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	)	ASLBP No. 08-861-01-PAPO-BD01
	)	
(High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)	)	April 28, 2008

U.S. DEPARTMENT OF ENERGY
RESPONSE TO MEMORANDUM
(REQUESTING INPUT FROM POTENTIAL
PARTIES ON FORMAT OF CONTENTIONS)

I. INTRODUCTION

On April 4, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory Board) issued a Memorandum (Requesting Input from Potential Parties on Format of Contentions) (Memorandum). In that Memorandum, the Advisory Board noted that potential parties to the Yucca Mountain licensing proceeding have indicated that they may submit "five times the largest number" of contentions (around 650 contentions) ever filed in an NRC adjudicatory proceeding in almost the last 20 years, and that the actual number of contentions could be much higher. Memorandum at 2. In light of the "rigorous" schedule set forth in 10 CFR Part 2, Appendix D (Appendix D) for the Yucca Mountain licensing proceeding, the Advisory Board requested comments on a number of proposals to expedite the hearing process, particularly with respect to the submission and disposition of contentions at the contention admissibility review stage. *Id.* at 2.

The U.S. Department of Energy (DOE or Department) hereby submits its response to the proposals set forth in the Advisory Board's Memorandum. The Department's recommendations are intended to help ensure that the Yucca Mountain licensing proceeding is carried out as efficiently as possible, consistent with the schedule milestones established by section 114(d) of the Nuclear Waste Policy Act (NWPA) and Appendix D, and with due regard for the rights of parties and potential parties to the proceeding. Overall, DOE strongly endorses the Advisory Board's proposals.

II. DISCUSSION

The Advisory Board has set forth a number of specific "Issues" to be addressed (*see* Memorandum at 3-6, Issues A-D). Before doing so, however, the Advisory Board raises two important preliminary matters that warrant a response.

First, the Advisory Board states that while other Licensing Boards have "sometimes admitted very broad or multi-part contentions," in this 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." Memorandum at 3. The Advisory Board believes that requiring such single issue contentions will more clearly define the issues to be litigated on the merits, and will reduce the resources later required to "further narrow or clarify" the contentions. *Id.* at 3.

DOE agrees that it is essential that contentions be framed in a "single issue" format for the reasons stated by the Board, and because doing so will significantly enhance the parties' and potential parties' ability to submit clear, concise and responsive Answers and Replies in the time frames allotted by Appendix D. The Advisory Board should recommend to the U.S. Nuclear

Regulatory Commission (Commission)[1] that potential parties be required to submit their contentions in "single issue" format. The Advisory Board should also more precisely define the expectations for what constitutes a "single issue" contention, in order to minimize the potential for a contention to be unfocused and/or intertwine different aspects of the same general issue.

DOE recommends that, *to the maximum extent possible*, any alleged error or omission in the License Application (LA) that, if true, would demonstrate that the LA is inadequate or fails to meet applicable NRC requirements, should be stated as a single contention. Thus, if for example, a potential party believes that there are multiple alleged errors or omissions in DOE's seismic analysis, each of which is an independent and sufficient basis for concluding that the seismic analysis is inadequate, each such error or omission should be stated as a single contention. The potential parties should be directed to make their very best efforts to submit single issue contentions.

DOE recognizes that this approach will likely increase the number of contentions, but it will also produce more narrow and focused contentions that are easier to manage during the adjudicatory process and still give potential parties the flexibility to effectively present their concerns.

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[1] DOE is aware that the Advisory Board has asked the Commission to grant it the additional authority to issue "binding" case management orders to ensure that case management standards "will be effective in a time frame that reasonably allows the parties to comply," and has recognized that case management standards "need to be in effect well before the notice of hearing is issued." Memorandum of March 31, 2008 (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority) at 2-3. DOE agrees that the Advisory Board should be given such authority up until the time that the Commission's notice of hearing is issued, at which time, the role of the Advisory Board can be revisited. The establishment of case management standards well before the notice of hearing is issued (e.g., no later than 30 days after DOE submits its LA) will be an important contributor to the Commission's success in managing the contention disposition process in accordance with Appendix D.

