

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-876-HLW-CAB01 William J. Froehlich, Chairman Thomas S. Moore Richard E. Wardwell	ASLBP BOARD 09-877-HLW-CAB02 Michael M. Gibson, Chairman Alan S. Rosenthal Nicholas G. Trikouros	ASLBP BOARD 09-878-HLW-CAB03 Paul S. Ryerson, Chairman Michael C. Farrar Mark O. Barnett
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In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) **Docket No. 63-001-HLW**
)
(High Level Waste Repository)) **June 10, 2009**

**JOINT PROPOSED PROCESS AND SCHEDULE
FOR GROUPING AND CONSOLIDATING CONTENTIONS**

In accordance with the Memorandum and Order (Regarding the Telephonic First Prehearing Conference) of Construction Authorization Board-01 ("CAB") dated March 20, 2009 ("March 20th Order"), the below identified Parties¹ hereby file this Joint Proposed Process and Schedule for Grouping and Consolidating Contentions. As directed by the CAB in its March 20th Order, this filing is being made within 10 days after the expiration of time for filing any appeals and briefs in opposition to appeals from the Memorandum and Order dated May 11, 2009 ("May 11th Order").²

¹ The following seven (7) Parties join in the filing of this joint proposed process and schedule for grouping and consolidating contentions: State of Nevada; State of California; Clark County, Nevada; County of Inyo, California; Nuclear Energy Institute; the NRC Staff; and the Department of Energy. In addition, Joint Timbisha Shoshone Tribal Group (JTS) and Native Community Action Council (NCAC), who have been granted standing in this proceeding with party status dependent upon compliance with the certification requirements of the Licensing Support Network (*see* May 11th Order at 68, 70, 93, and 99), join in support of this filing.

² Pursuant to 10 C.F.R. Part 2, App. D, appeals from the First Prehearing Conference Order were due 10 days after the issuance of that Order, and briefs in opposition were due 10 days after those appeals were filed.

1. **Process Issues**

A. **Grouping of Contentions**

The Parties have begun the process of identifying groups of admitted contentions that, in their view, are best addressed together or during the same general time frame because they focus on a common subject matter or rely upon the same expert witness(es). For example, environmental contentions that address transportation issues specific to the State of Nevada or the State of California or safety contentions that address groundwater infiltration issues may be appropriate for grouping. The Parties shall consult in good faith in an effort to reach agreement on proposed groupings of admitted contentions to submit to the CAB.

In the event that a group of contentions includes admitted contentions from more than one party, the Parties recommend that counsel for those parties work together to schedule and prosecute depositions, conduct any other discovery, and coordinate plans for summary disposition motions. Counsel for each admitted party would accept lead responsibility for litigating the contentions submitted by that party and admitted to the hearing by the CAB.³ The fact that an admitted contention has been grouped with other similar contentions should not preclude an admitted party from advocating or defending its admitted contentions.

B. **Consolidation of Contentions**

The Parties are also considering whether consolidation of admitted contentions is warranted. For example, admitted contentions filed by more than one party where the legal and factual issues identified in those contentions are sufficiently similar or related may be candidates

³ In contrast, however, if two or more admitted contentions submitted by different parties are consolidated by a licensing board, then "the prudent approach is to designate 'lead' parties for the litigation of each of these contentions." See Louisiana Energy Services, L.P. (National Enrichment Facility), 60 NRC 40, 71, LBP-04-14, Memorandum and Order dated July 19, 2004, *aff'd*, 60 NRC 619. Compare 10 C.F.R. § 2.309(f)(3) (addressing the use of a lead when contentions are joined or adopted by more than one petitioner).

for consolidation. Likewise, where the same expert witness has been identified by one or more parties the possibility exists for consolidation. The Parties are mindful that consolidation facilitates timely discovery and reduces the complexity of this proceeding. However, the Parties want to ensure that any consolidation preserves all of the issues contained within an admitted contention that would be withdrawn upon consolidation with another contention but does not expand the scope or bases beyond the originally admitted contentions. Accordingly, any proposed consolidation would be premised upon the CAB's grant of a specific request by a party or parties to amend or modify an admitted contention to incorporate issues from another contention identified for withdrawal. The Parties shall consult in good faith in an effort to reach agreement on proposed consolidation of admitted contentions to submit to the CAB.

2. Schedule Issues

As is being requested in the concurrently filed "Joint Proposed Discovery Schedule," the Parties are requesting the CAB to issue a Case Management Order to govern the discovery process. The Parties suggest that such a Case Management Order require all intervenors to group and consolidate their contentions when they first are required to identify expert witnesses in support of their contentions, and that any other party be permitted to file objections or alternate proposals within ten (10) days of that date. If, subsequently, a party seeks to add another contention or contentions to an existing group of contentions, or seeks to create a new group of contentions, or seeks to re-group contentions, leave of the CAB must first be obtained. This suggestion is supported by the fact that the Commission is scheduled to rule on the pending appeals of the May 11th Order on or about June 30, 2009. *See* 10 C.F.R. Part 2, App. D (specifying that the Commission decision on the appeals of the First Prehearing Conference Order is scheduled for issuance 50 days after that order). To the degree that the Commission

reverses the decision of the CAB that admitted or denied the admission of one or more contentions, the Parties' proposal to group or consolidate admitted contentions would likewise be impacted.

Respectfully submitted,

(signed electronically)

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Dated: June 10, 2009

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NUCLEAR REGULATORY COMMISSION**

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Proposed Process and Schedule for Grouping and Consolidating Contentions has been served upon the following persons by the Electronic Information Exchange:

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