UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

DOCKETED 8/13/08
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In the Matter of	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. PAPO-00
(High Level Waste Repository: Pre-Application Matters)	)	ASLBP No. 04-829-01-PAPO

CLI-08-18

MEMORANDUM AND ORDER

On April 28, 2008, the State of Nevada requested that the Commission modify the schedule for the filing of petitions to intervene in any proceeding on the Department of Energy's (DOE) application for authorization to construct a geologic repository at Yucca Mountain, Nevada.[1] We decline to modify the schedule as specifically requested by Nevada. As discussed below, however, we grant Nevada, as well as any other petitioner, an additional thirty (30) days in which to file a petition to intervene, or a petition for status as an interested government participant, in any proceeding initiated on the Yucca Mountain application. In addition, we propose further modifications to the schedule currently codified in 10 C.F.R. Part 2, Appendix D.

[1] *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).

DISCUSSION

A. The Nevada Motion

The Nevada Motion requests an extension of time, from 30 days after publication of a notice of hearing,[2] until 180 days after publication of that notice, to file a request for hearing in any proceeding on a construction authorization application for a geologic repository at Yucca Mountain.[3] Nevada cites three principal bases for its request: first, more time is needed to prepare contentions that will satisfy the Commission's pleading standards;[4] second, the NRC Staff previously indicated to Nevada that potential parties would have ten months to review relevant materials (six months to review documents on the Licensing Support Network, three months during the docketing period, and 30 days following the notice of hearing);[5] and third, allowing more time to frame contentions actually will expedite the proceeding by permitting Nevada to focus and narrow the issues (including time to meet with DOE and the NRC Staff).[6]

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[2] *See* 10 C.F.R. § 2.309(b)(2).

[3] Shortly thereafter, the Nevada Congressional delegation wrote to the Secretary of the Commission, similarly requesting that the Commission provide potential parties to the licensing proceeding 180 days after the date the Staff dockets the application and publishes a notice of hearing to submit petitions and contentions. Letter from the Honorable Harry Reid *et al.* to Annette L. Vietti-Cook (Apr. 30, 2008)(ML081220486).

[4] Nevada Motion at 4. Nevada notes that it must review more than 110,000 pages of material comprising the license application and supporting material not already available on the Licensing Support Network (LSN). *Id.*

[5] *Id.* at 5-6, citing the transcript of a May 23, 2001 public meeting to discuss the hearing process for a potential repository at Yucca Mountain (ML012060483). Subsequent to the filing of the Nevada Motion, we affirmed the Pre-License Application Presiding Officer's (PAPO) denial of Nevada's motion to strike DOE's LSN certification of October 19, 2007. *U.S. Department of Energy* (High Level Waste Repository; Pre-Application Matters), CLI-08-12, 67 NRC __ (slip op. June 17, 2008).

[6] Nevada Motion at 7.

DOE, the NRC Staff, and Nye County filed answers to the Nevada Motion. Both DOE and the NRC Staff oppose any extension.[7] Nye County suggests that the 180-day period Nevada requests should begin at the date of license application tender, as opposed to the date the application is docketed.[8]

The current schedule for the adjudicatory proceeding on a construction authorization application for a high-level waste repository is codified in 10 C.F.R. Part 2, Appendix D. The schedule was initially promulgated as a model timeline nearly twenty years ago, as part of a negotiated rulemaking.[9] In 1991, the Commission modified the rules, via notice-and-comment rulemaking, with respect to the schedule.[10] At that time, the Commission amended 10 C.F.R. Part 2, Subpart J, to add 10 C.F.R. § 2.1026 and Appendix D, which codified the model schedule (with minor changes), and added some flexibility for the Presiding Officer to handle special circumstances.[11] Since that time, the Appendix D schedule has not been modified.[12]

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[7] *U.S. Department of Energy Answer Opposing the State of Nevada's Motion to Establish a Schedule for Filing Contentions* (May 8, 2008); *NRC Staff Response to the State of Nevada's Motion to Establish a Reasonable Schedule for the Filing of Contentions on Yucca Mountain* (May 8, 2008).

[8] *Nye County Response to State of Nevada's Motion for Schedule for Filing Contentions* (May 3, 2008).

[9] Final Rule, 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 (Apr. 14, 1989).

[10] Final Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 56 Fed. Reg. 7787 (Feb. 26, 1991).

[11] 10 C.F.R. § 2.1026(b) and (c) provide that the Presiding Officer may grant extensions of time for individual milestones for the participants' filings, and may delay its own issuances for up to 30 days beyond the date of the milestone set in the hearing schedule.

[12] The Commission had the opportunity to revisit the Appendix D schedule when it revised its rules of practice in 2004, but expressly declined to do so. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004)(declining to extend the 30-day period for filing requests for hearing and petitions to intervene in a proceeding on a high-level waste repository, "in view of the ample pre-application document disclosures provided by the LSN").

