

April 28, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADVISORY PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD

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

THE NUCLEAR ENERGY INSTITUTE'S RESPONSE TO THE
ADVISORY PAPO BOARD'S APRIL 4, 2008 MEMORANDUM

Pursuant to the Advisory Pre-License Application Presiding Officer Board's ("Advisory PAPO Board") April 4, 2008 Memorandum (Requesting Input from Potential Parties on Format for Contentions) ("Memorandum"), the Nuclear Energy Institute ("NEI") hereby responds to the questions contained therein. Memorandum at 3-6.

A. Question A

In response to Question A, NEI agrees that the Advisory PAPO Board should recommend that parties be required to file contentions in a uniform format. In response to the applicable sub-questions, NEI submits:

2. NEI is not aware of an organizational format that would be superior to one that calls for 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)(i)-(vi).

3. Contentions of omission should be clearly identified as such, and should specify what law requires inclusion of the missing information.
4. Potential parties should be required to identify contentions that raise only legal issues. This would allow such contentions to be put on a separate track for briefing and decision. Such designation would also avoid subsequent disputes as to the scope of the contention.

B. Question B

In response to Question B, NEI agrees that the Advisory PAPO Board should recommend that the parties be required to clearly label each contention on the first page of each contention. In response to the applicable sub-questions, NEI submits:

1. In general, contention subject categories would be useful to allocate contentions among licensing boards and also the counsel with primary responsibility for preparing answers. The subject categories that would be most useful include, but are not limited to, Safety, Environmental, Emergency Planning, Physical Security, Quality Assurance, Technical Qualifications, Management Qualifications, and Miscellaneous.

2. It would be useful for the contention label to include a reference to the document from which the contention is drawn. It would be particularly useful if the contention identifies the most specific subsection of the referenced document. This will direct the reader to the specific portion of the licensing document the petitioner seeks to controvert. It would not be useful if a reference were made to, for example, the environmental report as a whole, or even a specific chapter of the environmental report because the reader would not know with any specificity the portion of the document being challenged.

3. NEI supports Option 1 of the two labeling systems proposed by the Board. Among other things, the labeling format in Option 1 includes a number that corresponds to the specific numerical subsection of the document from which the contention is drawn.

NEI supports using acronyms reflecting the specific portion of the DOE documents or NRC position statement from which the contention is drawn. Regarding the specific suggestions offered in Option 1, NEI believes the “LA-SAR” acronym should be broken down into a separate category for each major SAR subdivision as follows:

- | | |
|--|-------------|
| • Pre-Closure | LA-SAR-PRC |
| • Post-Closure | LA-SAR-POC |
| • Research and Development
Program for Safety Questions | LA-SAR-RDSQ |

- Performance Confirmation LA-SAR-PC
- Management Systems LA-SAR-MS

In addition, NEI believes that “DOE SEIS for Rail Transportation” does not need to be broken down into sub-categories (*e.g.*, SEIS-RT-S to indicate the Summary section). One acronym for all rail transportation contentions should be sufficient.

C. Question C

In response to Question C, NEI believes that the Advisory PAPO Board should recommend that contentions employ a uniform system for referencing or attaching supporting materials at the initial contention phase. In response to the applicable sub-questions, NEI submits:

1. For non-Licensing Support Network (“LSN”) documentary material or expert analysis, NEI does not believe that it would be sufficient to cite to an active, publicly accessible internet universal resource locator (“URL”). Although the Advisory PAPO Board’s question is premised on the URL being publicly accessible, URLs may become deactivated due to the passage of time or because of some technical change to the website hosting the URLs. This issue will likely be more frequent with the passage of time. For example, a URL that is active at the contention admission stage may not be active at the summary disposition stage. As discussed in response to Question C.3., NEI believes that all non-LSN

material other than readily available legal authorities should be attached to the intervention petition.

2. For LSN documentary material, it is sufficient that a party include the LSN accession number of the document along with the full citation (i.e., document title, date, page number, etc.) for the referenced documentary material.
3. NEI agrees that all non-LSN material other than readily available legal authorities should be attached to the intervention petition, *with the exception of* materials specifically excluded from the LSN under 10 C.F.R. § 2.1005.
4. NEI does not agree that all supporting materials (other than readily available legal authorities) should be electronically attached to each intervention petition. By the very nature of the conduct of discovery in this proceeding, parties and potential parties are required to have access to, and participate on, the LSN. With such access, parties and potential parties should be able to obtain copies of the vast majority of supporting materials referenced in the intervention petition on the LSN, thus obviating the need to include copies of LSN material with the intervention petition.
5. Under Alternative C.3., attaching all other supporting materials (i.e., non-LSN material other than readily available legal authorities) should

be feasible in light of the Commission's 50 megabyte limitation because NEI expects the amount of such supporting materials to be limited. Aside from the stated exclusions, the Commission's regulations require that parties and potential parties make all documentary material available on the LSN. 10 C.F.R. § 2.1003. Documentary material includes any information upon which a party or potential party intends to rely and/or cite to in support of its position in the proceeding. 10 C.F.R. § 2.1001. Thus, most of the material supporting a contention should be on a participant's LSN.

D. Question D.2.

In response to the State of Nevada's suggestions for organizing the hearing process¹, NEI submits:

1. NEI agrees with the NRC Staff's position² that the length of the docketing period is solely within the NRC Staff's discretion. The Board should not recommend that the Commission set an arbitrary, minimum time period for its docketing review. Nor should the Board, *ex ante*, suggest limits on the number or scope of amendments that can be made to the license application because this would unnecessarily restrict DOE's ability to file amendments to the license application. See Staff Reply at 3 & n.3. That

¹ Nevada Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008) ("Nevada Response").

