May 4, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO PETITION TO INTERVENE OF THE PRAIRIE ISLAND INDIAN COMMUNITY

INTRODUCTION

On March 15, 2010, the Prairie Island Indian Community (PIIC) filed a petition to intervene in the above-captioned proceeding. Petition to Intervene of the Prairie Island Indian Community, dated March 15, 2010 ("Petition"). The petition was filed pursuant to 10 C.F.R. § 2.309, which requires a showing of standing and the proffering of an admissible contention. For the reasons set forth below, PIIC did not submit an admissible contention, and therefore, its Petition should be denied. However, the Staff would not object to a request by PIIC to participate under 10 C.F.R. § 2.315(c),[1] provided it certifies pursuant to 10 C.F.R. §§ 2.1003 and 2.1009, that it has made its documentary material available via the Licensing Support Network (LSN), or that it does not have any documentary material.

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

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the "Yucca Mountain Repository License Application," ("LA") seeking authorization to begin construction of a permanent high-level waste repository at Yucca Mountain. *See* Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008); corrected 73 Fed. Reg. 40,883 (July 16, 2008). On October 17, 2008, the Commission issued a "Notice of Hearing and Opportunity to Petition for Leave to Intervene," which provided that intervention petitions must be filed within 60 days. *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497 (2008); *see also* In the Matter of U.S. Department of Energy (High Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (October 22, 2008).

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

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[2] DOE filed answers to the intervention petitions on or before January 16, 2009. *See id.* at 379 n. 20. The Staff responded to the intervention petitions on February 9, 2009. NRC Staff Answer to Intervention Petitions, filed February 9, 2009 ("Staff Answer"). On or before February 24, 2009, ten petitioners filed timely replies to the DOE and Staff answers. *See* 69 NRC at 379 n.24.

69 NRC 367, 377-378 nn.5-19 (2009), *aff'd in part, rev'd in part*, CLI-09-14, 69 NRC 580 (2009). The three Construction Authorization Boards (CABs) designated to rule on the petitions granted 10 petitions to intervene, granted the interested governmental requests under § 2.315(c), and admitted all but 17 of the 318 proposed contentions. *See id*. at 499-500. Later, CAB-04 granted NCAC and the Joint Timbisha Tribal Group party status after each satisfied LSN certification requirements. Order (Granting Party Status to the Native Community Action Council), dated August 27, 2009 (unpublished) at 2; Order (Granting Party Status to the Joint Timbisha Shoshone Tribal Group), dated August 27, 2009 (unpublished) at 2.

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

A DOE "Motion to Stay the Proceeding," filed on February 1, 2010 ("Stay Motion") stated that the President, in the proposed budget for fiscal year 2011, "directed that the Department of Energy 'discontinue its application to the U.S. Nuclear Regulatory Commission for a license to construct a high-level waste geologic repository at Yucca Mountain in 2010 . . . .'" Stay Motion at 1. The Stay Motion further stated that the proposed budget indicated that all DOE funding for Yucca Mountain would be eliminated in 2011.[3] *Id*. Therefore, DOE stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding in order to

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[3] The Stay Motion referenced statements in the proposed budget prepared by the Office of Management and Budget for Fiscal Year 2011. Budget of the U.S. Government, Fiscal Year 2011, Appendix at 437 (available at http://www.whitehouse.gov/omb/budget/fy2011/assets/doe.pdf).

avoid unnecessary expenditure of resources by the Board and parties. *See* Stay Motion at 2. CAB-04 granted a stay of the proceeding on February 16, 2010.

On March 3, 2010, DOE filed its withdrawal motion,[4] and PIIC filed the instant Petition seeking to intervene as a party in this proceeding on March 15, 2010. On April 6, 2010, the Board suspended briefing on the PIIC Petition, as well as the intervention petition of the National Association of Regulatory Utility Commissioners and the DOE Motion to Withdraw, until further notice.[5] Both DOE and Nye County petitioned the Commission for interlocutory review of the April 6, 2010 Board order.[6] On April 23, 2010, the Commission vacated the April 6, 2010 Board order and remanded the matter back to the Board for resolution of the DOE Motion to Withdraw by June 1, 2010.[7] On April 27, 2010, the Board ordered that answers to the PIIC Petition be filed by May 4, 2010.[8] The Staff's answer is set forth below.[9]

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[4] U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 ("Motion to Withdraw").