The second preliminary matter raised by the Advisory Board is its suggestion that contentions be submitted 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." Memorandum at 3. Although this recommendation has been criticized by the State of Nevada,[2] DOE believes that such a uniform formatting scheme is essential. DOE also has no objection to the establishment of corresponding formatting requirements applicable to its Answers to Petitions to Intervene, or to a requirement that Replies should also adhere to a uniform structure.[3] *See* Memorandum at 2, n.3.

Provided below are DOE's responses to the specific Issues raised by the Advisory Board in its Memorandum.

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?

Yes. As discussed above, DOE fully concurs with this recommendation.

1. **If not, please describe how employing a uniform format would be burdensome or otherwise inappropriate.**

As discussed above, a uniform formatting system would not be burdensome and should apply to all potential parties. Nor would it be inappropriate to require a common structure tailored to the applicable regulatory standards for the admission of contentions set forth in 10 CFR § 2.309. In fact, if the *Licensing Boards* appointed to review and rule on the admissibility of contentions are to meet *their* Appendix D milestones (*i.e.,* scheduling of the first pre-hearing

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2 *See* Nevada Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Nevada Response) at 7.

3 If for any reason a Petition to Intervene is filed before the 30 day deadline specified in Appendix D, or an Answer is filed before the Appendix D 25 day deadline, the deadlines for filing Answers and Replies should still be calculated on the basis of the Appendix D schedule and should not be moved forward.

conference seven days after receipt of Replies, and a First Pre-Hearing Conference Order 30 days later), such a uniform formatting scheme is critical.

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)?**

No. The basic formatting scheme should require each potential party to address separately, in order, and clearly label, each of the admissibility standards set forth in 10 CFR § 2.309(f)(1)(i)-(vi). This approach is clear, direct and precisely focused on the operative legal standards. In addition, in addressing each admissibility standard, each potential party must include sufficient information to permit a decision on the admissibility of a contention without the need to request further information, or oral argument, to clarify the nature and basis of the contention. The absence of sufficient information should be a basis for rejection of a contention.

DOE also recommends that, with respect to the admissibility standard set forth in 10 CFR § 2.309(f)(1)(vi) (*i.e.,* the provision of "references to specific portions of the application"), potential parties should be required to: (a) label and organize their contentions in accordance with the structure and organization of the LA; (b) conspicuously reference the subsections of the LA at the "fourth" level of "granularity," preferably in the title of the contention; and (c) provide references in the text of the contentions to the specific LA pages being challenged. These recommendations were discussed in DOE's March 24, 2008 Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties) (March 24, 2008 Response) at 3-4.

3. **Should contentions of omission – that is, those asserting that the application fails to contain information on a relevant matter as required by law [footnote omitted], 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?**

Yes. "Contentions of omission" should be clearly identified as such in the contention basis statement. (*See* the Advisory Board's reference to 10 CFR § 2.309(f)(1)(vi) in its Memorandum at 4, n.6). This will aid the potential parties *and the Licensing Boards* in evaluating and dispositioning the contentions. It should be recognized that parties filing Answers are free to challenge Petitioners' characterizations and argue, as appropriate, that a particular contention is or is not a contention of omission under the applicable Commission legal standards. DOE therefore recommends that the first line of the basis statement state that: "This is a contention of omission." In addition, a contention of omission should identify precisely what information has not been included, discuss why such information is relevant to the LA, and set forth the reasons such information must be included, including clear and complete citations to the particular statutory, regulatory or other provision that requires inclusion of the information.

