

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 NATIONAL ASSOCIATION
OF REGULATORY UTILITY COMMISSIONERS' PETITION TO INTERVENE

INTRODUCTION

On March 15, 2010, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition to intervene in the above-captioned proceeding. National Association of Regulatory Utility Commissioners Petition to Intervene, dated March 15, 2010 ("Petition"). For the reasons set forth below, NARUC's Petition should be denied because NARUC has not demonstrated standing and has not proffered an admissible contention.¹

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

¹ However, the Staff does not oppose allowing NARUC to participate in this proceeding as an *amicus curiae*. Although 10 C.F.R. § 2.315(d) allows *amicus* filings where a matter is under Commission review, interested individuals and organizations have been permitted to participate as *amicus curiae* on legal issues before a licensing board. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987) ("[T]his consideration does not perforce preclude the granting of leave in appropriate circumstances to file briefs or memoranda *amicus curiae*. . . on issues of law or fact that still remain for Licensing Board disposition." (Citations omitted)).

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 *U.S. Dep't 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 (NEI); Nye County, Nevada; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral, jointly ("Four Counties"); 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. See *U.S. Dept. of Energy* (High-Level Waste Repository), LBP-09-6, 69 NRC 367, 377-378 nn.5-19 (2009), *aff'd in part, rev'd in part*, *U.S. Dept. of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580 (2009). Three Construction Authorization Boards (CABs or Boards) 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 (SER) scheduled to be completed. *Id.* Depositions were scheduled to begin on February 16, 2010. *Id.* at 7.

In a "Motion to Stay the Proceeding," filed on February 1, 2010 ("Stay Motion"), DOE 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. DOE further stated that the proposed budget indicated that all DOE funding for Yucca Mountain would be eliminated in 2011,² stated its intent to withdraw the license application by March 3, 2010, and requested a stay of the proceeding in order to avoid unnecessary expenditure of resources by the Board and parties. *See id.* at 2. CAB-04 granted a stay of the proceeding on February 16, 2010. On March 3, 2010, DOE filed a motion to withdraw the license application. U.S. Department of Energy's Motion to Withdraw, dated March 3, 2010 ("Motion to Withdraw"). On March 15, 2010, NARUC filed the instant Petition seeking to intervene as a party in this proceeding, and proffering 4 contentions. Petition at 2.

² 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>).

On April 6, 2010, the Board suspended briefing on the intervention petition of the National Association of Regulatory Utility Commissioners and the DOE Motion to Withdraw, until further notice.³ Both DOE and Nye County petitioned the Commission for interlocutory review of the April 6, 2010 Board order.⁴ 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, 2010.⁵ On April 27, 2010, the Board ordered that answers to the NARUC Petition be filed by May 4, 2010.⁶ The Staff's answer to NARUC's Petition is set forth below.⁷

³ Memorandum and Order (Suspending Briefing and Consideration of Withdrawal Motion), dated April 6, 2010 (unpublished) (slip op. at 13).

⁴ 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.

⁵ U.S. Dept. of Energy, CLI-10-13, 71 NRC ____ (April 23, 2010) slip op. at 5.

⁶ Order (Setting Briefing Schedule)," dated April 27, 2010 (unpublished) slip op. at 2. That order indicated the Board would rule on the DOE withdrawal motion by June 30, 2010.

⁷ 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

A. Standing Pursuant to 10 C.F.R. § 2.309(d)

To establish standing to intervene as a party, NARUC must meet the Commission's requirements set forth in 10 C.F.R. § 2.309(d), under which a request for hearing or petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the [Atomic Energy Act] to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/ petitioner's interest.

10 C.F.R. § 2.309(d)(1). The Commission adheres to contemporary judicial standards for standing, under which a petitioner must: "(1) allege an 'injury in fact' that is (2) 'fairly traceable to the challenged action' and (3) is 'likely' to be 'redressed by a favorable decision.'" *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations and internal quotation marks omitted).

An organization, such as NARUC, may either establish standing based on its representation of one or more of its members who have standing in his or her own right (representational standing), or an organization may have standing to participate on its own behalf, based on injury to its own organizational interests (organizational standing). *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). Where an organization seeks to establish "representational standing," it must show that at least one of its members may be affected by the proceeding and would have standing in his or her own right, it must identify that member by name and address, and it must show that the member "has authorized the organization to represent him or her and to request a

hearing on his or her behalf." See, e.g., *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (citations omitted); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000). Further, for the organization to establish representational standing, the member seeking representation (1) must qualify for standing in his or her own right; (2) the interests that the organization seeks to protect must be germane to its own purpose; (3) and neither the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999) (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)).