[5] Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), dated April 6, 2010 (unpublished) (slip op. at 13).

[6] U.S. Department of Energy's Petition for Interlocutory Review, dated April 12, 2010; Nye County Nevada's Petition for Interlocutory Review of CAB04 April 6, 2010 Order, dated April 15, 2010.

[7] *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-13, 71 NRC __ (April 23, 2010) (slip op. at 5).

[8] Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished) (slip op. at 2). The Board indicated that it would decide DOE's Motion to Withdraw by June 30, 2010. *Id.* at 2.

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

DISCUSSION

I. Standing

In order to demonstrate standing, a petitioner must satisfy the 10 C.F.R. § 2.309(d)(1) requirements and allege a particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision. *See, e.g., Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999). The Staff does not oppose PIIC's standing to intervene in this proceeding. PIIC is a Federally-recognized Indian Tribe, and the Prairie Island Indian Reservation is adjacent to the Prairie Island Nuclear Generating Plant and its Independent Spent Fuel Storage Installation (ISFSI). Petition at 3-4. PIIC asserts concern that the storage of spent nuclear fuel at the ISFSI may result in detrimental health and safety impacts to PIIC members and visitors to the reservation, in addition to adverse environmental consequences. *Id.* at 4. PIIC argues that the ISFSI in its community has not been studied or approved for long-term storage or permanent disposal, but DOE's Motion to Withdraw raises the prospect that spent nuclear fuel will remain in its community and create long-term risks. *Id.* at 6. PIIC alleges that the granting of DOE's Motion to Withdraw with prejudice "would result in extreme prejudice to [its] interests, as it may forever foreclose siting a geologic repository at Yucca Mountain." *Id.* at 7.[10]

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[10] PIIC also alleges it has standing (1) because it represents energy users in its community, who have paid into the Nuclear Waste Fund, and (2) based on the "proximity presumption". Petition at 2, 4. However, at least one circuit has found that nuclear utilities, and not individual ratepayers, are the intended beneficiaries of the Nuclear Waste Policy Act (NWPA). *Roedler v. U.S. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001). Therefore, the interests of the ratepayers in the Nuclear Waste Fund are not within the zone of interests protected by the NWPA and cannot be used to demonstrate standing. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (A petitioner must allege injury "to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agenc[y is] claimed to have violated.") (internal citations omitted); *see also Power Authority of the State of New York* (James FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000). With respect to the Atomic Energy Act, "the Commission has long held that ratepayer interests do not confer standing." Pacific Gas & Electic Co. (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, (continued. . .)

Because the Staff does not oppose PIIC's standing to intervene, the Staff does not address PIIC's argument in the alternative for discretionary intervention. *See id.* at 8.

II. Nontimely Intervention

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

A. Good Cause

With respect to this factor, PIIC argues that, when the notice of hearing was issued, it believed that the LA would be consistently supported by DOE until NRC issued a decision on

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(. . .continued)

55 NRC 317, 336 n.23 (2002).

The "proximity presumption" does not give PIIC standing in this proceeding concerning a high-level waste repository at Yucca Mountain. PIIC is located near the Prairie Island Nuclear Generating Plant, not Yucca Mountain. *See* Petition at 4. Furthermore, the "proximity presumption" is used in proceedings for power reactor construction permits, power reactor operating licenses, and significant amendments thereto. *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989) (citations omitted). In situations without such obvious potential for offsite consequences, the proximity presumption does not apply, and the petitioner must allege some specific injury in fact flowing from the action. *Id.* at 329-30.

