

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
May 11, 2010

**NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS' REPLY TO THE ANSWERS FILED TO ITS
MARCH 15, 2010 PETITION TO INTERVENE BY**

**CLARK COUNTY, COUNTY OF INYO, EUREKA COUNTY, FOUR
NEVADA COUNTIES OF CHURCHILL, ESMEERALDA, LANDER AND
MINUERAL, JOINT TIMBISHA SHOSHONE TRIBAL GROUP, NYE
COUNTY, THE NUCLEAR REGULATORY COMMISSION STAFF, THE
STATE OF NEVADA, AND THE U.S. DEPARTMENT OF ENERGY**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(2), and consistent with the April 27, 2010 Construction Authorization Board 04's April 27, 2010 Order,¹ the National Association of Regulatory Utility Commissioners (NARUC) respectfully files this reply to the parties that filed answers to its petition to intervene in this proceeding.

Overview of Answers Responding to NARUC's Petition to Intervene

A. The Department of Energy: Significantly, DOE not only does not oppose NARUC's petition,² it specifies that "NARUC should be able to present their differing view of the law on this issue in this unique proceeding," points out that NARUC's intervention "should not cause undue delay," and concedes the obvious – that NARUC's petition is "timely relative to the filing of the motion to withdraw." *Id.* Given that DOE is the proponent of the motion that is the focus of NARUC's *opposing* intervention - its concessions/views with respect to NARUC's ability to participate are significant and should weigh heavily in any final Board disposition of NARUC's petition.

¹ *CAB Order* (Setting Briefing Schedule) ML101170592 (Apr. 27, 2010) at 2 (unpublished).

² *U.S. Department of Energy's Response to Petitions to Intervene of the State of Washington, the State of South Carolina, Aiken County, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community* (March 29, 2010), at 2-3.

B. Nye County: Nye County supports NARUC's intervention.

Specifically, their answer accurately states:

By granting intervention, the CAB assures that all perspectives are considered as it determines whether to grant, deny, or condition DOE's Motion to Withdraw in this licensing proceeding which has major implications for national nuclear policy. For the reasons stated in the Additional Petitioners' filings in response to the requirements of 10 C.F.R. §§ 2.309(a)-(g), which responses are incorporated herein by reference, Nye County supports the late intervention of each of the Additional Petitioners in this proceeding.³

C. Four Nevada Counties of Churchill, Esmeralda, Lander &

Mineral: The four listed Nevada Counties also state:

support for the intervention of the Petitioners in this proceeding. The Petitioners present a unique perspective with respect to spent nuclear fuel storage and the Yucca Mountain Repository. The Four Nevada Counties believe permitting intervention by the Petitioners will only benefit the licensing process by allowing a full development and fair hearing on the issues at hand.⁴

³ *Nye County Answers to the Petition to Intervene filed by the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community* (March 26, 2010) at 2. {emphasis added}

⁴ *Four Nevada Counties of Churchill, Esmeralda, Lander and Mineral Supplement to its March 29, 2010 Answer to the Petitions to Intervene filed by the State of South Carolina, State of Washington, Aiken County, South Carolina, the National Association of Regulatory Utility Commissioners, and the Prairie Island Indian Community* (May 5, 2010) at 1. {emphasis added} This pleading notes also states the counties "continue to have no objection to Petitioners' intervention so long as they have met the requirements for intervention set forth in 10 C.F.R. § 2.309 or, alternatively, 10 C.F.R. § 2.315." Id.

D. The NRC Staff: Significantly, the NRC Staff, like DOE, also *concedes* that NARUC’s intervention “demonstrates good cause for its failure to file on time.”⁵ While also *conceding* that “NARUC’s claimed injury is similar to the economic harm asserted by NEI” and pointing out that “the Board found that this was sufficient to establish NEI’s standing”, *Id.* at 6, the Staff still argues NARUC’s injuries are distinguishable from NEI’s. *Id.* at 7. As discussed below, those arguments lack merit. The NRC Staff also claims NARUC’s contentions should be regarded as inadmissible because they do not address issues relating to “applicable safety, security, and technical standards. . . .” *Id.* at 16. As discussed below, given the NRC’s recent “remand,” this argument lacks merit. Indeed, even absent any NRC order, the argument raises serious policy questions about rigidly applying a narrow interpretation of a scoping order focused on a substantive review of the DOE application on its merits – to contentions in an intervention focused solely on an unexpected (and, facially illegal) motion to withdraw. The NRC also argues NARUC cannot qualify for discretionary intervention, but apparently believes NARUC’s reply might assist board deliberations (or will at least not cause any undue delay) as they do “not oppose” allowing NARUC to participate as an *Amicus Curiae*. *Id.* at 1 note 1 and 8.

⁵ *NRC Staff Answer to the National Association of Regulatory Utility Commissioners’ Petition to Intervene (“NRC Answer”)* (May 4, 2010), at 12.

C. Nevada and the Joint Timbisha Shoshone Tribal Group: Nevada raises several novel issues. First it claims NARUC’s petition is untimely essentially based on the absurd assertion that everyone should have anticipated over a year ago that DOE would suddenly choose to file - *without explanation or any factual justifications* - a motion to withdraw *with prejudice* which, on its face, is, at best, “inconsistent” with the specific NWPA mandate to file the Yucca Mountain application.⁶

It also raises another *res nova* about representational standing – claiming that since (i) NARUC has sought representational standing based on an affidavit from a South Carolina commissioner, (ii) only a single designated entity of a State may be admitted as a party, and (iii) South Carolina is seeking party status too – our intervention must necessarily fail. *Id.* at 1. A discussion of the flaws in this rationale is included below.

Nevada also partially opposes two of NARUC’s contentions. *Id.* at 11-15. The Joint Timbisha Shoshone Tribal Group adopts Nevada’s arguments by reference.⁷

⁶ *State of Nevada’s Answer to the National Association of Regulatory Utility Commissioners’ Petition to Intervene* (“*Nevada Answer*”) (May 4, 2010), at 5.

⁷ *Joint Timbisha Shoshone Tribal Groups’ Response to Petition to Intervene by the National Association of Regulatory Utility Commissioners’ Petition* (May 4, 2010), at 1. NARUC’s response, *infra*, will only reference the *Nevada Answer*.

D. Clark County, Nevada: Clark County incorporates by reference the substance of Nevada's opposition.⁸ Clark County has offered an additional comment on timeliness of NARUC's petition which will be addressed below.

E. Eureka County, Nevada and Inyo County, California: Parties electing to take no position on NARUC's petition include Eureka County, Nevada,⁹ and Inyo County, California.¹⁰

As discussed *infra*, arguments opposing NARUC's intervention lack merit. NARUC has demonstrated standing to intervene consistent with 10 C.F.R. § 2.309 and judicial concepts of standing, and that good cause exists to allow its intervention out-of-time.

⁸ *Answer of Clark County, Nevada to Petitions to Intervene of the Prairie Island Indian Community and the National Association of Regulatory Utility Commissioners ("Clark Answer")* (May 4, 2010) at 1. Where there is overlap, NARUC's response, *infra*, will only reference the *Nevada Answer*.

⁹ *Eureka County's Response to Petitions to Intervene by States of South Carolina and Washington; Aiken County, South Carolina; Prairie Island Indian Community; and the National Association of Regulatory Utility Commissioners* (March 29, 2010) at 1.

¹⁰ *The County of Inyo's Response to Petitions to Intervene by States of South Carolina and Washington; Aiken County, South Carolina; Prairie Island Indian Community; and the National Association of Regulatory Utility Commissioners* (March 29, 2010) at 1.

NARUC has also offered admissible contentions within the scope of this proceeding. It has presented a compelling case for discretionary intervention. Therefore, NARUC's petition to intervene should be granted.

II. NARUC RESPONSE

A. STANDING:

NARUC is *sui generis* and has represented the interests of State public utility commissioners for over 100 years. NARUC has a direct interest in this proceeding based on its representation of its members' interests arising under the AEA and the Nuclear Waste Policy Act of 1982, 42 U.S.C §§ 10101 et seq. ("NWPA"). See, e.g., *NARUC v. DOE*, 851 F.2d 1424 (D.C. Cir. 1988), where, although standing was not specifically addressed, NARUC was the lead petitioner in a successful appeal involving DOE and the nuclear waste disposal program. Congress also frequently recognizes both NARUC's members' expertise and their obvious substantial interests by inviting NARUC to testify on a range of nuclear waste disposal issues.¹¹

All of NARUC's voting members are government officials.

¹¹ See generally, *National Association of Regulatory Utility Commissioners Petition to Intervene* (March 15, 2010), at 6 note 4. ("*NARUC Petition*").

