

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)	)	May 6, 2008

**U.S. DEPARTMENT OF ENERGY**  
**ADDITIONAL COMMENTS ON**  
**CASE MANAGEMENT MATTERS**

On April 29, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory Board) encouraged parties and potential parties to the Yucca Mountain licensing proceeding to file written responses to the comments received from other parties and potential parties, in advance of the May 14, 2008 case management conference. Memorandum Requesting Additional Written Comments from Potential Parties on Format for Contentions (April 29, 2008) (April 29 Memorandum). The U.S. Department of Energy's (DOE or Department) additional comments are provided below.

1. The State of Nevada has proposed an alternative to the Advisory Board's recommendation that contentions be structured to specifically address each of the six relevant criteria for determining the admissibility of contentions set forth in 10 CFR § 2.309(f)(1)(i)-(vi).<sup>1</sup>

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<sup>1</sup> Section 2.309(f)(1)(i)-(vi) states: (f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must: (i) Provide a specific statement of the issue of law or fact to be raised or controverted; (ii)

Nevada's Response to Advisory Pre-License Application Presiding Officer Board's April 4, 2008 Memorandum (April 28, 2008) (Nevada Response) at 2-5. In particular, Nevada argues that it would be "burdensome, unlawful, and unnecessary" to require that each contention address separately each of the six relevant admissibility criteria (Nevada Response at 4), and instead proposes that four of the six criteria be conflated into two criteria. DOE disagrees.

The criteria set forth in Section 2.309(f)(1) are long-standing and consistently have been applied in NRC licensing proceedings. They are well understood and represent the Commission's views on the prerequisites for admission of contentions in NRC proceedings. Had the Commission felt that the determination of admissibility could or should be made based upon a smaller or different set of criteria, it presumably would have reflected that determination in the rule itself.

Further, the Yucca Mountain proceeding is not the proceeding in which the Licensing Boards should be experimenting with new formulations of well-established requirements and precedents. Moreover, changes to those requirements and precedents are likely to lead to unintended consequences. It is difficult to predict how Nevada's proposed changes might, in some way not presently understood, create new procedural issues or conflicts that would not occur if, as the Advisory Board has suggested, the Boards adhere to existing requirements and precedent.

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Provide a brief explanation of the basis for the contention; (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (v) Provide 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 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; and (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information 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 contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

Nevada argues that it would be “burdensome” to utilize the six criteria set forth in Section 2.309(f)(1)(i) – (vi), but never explains why. Nevada Response, *passim*. Similarly, the State incorrectly argues that the Advisory Board’s recommended approach would be “unlawful.” Nevada Response at 4. Clearly, asking the parties and potential parties to structure and present their contentions in a form that tracks the relevant admissibility criteria is not unlawful and is well within a Licensing Board’s authority. See 10 CFR § 2.319. Nothing in *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1132 (1985) (*UCS*), which is cited by Nevada, suggests otherwise. *UCS* does not even address the contention pleading standards, much less does it hold, as Nevada suggests, that any of the six criteria are so closely related as to be indistinguishable. *Compare id. with* Nevada Response at 3.

2. Nevada argues that “if a contention takes issue with a specific portion of the application, it should be presumed that the contention satisfies both items [10 CFR § 2.309(f)(1)] (iii) and (iv), because if otherwise were to be true then DOE’s application must include information and analyses that are irrelevant and immaterial.” Nevada Response at 3-4. DOE disagrees.

The assertion that if information of any nature exists in the LA, then any criticism of that information embodied in a contention is within the scope of the proceeding and is material to the NRC’s regulatory findings is incorrect. Instead, Boards must consider each of the contention admissibility factors separately. Simply alleging a deficiency in the application does not eliminate the independent scope and materiality requirements. “Where a contention alleges a deficiency or error in the application, the deficiency or error must have some independent health and safety significance.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 89 (2004), *aff’d* CLI-04-36, 60 NRC 631 (2004). Similarly,

Boards also consider, as a separate factor, whether the contention is within the scope of the proceeding. *See id.* at 90.

Thus, the mere fact that certain information is provided in the LA does not necessarily bring that information into the scope of the LA proceeding. For example, the LA will refer to the fact that the Transportation and Disposal (TAD) canisters will be certified in accordance with 10 CFR Part 71. However, that does not mean that a contention challenging whether the TAD canisters meet the Part 71 requirements for the issuance of a certificate of compliance is within the scope of the proceeding or is material to the NRC findings in this proceeding. The Part 71 certificate of compliance process is a regulatory process separate from licensing of the repository under 10 CFR Part 63. Similarly, the LA will reference certain DOE land use permits issued by the Bureau of Land Management (BLM) for the development of borrow pits to furnish construction materials. That does not mean that a contention challenging whether the BLM appropriately issued such permits is within the scope of the proceeding or is material to the NRC findings. Therefore, it should not be “presumed” that a mere reference to a matter in the LA demonstrates that matter is within the scope of the proceeding or is material to the findings to be made by the NRC in issuing the repository construction authorization.

3. Nevada states that “there should be a discussion of one paragraph in length that demonstrates compliance with both” 10 CFR §§ 2.309(f)(1)(v) and (vi). Nevada Response at 4. DOE does not object if Nevada chooses to limit the length of its discussion of criteria (v) and (vi) (or any of the other criteria set forth in Section 2.309(f)(1)), so long as it is understood that a party or potential party is under an obligation to provide whatever level of detail is necessary to demonstrate compliance with the applicable admissibility criteria. Nevada’s proposed

limitations on the length of discussion of the admissibility criteria should not be construed as setting a new, or lesser, standard for admissibility.

