

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-08-10

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

DOCKETED 06/20/08

SERVED 06/20/08

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository: Pre-Application
Matters, Advisory PAPO Board)

Docket No. PAPO-001

ASLBP No. 08-861-01-PAPO-BD01

June 20, 2008

MEMORANDUM AND ORDER

(Case Management Order Concerning Petitions to Intervene, Contentions, Responses and Replies, Standing Arguments, and Referencing or Attaching Supporting Materials)

I. INTRODUCTION

On December 13, 2007, the Commission authorized the establishment of an Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board or Board) to obtain the views of potential parties¹ and recommend case management requirements for any adjudication regarding an application by the Department of Energy (DOE) for authorization to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada.² Pursuant to this authority, this Board was established on February 13, 2008.³

¹ "Potential party," as it is used here, means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definition of "party," "potential party," or "interested governmental participant" under 10 C.F.R. § 2.1001.

² Staff Requirements Memorandum COMSECY-07-0030-Requesting Authority to Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing (Dec. 13, 2007).

³ See 73 Fed. Reg. 9358 (Feb. 20, 2008). The Board was reconstituted on March 20, 2008. See 73 Fed. Reg. 16,077-78 (Mar. 26, 2008).

On June 17, 2008, the Commission supplemented the Board's recommendation authority with authority to issue binding case management orders for specified procedural aspects of any HLW proceeding that may be initiated.⁴ Because early notice will be beneficial, we hereby establish such binding case management requirements, and also make certain related recommendations.

II. BACKGROUND

By memoranda issued on March 6, April 4, April 29 and May 2, 2008, the Advisory PAPO Board requested comments from potential parties on a variety of issues. The Board also held a full-day conference with potential parties at the Commission's Las Vegas Hearing Facility on May 14, 2008, with video conference participation from the Commission's headquarters in Rockville, Maryland. Further written comments from potential parties were received on May 28, 2008. Numerous potential parties expressed their views, including: DOE; the NRC Staff; the State of Nevada (Nevada); the Nevada counties of Churchill, Esmeralda, Lander, and Mineral (jointly); the Nevada counties of Clark, Nye, Eureka, and Lincoln; the Nuclear Energy Institute (NEI); the California Attorney General's Office (California Department of Justice) and the California Energy Commission; and the California county of Inyo.

The potential parties' comments confirmed that any HLW repository construction authorization adjudication will be challenging. Collectively, their responses indicated that potential parties may file more than 650 contentions, which is approximately five times the largest number filed in any Nuclear Regulatory Commission proceeding since the contention admissibility standards were significantly revised in 1989. Moreover, as Nevada and others recognized, this total may likely be even higher, if "sub-contentions" are broken into single-issue

⁴ U.S. Dep't of Energy (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), CLI-08-14, 67 NRC __, __ (slip op. at 6-7) (June 17, 2008).

contentions.⁵ As the Commission has stated, any proceeding that may be initiated concerning a HLW repository at Yucca Mountain “has the potential to be one of the most expansive proceedings in agency history.”⁶

In light of the number of contentions that will likely have to be addressed within the rigorous schedule established by 10 C.F.R. Part 2, Appendix D, the potential parties that participated in our process generally supported the concept of employing a prescribed format for contentions (as well as answers and replies) to expedite the process. Specifically, there was a consensus among the participants that, to facilitate briefing and decisions concerning admissibility of potentially hundreds or even thousands of contentions, the contentions and subsequent, related documents should 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 supporting material.

The Advisory PAPO Board therefore believes that the case requirements set forth below are supported by a majority of the potential parties that participated before the Board. These requirements are limited to procedural matters, and are intended to help both potential parties and licensing boards address the admissibility of contentions in any HLW proceeding effectively and efficiently. They are not intended to make the process more difficult. Accordingly, because the requirements are being imposed for the first time in a unique and complex proceeding, failure to comply with these case management requirements shall not be grounds for any potential party to object to the admissibility of a proffered contention or the filing of an answer, although the licensing boards retain the right to reject proffered contentions should a potential party significantly and in bad faith ignore these requirements.

⁵ See Nevada Response to the Board’s Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008) at 2.

⁶ U.S. Dep’t of Energy, CLI-08-14, 67 NRC at ___ (slip op. at 5).

