

**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)
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U.S. DEPARTMENT OF ENERGY) **Docket No. 63-001-HLW**
)
(High Level Waste Repository)) **June 15, 2009**

**DEPARTMENT OF ENERGY’S RESPONSE TO
JOINT PROPOSED DISCOVERY SCHEDULE**

In accordance with the Memorandum and Order (Regarding the Telephonic First Prehearing Conference) of Construction Authorization Board-01 (“CAB”) dated March 20, 2009, the Department of Energy (“DOE”) files this response to the Joint Proposed Discovery Schedule submitted by the State of Nevada on its own behalf and on behalf of several other parties. While DOE agrees with much of the proposed discovery schedule, there continue to be several areas of disagreement.¹

1. Award of Attorneys Fees and Costs

In Section 2.D (p.17) Nevada proposes that the Board be given the authority to award attorneys fees and costs as a sanction. The Commission regulations specifically promulgated for this proceeding do not provide for such an award and the CAB does not

¹ DOE does not agree with much of the argument included in Nevada’s proposal particularly as it relates to positions DOE has taken or the resources of the various parties. In any event, DOE has submitted with this response a redlined version of Nevada’s proposal making proposed changes only to the substantive provisions and not to Nevada’s various references to DOE.

have the authority to make such awards. Indeed, it would be particularly inappropriate for one federal agency to have the authority to impose such sanctions on another federal agency (or on the NRC staff). Had the Commission chosen to expand the Board's authority in this regard it would have done so. Instead, the Commission adopted **for this proceeding** the provisions set forth in 10 CFR § 2.1018 (c) (1) describing with particularity the sanctions available to the CAB in this proceeding. Those sanctions do not include the authority to award attorney's fees or costs.

2. 30(b)(6) Depositions

In Section 2.D (p. 17) Nevada proposes that Board permit the parties to notice subject matter depositions as is permitted under Rule 30 (b)(6) of the Federal Rules of Civil Procedure. As in the case of attorneys fee and costs, there is nothing in the Commission discovery procedures governing this proceeding that permits the use of subject matter depositions like those permitted under 30 (b) (6). Rather, any deposition taken in this proceeding must, in accordance with 10 CFR § 2.1019 (a), designate a specific person to be deposed. Given that Nevada has suggested in its proposal that there may be hundreds of depositions taken in this proceeding, it makes no sense to add a new unauthorized deposition device which will only increase the complexity of the discovery process.

3. Sequencing Depositions

In Section 2.C (p. 12) dealing with sequencing of depositions, Nevada proposes that because DOE has the burden of proof, all DOE witnesses on a particular contention or group of contentions be deposed prior to the deposition of any intervener witnesses on those same contentions. There is no precedent for this proposal and, in DOE's view, a far

stronger argument can be made that interveners' witnesses should be deposed before any DOE witnesses. It can hardly be doubted that the intervener expert witnesses have a far more complete understanding of the bases for the contentions than do any of DOE's experts. For example, Nevada has not yet provided the details of its arguments on each contention,² so DOE does not currently know all of the details of Nevada's arguments. DOE's witnesses will be far better able to address the contentions after learning from interveners' expert witnesses the precise nature and basis of each contention. Because DOE witnesses do not know (and could not know) all of the technical underpinnings of the intervener contentions, to require DOE experts to be deposed first will necessarily result in DOE's experts "qualifying or limiting their opinions." See Nevada's proposal at p. 13. In contrast, if interveners are deposed about the very contentions they are sponsoring, there is virtually no likelihood that they would have to qualify their opinions in any way. In summary, DOE submits that either the normal practice of scheduling depositions be used and the parties, in good faith, work out a schedule as is assumed in the rules governing this proceeding or intervener witnesses be deposed first. DOE is in favor of the normal practice contemplated by the rules rather than the novel and unauthorized approach favored by Nevada.

² See e.g. Nevada Reply to DOE's Answer at 398 (Feb. 24, 2009) ("While the resolution of disputed facts is for a later time, Nevada would point out *to illustrate the issue* identified in the contention In this *illustrative example . . .*") (Emphasis added); *id.* at 401 ("While a resolution of factual disputes would be premature at this point, Nevada would observe that DOE's immersion corrosion tests did not properly account for the effects of corrosion product positive titanium metal ions in solution by failing to address solution replenishment in a way that duplicates what is expected in the repository.).

4. Scheduling Depositions

Nevada proposes in Section 2.B (p. 10-12) that the party taking a deposition negotiate the timing, venue and schedule with all the other parties. In order to make this process more efficient, DOE proposes the following:

“Only the lead party for a contention may seek to depose a DOE or NRC Staff witness. The lead party will be responsible for consulting with the other parties with regard to the date, location, and anticipated duration of the deposition. In the event that DOE seeks to depose another party’s witness, DOE shall consult with the lead party’s counsel for the contention(s) to be addressed. The lead party shall be responsible for consulting with other parties with regard to the date location, and anticipated duration of such deposition.”

In addition, the lead intervener for each contention would be responsible for submitting any other forms of discovery relating to that contention or group of contentions. Providing for a lead intervener will substantially simplify the discovery process and allow discovery to proceed more efficiently. DOE does agree with Nevada’s proposal to conduct depositions based on grouping of like contentions.

5. Limitation on Depositions

Nevada proposes in Section 2.B (p. 11-12) that no more than three persons be deposed in any week and that every month there be a one week break. If Nevada is correct that there will be in excess of 150 expert witness plus the 20 or more “other witnesses” (see Section 2.B (p. 10)) it will be impossible to complete the depositions of all witnesses within the approximately nine months currently allotted for depositions (*i.e.*, between approximately Fall 2009 and Summer 2010). With as many as 200 depositions to be taken, it will be necessary to take depositions every work day of the week and, in many instances, depositions will have to be concurrent. It makes no sense at the outset to

adopt a schedule like that proposed by Nevada in which discovery cannot possibly be completed in the time allowed by the Commission.

