DEPARTMENT OF ENERGY AND NUCLEAR ENERGY INSTITUTE
RESPONSE TO MEMORANDUM AND ORDER
DATED AUGUST 25, 2009
(CONCERNING FURTHER PREHEARING CONFERENCE)

The Department of Energy (“DOE”) joined by the Nuclear Energy Institute\(^1\)
hereby submits this response to the Memorandum and Order, issued by the Construction
Authorization Board-04 (“Board”) on August 25, 2009, concerning the prehearing
conference scheduled for September 14-15, 2009. DOE’s and NEI’s agreement with
certain responses of the State of Nevada (“Nevada”) is also set forth in this response.

1. In light of the NRC Staff’s plans to issue the SER serially and associated
scheduling uncertainties, will it be appropriate to proceed with adjudication
of contentions on multiple tracks: that is, for the parties to conduct
discovery on certain related groups of contentions while simultaneously
participating in hearings on other related groups of contentions that are
ready for adjudication?

\(^{1}\) DOE is authorized to state that Nye County joins in the responses to Construction Authorization
Board questions 4-21.
DOE and NEI agree with Nevada’s schedule for litigating NEPA contentions including the provisions of Option 2. All environmental contentions related to SER Volume 3 would (other than those related to DOE’s additional groundwater analyses) be litigated along with the SER Volume 3 safety contentions. After submittal of findings of fact on post-closure contentions, all remaining NEPA contentions would be litigated. DOE and NEI along with California believe that a litigation schedule for those NEPA contentions affected by DOE’s Analysis of Postclosure Groundwater Impacts should be set after the NRC Staff announces how it will proceed with respect to that document. No later than 40 days after the NRC Staff makes its announcement California and DOE will propose a litigation schedule for those contentions (and any new related contentions).

Finally, DOE and NEI do not think it is necessary or appropriate at this early stage to try to fashion a detailed procedural schedule for later phases of this proceeding such as that proposed by Nevada, especially because the NRC Staff has stated that other than the schedule for SER Volumes 1 and 3, the schedule for the remaining SER Volumes is “uncertain at this time and may change due to future fiscal year budgets or unanticipated emergent work associated with the review” of the LA. See NRC Staff Answer to the CAB’s July 21, 2009 Order concerning Serial Case Management.

2. It appears that most or all parties wish to conduct some form of further discovery before adjudication of any factual NEPA contentions. Specifically, what discovery will be required and how long should it take?

DOE and NEI agree that discovery is necessary for factual components, if any, of the environmental contentions. Discovery on the environmental contentions related to SER Volume 3 should commence at the same time as discovery commences on the safety contentions related to SER Volume 3, based on a schedule to be ordered by the Board.
(other than those related to DOE’s additional groundwater analysis). As noted above, DOE and NEI do not think it is necessary or appropriate to try to fashion a procedural schedule for later phases of this proceeding.

3. **Given the parties apparent belief that further discovery is needed before any factual contention can be adjudicated, what is the earliest date on which the parties agree that at least some factual contentions can be ready for adjudication?**

Hearings on contentions related to SER Volumes 1 and 3 could commence 4 months after the close of discovery on those contentions.

4. **In light of the NRC Staff’s plans to issue the SER serially and associated scheduling uncertainties, should limits on the total number of depositions be imposed by a Case Management Order at this time?**

There should be limits imposed on the number of depositions parties may take of persons who are not identified by a party as an expert. For litigation of the SER Volumes 1 and 3 related contentions, the limits proposed in the earlier Joint Proposed Discovery Schedule of 5 depositions (of persons who are not identified by a party as an expert) for each party, except DOE and Nevada who would be limited to 20 such depositions each, should be adopted. Because of the large number of post-closure contentions related to SER Volume 3 and a corresponding large number of experts, there could be in excess of 100 expert depositions on post-closure contentions. If the limits proposed in the earlier Joint Proposed Discovery Schedule were imposed, there could be an additional 50-70 non-expert depositions on these contentions. This is more than a sufficient number of depositions to allow parties to prepare for hearings. For litigation of contentions related to SER Volumes 1, 2, 4 and 5 and the remaining environmental contentions, it might be appropriate to impose separate lower limits.