This Order applies to documents likely to be filed in support of, or in opposition to, intervention as a party in a HLW proceeding. Because it is less common and involves rather different considerations, the Board has not attempted to formulate requirements concerning participation other than as a party.⁷ Nor has the Board addressed the extent (if any) to which similar case requirements might be appropriate in adjudications other than a HLW proceeding. As the Commission has recognized, the Yucca Mountain matter presents “unique facts and circumstances.”⁸

III. CASE MANAGEMENT REQUIREMENTS FOR ANY HLW PROCEEDING

A. Intervention Petitions

Each intervention petition shall consist of three sections: (1) an introduction; (2) contentions; and (3) supporting attachments.

1. Introduction to Petition

The introduction shall contain at least three subsections.

First, in accordance with 10 C.F.R. § 2.309(d), the introduction shall identify the petitioner and set forth the basis on which it asserts standing, including specific, labeled sections addressing, as applicable, the required elements, such as injury-in-fact and zone of interests. Any petitioner requesting discretionary standing pursuant to 10 C.F.R. § 2.309(e) shall likewise label its discussion of each of the applicable regulatory requirements.

Second, if the petition sets forth more than 10 contentions, the introduction shall contain a table of contents, including the titles of each contention and of each attachment to the petition.

Third, the introduction shall designate which (if any) contentions are submitted as joint contentions pursuant to 10 C.F.R. § 2.309(f)(3) and, for each such joint contention, list all

⁷ See, e.g., 10 C.F.R. § 2.315 (participation by a person not a party).

⁸ U.S. Dep’t of Energy, CLI-08-14, 67 NRC at __ n.17 (slip op. at 7 n.17).

sponsors and designate the participant that has authority to act with respect to the contention. (This information shall be provided in the petition of each sponsor of a joint contention.)

2. Format for Contentions

Each contention shall consist of four parts: (1) a label; (2) a title; (3) a body, addressing 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); and (4) a statement concerning whether the contention is a joint contention.

First, the label shall contain three subparts: (1) a three-letter designation of the participant submitting the contention; (2) a descriptor that designates the subject matter of the contention; and (3) a number that sequentially designates the particular contention in that subject matter category. (E.g., NEV-SAFETY-352)

To avoid duplication, potential parties shall ensure that their adopted three-letter participant designations are unique. Where practicable, a potential party shall use the first three letters of the first principal word in its name (e.g., NEV) or a familiar acronym (e.g., NEI).

Subject matter descriptors shall be selected from among three possibilities: (1) SAFETY (to be used with safety/technical contentions pertaining to the DOE license application, including the safety analysis report); (2) NEPA (to be used with National Environmental Policy Act-related contentions pertaining to the DOE NEPA documents, including supplemental environmental impact statements and any of the rail transportation supplements, or the NRC Staff position statement on adoption of DOE environmental documents); and (3) MISC (to be used with all other contentions). (E.g., NEV-SAFETY-352; CAL-NEPA-101; NYE-MISC-22)

Second, solely for ease of reference, each contention shall have a short, descriptive title that is unique to that contention (e.g., "Failure to Discuss Pre-Closure Dismantling of Subsurface Radiation Monitoring Facility"). Such titles will not be given any substantive significance in determining the admissibility of contentions.

Third, the body of each contention shall 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). In addition to the requirements expressly set forth in those six subsections, potential parties shall comply with the following further requirements:

Section 2.309(f)(1)(i) requires “a specific statement of the issue of law or fact to be raised or controverted.” This statement shall set forth petitioner’s contention in precisely the form it wishes the contention to be considered, and rarely should require more than a sentence or two. Potential parties shall also strive to frame narrow, single-issue contentions, notwithstanding that this may result in the filing of an increased number of contentions and some duplication in drafting. Although difficult to define, what this means is that, while at the same time placing other potential parties on notice of the claims they will be either supporting or opposing, contentions should be sufficiently specific as to define the relevant issues for eventual rulings on the merits, and not require the parties or licensing boards to devote substantial resources to narrow or to clarify them. In addition, each contention that raises a legal issue or is a contention of omission shall so state.

Contentions raising purely legal issues may be easier to parse into single-issue contentions, and potential parties shall do so to the maximum extent possible. Contentions that raise factual or mixed factual and legal issues, however, should also be framed as single-issue contentions. For example, a contention that identifies a single alleged error or omission that petitioner believes independently demonstrates that DOE has failed to meet one or more closely-related regulatory requirements would be a single-issue contention. A contention can allege that more than one regulatory requirement is violated and still be a single-issue contention if it identifies only a single factual (or legal) rationale and the regulatory requirements are closely related. A contention that identifies a single set of facts, but alleges violations of more than one closely-related section of a single statute, would also be a single-issue contention. Conversely, a

contention that identifies a single set of facts but alleges violations of more than one statute (e.g., Atomic Energy Act, Nuclear Waste Policy Act, or NEPA) generally would not be a single-issue contention. In such circumstances, the alleged violation of each pertinent statute should be set forth as a separate contention. Notwithstanding the above, however, a petitioner shall not be precluded from alleging, in a separate contention, that the cumulative impact of errors or omissions set forth in other contentions, taken together, demonstrates a violation of regulatory requirements, whether or not the errors or omissions alleged in such other contentions are considered material by themselves.

