March 29, 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 SOUTH CAROLINA PETITION TO INTERVENE AND SUPPLEMENT

INTRODUCTION

On February 26, 2010, the State of South Carolina ("South Carolina" or "State") filed a petition to intervene in the above-captioned proceeding. Petition of the State of South Carolina to Intervene, dated February 26, 2010 ("Petition"). For the reasons set forth below, South Carolina's Petition should be denied because it does not proffer an admissible contention. However, because the Staff does not dispute that South Carolina has demonstrated its standing to intervene, the Staff would not object to a request by South Carolina to participate under 10 C.F.R. § 2.315(c),[1] provided it certifies pursuant to 10 C.F.R. §§ 2.1003 and 2.1009, that it has made its documentary material available via the Licensing Support Network (LSN), or that it does not have any documentary material.

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[1] The Staff notes that participation as an interested government participant pursuant to 10 C.F.R. § 2.315(c) is not predicated on the submission of an admissible contention under 10 C.F.R. § 2.309(f)(1) or subject to the timeliness standards in § 2.309(c). Because South Carolina has requested participation as a party pursuant to 10 C.F.R. § 2.309 rather than as an interested government participant pursuant to § 2.315(c), the Staff addresses the § 2.309 requirements in this answer.

BACKGROUND

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

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[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).

[3] DOE later 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 February 26, 2010, South Carolina filed the instant Petition seeking to intervene as a party in this proceeding. Petition at 2. The Staff's answer to the Petition is set forth below.[4]

DISCUSSION

I. Standing

To establish standing to intervene as a party, South Carolina must meet the Commission's requirements set forth in 10 C.F.R. § 2.309(d).[5] Under § 2.309(d), 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). South Carolina alleges two injuries related to DOE's decision to withdraw the license application; first, South Carolina would be "on the list of candidate states for a waste disposal or storage facility, and more so than many other states," and second, "the continuing potential hazard of the onsite storage" of high-level waste a commercial power reactors in South Carolina and at the Savannah River Site. Petition at 3-4. While South Carolina has not demonstrated that its potential inclusion on the list of candidate sites for waste

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[4] In this Answer, the Staff follows the Boards' previous instructions 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).

[5] Because the HLW repository is not to be located within South Carolina's boundaries, South Carolina is not entitled to automatic standing in this proceeding and instead must show that it meets the requirements for standing in 10 C.F.R. § 2.309(d). *See U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 424 (May 11, 2009).

storage or disposal an “actual or imminent” injury-in-fact necessary to establish standing,[6] *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Staff does not dispute South Carolina's demonstration of standing insofar as it is premised on "the continuing potential hazard" of the storage of high-level waste in South Carolina.[7]

II. Timeliness

In addition to demonstrating standing, South Carolina 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). South Carolina admits that its petition was not filed by December 22, 2008 but argues that, pursuant to 10 C.F.R. § 2.309(c), its non-timely filing should be entertained.

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 __, slip op. at 3 (March 26, 2010). 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,

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[6] South Carolina states that it would be in danger of being considered for high-level waste storage or disposal "if the nation's nuclear waste disposal efforts revert back to their pre-1987 status as a result of dismissal of the license application in this matter." Petition at 4. However, even prior to the 1987 amendment of the NWPA limiting site characterization activities to Yucca Mountain, Pub. L. No. 100-203 (101 Stat. 1330) (1987), South Carolina was not on the list of potential sites. *See* Recommendation by the Secretary of Energy of Candidate Sites for Site Characterization for the First Radioactive Waste Repository, dated May 1986, at 1 (DEN000010633) (The nominated sites were Richton Dome, Mississippi; Yucca Mountain, Nevada; Deaf Smith County, Texas; Davis Canyon, Utah; and Hanford, Washington.).

[7] South Carolina argues in the alternative that it should be granted discretionary standing. Because the Staff does not dispute the State's standing as-a-matter-of-right, these arguments are not addressed.

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, South Carolina argues that, because DOE's "recent announcement of its intent to withdraw the application is a new and unexpected development that gives rise, for the first time, to a reason for South Carolina to have an interest in participating in this matter," South Carolina could not seek to intervene earlier. Petition at 7. Insofar as South Carolina's nontimely contentions relate to DOE’s motion to withdraw its license application, the Staff agrees that South Carolina 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 South Carolina filed its petition promptly after the new information became available inasmuch as the State filed within 30 days of that new information.[8] *Compare* 10 C.F.R. § 2.309(c)(1)(i) *with* 10 C.F.R.