NARUC asserts a claim of representational standing based on the interests of David Wright, a NARUC member and a Commissioner of the South Carolina Public Utilities Commission. Petition at 9. NARUC argues that its members, including Commissioner Wright, are harmed because "[u]tilities pay for the so-far non-existent repository for commercial nuclear waste through the NWF [Nuclear Waste Fund], which is, in turn, passed through, by NARUC members, to ratepayers." *Id.* at 14. Additionally, NARUC argues that its Commissioners' must deal with the issues of costs to the utilities of interim storage and the security of . . . waste while waiting for the federal government to take title and dispose of the waste as required by the NWPA." *Id.* at 11. These harms, NARUC argues, would be "substantially diminished" if DOE's Motion to Withdraw the LA were denied and the licensing were to move forward. *Id.* at 12. NARUC's claimed injury is similar to the economic harm asserted by NEI, in so far as it alleges interests affected by the costs associated with interim storage of spent fuel in the absence of a repository and by the continued payment into the NWF. See *High-Level Waste*, LBP-09-6, 69 NRC at 429-30. The Board found that this was sufficient to establish NEI's standing. *Id.* at 435.

However, NARUC's claim of standing premised upon payments into the NWF is distinguishable from NEI's claim. The intended beneficiaries of the NWPA are the nuclear utilities, not the individual ratepayers. *Roedler v. U.S. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001). NEI represents its members, which are nuclear utilities, but NARUC represents state utility commissioners, who protect individual ratepayers. NARUC does not claim any direct injury to itself as an organization under the Atomic Energy Act (AEA). NARUC bases its interest on its members' ability to fulfill their *parens patriae* duties to protect the health, safety, and economic welfare of electric ratepayers. Petition at 4, 5, 10, and 12. NARUC also asserts that its members must deal with the pass-through cost associated with (1) the Nuclear Waste Fund and (2) interim storage and security of nuclear waste. *Id.* at 11. Finally, NARUC claims that its members will have to "expend increased staff and financial resources." *Id.* at 14. However, the Petition does not show that NARUC or its members will be prevented from fulfilling their statutory duties to protect the health and safety of electric ratepayers, but that doing so would require them to pass on higher costs to ratepayers. Therefore, NARUC has not shown that it or its members will suffer any of the alleged health and safety injuries.

Moreover, under Commission precedent, economic harm to ratepayers is not sufficient to establish standing in this proceeding. "[T]he Commission has long held that ratepayer interests do not confer standing" under the AEA. *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 n. 23 (2002). Ratepayer interests 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 agencies were 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). Because NARUC has not alleged an interest that is

arguably within the zone of interests to be protected or regulated by the NWPA, it has not demonstrated that it has standing pursuant to 10 C.F.R. § 2.309(d).

B. Discretionary Intervention

NARUC argues in the alternative that it should be granted discretionary intervention pursuant to 10 C.F.R. § 2.309(e). Under § 2.309(e), the Board “will consider and balance” several factors in deciding whether to permit discretionary intervention:

(1) Factors weighing in favor of allowing intervention --

- (i) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record;
- (ii) The nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding; and
- (iii) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest;

(2) Factors weighing against allowing intervention--

- (i) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (ii) The extent to which the requestor's/petitioner's interest will be represented by existing parties; and
- (iii) The extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding.

10 C.F.R. § 2.309(e). The Commission has noted that “discretionary intervention is an extraordinary procedure, and will not be allowed unless there are compelling factors in favor of such intervention.” Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004).

Of the six factors, the primary consideration is whether the petitioner has demonstrated the capability and willingness to contribute to the development of the evidentiary record.

