

May 8, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. PAPO-00, PAPO-001
U. S. DEPARTMENT OF ENERGY)	
)	ASLBP No. 04-829-01-PAPO
(High-Level Waste Repository: Pre-Application Matters))	ASLBP No. 08-861-01-PAPO-BD01

NRC STAFF RESPONSE TO THE STATE OF NEVADA'S MOTION TO ESTABLISH A
REASONABLE SCHEDULE FOR THE FILING OF CONTENTIONS ON YUCCA MOUNTAIN

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the State of Nevada's ("Nevada") motion requesting an extension for the filing of petitions and contentions in the construction authorization proceeding for Yucca Mountain. State of Nevada's Motion to the Commission to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain (Apr. 28, 2008) ("Nevada Motion").¹ For the reasons set forth below, the Commission should deny Nevada's Motion.

DISCUSSION

In its Motion, Nevada requests that the Commission extend the period of time for filing petitions to intervene and requests to participate as interested governmental participants in the high-level waste proceeding from 30 to 180 days after the notice of hearing is published.

¹ The Staff's response is being filed in accordance with the May 1, 2008 Order issued by the Secretary of the Commission. In addition, as the above caption indicates, copies of this response are being filed with the Pre-License Application Presiding Officer (PAPO) and the Advisory Pre-License Application Presiding Officer because Nevada served its Motion in both proceedings. See Nevada Motion at 1.

Nevada Motion at 1. Nevada argues that the 30 days currently provided in 10 C.F.R. § 2.309(b)(2) “is grossly inadequate.” *Id.* at 6. In addition, Nevada argues that because there is no minimum amount of time in which the Staff can make its docketing decision and because there is no limit on the scope or the number of amendments that DOE can make to its application, Nevada is only guaranteed about 30 days to fully review both the license application and references and to file contentions. *Id.* at 4. To support its Motion, Nevada claims that fairness and its right to a hearing under Section 189a of the Atomic Energy Act (“AEA”) mandate that it be provided an adequate amount of time to prepare and file contentions. *Id.* at 3 (citing Atomic Energy Act of 1954, as amended, § 189a(1)(A), 42 U.S.C. § 2239). Nevada suggests that 180 days from the publication of the notice of hearing to file contentions is a reasonable and adequate amount of time. *Id.* at 1, 8.

Nevada’s Motion should be denied. As discussed below, Nevada has demonstrated neither that (1) there is new information that was not considered when the Commission’s regulations were promulgated, which would render them unfair and inadequate nor (2) an extension providing that contentions may be filed 180 days after publication of the notice of hearing is reasonable.

While Section 189a of the AEA provides Nevada with a right to seek intervention in the high-level waste proceeding, intervention is “subject to the Commission’s rulemaking power under section 161p and, thus, to reasonable procedural requirements designed to further the purposes of the Act.” See Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (citing

BPI v. AEC, 502 F.2d 424, 427-28 (D.C. Cir. 1974)).² The Commission has created reasonable procedural requirements which, as Nevada notes, are committed to fundamental fairness. See Nevada Motion at 3 (internal citations to *Federal Register* omitted).³

The Commission's regulations have always provided interested participants in the high-level waste proceeding with 30 days to file contentions from publication of the notice of hearing. Compare 10 C.F.R. § 2.309(b)(2) with Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,938 (Apr. 14, 1989). In 2004, when the Commission revised its Part 2 regulations, this 30-day provision was revisited. Although additional time for filing contentions was provided in other NRC proceedings, the Commission retained and justified the 30-day timeframe for the high-level waste proceeding, stating that it was sufficient "in view of the ample pre-application document disclosures provided by the LSN [Licensing Support Network]." See Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004).

The Commission anticipated that the high-level waste proceeding would involve complex issues and a substantial amount of information. See, e.g., *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters), CLI-04-32, 60 NRC 469, 470 (2004); 66 Fed. Reg. at 29,453; 54 Fed. Reg. at 14,926. Unlike traditional NRC proceedings, the Licensing Support Network (LSN) provides high-level waste participants with the opportunity to conduct a

² See also *Baltimore Gas & Elec. Co.*, (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 341 (1998) (stating the Commission has "'broad regulatory latitude' under the Atomic Energy Act to establish its 'own rules of procedure . . .'" (internal citations omitted).

³ Objectives of the Commission's hearing processes include providing a fair process and avoiding unnecessary delays. Policy on Conduct of Adjudicatory Proceedings; Policy Statement, 63 Fed. Reg. 41,872, 41,873 (Aug. 5, 1998).

“comprehensive and early review of millions of pages of relevant licensing material . . . to permit the earlier submission of better focused contentions”⁴ 54 Fed. Reg. at 14,926. Thus, Nevada’s argument that additional time is needed due to the complexity and volume of material, see Nevada Motion at 4-5, fails to offer any new information or circumstances that the Commission has not previously considered.