Section 2.309(f)(1)(ii) requires “a brief explanation of the basis for the contention.” Rarely should this require more than a sentence or two.

Section 2.309(f)(1)(iii) requires a showing that “the issue raised in the contention is within the scope of the proceeding.” Often, this requirement may be satisfied by reference to a potential party’s response to the next provision (section 2.309(f)(1)(iv)).

Section 2.309(f)(1)(iv) requires a showing 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.” This requires citation to a statute or regulation that, explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention. Citation to a specific statutory or regulatory requirement is preferable to citation to a more general statutory or regulatory requirement. Potential parties shall cite the principal statutory or regulatory requirement or requirements on which they rely.

Section 2.309(f)(1)(v) requires, in addition to a concise statement of the alleged facts or expert opinions that support its position and on which it intends to rely, that a potential party provide “references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” Such “references” shall be as specific as reasonably possible. Readily available legal authorities, materials that cannot be attached

because of copyright restrictions, and Licensing Support Network (LSN) documentary material need not be attached to a potential party's petition. Referenced LSN documents, however, shall include the LSN accession number and the title, date and specific page number of the document. All other supporting documents shall be electronically attached to the petition. Specifically, a reference to an active, publicly-accessible internet universal resource locator (URL) should not be made without electronically attaching copies of the information being cited, as the content of such web sites may change or subsequently become inaccessible. See 10 C.F.R. § 2.1013(c)(1)(vi). Attached affidavits shall be individually paginated and contain numbered paragraphs that can be cited with specificity.

Section 2.309(f)(1)(vi) requires, among other things (and except for contentions of omission), "references to specific portions of the application (including the applicant's environmental [documents] and safety report) that the petitioner disputes and the supporting reasons for each dispute." Because these documents will be on the LSN, it will be sufficient to reference them in the same manner as other LSN documents, citing to the most specific portion of the document that is practicable.

Fourth, where applicable, a statement shall be included indicating that the contention is jointly sponsored pursuant to 10 C.F.R. § 2.309(f)(3), listing all participants that are sponsoring the contention, and designating the specific participant with authority to act with respect to the contention. (This information shall be provided in the introduction to the petition of each sponsor of a joint contention.)

3. Attachments

As noted above, except for readily available legal authorities, materials that cannot be attached because of copyright restrictions, and documents available on the LSN, all documents that are referenced in support of one or more contentions shall be electronically attached to the petition.

Attachments shall be numbered consecutively and individually paginated. Because of the way in which the Commission's electronic filing system is programmed, such supporting documents should be designated as "attachments" and not as "exhibits" (a term that is reserved for evidentiary exhibits at later stages in the adjudication process).

B. Answers

Insofar as practicable, answers (including any attachments thereto) shall follow the format of petitions, in order and clearly labeled.

Answers shall be limited to addressing specific, alleged deficiencies in petitions and particular contentions. For example, if a potential party challenges only another potential party's standing, and not the admissibility of any particular contention, the answer should address only standing. If a potential party challenges only whether the petitioner is in substantial and timely compliance with the requirements of 10 C.F.R. § 2.1003, as required by 10 C.F.R. § 2.1012(b)(1), the answer should address only that issue. If a potential party challenges whether a particular contention satisfies only certain of the six requirements for contentions set forth in 10 C.F.R. § 2.309(f)(1) – e.g., an alleged failure to show that the issue raised is within the scope of the proceeding pursuant to section 2.309(f)(1)(iii) – the answer should address only those specific requirements. Nonspecific answers that provide only a boiler-plate objection (e.g., "the contention fails to provide a sufficient supporting basis") are not helpful and should be avoided.

C. Replies

Insofar as practicable, replies (including any attachments thereto) shall follow the format of answers, in order and clearly labeled.

Replies shall be limited to addressing points that have been raised in answers. For example, if no potential party has challenged whether the existence of a genuine dispute has been established with respect to a particular contention, pursuant to 10 C.F.R. § 2.309(f)(1)(vi),

a petitioner's reply need not and should not address that issue any further with respect to that contention.

