

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository:
Pre-Application Matters, Advisory PAPO
Board)

Docket No. PAPO-001

ASLBP No. 08-861-01-PAPO-BD01

April 4, 2008

MEMORANDUM

(Requesting Input from Potential Parties on Format for Contentions)

On March 6, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board or Advisory Board) issued a Notice and Memorandum requesting information from potential parties to the possible adjudication regarding an application by the Department of Energy (DOE) for authorization to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada.¹ As explained in that Notice and Memorandum, the Advisory Board's purpose is to help both potential parties and licensing boards address the admissibility of contentions in any such proceeding effectively and efficiently.

Responses were received from DOE; the NRC Staff; the State of Nevada (Nevada); the Nevada counties of Churchill, Esmeralda, Lander, and Mineral (jointly); the Nevada counties of Clark, Nye, Eureka, and Lincoln; the Nuclear Energy Institute; and the California county of Inyo.

¹ "Potential party," as it is being used by the Advisory Board (in the absence of some other designation or definition), means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definitions of "party," "potential party," or "interested governmental participant" under 10 C.F.R. § 2.1001.

Collectively, the responses suggest that potential parties may file 650 or more contentions, which is five times the largest number filed in any Nuclear Regulatory Commission proceeding since the contention admissibility standards were revised in 1989. Moreover, as Nevada recognized, the total could even be substantially higher, depending on whether “sub-contentions” are allowed.²

Accordingly, in light of the number of contentions that will likely have to be addressed within the rigorous schedule established by 10 C.F.R. Part 2, Appendix D, the Advisory Board requests comments from potential parties concerning whether employing a prescribed format for contentions (as well as answers and replies) would expedite the process.³ We remind potential parties that the agency’s requirements associated with the submission and admission of contentions are intended to perform three principal functions: (1) “focus[] the hearing process on real disputes susceptible of resolution in an adjudication”; (2) place the parties on notice of a “petitioner’s specific grievances and thus give[] them a good idea of the claims they will be either supporting or opposing”; and (3) ensure that full adjudicatory hearings are triggered only by contentions for which at least some minimal factual and legal foundation has been proffered in support.⁴ Moreover, the Commission’s regulations require that, for “each” contention, the

² Nevada Response to the Board’s Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008) at 2 [hereinafter Nevada Response].

³ At this time, the Advisory Board invites comments directed primarily at the format of contentions, although we contemplate that standards for contentions would ultimately require corresponding standards for answers and replies.

⁴ See Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

request or petition must provide a “specific” statement of “the” issue of law or fact to be raised or controverted.⁵

We recognize that in other cases licensing boards have sometimes admitted very broad or multi-part contentions. The Advisory Board’s preliminary opinion, however, is that, in any HLW proceeding, the purposes of the contention review process, adherence to the language of the controlling regulations, and efficient case management will all best be served if the parties submit single issue contentions. Specifically, it is our hope and expectation that, once ruled upon, for the most part contentions will clearly define the relevant issues for eventual rulings on the merits, and not require that the parties or licensing boards devote substantial resources to further narrow or clarify them.

Further, it is the Advisory Board’s preliminary opinion that, to facilitate briefing and decisions concerning the admissibility of potentially hundreds or even thousands of contentions, it would be helpful if contentions were submitted initially in a uniform format, employing a uniform protocol for demonstrating compliance with the criteria for admissibility and a uniform system for referencing or attaching all supporting materials.

With these overarching principles in mind, we invite potential parties to comment on the following issues:

- A. In light of the circumstances described above and the language of 10 C.F.R. § 2.309(f)(1)(i), should we recommend that parties be required to file contentions in a uniform format?
 - 1. If not, please describe how employing a uniform format would be burdensome or otherwise inappropriate.

⁵ 10 C.F.R. § 2.309(f)(1)(i).