In addition, DOE agrees that any NEPA-based contentions (whether or not a contention of omission), should be specifically identified as such, particularly in light of the fact that the Commission has adopted special standards governing the admissibility of NEPA-based contentions. *See* 10 CFR § 51.109. DOE therefore recommends that the first line of the basis statement state that: "This is a NEPA-based contention." In this regard, in addition to the information required by 10 CFR § 2.309, each potential party must include sufficient information in a NEPA-based contention to demonstrate that the requirements of section 114(f)(4) of the

NWPA and 10 CFR § 51.109 are satisfied. This information must be set forth in an affidavit which demonstrates with specificity: (1) the factual and/or technical bases for the claim that, with respect to the issue identified in the contention, it is not practicable to adopt the DOE environmental impact statement (EIS), as it may have been supplemented; (2) how the action to be taken by the Commission differs from the action proposed in the LA and why the difference may significantly affect the quality of the human environment, or that there is significant and substantial new information or new considerations that render consideration of the issue in the DOE EIS inadequate; (3) the reasons why a materially different result would be or would have been likely had the information in the affidavit been considered; and (4) whether the potential party could have raised or will have the opportunity to raise the information in the affidavit in a DOE administrative proceeding or a judicial proceeding. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised.

Moreover, if a potential party intends to challenge the LA on NEPA and other grounds (e.g., safety or security), based upon the same facts, each such challenge should be presented as a separate contention, because the criteria for determining admissibility will differ depending upon whether the contention is or is not NEPA-based.

4. **Should contentions raising only legal issues be clearly identified as such?**

Yes. If a contention may be amenable to resolution (*i.e.,* a determination of admissibility) on purely legal grounds, such as by way of a statutory interpretation or interpretation of the Commission's regulations, it should be so identified. This will not only assist the Boards and the potential parties at the admissibility stage, but will also create a path for

early resolution of purely legal issues that have been admitted as contentions through the submission of legal briefs, and oral argument, as necessary, without the need for discovery or an evidentiary proceeding on such issues. DOE therefore recommends that the first line of the basis statement state, as appropriate, that: "This contention raises only a legal issue;" or "This contention raises an issue that, in part, is legal." Where an issue involves both factual and legal elements, every effort should be made to separate the issue into two contentions that focus on either the factual or legal elements. Where separate contentions are not practical, the contention should clearly identify the legal element of the contention.

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?

Yes. The ability to quickly allocate contentions to the appropriate Licensing Boards will be an important factor in meeting the Appendix D milestones. DOE does not believe that there is any significant burden associated with this proposed requirement.

1. **What subject categories would be most useful for such labeling (for example, NEPA, safety, miscellaneous)?**

DOE believes that it would be reasonable to establish separate Licensing Boards with the following scopes of authority: (a) Pre-Closure issues; (b) Post-Closure issues; and (c) NEPA/Programmatic (including Quality Assurance issues). Categorizing the contentions under these categories would enable the contentions to be promptly apportioned among the various Licensing Boards. DOE recommends adding this categorization to the Advisory Board's Option 1 discussed below.

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)?**

Yes. The numbering or labeling of each contention must explicitly identify if it is based on: (a) DOE's Safety Analysis Report (SAR); (b) a particular DOE NEPA document (e.g., the Repository Supplemental EIS (Repository SEIS)); (c) the Quality Assurance Requirements Document (QARD); or (d) one of the other "general information" or "programmatic" sections included in the LA (e.g., physical protection and material control and accounting).

With respect to the appropriate LA subsection level to be referenced, DOE continues to recommend use of the fourth level of "granularity." DOE provided detailed information on the anticipated LA table of contents in its March 24, 2008 Response in order to assist the Board in this determination. As stated therein, this level of specificity will provide adequate notice to the Boards and the parties as to the specific portions of the LA being challenged, while not imposing an onerous burden on Petitioners or requiring Petitioners to cite multiple, lower-tiered subsections of the LA. For the same reasons, DOE recommends use of the fourth level of granularity for DOE NEPA documents and the third level of granularity for the QARD, which is a less detailed and lengthy document than the LA or the NEPA documents. Contention basis statements must also point to the relevant page numbers of the LA, the NEPA documents, or the QARD being challenged and to the relevant page numbers for any documents referenced or attached as bases for a contention. Simply attaching a large document as an exhibit without reference to the relevant pages being referenced would create an onerous burden in responding to

the content of such references, as well as create a potential ground for dismissal of the contention for failure to state an adequately specific basis.

