

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-00, PAPO-0001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	ASLBP No. 08-861-01-PAPO-BD01
(High Level Waste Repository: Pre-Application Matters)	April 28, 2008

**STATE OF NEVADA'S MOTION TO THE COMMISSION TO
ESTABLISH A REASONABLE SCHEDULE FOR
THE FILING OF CONTENTIONS ON YUCCA MOUNTAIN**

For the reasons set forth below, and pursuant to 10 C.F.R. §§ 2.307 and 2.309(b), the State of Nevada asks the Commission to establish a reasonable schedule for the filing of petitions and contentions in the Yucca Mountain construction authorization proceeding.¹ Such a schedule would provide that petitions to participate as a full party or as an interested government and contentions would be due within 180 days after publication of the notice of hearing.²

I. Background

The Department of Energy ("DOE") has announced its intention to file (tender) an application for a construction authorization for its proposed Yucca Mountain high-level waste repository ("LA") this coming June. This LA, the culmination of decades of scientific work, will

¹ This motion is being filed with the Commission because 10 C.F.R. § 2.1026(b) provides that extensions of time greater than 15 days may be granted only by the Commission. Moreover, no Presiding Officer Board has been delegated decision-making power over matters relating to the filing of contentions.

² As required by 10 C.F.R. § 2.323(b), Mr. Malsch certifies that he made a sincere effort to contact other potential parties most affected by this motion (DOE, NRC Staff, and the Nuclear Energy Institute (NEI)) to resolve the issue presented but that these efforts were unsuccessful. DOE (Mr. Silverman) stated that DOE opposes any extension of time; NRC Staff (Mr. Lenehan) stated that NRC Staff cannot agree to support the motion and will review what is filed and respond accordingly; NEI (Mr. Bauser) stated that it could not agree in advance not to oppose the motion and would need to evaluate its merits following its submission.

be over 8000 pages long and represent the work of many hundreds of experts.³ The LA will also refer to about 100,000 pages of direct (first tier) references, including DOE's latest Total Systems Performance Assessment ("TSPA"), the key to its post-closure safety evaluation.⁴ This TSPA is described most recently in an Addendum to DOE's 2008 TSPA analysis and model report ("AMR"), which was released just a few weeks ago.⁵ The AMR explaining what features, events and processes ("FEPs") are included and excluded from the whole TSPA was also just recently released.⁶ Together, the TSPA AMR, the TSPA AMR Addendum, the FEP AMR, and the underlying data, comprise many thousands of pages of text and over one terabyte of information (in LSN format).

DOE's Yucca Mountain supplemental and initial environmental impact statements, which are fully subject to the licensing hearing, comprise many additional thousands of pages of materials, portions of which are not finalized. EPA and NRC have yet to publish their final licensing standards for the potentially critical post-10,000-year post-closure performance assessment.

Nevada's expert team has made valiant efforts to keep up with what DOE has been doing, but has been severely hampered by moving targets and critical missing documents. A few months ago, DOE announced that its projected LA filing date could slip to December, because funds appropriated for the project were less than what DOE had requested, but then the June date was proclaimed again. In 2007, NRC Staff maintained that its acceptance (docketing) review would require up to six months, but it announced more recently that it should be able to complete the review in three months. As indicated above, Nevada's experts were granted access to what

³ The list of LA sections and subsections alone is over 100 pages long. *See* DOE Response to Advisory Pre-Application Presiding Officer (PAPO) Board's Notice and Memorandum, dated March 24, 2008.

⁴ *See* presentation of E.F. Sproat at NRC's 2008 Regulatory Information Conference.

⁵ The TSPA AMR is at DEN001574936, and the Addendum is at DEN001579005.

⁶ DEN001584824 and DEN001582873.

appears to be the TSPA and FEP AMRs that DOE will rely on in its LA only within the last few weeks, and licensing standards are still missing.

