

January 31, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. 63-001-HLW
	)	
(High-Level Waste Repository)	)	ASLBP No. 09-892-HLW-CAB04
	)	

NRC STAFF RESPONSE TO STATE OF NEVADA'S MOTION  
FOR RECONSIDERATION OF THE REJECTION OF NEV-MISC-001

INTRODUCTION

On January 20, 2011, the State of Nevada (Nevada) filed a motion seeking reconsideration of the rejection of NEV-MISC-001 in *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC 367, 472-73 (2009) (LBP-09-06), *rev'd in part, aff'd in part*, CLI-09-14, 69 NRC 580 (2009). State of Nevada's Motion for Reconsideration of the Rejection of NEV-MISC-001, dated January 20, 2011 (Motion). For the reasons stated below, the staff of the U.S. Nuclear Regulatory Commission (Staff) opposes the Motion because it is untimely and does not show compelling circumstances.

BACKGROUND

In LBP-09-06, the Construction Authorization Board (CAB) 01, one of the Boards designated to rule on the contentions in the proceeding on the U.S. Department of Energy (DOE) Licensing Application (LA), denied admission of NEV-MISC-001. LBP-09-06, 69 NRC at 472-73. That contention alleged that a construction authorization cannot be granted because, as alleged in NEV-SAFETY-041, Yucca Mountain will erode to the level of the repository drifts starting approximately 500,000 years after waste emplacement, at which time the facility will not constitute a "repository," but will be "a retrievable storage facility." *Id.* (quoting State of Nevada's Petition to Intervene as a Full Party, dated December 19, 2008

(Nevada Petition), at 1144). CAB 01 ruled that NEV-MISC-001 did not present a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi), because it “raises a legal issue that depends upon resolution of factual issues presented in NEV-SAFETY-041,” which if proven valid, would render the legal issue in NEV-MISC-001 moot (because the DOE LA will fail), and if found invalid, would render the legal issue in NEV-MISC-001 irrelevant. *Id.* at 473.

In June 2009, this Board was established “to preside over matters concerning discovery, Licensing Support Network compliance, new or amended contentions, grouping or consolidation of contentions, scheduling, [and] case management matters relating to any of the foregoing” in the proceeding on the DOE LA. Establishment of Atomic Safety and Licensing Board; Department of Energy, 74 Fed. Reg. 30,644, 30,644 (June 26, 2009).

On December 14, 2010, the Board ruled on the Phase I legal issues, and directed the affected parties to file a stipulation as to the effects of its rulings on the admitted contentions by January 21, 2011. *U.S. Dep’t of Energy (High-Level Waste Repository)*, LBP-10-22, 72 NRC \_\_\_ (slip op. at 4, 5) (Dec. 14, 2010) (LBP-10-22). On January 21, 2011, DOE submitted a joint report on behalf of DOE and, except where otherwise noted, Nevada, the Nuclear Energy Institute (NEI), and the Staff. *U.S. Department of Energy’s Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22*, dated January 21, 2011 (Joint Report), at 4. The Joint Report indicated that “[a]ll parties agree that NEV-Safety-041 is subject to dismissal” in light of LBP-10-22, *id.*, Attachment at 2, because LBP-10-22 held that “10 C.F.R. § 63.342(c) does not require the post-10,000-year performance assessment to include the effects of erosion” if, assuming for the purposes of legal argument, erosion is not shown to “cause[] increases in radiological exposures or releases within the first 10,000 years,” LBP-10-22, slip op. at 17.

Nevada filed the instant Motion on January 20, 2011 seeking reconsideration of CAB 01’s rejection of NEV-MISC-001. The Staff’s response to the Motion is set forth below.

