

June 15, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARDS

In the Matter of)	
)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY)	
)	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository))	09-877-HLW-CAB02
)	09-878-HLW-CAB03

DIFFERING VIEWS OF THE NRC STAFF
TO THE PROPOSED DISCOVERY SCHEDULE

INTRODUCTION

In accordance with the Memorandum and Order (Regarding the Telephonic First Prehearing Conference) of Construction Authorization Board-01 (Board) dated March 20, 2009 ("March 20th Order"), the NRC staff ("Staff") hereby files its differing views from certain positions expressed in the Joint Proposed Discovery Schedule filed in this proceeding on June 10, 2009 by the States of Nevada and California, by Clark County, Nevada and Inyo County, California and by the Nuclear Energy Institute ("Joint Schedule").¹

DISCUSSION

The Staff supports many of the Joint Schedule's suggestions. However, the Staff's view differs with respect to the following:

1. The inclusion of monetary penalties on page 17, first paragraph;
2. The provisions relating to entry upon land for inspection on pages 18-19;

¹ Subsequently, Nye County, Nevada, White Pine County, Nevada, and the Four Counties of Nevada (Churchill, Esmeralda, Lander, and Mineral) supported the Joint Schedule. Supplemental Filing Identifying Additional Parties Supportive of the Joint Proposed Pleadings Filed June 10, 2009 (June 12, 2009).

3. The provisions relating to Summary Disposition Motions on page 17 and pages 22-24;
4. The incorporation of provisions of the Federal Rules of Civil Procedure on pages 4, 5, 11 and 17.

In addition, while the Staff supports the recommendation for appointment of a Discovery Master, the Staff recommends that the Discovery Master not be a member of any of the Construction Authorization Boards appointed to preside over this proceeding.² See Joint Schedule at 20-22.

A. Imposition of Monetary Penalties.

The Joint Schedule provides for monetary sanctions under certain circumstances. Although monetary sanctions may be permitted pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Civil Procedure do not control Commission proceedings unless the Commission has specifically selected the particular rule for that purpose. *General Electric Co. (Vallecitos Nuclear Center, General Electric Test Reactor)*, LBP-78-33, 8 NRC 461, 466 (1978). As early as 1978, a licensing board observed that only those provisions of the Federal Rules of Civil Procedure that have been specifically adopted are read into the rules governing Commission proceedings. *Vallecitos*, LBP-78-33, 8 NRC at 466 (“...having expressly selected some, but not all, of the discovery provisions set out in the Federal Rules, the Commission did not intend for the unselected Federal Rules to control its proceedings.”).

The Joint Schedule includes the following:

In the event that counsel examining the witness does so in a manner inconsistent with the procedures set forth in this Section 2.D., or unreasonably annoys,

² Although the Staff does not oppose many of the proposed discovery provisions, the Joint Schedule contains certain statements regarding the Staff on pages 2-3, 10 and 12 that are unnecessary for the Board's present purpose of developing a discovery schedule. These statements should not be included in any case management order issued by the Board.

embarrasses, harasses, or oppresses the witness, or in the event that counsel defending the witness does so in a manner inconsistent with the procedures set forth in this Section 2.D, or impedes, delays or frustrates the fair examination of the witness, such counsel and/or the party they represent may be subject to sanction (*including reasonable expenses and/or attorney fees*) by the Discovery Master or the CAB. The provisions of 10 C.F.R. § 2.1018(c)(1) shall apply to any deposition.

Joint Schedule, at 16-17 (Emphasis supplied).

Neither 10 C.F.R. § 2.1018(c)(1) nor any other provision in the Commission's Rules (or in any Federal Rule adopted by the Commission) allows for the imposition of monetary sanctions. The remedies available in this proceeding are clearly identified in 10 C.F.R. § 2.1018.³ These are the only sanctions available under Commission regulations and the only sanctions that may be imposed. The Commission has not adopted FRCP 30 (from which the phrase "impedes, delays or frustrates the fair examination" is taken and which allows for the imposition of attorney's fees) in its Rules of Practice and thus it is not controlling in this proceeding. *Vallecitos*, LBP-78-33, 8 NRC at 466. Consequently, the Board should reject the recommendation to include the phrase "including reasonable expenses and/or attorney fees."

³ The remedies available under 10 C.F.R. § 2.1018 include orders

- (i) That the discovery not be had;
- (ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (iii) That the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery;
- (iv) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
- (v) That discovery be conducted with no one present except persons designated by the presiding officer;
- (vi) That, subject to the provisions of Sec. 2.390 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or
- (vii) That studies and evaluations not be prepared.

B. Entry upon Land.

The Joint Schedule's provisions related to entry upon land should be rejected. See Joint Schedule at 18-19. These provisions are vague and overly broad, and if adopted, could impede efforts to develop a complete record in this proceeding. The Joint Schedule does not identify the locations to which this provision applies, because it does not state which lands the Timbisha Shoshone consider "sacred or culturally or historically sensitive" and to which the tribe could, therefore, deny access. (" . . . if the Tribe or any federally-recognized tribe affiliated with NCAC decides not to permit access to a site based on considerations pertaining to sites that are sacred or culturally or historically sensitive to the Timbisha Shoshone Tribe or any federally-recognized tribe affiliated with NCAC, the Tribe or any federally-recognized tribe affiliated with NCAC shall have sole discretion to refuse access." Joint Schedule, at 19 *Vallecitos*, (Emphasis supplied). Because the Staff does not know which sites would be covered by these provisions, the Staff cannot agree to them.