See 69 Fed. Reg. at 2201; *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 617 (1976); *General Public Utilities Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

The petitioner should “show [a] significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented” *Pebble Springs*,

CLI-76-27, 4 NRC at 617. NARUC argues that its contentions demonstrate that it "will contribute to a robust briefing and hearing on the merits of DOE's motion to withdraw the application." Petition at 22. However, NARUC has not shown that it will substantially assist in developing a sound record, as it does not proffer any admissible contentions, and its proffered contentions are legal arguments. Given that all parties in this proceeding are represented by legal counsel, it is reasonable to presume that legal arguments will be well-developed and explored, making the addition of legal contentions by additional parties unlikely to substantially assist in developing a sound record. Therefore, 10 C.F.R. § 2.309(e)(1)(i) weighs against granting NARUC discretionary standing.

Neither of the two remaining factors weighs in favor of allowing discretionary intervention support NARUC's request. For the second factor, the nature and extent of its interest in the proceeding, NARUC reiterates its concern regarding payments by ratepayers into the NWF. Petition at 14; see *also* 10 C.F.R. § 2.309(e)(1)(ii). However, as noted above, individual ratepayers are not the intended beneficiaries of the NWPA. *Roedler v. U.S. Dep't of Energy*, 255 F.3d 1347, 1352 (Fed. Cir. 2001). Interests which do not establish a right to intervention because they are outside the zone of interests to be protected by the enabling statutes are not positive factors for the purposes of granting discretionary intervention. *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 388, *aff'd*, ALAB-470, 7 NRC 473 (1978). Therefore, this factor weighs against NARUC. With respect to the third factor, the effect of any decision or order that may be issued, NARUC argues that withdrawal of the LA will "significantly harm ratepayers who have paid billions of dollars, through utility charges, into the Nuclear Waste Fund," and "exacerbate NARUC members' ability to "protect the health, safety, and economic welfare of its State electric ratepayers." Petition at 15. However, these interests are outside the zone of interests to be protected by the NWPA or the AEA, see *Enrico Fermi*, LBP-78-11, 7 NRC at 388, and, therefore, this factor likewise weighs

against NARUC.

Of the three factors weighing against allowing discretionary intervention, two factors do not support NARUC's request. NARUC concedes with regard to 10 C.F.R. § 2.309(e)(2)(i) that it "is considering other avenues to protect its interests including legal action, communication with DOE, and engagement with the Blue Ribbon Commission on America's Nuclear Future." Petition at 16, 20. In addition, NARUC could seek permission to participate in the legal briefings as an *amicus curiae* in response to the Motion to Withdraw. See *Oyster Creek*, LBP-96-23, 44 NRC at 161 (1996).⁸ Therefore, 10 C.F.R. § 2.309(e)(2)(i) weighs against allowing discretionary intervention. NARUC also argues that "[n]o existing party to this proceeding, or potential intervenor, represents a NARUC member commission or directly covers all of NARUC's member's interests." Petition at 16, 20. However, although NARUC asserts interests and injuries that are tied directly to payments into the NWF, NARUC has not explained how its interests are distinct from those of NEI, an already admitted party. Therefore, NARUC has not demonstrated, pursuant to 10 C.F.R. § 2.309(e)(2)(ii), that its interests will not be represented by an existing party, and this factor weighs against NARUC. The final factor, the extent to which NARUC's participation will inappropriately broaden the issues or delay the proceeding, 10 C.F.R. § 2.309(e)(2)(iii), weighs neither for nor against NARUC. See 10 C.F.R. § 2.309(e)(2)(iii). NARUC claims that its participation will not broaden the issues in or delay the proceeding because the issue of whether the Motion to Withdraw should be granted is already before the Board and the Board's stay and decision to rule on intervention petitions prior to the Motion to Withdraw has already shifted the proceeding schedule.⁹ Petition at 16, 21. Although

⁸ As noted in n.1, above, the Staff would not object to such participation by NARUC.

⁹ Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).

NARUC's participation could cause minimal delay, it would not be likely to broaden the issues before the Board because existing parties may raise the issues contained in NARUC's contentions. Therefore, this factor weighs neither for nor against granting NARUC's request for discretionary intervention.

Given that, on balance, the factors to be considered do not favor discretionary intervention; the Board should decline to grant NARUC's request for discretionary intervention.

II. Timeliness

In addition to demonstrating standing, NARUC must demonstrate that its Petition is timely. Timely petitions to intervene in this proceeding were due no later than December 22, 2008. See 73 Fed Reg. 63,029, 63,031 (Oct. 22, 2008). NARUC admits that its petition was not filed by December 22, 2008, but argues that its non-timely filing should be entertained pursuant to 10 C.F.R. § 2.309(c).

