

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman  
G. Paul Bollwerk, III  
Paul S. Ryerson

_____	)	
In the Matter of	)	
	)	Docket No. PAPO-001
U.S. DEPARTMENT OF ENERGY	)	
	)	
(High Level Waste Repository:	)	ASLBP No. 08-861-01-PAPO-BD01
Pre-Application Matters, Advisory PAPO	)	
Board)	)	
_____	)	March 24, 2008

**NEVADA RESPONSE TO THE BOARD'S NOTICE AND MEMORANDUM OF  
MARCH 6, 2008 (REQUESTING INFORMATION FROM POTENTIAL PARTIES)**

**I. RESPONSE TO ADVISORY PAPO BOARD QUESTIONS**

The State of Nevada provides the following answers to the questions the Advisory Pre-License Application Presiding Officer ("PAPO") Board posed to potential parties in its March 6, 2008 Notice and Memorandum (Requesting Information from Potential Parties).

First, the number of contentions Nevada currently believes that it will prepare and submit in the Yucca Mountain repository construction authorization proceeding is 251-500. We emphasize that this is Nevada's current, best, good faith *estimate* of the number of contentions Nevada may file, but this estimate is very tentative and preliminary. In fact, Nevada has not prepared any final contentions at this time. This is because, among other reasons, there is no construction authorization License Application (LA) on file, a report on the results of Nevada's corrosion research in China is under preparation, critical documents underlying DOE's LA are

still missing, and there is no final EPA or NRC rule on the standards applicable to the conduct or results of the post-10,000-year performance assessment, the most important part of DOE's LA.<sup>1</sup>

Also, the number of contentions ultimately filed will depend on how the contentions are formatted, i.e., are there sub-contentions within contentions and are these treated as separate contentions? Should contention bases be reformatted as separate contentions? Nevada will adopt the most useful and practicable format in framing all of its contentions, without regard to the absolute number being filed.

Second, Nevada advises that its current, best, good faith estimate of the time realistically required to reply to answers is six months. This assumes that the applicant tries to narrow the scope of the contested proceeding by objecting to the admissibility of virtually every contention, as applicants have often done in the past, with the result that Nevada could be compelled to draft 251-500 replies to 251-500 objections. This assumes Nevada would prepare and draft, on average, as much as four replies per working day.

In this regard, Nevada notes that in its March 12, 2008 filing, Churchill, Esmeralda, Lander, and Mineral Counties provided a best, good faith estimate that they would need 30 days to reply to objections to 1-10 joint contentions. Assuming ten objections were filed to the joint counties' ten contentions, the counties are saying they need about three days per contention. In its March 13 filing, Lincoln County estimates it will need about one day per contention to reply, and in its March 19, 2008 filing, Inyo County estimates it will need about six days per contention to reply. If we apply a similar metric to Nevada, and assume there are 251-500 objections to an equal number of contentions (a range of one to six days per reply), the result is that Nevada

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<sup>1</sup> The document referenced in footnote 15 of the Advisory PAPO Board's Notice and Memorandum (DEN001574936) has not yet been fully evaluated. It appears to be the "Lead Lab's" recommendation to DOE, rather than an accepted reference for the LA. On February 8, 2008, in response to a congressional inquiry, DOE advised that neither the final Total Systems Performance Assessment nor the final Pre-Closure Safety Analysis in support of the LA had been completed.

needs 251-3,000 days to draft and file replies, as much as eight years. Nevada's estimate is a fraction of this. This is not intended to criticize the counties' estimate as too high, but to suggest that Nevada's estimate could be much too low.

## **II. RELATED CONTENTION ISSUES AFFECTING THE SCHEDULE**

The Notice and Memorandum notes (at p. 1) that the Commission authorized the Advisory PAPO Board to obtain input on "the broad range of procedural matters" expected to arise from the adjudication. The PAPO Board presiding over document disputes has endeavored to anticipate problems and propose solutions to them, but its mandate is limited. A much broader effort to anticipate and address problems with meeting the three-year schedule in 10 C.F.R. Part 2, Appendix D is required, and Nevada welcomes the opportunity afforded by the appointment of this Board to begin this endeavor. With this in mind, and without knowing what additional steps the Advisory PAPO Board has in mind, Nevada offers the following comments and suggestions regarding one deadline not mentioned in the Notice and Memorandum – the deadline for filing contentions – and a few other aspects of the Commission's contention practice.