II. Grounds for the Motion

Nevada's motion is based on the need for fundamental fairness and protection of Nevada's right to a hearing under Section 189a(1)(A) of the Atomic Energy Act of 1954, as amended ("AEA"), and the Commission's regulations at 10 C.F.R. § 2.309(d)(2)(iii). Section 189a(1)(A) of the AEA grants "any person whose interest may be affected" the right of a hearing in any proceeding "for the granting ...of any license." There can be no doubt that Nevada has an "interest" that "may be affected" in any proceeding to consider licensing of Yucca Mountain. Indeed, by giving Nevada standing to intervene, 10 C.F.R. § 2.309(d)(2)(iii) confirms that Nevada has the requisite interest to invoke the right to hearing granted by Section 189a(1)(A). It is long established that such a right to a hearing includes the right to both adequate notice and the right to have an adequate amount of time to prepare one's case, which in this instance includes an adequate time to prepare contentions. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 333 U.S. 306, 315 (1950); *Roller v. Holly*, 176 U.S. 398 (1900). And indeed, in amending and elaborating on its Rules of Practice, the Commission often has emphasized its commitment to fundamental fairness. 73 Fed. Reg. 20963, 20968-69 (Apr. 17, 2008); 69 Fed. Reg. 2182, 2191 (Jan. 14, 2004); 63 Fed. Reg. 41822, 41823 (Aug. 5, 1998); 54 Fed. Reg. 33168, 33170 (Aug. 11, 1989). Also, Section 554(c) of the Administrative Procedure Act requires the Commission to give interested parties a reasonable opportunity for "the submission and consideration of facts [and] arguments," which necessarily includes a reasonable opportunity to submit contentions.

The Commission's rules are clear that a potential party has an ironclad obligation to review the license application at issue, and that the bases for contentions must cite to "specific

portions of the application." 10 C.F.R. § 2.309(f)(1)(vi). The Commission's rules do not indicate that references in the LA must be reviewed and cited as well, but Nevada expects that the LA may be completely or partially inscrutable unless some or all direct supporting references are reviewed. Therefore, to prepare contentions that satisfy the Commission's stringent pleading rules, Nevada must review over 110,000 pages of technical materials, and possibly one or more terabytes of supporting information, within the time allotted for the filling of contentions, or possibly forfeit forever its right to challenge the licensing of Yucca Mountain.

Currently, Nevada's contentions are due within 30 days of publication of the notice of hearing, which normally occurs shortly after the license application is docketed. This follows a period after tendering of the LA, during which time the NRC decides whether the LA is sufficiently complete to docket it. However, the Commission's regulations have no minimum time for this docketing review. Moreover, the Commission's regulations do not limit the number or scope of amendments to the tendered LA that DOE may file during the docketing review, thereby creating the potential for a moving target that cannot be pinned down so that contentions can be finalized. In short, under the regulations, Nevada cannot absolutely count on more than about 30 days to review fully both the docketed LA and all of its supporting references.⁷ Even assuming the LA and supporting references can be read like paperback novels, at about 30 pages per hour, it would take 3666 hours, or about one full year of 10-hour days, with no time off, just for one person to read the materials once-through. Working 24/7 for 30 days, if that were even possible, would only get someone about one fifth of the way through. Of course, a division of labor will be possible, and not every expert will have to read all 110,000 or more pages. Still, a few experts and counsel will need to have some working knowledge of the entire suite of

⁷While many of the supporting references are now available, trying to prepare contentions directed at a future LA based solely on the references that may (or may not) be cited is like trying to prepare a reply brief based solely on a list of potential footnotes for the appellant's opening brief.

information. Reviewing the LA will be a monumental task, unlike any one that any potential NRC party has ever faced.

Of course, reviewing the LA is just the beginning; actual contentions have to be drafted and filed. Because of the broad scope and unique nature of the issues, the amount of analysis and information expected to be included in the LA and supporting materials, and the high degree of public interest in the world's first high-level waste geologic repository, the number of contentions that one should reasonably expect to be filed (perhaps over 650) is five times greater than in any prior NRC proceeding.⁸ In establishing a reasonable time for the filing of contentions, the Commission must take account of both the time required to review relevant materials and the time to draft and file the numerous contentions that the review is likely to suggest.

The Commission's LSN rules are premised on the concept that Nevada and other potential parties should have a full 180 days (six months) to review the documents underlying the LA on the LSN before the LA is filed (tendered).⁹ Indeed, NRC representatives even advised interested members of the public in 2001 that, despite the 30-day period, they would in fact have *ten months* to prepare their contentions, consisting of six months' review of underlying

⁸ See Advisory Pre-License Application Presiding Officer Board Memorandum, dated April 4, 2008, at p. 2. There is no absolute or relative limit to the number of contentions that may be filed. *Cleveland Electric Illuminating Company (Perry Nuclear Plant, Units 1 and 2)*. ALAB-706, 16 NRC 1754 (1982).