A non-timely intervention petition may not be considered unless the Board determines that the eight-factor balancing test set forth in 10 C.F.R. § 2.309(c)(1) weighs in favor of the petitioner. *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC ___, (March 26, 2020) slip op. at 3. 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 for Failure to File on Time

With respect to this factor, NARUC argues that "DOE's March 3, 2010 motion to withdraw its licensing application triggered NARUC's" Petition, and that the Motion to Withdraw was unexpected at the time initial intervention petitions were to be filed. Petition at 17. Insofar as NARUC's nontimely contentions relate to DOE's Motion to Withdraw, the Staff agrees that NARUC could not have filed 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 NARUC filed its petition promptly after the new information became available inasmuch as NARUC 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.) Therefore, NARUC has demonstrated good cause for its failure to file on time

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

Even where a petitioner has shown good cause, the seven remaining 10 C.F.R. § 2.309(c)(1) factors must be weighed. The Commission has held that the remaining factors should not be weighted equally. *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," 10 C.F.R. § 2.309(c)(1)(vii), and "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record," 10 C.F.R. § 2.309(c)(1)(viii), are the two most

important factors.¹⁰ *Id.* NARUC argues that its participation will not delay the proceeding because "DOE's motion to withdraw already shifted the procedural schedule, effectively providing time for interventions that will not engender further delay," and that its participation will not broaden the issues in the proceeding because the issue of whether the Motion to Withdraw should be granted is already before the Board. Petition at 21. NARUC's contentions, if admitted, would not broaden the issues already before the Board because NEI has raised the legal issues contained in NARUC's contentions. Therefore, 10 C.F.R. § 2.309(c)(1)(vii) weighs neither for nor against NARUC.

As to the extent to which NARUC's participation may assist in developing a sound record, NARUC asserts that, "[a]s the contentions asserted in [its Petition] demonstrate, NARUC will contribute to a robust briefing and hearing on the merits of DOE's motion to withdraw the application." Petition at 22. However, NARUC has not shown that it will substantially assist in developing a sound record, as it does not proffer any admissible contentions. Therefore, 10 C.F.R. § 2.309(c)(1)(viii) weighs against NARUC.

The five remaining factors, 10 C.F.R. §§ 2.309(c)(1)(ii)-(vi), do not weigh in favor of NARUC.

With respect to 10 C.F.R. § 2.309(c)(1)(ii), the nature of NARUC's right to be made a party to the proceeding, NARUC asserts that its members expend increased resources on overseeing utility rates in their home states "because of DOE's failure to comply with its statutory obligation to take possession of waste." Petition at 14. However, for the reasons discussed above, NARUC has not demonstrated that it has standing as a matter of right in this

¹⁰ 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.

proceeding. Therefore, this factor weighs against NARUC.

NARUC has not demonstrated any property, financial or other interest in the proceeding under 10 C.F.R. § 2.309(c)(1)(iii). NARUC asserts an interest in protecting the "health, safety, and economic interests of. . . (its). . . ratepayers." Petition at 4. However, as discussed above, the economic interests of ratepayers are not cognizable in this proceeding, and NARUC has not demonstrated that its members' abilities to fulfill their health and safety responsibilities will be adversely affected by DOE's Motion to Withdraw. As a result, 10 C.F.R. § 2.309(c)(1)(iii) weighs against NARUC.

To demonstrate "the possible effect of any decision or order that may be issued in the proceeding" on its interest under 10 C.F.R. § 2.309(c)(1)(iv), NARUC argues that withdrawal of the LA will "significantly harm ratepayers who have paid billions of dollars, through utility charges, into the Nuclear Waste Fund." Petition at 15. However, because, as discussed above, ratepayers are not persons within the zone of interest the NWPA was designed to protect, this factor does not weigh in favor of NARUC.

With respect to 10 C.F.R. § 2.309(c)(1)(v), NARUC concedes that it "is considering other avenues to protect its interests including legal action, communication with DOE, and engagement with the Blue Ribbon Commission on America's Nuclear Future." Petition at 20. Therefore, the availability of other means to protect its interests weighs against NARUC.