Considering these longstanding procedural requirements for a high-level waste repository proceeding, we note the following recent developments. In preparation for submission of its application, DOE made information available on the LSN in October 2007, and, as noted above, its LSN certification has been upheld.[13] On June 3, 2008, DOE tendered a license application seeking authorization to construct a geologic repository at Yucca Mountain.[14] The NRC Staff has not yet accepted the application for review and has not yet docketed it in accordance with 10 C.F.R. § 2.101(e)(3). The Staff has stated that it expects to complete the acceptance review in approximately 90 days; that is, in September 2008.[15] This 90-day review period is consistent with the Staff's statements in 2001, cited in the Nevada Motion. As a practical matter, in addition to its many years of participation in pre-application matters, Nevada already has approximately 120 days (i.e., the 90-day acceptance review period plus the 30-day period for filing petitions in response to the Notice of Hearing), to refine its proposed contentions from the date of NRC's official notice of the availability of the application in the *Federal Register.*[16] In these circumstances, we see no basis for granting Nevada the full 180-day extension of time it seeks.

It is true, however, as we recently acknowledged, that if a proceeding is initiated on the DOE application, it has the potential to be one of the most expansive and complex adjudicatory

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[13] A proceeding on a high-level waste application is the only NRC adjudicatory proceeding that specifically provides for pre-application discovery.

[14] Yucca Mountain; Notice of Receipt and Availability of Application, 73 Fed. Reg. 34,348 (June 17, 2008).

[15] Information on the Staff's acceptance review is available on the NRC's Web site: http://www.nrc.gov/waste/hlw-disposal/licensing/acceptance-safety/acceptance-review.html (last revised June 12, 2008).

[16] In addition, the Presiding Officer retains the flexibilities accorded it by 10 C.F.R. § 2.1026.

proceedings in agency history.[17] In addition, the 30-day time limit provided for intervention petitions for a high-level waste repository construction authorization proceeding is half the time accorded participants in nearly all other NRC adjudicatory proceedings, most of which are narrower in scope and less complex than we would anticipate a high-level waste repository proceeding to be.[18] We therefore find a modest extension of time reasonable and, indeed, advisable.[19] Should an adjudicatory proceeding commence on the application, Nevada, as well as any other petitioner in that proceeding, is hereby *granted* a thirty (30) day extension of time in which to file a petition to intervene and request for hearing, or a petition for status as an interested government participant. This 30-day extension will be reflected in any notice of hearing we publish in connection with DOE's construction authorization application.

B. Proposed Revisions to Other Procedural Milestones

In order to provide equitable, proportional extensions of time to other participants in any proceeding that may be commenced, the Commission proposes to revise additional milestones in 10 C.F.R. Part 2, Appendix D. In particular, the Commission plans to double the existing time permitted to file answers and replies, pursuant to 10 C.F.R. §§ 2.309(h)(1) and (h)(2), to fifty (50) and fourteen (14) days, respectively. Any party or potential party who is participating in the

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[17] *U.S. Department of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), CLI-08-14, 67 NRC __ (slip op. June 17, 2008)(noting the "voluminous body of information upon which a postulated adjudicatory proceeding would be based"). The Advisory PAPO Board has noted the number of contentions could exceed 650, with the bulk of those submitted by the State of Nevada. Memorandum (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority)(Mar. 31, 2008)(unpublished), slip op. at 2 & n.2.

[18] *Compare* 10 C.F.R. § 2.309(b)(3)(providing for 60 days to file intervention petitions and hearing requests in NRC proceedings other than those for license transfer requests and a construction authorization application for a high-level waste repository).

[19] The Commission has authority to issue case-specific orders modifying procedural regulations, including milestone schedules. *Nat'l Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

ongoing matter before the PAPO Board may provide comments on these proposed extensions of time no later than ten (10) days from the date of this Order.

Finally, the Commission proposes to revise certain Appendix D milestones applicable to the Presiding Officer if a proceeding on DOE's application for a geologic repository commences. In particular, the Commission proposes to extend the period for the First Prehearing Conference from eight (8) to sixteen (16) days after the deadline for filing replies, and to extend the period for issuance of the First Prehearing Conference Order from thirty (30) to sixty (60) days after the First Prehearing Conference.[20] The Commission requests that the Atomic Safety and Licensing Board Panel provide comments on the reasonableness of the current and proposed time frames no later than ten (10) days from the date of this Order.

[20] *See* 10 C.F.R. §§ 2.1021(a), (d).

For the reasons set forth above, we *deny* Nevada's request for a 180-day extension of time but *grant* a 30-day extension of time to Nevada and all other hearing petitioners.

IT IS SO ORDERED.[21]

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
This 13th day of August, 2008.

[21] Pursuant to 10 C.F.R. § 2.101(e)(3), a docket number will be assigned to DOE's application if and when the Staff determines that the application is acceptable for docketing. As an administrative convenience, this Memorandum and Order will be served on the service lists for the PAPO-00 and PAPO-001 dockets.

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NUCLEAR REGULATORY COMMISSION

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Pre-Application Matters)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that, as an administrative convenience, copies of the foregoing COMMISSION MEMORANDUM AND ORDER, (CLI-08-18), issued August 13, 2008 in the matter of the U.S. Department of Energy High Level Waste Repository, have been served upon the following persons by Electronic Information Exchange, with the exception of Dr. Jacob Paz, upon whom a copy has been served by U.S. Mail, first class, at P.O. Box 80421, Las Vegas, NV 89180.

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