the merits. Petition at 9. PIIC alleges that its good cause to intervene is based on (1) the new information established by DOE's Motion to Withdraw filed on March 3, 2010, which lacked a clear explanation or rationale for DOE's reversal of position with respect to Yucca Mountain, and (2) filing its petition to intervene within the 10-day window for responding to DOE's motion. *Id.* at 9-10. Because PIIC's nontimely contentions relate to DOE's motion to withdraw its license application, the Staff agrees that PIIC could not have filed a petition proferring these contentions at the outset of the proceeding. *See Millstone*, CLI-05-24, 62 NRC at 564-65 (providing that good cause requires an analysis of why the petitioner could not file on time and whether the petitioner filed as soon as possible thereafter). The Staff does not dispute that PIIC filed its petition promptly after the new information became available inasmuch as PIIC filed within 30 days of that new information. *Compare* 10 C.F.R. § 2.309(c)(1)(i) *with* 10 C.F.R. § 2.309(f)(2); *see* CAB Case Management Order #1, dated January 29, 2009, at 3-4 (A new or amended contention will be deemed timely under 10 C.F.R. § 2.309(f)(2) if filed within 30 days of the date on which the new and material information first became available.).

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

A balancing of the remaining factors in 10 C.F.R. § 2.309(c), along with PIIC's good cause, favors the Board's allowing the late filing. The Commission has held that the remaining factors should not be equally weighted. *See Diablo Canyon*, CLI-08-8, 67 NRC at 197-98. "The extent to which the petitioner's participation will broaden the issues or delay the proceeding" and "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record" are the two most important factors.[11] *Id.* PIIC argues that its

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

participation will not broaden the issues to be considered in the proceeding because it is the filing of the DOE that raised issues as to whether the withdrawal motion is lawful and within the Board's authority to grant. Petition at 13. PIIC claims that its intervention will not cause delay, arguing that DOE's action has delayed the discovery and the hearing process. *Id.* PIIC also asserts that it will comply with Board deadlines. *Id.* While PIIC's contentions do broaden the issues before the Board because no existing party has raised the legal issues contained in PIIC's contentions at this time, any potential delay may not be significant given that (1) PIIC seeks to raise legal issues that can be handled by briefing and (2) DOE wishes to withdraw its application and end the proceeding. Therefore, 10 C.F.R. § 2.309(c)(1)(vii) does not weigh for or against PIIC.

As to the extent to which its participation may assist in developing a sound record, 10 C.F.R. § 2.309(c)(1)(viii), PIIC asserts that it will provide "helpful briefing arguments concerning DOE's motion and the manner in which the Board should rule on the motion." Petition at 14. Additionally, PIIC claims it directly represents the interests and concerns of a host community of spent nuclear fuel storage facilities and ratepayers who are affected by DOE's action. *Id.* However, PIIC has not shown that it will substantially assist in developing a sound record, as it does not proffer any admissible contentions. Therefore, this factor weighs against PIIC.

The remaining five factors weigh in favor of PIIC. With respect to PIIC's right to be made a party to the proceeding, 10 C.F.R. § 2.309(c)(1)(ii), as discussed above, the Staff does not dispute that PIIC has standing as a matter of right in this proceeding. PIIC asserts that an order granting DOE's Motion to Withdraw gives rise to significant environmental, safety, and financial risks and costs because it creates the possibility that spent nuclear fuel will remain in PIIC's community. Petition at 6-7 (citing 10 C.F.R. § 2.309(c)(1)(iii), (iv)). PIIC claims that because it is not clear the courts could provide timely relief on a matter before the Board and the

Commission, DOE's Motion to Withdraw, there are no other means to protect its interests. Petition at 11-12 (citing 10 C.F.R. § 2.309(c)(1)(v)). Finally, with respect to 10 C.F.R. § 2.309(c)(1)(vi), PIIC notes that it is a Federally-recognized Indian Tribe that is a host community for spent nuclear fuel and, as such, has unique interests that cannot be represented by existing parties. Petition at 12.

Weighing the factors listed in 10 C.F.R. § 2.309(c)(1), with the consideration that the good cause factor is most important, leads the Staff to conclude that the balancing test favors allowing PIIC's nontimely filing.