² NRC Staff Reply to Nevada Response to Board Notice and Memorandum of March 6, 2008 (Apr. 3, 2008) ("NRC Staff Reply") at 2-3.

DOE may be required to provide additional information during the acceptance review is specifically contemplated by the Commission's regulations. 10 C.F.R. § 2.102(a). If DOE develops a better method of addressing a safety, environmental, or other issue, it should amend the application accordingly. The interest here is in a safe and environmentally sound geologic repository, not arbitrary limitations on the proceeding.

2. NEI opposes Nevada's suggestion that DOE be restricted as to how it may answer contentions. Nevada suggests that "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." Nevada Response at 9. Nevada's suggestion impermissibly seeks to rewrite the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi). To be admitted into the proceeding, a contention must satisfy all of the admissibility criteria – including "provid[ing] a concise statement of the alleged facts or expert opinions which support" the contention (10 C.F.R. § 2.309(f)(1)(v) (emphasis added)) and providing "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." 10 C.F.R. § 2.309(f)(1)(vi) (emphasis added).

In answering contentions, DOE has the right to argue against a contention's admissibility based on its failure to meet any of the

requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Nevada cannot rewrite the rules to its advantage. DOE has the right under NRC rules to demonstrate that a contention has provided an insufficient factual basis. In other words, if the contention on its face has the facts wrong, DOE can and should argue that the contention should not be admitted on that basis. Such arguments need not wait until the summary disposition or merits stage of the proceeding.

NEI also opposes Nevada's suggestion that DOE should only get one chance at a summary ruling on a particular contention. This is a thinly veiled attempt by the State of Nevada to divert the proceeding into frivolous and wasteful litigation over whether, "upon analysis" (Nevada Response at 9), an answer to a contention reads more like an attempt at summary disposition. Moreover, Nevada's suggestion is contrary to the Commission's regulations. Those regulations provide that the presiding officer's First Pre-Hearing Conference Order will identify participants in the proceeding, admit contentions, and set discovery and other schedules. See 10 C.F.R. Part 2 App. D. The presiding officer is not given the power at this stage to limit a party's right to later seek summary disposition of an issue. In addition, under 10 C.F.R. § 2.1000, the procedures for the high-level waste repository proceeding do not take precedence over 10 C.F.R. § 2.710, Motions for Summary Disposition. That regulation provides in relevant part,

Any party to a proceeding may move, with or without supporting affidavit, for a decision by the presiding officer in that party's favor as to all or any part of the matters involved in the proceeding. Summary disposition motions must be filed no later than twenty (20) days after the close of discovery.

10 C.F.R. § 2.710(a). The only limitation on summary disposition motions is that they must be filed no later than 20 days after the close of discovery.

Id. Nothing in the regulation suggests that the presiding officer can preempt any party from later filing motions for summary disposition based on its answers to contentions, which will be filed well in advance of the close of discovery.

3. For the same reasons discussed in response to Nevada's first suggestion, supra pp. 6-7, NEI also opposes Nevada's suggestion that post-docketing amendments or supplements to the application be limited. Indeed, this and similar suggestions have previously been rejected in other licensing proceedings and contravenes the "dynamic licensing process followed in Commission licensing proceedings." See Entergy Nuclear Vermont Yankee L.L.C. & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 N.R.C. 749, 753 (2004), quoting Curators of the University of Missouri (Trump-S Project), CLI-95-8, 41 N.R.C. 386, 385 (1995).

NEI also opposes Nevada's suggestion that the limitation on the time allowed to conduct the hearing be calculated from the time of the filing of the last substantive amendment or supplement. The Commission has

already interpreted the Nuclear Waste Policy Act’s (“NWPA”) limitation on the proceeding’s length as commencing with the docketing of the application.³ This interpretation is reflected in the Commission’s high-level waste repository hearing schedule contained in 10 C.F.R. Part 2 Appendix D. 66 Fed. Reg. at 29,453. Nevada offers no reason to depart from the Commission’s longstanding practice “to tie hearing schedules to the docketing of a license application.” *Id.* Further, Nevada’s suggestion begs the questions – left unanswered by the State – of what should qualify as the “last substantive amendment or supplement”, and how does one know when the last one is filed? It seems that Nevada’s suggested approach would restart the clock each and every time an amendment to the LA was filed, which would eviscerate the statutory command set forth in the NWPA. It has been a universal and longstanding practice to amend license applications during the NRC Staff’s review process. Therefore, Congress certainly recognized the likelihood that the license application would be amended during the course of the NRC review when it enacted the limitation on the proceeding’s duration. With its suggestion, Nevada baldly attempts to turn a device meant to expedite the proceeding into one that will delay it – perhaps indefinitely.

³ Final Rule, Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,453 n.1 (May 31, 2001).

4. For the reasons set forth by the NRC Staff (Staff Reply at 3-4), NEI opposes Nevada's suggestion that the NRC Staff limit its participation in the proceeding. Indeed, 10 C.F.R. § 2.1001, which grants the NRC Staff party status in this proceeding, contrasts with other regulations that provide the Staff with the option of participating in a proceeding, such as a Subpart L proceeding. See 10 C.F.R. § 2.1202(b)(1) ("The NRC staff is not required to be a party to a proceeding under this subpart").

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing "Nuclear Energy Institute's Response to the Advisory PAPO Board's April 4, 2008 Memorandum" has been served via the Nuclear Regulatory Commission's Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,



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