6. Entry on Land

In Section 3.B (p. 18-19) dealing with entry on land, Nevada proposes that the Timbisha Shoshone Tribe have the authority to deny in its sole discretion entry on its land if the site is considered to be sacred, or culturally or historically sensitive. DOE has no objection to this provision, provided that if the entry on land is needed to address a contention and entry is denied, the contention must be dismissed.

7. Summary Disposition Motions

Finally, the discovery proposal submitted by Nevada improperly addresses the subject of Summary Disposition Motions—a subject that is not covered by the CAB’s March 20, 2009 order. Section 5 (p. 22). It should be rejected on that ground alone. Moreover, like the other proposals discussed above, Nevada’s approach is inconsistent with the Commission’s rules regarding summary disposition that were developed specifically for this proceeding. 10 CFR 2. § 1025.³ Those rules do not contain any of the limitations contained in Nevada’s proposal. There is no reason, for example, to limit DOE or any party to one summary disposition motion for an entire group of contentions. Nor, in light of the schedule in this case, does it make sense to allow only four summary disposition motions in a particular month for a particular party. Nevada has some 200 contentions, and DOE may well find it necessary to submit more than four such motions in a given month and to address contentions individually or as a group as DOE believes appropriate.

³ In certain instances, Nevada’s proposal unnecessarily repeats what is already included in the 10 CFR 2.1025.

If summary disposition motions must be filed by subject matter grouping, then equally troubling is the 50-page limit on summary disposition motions. While proposing that a summary disposition must deal with an entire group of contentions, the limitation of 50 pages makes it virtually certain that DOE, for example, will not be able to deal adequately with all contentions in a group. Assume, for example, that a particularly grouping contains twenty or more contentions. In moving for summary disposition, DOE would be placed in the near impossible situation of devoting only a page or two to each contention thus assuring that its motion will be denied. In short, Nevada's proposal imposes limitations not included in 10 CFR 2.1025 and which will operate to prejudice DOE. Its proposal should be rejected.

For the foregoing reasons, DOE respectfully requests that the Joint Proposed Discovery Schedule be modified as described above.

Respectfully submitted,

Signed electronically by Alex S. Polonsky

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Dated in Washington, D.C.
this 15th day of June 2009

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NUCLEAR REGULATORY COMMISSION**

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In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High Level Waste Repository))

Docket No. 63-001-HLW

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JOINT PROPOSED DISCOVERY SCHEDULE

In accordance with the Memorandum and Order (Regarding the Telephonic First Prehearing Conference) of Construction Authorization Board-O1 (“CAB”) dated March 20, 2009 (“March 20th Order”), the below identified Parties¹ hereby file this joint proposed discovery schedule with accompanying discussion. 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 brief in opposition to appeals from the Memorandum and Order dated May 11, 2009 (“May 11th Order”)². For the reasons set forth herein and consistent with the March 20th Order,³ the Parties

¹ The following five (5) Parties join in the filing of this joint proposed discovery schedule: State of Nevada; State of California; Clark County, Nevada; County of Inyo, California; and Nuclear Energy Institute. It should also be noted that White Pine County, Nevada has agreed with prior drafts of this pleading, but was unavailable to approve its final form and therefore was not included as supporting this pleading. 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.

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respectfully request that discovery in this proceeding commence on or about July 6, 2009,⁴ and that it follow the proposed schedule and processes described herein. In that regard, the Parties understand that this filing (and possibly filings from other parties) will form part of the foundation for a Case Management Order to be issued by the CAB to govern such discovery. To the degree that the CAB determines that the resolution of certain legal contentions should proceed without discovery or that discovery should proceed for those legal contentions in an alternate manner or under an alternate schedule, the Parties request such details to be addressed in the Case Management Order as well.

1. Identification of Witnesses

10 C.F.R. § 2.1018(a)(1)(vi) allows for the discovery from each of the parties of the names of the witnesses and the subjects they plan to address. In addition, 10 C.F.R. § 2.709(a)(1) requires the NRC Staff to make available one or more witnesses for deposition and appearance at the hearing on any non-privileged matter that is relevant to the issues in this proceeding.

A. Party Witnesses

With the filing of the Petitions to Intervene in this proceeding, the Petitioners identified literally dozens of expert witnesses to support their contentions. For each expert witness so identified, Petitioners included a copy of the expert's resume or curriculum vitae which clearly set forth the expert's qualifications to render the opinions contained in either the expert's accompanying affidavit and/or within the contentions the expert specifically adopted.

³ In the March 20th Order the Board suggested that the joint proposed discovery schedule filed herein have "a starting date commencing shortly after the expiration of time for filing briefs in any appeals from the Licensing Boards' orders identifying the parties and admitted contentions." Slip op. at 2.

⁴ By joining in the filing of this joint proposed discovery schedule, and herein recommending that discovery begin on or about July 6, 2009, no Party is obligated to seek discovery. Moreover, each Party specifically reserves the right to resist efforts of other parties to seek discovery from it for appropriate reasons to be articulated if and when such issues should arise in the future.