5. **If so, what should such limits be?**
There should be limits on the number of depositions as described above.

6. **Given that discovery will now likely take place over several years, rather than in less than one year, are the limitations in the Joint Proposed Discovery Schedule on the timing of depositions (e.g., no more than three depositions per week, at least one “off-week” per month) now acceptable to all parties?**

   No. Given the large number of witnesses likely to be deposed during the litigation of post-closure contentions, it would be necessary to take depositions virtually every week of the discovery period after identification of witnesses. At certain periods during discovery, more than 3 witnesses in a given week might have to be deposed. This is an extraordinary proceeding and, as the Board has recognized, it will require a great deal of time and work by all the parties on a daily basis.

7. **If not, what limits do the parties now propose?**

   The only limitation that should be imposed is that more than one witness for the same party should not be deposed on the same day. Beyond that, the parties should proceed in good faith in scheduling depositions and make every effort not to impose undue burdens on any party.

8. **In light of the NRC Staff’s plans to issue the SER serially and associated scheduling uncertainties, would it still be reasonable for the Case Management Order to specify that each witness shall be presented for deposition only once?**

   We agree with the Nevada response to Question 8.

9. **Rather, in negotiating a deposition schedule, should the parties accord a high priority to avoiding multiple depositions of the same witness, while recognizing that some witnesses may have to be deposed more than once if their testimony pertains to more than one group of contentions set for hearing?**

   We agree with the Nevada response to Question 9.
10. If not, what guidance regarding multiple depositions of the same witness should be included in a Case Management Order?

We agree with the Nevada response to Question 10.

11. Consistent with 10 C.F.R. § 2.1018(a)(1)(vi), the Joint Proposed Discovery Schedule provides that the parties’ identification of an expert witness should include, at a minimum, the “subject matter” and the contentions that the expert will address. In contrast, Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure requires a more detailed explanation of an expert’s proposed testimony, including “a complete statement of all opinions the witness will express and the basis and reasons for them,” as well as specification of the “data or other information considered by the witness in forming them.” Would depositions be more useful and efficient if the parties were to agree upon a disclosure similar to Rule 26(a)(2)(B) requirements for expert witnesses in this proceeding?

Expert reports such as those required by Rule 26 of the Federal Rules of Civil Procedure should not be required in this proceeding. The Commission’s Rules do not provide for such reports.

12. Can the parties agree upon voluntary disclosure of the proposed content of expert witness testimony, similar to that required by Rule 26(a)(2)(B)?

DOE and NEI do not agree that the parties should be required to provide the information listed in the Nevada response to Question 12 for each expert. The information that Nevada suggests be provided is nearly the same as that required by FRCP Rule 26. The principal disclosure under Rule 26 is the statement of the expert's opinions and the "basis and reasons for them" as well as supporting documents. That is precisely what Nevada proposes here. The amount of work required to compile the information would be enormous and the proposed statement of the expert’s opinion could not possibly be prepared by a DOE's expert at the outset of discovery. As we describe in response to Question 14, DOE's experts do not know and could not be expected to know the detailed bases for contentions until completion of discovery. Therefore, DOE experts
could not provide expert opinions about specific contentions until discovery is completed. Indeed, under Rule 26, the expert report is never provided at the outset of a case but in virtually every instance after completion of fact discovery. Here, of course, the experts will submit detailed prefiled testimony prior to the hearing and thus there is no need to provide expert reports at the close of discovery.

13. If not, is there any such disclosure – more specific than expected “subject matter” and “contentions” – upon which the parties can agree?

   The parties should provide the information identified in the bullets on pages 4 and 5 of the June 10, 2009 Joint Proposed Discovery Schedule.