Finally, NARUC claims, under 10 C.F.R. § 2.309(c)(1)(vi), that "[n]o existing party to this proceeding, or potential intervenor, represents a NARUC member commission or directly covers all of NARUC's member's interests." Petition at 20. However, although NARUC's interests and injuries are tied directly to payments into the Nuclear Waste Fund, NARUC has not explained how its interests are distinct from NEI's, an already admitted party. Therefore, it has failed to demonstrate that its interests will not be represented by an existing party, and this factor weighs against NARUC.

Therefore, a meaningful weighing of the factors listed in 10 C.F.R. § 2.309(c)(1), even with the consideration that the good cause factor is most important, in the Staff's view, favors not allowing NARUC's non-timely 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 497, 499-500 (2008). Section 2.1003 requires each potential party, interested government participant, and party to certify, in compliance with procedures implemented under § 2.1009, that it has made its documentary material available on the Licensing Support Network (LSN). In addition, a petitioner will not be found to be in substantial and timely compliance unless the petitioner complies with all of the orders of the Pre-License Application Presiding Officer (PAPO) regarding electronic availability of documents. *High-Level Waste Repository*, CLI-08-25, 68 NRC at 500.

A person denied party or interested governmental participant status pursuant to § 2.1012(b)(1) may request such status upon a showing of subsequent compliance with the requirements of § 2.1003. *Id.* at 500 n.1; *see also* Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,937 (April 14, 1989) (A person denied such status "may later come into compliance and be admitted to the hearing, assuming they meet all the requirements in § 2.1014 or 10 CFR 2.715(c) [currently § 2.309 or §2.315(c)] for admission."). However, 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.

NARUC states that it "has made a good faith effort to substantially comply with" 10 C.F.R. § 2.1003 and "has been in communication with . . . the NRC's Licensing and Support Network Administrator to obtain technical guidance to comply with" LSN requirements. Petition, Additional Certification at 1. Thereafter, on April 30, 2010, NARUC filed a document captioned "Certification of Licensing Support Network Supplementation," in which it stated that it had not yet identified documentary material as specified in 10 C.F.R. § 2.1003. In the Staff's view, these two actions, taken together, demonstrates compliance with 10 C.F.R. §§ 2.1003 and 2.1009.

IV. Contention Admissibility

A. Contention Admissibility Requirements

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

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]

(vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the

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

10 C.F.R. § 2.309(f)(1). Failure to comply with any one of the 10 C.F.R. § 2.309(f)(1) requirements is grounds for dismissal of the contention. Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

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 2,202; *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 the issues to 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 Pub. Serv. 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).

NARUC's compliance with these requirements is addressed in the paragraphs below.

B. NAR-MISC-01: NEITHER DOE NOR THE NRC HAVE DISCRETION TO TERMINATE THIS PROCEEDING WITH PREJUDICE

The issue raised in this proposed contention is:

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

Petition at 23. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope of 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 the NRC must make to support the action that is involved in the proceeding, as required by § 2.309(f)(1)(iv); and does not show a genuine dispute with DOE on a material issue of fact or law with respect to the LA, as required by § 2.309(f)(1)(vi).

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

The scope of the issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order. *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-825, 22 NRC 785, 790-91 (1985); *PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 & 2)*, LBP-07-10, 66 NRC 1, 23, *appeal denied*, CLI-07-25, 66 NRC 101 (2007). The scope of admissible contentions in the instant proceeding is limited to 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.

NARUC does not explain how NAR-MISC-01 relates to a safety, security or technical issue with the LA. Rather, NARUC states that "[b]y filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to this proceeding." Petition at 26. The contention contains no further explanation.

A statement that DOE has placed the Motion to Withdraw within the proceeding is not sufficient on its own to demonstrate that a contention challenging the motion is within the scope of admissible contentions in this proceeding.¹¹ The Commission made clear in the hearing

¹¹ 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 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, 2010, 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 the standards for 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, see, 10 C.F.R. § 2.319, the Commission’s 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 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.” *U.S. Dep’t of Energy* (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.