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Although DOE objected to all contentions contained in each Petition to Intervene filed by each Petitioner, DOE has not yet identified any of its own witnesses (expert or other) who will respond to those contentions that this Board has admitted for hearing.⁵ Likewise, NRC Staff objected to almost all contentions but has not yet identified any witnesses of its own (expert or other) who will respond to those contentions that this Board has admitted for hearing,⁶ and has not identified any witness who will satisfy the NRC Staffs obligations under 10 C.F.R. § 2.709(a)(1).⁷ However, it is clear from the nature of DOE’s and NRC Staffs Answers that expert assistance was provided in drafting almost all of the answers to specific contentions, and therefore both DOE and NRC Staff must already have retained and received opinions from experts for each contention involving the need for expert testimony. Moreover, the filing of DOE’s Yucca Mountain license application was preceded by years of pre-application submissions by DOE and NRC Staff documented technical reviews.

Given the above discussion, at the outset of discovery DOE should be able to provide Petitioners with the identity of its testifying experts. While NRC Staff must also have already retained and received opinions of experts for the contentions involving expert testimony, NRC Staff has not yet made clear whether it will mount an affirmative case against or otherwise challenge any of the admitted contentions, and thus offer witnesses (expert or other). However,

⁵ In its Answer to the State of Nevada’s Petition to Intervene, DOE submitted the affidavit of Dr. Peter N. Swift to discuss his role in the development of the Total Systems Performance Assessment (“TSPA”). *See* DOE’s Answer to State of Nevada’s Petition to Intervene (dated January 16, 2009), Attachment 2. Dr. Swift did not offer an opinion countering any of the specific issues set forth in any of the enumerated contentions filed by the State of Nevada.

⁶ In its Answer to the Intervention Petitions, NRC Staff submitted the affidavit of Mr. Earl P. Easton to provide technical support for the answer to CAL-NEPA-8, and also submitted the affidavit of Mr. James R. Winterle to provide technical support for the answer to TIM-NEPA-4. *See* NRC Staff Answer to Intervention Petitions (dated February 9, 2009), Attachment B, ¶¶ 4 and 5, and Attachment C, ¶¶ 4 and 5.

⁷ Since it is a party to this proceeding, pursuant to 10 C.F.R. § 2.709(a)(1) the NRC Staff is required to “make available one or more witnesses ... for oral examination at the hearing or on deposition regarding any matter, not privileged, that is relevant to the issues in the proceeding.”

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NRC Staff should be able to decide at an early phase when it will present expert testimony, and like DOE and any other party, identify who its experts will be.

Subject to the timing provisions for the NRC Staff identified in Section 1.C, *infra*, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order DOE, NRC Staff, the Parties and any other party: (i) to identify to the degree then known, within 10 days after the date identified in the Case Management Order for the start of discovery, their expert witnesses and any other witnesses (including third party witnesses) that they currently intend to provide testimony at the hearing in this proceeding; (ii) to provide every 60 days thereafter an update of the list of expert witnesses and any other witnesses (including third party witnesses) that they intend to provide testimony at the hearing in this proceeding, or a certification that no additional witnesses have been identified; and (iii) not later than 120 days before discovery closes to provide the final updated identification of their expert witnesses and any other witnesses who they intend to call at the hearing in this proceeding. The parties shall make each such identification of witnesses in accordance with the following requirements:

- The listing identifying expert witnesses shall include, at a minimum, the following, information for each witness identified: name; affiliation; address; curriculum vitae; the subject matter(s) that the witness will address; and the contention(s) that the witness will address.
- 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).

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- 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).
- The listing shall be provided even if any similar information already was provided as part of any Petition to Intervene, any Answer to any Petition to Intervene, or any Response to any Answer to any Petition to Intervene.
- Since all such witnesses (expert or otherwise) may be produced at the hearing by the party identifying them, no party may object to the deposition of such witnesses so long as the deposition is limited to matters relating to admitted contentions or the subject matter identified as that to be addressed by the witness. Failure to produce a witness for deposition will preclude that witness from testifying at the hearing in this proceeding.

B. Other Witnesses

Subject to the timing provisions for the NRC Staff identified in Section 1.C, *infra*, and subject to the provisions of 10 C.F.R. § 2.709, the Parties recommend that as part of the Case Management Order in this proceeding, the CAB also order the parties: (i) to identify, within thirty (30) days of the date identified in the Case Management Order for the start of discovery, to the degree then known, any witness (other than its own witnesses, third party witnesses, and known opposing witnesses as identified in Section 1.A, *supra*) that it intends to depose in this proceeding (*e.g.*, where a party identifies a particular DOE witness with knowledge or information relevant to an admitted contention or other identified subject matter); and (ii) to provide not later than 120 days before discovery closes an updated identification of such

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witnesses who will be called at the hearing in this proceeding. Each such identification of witnesses should be made subject to the following limitations.

- The party identifying any such witness shall also identify each and every admitted contention or other subject matter to which the witness' testimony will pertain, and the deposition shall be limited to those matters relating to those contentions or other subject matters.
- DOE and the State of Nevada each shall be limited to identifying no more than twenty (20) such witnesses for deposition. Any other party (other than NRC Staff) shall be limited to identifying no more than five (5) such witnesses.
- To the degree that any party concludes that more than its allotted number of witnesses should be deposed, then that party must seek leave of the Discovery Masters⁸ before noticing the deposition of any witness(es) beyond the allotted number of witnesses.
- Any party may object to the deposition of any witness identified as permitted in this Section 1.B by moving for a protective order before the Discovery Master. Failure to produce a witness for deposition will preclude that witness from testifying at the hearing in this proceeding.

C. NRC Staff's 2.709 Witnesses

The Parties agree that discovery against the NRC Staff is governed by 10 C.F.R. § 2.709 and recommend: (1) that in no event should the NRC Staff be required to respond to any discovery request, or to identify or produce any NRC Staff witnesses or potential witnesses pursuant to 10 C.F.R. § 2.709(a)(1) or to respond to written interrogatories pursuant to 10 C.F.R. § 2.709(a)(2) with respect to any matter related to a safety issue or contention until after the NRC

⁸ The Parties are recommending the use of a Discovery Master in this proceeding for the reasons listed in and empowered as described in Section 4 *infra*.

