then when, if ever, might we expect to see new nuclear power plants?

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Answer to Prairie Island Indian Community's Petition to Intervene has been served upon the following persons by the Electronic Information Exchange:

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