

October 17, 2007

COMSECY-07-0030

MEMORANDUM TO: Chairman Klein
Commissioner Jaczko
Commissioner Lyons

FROM: E. Roy Hawkens
Chief Administrative Judge
Atomic Safety and Licensing Board Panel */RA/*

SUBJECT: REQUESTING AUTHORITY TO ISSUE CASE MANAGEMENT
ORDERS IN HIGH-LEVEL WASTE PROCEEDING PRIOR TO
THE ISSUANCE OF A NOTICE OF OPPORTUNITY FOR
HEARING

The purpose of this memorandum is to request that the Commission authorize me to issue and, if appropriate, to delegate authority to the Pre-License Application Presiding Officer (PAPO) Board to issue case management orders covering the broad range of procedural matters expected to accompany the upcoming adjudication regarding the Department of Energy's (DOE) application for authorization to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada.¹

Such case management orders are needed to enable licensing boards to manage efficiently the more than one thousand contentions – many of which will be highly technical in nature – that are expected to be filed by the dozen or more potential parties to the proceeding a short time after DOE's license application (LA) is docketed. For such case management orders to be effective in materially expediting the process, they must be communicated to potential parties well before the Commission's Notice of Opportunity for Hearing. Failure to address these procedural issues prior to that Notice will likely have adverse consequences on the schedule.

If granted the requested authority, I will work with the judges on the Atomic Safety and Licensing Board Panel (Panel) to develop and issue a series of case management orders that will allow us (and concomitantly the parties) to, among other things, organize, label, and track contentions from the time the intervention petitions are filed until the last day of the proceeding. In particular, these orders will enable us to: (a) quickly organize the contentions for allocation among multiple licensing boards consistent with their respective technical expertise; (b) in accord with 10 C.F.R. § 2.309(f)(3), encourage the parties to file "joint" contentions or to adopt the contentions of other parties (rather than filing separate but essentially identical issue statements); and (c) identify and consolidate contentions filed by parties that address identical (or substantially identical)

¹ Because the PAPO Board's jurisdiction currently is limited to disputes regarding LSN documents, it would need further authorization to address the matters that are the subject of this memorandum. See 10 C.F.R. § 2.1010(a)(1); U.S. Department of Energy (High Level Waste Repository), CLI-04-20, 60 NRC 15, 18 (2004).

substantive matters. When appropriate, the Panel intends to obtain input and suggestions from the NRC Staff and potential parties by holding case management conferences and providing an opportunity to comment on proposed case management orders.

To further our central objective of imposing an orderly procedural regime on what could otherwise be a massively disjointed process, it is our expectation that case management orders will establish contention pleading and numbering protocols that permit the rapid initial categorization, assessment, and sorting of contentions to a reasonably fine level of specificity, which, in turn, will aid significantly in expeditiously reviewing and ruling on the contentions, consolidating and distributing contentions among licensing boards for substantive consideration, and establishing computerized cradle-to-grave organization and tracking of contentions by party/issue/licensing board to ensure that the administrative record is demonstrably complete and accurate.²

For over two years, the PAPO Board has been working with counsel for potential parties through conferences and case management orders, defining and resolving a host of potential problems relating to claims of privilege regarding Licensing Support Network (LSN) documents. This process has been constructive and productive, resolving a priori an untold number of motions and eliminating months of time that would otherwise have been devoted to resolving disputes over the production of LSN documents. This experience has confirmed the prudence of considering and addressing important procedural issues before the DOE LA is filed.

Therefore, I respectfully request that the Commission authorize me to issue and, if appropriate, to delegate authority to the PAPO Board to issue, case management orders in the HLW proceeding addressing procedural issues of the kind described in this memorandum.

I would be pleased to meet with you or members of your staff to discuss these matters more fully, if you deem it desirable.

SECY, please track.

cc: SECY
OCAA

² In this regard, it is our current intent to require potential parties to number their contentions under a protocol that will self-identify, with a high degree of specificity, the portion of the LA documentation to which the contention pertains, requiring, for example, that contentions be numbered to correspond to the DOE LA paragraph numbering system, which we understand is similar to, but unfortunately somewhat different than, the numbering scheme used by the NRC Staff in the "Yucca Mountain Review Plan," NUREG-1804.

In addition, we are examining other time-saving procedures that could be effected in the case management order context, such as providing detailed instructions (consistent with governing regulations) concerning contention drafting, with an emphasis on specificity (i.e., each contention should be drafted to cover a precise issue at the lowest/most detailed level of the DOE application possible). We are also considering a requirement for a standard "cover sheet" for each contention that concisely summarizes the supporting basis and each factor required to be met under 10 C.F.R. § 2.309(f).

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