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*Basically the  
supports the  
strawman responses  
and provides  
additional justification  
for them*

JAY E. SILBERG, P.C.

March 13, 1989

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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Re: Final Rulemaking on the Licensing Support  
System for the High-Level Waste Licensing  
Proceeding -- Request for LSS Advisory Committee  
Responses to Questions from Commissioner Curtiss

Dear Sir:

Your February 24, 1989 memorandum to Howard S. Bellman requested that members of the HLW Licensing Support System Advisory Committee provide their responses to a series of questions prepared by Commissioner Curtiss. The questions largely relate to the Topical Guidelines included in the Supplementary Information accompanying the proposed Licensing Support System (LSS) rule.

The February 24 memorandum included a "strawman" answer to each of Commissioner Curtiss' questions prepared by the NRC Staff and requested the views of the HLW LSS Advisory Committee as to whether the "strawman" answers accurately characterize the outcome of the Committee's deliberations.

The Industry Coalition, comprising the Edison Electric Institute, the Utility Nuclear Waste and Transportation Program (formerly the Utility Nuclear Waste Management Group), and the U.S. Council for Energy Awareness, in general agree with the "strawman" answers prepared by the Staff. We agree with the "strawman" answers to Questions 2, 5 and 7. We would, however, add the following additional responses to Questions 1, 3, 4, 6, 8 and 9. We believe that these additional responses, together with the "strawman" answers, provide a complete answer to Commissioner Curtiss' questions.

Question 1. Commissioner Curtiss' introduction to questions (a) - (f) interpreted a statement to the Commission by James Davenport, Special Deputy Attorney General to the State of

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Nevada, as suggesting that the Topical Guidelines reflected a judgment by the Advisory Committee as to the issues that would be relevant in the repository licensing proceeding. We do not read Mr. Davenport's statement as making such a suggestion. Nor do the Advisory Committee's negotiations reflect such a suggestion. The "strawman" answers correctly describe the role of the Topical Guidelines that was shared by all members of the Committee.

Question 3. This question asks whether the use of the Topical Guidelines in determining access to the LSS prior to the HLW proceeding might somehow impact the scope of issues to be litigated in the proceeding. The two issues are wholly separate. The proposed rule on contentions, § 2.1014(a)(2)(ii) - (iv), makes no reference to the Topical Guidelines or to the Pre-License Application Licensing Board's determination on access to the LSS by "potential parties" (which in turn is governed in part by reference to the Topical Guidelines). Conversely, the factors used to rule on a petition to intervene in the licensing proceeding, particularly the fact that the petitioner received access to the LSS (i.e., was a "potential party" under § 2.1008(c)), § 2.1014(c)(4), do not reference or relate back to the standards for admissibility of contentions in § 2.1014(a)(2).

Question 4. Commissioner Curtiss' question asks in part why information relating to alternative sites and alternative disposal technologies should be included in the LSS in light of the 1987 amendments to the Nuclear Waste Policy Act. During the course of the negotiated rulemaking, this question was discussed at some length. The justification, which was at least tacitly accepted by the parties, was that documentary material on alternative sites and alternative disposal technologies might include information that was relevant to the Yucca Mountain repository (or likely to lead to the discovery of such information). For example, a waste package design considered in connection with another site (or another disposal technology) might have some bearing on the waste package design for Yucca Mountain. Including such information in the LSS was therefore appropriate.

Question 6. This question raises the issue of whether the Topical Guidelines can be amended by the Commission without the concurrence of the Negotiating Committee. We believe that the Commission is not required to obtain concurrence by the Negotiating Committee before making changes in the Topical Guidelines. Commissioner Curtiss quotes from SECY-89-027 that the existing scope of the Topical Guidelines "was developed as part of the consensus process on the entire rulemaking." This statement is misleading. There was no consensus on the proposed

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rule. The protocol adopted for the negotiated rulemaking required unanimity for there to be "consensus." The Commission is therefore not bound by the rule as proposed by a majority of the negotiating committee. Even if there had been a consensus, i.e., unanimity, the Commission only committed to "issue for comment any proposed rule resulting from an consensus of the negotiating committee . . . ." 53 Fed. Reg. 29024, 29027 (August 5, 1987). It did not (and could not) commit to adopt as the final rule a consensus proposal, let alone a proposal which was not based on a consensus of the negotiating committee. At the outset of the negotiated rulemaking, the Commission stated,

The consensus is not the basis per se for the final rule which the agency will develop after traditional notice and comment procedures.

52 Fed. Reg. at 29024. The Commission is therefore free to modify the proposed rule however it sees fit, consistent with the requirements of the Administrative Procedure Act. While the Commission is free to modify the Topical Guidelines unilaterally, we have no objection should the Commission decide to seek the views of the Negotiating Committee or its successor prior to making such changes.

Question 8. Commissioner Curtiss asks about the procedures available for a party to challenge the LSS Administrator's determination that DOE has substantially complied with its LSS obligations. This certification, described in proposed § 2.1003(h)(1), is required before the repository application can be docketed under proposed Subpart J. Proposed § 2.1010 provides that the Pre-License Application Licensing Board shall rule on "disputes relating to the LSS Administrator's decision on substantial compliance pursuant to section 2.1003(h)." There is no basis for the suggestion that "full-flown adjudicatory procedures" might apply to the resolution of such disputes. The issue should be resolved on motions, with the board free to hear oral argument by counsel if it deems that such an additional step is necessary or helpful in reaching its decision.

Question 9. This question involves the Commission sua sponte rule, 10 CFR § 2.760a, and the fact that proposed § 2.1000 did not list § 2.760a among the provisions of Subpart G that would be applicable in the licensing proceeding for the geologic repository. Although the "strawman" answer correctly states that the Negotiating Committee did not discuss the sua sponte issue, the Industry Coalition was certainly aware that § 2.760a was excluded from those Subpart G sections listed in § 2.1000. We believe that this exclusion is entirely appropriate. In addition

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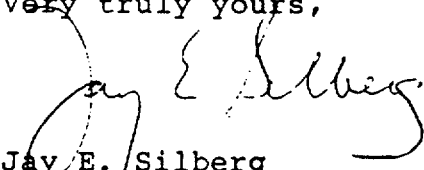
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to the reasons set forth in the "strawman" answer (i.e., required hearing, well-prepared intervenors), it has also been our experience that licensing boards have often been overly expansive in their use of the sua sponte authority. On occasions, some boards have even launched mini-proceedings to determine whether an issue arousing their curiosity would meet the tests for admitting a sua sponte issue. Sua sponte authority is unnecessary in the repository context and its exclusion could assist the Commission in completing the hearing in a timely manner.

We appreciate the opportunity to provide these answers and would be pleased to discuss this with the Commission and its Staff.

Very truly yours,

  
Jay E. Silberg  
Counsel to Industry Coalition

cc: James R. Curtiss  
Howard S. Bellman  
Francis X. Cameron  
Members, LSS Negotiating Committee

→ But exclusion of 2.760a is not necessarily exclusion of sua sponte authority. If 2.760a is not applicable, the ASLB will have whatever sua sponte authority any board has in a non-reactor OL proceeding - that could be sua sponte authority without limitation. [e.g. in a power reactor CP proceeding, ASLB can raise any add'l issues it feels it needs to have addressed in order to make the overall safety findings].