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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
G. Paul Bollwerk, III
Paul S. Ryerson

In the Matter of U.S. DEPARTMENT OF ENERGY (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board)	Docket No. PAPO-001 ASLBP No. 08-861-01-PAPO-BD01 March 31, 2008

MEMORANDUM
(Advisory Pre-License Application Presiding Officer Board
Request to the Commission for Additional Authority)

On February 13, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board) was established pursuant to the Commission's delegation of authority in Staff Requirements Memorandum COMSECY-07-0030 dated December 13, 2007. In granting this Board authority in COMSECY-07-0030, the Commission stated that "[i]f at any time during this process the ASLBP perceives the need to obtain additional authority, the ASLBP should make such a request at that time." The Advisory PAPO Board is now submitting this memorandum to request additional authority from the Commission for the Board to issue binding case management orders rather than serving solely in an advisory capacity relative to these matters.

Ward Sproat, Director of the Office of Civilian Radioactive Waste Management at the Department of Energy (DOE), has stated that DOE plans to file its license application for

Nuclear Regulatory Commission
Exhibit # - NRC131517-00-BD01
Docket # - 99900999
Identified: 03/23/2010
Admitted: 03/23/2010 Withdrawn:
Rejected: Stricken:

construction of a high-level waste (HLW) repository at Yucca Mountain, Nevada, in June 2008.[1] Additionally, in responding to a question earlier this month at the agency's Regulatory Information Conference regarding the time necessary to make a decision concerning docketing of that application, Office of Nuclear Materials Safety and Safeguards Director Michael Weber declared that the NRC staff would reach such a determination within ninety days of the filing of the DOE application. The adjudicatory proceeding regarding the HLW application thus could begin in September 2008. In addition, the State of Nevada recently stated in response to our first case management-related information request to potential parties that it is likely to file as many as 500 contentions in the HLW proceeding.[2]

As explained below, the schedule, in conjunction with the responses from potential parties to our first request for information, make it apparent that we need greater authority to issue binding case management orders to ensure that standards will be effective in a time frame that reasonably allows the parties to comply.

In ASLBP's original October 17, 2007 memorandum to the Commission requesting authority to establish a board to deal with these types of procedural matters, Chief Administrative Judge E. Roy Hawkens introduced the concept of requiring potential parties to

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[1] Lisa Mascaro, Feds Say Yucca Moving Forward, Las Vegas Sun, Mar. 13, 2008, available at http://www.lasvegassun.com/blogs/early line/2008/mar/13/feds say yucca moving forward; Press Release, Dep=t of Energy, Statement from Ward Sproat on Yucca Mountain, Director of the Office of Civilian Radioactive Waste Management (Dec. 12, 2007), available at http://www.energy.gov/news/5771.htm.

[2] See Nevada Response to the Board's Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties) (Mar. 24, 2008) at 1. The high-end estimates of the other potential parties who indicated they might seek to file contentions would bring the contention total to 650+, which is five times the largest total filed in an agency proceeding since the contention admissibility standards were revised in 1989. Nonetheless, as Nevada noted, see id. at 2, this total could go significantly higher depending on whether "subcontentions" are or are not permitted, a matter that the Advisory PAPO Board anticipates exploring further with the potential parties.

format their contentions in a manner that will identify to which portion of the License Application the contention pertains, and in a manner that will clearly address each contention admissibility factor of 10 C.F.R. § 2.309(f)(1). Our suggestions along these lines would be designed to avoid confusion and ensure that answers to the contentions -- which, under the schedule in 10 C.F.R. Part 2, Appendix D, DOE and the NRC Staff must file within twenty-five days -- directly address only those section 2.309(f)(1) admissibility factors that they assert are not met.[3] Likewise, the suggested requirements would ensure that replies -- which petitioners must file within seven days under Appendix D -- only address the specific objections to admissibility that DOE and the Staff raise in their answers.[4] Additionally, the proposed requirements will ensure that licensing boards are in the best position efficiently to review and to rule on the admissibility of 500 or more proffered contentions within the narrow thirty-eight-day time period that begins to run after replies are filed.