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[8] South Carolina also argues that its Petition is timely pursuant to 10 C.F.R. § 2.309(f)(2) because DOE statements and filings on January 29, 2010 and February 1, 2010 regarding DOE's plans to seek withdrawal of the LA are new information that that is materially different from previous information. Petition at 5-6. Because the State filed its new contentions within 30 days after the availability of this material new information, the Staff does not dispute South Carolina's claim that, if 10 C.F.R. § 2.309(f)(2) applies, the petition is timely filed. That provision is usually applied to new or amended contentions filed by an already admitted party. *See Southern Nuclear Operating Co.* (Vogtle Electrical Generating Plant, Units 3 and 4), LBP-09-03, 69 NRC 139, 158 n. 12 (2009).

§ 2.309(f)(2); *see* CAB Case Management Order #1, dated Jan. 29, 2009, at 3-4 (For purposes of complying with 10 C.F.R. § 2.309(f)(2), a new contention will be deemed timely if filed within 30 days of the date on which the new and material information first became available.).

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

A balancing of the remaining factors in 10 C.F.R. § 2.309(c), along with South Carolina's good cause, favors the Board's entertaining the late filing. The Commission has held that the remaining factors should not be equally weighted. *See Diablo Canyon*, CLI-08-8, 67 NRC at 197-98. "The extent to which the petitioner's participation will broaden the issues or delay the proceeding" and "the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record" are the two most important factors.[9] *Id.* South Carolina argues that any delay in the proceeding caused by its participation "would be minimal, and would not outweigh the desirability of permitting at least one party to the case to present argument against the anticipated motion to withdraw." Petition at 14. As the proceeding has already been stayed pending a Board ruling on DOE's motion to withdraw[10], there may be only minimal delay associated with South Carolina's participation. However, South Carolina does not address the potential that its participation may broaden the issues in the proceeding. Therefore, this factor does not weigh for or against South Carolina. *See* 10 C.F.R. § 2.309(c)(1)(vii). As to the extent to which South Carolina's participation may assist in developing a sound record, South Carolina asserts that its "participation would provide for full, contested consideration by [the Board] of the issue of whether the Commission can order the

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[9] 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.

[10] Order (Granting Stay of Proceeding), dated February 16, 2010 (unpublished).

withdrawal of an application with prejudice in light of the provisions of 42 U.S.C. § 10134(d)." Petition at 15. However, South Carolina has not shown that it will substantially assist in developing a sound record, as it does not proffer any admissible contentions. *See* 10 C.F.R. § 2.309(c)(1)(viii). Therefore, this factor weighs against South Carolina. To demonstrate "the possible effect of any decision or order that may be issued in the proceeding" on its interest, 10 C.F.R. § 2.309(c)(1)(iii), South Carolina argues that unless its Petition is granted and the State is made a party to the proceeding, it "might be held not to have a right to petition for review of [any Commission] decision [on the withdrawal motion] by a Court of Appeals." Petition at 11. However, grant of an intervention petition is not a prerequisite for judicial review. *See* 10 C.F.R. § 2.315(c) (participation as an interested government participant); *see also Massachusetts v. U.S.*, 522 F.3d 115 (1st Cir. 2008) (state that had been interested government participant appealed Commission's grant of license renewal). Therefore, South Carolina has not articulated the possible effect that any decision in this proceeding may have with respect to its interests regarding judicial review, and this factor also weighs against the State.

The remaining four factors weigh in favor of South Carolina. With respect to South Carolina’s right to be made a party to the proceeding, as discussed above, the Staff does not dispute the State's standing as a matter of right in this proceeding. *See* 10 C.F.R. § 2.309(c)(1)(ii). South Carolina asserts that the withdrawal of the LA could jeopardize the removal of "spent fuel and other nuclear material now being temporarily stored in South Carolina" to the Yucca Mountain Repository. Petition at 11; *see* 10 C.F.R. § 2.309(c)(1)(ii). While South Carolina concedes that "[i]t is possible that South Carolina would be able to challenge a dismissal of this action by the Commission either via Petition for Review, on the ground that the agency acted beyond its statutory authority, or via a civil action in a Court of Appeals as permitted by 42 U.S.C. § 10139(a)," it also argues that intervention in the proceeding is the only course that would allow the Board to rule upon South Carolina's

objections to the Motion to Withdraw. Petition at 13; *see* 10 C.F.R. § 2.309(c)(1)(v). Finally, South Carolina states that it "is not aware of any party to this proceeding whose interest is similar or identical to that of South Carolina." Petition at 14. Because South Carolina is a sovereign state with interests distinct from other admitted parties, it has shown that it is not likely that other existing parties will represent the State's interests. 10 C.F.R. § 2.309(c)(1)(vi).