3. **Please comment on the usefulness of the possible labeling systems described in Attachment A.**

A uniform labeling system of the types suggested by the Advisory Board would be very useful, as generally discussed above. DOE believes, however, that the Advisory Board's Option 1 is more precise, more useful and is the preferred option. DOE's specific comments and recommendations on Option 1 are set forth below.

<u>Option 1</u> – Each contention would be designated using the following elements:

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 [Repository] 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 designation should be provided by the presiding officer.

DOE agrees with the designation scheme proposed by the Advisory Board, except that it is the Department's position that issues related to the DOE Rail Corridor Supplemental EIS (Rail Corridor SEIS) and Rail Alignment EIS (Rail Alignment EIS) are outside the scope of the proceeding, because they are intended to support proposed actions to be taken by the Department

that are outside the scope of the Commission's jurisdiction, and that contentions based upon alleged inadequacies or omissions in those documents would not be admissible.[4] Indeed, not only are these matters outside the scope of this proceeding, but they have already been addressed by the courts. In a 2006 decision, the D.C. Circuit rejected the State of Nevada's challenges to the transportation elements of the FEIS. *Nevada v. DOE*, 457 F.3d 78 (D.C.Cir 2006). To the extent these documents include any information relevant to a decision that the Commission is authorized to make in this proceeding, DOE believes such information should be and has been included in the Repository SEIS. DOE would be willing to brief and/or address this issue at the appropriate time (including before the commencement of the hearing). Indeed, this is a legal issue of the type that can be resolved by the Commission early in the proceeding in the Notice of Hearing.

If the matter is resolved before the submission of contentions, there may be no need for the above-referenced contention designations for the Rail Corridor SEIS or Rail Alignment EIS. If the matter is not resolved by that time, then those designations should be preserved, with the recognition that DOE is not conceding that the adequacy of those documents is an appropriate subject of litigation in the proceeding. Finally, subject to the foregoing, DOE agrees with the proposed acronyms with three recommendations. [5]

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[4] The Repository SEIS includes the potential environmental impacts of national transportation, as well as the potential impacts in Nevada from the construction and operation of a rail line along specific alignments in either the Caliente or the Mina corridor, to ensure that the Repository SEIS considers the full scope of potential environmental impacts associated with the proposed construction and operation of the repository. Accordingly, the Repository SEIS incorporates by reference appropriate portions of the Nevada Rail Corridor SEIS and the Rail Alignment EIS.

[5] First, the Advisory Board should note that the Rail Alignment EIS is not a supplemental EIS and DOE recommends modifying the designation code to "DOE EIS for Rail Transportation – Rail Alignment: EIS-RT-RA." In addition, DOE suggests deleting the reference to the DOE SEIS for Rail Transportation "Summary" because it is included in the SEIS and is not a separate document. Finally, the Advisory Board may also wish

> **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.**
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> **For example, the designation LA-G1-1.1.3.2-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.**
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> **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, through ZZ.**
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> **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.**

DOE agrees with this proposal, including in particular, the explicit reference to the fourth level of "granularity" of the LA (e.g., LA-GI-1.1.3.2-B).

> **A short descriptive title unique to the particular contention:**
> **Contention LA-G1-1.1.3.2-B: Application Fails to Discuss Pre-closure Dismantling of Subsurface Radiation Monitoring Facility**

DOE agrees with this proposal. Indeed, this type of information could readily serve as the basic content of the "preliminary disclosures" which DOE advocates below. (*See* section E.3 below). There would be considerable benefit and little burden if the potential Petitioners were required to provide in advance a list of anticipated contentions such as: "Contention LA-GI-1.1.3.2-B: Application Fails to Discuss Pre-Closure Dismantling of Subsurface Radiation Monitoring Facility."

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to add a designation for the classified Naval Nuclear Propulsion Program Technical Support Documents (TSD) that will be part of the LA (e.g., LA-TSD-XXXX).