A problem arises, however, with the ability of the potential parties to comply with these time-saving procedures under our current advisory authority. Assuming the Commission accepts our suggestions and is willing to incorporate them into the agency's notice of opportunity for hearing, under the current Appendix D schedule described above there simply will not be enough time for potential parties to implement these proposed procedural requirements. As DOE recognized in its recent response to the Board's initial request for information,[5] these standards need to be in effect well before the notice of hearing is issued. As a practical matter, to meet the rigorous schedule imposed by Appendix D, the parties will

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[3] See 10 C.F.R. Part 2, app. D (Day 55).

[4] See id. (Day 62).

[5] See [DOE] Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties) (Mar. 24, 2008) at 3 n.1.

begin drafting their contentions well before the formal notice of hearing is issued.[6] Accordingly, to be most effective, the proposed standards must be available before that date.

Accordingly, we respectfully request that the Commission empower the Advisory PAPO Board to issue binding case management orders to ensure that any adjudicatory proceeding regarding the construction of a HLW repository is orderly and efficient, and that potential parties to such proceedings have sufficient time to comply with any time-saving procedural requirements that will be imposed. As indicated in the ASLBP's earlier October 17, 2007

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[6] Although the Advisory PAPO Board has been seeking information from the parties regarding the timing of the filing of answers and replies to contentions, any case management order by the Board would be subject to the provisions of 10 C.F.R. § 2.1026(b), which limits any Board time extensions of the Appendix D schedule to 15 days absent Commission approval.

We would note that in limiting our authority in COMSECY-07-030 to acting in an advisory capacity, the Commission may have been reluctant to grant binding authority to a licensing board prior to the issuance of a notice of opportunity for hearing. See 10 C.F.R. § 2.318(a) ("Unless the Commission orders otherwise, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences . . . . A proceeding commences when a notice of hearing . . . is issued."). However, under the Atomic Energy Act (AEA) and Commission regulations, the Commission has broad authority in the creation of Atomic Safety and Licensing Boards. Section 191(a) of the AEA provides in relevant part:

> [T]he Commission is authorized to establish one or more atomic safety and licensing boards, . . . to conduct such hearings as the Commission may direct and make such intermediate or final decisions as the Commission may authorize with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act, any other provision of law, or any regulation of the Commission issued thereunder.
>
> The Commission <u>may delegate to a board such other regulatory functions as the Commission deems appropriate</u>.

42 U.S.C. § 2241(a) (emphasis supplied). Similarly, 10 C.F.R. § 1.15 states that "[t]he Atomic Safety and Licensing Board Panel . . . conducts hearings for the Commission and <u>such other regulatory functions as the Commission authorizes</u>." (Emphasis supplied.) Therefore, the AEA and Commission regulations authorize the Commission, in its discretion, to establish and empower a board with the authority to issue binding case management orders prior to issuance of a notice of opportunity of hearing.

memorandum to the Commission, the Advisory PAPO Board will seek comments from the potential parties on various proposals and hold case management conferences to aid in formulating case management orders. That process will continue and, of course, all Board case management orders will be fully reviewable by the Commission.

Under the circumstances, it would be most helpful if the Commission could provide a response to this request by the end of April 2008.

The Advisory PAPO Board has been authorized to state that Chief Administrative Judge Hawkens has reviewed and supports this request.

The Advisory Pre-License Application
Presiding Officer Board

/RA/
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G. Paul Bollwerk, III
ADMINISTRATIVE JUDGE

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Paul S. Ryerson
ADMINISTRATIVE JUDGE

Rockville, Maryland

March 31, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. PAPO-001
	)	
(Advisory Pre-License Application:	)	
Presiding Officer Board	)	
(Advisory PAPO Board)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ADVISORY PAPO BOARD MEMORANDUM (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. PAPO-001
ADVISORY PAPO BOARD MEMORANDUM (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority)

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