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

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

A person denied party or interested governmental participant status pursuant to § 2.1012(b)(1) may request such status upon a showing of subsequent compliance with the requirements of § 2.1003. *Id*. at 500 n.1; s*ee also* Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,937 (April 14, 1989) (A person denied such

status "may later come into compliance and be admitted to the hearing, assuming they meet all the requirements in § 2.1014 or 10 CFR 2.715(c) [currently 2.309 or 2.315(c)] for admission."). However, any such party or interested governmental participant subsequently admitted into the proceeding must take the proceeding as they find it and the proceeding shall not be delayed in order to accommodate any such party. *See High-Level Waste Repository*, CLI-08-25, 68 NRC at 500 n.1; *see also* 54 Fed. Reg. at 14,937.

PIIC has not yet certified, pursuant to §§ 2.1003 and 2.1009, that it has made its documentary material available. *See* Petition at 35 (indicating intent to comply with 10 C.F.R. § 2.1003). Accordingly, PIIC should not be admitted to the proceeding until it has done so.

IV. Contention Admissibility

A. Contention Admissibility Requirements

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

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

> supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1). Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissal of the contention. Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also PFS*, CLI-99-10, 49 NRC at 325.

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

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

Similarly, long-standing Commission precedent establishes that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues that may be contested as set forth in the *Federal Register* notice of hearing and comply with the

requirements of former § 2.714(b) (subsequently restated in § 2.309(f)) and applicable Commission case law. *See, e.g.*, *Pub. Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 400 (1991). In addition to the requirements set out above, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

B. Contentions

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

PIIC-MISC-01 – THE DOE Secretary's Action in Filing The Motion to Withdraw is Unlawful Under the NWPA and the Standard Contract.

> The DOE Secretary's action in filing the March 3, 2010 Motion to Withdraw the license application is unlawful, as being unauthorized and inconsistent with the NWPA and the Standard Contract.

Petition at 14. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).[12]

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Duke Power Co*. (Catawba Nuclear Station, Units 1 & 2), ALAB-825, 22 NRC 785, 790-91 (1985); *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007), *appeal denied*, CLI-07-25, 66 NRC 101 (2007). The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also U.S. Dep't of Energy* (High-Level Waste Repository), CLI-10-10, 71 NRC __ (Mar. 11, 2010) (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

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[12] PIIC has not cited any authority that would give the NRC the authority to entertain arguments related to DOE's obligations under the Standard Contract.

PIIC does not explain how PIIC-MISC-01 relates to a safety, security or technical issue with the LA or NEPA. Instead, the contention argues that because DOE's action raised this legal issue, PIIC's opposition to the motion "inextricably falls within the scope of this proceeding. Petition at 20.

PIIC essentially argues that, since the Board will consider DOE's motion as part of the proceeding, then PIIC's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will properly address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). Nothing in the Commission's contention rules, however, do appears to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding. PIIC has not explained how PIIC-MISC-01 relates to the safety, security, and technical aspects of the LA or the satisfaction of NEPA requirements. Therefore, PIIC-MISC-01 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.[13]

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[13] The Board inquired whether the Staff "continues to assert that the issue of DOE's authority to withdraw its Application is beyond the scope of this proceeding in light of the Commission's April 23, 2010 order stating that the NRC's position should be available to the Court of Appeals if judicial review is (continued. . .)

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

An admissible contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). This requirement "means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008); *see also Yankee Atomic Electric Co.* (Yankee Nuclear

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pursued." Order (Setting Briefing Schedule), dated April 27, 2010 (unpublished) (slip op. at 2). The Board appears to be construing Staff statements regarding the admissibility of petitioners' contentions under 10 C.F.R. § 2.309(f)(1)(iii). *See, e.g.,* NRC Staff Answer to State of Washington's Petition for Leave to Intervene and Request for Hearing, filed March 29, 1010, at 12-13. The Staff's position is that the petitioners did not meet their burden of demonstrating that their contentions are within the scope of the proceeding, as required by § 2.309(f)(1)(iii).