notice that contentions are to relate to safety, security, and technical aspects of the LA. 73 Fed. Reg. 63,029, 63,031; *see also High-Level Waste Repository*, CLI-10-10, 71 NRC at ___, slip op. at 5 (Mar 11, 2010) (A contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding). DOE's motion to withdraw, as posited, is a procedural matter that is not premised on the safety, security, and technical aspects of the LA. See Motion to Withdraw at 3-4. NARUC has not explained how either the Motion to Withdraw or NAR-MISC-01 relates to the safety, security, and technical aspects of the LA. Therefore, NAR-MISC-01 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." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-9, 67 NRC 421, 431 (2008); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 258 (1996) *petition for review denied*, 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 the NRC's decision whether to grant a CA based on the safety and technical merits of the LA after a review conducted pursuant to 10 C.F.R. Part 63 and other applicable regulations. In addition, the Advisory Pre-Application Presiding Officer (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 raised in NAR-MISC-01 is material to the findings the NRC must make in the proceeding, NARUC states that "[t]he legality of DOE's motion to withdraw with prejudice the license application and whether NRC has the authority to grant such a motion are material to the proceeding." Petition at 26. NARUC offers no further explanation. A bare assertion that the issue raised in the contention is material does not address the contention admissibility requirement. Therefore, NAR-MISC-01 should be rejected because it fails to address 10 C.F.R. § 2.309(f)(1)(iv).

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).

NARUC states that it "does not anticipate any disputed facts, because DOE has not offered any to justify its motion." Petition at 27. However, NARUC does not reference any specific portion of the LA in dispute and does not identify any specific information that was improperly omitted from the application. Therefore, NAR-MISC-01 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and should not be admitted.

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

C. NAR-MISC-02: ALTERNATIVELY, IF THE NWPA DOES NOT PRECLUDE DOE FROM MOVING TO DISMISS WITH PREJUDICE, DOE HAS FAILED TO MEET THE BOARD'S REQUIREMENTS FOR DISMISSAL WITH PREJUDICE

The issue raised in this contention is:

Whether DOE's motion to withdraw the license application with prejudice meets the requirements for such a withdrawal that the Board has asserted in prior cases.

Petition at 28. 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) 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

To demonstrate that NAR-MISC-02 complies with 10 C.F.R. § 2.309(f)(1)(iii), NARUC states that "[b]y filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding." Petition at 31. The scope of admissible contentions in the instant proceeding is limited to 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 at ___, slip op. at 6. NARUC does not explain how NAR-MISC-02 relates to the safety, security, and technical aspects of the LA. Therefore, the contention does not demonstrate that the issue raised is within the scope of the instant proceeding and should not be admitted.

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

NARUC states that it "does not anticipate any disputed facts" with respect to NAR-MISC-02. Petition at 31. However, the contention does not cite to a particular portion of the LA that is in dispute, as required by 10 C.F.R. § 2.309(f)(vi). *See also Rancho Seco*, LBP-93-23, 38 NRC at 247-48. For this reason, NAR-MISC-02 should not be admitted.

Because NAR-MISC-02 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

D. NAR-MISC-03: DOE'S DECISION TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN PROJECT IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF ADMINISTRATIVE PROCEDURES ACT

The issue raised by NAR-MISC-03 is:

Whether DOE's motion to withdraw the license application with prejudice without any explanation besides the assertion that "Yucca Mountain is not a workable option for long term disposition..." is arbitrary and capricious in violation of the Administrative Procedures Act (APA), 5 U.S.C. § 706(2)(A)

Petition at 32 (internal citation omitted). As 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 the 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), and, therefore, is inadmissible.

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

To demonstrate that the issue raised in NAR-MISC-03 is within the scope of the proceeding, NARUC states that "[b]y filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding." Petition at 34. This argument is identical to those advanced in support of NAR-MISC-01 and NAR-MISC-02, and fails for the same reasons. The scope of admissible contentions in the instant proceeding is limited to 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 at ___, slip op. at 6, but NARUC does not explain how the issue of the NRC's authority to grant a motion to withdraw the LA relates to the safety, security, and technical aspects of the LA. Therefore, the contention does not demonstrate that the issue raised is within the scope of the instant proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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

In order to demonstrate that the issue raised in NAR-MISC-03 is material to the findings the NRC must make, NARUC states that "NARUC's contention goes to the core of whether or not DOE's motion should be granted, and as such is material to the proceeding." Petition at 34. Without further explanation, this statement alone is insufficient to address the requirement in 10 C.F.R. § 2.309(f)(1)(iv) that the issue raised in a contention must be material to the findings the NRC must make with respect to the LA. NARUC offers no information in the contention that explains the relationship between the issue raised, whether DOE's Motion to Withdraw violates the APA, and the findings the NRC must make with respect to the safety of the LA or the Staff's adoption of the EIS. *See Millstone*, LBP-08-9, 67 NRC at 431. Therefore, NAR-MISC-03 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and should not be admitted.