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-G1-1.1.3.2-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.

DOE agrees with this proposal. All of the entities that have made Licensing Support Network (LSN) certifications already have unique identifiers, (e.g., "NEV" and "NYE"). The same identifiers could be used for the contentions.

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 <u>all</u> supporting materials (other than readily available legal authorities) be electronically attached to each intervention petition, 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? [Footnote omitted].**

DOE believes that Issue C and its subparts can best be addressed in a single response. DOE strongly encourages the Advisory Board to recommend that *all* documents relied upon in support of a contention be electronically attached to the contention, regardless of whether or not they are publicly available on LSN or otherwise, with the exception of "readily available legal authorities" and relevant, referenced excerpts from the LA. DOE's recommended approach

tracks the alternative set forth in the Advisory Board's Issue C.4 above, is important to the potential parties' ability to meet the Appendix D milestones, and is consistent with fundamental principles of fairness.

DOE and other parties that will file Answers will have as little as 25 days to respond. There is a very significant burden associated with retrieving documents, in the very short time available, from public websites or even the LSN for 650 or more contentions, and the potential for errors in website addresses, website downtimes, or removal of documents previously available on a website is also significant. The burden of simply attaching these documents is small while the burdens for the Licensing Boards and the parties associated with wholesale search and retrieval would be significant. Furthermore, this would avoid disputes regarding access to such documents, or regarding the need to seek prompt production in the event a document is unavailable.

The Department does not believe it will be "infeasible" to provide all supporting materials despite the restrictions on the transmission of documents exceeding 50 megabytes. It is largely a ministerial task to transmit separate 50 megabyte "packages," and the Advisory Board itself has noted that the Commission is planning to have in place a "bundling" function on EIE prior to the submission of Petitions to Intervene that should further simplify the filing process. Memorandum at 5, n.7. Alternatively, DOE is willing to accept service of Nevada's Petition to Intervene on a CD-ROM, in the same format as would be uploaded to the EIE, assuming simultaneous service is made to counsel in Washington, D.C.

D. Finally, we invite (1) DOE to provide further details regarding its proposals for achieving the Appendix D milestones; [footnote omitted] (2) comments from any potential party regarding Nevada's suggestions for organizing the hearing process; [footnote omitted] and (3) suggestions from any other potential party concerning these matters.

DOE's additional proposals for achieving the NWPA mandates and the Appendix D milestones are presented below, followed by DOE's comments on Nevada's suggestions for organizing the hearing process.

E. Additional DOE Proposals to Achieve the Appendix D Milestones

1. The First Case Management Order Should Focus Exclusively on Issues of Legal Standing, LSN Compliance and Contention Admissibility.

The Yucca Mountain licensing proceeding will be a highly complex proceeding and it is difficult to predict all, or even most, of the case management procedures that will be needed throughout the course of the litigation. At the same time, there is a need for an expeditiously issued and binding Case Management Order governing the "front-end" of the hearing process well before the notice of hearing is issued. DOE interprets the Advisory Board's orders to date as focusing on these "front-end" issues, and we encourage the Advisory Board to continue to do so if a timely and effective Case Management Order is to be issued. Accordingly, DOE recommends that the Advisory Board focus its efforts on the form and content of contentions, on the threshold showing for legal standing, on LSN compliance, on admissibility determinations to be made upon receipt of contentions, and on the period up to and including the First Pre-hearing Conference Order.

2. Urge the Commission to Establish the Number and Scope of Authority of Licensing Boards that Will Conduct the Proceeding As Soon as Possible.

It would be helpful to know the number and scope of authority of the Licensing Boards to be empanelled at the earliest possible time. As discussed above, DOE recommends that three Licensing Boards be empanelled to address Pre-Closure issues, Post-Closure issues, and NEPA/Programmatic (including QA) issues.