In the Staff's view, the Commission's Order does not define or change the scope of the proceeding or admissible contentions. *See* Memorandum and Order, CLI-10-13, 71 NRC __ (April 23, 2010) (slip op.). The Commission's Order directs the Board to "issue a decision" on DOE's Motion to Withdraw. *Id*. at 5. There is a distinction between, on the one hand, matters that the Board can properly entertain in connection with a motion raised by existing parties during the course of a proceeding and, on the other hand, matters that can be the subject of admissible contentions under 10 C.F.R. § 2.309(f)(1). While the Board has broad powers to hear and resolve matters that arise during the course of a proceeding, the contention admissibility rules are specific and strict. The issue of DOE's authority to withdraw its LA under the NWPA can be adjudicated by this Board, but a contention challenging DOE's authority to withdraw its LA does not satisfy the Commission's contention admissibility requirements as interpreted by NRC decisions and Commission statements in the Notice of Hearing defining the scope of this adjudicatory proceeding. In the Notice of Hearing, the Commission stated that "[t]he matters of fact and law to be considered are whether the application satisfies the applicable safety, security, and technical standards of the AEA and NWPA and the NRC's standards in 10 CFR Part 63 for a construction authorization for a high-level waste geologic repository, and also whether the applicable requirements of the National Environmental Policy Act (NEPA) and NRC's NEPA regulations,10 CFR Part 51, have been met." 73 Fed. Reg. 63,029. In response to an appeal of the denial of a late-filed intervention petition, the Commission stated that the petitioner's "proposal is beyond the scope of this proceeding, which concerns only the adequacy the Department of Energy's request for construction authorization at Yucca Mountain." *High-Level Waste Repository*, CLI-10-10, 71 NRC __ (slip op. at 6). Thus, the Board's authority to rule on DOE's Motion to Withdraw, which is conferred by 10 C.F.R. § 2.107, is a separate matter from the 10 C.F.R. § 2.309(f)(1) requirements for admissible contentions. Accordingly, petitioners must demonstrate the issue in a contention falls within the scope of the proceeding as set forth in the Notice of Hearing.

Power Station), CLI-96-7, 43 NRC 235, 258 (1996), *review declined,* CLI-96-9, 44 NRC 112 (1996) (A contention regarding a decommissioning plan "must show some specific link between the alleged errors in the plan and the health and safety impacts they invoke."). In the instant proceeding, a material contention, therefore, must be linked to NRC's decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC's adoption of the DOE EISs. In addition, the APAPO Board stated that this "requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention." *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in PIIC-MISC-01 is material to the findings NRC must make in the proceeding, PIIC argues that the Board will need to rule on DOE's motion, and its contention relates to whether DOE's motion should be granted. Petition at 20. However, whether DOE can legally withdraw its LA under the NWPA and Standard Contract is not material to the findings NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Furthermore, PIIC cites a statute or regulation that relates to the authority of DOE to terminate this proceeding, but it does not cite any health and safety requirements that an application must meet. Therefore, PIIC-MISC-01 should not be admitted.

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

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

Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1992), *review declined*, CLI-94-2, 39 NRC 91 (1994).

Here, PIIC asserts that there is a genuine dispute on a material of issue of law—whether DOE has the lawful authority and discretion to withdraw its LA with prejudice. Petition at 21. PIIC, however, does not dispute any portion of the LA or claim that information was improperly omitted from it. Therefore, PIIC-MISC-01 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

Because PIIC-MISC-01 does not meet the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

PIIC-MISC-002 – The NRC (In Addition to the DOE) Does Not Have the Discretion to Terminate the License Proceeding, or to Terminate the Licensing Process With Prejudice.

> Petitioner asserts that the NRC (in addition to the DOE) does not have the lawful authority or discretion to terminate this licensing proceeding without a substantive decision on the merits, and certainly lack such authority or discretion to terminate this licensing process at this stage, in the manner proposed, with prejudice, so as to terminate the entire Yucca Mountain project.