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Staff has issued its Safety Evaluation Report (SER) or if portions of the SER are issued over a period of time until after the NRC Staff has issued a particular portion of the SER; and (2) with respect to any matter related to an environmental issue or contention, that the NRC Staff should respond to any discovery request, or to identify or produce any NRC Staff witnesses or potential witnesses pursuant to 10 C.F.R. § 2.709(a)(1), or to respond to written interrogatories pursuant to 10 C.F.R. § 2.709(a)(2) only with respect to the NRC Staff's September 5, 2008 Adoption Decision Report (ADR), ADAMS Accession Number: ML082420342.

D. Late-Identified Witnesses

There may be circumstances in which witnesses (expert or other) identified by a party may prompt one or more of the parties to identify additional witnesses (expert or other) beyond those initially identified. Similarly, as a result of testimony provided in a deposition or information identified during the course of discovery, a party may conclude that an additional witness(es) (expert or other) will be required beyond those initially identified. It may also arise that, during the course of discovery, a previously identified expert witness for any party becomes unavailable due to death, disability or other unforeseen or unavoidable circumstances, which prompts the need to identify a replacement expert witness.

In light of such possibilities, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order the parties to identify any new, additional or replacement witness(es) as soon as practicable after the circumstance that prompts the need to secure such a witness; provided, however, that in no event may any party identify a witness (expert or other) so late in the discovery process that it delays the proceeding or unduly prejudices another party. *See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), ASLBP No. 01-790-01-ML, Memorandum and Order dated April 30, 2002, slip op. at 2-3.*

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2. Depositions of Witnesses

10 C.F.R. §§ 2.1018(a)(1)(iv) and 2.1019 allow for deposition by oral examination of witnesses upon prior reasonable notice and without leave of the CAB. 10 C.F.R. § 2.1019(i)(1) requires the deponent to produce an electronic index of documents relevant to the subject matter of the deposition, as well as those documents identified in 10 C.F.R. § 2.1019(1)(2), at least 10 days prior to the deposition.

A. Notice Issues

It can be reasonably assumed that each witness (expert or other) identified by a party will have myriad commitments throughout the period of discovery in this proceeding that will bear upon the date of their deposition (perhaps even more so for the Parties whose experts are retained for only a portion of their time, whereas experts for DOE are likely employees or contractors working full-time on issues involving Yucca Mountain). In addition, unless deposed where they reside, most of the witnesses will have to travel to the location of their deposition - a time-consuming and costly process.⁹ Moreover, given the nature of the information required to be produced by a witness pursuant to 10 C.F.R. § 2.1019(1) at least 10 days prior to their deposition, significant time will be required to identify and collect such information for production.

Accordingly, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order the following procedures be applied whenever any counsel intends to notice any witness for deposition:

⁹ For example, the State of Nevada has 7 expert witnesses that reside in the United Kingdom, 1 expert witness that resides in Austria, and 1 expert witness that resides in South Africa. The State of Nevada does not intend to produce those experts in their home countries which necessitates international travel requiring great time and cost.

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- If counsel for any party seeks to depose any witness, prior to noticing the deposition such counsel must confer in good faith with counsel who will defend the witness on matters involving, at a minimum, the date, location, and anticipated duration of the proposed deposition.

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- Only the lead party for a contention may seek to depose a DOE or NRC Staff witness. The lead party shall be responsible for consulting with the other parties with regard to the date, location, and anticipated duration of the deposition. In the event that DOE seeks to depose another party's witness, DOE shall consult with the lead party's counsel for the contentions(s) to be addressed. The lead party shall be responsible for consulting with other parties with regard to the date, location, and anticipated duration of such deposition.

- The preferred location for the deposition of a witness shall be that location that all counsel involved in the deposition and the witness mutually agree to be the most convenient, but if there is no agreement, then the location shall be, at the discretion of the counsel defending the witness, one of the following locations: (i) in the metropolitan area of the city where the witness resides (at a location convenient to the witness) provided that city is located within the continental United States; (ii) in the office of the counsel defending the witness; or (iii) at a location in Las Vegas, Nevada for witnesses residing west of the Mississippi River or in Washington, D.C. for witnesses (or Rockville, Maryland for NRC Staff witnesses) residing east of the Mississippi River.

Deleted: <#>To the degree that counsel for any party, other than either counsel for the party seeking the deposition or counsel defending the deposition, has expressed in writing to counsel taking the deposition and counsel defending the deposition an interest in attending such deposition and examining such witness (e.g., where multiple parties have joined a contention or group of contentions, or where counsel for a particular party has contacted counsel for DOE or any party and identified a specific witness whose deposition is of interest), such counsel shall also be consulted on matters involving, at a minimum, the date, location, and anticipated duration of any deposition before any notice of deposition may be issued.¶

- Unless otherwise agreed among all involved counsel and the witness, all depositions should be scheduled with at least 60 days' prior notice. When the deposition notice is

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issued, it shall be served on all parties, the CAB, and the Discovery Master via the EIE.