DOE also recommends that an additional "Coordinating" Licensing Board be empanelled for the specific purpose of designating which contentions will be heard by which of the above three substantive Boards, ruling on legal standing for all Petitioners, and perhaps addressing generic procedural issues at the outset. In addition, the Coordinating Licensing Board could assume the functions of the existing Pre-License Application Presiding Officer Board (PAPO Board), rule on future LSN compliance issues, (particularly as they relate to the compliance prerequisites for participation as a party to the proceeding), and possibly address general discovery management.

3. Direct Potential Petitioners to Submit Simple, Non-Binding "Preliminary Disclosures" Before Petitions to Intervene are Submitted.

If a Case Management Order is issued within about 30 days of DOE's filing of the LA, it would greatly facilitate the process of complying with the Appendix D milestones if potential parties were directed to make a brief "preliminary disclosure" of the basic thrust of their anticipated contentions at some reasonable time prior to the due date for receipt of Petitions.

DOE proposes that such disclosures be made no later than 90 days after DOE submits the LA and that they contain the following information:

- A revised and updated number of anticipated contentions based on the format direction provided in the Case Management Order (e.g., single issue contentions);
- The alpha-numeric identifying information for each anticipated contention, again based on the format direction provided in the Case Management Order; and
- A brief summary of the basic error or omission raised by the contention (perhaps 1-3 sentences) that will provide the Boards and the other potential parties with some reasonable advance notice of the general nature and scope of the anticipated contentions.

Receipt of this information before the actual filing of contentions would enable the Coordinating Licensing Board to, at least preliminarily, parse out the contentions to the various substantive Boards, and allow the Boards and the other potential parties to begin to review key, affected components of the LA. It should also allow for early review by the Boards of potentially duplicative contentions that could be consolidated, and for the early designation of "lead parties" for duplicative or co-sponsored contentions. Under the current schedule assumptions, such disclosures would likely be made about 30 days before Petitions to Intervene are due, and not until 90 days after the LA has been submitted, giving Petitioners considerable time to provide the proposed limited degree of disclosure at a time when they would likely be close to finalizing their contentions. Therefore, this would not create a significant burden on the Petitioners, and would give the Boards and the parties a "head start" in organizing for the early phase of the proceeding and meeting the statutory and regulatory milestones.

4. Delegate Contentions Based on Classified Information to the Licensing Boards with Authority to Rule on the General Subject Area.

Any person who believes that he or she may desire a security clearance should have already applied to the NRC for such a clearance since any potential party should be fully aware that there will be classified portions of the LA. The potential that the issuance of security clearances will delay access to classified information, and thus the development of contentions based on such classified information is significant. DOE believes that the Licensing Board with the authority to rule on a particular subject area (e.g., Post-Closure issues) should rule on any classified contentions related to that subject. No separate Licensing Board to handle classified matters seems necessary, and creating such a separate Board could result in different Boards ruling on very similar substantive issues.

5. The Advisory Board Should Issue a Protective Order for Access to Non-Classified Protected Information Before the Notice of Hearing.

The NRC's Licensing Boards have considerable experience in developing protective orders and non-disclosure agreements for non-classified protected information (e.g., information that is for Official Use Only (OUO)). In DOE's view, there is no reason that an appropriate protective order and non-disclosure agreement could not be put in place before the notice of hearing. Typically, the potential parties cooperate on the development of a draft protective order and non-disclosure agreement for review and issuance by the Board. DOE can develop a draft, based upon previously approved protective orders in this and other proceedings,

and work with the potential parties to offer a proposal to the Advisory Board. This will avoid delays in filing contentions based upon non-classified protected components of the LA.[6]

F. DOE Responses to Nevada's Suggestions for Organizing the Hearing Process

There are numerous aspects of Nevada's March 24, 2008 Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Nevada Response) with which DOE fundamentally disagrees, including, in particular, Nevada's various estimates for the time it will take to review the LA and prepare contentions (e.g., "seven business weeks" just to read the LA), and file Replies to Answers (e.g., "six months" to "eight years"). Nevada Response at 2-3, 5. However, the Advisory Board has not invited the potential parties to broadly address Nevada's Response, but instead, to more narrowly comment on "Nevada's suggestions for organizing the hearing process." Memorandum at 5-6. In the interest of assisting the Advisory Board in its specific inquiry, DOE's comments focus on Nevada's suggestions for organizing the hearing process.

