

November 24, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ADVISORY PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD

_____)	Docket No. PAPO-001
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD-01
)	
(High Level Waste Repository:)	
Pre-Application Matters, Advisory)	
PAPO Board))	
_____)	

THE NUCLEAR ENERGY INSTITUTE'S
PETITION TO CERTIFY ISSUE TO THE COMMISSION

I. Introduction

Pursuant to 10 C.F.R. § 2.323(f)(2) the Nuclear Energy Institute (“NEI”) hereby petitions¹ the Pre-License Application Presiding Officer Board (“Board”) to certify to the Commission the following issue: Under section 2.309(h)(1), may any other than only the Department of Energy and the Nuclear Regulatory Commission Staff file answers to initial petitions and contentions in the Yucca Mountain licensing proceeding?² As discussed below,

¹ NEI certifies that it has contacted the Department of Energy (“DOE”), the Nuclear Regulatory Commission Staff (“NRC Staff”), and other participants in this proceeding by e-mail concerning this request for certification. Of those responding, DOE and Eureka, Nye, Churchill, Esmeralda, and Lander Counties stated that they did not object to grant of the petition and certification, but took no position with respect to the issue, itself. The NRC Staff took no position on the petition, but “reserve[d] the right to respond . . . or to file a response to the Commission if the question is certified.” Nevada, California, and Clark County indicated that they objected to the petition and grant of certification.

² NEI sought to have this matter addressed by the Advisory Pre-License Application Presiding Officer (APAPO) Board in June. However, NEI’s request for consideration of the point was denied in an unpublished Memorandum and Order, issued July 1, 2008, on the basis that it was founded on an incorrect reading of an earlier APAPO Board Order. NEI also raised the issue in comments filed in August in response to the Commission’s August 13, 2008 Memorandum and Order. However, the matter has yet to be considered.

this matter constitutes a significant issue pertinent to the proper, efficient conduct of said proceeding.

II. Discussion

A. Regulations

The Commission's regulations in 10 C.F.R. §2.309, "Hearing requests, petitions to intervene, requirements for standing, and contentions," apply to the Yucca Mountain high-level radioactive waste repository licensing proceeding.³ Regarding who may answer a request for hearing, a petition to intervene, and/or contentions, section 2.309 states:

The applicant/licensee, the NRC staff, and any other party to a proceeding may file an answer to request for hearing, a petition to intervene, and/or proffered contentions within twenty-five days after service of the request for hearing, petition, and/or contentions.⁴

Thus, on its face, the regulation provides that, aside from DOE (as the "applicant") and the NRC Staff, only parties to a proceeding may file answers to contentions. At the initial intervention stage of the Yucca Mountain licensing proceeding, when contentions are first proffered, there will be no "parties" except for DOE and the NRC Staff -- only potential parties.⁵ Accordingly, by its terms, the regulation permits only DOE and the NRC Staff to answer initial petitions for intervention and contentions. Further, the Statement of Considerations accompanying the intervention rules makes the point crystal clear.

Answers and Replies. Section 2.309(h) allows the applicant or licensee and the NRC staff twenty-five (25) days to file written

³ 10 C.F.R. § 2.1000.

⁴ 10 C.F.R. § 2.309(h)(1) (emphasis added).

⁵ 10 C.F.R. § 1.1001 does reference "party" as including "the host State, 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), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101)" However, that definition is explicitly subject to the proviso of 10 C.F.R. § 2.309 that there be a determination that the entity "has proposed at least an admissible contention" See 10 C.F.R. §§ 2.309(a) and 2.309(d)(2).

answers to requests for hearing/petitions to intervene and contentions, and allows the petitioner to file a written reply to the applicant/licensee and staff answers within seven (7) days after service of any answer. No other written answers or replies will be entertained.⁶

This distinction is clear elsewhere in the regulations. When the Commission wants its regulations to refer to persons seeking to be parties, it has done so explicitly. For example, section 2.4 denominates a collective category of entities that includes both “part[ies],” and “an individual or organization that has petitioned to intervene in a proceeding or requested a hearing but that has not yet been granted party status by an Atomic Safety and Licensing Board or presiding officer” as “participant.”

As another example, the regulations provide that a “requestor/petitioner may file a reply to any answer”⁷ The intervention regulations could have been crafted to specify that a “requestor/petitioner” may file answers to intervention petitions, but they weren’t. Thus, while the Commission might have drawn the line with respect to filing answers elsewhere, it did not.

Clearly, the Commission’s regulations permit only DOE and the NRC Staff to answer the initial petitions for intervention and contentions in this proceeding. Under the regulation, the authority contained in section 2.309(h)(1) for “any other party to a proceeding” to file an answer does not find application at the outset of the Yucca Mountain proceeding. That phrase will not be surplusage, however, once there are “other parties” in the proceeding. Thus, the provision will apply to late-filed requests for hearing, petitions to intervene, and contentions.⁸

⁶ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,222 (Jan. 14, 2004)(emphasis added). *See also id.* at 2,203.

⁷ 10 C.F.R. § 2.309(h)(2).

⁸ 10 C.F.R. § 2.309(h) imposes the requirements set forth in that section “[u]nless otherwise specified by the Commission, presiding officer, or the Atomic Safety and Licensing Board designated to rule on requests for hearings or petitions for leave to

B. Policy

Finally, it must be emphasized that the issue raised here is by no means a simple matter of procedural detail and nicety. The Yucca Mountain licensing proceeding promises to be one of the most complex ever adjudicated before the NRC. As the Commission has noted repeatedly, a proceeding on an application to construct a high-level waste repository on Yucca Mountain has the potential to be one of the most expansive in agency history.⁹ Under such circumstances, adding unnecessary elements -- such as a multitude of answers by entities not even yet established as parties, as well as related replies -- would complicate and burden an already ponderous proceeding. The impropriety of such a process should be clearly stated at the outset.

III. Conclusion

Based on the foregoing, the Board should immediately certify the issue identified and discussed above to the Commission for prompt consideration.

Respectfully submitted,

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intervene.” Based on the Statement of Considerations, this provision is intended only to allow some flexibility in the time periods provided to file answers and replies. 69 Fed. Reg. at 2,203 (“If there are special circumstances, the requestor/petitioner may request a short extension from the presiding officer.”).

⁹ See *U.S. Department of Energy* (High-Level Repository: Pre-Application matters) CLI-08-18, 68 NRC __ (slip op. at 4-5 August 13, 2008).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “The Nuclear Energy Institute’s Petition to Certify Issue to the Commission” was served this date via the Nuclear Regulatory Commission’s Electronic Information Exchange (EIE) upon those on the Service List maintained by the EIE for the above-captioned proceeding.

Respectfully submitted,

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