⁹ See, e.g., 66 Fed. Reg. 29453, 29459 (May 31, 2001). This "six months rule" is supported more fully in Nevada's pending appeal to the Commission from the Pre-License Application Presiding Officer (PAPO) Board's denial of Nevada's motion to strike DOE's October 19, 2007 LSN certification. The six months would be in addition to the 30 days specified in the notice of hearing. Should the Commission grant Nevada's appeal, DOE would be unable to tender its LA until six months after it recertified properly. When the Commission amended its Rules of Practice in 2004, it defended its 30-day period for Yucca Mountain petitions based on "the ample pre-application document disclosures provided by the LSN." 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004).

documents on the LSN, a three-month period for a docketing review, followed by the 30 days established in the notice of hearing.¹⁰

Given the above, the 30-day period established by 10 C.F.R. § 2.309(b)(2) and Appendix D to 10 C.F.R. Part 2 is grossly inadequate.¹¹ Such a short period stands in stark contrast to the twenty or more years it has taken DOE to prepare its LA, the one and one half years that Appendix D gives the NRC Staff to complete its safety evaluation, and the seven to ten months' LA review and preparation time contemplated by the Commission's LSN rules and promised to the public by the Commission's representatives. It also stands in stark contrast to the over five-year extension for filing of the LA that DOE effectively granted to itself.¹² Finally, granting such an extension of time would be in accord with Commission practice and precedent. *See* presentation of E.F. Sproat at NRC's 2008 Regulatory Information Conference. In *Nuclear Fuel Services, Inc., et al. (West Valley Reprocessing Plant)*, CLI-75-4, 1 NRC 273 (1975), the Commission granted a nine-month extension of time to file petitions to intervene in a proceeding far less complicated and far less affected by the public interest than Yucca Mountain. Granting the request in West Valley but denying Nevada's more modest request could not be reconciled.¹³

¹⁰ Transcript of May 23, 2001 NRC public meeting in Las Vegas to explain the hearing process at 90-91 (Exhibit A hereto).

¹¹ This motion assumes that, in drafting contentions, Nevada is under no obligation to cite to and review every possible relevant document on the LSN, in addition to the LA and perhaps the LA's first-tier references. A comprehensive review of the millions of pages of materials on the LSN would take years, not the 180 days requested in this motion.

¹² Section 114(b) of the Nuclear Waste Policy Act of 1982 required DOE to file its LA within 90 days after the site recommendation became effective, or by October 2002. Apparently, as far as DOE is concerned, the deadlines in Section 114 are not to be enforced.

¹³ *See also Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power plant, Units 1 and 2)*, CLI-98-25, 48 NRC 325 (1998), where the Commission provided for contentions to be filed over four months after docketing of the application in a reactor license renewal proceeding described as "limited in scope." The scope of potential issues in Yucca Mountain is easily a factor of ten greater than in the *Calvert Cliffs* case. Therefore, *Calvert Cliffs* suggests that a reasonable contention filing period for Yucca Mountain is forty months. The instant request is modest in comparison.

Finally, granting this motion may well expedite the proceeding. Nevada informed the Advisory Pre-License Application Presiding Officer ("PAPO") Board that its current but very preliminary best estimate of the number of contentions it will file is 251-500. Nevada would be willing to meet with DOE and NRC Staff during the requested 180-day period with a view toward focusing and narrowing the issues, especially to the extent some of Nevada's contentions may otherwise result from a misreading of DOE's safety case and NEPA documents or constitute matters that may be subject to early resolution or stipulation.¹⁴

Nevada files this motion well in advance of the issuance of the notice of hearing to avoid unnecessary regulatory uncertainty. The efficient and effective review of the LA and its supporting materials and the efficient and effective drafting and filing of adequate contentions are both impossible without knowledge of what the contention filing schedule will be. Waiting until the issuance of the notice of hearing to rule on extensions of time would severely prejudice Nevada because, as a practical matter, plans and resources for the LA review and the drafting of contentions must be in place well before then. As things now stand, the regulatory uncertainty is already extreme because, without any established minimum NRC Staff docketing (completeness) review time, Nevada cannot be sure whether, under 10 C.F.R. § 2.309(b)(2), contentions will be due in this July, this November, or some time in between.

¹⁴Nevada is of course aware of the three and four year deadline for a final NRC licensing decision in Section 114(d) of the Nuclear Waste Policy Act of 1982. Granting Nevada's requested extension should not result in a failure to meet either the three or the four year deadline. However, fundamental fairness necessarily takes precedence over arbitrary deadlines in any event. *See Barnhart v. Peabody Coal*, 123 S. Ct. 248 (2003); *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976). As indicated, DOE blew past its 90-day LA submission deadline with nary a peep from either Yucca Mountain supporters or the NRC. It would be inconsistent and unfair to enforce the Act's deadlines when doing so disadvantages *opponents* of Yucca Mountain but to ignore them when they disadvantage *proponents* of Yucca Mountain.