The association also is recognized by Congress in several statutes,¹² consistently by Article III courts,¹³ and by federal agencies,¹⁴ as the proper entity to represent the collective interests of the State utility commissions.

¹² See, e.g., 47 U.S.C. § 410(c) (1971) (Congress designated NARUC to nominate members to Federal Commissioner-State Commissioner boards); *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (“Carriers . . . applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.”).

¹³ See, e.g., *U. S. v. SMCRC*, 467 F. Supp. 471 (N.D. Ga. 1979), aff’d 672 F.2d 469 (5th Cir. 1982), aff’d en banc on reh’g, 702 F.2d 532 (5th Cir. 1983), rev’d on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: “The District Court permitted . . . (NARUC), an organization composed of state agencies, to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions’.” 471 U.S. 52, n. 10.)

¹⁴ As noted in our intervention, this includes, among *many* others, the *Federal Energy Regulatory Commission* and even *DOE*. See, e.g., *NARUC to Assist in Educating States, Public on Liquefied Natural Gas – DOE project to Promote Responsible Development and Deployment of LNG Infrastructure* (Sept. 10, 2003), available at: http://fossil.energy.gov/news/techlines/2003/tl_naruc_lng1.html. NARUC is also the only non-federal member of the interagency Smart Grid Task Force headed by DOE’s Eric Lightner. NARUC and DOE also regularly co-sponsor the *National Electricity Delivery Forum*. See, e.g., the Feb. 2007 remarks of Energy Deputy Secretary Sell: “NARUC is playing a vital role in increasing discussion among those most responsible for growing the national grid into the 21st Century. I particularly want to note the important coordination between NARUC and [DOE] to hold this second annual Electricity Delivery Forum.” Available at: <http://www.energy.gov/news/archives/4817.htm>. App. J, of DOE’s Oct. 2007 *Draft Supplemental Environmental Impact Statement for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain*, lists NARUC as one of the groups DOE believed should want to review the document. Available on DOE’s website at: http://nepa.energy.gov/nepa_documents/docs/deis/eis0250F-1D/003%20volume%202/011%20appendix%20j.pdf

NARUC’s petition to intervene presents a compelling case for NARUC standing that complies in all particulars with the precedent for “representational” or “organizational” standing. The only two parties that actually provide arguments otherwise are the NRC Staff and Nevada. Significantly, the NRC staff’s analysis starts off by conceding that:

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 435.¹⁵

However, the NRC staff claims “NARUC has not shown that it or its members will suffer any of the alleged health and safety injuries.”¹⁶ A close examination of the text of NARUC’s intervention and the attached affidavit of Commissioner Wright¹⁷ reveals clearly – that is simply not true.

¹⁵ *NRC Answer* at 6

¹⁶ Id. at 7.

¹⁷ *Affidavit of the Honorable David Wright, NARUC Member Commissioner, in support of the Standing of the National Association of Regulatory Utility Commissioners (Wright Affidavit) Attachment One of the National Association of Regulatory Utility Commissioners Petition to Intervene (“Wright Affidavit”)* (March 15, 2010), at 2.

NARUC members' interests are certainly broader than their respective statutory mandates to protect ratepayers from unjust rates.¹⁸ Commissions also enforce rules designed to assure the safety of, reduce risk to, and promote reliability of service for both the Commission staff and the general public vis-à-vis regulated utility operations. The ongoing lack of a licensed repository increases both the costs and the risks of all operating nuclear plants in the United States. In summary, Mr. Wright's affidavit points out the following:

1. Commissioner Wright works within 30 miles of a recently approved nuclear facility; and

¹⁸ The *NRC Answer* at 7, cites *Pac. Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336 (2002), for the proposition that "ratepayer interests do not confer standing under the AEA." However, a close examination of that holding indicates that economic harm (which is one key ratepayer interest) is excluded only when that harm is not directly related to environmental or radiological harm. Specifically, *Pacific Gas* states "the AEA and NEPA zones of interests do *not* include purely economic injuries *unlinked to radiological or environmental harm . . .*" {emphasis added} It is true the impacts NARUC details in its intervention do have economic consequences. But those consequences are related to radiological or environmental harms. Continued storage of high level waste at power reactor sites or independent spent fuel storage installations regulated by the NRC in fact involves radiological safety, security, and environmental matters. NARUC's asserted interests related to continued storage of spent fuel therefore are well within the NRC's "zones of interests" under the AEA and NEPA. Likewise, the potential for radiological injuries to NARUC Commissioners, staffs, and the public at large at reactor sites, are well within the zones of interests under the AEA and NEPA. The Supreme Court noted in *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, that "[t]he first question [in establishing standing] is whether the plaintiff alleges that the challenged action has caused him injury, in fact, *economic or otherwise*." 397 U.S. 150, 151 (1970) (emphasis added). Indeed, at some level *any* safety or property interest could be considered an economic injury, but the economic nature of the injury cannot foreclose standing.

2. Part of Commissioner Wright’s responsibilities are to “limit[] . . . the risks of on-site storage”;
3. As the State rules cited in note 1 on page 3 of the affidavit make clear Commissioner Wright’s commission has responsibility for the safety of persons and property and a duty to limit risk from utility operations;¹⁹
4. The DOE Final Environmental Impact Statement for the repository concludes that not building the repository could result in “widespread

¹⁹ Safe and reliable operation of electric utilities, including nuclear plants, is a focus of many members that share obligations similar to those cited by Wright. See, e.g., 2009 Minn. Statutes, Ch. 216B.243, Subd. 3. “*No proposed large energy facility shall be certified . . . unless the applicant can show that demand for electricity cannot be met more cost effectively through energy conservation and . . . unless the applicant has otherwise justified its need. In assessing need, the commission shall evaluate: . . .(5) benefits of this facility, including its uses to protect or enhance environmental quality, and to increase reliability of energy supply . . . (7) the policies, rules, and regulations of other state and federal agencies . . .(12) if the applicant is proposing a nonrenewable generating plant, the applicant's assessment of the risk of environmental costs and regulation on that proposed facility over the expected useful life of the plant, including a proposed means of allocating costs associated with that risk”; Subd. 3b (b): “Any certificate of need for additional storage of spent nuclear fuel for a facility seeking a license extension shall address the impacts of continued operations over the period for which approval is sought.” Minn. Admin. Rules (MAR) 7855.0650 provides that applicants for large energy facilities “*shall provide data on wastes and emissions associated with construction or operation of the facility, including: A. the types and estimated amounts of solid, liquid, and gaseous radioactive wastes that would be produced by the facility, and the level of radioactivity of each in curies per year;*” and “*B. an analysis of human exposure to ionizing radiation attributable to operation of the facility, taking account of the pathways of radioactive releases to humans;*”. MAR 7855.0660 POLLUTION CONTROL AND SAFEGUARDS EQUIPMENT: “*The applicant shall provide data regarding pollution control and safeguards equipment, including: A. the provisions that would be made for management of radioactive materials; B. a description of contingency plans to reduce the effects of an accidental release of radioactive materials;*” and . . . “*F. the measures that would be taken to prevent spills or leaks of pollutants, or to minimize the effects of spills or leaks on the environment.*”*

contamination of the seventy-two commercial and five DOE sites across the United States, with resulting human health impacts²⁰ immediately after listing 24 States with both nuclear facilities and NARUC member commissions.²¹

Significantly, in many of those listed States, the NARUC member commissioners and staff work very close to a nuclear facility impacted by DOE's ongoing failure to comply with its obligation to accept waste. For example, the Minnesota Commission's offices are located about 31 miles from the Prairie Island Nuclear Generating Plant. Indeed, according to the NRC's website, NARUC member commissions in *at least* the following States have offices located within at least 40 miles of a reactor: Louisiana (24 miles), Pennsylvania (10 miles), New York (24 miles), Minnesota (31 miles), Maryland (40 miles), Virginia (40 miles), Arizona (36), Missouri (25 miles) and South Carolina (26 miles).²²

In short, the interests outlined by Commissioner Wright - which are representative of many other NARUC members from different States - are both

²⁰ *Wright Affidavit* at 5.

²¹ *Id.* at 4.

²² An alleged injury to health and safety, shared equally by all those residing near a reactor, *can* form the basis for standing. *See, Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1434 (1982). *See, Map of the United States Showing Locations of Operating Nuclear Power Reactors* (U.S. NRC website) Last Accessed May 10, 2010, available online at <http://www.nrc.gov/info-finder/reactor/#USMap>; *See also Locations of Independent Spent Fuel Storage Installations* (U.S.NRC website) Last Accessed May 10, 2010, at <http://www.nrc.gov/waste/spent-fuel-storage/locations.html>.

germane to NARUC's mandate and also well within the zone of interests of the Atomic Energy Act (radiological health, safety, and security associated with interim storage and disposal), the National Environmental Policy Act (environmental impacts of interim storage and disposal), and the Nuclear Waste Policy Act (timeline and cost-effective development of a repository).²³

However the Board ultimately rules on the DOE motion, it will impact those interests, and as the earlier cited DOE Environmental Impact Statement suggests, *inter alia*, increase (or decrease) the prospects for potential health and safety consequences associated with on-site interim storage.

