**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

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| In the Matter of | ) | |
| | ) | 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) | ) | |
| | ) | April 28, 2008 |

**NEVADA'S RESPONSES TO ADVISORY PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD'S APRIL 4, 2008 MEMORANDUM**

The State of Nevada provides the following responses to the Advisory Pre-License Application Presiding Officer (APAPO) Board's April 4, 2008 Memorandum.

## I. SINGLE ISSUE CONTENTIONS

The APAPO Board suggests (Memorandum at page 3) that all contentions should be "single issue" contentions. By this, Nevada understands the APAPO Board to mean that potential parties should not use the brief explanations of contention bases required by 10 C.F.R. § 2.309(f)(1)(ii) as an indirect means to draft sub-contentions. Nevada does not object in principle to this concept, although in practice this will lead to a substantial duplication of effort in satisfying the requirements of 10 C.F.R. § 2.309(f)(1)(iii-vi). This would be true, for example, if numerous single issue contentions state that a particular sentence in the application is untrue, differing only in the reason given in support of the contention statement.

## II. UNIFORM FORMAT

**Question A**

1. Nevada does not object to a uniform but reasonable format for contentions.

2. For the reasons given below, Nevada objects strongly to a requirement that each contention address separately, in order and clearly labeled, each of the six requirements of 10 C.F.R. § 2.309(f)(1)(i-vi). Instead, Nevada makes an alternative suggestion that would serve the same purposes.

The requirements for admission of contentions are set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi). These six requirements are as follows:

(i) There must be "a specific statement of the issue of law or fact to be raised or controverted."

(ii) There must be "a brief explanation of the basis for the contention."

(iii) There must be a "demonstrat[ion] that the issue raised . . . is within the scope of the proceeding."

(iv) There must be a "demonstrate[ion] that the issue raised . . . is material to the findings the NRC must make to support the action that is involved in the proceeding [granting the application]."

(v) There must be "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 the 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."

(vi) There must be "sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." This 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 provide information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."

All of these requirements are related to each other. Item (1) is the "contention" that serves to define the issue. Item (ii) seems to be unnecessary given items (v) and (vi), but apparently it is intended to help define the scope of item (i), the contention itself. If an issue is "material to the findings the NRC must make to support the action that is involved in the proceeding [granting the application]" (item (iv)), it would follow that it is also "within the scope of the proceeding" (item (iii)), and *vice versa*. *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert denied*, 469 U.S. 1132 (1985). Items (v) and (vi) are closely related, because item (vi) explains that what is alleged in satisfaction of (v) must also show that there is a "genuine dispute" on a "material issue," and include appropriate references to the LA or NEPA document or, in information is alleged to be missing, an explanation why the missing information is required.[1]

It appears that a contention must include separate statements with respect to items (i) and (ii). However, as explained above, items (iii) and (iv) are essentially the same thing, and a single discussion should be sufficient to satisfy both requirements. For example, if a contention takes issue with a specific portion of the application, it should be presumed that the contention satisfies

[1] Another requirement, that a petitioner show that a contention, if true, would entitle it to relief, was deleted from 10 C.F.R. Part 2 in 2004. The final Part 2 rule preamble explains that the requirement (previously found in 10 C.F.R. § 2.714(d)(2)(ii)) constituted "an unneeded additional requirement" that "overlaps the requirement in § 2.309(d)(1)(iv) with respect to standing, requiring the request/petition to address 'the possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.'" 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

both items (iii) and (iv), because if otherwise were to be true then DOE's application must include information and analyses that are irrelevant and immaterial. *See e.g., Entergy Nuclear Generating Company, et al. (Pilgrim Nuclear Power Station)*, LBP-06-23, 64 NRC 257 at 310 (2006). A single discussion should also be sufficient to satisfy items (v) and (vi). Neither 10 C.F.R. § 2.309 nor NRC case law provides for rejection of a contention basis that, taken as a whole, meets the requirements of § 2.309(f)(1)(iii)-(vi), but fails to do so by using four separate paragraphs.

In sum, a requirement that every contention address, in six separate paragraphs, compliance with each of the six requirements of 10 C.F.R. § 2.309(f)(1) would be burdensome, unlawful, and unnecessary to satisfy the purposes of 10 C.F.R. § 2.309(f), as aptly summarized on page 2 of the Memorandum. Instead, Nevada proposes that each contention consist of four separate parts. First, in compliance with item (i), there should be a one sentence statement of the contention itself. Second, in compliance with item (ii), there should be a one sentence summary of the basis of the contention, solely for the purpose of defining the contention's scope more precisely, to the extent that may be necessary or useful. Third, in compliance with items (iii) and (iv), there should be a separate discussion why the contention raises a material issue, it being understood that a contention challenging a specific part of DOE's LA as not in compliance with an applicable regulatory requirement (e.g. a provision in 10 C.F.R. Part 63) presumptively satisfies both (iii) and (iv).

Finally, in compliance with items (v) and (vi), there should be a discussion of one paragraph in length that demonstrates compliance with both items, along with appropriate references, if any. In accordance with the Commission's stated intent, it should be understood that these items require only a "minimal showing that material facts are in dispute, thereby demonstrating that an inquiry in depth is appropriate" and also that "at the contention filing stage

the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion."[2]

3. Nevada does not object to what is proposed for contentions of omission.

4. Nevada does not object to an identification of contentions raising only legal issues, provided that it is understood that a contention labeled as a "legal" one will not be denied just because, after analyses of the answers and replies, it turns out that a mixed law-fact issue is presented. It will often be difficult to distinguish, from the outset, a contention that raises a pure legal issue from one that raises a mixed issue of fact and law.