Nevada first proposes "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." Nevada Response at 3. Abandonment of the fundamental adjudicatory system that has been in place at the NRC (and before it, the Atomic Energy Commission) would be a fundamental step backward that would cause extensive delay, and a raft of unanticipated procedural disputes arising out of wholly-new and untested hearing procedures. It would be fundamentally inconsistent with the NWPA milestones and clearly contrary to Congressional direction. Nevada's bare suggestion to abandon the NRC's contention system should be summarily rejected. To the extent feasible within the existing regulatory framework, DOE would support

[6] Limited portions of the LA will be withheld from public disclosure as OUO.

efforts by the Advisory Board to identify and limit the issues to be considered in the proceeding to those that are essential to the licensing determinations that the Commission must make and to avoid duplication of issues and consideration of issues not material to the decision-making process.

Nevada next suggests that, because of the scope of the LA and accompanying references, Nevada "faces a grave due process challenge unless the time for filing contentions and bases is measured in years, not months." *Id.* at 5-6, n.2. However, Nevada neither substantiates its assertions nor offers any constructive proposals to facilitate compliance with the regulatory framework adopted by the Commission in response to Congressional direction in the NWPA.[7] Rather, Nevada proposes several changes to the existing regulatory framework that has been in effect for many years.

First, it asks if the NRC Staff can commit to a "minimum docketing review period significantly in excess of three months" and "reasonable" limits on the "number and scope of amendments or supplements to the tendered LA before docketing." Nevada Response at 8-9. The NRC Staff objected to this proposal in its April 3, 2008 Reply to Nevada Response to Board Notice and Memorandum of March 6, 2008 (NRC Staff Reply) at 2-3. DOE concurs with the Staff's position. In addition, DOE has no present intention to submit any amendments or supplements to the tendered LA before docketing.

In any event, Nevada's fundamental premise (and the apparent basis for its allegation of "due process" issues) is the erroneous position that it will have had only a very limited time to

[7] Nevada's statement that it would take "almost . . . seven business *weeks* . . . just to read through the LA itself *once*" appears to be based on the assumption of *one* reviewer reading the LA. Nevada Response at 5 (emphasis added).

prepare contentions before the submittal due date. There is simply no due process issue here: (1) Nevada has had extensive access to documentary materials on the LSN and has been actively reviewing those materials; (2) it has had access to the key Analysis Model Reports (AMRs) that support the LA, including the TSPA AMR; (3) it has attended and monitored numerous DOE-NRC technical exchange meetings and Advisory Committee on Nuclear Waste and Materials meetings; (4) it has filed and received responses to numerous Freedom of Information Act Requests; and (5) it has been performing its own analyses and experiments and otherwise identifying issues for contentions for several years. Instead of the 90 days Nevada would have had to review relevant materials between the President's Site Recommendation and the filing of DOE's LA (*see* section 114(b) of the NWPA), Nevada has had a far more extensive, and unprecedented opportunity (extending over years) to prepare for intervention.

Furthermore, although in 1991 Nevada (and others) objected to the Appendix D schedule in connection with the promulgation of 10 CFR Part 2, Subpart J, the Commission rejected assertions that the schedule is "unrealistic or inconsistent with . . . [the Commission's] statutory obligations." 56 Fed. Reg. 7787, 7791 (Feb. 29, 1991). Indeed, in it owns words:

> The Commission . . . reviewed the schedule and finds that it balances the need to comply with the statutory deadline with the need to insure effective public participation and a thorough technical review of the [LA].

Id. Nevada subsequently stated that the six-month period between DOE's LSN certification and LA submittal "reflects an appropriate amount of pre-license application review time for participants to prepare for the licensing proceeding." 66 Fed. Reg. 29,453, 29,548-49 (May 31, 2001). Accordingly, Nevada's current attempt to change the Appendix D milestones must be rejected.