Significantly, Nevada's opposition does not even attempt to argue that these facts fail to demonstrate an "injury in fact" causally tied to this proceeding.²⁴ Instead, Nevada raises two novel arguments:

²³ These impacts meet judicial concepts of standing under Article III of the Constitution, as well as judicial concepts of prudential standing (the "zone-of-interest" test) and are sufficient to establish NARUC's standing. They (1) are to NARUC members, their staffs, and the public they have a statutory duty to protect, (2) are traceable to NRC action in this proceeding (*e.g.*, granting an unsupported motion to withdraw or continuing to the merits of the application and either denying or granting the license); and (3) are likely to be redressed by a favorable decision (*e.g.*, rejection of the petition to withdraw and ultimate grant of the license). *See, e.g., Bennett v. Spear*, 520 U.S. 154, 167 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998).

²⁴ *Nevada Answer* at 1-3.

Nevada's Flawed "Representational Standing" Argument

Nevada's first argument reflects a skewed understanding of the concept of *representational* standing. Specifically it claims that because (i) NARUC has sought representational standing based on an affidavit from a South Carolina commissioner, (ii) only a single designated entity of a State may be admitted as a party, and (iii) the South Carolina Attorney General (SCAG) is also seeking party status – NARUC's intervention must necessarily fail.²⁵

It is worth pointing out as a preliminary matter, Nevada's presentation of this argument necessarily

[1] Concedes that Commissioner Wright does have standing – at least, according to Nevada, until the Board grants the SCAG's petition to intervene; and

[2] Concludes – in advance of any Board determination – that the SCAG's petition will be successful; and

[3] Concedes that if NARUC had chosen another member from a different State, this Nevada argument fails.

Nevada was unable to muster a *single* case to support its argument. NARUC faced similar difficulties and could not find any case where a single State Attorney

²⁵ Id. at 2. ("If Commissioner Wright cannot represent the interests of South Carolina and its citizens because the . . . Attorney General represents them, then he has no individual standing to intervene and, because NARUC relies exclusively on . . . Wright's standing as a member, its case for standing fails as well.")

General intervention was pending at the same time a NARUC (or a similar multi-State member government association) used a member from the same State to demonstrate standing in their pending intervention.

It appears this theory has never been presented.

The reason why is obvious. Allowing “representational” status requires entities to select one or more members as surrogates to keep from having to engage in the extremely burdensome prospect of demonstrating that all or some significant portion of their members have standing. Nevada’s tortured text highlights the fatal flaw in its argument:

Nevada cannot understand how Commissioner Wright could represent the interests of South Carolina and its citizens when South Carolina's Attorney General is already doing so. Id.

Assuming that South Carolina’s Attorney General (SCAG) is ultimately granted intervention as a party, he *may* represent *some* of the interests of the citizens of South Carolina, but he most definitely will not represent the interests of the remainder of NARUC member commissions – which are not located in South Carolina – or the interests of NARUC.

For this reason – even if the SCAG intervention is ultimately granted – that fact should have no impact on the Board’s consideration of NARUC’s petition.

Denying NARUC representational standing based on the Nevada rationale makes no sense. It might make sense but only the all-but-impossible scenario that there is

another outstanding intervention in this docket seeking (like NARUC) “representational” standing filed by a NARUC-like entity with the particular interests of NARUC’s members and the same nationwide set of members.

NARUC has already expended scarce resources locating a member and getting an affidavit filed. Nevada’s argument implies but for the possibility that SCAG’s pending petition will be granted, NARUC has fully complied with the rules. Accepting Nevada’s narrow view will require those seeking representational standing not only to provide a member of a class of government public service that spans the country that can demonstrate standing-in-fact, but also to (i) anticipate the final action of the board on any pending interventions, and (ii) expend scarce resources filing – what in NARUC’s case is - essentially duplicative affidavits in support. The rule specifies a representational standing procedure presumably to eschew the filing of duplicative affidavits from all of an association’s members. On its face the Nevada argument runs counter to that specification.

However, assuming, for the sake of argument, that the Board finds some merit in the Nevada rationale – there are other facts to consider.

Not only will the SCAG most definitely NOT represent the interests of NARUC’s members in other States, the SCAG will not even represent all the interests of Mr. Wright’s South Carolina commission and staff.

As a matter of State law, the SCAG’s statutory charge does not and cannot include all the duties assigned the South Carolina commission, including the representative sample outlined in Mr. Wright’s affidavit.

This Nevada argument lacks merit. However, it is clear by its own terms it must fail if NARUC amends its intervention to attach an affidavit making basically the same claims – but using a Commissioner from another State. We have done so. By a separate pleading, circulated yesterday for comment, NARUC is filing contemporaneously an amendment to its intervention appending an affidavit from a Commissioner from the State of Minnesota.

Nevada’s Flawed “Procedural Rights” Argument

Nevada’s second “argument” is similarly flawed.

The state argues accurately that NARUC’s intervention is to oppose DOE’s attempt to summarily terminate this proceeding with prejudice before the merits are ever reached.

However, it then contends this interest is “purely procedural” and insufficient to convey standing.²⁶ This Nevada argument begins by relying on a case with facts that are transparently at odds with the present circumstances: *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004) (“*EPSA*”).

²⁶ *Nevada Answer* at 2-3.

The *EPSA* case, unlike the current circumstance, addresses whether a participant in an agency proceeding has standing to appeal an adverse procedural ruling to an Article III court. Applied to the current circumstances – it stands for the proposition that if NARUC is granted an intervention before the Board – it will necessarily have standing to appeal any procedural aspects of final Board (or NRC) action to a United States Court of Appeals.

Significantly, in the cited case, there was never any question that the appellant (*EPSA*) had standing before the agency (*FERC*). Indeed, the circumstances here, involving an intervenor’s standing *before an agency*, is never raised or at issue in that case.

As the D.C. Circuit notes: “No one, including *FERC*, doubts that *EPSA* and its members have a right to participate in contested *FERC* hearings when their financial interests are at stake.”²⁷

EPSA could (and did) participate in the underlying docket before the agency – and then sought rehearing before the agency raising the violation of its “procedural right.” Unlike in the current circumstance, no one challenged its standing before the agency. Only when *EPSA* appealed the adverse ruling of the *FERC* to the D.C. Circuit – did *FERC* respond with a motion to dismiss arguing

²⁷ *EPSA*, 391 F.3d 1261-2.

that ESPA lacked standing to challenge rules. The challenge to standing was, as the D.C. Circuit noted quite “easily dismissed.”²⁸

This case is light years from the current circumstance. NARUC is seeking to intervene before an agency (i.e., the Board) to argue Congress requires the Board to deny DOE’s motion. Again, properly viewed, the *EPSA* case stands only for the proposition that if NARUC is allowed to participate before the Board/NRC in this hearing, NARUC will have standing to appeal the final NRC action to a United States Court of Appeal.

The second case Nevada cites to support its quixotic “procedural right” argument is *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-3 (1992) (“*Lujan*”).

Nevada’s “read” of that case is also flawed and just as easily dismissed. Basically, Nevada’s analysis misconstrues the relevant case law to conflate the idea of a “procedural right” with the relief NARUC and other intervenors are seeking.

“Procedural rights” as described by the Supreme Court in *Lujan* at 572-3 and in footnote 7, refers to a government rule (or common-law right) that provides an appellant (or a petitioner to intervene) a lower threshold to achieve standing. This concept – whether an appellant or intervenor has access to a lower threshold has little to do with the relief NARUC is seeking.

²⁸ Id.

None of the late intervenors, including NARUC, have claimed the focus of our interventions - the NWPA's instructions to DOE to file the Yucca Mountain application - gives intervenors a reduced burden or provides a lower threshold to demonstrate standing before the Board. Indeed, even the most cursory examination of NARUC's initial intervention - with the required affidavit, required listed contentions, required separate listings of each element of standing - demonstrate if anything, at least the *evidentiary* threshold an intervenor must meet to demonstrate standing in this proceeding is a higher bar than that required by other tribunals.