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

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also High-Level Waste Repository*, CLI-10-10, 71 NRC __ (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

PIIC does not explain how PIIC-MISC-002 relates to a safety, security or technical issue with the LA. Instead, the contention states "[s]ince DOE's motion raises this issue, Petitioner's Opposition to DOE's Motion on this issue is within the scope of the proceeding." Petition at 23.

PIIC essentially argues that if the Board considers DOE's motion as part of the proceeding, then PIIC's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will properly address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). Nothing in the Commission's contention rules, however, appears to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding. PIIC has not explained how PIIC-MISC-02 relates to the safety, security, and technical aspects of the LA or the satisfaction of NEPA requirements. Therefore, PIIC-MISC-002 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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

An admissible contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). This requirement "means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment." *Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258 (A contention regarding a decommissioning plan "must show some specific link

between the alleged errors in the plan and the health and safety impacts they invoke."). In the instant proceeding, a material contention, therefore, must be linked to NRC's decision whether to grant a construction authorization based on the safety and technical merits of the LA or NRC's adoption of the DOE EISs. In addition, the APAPO Board stated that this "requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention." *High-Level Waste Repository*, LBP-08-10, 67 NRC at 455.

In order to demonstrate that the issue presented in PIIC-MISC-002 is material to the findings NRC must make in the proceeding, PIIC argues that the Board will need to rule on DOE's motion, and PIIC's contention goes to whether DOE's motion should be granted. Petition at 23. However, whether NRC or DOE can terminate the licensing process at this stage is not material to the findings NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Furthermore, PIIC cites a statute or regulation that relates to the authority of DOE to terminate this proceeding, but it does not cite any health and safety requirements that an application must meet. Therefore, PIIC-MISC-002 should not be admitted.

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

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

Here, PIIC asserts that there is a genuine dispute on a material of issue of law—whether DOE and NRC have authority or discretion to terminate the proceeding. Petition at 24.

However, PIIC does not dispute any portion of the LA or claim that information was improperly omitted from it. Therefore, PIIC-MISC-002 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

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

PIIC-MISC-003 – DOE's Motion Seeking to Irrevocably Terminate the Yucca Mountain Repository Program Constitutes a Violation of NEPA

> The DOE's Motion to Withdraw the construction license application in this proceeding, with prejudice, constitutes DOE's decision to irrevocably terminate the Yucca Mountain repository program. This motion and decision fails to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321.

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

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also High-Level Waste Repository*, CLI-10-10, 71 NRC __ (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

Although PIIC-MISC-003 alleges that DOE has not complied with NEPA, it does not explain why the alleged failure to comply with NEPA with respect to DOE's decision to terminate the Yucca Mountain repository project is an *applicable* NEPA requirement in this construction authorization proceeding. Instead, the contention argues that, because DOE's Motion to

Withdraw violates NEPA, it inherently raises the legal issue in PIIC-MISC-003, and therefore, the contention is within the scope of the proceeding. Petition at 26.

PIIC essentially argues that if the Board considers DOE's motion as part of the proceeding, then its opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, as indicated earlier, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will properly address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). Nothing in the Commission's contention rules, however, appears to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding. PIIC has not explained how PIIC-MISC-003 relates to an applicable NEPA requirement. Therefore, PIIC-MISC-003 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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

An admissible contention must assert an issue of law or fact that is "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). This requirement "means that there must be some significant link between the claimed deficiency [in the contention] and the agency's ultimate determination regarding whether or not the license applicant will adequately protect the health and safety of the public and the environment." *Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7,

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

In order to demonstrate that the issue presented in PIIC-MISC-003 is material to the findings NRC must make in the proceeding, PIIC argues that the Board will need to rule on DOE's motion, and neither the Board nor the NRC should "approve a motion aimed at implementing a decision which is unlawful, either substantially or procedurally." Petition at 26. However, the materiality standard in § 2.309(f)(1)(iv) is connected to the agency's "determination on whether the applicant will adequately protect the health and safety of the public and the environment." *See Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258. PIIC has not demonstrated how PIIC-MISC-003 relates to that determination with respect to the grant or denial of a construction authorization. Therefore, PIIC-MISC-003 should not be admitted.