14. It appears that Intervenors would like to depose all the Applicant’s witnesses before depositions of any of their own witnesses, and that the Applicant would like to depose all the Intervenors’ witnesses before depositions of any of the Applicant’s witnesses. In light of the NRC Staff’s plans to issue the SER serially and associated scheduling uncertainties, can the parties now agree upon a plan for sequencing depositions?

   DOE and NEI believe that 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. DOE's expert witnesses should not be deposed before any interveners’ witnesses on a particular contention or group of contentions. As DOE pointed out in its earlier Response to the Joint Proposed Discovery Schedule, a stronger argument can be made that interveners' witnesses should be deposed before any DOE witnesses. Interveners' expert witnesses have a more complete understanding of the bases for the contentions than do any of DOE's experts. DOE's witnesses would be better able to address the contentions after learning from interveners' expert witnesses the precise nature and basis of each contention. Nonetheless, DOE and NEI are in favor of the
normal practice contemplated by the rules rather than the novel and unauthorized
approach suggested in the Joint Proposed Discovery Schedule.

15. **Would voluntary disclosure of more detailed information concerning
proposed expert testimony, of the sort described above, assist the parties in
agreeing upon the sequence of depositions?**

Expert reports like those proposed by Nevada are not provided for in NRC
regulations and should not be required nor should sequencing of depositions.

16. **In light of the NRC Staff’s plans to issue the SER serially and associated
scheduling uncertainties, should limits on the total number of requests for
admission be imposed by a Case Management Order at this time?**

We agree that limits should be imposed on requests for admissions as proposed in
the Joint Proposed Discovery Schedule.

17. **If so, what should such limits be?**

*See Question 16 above.*

18. **Applicable regulations expressly contemplate “[i]nformal requests for
information” and specify that the Board should authorize formal
interrogatories or depositions upon written questions only “in the event that
the parties are unable, after informal good faith efforts, to resolve a dispute
in a timely fashion concerning the production of information.” The Board
does not wish to decide numerous motions for permission to obtain
information that should have been made available voluntarily. Is any
mechanism required to discourage the need to resort to such motions?**

There is no additional mechanism that the Board should impose to ensure that the
parties will not resort to unnecessary motions practice. To date the parties have acted in
good faith in providing information voluntarily and there is every reason to believe that
those good faith efforts will continue in the future.

19. **Is so, what should the mechanism be?**

*See Response to Question 18.*
20. In light of the NRC Staff’s plans to issue the SER serially and associated scheduling uncertainties, are there provisions in the Joint Proposed Discovery Schedule (other than provisions referenced above) that one or more parties previously supported but no longer support?

Except as noted in this response, and in DOE’s earlier response to the Joint Proposed Discovery Schedule, there are no such provisions.

21. If so, what are such provisions?

See Response to Question 20.

22. In light of the NRC Staff’s plans to issue the SER serially and associated scheduling uncertainties, are there additional provisions (not suggested above) that the parties wish to propose for inclusion in a Case Management Order?

The Case Management Order should address two additional matters. First, the schedule for briefing legal issues should be included in the Order. The scheduling of legal briefing of legal issues should be discussed at the hearing as suggested by Nevada. Second, the Order should resolve any disputes over the binning of contentions between SER Volumes.

23. If so, what are such provisions?

See Question 22.
Respectfully submitted,

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Dated in Washington, D.C.
this 11th day of September 2009
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of: )
U.S. Department of Energy ) September 11, 2009
(High Level Waste Repository ) Docket No. 63-001
Construction Authorization Application)

CERTIFICATE OF SERVICE

I hereby certify that copies of the “DEPARTMENT OF ENERGY AND NUCLEAR ENERGY INSTITUTE RESPONSE TO MEMORANDUM AND ORDER DATED AUGUST 25, 2009 (CONCERNING FURTHER PREHEARING CONFERENCE)” have been served on the following persons on this 11th day of September 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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