In *Lujan*, the Supreme Court rejected an appellate court's finding that a statutory provision created a "procedural right" that allowed anyone "to file suit in federal court to challenge the Secretary's . . . failure to follow the assertedly [sic] correct consultative procedure, notwithstanding" that intervenor/appellant's "inability to allege any discrete injury flowing from that failure."²⁹ The argument was whether the "citizen suit" provision of the relevant statute allowed a party to *avoid* demonstrating an injury or impact to their interests, yet still retain standing to sue. The Supreme Court held that that "procedural right" provision could not.

²⁹ *Lujan*, 504 U.S. 572-3.

That is most definitely NOT the case here. There is no statute or NRC rule that NARUC is relying upon to avoid demonstrating the elements of its standing. No court – nor for NARUC³⁰ – have the NRC rules - created a “procedural right” allowing NARUC to secure standing without demonstrating that there is an impact on NARUC’s interests.

The NWPA’s specification that DOE file the Yucca Mountain application does not contain any such procedural provision. Nor has NARUC alleged that is the case. In short, neither cited case supports Nevada’s thesis. Both are distinguishable on the facts and the law. The Board requires a showing of standing. NARUC has complied with that requirement. Just because NARUC is seeking to require DOE to follow the law on a Congressionally-mandated procedure, does not equate to a finding that NARUC is the beneficiary of a judge-made or statutorily-based “procedural right.” There is no question NARUC has an enormous and very “concrete interest” in the outcome of this proceeding.³¹ We also have a very clear “concrete interest” in assuring that the application gets

³⁰ Unless the Board finds merit to the suggestion in note 10, on page 10 of NARUC’s original petition.

³¹ Nevada suggests that the “redressability” element of standing requires that a party show “there is a substantial likelihood the outcome will be favorable.” Nevada Answer at 1, n. 1. This unusual formulation of the redressability standard is not supported by the case Nevada cites for authority. *See Duke Power Co. v. Carolina Envir’l Study Group Inc.*, 438 U.S. 59, 78 (1978).

substantively reviewed on the merits. The fact that we are seeking to require dismissal of the facially deficient DOE motion does not mean we are pursuing a procedural right as outlined in the cited cases – it does not mean NARUC can (or did) avoid providing all the showings necessary to demonstrate standing.

Nevada’s argument holds some common elements with Clark County’s answer.³² Both answers attempt to equate this proceeding – where Congress has mandated a federal agency file this application – with the circumstance where a private party can withdraw its application for a nuclear facility.

All of Clark County’s arguments also require as a fundamental premise that NARUC *could* have anticipated that DOE – for no reason - could withdraw with prejudice - this application that Congress clearly mandated they file. As the NRC Staff’s recognition of the “timeliness” of NARUC’s filing indicates, that premise is wildly inaccurate.³³ Clark County’s entire argument, addressed in more detail, *infra*, is tainted by efforts to equate DOE’s motion to withdraw the Yucca Mountain application with prejudice – with other private (non-agency) industry

³² *Clark Answer* at 1-4.

³³ See also *Reply of Aiken County to Answers to Petition to Intervene* (April 5, 2010) at 5. (“That somehow Aiken County would be on notice over a year ago that there would be a non-scientific withdrawal which would preclude the board from reaching a substantive decision on the license application is simply preposterous. As set out in the accompany affidavit, DOE actions are exceptional circumstance not contemplated by NRC’s regulations or foreseeable by any potential party. “)

applications – private cases that are easily distinguishable because in those private cases Congress did not pass a law mandating any application filing. There simply is no comparison. Congress did order DOE to file this application. DOE lacks authority to withdraw it with prejudice. Congress passed the Nuclear Waste Policy Act (NWPA) to address the problem of accumulated spent nuclear fuel and high-level waste.³⁴ Even back in 1982, Congress specifically recognized in the Act that decades had already been wasted on ineffective efforts.³⁵ Congress expected the NWPA process to deliver a substantive result: a disposal solution for waste stored on-site in reactors across the country. All of NARUC’s members, including those that live close to operational reactors, fall squarely within the zone of interest of that process.³⁶ Because the substantive result of the NWPA process is to benefit directly both NARUC’s members, their staffs, and the health and safety of the public they are charged to protect from unreasonable practices (and rates),

³⁴ See 42 U.S.C. § 10131(a)(2) (finding that accumulated waste from reprocessing spent fuel is a national problem); 42 U.S.C. § 10131(b)(1) (stating NWPA’s purpose is to “establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste. . .”).

³⁵ See 42 U.S.C. § 10131(a)(3) (“Federal efforts during the past 30 years to devise a permanent solution to the problems . . . have not been adequate”).

³⁶ See, e.g., *U.S. Dep’t of Energy*, 69 NRC ____ (slip op) at 74 (“NEI represents those who are not only within the zone of interests of the NWPA but also are the intended beneficiaries of that Act”).

NARUC's interests in maintaining the NWPA-specified process goes beyond a "purely procedural" concern. The concrete concerns outlined in this answer and in NARUC's petition are directly tied to this process.

DOE's motion threatens to terminate the NWPA's process before the merits of the license application are reached and before there is any other alternative at hand. While DOE has convened a Blue Ribbon Commission to examine alternatives and recommend possible amendments to the NWPA, this cannot substitute for a process already provided by law. At this juncture, there is only one legal process in place to provide for a geologic repository and one prospective geologic repository approved by Congress—Yucca Mountain. It is rank speculation to expect that any alternative legal process will be in place within any identifiable timeframe.

Even though the ultimate licensing of Yucca Mountain is not guaranteed by the NWPA, a full review of the merits of the application is. Within this context, NARUC satisfies all the requirements of standing: "injury in fact" (an invasion of a judicially cognizable interest that is concrete and particularized as well as actual or imminent); causation (that there be a causal connection between the injury and the conduct complained of; that the injury be fairly traceable to the challenged action); and redressability (that it be likely, and not merely speculative, that the injury will be redressed by a favorable decision). *See Bennett v. Spear*, 520 U.S. 154, 167

(1997). (If the DOE motion is denied, a favorable ruling, NARUC will be redressed). With respect to “injury in fact,” NARUC has demonstrated its interest in maintaining the *process* of the NWPA based on its interest in the substantive result that process is intended to achieve.

None of Nevada’s arguments defeat NARUC’s standing. It does not matter that NARUC is commenting only on the merits of DOE’s motion to withdraw, without filing contentions on the license application itself. The disposition of DOE’s motion— which raises the fundamental issue of whether the proceeding itself should continue—represents a distinct sub-issue within this proceeding.³⁷

Nevada cites to the Supreme Court’s decision in *Lujan* for its argument that “the assertion of a pure procedural interest is not sufficient for standing.”³⁸ But, as discussed, *supra*, neither the facts, nor the law of the case support Nevada’s position. Indeed, *Lujan* directly supports NARUC’s construction of the decision – as well as NARUC’s standing to be heard on this sub-issue:

³⁷ See *Puerto Rico Elec. Power Auth.* (North Coast Nuclear Plant, Unit 1), ALAB-662, 14 NRC 1125, 1134 (1981) (recognizing that a change in the focus of a proceeding from the substantive merits of an application to the conditions, if any, upon which an unresolved application may be withdrawn represents a “shift” of the proceeding, with different questions and standards at hand).

³⁸ *Nevada Answer* at 2.

“We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, *so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.*”³⁹

The fact that the sub-issue of concern is raised within a broader proceeding does not diminish NARUC standing to oppose DOE on this issue. Similarly, if NARUC is successful in requiring the DOE motion to fail, it does not matter that the larger proceeding will continue without NARUC’s participation or that DOE’s application might ultimately be denied on the merits.

Even if the effect of a favorable ruling is only to keep the NWPA process intact and thereby require an actual substantive review of the Yucca Mountain application, that will constitute effective redress.⁴⁰ The ultimate determination of whether construction of the Yucca Mountain repository should be authorized should be decided on the *merits* of DOE’s application. While the denial of DOE’s

³⁹ *Lujan*, 504 U.S. at 573 n.8 {*emphasis original and added*}.

⁴⁰ See Generally, Gulf States Utilities Co., et al. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, aff’d, CLI-94-10, 40 NRC 43 (1994). A petitioner need not establish that injury will inevitably result from the proposed action to show an injury in fact, *but only that it may be injured in fact by the proposed action*. Note, assuming *arguendo*, NARUC does have, as Nevada’s argument suggests, both a “procedural injury” and a “procedural right”, then *Lujan* teaches, that: [U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years *Id.* at n.7.

application could most certainly bring about the same harms that NARUC currently seeks to avoid, that does not alter our standing. The fact that the Yucca Mountain license *might* ultimately be denied on the merits does not alter the fact that, if granted, DOE's motion to end the NWPA's process short of a merits determination *will* have that effect today. DOE's motion threatens to frustrate prematurely a process Congress specified to address one of the nation's most contentious issues. NARUC has standing to oppose efforts to subvert Congressional intent.