B. Scheduling Issues

It can be reasonably assumed that, given the number of contentions that have been admitted in this proceeding, counsel expect to expend significant legal resources to prepare for and to conduct or defend any depositions that will occur. For example, for the 299 contentions that the CAB has admitted in this proceeding, petitioners have been identified over 50 expert witnesses - most opining on multiple contentions. Assuming that DOE and NRC Staff will each identify a similar number of expert witnesses, it is possible that at least 150 individual expert depositions will occur during the discovery period.¹⁰ Still more depositions are expected to be taken of fact witnesses and/or other witnesses identified at the outset of discovery or that may be identified throughout discovery. Since counsel for intervenors are limited in number and will have significant obligations in this proceeding during the time frame in addition to depositions (e.g., preparing and responding to summary disposition motions), as well as obligations to other clients in other matters, if no time constraints are placed on both the length and frequency of depositions it is clear that counsel for all parties would have to devote substantially all their time over the next year to nothing but depositions in this proceeding¹¹

Deleted: Moreover, it appears reasonable to incorporate "off-weeks" within any scheduling requirements in order to afford counsel sufficient time to prepare for depositions especially after a particularly lengthy period of time in which depositions are occurring on a daily or almost daily basis.

¹⁰ Under the current schedule set forth in 10 C.F.R. Part 2, App. D, discovery in this proceeding will last 351 calendar days or 240 business days (discounting 25 weekends and 11 holidays) if the CAB issues a Case Management Order that commences discovery on July 6, 2009.

¹¹ It should be noted that unlike DOE and NRC Staff, the resources of the Parties, and in particular the affected units of local government, are quite limited and highly dependent on the availability of constrained public and private funds. The need to ensure cost effectiveness, to maintain efficiency, and to leverage available resources are some of the significant reasons underlying the Parties' proposed procedures set forth in this pleading. Due to the imbalance of available resources between DOE and NRC Staff on one side and intervenors on the other side, fairness suggests that the CAB should accord the Parties flexibility on matters involving the procedural aspects of discovery.

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Accordingly, the Parties recommend that as part of the Case Management Order the CAB order that the following scheduling requirements be applied to any deposition noticed and conducted in this proceeding, unless all the counsel involved in the deposition collectively agree to an alternate schedule or leave of the Discovery Master is obtained:

- 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 (*e.g.*, where multiple parties will participate and examine the witness during the deposition, or where the deponent will be testifying on matters involving several contentions or groups of contentions). The party noticing the deposition shall be entitled to approximately 5 of the 7 hours to examine the witness.
- The witness should be presented only once for deposition, and thus counsel for any party must be afforded the opportunity to attend the deposition and examine the witness at that time.

C. Sequencing Issues

As made clear in the Petitions to Intervene filed by the Parties, each of the admitted contentions contains a concise but detailed summary of the facts and expert opinion that support the assertions made. While DOE’s Answers attempt to rebut each of those contentions, often by making numerous merits-based arguments, DOE’s Answers do not necessarily put forth an affirmative case responsive to the matters placed at issue in the contentions. NRC Staffs Answers offer even less argument on the merits. Therefore, the positions on the merits of both DOE and

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<#>No more than 3 witnesses may be deposed in any one week subject to the ability of counsel to travel to different locations for separate depositions, unless all counsel involved collective agree otherwise.¶
<#>In scheduling of depositions, counsel for all parties shall incorporate an “off-week” approximately once a month or after a particularly lengthy period of time in which depositions are occurring on a daily or almost daily basis.¶

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NRC Staff with regard to the admitted contentions are not well defined or fully evident from the pleadings that have been filed to date. However, as the applicant, DOE has the burden of going forward and the burden of persuasion. While NRC Staff has no formal burden on safety contentions, prior practice in other NRC licensing proceedings suggests that if NRC Staff sponsors any testimony such testimony will oppose the contention.

Accordingly, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order that the depositions of any DOE witness on a particular contention or group of contentions should precede those of the Parties' witness unless counsel for all parties involved in the deposition collectively agree to proceed differently. Moreover, since it is also recommended that an expert witness be produced for deposition only once and continue day-to-day until completed (*see* Section 2.B, *supra*), and because the views of the expert witness(es) for DOE are likely to require a response by the expert witness(es) for one or more parties, DOE's experts should be deposed before Petitioners' experts are deposed. Sequencing the depositions in this way clearly benefits the development of a sound record in this proceeding. To allow the opposite sequencing to occur (without the concurrence of all counsel involved) could result in the Parties' witnesses qualifying or limiting their opinions.

Given the large number of contentions that have been admitted in this proceeding.. the Parties also recommend that as part of the Case Management Order in this proceeding the CAB order depositions to proceed on related contentions or groups of contentions in a relatively fixed window of time during the period of discovery. For example, the depositions of DOE's witnesses and the Parties' witnesses on a specific contention could occur during back-to-back days during a particular week and on groups of related contentions on back-to-back weeks (subject to the caveat noted above regarding "off weeks"). The idea is to allow counsel to prepare for and

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conduct depositions of witnesses testifying on related subject matters within a relatively concise time frame, and thereafter leave the matter to rest for the evidentiary hearing or resolution by way of a motion for summary disposition. This concept avoids counsel having to prepare twice for the same subject matter or issue (*i.e.*, initially requiring counsel for a party to take the deposition of a DOE witness and then months later requiring the same counsel to defend the deposition of the party's witness).

D. Procedural Issues

Recognizing the extremely large number of depositions that the parties may want to take, the complexity of the issues involved, and the number of counsel involved in this proceeding, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order counsel for all parties to adhere to the following procedural rules in those depositions:

- Generally only one counsel for each party should examine or defend a witness in a deposition; however, more than one counsel may examine or defend a witness (although not simultaneously) in a deposition under the following circumstances: (i) where a witness will be opining on more than one contention or group of contentions that necessitates the use of more than one attorney, although such issues shall be examined and defended sequentially; or (ii) where the deposition extends over more than one day and counsel availability is or becomes problematic (*e.g.*, a witness from outside the United States is only available on specific dates, some of which conflict with the schedule of a single counsel examining or defending the witness).
- Upon 10 days advance notice to all counsel involved in a deposition, counsel to a party may participate in a deposition, including questioning a witness, by telephone or video conference.