As explained below, Nevada would like to raise with the Commission and Board some ideas on the possible solution to some extremely significant procedural difficulties occasioned by this unique proceeding – including the possibility that both the public interest and the fair, just and efficient adjudication of this proceeding might be better served by not using a system of contentions at all and instead using other methods of identifying and limiting the issues that have proved workable in civil litigation.

### **Background: The Procedural Problem**

As all parties recognize, this is a unique proceeding. This proceeding will call upon the Commission to decide whether to license the first nuclear waste repository in the world. The question of whether Yucca Mountain should be converted into a waste repository critically

affects every American – especially the scores of millions of people along transportation routes, the State of Nevada where DOE hopes to locate this facility, and the portions of California that lie along the path of the ground water. This decision involves scores of billions of dollars; decades, if not a century of potential construction, operation and maintenance; and an assessment of safety for at least one million years.

DOE's LA will be over 8,000 pages long and will include over 200 references. The references will total about 100,000 pages, and in addition, there are several hundred thousand pages of design information (March 13, 2008 panel presentation of E.F. Sproat at the 2008 NRC Regulatory Information Conference). One LA reference alone, the Total Systems Performance Assessment (TSPA-LA) model report, is about 3,500 pages long. *See* LSN Document DEN001574936. The texts of DOE's Yucca Mountain Supplemental Environmental Impact Statement and supporting references, which are fully challengeable by Nevada in the hearing, are thousands of pages long. DOE's Total Systems Performance Assessment in support of its recent Supplemental Environmental Impact Statement (the TSPA-SEIS) is on a hard drive with 150 gigabytes of underlying data (140 gigabytes of which are compressed, equal to 250 gigabytes of uncompressed data). In an LSN format, the TSPA-SEIS model would comprise 1 terabyte (1,000 gigabytes) of information (*see* DOE brief before the Commission in opposition to Nevada's appeal from denial of its motion to strike DOE's LSN certification at p. 30 and note 74). The TSPA-LA model could easily involve much more data.

Therefore, the Yucca Mountain LA, DOE NEPA documents, and supporting references will comprise more than 110,000 pages of detailed technical information and over 500 gigabytes of information. The LA alone has taken DOE over 20 years to prepare, at a cost of about \$1.3 million per page. The TSPA model report mentioned above, only one of the 200 references in the LA, had over 40 authors.

At this point, under the current rules, we do not know exactly how much time Nevada will have to review the LA that took DOE over 20 years to prepare, using thousands of experts and billions of dollars. As currently constituted, the Commission's Rules of Practice provide for petitions for leave to intervene (and contentions) in the Yucca Mountain licensing proceeding to be filed within 30 days of publication of the Notice of Hearing. This 30-day period follows whatever period of time the staff will take to review the LA for completeness and docketing. However, the amount of extra time is highly uncertain. The duration of the docketing review is not fixed by regulation. The NRC Yucca Mountain Review Plan suggests a time period of only three months NRC Staff informed Nevada and DOE a few months ago that the docketing review could take as many as six months, but a few days ago, NRC Staff informed Nevada that its docketing review would be completed in three months.

But whatever period of time this process takes will be a tiny fraction of the time DOE has had to prepare the LA, and the amount of work to be done by Nevada is staggering in relation to the time available to do it. For example, assuming the Staff takes three months to review the LA before docketing, and the docketed LA looks very much like the tendered one, Nevada lawyers and technical team leaders have four months to review the LA before contentions are due. Assuming a normal reading pace suitable for novels (rather than technical information) – say 30 pages an hour – it would take almost the first seven business *weeks* of this period just to read through the LA itself *once*, and the 100,000 pages of referenced technical information would take something like 20 additional business *months* to read through. Nevada may also need to master the 500 gigabytes of information, and gain some familiarity with the several hundred thousand pages of design information, in order to formulate, draft, and document contentions.<sup>2</sup>

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<sup>2</sup> 10 C.F.R. § 2.309(f) requires each contention to refer to the specific portion of the application in dispute. The same regulation also indicates that bases for contentions are based broadly on "documents or other information available at the time the petition is to be filed, such as . . . other supporting documents filed by an applicant or licensee or otherwise available to petitioner." 10 C.F.R. § 2.309(f)(2). Clearly, in drafting contentions, a petitioner

Nevada has a team of experts and lawyers, and therefore, some division of labor will be possible, but a small core group of experts and lawyers must still have a working knowledge of the LA and references as an integrated whole. Some Yucca Mountain documents will have been made available earlier on the LSN, but critical documents are still missing, and in any event, without the LA, it is impossible to know precisely how the documents will be used, if they are used at all.