B. DISCRETIONARY INTERVENTION:

As discussed in the NARUC's Petition (at 7-8), an alternative basis for standing to participate is discretionary standing available pursuant to 10 C.F.R. § 2.309(e) and longstanding NRC precedent.⁴¹ Both NRC Staff and Nevada contest NARUC's participation based on discretionary standing.

The Commission has broad discretion to allow intervention where it is not a matter of right.⁴² As discussed in the NARUC's original Petition, there are three factors which, if established, weigh in favor of granting standing: 1) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record; 2) the nature and extent of the petitioner's property,

⁴¹ See, e.g., *Portland Gen. Elec. Co.*, 4 NRC at 616.

⁴² See, e.g., *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 442 (1980).

financial, or other interest in the proceeding; and 3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. There are also three factors weighing against standing: 1) the availability of other means whereby petitioner's interest will be protected; 2) the extent to which the petitioner's interest will be represented by existing parties; and 3) the extent to which petitioner's participation will inappropriately broaden or delay the proceeding.

NARUC already addresses each of these factors in its petition.

NARUC can assist in developing a sound record

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.⁴³

Most of the NRC Staff and Nevada arguments claiming NARUC's justification for discretionary intervention is deficient are recyclings of the same arguments both parties raise elsewhere to oppose NARUC's standing and contentions. Their response on this factor is no exception. In challenging NARUC's "ability to contribute to a sound record" both NRC staff and Nevada raise arguments derivative of the "scoping" claims discussed, *infra* at 45-53.

⁴³ 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).

Specifically, NRC Staff claims NARUC cannot substantially contribute to the record – in part because we allegedly have not, in NRC Staff’s view, proffered any admissible contentions.⁴⁴ NARUC has provided a concise overview of the flaws of the NRC staff’s reasoning, *infra*, at 45-53.

Nevada and NRC Staff also both claim we can make no real contribution because only legal issues are currently pending before the board.⁴⁵

NRC staff argues since all parties are represented by legal counsel it is reasonable to presume that legal arguments will be well-developed and explored. Based on this somewhat dubious reasoning, NRC Staff asserts NARUC is unlikely to contribute to the development of a sound record.

There will be a record of this proceeding. The Board will base its decision upon the legal contentions and argument placed into that record. If NARUC cannot make a “contribution” on the validity of the DOE motion, neither can anyone else. No one can know, until we file our briefs and participate in the oral arguments, the level or the value of NARUC’s contribution. Indeed, the association’s long involvement with, and interest in, the Yucca Mountain Facility, strongly suggests NARUC is well placed to make a valuable contribution to the record which should assist the Board in making its final determination.

⁴⁴ *NRC Answer* at 9.

⁴⁵ *Nevada Answer* at 4; *NRC Answer* at 9.

Therefore, 10 C.F.R. § 2.309(e)(1)(i) weighs in favor of granting NARUC discretionary standing.

The nature of NARUC's interests and the impact of any Board action weigh heavily in favor of granting discretionary intervention.

Both NRC Staff and Nevada claim neither of the two remaining factors to be weighed in favor of allowing discretionary intervention support NARUC's alternative request for discretionary intervention.

On the second factor, the nature and extent of NARUC's interest in the proceeding, both recycle flawed arguments that NARUC's interest is focused solely on "ratepayer" economic interests - arguing they are not the intended beneficiaries of NWPA. They are both incorrect. NARUC has already addressed the flaws in this intentionally myopic review of our original petition to intervene.⁴⁶ Throughout both NARUC's original intervention and this answer, we have detailed at length both NARUC's interest and the impact of any order disposing of the DOE motion. Nevada, recycling claims made elsewhere, argues these showings are irrelevant because "NARUC has no cognizable interest in this proceeding unless the State of South Carolina agrees that Mr. Wright and NARUC, as opposed to its

⁴⁶ See the discussion, *supra*, at 6-13.

Attorney General, should represent its interests.”⁴⁷ NARUC has already pointed out the frailties of that argument, *supra*, at 13-16. As those pages make clear – NARUC does have a cognizable interest impacted by this proceeding. Moreover, Mr. Wright’s affidavit is sufficient to justify NARUC’s representational standing even if the Board ultimately chooses to grant the South Carolina Attorney General intervention.

With respect to the third factor, the effect of any decision or order that may be issued, NRC Staff, citing page 15 of our intervention, notes that NARUC argues withdrawal of the application will “exacerbate NARUC members’ ability to “protect the health, safety, and economic welfare of its State electric ratepayers.” Again, at page 10 of their answer, they claim these interests “are outside the zone of interests to be protected by the NWPAA or the AEA.... and, therefore, this factor likewise weighs against NARUC.” They are again wrong and they, again, recycle the same arguments NARUC has already addressed at length elsewhere in this pleading, *infra* at 45-53 and *supra* at 8-17.

Neither NEI nor the S.C. Attorney General represent NARUC’s interests.

Nevada also claims all of the factors weighing against intervention in 10 C.F.R. § 2.309 (e)(2) apply to NARUC's request, with the possible exception of factor (ii) (the extent to which petitioner's interests will be represented by existing

⁴⁷ *Nevada Answer* at 10.

parties).⁴⁸ However, it claims “even factor (ii) will count against intervention if South Carolina is admitted as a party because Mr. Wright’s interests (and therefore NARUC’s interests) will be protected by” the SCAG.⁴⁹ Nevada is wrong. As discussed in more detail, *supra*, at 15-18, not only will the SCAG most definitely NOT represent the interests of NARUC’s members in other States, the SCAG will not even represent all the interests of Mr. Wright’s South Carolina commission and staff. As a matter of State law, the SCAG’s statutory charge does not and cannot include all the duties assigned the South Carolina commission, including the representative sample outlined in Mr. Wright’s affidavit.

The NRC staff also believes factor (ii) does not weigh in favor of NARUC’s intervention – because NARUC “has not explained how its interests are distinct from those of NEI, an already admitted party.” This is somewhat inaccurate. Our original petition outlines the basis for our entry.⁵⁰ While NRC Staff may speculate NEI’s and NARUC’s interests are identical on this issue – that remains to be seen.

⁴⁸ *Nevada Answer* at 4.

⁴⁹ *Nevada Answer* at 4-5.

⁵⁰ Among other things, NARUC members, unlike NEI, are government entities with statutory obligations to protect the public health and welfare.

NARUC will not inappropriately broaden the issues or induce delay.

Interestingly, Nevada and NRC Staff disagree on whether NARUC’s participation will “inappropriately broaden” the proceeding. NRC Staff points out that NARUC’s participation is not likely to broaden the proceeding as others are likely to raise the same issues – though it also contends we could cause minimal delay. Overall NRC staff says this factor does not weigh for or against discretionary intervention.⁵¹ Nevada, ignoring the fact that others have raised the similar “extra” contentions, argues the additional contentions will broaden the hearing. Nevada is wrong. And the NRC staff is wrong too – particularly since they effectively concede NARUC’s participation as an Amicus if our intervention fails. Given the Board has already decided to allow NARUC to participate in the June hearings and to file an answer to the DOE motion – it is difficult to see how granting our intervention could impose any additional delay in this proceeding.

Engagement with the Board and the Administration, and participation in pending Court appeals are no substitute for participation here.

Both Nevada and NRC staff claim that NARUC has other means to protect our interest including participation as an Amicus and/or that other parties can represent our interests. NRC Staff points out a purported concession at page 10 of its answer: “NARUC concedes with regard to 10 C.F.R. § 2.309(e)(2)(i) that it ‘is

⁵¹ *NRC Answer* at 10.

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.’”

Communications with DOE and the Blue Ribbon Commission are clearly no surrogate for participation in this proceeding. Based on their spokespersons and public actions to-date, DOE is opposed to any present or future consideration of the Yucca Mountain Repository on the merits, and the Blue Ribbon Commission may not even consider the repository as an option. Elimination of this option can only exacerbate the waste disposal problem and the risks of onsite storage.

Nor is participation in the pending court appeals addressing the withdrawal motion a substitute for action before the Board. As the NRC points out in its recent remand order,⁵² the courts are likely to show deference to both the Board and the NRC’s final action in this docket. The only way for NARUC to fully vindicate its members concerns in participation in this proceeding.

Moreover, NARUC’s participation will ensure full briefing and argument on whether DOE’s motion should be granted.