Further, adoption of these provisions would deny the Board jurisdiction to determine whether an inspection request should be granted. Instead the Joint Schedule would place this authority solely in the hands of the Timbisha Shoshone Tribe, any federally-recognized tribe affiliated with the Native Community Action Council, the Joint Timbisha Shoshone Tribal Group, and the Tribal Historic Preservation Officer. This is contrary to 10 C.F.R. § 2.319, which vests responsibility for the fair and impartial conduct of the hearing solely with the presiding officer.

The consequence of accepting this proposal would be to permit one party to this proceeding to exercise the Board's authority to determine whether or not to permit entry by the other parties upon land in the immediate vicinity of Yucca Mountain, the situs of this proceeding. The Staff opposes such a restriction and urges the Board not to adopt the language, under the caption "Entry Upon Land for Inspection," in the Joint Schedule at 18-19.

C. Summary Disposition Motions.

The Joint Schedule is intended to be responsive to the March 20th Order. However, it includes information not requested by the Board. The March 20th Order does not seek proposals on handling summary disposition motions. Consequently, the proposals related to procedures for handling dispositive motions are not responsive and should not be adopted. See Joint Schedule, at 17 and 22-24.

Even if the Board were inclined to consider the Joint Schedule's comments concerning dispositive motions on their merits, the Staff does not support the proposals made. Motions for summary disposition are governed by 10 C.F.R. § 2.710 and 10 C.F.R. § 2.1025. These regulations provide that motions for summary disposition are to be filed "no later than twenty (20) days after the close of discovery." 10 C.F.R. §§ 2.710(a), 2.1025(a). Answers supporting or opposing the motion are allowed "within twenty (20) days after service of the (summary disposition) motion." 10 C.F.R. §§ 2.710(a), 2.1025(a). Unlike the Joint Schedule's proposal, under the Commission's rules, there is no mention of closing the right to file dispositive motions at any other time. There is no mention of page limitations, nor are there limits on the number of summary disposition motions a party may file.

It is premature at this time and at this stage of the proceeding to peremptorily impose requirements that are more restrictive than those imposed by the Commission's regulations. The Staff acknowledges that based on experience developed during the discovery phase of this proceeding, such restrictions may be warranted. However, the Staff submits that no extraregulatory restrictions should be imposed unless and until such time as the Board's and the parties' experience implementing the discovery process in accordance with Commission regulations demonstrates that further restrictions are necessary.

D. Incorporation of Certain Federal Rules of Civil Procedure.

This Staff disagrees with the proposal to incorporate by reference Rules 26 and 30 of the Federal Rules of Civil Procedure to this proceeding. Inasmuch as those provisions have

not specifically been incorporated into the Commission's Rules of Practice, 10 C.F.R. Part 2, they should not be incorporated into the discovery procedures in this proceeding. The specific language to which the Staff objects is in the text of the Joint Schedule quoted below (emphasis supplied):

1. Page 4, last bullet point: "The listing identifying expert witnesses shall also include all relevant publications authored by the witness in the previous 10 years in accordance with Federal Rule Civil Procedure (FRCP) 26(a)(2)(B)(iv)";
2. Page 5, first bullet point: "The listing identifying expert witnesses shall also include all cases in which the witness has provided testimony at trial or by deposition in the previous four years in accordance with FRCP 26(a)(2)(B)(v)";
3. Page 11 first bullet point: "The length of the deposition of any one witness should be limited to no more than one 7-hour day (with an additional hour off for lunch), and Federal Rule of Civil Procedure ("FRCP") 30(d)(1) shall apply, unless all counsel involved in the deposition collectively agree (at least 10 days prior to the deposition occurring) that additional time is needed to fairly examine the witness..."
4. Page 17, first bullet point: "To the extent that counsel for any party seeks a deposition of another party on a particular subject matter (as opposed to a named witness), the procedures set forth in this Section 2.D shall apply as well as the procedures set forth in FRCP 30(b)(6) and 10 C.F.R. § 2.1019(i)(1)."

The Staff does not object to applying the substantive provisions suggested in the Joint Schedule. However, the Staff is concerned that incorporating the rules into the Joint Proposal could lead to unanticipated and unintended consequences. For example a situation could occur in which the case law relevant to a Federal Rule is inconsistent with Commission precedent or practice. Not all of the Federal Rules of Civil Procedure are applicable or appropriate to NRC proceeding. Although the Commission has included certain

aspects of the Federal Rules of Civil Procedure in its Rules of Practice, the Commission modified them as needed for NRC proceedings. For example, “[t]he mandatory disclosure provisions, . . . were generally modeled on Rule 26 of the Federal Rules of Civil Procedure, . . . (however, they) . . . have been tailored to reflect the nature and requirements of NRC proceedings.” Nuclear Regulatory Commission, Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2181, 2187 (January 14, 2004). Since the text of the Joint Schedule includes the unobjectionable substance of the intended provision of the referenced Federal Rule, incorporation of the cited Federal Rule itself is unnecessary.

CONCLUSION

As discussed above, the Board should reject the above cited provisions of the Joint Schedule dealing with imposition of monetary penalties, the provisions relating to entry upon land for inspection, the provisions relating to Summary Disposition Motions and incorporation of certain provisions of the Federal Rules of Civil Procedure. The Staff also recommends that any Discovery Master or Masters not be a member of any of the Construction Authorization Boards appointed to preside over this proceeding.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
This 15th day of June 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "DIFFERING VIEWS OF THE NRC STAFF TO THE PROPOSED DISCOVERY SCHEDULE" in the above-captioned proceeding have been served on the following persons this 15th of June, 2009, by Electronic Information Exchange.

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