D. Nontimely, New, and Amended Contentions

Insofar as practicable, and in addition to demonstrating compliance with other applicable requirements set forth in 10 C.F.R. § 2.309, nontimely, new, and amended contentions shall follow the prescribed format for initial petitions and contentions.

E. E-Filing Requirements

The potential parties are reminded that, consistent with the Pre-License Application Presiding Officer (PAPO) Board's fourth case management order,⁹ attachments or enclosures to a submission and any related responsive pleadings shall be submitted via the agency's E-Filing system as part of a single electronic file that consists of the pleading or other submission, the certificate of service, and all the attachments or enclosures associated with the pleading or submission. Also, in accordance with the agency's E-Filing guidance, multiple electronic files shall be used for pleadings or submissions with attachments or enclosures only if the filing exceeds 50 megabytes in size. See Guidance for Electronic Submissions to the NRC, Revision 3 (Nov. 20, 2007) at 10 (ADAMS Accession No. ML071580647). In contrast, exhibits (and pre-filed written testimony) should be submitted via the agency's E-Filing system as separate electronic files. See 10 C.F.R. § 2.304(g).

IV. RECOMMENDATIONS

Potential parties are encouraged, but not required, to identify groups of contentions that they believe might most efficiently be considered together by a single Atomic Safety and Licensing Board.

Potential parties are encouraged, but not required, to confer and submit joint

⁹ See PAPO Board Fourth Case Management Order (Concerning Electronic Filing, DDMS, Safeguards Information, and Other Items) (Oct. 5, 2007) at 1-4 (unpublished).

contentions, pursuant to 10 C.F.R. § 2.309(f)(3), where practicable.

Potential parties are encouraged, but not required, to provide the applicant and other participants with the LSN accession numbers of documents they intend to reference in their petitions several days in advance of filing petitions.

The Advisory PAPO Board recommends to future Atomic Safety and Licensing Boards with responsibility for any HLW proceeding that they impose the following additional case management requirements:

- A participant that wishes to adopt the contention of another participant, pursuant to 10 C.F.R. § 2.309(f)(3), should do so within either: (1) 45 days of the filing of the contention to be adopted; or (2) 45 days of the admission of the contention to be adopted. A pleading regarding adoption should state whether the adopter has contacted the originator of the contention regarding adoption and whether there is agreement on which participant will have authority to act regarding the contention.
- New or amended contentions, which may be filed with leave of the presiding officer pursuant to 10 C.F.R. § 2.309(f)(2), should be presumed timely if they are filed within 30 days after the availability of new or materially different information. If a participant requests additional time to file reasonably before such 30-day period expires, new or amended contentions may also be considered timely upon a Board finding that there has been an adequate showing of need for the additional time requested.

Finally, although the participating potential parties agreed that petitions should set forth the elements necessary to establish standing, there was not agreement as to what showing is required for certain affected units of local government. The participating potential parties identified a possible ambiguity in the Commission's regulations. Subpart J (which is specifically

applicable to HLW proceedings) defines a “party” to include, among others, “any affected unit of local government” as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101(31) – implying that such entities enjoy standing as of right. See 10 C.F.R. § 2.1001. Subpart J, however, does not take precedence over certain other Commission regulations, including 10 C.F.R. § 2.309. See 10 C.F.R. § 2.1000. 10 C.F.R. § 2.309(d)(2), in contrast, provides that a local governmental body need not address standing requirements if it wishes to be a party in a proceeding for a facility “located within its boundaries.” Otherwise, by its terms, 10 C.F.R. § 2.309(d)(2) appears to require that affected units of local government must establish standing in the same manner as all other potential parties. Accordingly, in order to avoid complex and potentially unnecessary briefing and decisions, the Board respectfully suggests that the Commission may wish to clarify its intent in this regard no later than in any applicable notice of hearing.

It is so ORDERED.

The Advisory Pre-License Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 20, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. PAPO-001
)
(Advisory Pre-License Application:)
Presiding Officer Board))
(Advisory PAPO Board))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (CASE MANAGEMENT ORDER CONCERNING PETITIONS TO INTERVENE, CONTENTIONS, RESPONSES AND REPLIES, STANDING ARGUMENTS, AND REFERENCING OR ATTACHING SUPPORTING MATERIALS), dated June 20, 2008, have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. PAPO-001

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MEMORANDUM AND ORDER (CASE MANAGEMENT ORDER CONCERNING PETITIONS
TO INTERVENE, CONTENTIONS, RESPONSES AND REPLIES, STANDING ARGUMENTS,
AND REFERENCING OR ATTACHING SUPPORTING MATERIALS)

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[Original Signed by L. D. Lewis]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 20th day of June 2008