The NRC in *Portland General Electric* case, cited by Nevada, actually supports intervention in cases like these, noting: “Permission to intervene should prove more readily available where petitioners show significant ability to

⁵² *U.S. Department of Energy (High Level Waste Repository)*, CLI-10-13, 71 NRC_, _ (Slip op. at 3- 4) {emphasis added}.

contribute *on substantial issues of law or fact* which will not otherwise be properly raised or presented. . . .”⁵³

The NRC has recognized that discretionary intervention is not limited only to those who will contribute to a sound record of technical information. Instead, discretionary intervention is to permit participation by petitioners who, despite not satisfying judicial standing criteria, nevertheless “would have a valuable contribution to make to our decision-making process,” even if only on a single issue.⁵⁴ NARUC will provide such a contribution.

⁵³ *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 617 (1976) (emphasis added).

⁵⁴ Id.

C. NON-TIMELY INTERVENTION:

In addition to demonstrating standing, NARUC, in its original intervention, demonstrated that there was good cause to file its petition out-of-time 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.⁵⁵

Good Cause for Failure to file on Time

The Commission has held that the first factor— whether there is good cause for failure to file on time—is the most important consideration.⁵⁶

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.”⁵⁷

⁵⁵ *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 71 NRC ___, (March 26, 2010) slip op. at 3.

⁵⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551, 564 (2005).

⁵⁷ Id. at 564-65.

Nevada and Clark County⁵⁸ disagree with the NRC staff on this first and most important factor.⁵⁹

⁵⁸ *Nevada Answer* at 6-9; *Clark Answer* at 2-5.

⁵⁹ Specifically, Nevada argues NARUC ignored or failed to reasonably discover publically available information that should have alerted NARUC as early as September 2008 that DOE may seek license withdrawal. These same arguments were raised to other petitions. NARUC agrees with (and incorporates by reference) the responses at 9 - 11 of the *State of Washington's Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy and Clark County, Nevada* (April 5, 2010), as well as the responses at 4 - 7 of the *Reply Brief of South Carolina on its Petition to Intervene*. As the NRC staff points out, *infra*, the agency has specified that new regulatory developments and the availability of new information may constitute good cause for late intervention. In its FY 2010 budget request, DOE requested nearly \$200 million to, *inter alia*, continue its license application. Secretary Chu testified that DOE intended to do just that in 2010 and Congress funded DOE's request. NARUC was entitled to rely on these facts over any press speculation or other campaign rhetoric. The February 1, 2010 announcement of DOE's decision to irrevocably terminate this proceeding was both a new regulatory development and new information giving NARUC good cause to now seek intervention. South Carolina points out a bare statement by then president candidate Obama in September 2008 that the project "should be abandoned" cannot impose a duty to intervene by December of 2008. Campaign rhetoric aside, at the time to many in the legal community, it appeared DOE lacked authority to withdraw the application with prejudice – whatever the views of a new Administration. But in any case, if NARUC had sought to intervene to challenge a campaign promise, as Nevada essentially argues, any opponent to such intervention would undoubtedly have successfully argued that that the statement on which such an intervention would have been based was hypothetical and completely unripe for adjudication.

As detailed *supra* at 6, in note 59 at 38, and *infra* at 39 note 60, the bulk of their arguments turn on the patently flawed notion that a year ago it was foreseeable – that DOE would file a bare and unsupported motion to withdraw the application for the Yucca Mountain Repository with prejudice.⁶⁰

The NRC Staff's analysis on this point is accurate and worth repeating here:

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

⁶⁰ The cases cited by Nevada are readily distinguishable from the current circumstances. In *Citizens for Fair Utility Regulation v. NRC*, 898 F.2d 51 (5th Cir.1990), an entity sought to intervene after the Board dismissed a proceeding pursuant to a settlement that had already undergone public comment. That petition was filed more than nine years after the proceeding began. The petitioner argued it made a strategic decision early in the proceeding to withdraw due to financial constraints and rely on another party to represent its interests. The NRC ruled this did not establish good cause for late intervention. In *Gulf States Utility Co. (River Bend Station, Units 1 & 2)*, ALAB-444, 6 NRC 760 (1977) a late intervener also relied on another party to represent its interests and was “lulled into inaction” by that party's participation. In *Easton Utilities Comm'n v. AEC*, 424 F.2d 847 (D.C. Cir. 1970), the late petitioner attempted intervention six months after the Board had terminated the proceeding and five months after its initial decision. Again, the late intervener argued that it relied on another party and, when that party did not appeal the Board's order, it sought intervention. None of these cases resemble the circumstances presented here. In all three cases, the late intervenor could and should have foreseen the possibility of the Board or party action that triggered their belated efforts to intervene. That simply was not possible here.

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.⁶¹

NARUC agrees.⁶²

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.

⁶¹ *NRC Answer* at 12. {emphasis added}

⁶² Clark County's only additional argument is that the "DOE's filing and prosecution of the License Application was always subject to potential rejection or dismissal by the NRC." *Clark Answer* at 3. This is true, but such rejection, in the absence of the kind of Motion to Withdraw that is now before the Commission, would only have occurred if the application were examined on the merits and found not to meet applicable safety, security and technical standards. Indeed, the need to meet such standards was presumably the entire reason for Congress to order that the Yucca repository be subject to Commission licensing review. The need for such review logically implied that a license could be denied, or at least, delayed until any safety issues were resolved. Clark County without foundation argues that NARUC and other intervenors must have believed that the filing of the license application was tantamount to the issuance of a license. Practically, there is no reason to think that anyone (particularly any lawyer) could have believed that. However, any lawyer that read the NWPA did have a right to believe that DOE, changed by statute with presenting a license application, would pursue it in good faith and not abandon it. This abandonment, and the potential waste of billions that would result, could not reasonably have been anticipated.

Allowing NARUC’s intervention will assist in the creation of a sound record and cannot either broaden the issues or delay the proceedings.

Of the remaining seven factors, the NRC finds the following two to be the most important:

1. “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
2. “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)]⁶³

The NRC Staff concedes, that “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.”⁶⁴

However, they conclude, apparently based on an earlier argument, that NARUC’s participation could cause some delay and that therefore this factor weighs neither for nor against NARUC’s participation.

They are wrong.

⁶³ See *Diablo Canyon*, CLI-08-8, 67 NRC at 197-98. 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.

⁶⁴ *NRC Answer* at 12. Nevada ignores the fact – self evident in the NRC staff response - that others have or are likely to raise the same issues NARUC has – and that cannot delay the proceeding. That is why they think this factor weights against a finding of timeliness. Nevada is wrong. See *Nevada Answer* at 10.

As noted earlier, the Board has *already* determined NARUC can respond to the DOJ motion and participate in the oral argument. Therefore granting NARUC's intervention cannot be disruptive and this factor necessarily weighs in favor of NARUC's participation.

In terms of our ability to contribute to the creation of a sound record, NRC staff repeats its earlier arguments that we cannot. We have already addressed the flaws in those arguments. See the discussion, *supra* at 28-30. Nevada claims – since we will not make any contributions to any technical record (of the license application – which will only occur if the DOE motion is denied) – that this factor weighs against allowing NARUC's late intervention. This is a variation of the scope arguments NARUC has addressed at length *infra* at 45-53.

Both NRC Staff and Nevada are wrong.

This factor also weighs in favor of granting NARUC's intervention.

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

According to both NRC Staff and Nevada, the five remaining factors, 10 C.F.R. §§ 2.309(c)(1)(ii)-(vi), do not weigh in favor of NARUC.

NRC Staff and Nevada are wrong.

Each of the NRC's arguments have been presented and addressed earlier in this pleading:

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, the NRC Staff and Nevada claim we have no standing.

NRC Staff and Nevada are wrong. See NARUC's response in the discussion at *infra* at 45-53 and *supra* at 8-17.

This factor weighs in favor of NARUC.

According to NRC staff and Nevada, NARUC has not demonstrated any property, financial or other interest in the proceeding under 10 C.F.R. § 2.309(c)(1)(iii). NRC Staff argues again that NARUC's interests are not cognizable and that NARUC has not demonstrated that its members' abilities to fulfill their health and safety responsibilities will be impaired.

The NRC Staff and Nevada are wrong.

They, *inter alia*, have misconstrued the scope of NARUC's asserted interest. See NARUC's response in the discussion at *infra* at 45-53 and *supra* at 8-17.

This factor weighs in favor of NARUC also.

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 pointed out that withdrawal will "significantly harm ratepayers who have paid billions."⁶⁵ NRC staff narrowly focuses on the "rates" part of ratepayer interest.

⁶⁵ *NARUC Petition* at 15.

The impact on NARUC Commissioners, Staff, and the people they protect is discussed at length *supra* at 8-17.

NARUC also point out withdrawal “necessarily exacerbates NARUC’s member commission’s ability to carry out their fiduciary responsibilities to protect the health, safety, and economic welfare of its State electric utility ratepayers.” *Id.* Nevada contends this is “hopelessly vague and unsupported” Nevada staff is wrong. See generally the discussion *supra* at 8-17 and *infra* at 45-53.