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

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

While PIIC-MISC-003 does reference the FEIS, PIIC does so to note that studies DOE has undertaken up until this point, in preparation for a license application for Yucca Mountain, "cannot be retroactively applied on a post-hoc basis to support DOE's" decision to withdraw its license application. Petition at 25. PIIC does not challenge the adequacy of the FEIS used to support the licensing of Yucca Mountain; instead, PIIC asserts that DOE failed to address the consequences of termination of the Yucca Mountain project. Therefore, the contention does not present a genuine dispute regarding the license application or FEIS at issue in this proceeding. Accordingly, the Board should not admit PIIC-MISC-003.

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

PIIC-MISC-004 – DOE's Decision and Motion to Withdraw the License Application, <u>and</u> 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 [sic] Act

> Petitioner asserts that DOE's decision and motion (to both withdraw and withdraw with prejudice) its license application, and to terminate the Yucca Mountain project (and also Board or NRC grant of said motion) is (or would be) arbitrary and capricious in violation of the Administrative Procedures [sic] Act (APA), 5 U.S.C. § 706(2)(A).

Petition at 27. For the reasons set forth below, this contention does not provide a brief explanation of the basis for the contention as required by 10 C.F.R. § 2.309(f)(1)(ii) insofar as it asserts NRC would violate the APA; does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

10 C.F.R § 2.309(f)(1)(ii): Brief Explanation of the Basis of this Contention

PIIC's statement of the contention alleges that NRC, in addition to DOE, would violate the APA if it granted DOE's Motion to Withdraw. Petition at 27. However, PIIC does not provide any explanation of why or how NRC would violate the APA in granting DOE's Motion to Withdraw. *See* Petition at 27-28. Therefore, to the extent that PIIC-MISC-004 alleges NRC, as opposed to DOE, would violate the APA, the contention does not comply with 10 C.F.R. § 2.309(f)(1)(ii) and should not be admitted.

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical

standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also High-Level Waste Repository*, CLI-10-10, 71 NRC __ (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

PIIC does not explain how PIIC-MISC-004 relates to a safety, security or technical issue with the LA or NEPA requirements. Instead, the contention states "[i]f DOE's motion is within the scope of this proceeding, then Petitioner's opposition to DOE's motion is similarly within the scope of this proceeding."[14] Petition at 28.

PIIC essentially argues that if the Board considers DOE's motion as part of the proceeding, then PIIC's opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will properly address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). Nothing in the Commission's contention rules, however, appears to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does

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[14] PIIC did not cite to any authority, such as the Energy Reorganization Act, Nuclear Waste Policy Act, or Atomic Energy Act, that would confer authority on the NRC to evaluate DOE's compliance with the APA.

not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding. PIIC has not explained how PIIC-MISC-004 relates to a safety, security, or technical aspect of the LA or an applicable NEPA requirement. Therefore, PIIC-MISC-004 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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

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

In order to demonstrate that the issue presented in PIIC-MISC-004 is material to the findings NRC must make in the proceeding, PIIC argues that the Board will need to rule on DOE's motion, and PIIC's contention "focuses directly on DOE's motion and opposes" it. Petition at 28. PIIC-MISC-004 asserts that the DOE decision to terminate the Yucca Mountain project and an NRC grant of DOE's Motion to Withdraw would be arbitrary and capricious under the APA. Petition at 27. However, whether DOE complied with the APA in deciding to terminate

the project is not material to the findings NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Similarly, NRC's compliance with the APA in ruling on DOE's Motion to Withdraw is not material to the findings that NRC would need to make in order to grant or deny a construction authorization. Therefore, PIIC-MISC-004 should not be admitted.

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

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

Here, PIIC asserts that there is a genuine dispute on a material issue of law regarding whether DOE's motion is unlawful, arbitrary and capricious, and violative of procedural requirements. Petition at 29. However, PIIC does not dispute any portion of the LA or EIS, nor does it claim that information was improperly omitted from either. Therefore, PIIC-MISC-004 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and should not be admitted.

