

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
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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

CLI-08-14

MEMORANDUM AND ORDER

On March 31, 2008, the Advisory Pre-License Application Presiding Officer Board (Advisory PAPO Board or Board) issued a Memorandum requesting that the Commission delegate to the Board additional authority to issue binding case management orders.¹ For the reasons set forth below, we authorize the Advisory PAPO Board to issue binding case management orders for specified purposes.

I. BACKGROUND

In COMSECY-07-0030, dated October 17, 2007, Chief Administrative Judge Hawkens requested that the Commission authorize him 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

¹ Memorandum (Advisory Pre-License Application Presiding Officer Board Request to the Commission for Additional Authority)(March 31, 2008)(unpublished)(Request).

adjudication regarding the Department of Energy's (DOE) application for authorization to construct a high-level waste repository at Yucca Mountain, Nevada."² At that time, Judge Hawkens requested the authority for the Atomic Safety and Licensing Board Panel to develop and issue a series of procedural case management orders that would permit, among other things, organization, labeling, and tracking of contentions from the commencement of the proceeding.

By Staff Requirements Memorandum (SRM) dated December 13, 2007, we authorized the Panel, on its own or through the PAPO Board, "to obtain input and suggestions from NRC staff and potential parties on the broad range of procedural matters expected to arise and associated case management requirements that could be imposed" in an adjudicatory proceeding regarding an application for a high-level waste repository at Yucca Mountain, Nevada.³ At that time, we directed the Panel to submit its proposed case management language to the Commission "for possible inclusion in the Commission's notice of opportunity to request a hearing and order governing the hearing process."⁴ We also directed the Panel to return to the Commission in the event that it perceived the need to obtain additional authority.

² COMSECY-07-0030, "Requesting Authority to Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing" (October 17, 2007), at 1 (footnote omitted).

³ See "Staff Requirements Memorandum – COMSECY-07-0030 – Requesting Authority to Issue Case Management Orders in High-Level Waste Proceeding Prior to the Issuance of a Notice of Opportunity for Hearing" (December 13, 2007).

⁴ *Id.* The Commission has determined that, as a policy matter, a mandatory hearing would be held in conjunction with an application for construction authorization for a high-level waste repository. 10 C.F.R. § 2.101(e)(8); see Final Rule, Disposal of High-Level Radioactive Wastes in Geologic Repositories: Licensing Procedures, 37 Fed. Reg. 13,971, 13,974 (Feb. 25, 1981). Therefore, should an application be docketed, a notice of hearing will issue pursuant to 10 C.F.R. § 2.104(c)(1).

Shortly thereafter, the Advisory PAPO Board was established.⁵ Since its establishment, the Board has issued three requests for information from potential parties relevant to case management issues.⁶ The March 6 Memorandum requested best, good-faith estimates of (1) the number of initial contentions; (2) the number of days needed to file reasoned answers to contentions; and (3) the number of days needed to file replies to the answers. In addition, the Board requested that DOE file the current draft version of the table of contents of its license application.⁷ The Board received a number of responses to this request by late March. The April 4 Memorandum invited the potential parties to comment on several procedural issues related to formatting and labeling of contentions, as well as the employment of a uniform system for referencing or attaching supporting materials. The Board also invited comment on certain procedural issues raised in DOE's and the State of Nevada's responses to the March 6 Memorandum.⁸ The Board received a number of responses to this second information request in late April.

⁵ Establishment of an Atomic Safety and Licensing Board, 73 Fed. Reg. 9358 (Feb. 20, 2008).

⁶ Notice and Memorandum (Requesting Information from Potential Parties)(March 6, 2008)(unpublished)(March 6 Memorandum); Memorandum (Requesting Input from Potential Parties on Format for Contentions)(April 4, 2008)(unpublished)(April 4 Memorandum); Memorandum (Requesting Additional Input from Potential Parties on Hearing Petition-Related Matters)(May 2, 2008)(unpublished)(May 2 Memorandum).

⁷ The Board is considering an organizational structure for petitions to intervene in which petitioners label contentions in a way that models the table of contents of a DOE license application. March 6 Memorandum, slip op. at 6.

⁸ See April 4 Memorandum, slip op. at 5-6, n.8. Thereafter, the Board issued an additional memorandum permitting potential parties to file optional written responses to the comments of other parties in advance of the May 14 conference. Memorandum (Requesting Additional Written Comments from Potential Parties on Format for Contentions)(April 29, 2008)(unpublished).

The Board convened a conference to discuss case management matters at the agency's Las Vegas hearing facility on May 14, 2008.⁹ The May 2 Memorandum lists a number of matters on which the potential parties commented at that time, including procedural matters relating to the timing of the submission of an application by DOE, the timing of the Staff's review, and a number of matters relating to hearing petitions, answers and replies.

This Request arose following the Board's review of information submitted pursuant to the March 6 Memorandum.