2. Would any organizational format be superior to one that calls upon each potential party to address separately, in order and clearly labeled, each of the six requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi)?
 3. Should contentions of omission – that is, those asserting “that the application fails to contain information on a relevant matter as required by law”⁶ as well as those asserted under the National Environmental Policy Act (NEPA) – be clearly identified as such, and specify what law (that is, statutes, regulations, or case precedents) requires inclusion of the allegedly missing information?
 4. Should contentions raising only legal issues be clearly identified as such?
- B. Should the parties clearly label their contentions on the first page, in a manner that might facilitate allocating them among licensing boards, as well as among counsel with primary responsibility for preparing answers? If not, why not?
1. What subject categories would be most useful for such labeling (for example, NEPA, safety, miscellaneous)?
 2. Would it also be useful for such labeling to include a reference to the document from which the contention is drawn (for example, license application, environmental impact statement) and, if so, at what level of specificity (that is, at what subsection level)?
 3. Please comment on the usefulness of the possible labeling systems described in Attachment A.

⁶ 10 C.F.R. § 2.309(f)(1)(vi).

- C. Should contentions employ a uniform system for referencing or attaching all supporting materials?
1. For non-Licensing Support Network (LSN) documentary material or expert analysis, would it be sufficient to cite to an active, publicly-accessible internet universal resource locator (URL)? If not, why not?
 2. For LSN documentary material, would it be sufficient to provide the LSN accession number of the document? If not, why not?
 3. Should all other materials (other than readily available legal authorities) be electronically attached to each intervention petition? If not, why not?
 4. Alternatively, should all supporting materials (other than readily available legal authorities) be electronically attached to each intervention petition? If not, why not?
 5. Under either of the two preceding alternatives (C.3 and C.4), would attaching supporting materials be infeasible in light of the Commission's requirement that documents exceeding 50 megabytes must be transmitted in multiple segments of 50 megabytes or less?⁷
- D. Finally, we invite (1) DOE to provide further details regarding its proposals for achieving the Appendix D milestones;⁸ (2) comments from any potential party

⁷ 10 C.F.R. § 2.1013(c)(1)(ii). In this regard, we note that the agency currently plans to have in place prior to the submission of HLW hearing petitions a new version of the current E-Filing system that will include a "bundling" functionality that will permit the identification of multi-part electronic submissions that constitute a single filing.

⁸ See U.S. Department of Energy's Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 24, 2008) at 2 n.1

regarding Nevada's suggestions for organizing the hearing process;⁹ and (3) suggestions from any other potential party concerning these matters.

Potential parties should organize their responses to correspond to the issues as set forth above.

Potential parties that wish to comment should file their responses through the agency's E-Filing system and serve them on the service list for the Advisory PAPO Board proceeding, docket number PAPO-001,¹⁰ no later than Monday, April 28, 2008. The Advisory Board will

⁹ See Nevada Response at 8-10. The Advisory Board has already received, and will consider, the NRC Staff's Reply to Nevada's Response, filed April 3, 2008, and invites the Staff to submit additional comments if it wishes. See NRC Staff Reply to Nevada Response to Board Notice and Memorandum of March 6, 2008 (Apr. 3, 2008).

¹⁰ This requires a certificate of service that, at a minimum, lists the individual names and e-mail addresses of (1) the representative(s) of each potential party; (2) the Licensing Board members; and (3) the Office of the Secretary on which E-Filing service is made, based on the service list in the E-Filing system as of the time of filing.

convene a conference at the Las Vegas Hearing Facility on Wednesday, May 14, 2008, to discuss these and other matters. Further details concerning that conference will be announced shortly.