III. Conclusion

The 30-day period established by 10 C.F.R. § 2.309(b)(2) and Appendix D to 10 C.F.R. Part 2 is grossly inadequate. The 180 day extension this motion requests would not affect when the LA could be docketed, but it is the bare minimum amount of time that Nevada's requires to conduct an adequate review of the LA and supporting references and to draft and file adequate contentions. Anything short of this will violate fundamental principles of fairness, vitiate Nevada's right to a hearing, and violate the Administrative Procedure Act.¹⁵

Nevada's motion should be granted for good cause shown.¹⁶

Respectfully submitted,

(signed electronically)

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April 28, 2008

¹⁵ Obviously, other potential intervening parties are confronting a similar problem in reviewing the LA and supporting references and in drafting and filing contentions. The 180 day extension requested by Nevada will benefit them as well.

¹⁶ The applicable rules indicate that the standard applicable to this motion is good cause shown. 10 C.F.R. §§ 2.307, 2.1026. However, if the Commission has in mind some more stringent standard, such as unavoidable and extreme circumstances (*see e.g.*, "Conduct of Adjudicatory Proceedings," 63 Fed. Reg. 41872, Aug. 5, 1998), then this motion satisfies this more stringent standard as well.

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(High-Level Waste Repository: Pre-Application Matters))	April 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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Susan Montesi

Exhibit 1

Exhibit 1

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

ORIGINAL

Title: Public Meeting to Discuss the Hearing Process
for Judging the Safety of a Potential High-
Level Waste Repository
Docket Number: (not applicable)
Location: Las Vegas, Nevada
Date: Wednesday, May 23, 2001
Work Order No.: NRC-221

Pages 1-139

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1

1 UNITED STATES OF AMERICA
2
3 NUCLEAR REGULATORY COMMISSION

4
5 PUBLIC MEETING TO DISCUSS THE HEARING
6 PROCESS FOR JUDGING THE SAFETY OF A
7 POTENTIAL HIGH-LEVEL WASTE REPOSITORY

8
9 WEDNESDAY,
10 MAY 23, 2001

11
12 LAS VEGAS, NEVADA

13

14

The Public Meeting convened at the
Regional Transportation Commission Building, 600 South
Grand Central Parkway, Las Vegas, Nevada, at
1:00 p.m., F.X. !!Chip?1 Cameron,
presiding.

Facilitato

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2 AGENDA ITEM PAGE
3 Welcome: Meeting Objectives and Format 3

23 MR. CHANDLER: Corbin, did you want to say
24 something?

25 MR. HARNEY: Okay. In the treaty -- the
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1 law of the land -- is that the law of the land, the
2 treaty?

3 MR. CHANDLER: The treaty is a part of the
4 law.

5 MR. HARNEY: Okay. Okay. You guys better
6 recognizethat, because it's very important -- if we
7 talk about law, how law works, let's abide by that,
8 instead ofmaking your own rules or regulations that

9. you won't abide by.

10 MR. CAMERON: Okay. Thank you all. We're
11 going to go into some specifics on the hearing process
12 next with Dennis, but first we'll take a break. Be
13 back around five after three -- give you 15 minutes to
14 stretch your legs and get some fresh air. Thank you.

15 (Whereupon, the proceedings in the
16 foregoing matter went off the record at
17 2:50 p.m. and went back on the record at
18 3:10 p.m.)

19 MR. CAMERON: Okay. Dennis, are you
20 ready? All right. Well, let's go.

21 We have some questions. We're next going
22 to go to Dennis Dambly, who is going to go through the
23 specifics of the hearing process. And we'll make sure
24 that we come back to some of these questions that were
25 raised earlier, so we close those out.

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1 So, Dennis, go ahead.

2 MR. DAMBLY: All right. Am I talking

3 close enough in here that you all can hear? Yes?

4 Good.

5 My name is Dennis Dambly, and as has been

6 mentioned previously it would be my staff who would be

8 But going now back to the notice of
9 receipt of an application. The important thing there
10 is you've got 30 days to file from the date that
11 that's published if you want to intervene and be a
12 party in the proceeding. If you miss the 30 days,
13 then you've got additional hurdles to get admitted
14 late, and it's possible you might not get in.

15 But the thing to remember, 30 days is a
16 short time. It's also -- the 30 days will be before
17 the staff is done. So if you have issues you want
18 raised you have to base those on DOE's application.
19. You don't base your issues on NRC's review. That
20 won't be done in that 30-day period.

21 And while 30 days is short, remember what
22 we talked about a little while ago, DOE has to have
23. all of their documents online six months before they
24 submit the application, and that would be three months
25 before -- there would be an additional three months

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1 before it's docketed.
2 So really nine months before this notice
3 would come out DOE's material should be online and
4 available to anybody.
5 So you can start, if you're seriously
6 interested in intervening in a proceeding, that's the
7 time to start preparing the issues you want resolved,
8 start looking in the licensing support network. The
9 NRC documents will be on there I guess eight months
10 before, and other people are interested. I'm sure the