After weighing the factors listed in 10 C.F.R. § 2.309(c)(1), with the consideration that the good cause factor is most important, the Staff's view is that the balancing test favors allowing South Carolina'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; s*ee also* Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*,* 54 Fed. Reg. 14,925, 14,937 (April 14, 1989) (A person denied such

status "may later come into compliance and be admitted to the hearing, assuming they meet all the requirements in § 2.1014 or 10 CFR 2.715(c) [currently 2.309 or 2.315(c)] for admission."). However, 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.

South Carolina claims that it does not have any documentary material because it seeks to intervene on only legal issues, which are based on undisputed facts. South Carolina Petition at 18-19. That statement does not comply with 10 C.F.R. Part 2, Subpart J requirements related to making documentary material available on the LSN. In order to certify that it has no documentary material, a petitioner must establish procedures and conduct training to ensure that documentary material will be identified if it exists. *See* 10 C.F.R. § 2.1009(a)(2),(3). In the absence of procedures and training designed to identify such material, a petitioner cannot make a good faith certification that it does not have any documentary material. In addition, once admitted to the proceeding, a party's participation is not limited to its initial proffered contentions. Parties may adopt contentions of other parties and raise late-filed contentions based on new information. *See* 10 C.F.R. § 2.309(f)(2), (3). Therefore, even if South Carolina does not have any documentary material at this time, it may at a later date. Because 10 C.F.R. Part 2, Subpart J has no provision that limits the requirement to make documentary material available to only factual contentions, petitioners must satisfy § 2.1003 before being admitted to the proceeding. 10 C.F.R. § 2.1012(b)(1); *High-Level Waste Repository*, LBP-09-6, 69 NRC at 383.

Because South Carolina has not certified, pursuant to 10 C.F.R. §§ 2.1003 and 2.1009, that it has made its documentary material available, or that it does not have any documentary

material, South Carolina should not be admitted to the proceeding until it has done so. 10 C.F.R. § 2.1012(b).

IV. Contention Admissibility

A. Contention Admissibility Requirements

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

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
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> (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.*, *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 400 (1991). In addition to the requirements set out above, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding." 10 C.F.R. § 2.335(a);

see also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003).

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

B. SOC-MISC-01—WITHDRAWAL OF APPLICATION WITHOUT CONGRESSIONAL AUTHORITY

This proposed contention argues that:

> The anticipated action by the Secretary in moving to withdraw the application with prejudice is beyond the authority of the Secretary. It is contrary to the requirement of Section 114(b) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10134(b), which requires that if the site designation is permitted to take effect (as has happened with the enactment of Public Law 107-200 (2002), then "the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site. . . ." (Emphasis added). This statute prohibits the Secretary from unilaterally withdrawing the application in the absence of further Congressional action, and thus any motion to that effect by the Secretary should be denied as void and without authority.

Petition at 19-20. 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 (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 __, slip op. at 6 (2010).

South Carolina does not explain how SOC-MISC-01 relates to a safety, security or technical issue with the LA. Instead, the contention merely states that "[i]t goes without saying

that the question of whether this proceeding should continue is one that is 'within the scope of the proceeding.'" Petition at 22. As support for this assertion, South Carolina states that "DOE can hardly contend otherwise, because it plans to file a motion that will raise the issue," but offers no further explanation. *Id.*

South Carolina's argument that DOE's intent to file a procedural motion places that motion within the scope of admissible contentions in this proceeding is unpersuasive.[11] The Commission made clear in the hearing notice that contentions are to relate to safety, security, and technical aspects of the LA. 73 Fed. Reg. 63,029, 63,031. Recently, the Commission found that a contention disputing the NWPA's mandate of geologic disposal is outside the scope of the instant proceeding. *High-Level Waste Repository*, CLI-10-10, 71 NRC at __, *slip op.* at 5. 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. South Carolina has not explained how either the motion to withdraw or SOC-MISC-01 relates to the safety, security, and technical aspects of the LA. Therefore, SOC-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

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[11] The Staff recognizes the Motion to Withdraw is an issue that will be addressed by the Board and admitted participants in the licensing proceeding. The Board has the power to "[r]egulate the course of the hearing and the conduct of the participants," "[d]ispose of procedural requests or similar matters," and "[d]ispose of motions," 10 C.F.R. § 2.319(g), (h), (p), and may place conditions on the withdrawal of an application, 10 C.F.R. § 2.107(a). The Commission’s contention rules, however, do not appear to contemplate intervention being based upon a contention that challenges a motion by a party in an ongoing proceeding. *See* 10 C.F.R. § 2.309(f)(1).