It is instructive to compare the time the NRC has given its own Staff to perform its duties. Appendix D to 10 C.F.R. Part 2 gives NRC Staff a full 548 days after the notice of hearing to complete its safety evaluation report. If NRC Staff, with vastly more resources than Nevada, were asked to file early contentions, Nevada suggests that it could not come close to doing so within 30 days after the notice of hearing.

This is a staggering process and other practical facts make it all the more daunting. To begin with, DOE may amend and supplement its tendered application frequently, up until the date of docketing, making the tendered LA a moving target that cannot be evaluated fully and finally until after it is actually docketed. Applications for security clearances for Nevada experts and counsel were timely filed but are still pending. Nevada also depends in substantial part on DOE for provision of resources, and in the recent past, such annual resources have been significantly delayed by DOE or the appropriations process. If, at just the right moment, DOE delays funds, it can effectively guarantee that the work cannot be done on time.

Yet, as currently constituted, the Rules of Practice contemplate a sweeping waiver. If during the allotted time, Nevada is unable to formulate contentions, or unable to formulate them

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is accountable for the contents of the application. 10 C.F.R § 63.23 authorizes DOE to incorporate by reference materials filed with the Commission, and assuming DOE will incorporate the 200 references into its application, it would appear that a petitioner is accountable for these as well. If, however, a petitioner is accountable for every other scrap of information available at the time the petition is due, such as several hundred thousand pages of design information, tens of millions of pages of documents on the LSN, and terabytes of computer codes, runs, and stored data, under penalty of waiver, then 10 C.F.R. § 2.309 (f) faces a grave due process challenge unless the time for filing contentions and bases is measured in years, not months. In responding here to the PAPO Advisory Board, Nevada assumed that its review obligation extended only to the LA, environmental impact statements, and other materials incorporated into these documents by reference and available in NRC's public ADAMS network.

sufficiently to meet whatever scrutiny follows from DOE and NRC, millions of stakeholders present and future face the prospect that the Commission will refuse to allow significant safety and environmental issues to be contested in a hearing. Both public policy and simple due process require that Nevada have sufficient time to respond to a filing over 20 years in the making without facing an effective waiver.

Although the schedule's affect on Nevada is especially dramatic, Nevada is certainly not the only party affected. As the Advisory PAPO Board noted, answers to Nevada's contentions must be filed within 25 days thereafter and petitioners may file replies to answers within 7 days after service. 10 C.F.R. §§ 2.309(b)(2), 2.309 (h)(1), 2.309(h)(2), 2.1026(a), and 10 C.F.R. Part 2, Appendix D. These limits may all be extended, but extensions beyond 15 days require referral to the Commission. 10 C.F.R. § 1026(b). If, using the high end of Nevada's good faith estimate, Nevada files 500 contentions, DOE and NRC Staff (and perhaps others who may be allowed to respond) will need to craft objections at the pace of 20 a day (one every 24 minutes for every business hour) to meet this burden. Replies will need to be generated at the rate of 71 per day (about one every seven minutes). And if the Licensing Boards or Commission spend as much as two hours on each contention, it would take about four person-months to rule upon them.

In sum, if the Commission's usual contention practice is followed in this unique proceeding, and strict but reasonable time limits are set for contentions, answers, replies, and rulings, at least one-third, and probably most of the three-year period allotted for the completion of the proceeding in Appendix D, will be consumed by arguments and rulings on contentions, leaving grossly insufficient time to the actual evidentiary hearings. Nevada respectfully suggests that one solution suggested by the Advisory PAPO Board in its Notice and Memorandum, more specific labeling and better organization of contentions, is akin to rearranging the deck chairs on the Titanic.