4. Nevada argues that the labeling of contentions should address the third, as opposed to the fourth level of “granularity” in the LA and that page number citations are unnecessary. Nevada Response at 5-6. DOE continues to believe that the fourth level of granularity is more appropriate. In any event, it is critical that each contention be clearly and uniformly labeled with the specific citation to the LA subsection(s) that is being challenged in the contention. Page numbers are also essential to assist the parties that must answer the contentions to quickly locate the critical passages. There will not be any differences in pagination, so Nevada’s concern with page cites is not genuine.<sup>2</sup>

5. While not literally a case management issue, Nevada states that “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.” Nevada Response at 6. DOE previously expressed its general views on this issue in its April 28 Response at 10-11. As stated therein, it is the Department’s position that issues related to DOE’s *Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada – Nevada Transportation Corridor* (Rail Corridor SEIS) and *Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada* (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

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<sup>2</sup> Nevada alleges that there could be differences in pagination depending upon whether the LA is viewed via the LSN or ADAMS. Nevada Response at 6. Whether on the LSN or in ADAMS, the LA will be available in PDF format and specific page numbers (e.g., LA p. 1.1-53) will not change.

jurisdiction, and that contentions based upon alleged inadequacies or omissions in those documents would not be admissible.<sup>3</sup> 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 DOE’s 2002 *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (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.

6. Nevada states that “[f]or 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,” and that a means to “track” revisions, supplements or superseded versions of such LA references must be established and maintained. Nevada Response at 7. Nevada proposes either a DOE LSN “subcollection devoted exclusively to LA materials” or use of ADAMS. *Id.* at 7-8.

DOE is willing to provide to the parties and potential parties the LSN accession numbers of references cited in the LA (with the exception of references that are excluded from LSN

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<sup>3</sup> The *Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (Repository SEIS) will include 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.

pursuant to Section 2.1005). It should be noted that these documents are already in the LSN with established accession numbers, and that references cited in the LA include the DOE participant accession numbers, where applicable, that are LSN searchable.<sup>4</sup> This should further Nevada's and other potential parties' ability to file contentions in a timely manner.

As for Nevada's statement that a means must be established to track superseded, revised, or supplemental LA references, DOE is willing to provide to parties and potential parties the LSN accession numbers for such documents, to the extent it modifies the cited LA references.

7. The NRC Staff has stated that "factual issues are not resolved at the contention admission stage." NRC Staff Response to Board's April 4, 2008 Memorandum (Requesting Input from Potential Parties on Format for Contentions), April 28, 2008 (NRC Staff Response) at 8. The Staff is correct that *genuine* issues of material fact are not resolved at the contention admissibility stage (such that sworn affidavits are not required at that stage). However, DOE does not believe that the Staff intended to suggest that the factual determinations explicitly embodied in Section 2.309(f)(1) do not apply. Furthermore, in this regard, DOE agrees with the Nuclear Energy Institute (NEI) comments (*See* The Nuclear Energy Institute's Response to the Advisory PAPO Board's April 4, 2008 Memorandum, April 28, 2008 (NEI Response) at 7-8). NEI correctly states that there is a "factual" as well as a "legal" component to a Licensing Board's admissibility determinations, citing the explicit language of Section 2.309(f)(1). NEI Response at 7. NEI states that "DOE has the right to argue against a contention's admissibility based on ... an insufficient factual basis. In other words, if the contention on its face has the

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<sup>4</sup> Nevada already has asked DOE to provide a list of the accession numbers for the references cited in the LA that have been completed or edited since December 1, 2007. (Nevada made no such request for the references pre-dating December 1, 2007). DOE provided the requested list to Nevada's counsel, who has confirmed they have located these documents on the LSN.

facts wrong, DOE can and should argue that the contention should not be admitted on that basis.”  
NEI Response at 7-8. DOE agrees.

8. Some of the commentors have stated that there is no need to electronically attach those LSN documents that are relied upon as part of the basis for the contentions and that provision of the accession numbers and other identifying information is sufficient. Given the potential volume of such references, and the limited time for answering the contentions and for the Boards to rule on the admissibility of the contentions, DOE continues to believe that attaching these documents is warranted.

Nevada and the other potential parties will have months to collect the cited documents and could provide them in CD-ROM format, without incurring an onerous burden. DOE, the NRC Staff and the Boards, on the other hand, will have to retrieve, in a period of as little as 25 days, multiple LSN documents for 650 or more contentions. Even if each contention cites only two LSN documents, there would be 1,300 documents to retrieve and review. One alternative would be to require the Petitioners to provide the LSN accession numbers (organized by contention) perhaps two weeks before the Petitions are due.

In addition, many of the commentors noted potential difficulties in accessing accurate and up to date documents supporting the contentions via the internet by URL address, and therefore stated that such documents should be attached to the contentions. DOE agrees. In fact, 10 CFR § 2.1013(c)(1)(vi) recognizes the unreliability of URL hyperlinks and effectively prohibits their use for references which form the basis of contentions.

9. Finally, in many other areas, there appears to be a strong consensus among most of the commentors. Those areas of consensus include, among other things: a requirement for “single issue” contentions; organizing the contentions to track the organization of the LA; use of a

uniform contention format; a preference for the Advisory Board's Option 1 for labeling contentions; and identification of contentions of omission and purely legal contentions. DOE looks forward to responding to the Advisory Board's additional, specific questions at the May 14 conference.

Respectfully submitted,

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ATOMIC SAFETY AND LICENSING BOARD

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing U.S. DEPARTMENT OF ENERGY ADDITIONAL COMMENTS ON CASE MANAGEMENT MATTERS have been served upon the following persons on May 6, 2008 through the Electronic Information Exchange.

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