## DISCUSSION

### A. Applicable Legal Standards

Under the Commission's regulations, a motion for reconsideration may not be filed except upon leave of the presiding officer if the motion shows "compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e). For a motion for reconsideration to be successful, it cannot reargue facts or repeat prior arguments, but must give the presiding officer a "good 'reason to change its mind.'" *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.13 (2004) (quoting *Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004)). It may not present new facts or arguments, unless the new material could not reasonably have been anticipated. *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-22, 60 NRC 379, 380-81 (2004), *aff'd*, CLI-04-36, 60 NRC 631 (2004). The standards applicable to motions for reconsideration are strictly applied; these motions should not be granted lightly. *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006). These standards are "intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration . . . ." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004).

In addition, the Commission's regulations provide that a motion for reconsideration "must be filed within ten (10) days of the action for which reconsideration is requested," 10 C.F.R. § 2.323(e), and that all motions must be filed "no later than then (10) days after the occurrence or circumstance from which the motion arises," 10 C.F.R. § 2.323(a). The Commission has indicated that "[i]ateness alone is sufficient to reject [a] reconsideration request." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005); *see, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1 (1988) (denying a motion for reconsideration that was filed nine days late).

Late-filed motions for reconsideration must show good cause in addition to new information or changed circumstances. *Id.* at 409 n.26 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-14, 55 NRC 301, 310-11 (2000)).

B. Nevada's Motion Was Not Timely Filed

The Motion should be denied for its failure to meet the timeliness requirement in 10 C.F.R. § 2.323 because the Motion was filed after the ten-day deadline and Nevada has not shown good cause for its delay. Nevada filed its Motion, asserting that the Board's December 14, 2010 decision requires reconsideration of CAB 01's decision to deny admission of NEV-MISC-001, more than three weeks after the expiration of the ten-day deadline (i.e., Monday, December 27, 2010). See Motion at 1. Nevada argues that its Motion was filed at "an appropriate time" because the Board "will be considering a closely related matter—the effects of LBP-10-22 on admitted contentions . . . ." *Id.* at 2. Nevada also claims that it had good cause for not filing earlier because it needed to consult with its expert, and that its timing was reasonable "considering both the Christmas holidays and the number of contentions . . . that needed to be reviewed to determine the total effect of LBP-10-22." *Id.* at 3.

Nevada does not demonstrate good cause for its tardiness. Nevada was aware of the number of contentions that might be affected by LBP-10-22 from the outset, but did not request additional time from the Board to file a reconsideration motion based on that decision. Instead, Nevada waited until December 28, 2010, one day after the deadline for filing a motion for reconsideration, to seek advice from its expert regarding the impact of LBP-10-22 on NEV-SAFETY-041, and waited ten additional days after receiving advice from its expert before filing its Motion on January 20, 2011. See *id.* at 3. Because Nevada has failed to show that it expended reasonable efforts to obtain advice from its expert on a timely basis, Nevada's claim of good cause is not persuasive. Nevada's late filing and failure to meet its burden to show good cause provide a sufficient basis for the Board to deny the Motion. See *Private Fuel*

*Storage, L.L.C.*, CLI-05-19, 62 NRC at 409 & n.26 (citing *Private Fuel Storage, L.L.C.*, LBP-00-14, 55 NRC at 310-11). Thus, the Board should deny the Motion as being untimely.

C. Nevada's Motion Has Not Shown Compelling Circumstances

Even though Nevada's untimeliness is sufficient to deny the Motion, Nevada's Motion should also be denied because Nevada has not shown "compelling circumstances" in support of its Motion. See 10 C.F.R. § 2.323. Nevada argues that the "premise underlying the CAB's dismissal of NEV-MISC-001 in LBP-09-06" was that NEV-MISC-001 would be moot or irrelevant depending on the resolution of the factual allegations set forth in NEV-SAFETY-041. Motion at 1-2. Nevada asserts that, because the factual allegations in NEV-SAFETY-041, which constitute the "factual predicate of NEV-MISC-001, . . . will never be proven to be correct or incorrect," CAB 01's decision to deny admission of NEV-MISC-001 should be reconsidered, and upon reconsideration, NEV-MISC-001 should be admitted. *Id.* at 2.