Nevada next states that applicants often "object to virtually every contention, often employing arguments that are only appropriate to summary disposition." Nevada Response at 9. Accordingly, Nevada recommends 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." *Id.*

DOE disagrees with this proposal. First, DOE fully intends to evaluate the contentions in good faith and to not object to the admission of those contentions that are not reasonably susceptible to a challenge on admissibility grounds. Indeed, DOE's position that it can and will submit its Answers to the Petitions in 25 days is premised, in part, on the assumption that there will be some number of contentions for which it will express no opinion with respect to their admission.

Second, there are legitimate "factual" grounds for concluding that a contention is not admissible that can be proffered without the need for an affidavit or declaration. An obvious example would be an allegation that the LA does not address a particular matter where DOE can point the Board to the precise pages of the LA that, in fact, do address that matter.

Third, Nevada proposes to limit the grounds upon which objections to contentions can be made, without making any effort to show that the proposed limitations are consistent with 10 CFR § 2.309 and applicable Commission precedent.

Nevada next argues that DOE should get "one shot" at a summary ruling on a particular contention, and that if a Licensing Board should disagree with a position taken by DOE at the admissibility stage, DOE should be denied the right to later move for summary disposition. Nevada Response at 9. Nevada's position is contrary to the NRC rules which allow a party to:

(1) argue that a contention is inadmissible because it raises no genuine legal *or factual* issue (indeed that is one of the explicit standards in 10 CFR § 2.309(f)(l)); and (2) subsequently file summary disposition motions, after clarification of issues (and accompanied by sworn affidavits that bring to light new facts or circumstances or which clarify the technical matters at issue). Nevada's position is completely inconsistent with NRC regulations and past practices and should be rejected.

Nevada also argues that post-docketing LA amendments or supplements "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." Nevada Response at 10. An applicant's interactions with the NRC Staff on licensing issues are not within the Licensing Boards' jurisdiction. An NRC license applicant has the right to amend its application as it sees fit and a Board does not have the authority to place limits on DOE's ability to do so. DOE acknowledges that such amendments could contain new information that could, subject to the applicable NRC legal standards, provide the basis for the admission of late-filed contentions. This again is standard NRC practice and the Appendix D schedule (e.g., 620 days between the First Pre-hearing Conference Order and the beginning of the Evidentiary Hearing) provides a reasonable amount of time to address and accommodate late-filed contentions *in parallel* with other hearing activities (such as derivative discovery and dispositive motions). In any event, Nevada's position would do nothing to enhance the NRC's ability to achieve the early "front-end" milestones which should, at this stage, be the subject of the Advisory Board's review.

Finally, Nevada urges the Advisory Board to "instruct" the NRC Staff to limit its participation in the proceeding in a manner which is completely inconsistent with the regulations

and the Staff's rights as a party. Nevada Response at 10. Again, the NRC Staff has responded to this argument in its Reply at 3-4. DOE concurs with the Staff's position.

III. CONCLUSIONS

DOE appreciates the opportunity to present its views on how best to organize and manage the process of filing, responding to, and ruling on contentions in the Yucca Mountain proceeding. The Department believes that its recommendations are reasonable, balanced, calculated to maximize the NRC's ability to meet the mandates of the NWPA and the Appendix D milestones, and consistent with the rights of all potential parties to the proceeding. DOE respectfully requests that the Advisory Board adopt its recommendations to the maximum extent possible.

Respectfully submitted,

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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	)	ASLBP No. 08-861-01-PAPO-BD01
	)	
(High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)	)	April 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing U.S. DEPARTMENT OF ENERGY RESPONSE TO MEMORANDUM (REQUESTING INPUT FROM POTENTIAL PARTIES ON FORMAT OF CONTENTIONS) have been served upon the following persons on April 28, 2008 through the Electronic Information Exchange. E-mail addresses followed by an asterisk do not appear on the current Electronic Information Exchange service list, but have been sent a separate courtesy e-mail attaching a copy of the Answer.

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