The Advisory Pre-License Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland

April 4, 2008

ATTACHMENT A
(Proposed Labeling Format for Initial Contentions)

Each contention would include the following labeling elements:

Option 1 – Each contention would be designated using the following elements:

- A. An acronym that reflects the specific portion of (1) the Department of Energy (DOE) license application(LA)/environmental impact statement (EIS) document; or (2) the NRC Staff Position Statement on adoption of the DOE EIS (PSA) from which the contention is drawn or, if the contention reasonably cannot be attributed to a particular DOE LA/EIS document or the PSA, a miscellaneous designation:

DOE License Application - General Information:	LA-GI
DOE License Application - Safety Analysis Report:	LA-SAR
DOE Supplemental Environmental Impact Statement:	SEIS
DOE SEIS for Rail Transportation - Summary:	SEIS-RT-S
DOE SEIS for Rail Transportation - Rail Corridor:	SEIS-RT-RC
DOE SEIS for Rail Transportation - Rail Alignment:	SEIS-RT-RA
NRC Staff Position Statement on Adoption of DOE EIS	PSA
Miscellaneous:	MISC

To the extent contentions arise subsequent to publication of the hearing opportunity notice that relate exclusively to entirely new licensing documents, additional subject category designations would be provided by the presiding officer.

- B. For each contention based on the DOE LA or SEIS/SEIS-RT, a number that corresponds to the specific numerical subdivision of that document from which the contention is drawn. If more than one contention is drawn from a particular subdivision, the initial contention would be given the designation “A” after the numeral, with an alpha designation assigned to each subsequent contention from that subdivision.

For example, the designation LA-GI-1.1.3.2-B would denote the second contention sponsored by a potential party based on subdivision 1.1.3.2 of the General Information portion of the DOE LA.

If there are more than twenty-six contentions based on the same subdivision so that A-Z have already been used to label the contentions, the numbering would continue with AA, AB, AC, though ZZ.

Any contentions that are asserted to have their basis in the Staff PSA would be numbered sequentially. The same would be true for any miscellaneous contentions that are asserted to have their basis in a source or document other than the DOE LA or SEIS/SEIS-RT or the Staff PSA, which would also include a designation indicating whether the primary emphasis of the contention is a safety or environmental issue.

- C. A short, descriptive title unique to the particular contention:

Contention LA-GI-1.1.3.2-B: Application Fails to Discuss Pre-Closure Dismantling of Subsurface Radiation Monitoring Facility

- D. A unique potential party designation:

A unique three-letter designation for each potential party to the proceeding would be incorporated into the beginning of the contention number for any contention filed by that potential party (e.g., Contention XXX-LA-GI-1.1.3.2-B). That participant-identifier also would be used as the initial part of the number associated with each evidentiary hearing exhibit subsequently submitted by that potential party.

Option 2 – Each contention would be designated using the following elements:

- A. An acronym that designates the subject matter of the particular Department of Energy (DOE) licensing document from which it is drawn or, if the contention cannot be attributed to a particular licensing document, a miscellaneous designation:

DOE License Application (LA), including the Safety Analysis Report (SAR): SAFT (Safety/Technical Contention)

DOE Supplemental Environmental Impact Statement (SEIS), any of the Rail Transportation Supplements (RTS), or the NRC Staff Position Statement on Adoption of the DOE EIS (PSA): NEPA (National Environmental Policy Act-related Contention)

Miscellaneous: MISC

- B. A number that sequentially designates the particular contention in that subject matter category and a short, descriptive title that is unique to that contention:

SAFT-352: Application Fails to Discuss Pre-Closure Dismantling of Subsurface Radiation Monitoring Facility

- C. A unique potential party designation:

A unique three-letter designation for each potential party to the proceeding that would be incorporated into the beginning of the contention number for any contention filed by that potential party (e.g., Contention XXX-SAFT-352). That participant-identifier also would be used as the initial part of the number associated with each evidentiary hearing exhibit subsequently submitted by that potential party.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. PAPO-001
	)	
(Advisory Pre-License Application:	)	
Presiding Officer Board	)	
(Advisory PAPO Board)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ADVISORY PAPO BOARD MEMORANDUM (Requesting Input from Potential Parties on Format for Contentions) have been served upon the following persons by Electronic Information Exchange.

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