Nevada fails to demonstrate "compelling circumstances" for reconsideration of NEV-MISC-001's rejection because the Board's decision in LBP-10-22 rendered NEV-MISC-001 irrelevant in this proceeding. The Board determined in LBP-10-22 that "[u]nder current regulations, the Board may not consider [the long-term effects of erosion] unless erosion is also shown to be a safety concern in the relatively near term (that is, over the next 10,000 years)." LBP-10-22, slip op. at 1. In ruling on Legal Issue 5, the Board concluded that "10 C.F.R. § 63.342(c) does not require the post-10,000-year performance assessment to include the effects of erosion if it is assumed there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years." *Id.* at 17. The Board also denied Nevada's rule waiver request in NEV-SAFETY-203,<sup>1</sup> concluding that "[u]nless erosion is

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<sup>1</sup> NEV-SAFETY-203 argues that, even if DOE's exclusion of land-surface erosion were correct for the first 10,000 years, notwithstanding 10 C.F.R. § 63.342(c), land-surface erosion should not be excluded from the Total Systems Performance Assessment (TSPA) in the subsequent period. State of Nevada's New Contentions Based on Final NRC Rule, dated May 12, 2009, at 9-11. The Board denied Nevada's rule waiver petition in NEV-SAFETY-203 because Nevada failed to make a *prima facie* showing

'screened in' as a FEP [feature, event, or process] because of its effects during the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years." *Id.* at 35-36.

The Board's rulings in LBP-10-22 thus render irrelevant the factual allegations in NEV-SAFETY-041 along with the legal issue in NEV-MISC-001 that relies upon those factual allegations. Nevada, DOE, NEI, and the Staff agree that the Board's decision in LBP-10-22 resolved NEV-SAFETY-041,<sup>2</sup> and that this contention is now "subject to dismissal." See Joint Report, Attachment at 2; Motion at 2. Nevada also concedes in its Motion that the factual allegations in NEV-SAFETY-041 do not demonstrate that erosion will cause an increase in radiological dose or releases within 10,000 years after closure. See Motion at 3 ("Dr. Thorne replied . . . advising candidly that the erosion analysis underlying NEV-SAFETY-041 would **not** support the proposition that erosion will cause an increase in radiological dose or releases within 10,000 years after closure." (emphasis in original)). As a result, under LBP-10-22, the effects of erosion in the post-10,000-year period as alleged in NEV-SAFETY-041 cannot be considered in this proceeding, and the legal issue in NEV-MISC-001, which rests solely upon allegations regarding erosion in the post-10,000-year period, are irrelevant in this proceeding. Given that Nevada has not shown compelling circumstances, the Board should deny the Motion.

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(footnote continued)

that its concerns about long-term erosion were not previously considered by the Commission, "explicitly or by necessary implication," during section 63.342's rulemaking proceeding. LBP-10-22, slip op. at 35-36.

<sup>2</sup> NEV-SAFETY-041 asserts that DOE improperly excluded land-surface erosion from the features, events, and processes (FEPs) considered in the post-10,000-year analysis because modeling studies and actual observations demonstrate that erosion will significantly change the modeling boundary conditions within the first 10,000 years, and that the crest of the mountain will erode to the level of the repository drifts within 500,000 to five million years. Nevada Petition at 238, 241; see *also* LBP-09-06, 69 NRC at 472.

CONCLUSION

For the reasons set forth above, the Board should deny Nevada's Motion because it is untimely without demonstrating good cause for the late filing and is not supported by compelling circumstances.

Respectfully submitted,

**/Signed (electronically) by/**

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**/Executed in accord with 10 C.F.R. § 2.340(d)/**

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Dated at Rockville, Maryland  
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NUCLEAR REGULATORY COMMISSION

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 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO STATE OF NEVADA'S MOTION FOR RECONSIDERATION OF THE REJECTION OF NEV-MISC-001" in the above-captioned proceeding have been served on the following persons this 31st day of January, 2011, by Electronic Information Exchange.

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