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 (1997) (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 SOC-MISC-01 is material to the findings the NRC must make in the proceeding, South Carolina states that "it goes without saying that the issue of whether this proceeding should continue is 'material to the findings the NRC must make,'" but offers no further explanation or support. Petition at 22. A petitioner must address all six contention admissibility criteria, and “no contention will be admitted for litigation in any NRC adjudicatory proceeding unless [the § 2.309(f)(1)] requirements are met.” *Changes to Adjudicatory Process,* 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (the Commission “will reject any contention that does not satisfy the requirements of” § 2.309(f)(1)). South Carolina's statement that the contention's materiality "goes without saying" does not address the contention admissibility requirement. Therefore, SOC-MISC-01 should be dismissed for failing to address 10 C.F.R. § 2.309(f)(1)(iv).

Even if the contention were viewed "in a light that is favorable to the petitioner," *Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998), and South Carolina's references to Nuclear Waste Policy Act (NWPA) § 114(b) elsewhere in the contention are considered, South Carolina has not demonstrated that the issue of whether DOE's proposed withdrawal of the LA violates § 114(b) is material to the findings the NRC would be required to make to determine "whether or not [DOE] will adequately protect the health and safety of the public and the environment" if granted a construction authorization. Therefore, SOC-MISC-01 should not be admitted.

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

An admissible contention must show that a “genuine dispute exists with the applicant/licensee on a material issue of law or fact,” identify either specific portions of, or alleged omissions from the application, and provide supporting reasons for the petitioner’s position. 10 C.F.R. § 2.309(f)(1)(vi). A contention that does not directly controvert a specific portion of the application, or identify specific additional information that the petitioner alleges was improperly omitted must be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1992), *review declined*, CLI-94-2, 39 NRC 91 (1994).

Here, South Carolina states that there is no disputed material issue of fact, but also states that "[e]qually clear, however, is the existence of a material issue of law, that is, the question of whether DOE has the power to withdraw the application, as discussed above." Petition at 23. However, South Carolina does not reference any specific portion of the LA in dispute. Nor does the State identify specific information that was improperly omitted from the application. Therefore, SOC-MISC-01 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi) and cannot be admitted.

Because SOC-MISC-01 does not meet the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.[12]

[12] However, if South Carolina is permitted to participate pursuant to 10 C.F.R. § 2.315(c), South Carolina could raise the arguments in SOC-MISC-01 in a brief in response to the Motion to Withdraw.

C. SOC-MISC-02—WITHDRAWAL OF APPLICATION IN VIOLATION OF SEPARATION OF POWERS

This contention argues that:

> For the same reasons set forth in the preceeding question, the doctrine of the separation of powers provides another basis for denying DOE the power to withdraw the application. The proposed withdrawal is not only directly contrary to the governing statute, it also seeks to have the Executive Branch determine matters which have already been determined by Congress, and thereby would constitute an executive encroachment on legislative power, as held in the authorities previously cited.

Petition at 23-24. For the reasons set forth below, this contention does not demonstrate that the issue raised is within the scope the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii); does not demonstrate that the issue raised is material to the findings 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

As with SOC-MISC-01, South Carolina states that SOC-MISC-02 complies with 10 C.F.R. § 2.309(f)(1)(iii) because "[i]t goes without saying that the question of whether this proceeding should continue is one that is 'within the scope of the proceeding'" and that "DOE can hardly contend otherwise, because it plans to file a motion that will raise the issue." Petition at 24. 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 5. South Carolina does not explain how SOC-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)(1)(iv): Materiality

To demonstrate compliance with 10 C.F.R. § 2.309(f)(1)(iv), SOC-MISC-02 states that "it goes without saying that the issue of whether this proceeding should continue is 'material to the findings the NRC must make,'" but does not elaborate further on this argument. Petition at 24. A contention that does not address each of the six admissibility factors is inadmissible. *Oyster Creek*, CLI-06-24, 64 NRC at 118. South Carolina's statement that the contention's materiality "goes without saying" does not address the contention admissibility requirement. Therefore, SOC-MISC-02 should be dismissed for failing to address 10 C.F.R. § 2.309(f)(1)(iv).

In addition, even if the contention is read in a light most favorable to the petitioner and statements elsewhere in the contention are considered, South Carolina does not relate the issue of whether DOE's motion to withdraw the application violates the principle of separation of powers to the ultimate determination to NRC must make on the safety of the LA or the adoption of the EIS. *See Millstone*, LBP-08-9, 67 NRC at 431. Therefore, SOC-MISC-02 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and cannot be admitted.