With respect to 10 C.F.R. § 2.309(c)(1)(v), NARUC points out 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."⁶⁶ NRC staff claims the availability of other means to protect its interests weighs against NARUC. NARUC respectfully disagrees, as noted earlier – discussions with DOE and the Blue Ribbon commission – and even participation in the pending lawsuit in the D.C. Circuit – is no surrogate for participation in this proceeding. See the discussion *supra* at 34-36.

Under 10 C.F.R. § 2.309(c)(1)(vi), concerning the degree to which NARUC’s interest with be represented by existing parties. The NRC staff summarizes the arguments made earlier on the same point.

They are still wrong. See the discussion *supra* at 32-33.

⁶⁶ *NARUC Petition* at 20.

Therefore, any meaningful weighing of the factors listed in 10 C.F.R. § 2.309(c)(1), particularly considering that the good cause factor is most important, favors allowing NARUC's non-timely filing.

D. CONTENTIONS [10 C.F.R. § 2.309(f)]:

NARUC must have at least one valid contention to perfect its intervention.⁶⁷ Only NRC staff has suggested all of NARUC's proffered contentions are facially invalid.⁶⁸ Nevada only "objects to NAR-MISC-03 and NARUC-MISC-04."⁶⁹ NRC staff argues NARUC's petition must be denied because none of its four contentions are admissible.

As a preliminary matter, NARUC respectfully notes that any arguments that, *at a minimum*, NARUC contentions NAR-MISC-01 and NARUC-MISC-02 are not properly before the Board are facially deficient. Even the most entrenched opponent of NARUC's intervention – Nevada – "does not object to the admission of NAR-MISC-01 and NARUC-MISC-01."⁷⁰ Those contentions point out that both the U.S. Department of Energy (DOE) motion to withdraw the Yucca

⁶⁷ See generally 10 C.F.R. § 2.309(f) requiring petitions for leave to intervene to "set forth with particularity the contentions sought to be raised."

⁶⁸ *NRC Answer* at 16.

⁶⁹ *Nevada Answer* at 11.

⁷⁰ Id.

Mountain application and any Board action to grant that motion with or without prejudice is basically *ultra vires*.

Both contentions are on their face central to any Board consideration or disposition of the pending motion to withdraw. Indeed, the Nuclear Regulatory Commission's April 23, 2010 order confirms both issues are squarely before the Board by specifying, as one of the reasons for requiring the Board to continue these proceedings, that:

Courts generally accord considerable weight to an agency's construction of the statutes it administers, and defer to an agency's interpretation of its own regulations. *Fundamental questions have been raised*, both *before us* and before the D.C. Circuit, *regarding* the terms of DOE's requested withdrawal, as well as *DOE's authority to withdraw the application in the first instance*. *Interpretation of the statutes at issue and the regulations governing their implementation falls within our province*. If judicial review is pursued after our final decision, the application of our expertise in the interpretation of the AEA, the NWPA, and our own regulations will, at a minimum, inform the court in its consideration of the issues raised by DOE's motion to withdraw.⁷¹

The NRC's directions, *which effectively require Board examination of the impact of the statute on "DOE's authority to withdraw the application in the first instance,"* are also reflected in Board's April 27, 2010⁷² Order – asking if the

⁷¹ U.S. Department of Energy (High Level Waste Repository), CLI-10-13, 71 NRC_, _ (Slip op. at 3- 4) {emphasis added}.

⁷² CAB Order (Setting Briefing Schedule) ML101170592 (Apr. 27, 2010) at 2 (unpublished).

NRC Staff “continues to assert the issue of DOE’s authority to withdraw its Application is beyond the scope of this proceeding,” as well as this Board’s focus on “the legislative history of the Nuclear Waste Policy Act..., the full statutory scheme of that Act, and the rules of statutory construction that should be applied in interpreting it.”⁷³

In spite of the Nevada contentions, this NRC’s “remand” also effectively requires consideration of NARUC’s remaining two contentions – for the same reasons. There is no question the Court will be facing those issues also on appeal – and the NRC has indicated, *inter alia*, it believes the Board decision should “inform” the Court on these matters.

The NRC Staff argues that all of NARUC’s contentions are deficient present an overly rigid and simplistic view of the NRC regulations and the Board’s orders – a view that is in direct conflict with the NRC remand and this Board’s instructions for the scheduled hearing.

Initially, the staff notes that (1) admissible contentions must relate to the scope of the proceeding (10 C.F.R. § 2.309(f)(1)(iii)) and that, in this proceeding, the scope of admissible contentions has been defined by initial hearing notice and order to be whether DOE license application satisfies applicable safety, security,

⁷³ CAB Order (Scheduling Argument and Further Prehearing Conference) ML101230242 (May 3, 2010) at 1 (unpublished).

and technical standards and whether the applicable requirements of NEPA and NRC's NEPA regulations have been met. *NRC Answer* at 16-18.

According to NRC staff, none of NARUC's contentions relate to whether DOE license application satisfies applicable safety, security, and technical standards or whether applicable requirements of NEPA and NRC's NEPA regulations have been met. Therefore, they contend our intervention must be dismissed.

Given the drastic shift in this docket occasioned by the filing of the DOE motion to withdraw, there is an obvious problem with this approach.

Because DOE fails to provide any factual or legally cognizable justification for filing a motion to withdraw,⁷⁴ the Board itself has no basis (or reason/record) to examine whether the "DOE license application satisfies applicable safety, security, and technical standards."

⁷⁴ DOE's motion asks the Board to dismiss DOE's license application with prejudice to "provide finality in ending the Yucca Mountain project for a permanent geologic repository and [to] enable the Blue Ribbon Commission, established by the Department. . . to focus on alternative methods of meeting the federal government's obligation to take high-level waste and spent nuclear fuel." *U.S. Department of Energy's Motion to Withdraw* (March 3, 2010) at 3. The only justification offered is the bare allegation that "the Secretary of Energy has decided that a geologic repository at Yucca Mountain is not a workable option for long-term disposition of these materials." *Id.* at 1. The secretary's unsupported decision directly supplants the central fact-based determination the NWPA specifies this Board, and subsequently, the NRC is to decide.

Practically, the issues NARUC has raises are – in fact – the only issues the Board will have to resolve to support its final disposition of the DOE motion to withdraw. This highlights a curious (and illogical) dichotomy inherent in the NRC Staff’s positions. On the one hand, NRC staff concedes the DOE’s unforeseeable filing of the motion to withdraw clearly provides “good cause” for NARUC to file its intervention out-of-time.⁷⁵ But, on the other hand, it is clear NRC staff believes no such intervention can raise any contentions focused exclusively on the legal issues – previously not in play – raised by that same motion.⁷⁶

NRC Staff’s interesting explanation, which they buried in a footnote,⁷⁷ is illuminating: “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...and on the other hand, matters that can be the subject of admissible contentions.”

Compare this “explanation” with the somewhat inconsistent NRC Staff exegesis on the *rationale* underlying the NRC contention rules, conceding, albeit phrased negatively, that the NRC should expend resources to support the hearing

⁷⁵ *NRC Answer* at 12.

⁷⁶ *NRC Answer* at 16 -18.

⁷⁷ *NRC Answer* at 20 note 11.

process where there is “. . .an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”⁷⁸

NARUC’s contentions are – as the NRC in note 20 effectively concedes – “appropriate for and susceptible to, resolution in an NRC hearing.”⁷⁹

In the unusual circumstances presented, assuming *arguendo*, NRC staff’s view is correct; it is difficult to imagine any *contention* that would justify a late intervention for any party. As the State of Washington correctly noted in its reply,⁸⁰ if the Board adopts NRC Staff’s logic, DOE’s withdrawal motion is itself outside the scope of the proceeding because it does not strictly concern “the adequacy of the Department of Energy’s request for construction authorization at Yucca Mountain.”⁸¹

The existing parties will, by following the Board’s instructions in its scheduling order, *necessarily engage on these issues*, even though – under the

⁷⁸ Id. at page 17 {citations omitted}.

⁷⁹ An alleged injury to a purely legal interest is sufficient to support standing. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LBP-90-15, 31 NRC 501, 506 (1990), reconsid. denied, LBP-90-25, 32 NRC 21 (1990).

⁸⁰ *State of Washington’s Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada* (April 5, 2010) at 14.

⁸¹ See U.S. Dep’t of Energy (High-Level Waste Repository), CLI-10-10, 71 NRC at __ (slip op. at 6).