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

To satisfy 10 C.F.R. § 2.309(f)(1)(vi), a contention "must include references to specific portions of the [LA] that the petitioner disputes" or specifically identify an alleged omission from the LA. 10 C.F.R. § 2.309(f)(1)(vi); *see also Rancho Seco*, LBP-93-23, 38 NRC at 247-48. However, to demonstrate a genuine dispute on an issue of law or fact, NAR-MISC-03 only states that "NARUC does not anticipate any disputed facts." Petition at 35. Because NARUC identifies neither a specific portion of the LA in dispute nor a specific omission from the LA, NAR-MISC-03 does not meet the requirement of 10 C.F.R. § 2.309(f)(1)(vi) and is inadmissible.

Because NAR-MISC-03 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.

E. NAR-MISC-04: DOE DID NOT COMPLY WITH NEPA BEFORE DECIDING TO IRREVOCABLY TERMINATE THE YUCCA MOUNTAIN WASTE REPOSITORY PROJECT

The issue raised in NAR-MISC-04 is "[w]hether DOE's Motion to withdraw the license application with prejudice violates" NEPA. Petition at 36. As 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 the 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), and, therefore, is inadmissible.

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

To demonstrate that the issue raised in NAR-MISC-04 is within the scope of the proceeding, NARUC states that "[b]y filing its application on March 3, 2010 to withdraw with prejudice the license application, DOE made this issue central to the proceeding." Petition at 37. This argument is identical to those advanced in support of NAR-MISC-01 and NAR-MISC-02, and fails for the same reasons. The scope of admissible contentions in the instant proceeding is limited to 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 at ___, slip op. at 6, but NARUC does not explain how the issue of whether DOE has met its NEPA burden in connection to its attempt to withdraw the LA relates to the safety, security, and technical aspects

of the LA.¹² Therefore, the contention does not demonstrate that the issue raised is within the scope of the instant proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii) and should not be admitted.

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

To demonstrate that the issue raised in NAR-MISC-04 is material to the findings the NRC must make to support the action involved in the instant proceeding, NARUC states that "NARUC's contention regarding the DOE's failure to conform to NEPA addresses the legality of DOE's motion and as such is material to the proceeding." Petition at 38. However, to satisfy materiality requirement "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. Here, however, rather than raising an issue with DOE's EISs as they support the LA, NARUC argues that DOE's withdrawal decision requires further analysis under NEPA. Absent an explanation of the relationship between the issue raised, whether DOE has complied with NEPA with respect to its Motion to Withdraw, and the findings the NRC must

¹² NARUC indicates that "[e]valuation of NEPA applicability and compliance may be outside of the NRC's jurisdiction." Petition at 36. Assuming *arguendo* that NARUC is correct, if the NRC has no jurisdiction over the issue, NARUC cannot argue that it is within the scope of the instant proceeding.

make with respect to the safety of the LA or the adoption of the EIS, NAR-MISC-03 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and should not be admitted.

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

To satisfy 10 C.F.R. § 2.309(f)(1)(vi), a contention "must include references to specific portions of the [LA] that the petitioner disputes" or specifically identify an alleged omission from the LA. 10 C.F.R. § 2.309(f)(1)(vi); *see also Rancho Seco*, LBP-93-23, 38 NRC at 247-48. However, to demonstrate a genuine dispute on an issue of law or fact, NAR-MISC-03 only states that "NARUC does not anticipate any disputed facts." Petition at 38. NARUC cites the "No Action Alternative" in the FEIS elsewhere in the contention. Petition at 37. However, this contention challenges whether DOE has analyzed the environmental impacts of withdrawing the application in existing NEPA documents, rather than challenging the adequacy of the FEIS used to support the licensing of Yucca Mountain. Therefore, the contention does not present a genuine dispute regarding the FEIS in this proceeding. Accordingly, NAR-MISC-03 does not meet 10 C.F.R. § 2.309(f)(1)(vi), and the Board should not admit the contention.

CONCLUSION

For the foregoing reasons, the Board should deny NARUC's petition to intervene. However, the Staff does not object to NARUC's participation as an *amicus curiae*.

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 NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS' PETITION TO INTERVENE" 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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