### **Some Alternatives**

Given the above, Nevada suggests that the potential parties work with the Advisory PAPO Board (and ultimately the Commission, which has authority to set the rules) to ask some hard questions about what useful purpose will be served by the early filing of both contentions and their supporting bases in this unique case and whether there may be better ways to define the specific issues for this hearing. In some NRC cases, the full contention process serves as a very early means to tell whether genuine issues will be raised and a formal hearing is warranted, but that will not be an uncertainty in this case. Moreover, most cases involve vastly fewer contentions. An objective examination of Appendix D suggests that the only listed prerequisites to commencement of the hearing on day 720 are the completion of discovery on day 608 and summary disposition rulings on day 698, both of which appear to be severable from a requirement to file contentions and bases within 30 days after the notice of hearing, considering among other things that most document discovery is via the LSN.<sup>3</sup>

In writing this, Nevada, of course, cannot presume that the Advisory PAPO Board or the Commission will agree with this approach. Accordingly, Nevada has also sought to evaluate what types of measures might ameliorate the practical problems involved. Nevada is not sure that an alternative will work. However, assuming the Advisory PAPO Board and the Commission decide that an attempt must be made to meet Appendix D using the usual contention practice, then Nevada respectfully suggests the following:

- (1) The Advisory PAPO Board should ask NRC Staff whether (a) it can commit to a minimum docketing review period, and (b) it could agree on reasonable ground rules to limit the number and scope of amendments or supplements to the tendered LA before docketing, or before restarting the clock on the docketing

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<sup>3</sup> A petition for rulemaking to amend Appendix D to 10 C.F.R. Part 2 appears not to be necessary. The Commission may extend any of the deadlines in Appendix D by any amount of time without amending its rules.

review. NRC Staff's responses would help the Advisory PAPO Board determine how much additional time may be added, as a practical matter, beyond the 30-day period specified in the notice of hearing. If NRC Staff were to agree to a minimum docketing review period significantly in excess of three months, and amendments and supplements were suitably limited, requests for extensions of the 30-day contention filing period in Appendix D and 10 C.F.R. § 2.309 might be avoided, and a decision within the three-year period in Appendix D would be more likely.

- (2) In most cases, applicants object to virtually every contention, often employing arguments that are only appropriate to summary disposition (*i.e.*, a merits decision based on written papers). Steps should be taken to avoid this. Among other things, an objection to a contention on other than legal grounds should include an affidavit or declaration by a qualified expert that he or she (a) cannot understand the contention, or (b) believes no genuine issue is raised. DOE should also be told that it gets "one shot" at a summary ruling on any particular contention. An objection to a contention that, upon analysis, seeks resolution of a genuine factual issue on the basis of the papers (contention basis and answer) should not only be denied, but it should also preclude DOE from later moving for summary disposition on that contention. Otherwise, DOE has everything to gain, and nothing to lose, by consuming everyone's time and resources by filing merits objections at the early contention stage.
- (3) There are no limits on the number and scope of post-docketing amendments or supplements to the application. Each amendment or supplement gives rise to a possible opportunity to file new contentions, which have the potential to disrupt

schedules. Amendments and supplements numbering 20 or more are not uncommon in complex cases. Amendments and supplements here should be limited to those necessary to respond to NRC Staff's requests for additional information, and the NWPA deadline should be calculated from the time of filing of the last substantive amendment or supplement. Appendix D should be adjusted accordingly.<sup>4</sup>

- (4) NRC Staff should be instructed to limit its participation in the proceeding. It should be told that it should participate only (a) when its institutional knowledge and perspective would contribute to resolution of an issue, for example interpretation of a Commission regulation, (b) to preserve and promote its ability to argue that the LA should be denied or conditioned, contrary to DOE's position on the matter, or (c) to defend its NEPA review, if any. For example, there is no reason why NRC Staff should answer every safety or security contention because these contentions are directed at DOE's LA, not the Staff's Safety Evaluation Report. Limiting the Staff's role would save substantial NRC Staff resources and, by limiting the number of filings, expedite the proceeding. Nevada would be willing to discuss corresponding limits on discovery against NRC Staff.

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<sup>4</sup> Nevada recognizes that an ASLB has no power over how the NRC Staff does its review. However, the Commission may exercise such power, and nothing precludes the Board from making recommendations.

Respectfully Submitted,

*(signed electronically)*

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NUCLEAR REGULATORY COMMISSION**

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	)	Docket No. PAPO-001
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP No. 08-861-01-PAPO-BD01
(High Level Waste Repository:	)	
Pre-Application Matters, Advisory PAPO	)	
Board)	)	March 24, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing State of Nevada's Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (\*)).

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