NRC’s logic – they are not sufficient to justify an otherwise valid intervention.⁸²

Of course, none of the existing parties raised any of these issues as contentions in their original interventions. Still, because they had a reason a year ago to intervene to participate in the substantive examination of the DOE application they can press their views on these topics. The circumstances have radically changed since those initial interventions were filed. The original scope of the proceeding—as defined by the Board’s initial order—has shifted significantly as a result of DOE’s motion.⁸³ Nothing in the NRC regulations, prior precedent, or the Board’s own orders in this docket requires such a rigid approach. Washington State’s answer⁸⁴ correctly notes that

(1) “the NRC Staff reads qualifiers into the terms of 10 C.F.R. § 2.309(f)(1) that do not exist in the regulation;” *Id.*

⁸² *Compare, NRC Staff Answer to State of Washington’s Petition for Leave to Intervene and Request for Hearing* (March 29, 1010) at 8-9, specifying that NRC Staff does not oppose Washington’s standing to intervene, agrees Washington meets NRC requirements for late-filed petitions, but claiming Washington fails to present any admissible contentions.

⁸³ As a result of this shift, none of cases NRC Staff cites for the proposition that “the scope of issues that may be contested in an NRC adjudicatory proceeding is defined by the Commission in its initial hearing notice and order” are instructive, because none of the cited cases considered presents the unusual circumstance of this case.

⁸⁴ *State of Washington’s Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada* (April 5, 2010) at 14-17.

- (2) “as noted in the Board’s May 11, 2009, Memorandum and Order, the strict language of 10 C.F.R. § 2.309(f)(1) must be applied *in context* when it comes to legal contentions: Not all the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) necessarily apply to legal issue contentions. . . . a purely legal issue contention obviously need not allege “facts” under section 2.309(f)(1)(v);” Id.
- (3)⁸⁵ the contentions raised by Washington (like those raised by NARUC) *do* relate to the license application at issue - the fundamental question of whether *that application* should be withdrawn with prejudice; and
- (4) “NRC precedent has recognized that the fundamental nature of a licensing proceeding can change as the proceeding evolves.”⁸⁶

NARUC’s contentions are consistent with the purpose of the rule.

⁸⁵ *State of Washington’s Reply to Answers of the State of Nevada, NRC Staff, U.S. Department of Energy, and Clark County, Nevada* (April 5, 2010) at 14.

⁸⁶ In *Puerto Rico Elec. Power Auth.*, 14 NRC 1125, the Commission recognized that a proceeding had “shifted” from the substantive merits of an application to the conditions, if any, upon which an unresolved application may be withdrawn, with different questions and standards at hand. *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. If DOE had included in its original application an express reservation to withdraw its application with prejudice at any time, for reasons unrelated to the technical merits of its application and for the purpose of precluding any future licensing of the Yucca Mountain repository, this reservation would surely be recognized as a proper subject of legal contentions. Just as surely, DOE’s interjection of the same issue at this point in the proceeding can and should be recognized as the proper subject of legal contention by interveners.” Id.

They are, as noted *supra*, “appropriate for, and susceptible to, resolution in an NRC hearing.”⁸⁷ They are material to the findings the NRC now must make to support a final determination of whether to allow DOE to withdraw its application with prejudice. Finally, NARUC’s contentions show a genuine dispute with DOE on a material issue of law with respect to the licensing application: whether DOE and the Board have the authority to prevent the application from going forward. Because DOE’s motion has shifted the scope of this proceeding, and because NARUC’s contentions fall within this shifted scope, the Board should admit NARUC’s contentions.

⁸⁷ See 69 *Fed. Reg.* at 2202. The Commission was clear, in promulgating its contention requirements (originally 10 C.F.R. § 2.714(b)(2)), that “purely legal contentions . . . may be admitted as issues in the proceeding. However, they will not be part of an evidentiary hearing, but rather, will be handled on the basis of briefs and oral arguments.” 54 *Fed. Reg.* 33,168, 33,172 (Aug. 11, 1989) (*Notice of Final Rulemaking on changes to Part 2, including 10 C.F.R. § 2.714*). The current rule, 10 C.F.R. § 2.309(f), “incorporate[s] the longstanding contention support requirements of former §2.714” 69 *Fed. Reg.* 2182, 2221 (Jan. 14, 2004).

NAR-MISC-01 *Neither DOE nor the NRC Have Discretion to Terminate This Proceeding with Prejudice.*

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45 to 53.

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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.*

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

NAR-MISC-03 *DOE's Decision To Irrevocably Terminate the Yucca Mountain Project is Arbitrary and Capricious in Violation of Administrative Procedures Act*

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

The objections NRC Staff and Nevada raise under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff and Nevada raise under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

Additional Response: By asking the Board to grant its license withdrawal “with prejudice,” DOE has asked the Board to employ its discretion to apply a “particularly harsh and punitive term imposed upon withdrawal” that by the Board's own precedent should be reserved for only unusual situations involving

substantial prejudice to the opposing parties or the public interest in general if an application were to be re-filed. *Philadelphia Electric Co.*, 14 NRC at 974; *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. In this sui generis docket, DOE is asking for withdrawal “with prejudice” to preclude a license application compelled by the NWPA and relating to the only geologic repository site approved by Congress from ever being resurrected. Given the implications and the public interest at stake, NARUC’s contention that DOE’s decision to irrevocably terminate the Yucca Mountain project is arbitrary and capricious is germane to the Board’s consideration of whether it should grant such relief, even if the Board ultimately lacks authority to actually rule on the merits of that contention. *See Puerto Rico Elec.*, 14 NRC at 1134 (weighing public interest considerations in determining whether to condition that a withdrawal be “with prejudice”). This contention is thus within the scope of the proceeding; material to the findings the Board must make in ruling upon DOE’s motion; and very likely a subject of genuine dispute by DOE.

NAR-MISC-04 *DOE Did Not Comply With NEPA Before Deciding to Irrevocably Terminate the Yucca Mountain Waste Repository Project*

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

The objections NRC Staff and Nevada raise under this section are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff raises under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53.

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

The objections NRC Staff and Nevada raise under this section to NARUC's contention are the general ones linking the application to a rigid reading of the original scope of the proceeding. NARUC's response to this is discussed, *supra*, at 45-53. The NRC Staff argues, *Id.* at 29, that there is no genuine dispute on a material issue of law or fact because NARUC has challenged "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." Nevada also asserts that "NEPA objections directed at DOE do not in themselves raise material issues" and it

reserves objection as to whether NAR-MISC-04 raises material issues within the scope of this proceeding. See Nevada Answer at 13-14. By asking the Board to grant its license withdrawal “with prejudice,” DOE has asked the Board to employ its adjudicative discretion to apply a “particularly harsh and punitive term imposed upon withdrawal” that by the Board’s own precedent should be reserved for only unusual situations involving substantial prejudice to the opposing parties or the public interest in general if an application were to be refiled. *Philadelphia Electric Co.* (Fulton Generating Station, Units 1 & 2), ALAB-657, 14 NRC 967, 974 (1981); *Puerto Rico Elec. Power Auth.*, 14 NRC at 1134. In this one-of-a-kind proceeding, DOE is asking for withdrawal “with prejudice” to preclude a license application compelled by the NWPAA and relating to the only geologic repository site approved by Congress from ever being resurrected. Given the implications and the public interest at stake, NARUC’s contention that DOE has failed to comply with a procedural antecedent before requesting its relief is germane to the Board’s consideration of whether it should grant such relief, even if the Board lacks authority to actually rule on the merits of that contention. See Puerto Rico Elec., 14 NRC at 1134 (weighing public interest considerations in determining whether to condition that a withdrawal be “with prejudice”). NAR-MISC-004 is thus within the scope of the proceeding; material to the findings the Board must make in ruling upon DOE’s motion; and likely a subject of genuine dispute by DOE.

III. CONCLUSION

For the foregoing reasons, NARUC respectfully requests that the arguments opposing its Petition for Leave to Intervene be rejected and the Board grant intervention.

DATED this 11 day of May, 2010

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

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

Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
May 11, 2010

CERTIFICATE OF SERVICE

I, James Bradford Ramsay, hereby certify that copies of the National Association of Regulatory Utility Commissioners' (NARUC) Reply to Answers to its Petition to Intervene dated May 11, 2010, have been served upon the following persons by Electronic Information Exchange.

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ADDITIONAL CERTIFICATION

Availability of Material

As required by 10 C.F.R. § 2.1012(b) and 10 C.F.R. §2.1003, the undersigned also has made a good faith effort to substantially comply with the “Availability of Material” requirements, 10 C.F.R. § 2.1003. NARUC has been in communication with Daniel J. Graser, the NRC’s Licensing and Support Network Administrator to obtain technical guidance to comply with this provision.

[Signed Electronically by James Bradford Ramsay]

Dated at Washington, DC
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