Furthermore, contrary to Nevada’s claim, 30 days is not the only time interested participants will have to review the license application. See *id.* at 4. Nevada will have access to the license application during the Staff’s docketing review. Although there is no minimum time in which the Staff can make its docketing decision, the Staff estimates that this determination will be made in about 90 days. Summary of the U.S. Nuclear Regulatory Commission/U.S. Department of Energy Quarterly Management Meeting at 4 (Mar. 25, 2008) (ADAMS ML081150641). In addition, at this point in time, the assumption that Nevada’s opportunity to file contentions will be limited by amendments to the tendered application during the Staff’s docketing review is speculative. See Nevada Motion at 4. In the event that DOE amends its application during the docketing review, Nevada would still be bound by the 30-day requirement

⁴ The Commission’s regulations require that the Department of Energy’s (“DOE”) LSN collection be certified at least six months prior to the tendering of its license application. 10 C.F.R. § 2.1012(a). The Commission determined this was an appropriate amount of time for participants to prepare for the high-level waste proceeding. Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,453, 29,459 (May 31, 2001). The PAPO Board, in ruling on Nevada’s motion to strike DOE’s LSN certification, held that only extant documents had to be made available at the time of initial certification. See *U.S. Dep’t of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-08-01, 67 NRC ___, slip op. at 10 (Jan. 4, 2008). In addition, the PAPO Board stated that the Commission always expected additional material would be created after initial certification and therefore, would be available for less than six months before tendering of the application. *Id.* at 16-17. Nevada’s Motion, here, does not show that the Commission failed to consider this when it established the 30-day timeframe. Nevada challenged the PAPO Board’s ruling and the appeal is pending before the Commission. See The State of Nevada’s Brief on Appeal from the PAPO Board’s January 4, 2008 and December 12, 2007 Orders (Jan. 15, 2008).

in Section 2.309(b)(2). Nevada could, however, seek an extension of time to file contentions based on information in the amendment. See 10 C.F.R. §§ 2.307(a), 2.323. Thus, Nevada fails to demonstrate new or unexpected circumstances that render the Commission's regulations unfair or inadequate.

In addition, Nevada's request for an extension to file contentions from 30 to 180 days is not reasonable. Contrary to Nevada's argument, a five month extension is not consistent with Commission precedent such as *Calvert Cliffs*. See Nevada Motion at 6.⁵ In *Calvert Cliffs*, petitioners argued that the Commission failed to provide sufficient information and time to develop contentions. See *Calvert Cliffs*, CLI-98-25, 48 NRC at 336. The Commission denied petitioners' appeal stating that the total amount of time provided to prepare contentions, five months from the receipt of the license application (four months from docketing), was sufficient. See *id.* at 342, 345, 352, *aff'd sub nom. Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).⁶ Applying the reasoning of *Calvert Cliffs*, Nevada's requested 180 days should begin to run at the date of receipt, not docketing. This

⁵ Nevada also relies on *West Valley* to support the proposition that granting an extension in this case would be consistent with Commission precedent. Nevada Motion at 6. *West Valley* is, however, distinguishable because it did not address the adequacy of time to file contentions, but rather focused on a late filed intervention petition. In *West Valley*, petitioners, Erie County, filed a petition for leave to intervene over nine months late. *Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant) LBP-75-4*, 1 NRC 89, 92 (1975). The Licensing Board denied the petition, *id.* at 99, and the Appeal Board affirmed this decision. See *Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant) ALAB-263*, 1 NRC 208, 217 (1975). The Commission, however, reversed with reluctance, and accepted the petition but acknowledged that the County's grounds for filing late were without merit. *Nuclear Fuel Services Inc., et al. (West Valley Reprocessing Plant), CLI-75-4*, 1 NRC 273, 275 (1975). Thus, *West Valley* does not support Nevada's Motion.

⁶ Similarly, in *North Anna*, the Commission denied petitioners' request for an extension to file contentions where petitioners claimed that demands of participating in the environmental impact statement scoping process and the unavailability of SECY papers warranted an extension. *Dominion Virginia Power (Combined License Application for North Anna Unit 3)*, No. 52-017 (May 1, 2008) (unpublished). The Commission again focused on the amount of time that petitioners had to formulate contentions from the date the license application became available and reasoned that nearly five months was adequate. *Id.* at 2.

would result in a 60 day extension from current provisions in 10 C.F.R. § 2.309, assuming a 90-day docketing review.⁷

Nevada also suggests that based on Commission precedent, an extension should be granted because the high-level waste proceeding is more complicated than cases like *Calvert Cliffs*. Nevada Motion at 6 & n.10. However, Nevada discounts the fact that, unlike traditional proceedings, interested participants in the high-level waste proceeding are afforded early access to a substantial volume of relevant and supporting materials during the pre-application discovery phase. See Nevada Motion at 4 n.7; 54 Fed. Reg. at 14,926. In fact, during this time, Nevada has been able to follow DOE's activities, conduct its own research, and begin to formulate contentions. See *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-08-05, 67 NRC ___, slip op. at 19 (Apr. 23, 2008) (Karlín, A., dissenting) (citing Hearing Before Nevada Legislative Committee on High Level Radioactive Waste, at 6-7 (Jan. 15, 2008) (Testimony of Robert Loux, Executive Director of the Nevada Agency for Nuclear Projects)). Thus, Nevada's argument that 180 days from the date of docketing is a reasonable amount of time to file contentions is not persuasive.

⁷ Consistent with *Calvert Cliffs*, Nye County suggests that the 180 day period Nevada requests should begin at the date of tendering, not docketing. See Nye County Response to State of Nevada's Motion for Schedule for Filing Contentions, at 2 (May 3, 2008).

CONCLUSION

For the reasons stated above, the Commission should deny Nevada's Motion.

Respectfully submitted,

Signed (electronically) by

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO THE STATE OF NEVADA'S MOTION TO ESTABLISH A REASONABLE SCHEDULE FOR THE FILING OF CONTENTIONS ON YUCCA MOUNTAIN" in the above-captioned proceeding have been served on the following persons this 8th day of May, 2008, by Electronic Information Exchange.

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