**Question B**

1-3. Nevada does not object to a reasonable labeling of contentions. With two exceptions, Nevada does not object to the labeling scheme in either Option 1 or Option 2.

First, Nevada cannot agree with DOE's suggestion that each contention should cite always to the fourth level of granularity and the actual page of the contested document. The draft listing of sections and subsections DOE supplied to the APAPO Board for the safety analysis report often goes down to seven or even more subheadings (e.g., section 2.3.6.4.4.2.2, "Localized Corrosion Model Propagation Model Adequacy"). Without reviewing the LA itself, it is impossible to estimate whether a Nevada contention can always be addressed to the finest grain or even to the fourth level of granularity. For example, should a Nevada contention that DOE has improperly disregarded a particular form of localized corrosion on the waste package be addressed to the model adequacy under section 2.3.6.4.4.2.2., the model adequacy under section 2.3.6.4.4.2., the abstraction and adequacy under section 2.3.6.4.4., the conceptual description in section 2.3.6.4.1., the TSPA implementation discussion in section 2.3.6.2., or the

[2] 54 Fed. Reg. 33168, 33171 (Aug. 11, 1989).

summary and overview in section 2.3.6.1? Nevada urges strongly that any labeling or citation not go beneath the third level of granularity (e.g., section 2.3.6) to avoid arbitrary and unnecessary classification and labeling schemes. The third level appears to be quite specific and more than sufficient to organize contentions in a logical fashion, and a finer grained labeling could require arbitrary and ultimately impossible choices among sub-sub-sub-sub-sub sub-sections. Moreover, with sub-sub-sub-sections cited (the third level of granularity), citation to page numbers is unnecessary. Moreover, page numbers may be confusing if the document is available in multiple formats (e.g., LSN and ADAMS) with different pagination.

Second, both Options indicate that contentions may be directed at the NRC Staff Position Statement on Adoption of DOE's EIS. DOE's Yucca Mountain NEPA statements, including its original 2002 site recommendation EIS, are fully subject to challenge in the NRC hearing, at least to the extent NRC will need to rely on them to satisfy its own NEPA obligations. *See* Denial of Nevada Petition for Rulemaking, 73 Fed. Reg. 5672 (Jan. 31, 2008). If NRC Staff's Position Statement is just a simple statement of its position, it is hard to understand how or why it should be the subject of separate contentions. To the extent NRC Staff proposes simply to accept what DOE has done, a contention challenging DOE's NEPA analyses necessarily challenges NRC Staff's Position Statement as well, and the Position Statement adds nothing of substance worthy of separate contentions. If the Position Statement takes issue with portions of DOE's NEPA analyses (because it believes it is deficient, because it believes it is out-of-date, or because it believes it is beyond the scope of NRC's NEPA responsibilities), but it includes no detailed supporting reasons, drafting of adequate contentions directed at NRC's Position Statement will be impossible except for useless boilerplate contentions asserting that the Statement is deficient for lack of support.

**Question C**

Nevada does not object to a reasonable uniform system for attaching or referencing supporting materials.

1. Nevada sees no need to attach (physically or electronically) supporting materials that are identified either with an NRC ADAMS accession number or an active, public-accessible internet universal resource locator (URL).

2. For LSN documentary materials, the LSN accession number should be sufficient provided that, if the document is not available in full image or searchable text, the header indicates clearly where the material may immediately be found.

However, there is a related problem that needs to be addressed. Nevada and other potential parties have encountered great difficulty finding specific DOE documents on the LSN without being given the specific LSN accession number. There are about 3.6 million documents on the LSN, the vast majority of them DOE's. Searching this very large collection using descriptive words or even using DOE alphanumeric identifiers (e.g., DOE DIRS numbers) produces multiple results. Moreover, when one finds the specific document desired, there is no way to be sure that it has not been superseded, revised, or supplemented. For the LSN to be useful as a basis for filing contentions, DOE's LA (as tendered, as docketed, and as amended after docketing) must identify all documents incorporated by reference or cited by their LSN accession numbers. Moreover, some means will need to be developed to track, in an accessible and up-to-date manner, when a specific DOE LSN document referenced or used in the LA has been superseded, revised, or supplemented. This could include creation of a new DOE LSN sub-collection devoted exclusively to LA materials with a continually updated excel spreadsheet that tracked document history, but other means might also be considered. NRC's ADAMS may be somewhat more useful in this regard than the LSN, because presumably NRC Staff will place the

LA and supporting references in one or more new ADAMS Yucca Mountain dockets, beginning when the LA is tendered, but keeping track of document history using ADAMS may still be a problem. Nevada has discussed these problems with Mr. Daniel Graser, the LSN Administrator, most recently at an LSN training session last week, and Nevada understands he is willing to offer some further insights and suggestions.

3. Materials not available on ADAMS, the LSN, or the internet (as discussed above) should be attached electronically.

4. Nevada would object to a requirement that all materials, including materials on ADAMS, the LSN, or the internet, be attached electronically. This would be burdensome and unnecessary.

5. If all or many references must be attached electronically, the NRC requirement that documents exceeding 50 megabytes be transmitted in segments of 50 megabytes or less would likely result in contentions being submitted in multiple segments. This is not infeasible, but it can make filing somewhat complicated and possible confusing. Using LSN and ADAMS accession numbers and URL designations would greatly reduce the need for filing in multiple segments, but may not eliminate it entirely.

Respectfully submitted,

*(signed electronically)*
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April 28, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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| U.S. DEPARTMENT OF ENERGY | ) | Docket No. PAPO-00 |
| | ) | |
| (High-Level Waste Repository: | ) | |
| Pre-Application Matters) | ) | |

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing State of Nevada's Responses to APAPO Board's April 4, 2008 Memorandum has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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