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- In those circumstances in which more than one counsel expect to examine a witness in a deposition and their interests appear to be aligned, examining counsel should be required to confer prior to the deposition to attempt to avoid or minimize repetitive questioning and unduly extending the time required to complete the deposition. The first counsel examining the witness will, to the extent feasible, conduct the majority of the deposition and additional counsel examining the witness will limit their examination to questions not already addressed.
- Counsel examining the witness may pose questions related to the admitted contention or the subject matter to be addressed by the witness that appear reasonably calculated to lead to the discovery of admissible evidence, and thus the question and answer itself need not be admissible. In addition, counsel may examine the witness with regard to prior testimony and past publications
- Counsel defending the witness may make objections on questions of evidence but shall do so in short form and without arguments. Objections on questions of evidence not made shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time (*e.g.*, form of the question or answer). Counsel defending the witness shall refrain from making arguments, suggestions, statements or objections designed to influence or having the effect of influencing the response of a witness to a question posed.
- With the exceptions of responses that would require the disclosure of privileged information, classified information, or information covered by a Protective Order by the NRC or its Presiding Officers, or where limited by order of the CAB or the Commission, the witness shall not be permitted, or instructed by counsel defending

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the witness, not to answer questions posed. It shall not be permissible for counsel defending a witness to instruct the witness not to answer, or for the witness to refuse to answer a question on grounds including but not limited to that the question is outside the scope of this proceeding, is not material to this proceeding, or does not relate to a genuine dispute or issue involved in this proceeding.

- Once the deposition transcript becomes available, it shall be submitted immediately to the counsel defending the witness, who shall forward the same to the witness for review and any correction. Review and any correction of the transcript shall be made within ten (10) days of the transcript becoming available for witnesses residing within the continental United States, and within twenty (20) days of the transcript becoming available for witnesses residing outside the continental United States. The procedural requirements of 10 C.F.R. § 2.1019(d) shall be followed.
- Counsel noticing a deposition shall be responsible for the following costs: (1) all charges associated with the venue where the deposition is conducted unless the witness is produced in the office of the counsel defending the deposition, or as otherwise agreed by counsel noticing the deposition and counsel representing the witness; (ii) the use of a court reporter to record the deposition by stenographic means; (iii) the use of the videographer to videotape the deposition but only if the videographer is requested by counsel noticing the deposition (otherwise the party requesting the videographer shall be responsible for such costs); (iv) the production of the transcript of the deposition and associated exhibits, and any necessary corrections; and (v) the filing of the transcript and associated exhibits as required by 10 C.F.R. § 2.1019(d).

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- With the exception of witnesses identified as specified in Item 1.B, *supra*, the cost associated with producing any witness (expert or other), as well as the cost for time spent and expenses incurred by any witness (expert or other) in preparing for their examination, in attending the deposition, or in reviewing and if needed correcting the transcript of their examination shall be borne by the party defending the witness.¹²

For non-expert witnesses identified as specified in Item 1.B, *supra*, the party noticing the deposition shall be responsible for the costs specified in 10 C.F.R. § 2.1019(g).

- The provisions of 10 C.F.R. § 2.1018(c)(1) shall apply to any deposition.

3. Other Forms of Discovery

A. Requests for Admission

10 C.F.R. §§ 2.1018 and 2.708 allow for requests, without leave of the CAB, for admission as to either (i) the genuineness and authenticity of any relevant document, or (ii) the truth of any specified relevant matter of fact. There are no limits on the number of requests for admission, and answers are required in 10 days. The Parties recommend that as part of the Case Management Order in this proceeding the CAB order the parties and their counsel to adhere to these requirements whenever making any requests for admission with the additional limitations that no party may file requests for admission more than once for each group of contentions (with a limit of no more than 5 requests for any one contention), and that no more than 4 sets of requests for admission may be filed by any party in any one calendar month without leave of the Discovery Master. *Compare*, Section V (recommending similar limits be established with regard to summary disposition motions), *infra*.

Deleted: 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, 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.

Deleted: <#>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(1)(1).¶

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¹² To the degree that it is controlling, the Parties request that the requirement in 10 C.F.R. § 2.1019(g) for the deponent to be paid fees as is the case for like service in U.S. district courts be waived for witnesses (expert or otherwise) identified by any party pursuant to Section 1.A, *supra*. The Parties suggest that, given the number of expert witnesses that will be identified in this proceeding, each party accept the financial responsibility for producing their own expert witnesses for deposition.

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B. Entry Upon Land for Inspection

10 C.F.R. §§ 2.1018(a)(1)(ii) and 2.1020(a) & (b) allows for requests, without leave of the CAB, to enter upon designated land or property for the purpose of access to raw data, inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property. There are no limits on such requests,¹³ and answers are required within 10 days. The Parties recommend that as part of the Case Management Order in this proceeding the CAB order the parties and their counsel to adhere to these requirements and also comply with the following.