II. DISCUSSION

To support its Request, the Advisory PAPO Board notes that DOE had publicly stated its intent to file a license application for construction of a high-level waste repository at Yucca Mountain, Nevada, in June 2008.¹⁰ Further, the Board states that responses to its first request for information "make it apparent" that it needs the authority to issue binding case management orders, to ensure effective planning for an orderly proceeding in sufficient time to permit potential parties to comply with the Board's case management standards and the rigorous time limitations in 10 C.F.R. Part 2, Appendix D.¹¹

Aside from the anticipated scope of the proceeding, the Advisory Board's principal concern is time. The Board argues that its existing advisory authority is insufficient because, under the rigorous schedule for the proceeding set forth in Appendix D, "there simply will not be

⁹ *Id.*, slip op. at 6-7; Memorandum (Logistics for Conference)(April 16, 2008)(unpublished).

¹⁰ Request at 1-2.

¹¹ *Id.* at 2-3; see 10 C.F.R. § 2.1026(a). The Board notes that the number of anticipated contentions in a high-level waste proceeding could exceed 650, with the bulk of those proffered by the State of Nevada.

enough time for potential parties to implement” its proposed standards if they are issued only when the Commission publishes the notice of hearing.¹²

The Board’s concerns are well taken. On the basis of estimated information provided to the Board, and taking into account the voluminous body of information upon which a postulated adjudicatory proceeding would be based, if a proceeding is, in fact, initiated on an application to construct a high-level waste repository at Yucca Mountain, then it has the potential to be one of the most expansive proceedings in agency history.¹³

The Board is correct that the Commission has broad authority to delegate powers to the Atomic Safety and Licensing Boards.¹⁴ In the matter before us, there is not yet a proceeding.¹⁵

¹² See Request at 3. On June 3, 2008, DOE submitted an application to the NRC.

¹³ See, e.g., *Nevada Response to the Board’s Notice and Memorandum of March 6, 2008 (Requesting Information from Potential Parties)* (March 24, 2008); *Clark County’s Response to Notice and Memorandum Requesting Information from Potential Parties* (March 21, 2008); *Nuclear Energy Institute Response to the Advisory PAPO Board’s March 6, 2008 Notice and Memorandum* (March 20, 2008); *Nye County Response to Advisory PAPO Board NOTICE AND MEMORANDUM (Requesting Information from Potential Parties)* (March 20, 2008); *Response by Churchill, Esmeralda, Lander and Mineral Counties to Notice and Memorandum (Requesting Information from Potential Parties)* (March 12, 2008); *Response of Lincoln County, Nevada to Notice and Memorandum Requesting Information from Potential Parties* (March 6, 2008); *Eureka County’s Response to the Advisory PAPO Board’s March 6, 2008, Order* (March 24, 2008); *Inyo County Response (Untitled)* (March 19, 2008); *NRC Staff Response to Board’s March 6 Notice and Memorandum (Requesting Information from Potential Parties)* (March 24, 2008); *U.S. Department of Energy’s Response to Advisory PAPO Board Notice and Memorandum (Requesting Information from Potential Parties)*(March 24, 2008).

¹⁴ Request at 4 n.6. Section 191a. of the Atomic Energy Act of 1954, as amended, 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 may delegate to a board such other regulatory functions as the Commission deems appropriate.

(continued. . .)

However, the Yucca Mountain matter is *sui generis*, in that (among many other things) the duration of the Staff's review is time-limited by statute, and the adjudicatory proceeding promises to be unusually complex. Further, as we have recently reiterated, our adjudicatory Boards have broad discretion to regulate the course of proceedings and the conduct of participants, and we are reluctant to embroil ourselves in day-to-day case management issues.¹⁶

The organization of petitions to intervene, in particular, the formatting and labeling of contentions, an associated structure for responses and replies regarding contentions, the organization of standing arguments, and a uniform system for referencing or attaching supporting materials, are case management matters for which early and binding notice would be beneficial. Issuance of procedural requirements on these matters should enhance the ability of potential parties, and of one or more adjudicatory boards, to address matters in controversy more efficiently and effectively. Therefore, we authorize the Board to issue binding case management orders on those subjects, which would apply if a proceeding is initiated. Of course, the Board remains free to make advisory recommendations to the Commission which the Commission could consider for inclusion in a notice of hearing or could endorse after receipt of such recommendations.

(. . .continued)

42 U.S.C. § 2241(a)(emphasis added). See 10 C.F.R. § 1.15 ("The [Panel] . . . conducts hearings for the Commission and other such regulatory functions as the Commission authorizes.")

¹⁵ Our regulations provide that a proceeding commences when a notice of hearing or a notice of proposed action under 10 C.F.R. § 2.105 is issued. 10 C.F.R. § 2.318(a).

¹⁶ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit Nos. 2 and 3), CLI-08-07, 68 NRC __ (slip op. April 30, 2008).

Although DOE has now tendered an application to the NRC, there is no guarantee of when – or if – that application will be accepted for docketing and a notice of opportunity for hearing published. That we approve the Advisory PAPO Board’s Request in part today in no way bears upon the Staff’s review of the application that DOE has submitted, and we do not assume that DOE’s application will be accepted for review. Rather, our decision is intended to permit the Advisory PAPO Board to address by binding order certain additional procedural aspects of an adjudicatory proceeding as specified above, which would apply *in the event a proceeding is initiated*.¹⁷

III. CONCLUSION

For the foregoing reasons, the Advisory PAPO Board’s request for authority to issue binding case management orders is granted for the purposes specified above.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of June, 2008.

¹⁷ Further, our ruling today should not be interpreted as precedential, as it takes into consideration the unique facts and circumstances surrounding the Yucca Mountain matter.