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

The contention states that there is no disputed issue of fact, but purports to raise a "clear . . . material issue of law, that is, the question of whether DOE has the power to withdraw the application." Petition at 25. 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, SOC-MISC-02 should not be admitted.

Because SOC-MISC-02 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.[13]

[13] However, if South Carolina is permitted to participate pursuant to 10 C.F.R. § 2.315(c), South Carolina could raise the arguments in SOC-MISC-02 in a brief in response to the Motion to Withdraw.

D. SOC-MISC-03: IF THE COMMISSION WERE TO GRANT DOE'S ANTICIPATED MOTION TO WITHDRAW THE APPLICATION, THAT GRANT WOULD EXCEED THE COMMISSION'S POWERS UNDER THE NWPA

Contention SOC-MISC-03 states that:

> If the Commission were to grant a motion to withdraw the application, such a grant would exceed the powers of the Commission, just as much as the Department's filing of the motion would exceed the powers of the Department [under] Section 114(d) of the [NWPA].

Petition at 25. 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

The contention argues that, because DOE has filed a motion to withdraw the LA, "[i]t goes without saying that the question of whether this proceeding should continue is one that is 'within the scope of the proceeding.'" Petition at 26. This argument is identical to those advanced in support of SOC-MISC-01 and SOC-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 5, but South Carolina 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

The contention states that "it goes without saying that the issue of whether this proceeding should continue is 'material to the findings the NRC must make.'" Petition at 26. 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. A contention that does not address each of the six admissibility factors is inadmissible. *Oyster Creek*, CLI-06-24, 64 NRC at 118. Because South Carolina's conclusory statement that the contention's materialitiy "goes without saying" does not actually address the materiality of the issues raised in the contention to the decisions the NRC must make with respect to the LA, the contention is inadmissible.

Further, nothing in the remainder of the contention explains the relationship between the issue raised, whether the Commission has the authority under the NWPA to grant the motion to withdraw the application, 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, SOC-MISC-03 does not meet the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and cannot 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. SOC-MISC-03 identifies neither a specific portion of the LA in dispute nor a specific omission from the LA. Therefore, this contention does not meet the requirement of 10 C.F.R. § 2.309(f)(1)(vi) and is inadmissible.

Because SOC-MISC-03 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1), the contention is inadmissible.[14]

[14] However, if South Carolina is permitted to participate pursuant to 10 C.F.R. § 2.315(c), South Carolina could raise the arguments in SOC-MISC-03 in a brief in response to the Motion to Withdraw.

E. SOC-MISC-04—ALL OF THE CHALLENGES IN SOUTH CAROLINA'S PETITION TO INTERVENE THAT WERE ADDRESSED TO DOE'S THEN-PROPOSED MOTION TO WITHDRAW APPLY EQUALLY TO THE ACTUAL MOTION TO WITHDRAW FILED BY DOE ON MARCH 3, 2010

On March 26, 2010, South Carolina filed a fourth contention supplementing its three previously-filed contentions. Supplement/Amendment to Petition of the State of South Carolina to Intervene, dated March 26, 2010 ("Supplement"). In SOC-MISC-04, South Carolina states that it intends to make explicit the point that, the three initial contentions, which "when filed were directed at the then-unfiled DOE Motion to Withdraw, apply with equal force to the actual Motion to Withdraw that was filed on March 3, 2010." Supplement at 2. South Carolina does not address the individual 10 C.F.R. § 2.309(f)(1) contention admissibility requirements, but states that "[t]he point-by-point analyses contained under the contentions of the original Petition to Intervene are incorporated herein by reference." *Id.*

To the extent that SOC-MISC-04 supplements or amends SOC-MISC-01, SOC-MISC-02, and SOC-MISC-03, the Staff does not dispute that the arguments contained in those contentions with respect to DOE's plans to file a motion to withdraw are equally applicable to the Motion to Withdraw, as filed on March 3, 2010. However, as discussed above, none of these contentions are admissible and, accordingly, SOC-MISC-04 is equally inadmissible.[15]

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[15] If South Carolina is permitted to participate pursuant to 10 C.F.R. § 2.315(c), though, South Carolina could raise the arguments in SOC-MISC-04, and its other proposed contentions, in a brief in response to the Motion to Withdraw.

CONCLUSION

For the foregoing reasons, the Board should deny South Carolina's petition to intervene, but should allow South Carolina to participate in the proceeding pursuant to 10 C.F.R. § 2.315(c), if requested.

Respectfully submitted,

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
this 29th day of March, 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 SOUTH CAROLINA PETITION TO INTERVENE AND SUPPLEMENT" in the above-captioned proceeding have been served on the following persons this 29th day of March, 2010, by Electronic Information Exchange.

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