Specifically, the Parties recommend that as part of the Case Management Order in this proceeding the CAB order that no party, including DOE and NRC Staff, may test, inspect, examine, or otherwise access for the purpose of this proceeding any property owned or occupied by the Timbisha Shoshone Tribe (the “Tribe”) or any member of the Tribe, or any property held in trust for the Tribe by the United States government, or any federally-recognized tribe affiliated with the Native Community Action Council (“NCAC”) without first providing advance written notice to counsel for the Joint Timbisha Shoshone Tribal Group (“JTS”) or NCAC, and the Tribal Historic Preservation Officer (“THPO”). For purposes of this proceeding there shall also be no inspection, examination, or other actions taken on lands to which the Timbisha Shoshone Tribe or any federally-recognized tribe affiliated with NCAC has federally defined possessory and usage rights outside the trust lands, including areas that are culturally sensitive that will require consultation by DOE and NRC Staff before any actions are taken as to these lands, including inspection of such lands without first providing advance written notice to counsel for

¹³ The Parties acknowledge that access to the Yucca Mountain site is governed by numerous security procedures, including the need to obtain advance security clearances and to restrict the use of photograph in some locations. Additionally, the Parties acknowledge that the Yucca Mountain site is in cold shut down and that timing of access will need to be coordinated for the specific access required.

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the JTS or the NCAC and the THPO. Additionally any information related to the Timbisha Shoshone Tribe's cultural resources or the cultural resources of any federally-recognized tribe affiliated with NCAC is confidential and must be considered in accordance with NRC procedures for handling confidential data and information. Any such notice shall set forth with particularity the purpose of the inspection; the methods to be used in the inspection (e.g., soil sampling, water sampling, photographs, etc.); the people who will participate in the inspection; the date(s) on which the inspection is requested to be conducted; and the specific site that is sought to be inspected. At its discretion, the Tribe or any federally-recognized tribe affiliated with NCAC shall determine whether the inspection request will be permitted, such consent not to be unreasonably withheld, with the exception that 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. [If access is denied, the contention related to the request for entry shall be dismissed.](#)

C. Document Production

Pursuant to 10 C.F.R. §§ 2.101 8(a)(1)(1) and 2.1003, the production of documents from parties in discovery is limited to that which exists on the LSN with the following three exceptions. First, under 10 C.F.R. § 2.1018(a)(1)(iii), document access or production is required (if specifically requested) where only bibliographic header information has been provided for nonprivileged, nonimageable documentary material (see 10 C.F.R. § 2.1003(a)). Second, under 10 C.F.R. § 2.1019(i), if requested, paper copies of additional documents in the possession of any deponent relevant to the subject matter of the deposition must be brought to the deposition if not already electronically provided. Third, additional document production may be permitted by

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NRC regulation or an applicable Case Management Order.¹⁴ The Parties recommend that as part of the Case Management Order in this proceeding the CAB order the parties and their counsel to adhere to these requirements whenever making any request for documents. Subpoenas for documents from non-parties may be issued pursuant to 10 C.F.R. § 2.1018(f)(3).

D. Interrogatories

Pursuant to 10 C.F.R. § 2.1018(a)(2), interrogatories are not permitted without leave of the CAB (or a Discovery Master) upon a showing that the parties have engaged in informal, but unsuccessful, good faith efforts to resolve a dispute in a timely fashion concerning the production of information. In the first telephonic prehearing conference held on March 12, 2009, the Board reiterated the applicability of this rule and declined to permit *carte blanche* use of interrogatories as a discovery tool. The Parties recommend that as part of the Case Management Order in this proceeding the CAB order the parties and their counsel to adhere to this limitation. The Parties specifically request that any requests for use of interrogatories filed by any party be heard by the Discovery Master.

4. Use of a Discovery Master

10 C.F.R. § 2.1018(g) allows the CAB to appoint a Discovery Master to resolve disputes between parties concerning informal requests for information as provided in 10 C.F.R. §§ 2.1018(a)(1) and (a)(2). In addition, pursuant to 10 C.F.R. § 2.1018(c), parties and petitioners are permitted to file a motion to limit or resist discovery for the reasons set forth therein.

¹⁴ See, e.g., In the Matter of U.S. Dep't. of Energy, (High Level Waste Repository: Pre-Application Matters), ASLBP No. 04-829-01-PAPO, Revised Second Case Management Order (Pre-License Phase Document Discovery and Dispute Resolution) dated July 6, 2007, slip op. at 14-15 (allowing a Licensing Board to order the discovery of the complete document when only a redacted version of the document was placed on the LSN), and Third Case Management Order dated August 30, 2007, slip op. at 7 (same but as regards sensitive unclassified information).

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The Parties recommend that as part of the Case Management Order in this proceeding, the CAB appoint a Discovery Master (or multiple Discovery Masters)¹⁵ and set forth the specific procedures that the parties must follow when submitting a discovery dispute to the Discovery Master in this proceeding. It is further recommended that the Discovery Master be available to address all discovery disputes in following fashion:

- Telephonically during a deposition if a witness improperly declines to answer a question or if counsel defending the witness improperly instructs the witness not to answer a question or instructs a witness through the use of “speaking objections.” The Discovery Master should resolve such disputes on procedural grounds and not substantive grounds (*e.g.*, to decide whether an instruction to a witness not to answer is appropriate without opining on the substance of the matter at issue in the question).
- On the pleadings submitted with regard to a specific discovery issue.
- Any motion made in writing to the Discovery Master shall comply with the time frames specified in 10 C.F.R. §§ 2.323(a) and (c), *i.e.*, the filing of a motion is required within 10 days of the circumstance from which the motion arises, the filing of an answer is required within 10 days of the motion, and no reply filing is permitted.
- Any motion filed with the Discovery Master, and any answer to any motion filed with the Discovery Master shall be limited in length to no more than 10 pages. *See Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage*

¹⁵ The Parties recognize that depositions will be occurring throughout the period of discovery on a weekly basis, and that many of those depositions may be occurring in the Pacific time zone whereas a Discovery Master may reside in the Eastern time zone. Accordingly, the Parties suggest that more than one Discovery Master may be warranted in this proceeding. In addition, the Parties suggest that on any particular day the assigned Discovery Master would be available to counsel for any party by dialing a pre-assigned telephone number within a prescribed period of time (*e.g.*, from 8 am to 12 noon, and from 1 to 5 pm Eastern). No ex parte contacts shall be allowed.