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

PIIC-MISC-005 – 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.

> The Petitioner asserts that the Board and NRC should reject DOE's motion, and attach conditions in its ruling to ensure DOE's compliance with the NWPA, the Standard Contract, NEPA, and the APA.

Petition at 29. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Catawba*, ALAB-825, 22 NRC at 790-91; *Susquehanna*, LBP-07-10, 66 NRC at 23. The scope of admissible contentions in the instant proceeding is whether the LA satisfies applicable safety, security, and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. 73 Fed. Reg. 63,029; *see also High-Level Waste Repository*, CLI-10-10, 71 NRC __ (slip op. at 6). Recently, the Commission observed that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __ (slip op. at 5).

PIIC does not explain how PIIC-MISC-005 relates to a safety, security or technical issue with the LA or NEPA requirements. Instead, the contention argues that if DOE's motion is within

the scope of the proceeding, then PIIC's response to the motion is also within the scope.[15] Petition at 33.

PIIC essentially argues that if the Board considers DOE's motion as part of the proceeding, then its opposition to that motion necessarily meets the contention admissibility scope requirement in § 2.309(f)(1)(iii). *See id.* However, the Commission's hearing notice makes clear that contentions must relate to safety, security, and technical aspects of the LA or the applicable NEPA requirements. 73 Fed. Reg. 63,029. The Staff recognizes DOE's Motion to Withdraw is an issue in the licensing proceeding that the Board and admitted participants will properly address. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). Nothing in the Commission's contention rules, however, appears to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1). The pendency of a motion does not waive the contention admissibility requirements that are premised upon the adequacy of the proposed action that is the subject of the proceeding. PIIC has not explained how PIIC-MISC-005 relates to a safety, security, or technical aspect of the LA or an applicable NEPA requirement. Therefore, PIIC-MISC-005 does not comply with 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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[15] PIIC suggests that the Board and NRC should hold the motion in abeyance until DOE complies with "the APA, NEPA, and the NWPA (and Standard Contracts)." Petition at 32. However, PIIC did not cite to any authority, such as the Energy Reorganization Act, Nuclear Waste Policy Act, or Atomic Energy Act, that would confer authority on the NRC to evaluate DOE's compliance with the APA or the Standard Contract.

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

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

In order to demonstrate that the issue presented in PIIC-MISC-005 is material to the findings NRC must make in the proceeding, PIIC argues that the Board will need to rule on DOE's motion, and PIIC's contention opposes DOE's motion and suggests conditions, "and is thus material to any ruling on the motion." Petition at 33. However, the materiality standard in § 2.309(f)(1)(iv) is connected to the agency's "determination on whether the applicant will adequately protect the health and safety of the public and the environment." *Millstone*, LBP-08-9, 67 NRC at 431; *see also Yankee Nuclear*, CLI-96-7, 43 NRC at 258. PIIC has not demonstrated how its opposition to DOE's motion is relevant to that standard. Therefore, PIIC-MISC-005 should not be admitted.

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

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

Here, PIIC asserts that there is a genuine dispute on a material issue of law regarding whether DOE's motion should be granted and the conditions that should attach to such a motion. Petition at 34. However, PIIC does not dispute any portion of the LA or EIS, nor does it claim that information was improperly omitted from either. Therefore, PIIC-MISC-005 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and should not be admitted.

Because PIIC-MISC-005 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

CONCLUSION

Because PIIC did not submit an admissible contention, the Board should deny PIIC's petition to intervene. The Board should allow PIIC to participate as an affected, Federally-recognized Indian Tribe pursuant to 10 C.F.R. § 2.315(c), if requested.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 4th day of May, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO PETITION TO INTERVENE OF THE PRAIRIE ISLAND INDIAN COMMUNITY" in the above-captioned proceeding have been served on the following persons this 4th day of May, 2010, by Electronic Information Exchange.

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