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Installation), ASLBP No. 08-860-01-ISFSI-BDOI, Scheduling and Management

Order for Discovery dated January 24, 2008, slip op. at 7.

- Any decision of the Discovery Master may be appealed to the CAB within 10 days, and unless appealed within that time frame the decision of the Discovery Master shall be considered final. If a decision of the Discovery Master is timely appealed, briefs in opposition shall be required within 10 days of the appeal, and no reply filings are permitted.

Finally, Petitioners recommend that the CAB retain jurisdiction to hear any and all motions for summary disposition rather than burdening the Discovery Master to decide such motions.

Respectfully submitted,

(signed electronically)

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Dated: June 15, 2009

Deleted: <#>Summary Disposition Motions¶

Pursuant to 10 C.F.R. §§ 2.710(a) and 2.1025, and Appendix D, any party may file a summary disposition motion no later than 20 days after the close of discovery¹⁶ for a decision in that party's favor on all or any part of the matters involved in this proceeding. These provisions do not require the filing of any motion for summary disposition, although they allow such motions to be filed throughout the period of discovery and up to 20 days after the close of discovery. Although an affidavit is not required (but is permitted), there must be attached to the motion a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Within 20 days of the filing of a motion for summary disposition, any party may file an answer in support of or opposing the motion (again an affidavit is not required but is permitted). Answers opposing the motion must be supported by a separate, short and concise statement contending there exists a genuine issue to be heard (allegations and mere denials do not suffice but instead specific facts must be shown that there is a genuine issue to be heard). No other filings (e.g., replies) are permitted.¶

Given the significant number of motions for summary disposition that are expected to be raised throughout the period of discovery, and to avoid any of the parties being inundated by such motions on an ongoing and regular basis (each of which requires an opposing response with supporting facts), the Parties recommend that as part of the Case Management Order in this proceeding the CAB order the following limits be placed on such motions:¶

<#>Each party may file only one summary disposition motion for any group of contentions, but it may address one or more contentions when filed.¶
<#>Any summary disposition motion should be filed as soon as possible (but in no case later than 30 days) after discovery on that group of contentions has been completed unless good cause can be shown to the Discovery Master to file later.¶

<#>No more than 4 summary disposition motions shall be filed by any party in any one calendar month.¶

<#>A summary disposition motion shall be limited in length to no more than 50 pages, and any accompanying affidavit(s) or statements(s) should also limit... [1]

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Summary Disposition Motions

Pursuant to 10 C.F.R. §§ 2.710(a) and 2.1025, and Appendix D, any party may file a summary disposition motion no later than 20 days after the close of discovery¹ for a decision in that party's favor on all or any part of the matters involved in this proceeding. These provisions do not require the filing of any motion for summary disposition, although they allow such motions to be filed throughout the period of discovery and up to 20 days after the close of discovery. Although an affidavit is not required (but is permitted), there must be attached to the motion a separate, short and concise statement of the material facts as to which the moving party contends that there is no genuine issue to be heard. Within 20 days of the filing of a motion for summary disposition, any party may file an answer in support of or opposing the motion (again an affidavit is not required but is permitted). Answers opposing the motion must be supported by a separate, short and concise statement contending there exists a genuine issue to be heard (allegations and mere denials do not suffice but instead specific facts must be shown that there is a genuine issue to be heard). No other filings (*e.g.*, replies) are permitted.

Given the significant number of motions for summary disposition that are expected to be raise throughout the period of discovery, and to avoid any of the parties being inundated by such motions on an ongoing and regular basis (each of which requires an opposing response with supporting facts), the Parties recommend that that as part of the Case Management Order in this proceeding the CAB order the following limits be placed on such motions:

¹ The current schedule for this proceeding specifies that discovery will close 608 days after the Notice of Hearing is issued. *See* 10 C.F.R. Part 2, App. D. Since the Notice of Hearing in this proceeding was issued on October 22, 2008, *see* 73 Fed. Reg. 63,029, discovery is scheduled to close on June 22, 2010, and the last day for filing summary disposition motions is July 12, 2010.

Each party may file only one summary disposition motion for any group of contentions, but it may address one or more contentions when filed.

Any summary disposition motion should be filed as soon as possible (but in no case later than 30 days) after discovery on that group of contentions has been completed unless good cause can be shown to the Discovery Master to file later.

No more than 4 summary disposition motions shall be filed by any party in any one calendar month.

A summary disposition motion shall be limited in length to no more than 50 pages, and any accompanying affidavit(s) or statements(s) should also be limited in length to no more than 50 pages.

A response in support of or in opposition to a summary disposition motion, and any accompanying affidavit(s) or statement(s), shall be limited in length in the same manner as the motion itself.

No pleading other than the motion and a response in support or opposition may be filed (*i.e.*, there shall be no reply pleadings).

As noted above, the Parties request that any motion for summary disposition be heard by the CAB as opposed to the Discovery Master. Finally, the Parties recommend that the CAB render its decision on the motion and response(s) within 40 days after the filing of the response(s).

**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:)	June 15, 2009
U.S. Department of Energy)	
(High Level Waste Repository)	
Construction Authorization Application))	Docket No. 63-001

CERTIFICATE OF SERVICE

I hereby certify that copies of the “**DEPARTMENT OF ENERGY’S RESPONSE TO JOINT PROPOSED DISCOVERY SCHEDULE**” have been served on the following persons this 15th day of June 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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 Washington, D.C. 20555-0001

U.S. Nuclear Regulatory Commission
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Lawrence McDade
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