STATE OF NEVADA'S REPLY TO
NRC STAFF'S COMMENTS REGARDING CONTENTION CONSOLIDATION

State of Nevada ("Nevada") replies as follows to "NRC Staff Comments Regarding Contention Consolidation" ("Comments"), in accordance with Section B (at 5) of CAB Case Management Order #2 (September 30, 2009) (CMO#2). Nevada will show that the NRC Staff's ("Staff") October 30 filing is not, as Staff claims, "consistent with CMO#2," and is also not consistent with commitments made by Staff in a previous filing on the very same subject.

Discussion

While Staff's filing is directed at the "Joint Proposal to Consolidate Contentions of Clark County, Nevada, State of Nevada, and Inyo County, California" ("Consolidation Proposal") filed on October 13, its filing is confounding due to its stated agreements with that Proposal.

First (Comments at 1), Staff makes clear that "The Staff does not object to any of the proposed consolidations" addressed in the Consolidation Proposal.
Second, Staff agrees with the procedural protocol suggested by the Consolidation Proposal, stating (Comments at 3): "The Consolidation Proposal suggests, at 2, that consolidated contentions be rewritten and submitted within 20 days of an order approving consolidation, with replies 10 days afterward. The Staff does not object to these suggestions."

If Staff does not object to the Consolidation Proposal or the proposed procedure, then what exactly does it object to? The answer is nothing. (Note, CMO#2, at 5, authorized "any objection to any proposed consolidation" to be filed within 30 days after the start of discovery. No party, including Staff, has filed a single objection.) Indeed, Staff did not even style its filing as an "objection," but rather "Comments." In truth, the Staff filing may more accurately be termed a motion (and one made without benefit of prior consultation) since its conclusion requests the CAB to "clarify" its position and to "direct" the parties to act as Staff urges.

Whether the Staff filing is characterized as an objection, a comment or a motion, its content directly contradicts its own joint filing and commitments made in this proceeding on June 10, 2009 (Joint Proposed Process and Schedule for Grouping and Consolidating Contentions). That filing, joined in by NRC Staff, addressed the consolidation by "more than one party" of contentions which are "sufficiently similar." Staff concedes in its current Comments, at 2, that the Nevada and Clark County volcanism contentions are "virtually identical" and that the Board "should consider consolidating" them. The parties who joined in the June 10 filing understood that in the event that "similar" contentions were consolidated, they would need to be rewritten. Accordingly, consolidation would unavoidably raise the question of the handling of issues unique to one of the consolidated contentions. The parties concurred that none of the authors of contentions which were consolidated should see any issue they raised
abandoned or dropped from the consolidated version of the contention. In this regard, Staff
joined the other parties in solemnly committing (at 3).

[T]he Parties want to ensure that any consolidation preserves all of the issues contained within an admitted contention that would be withdrawn upon consolidation with another contention . . .

This joint commitment bespeaks simple fairness. No party would be willing to undertake consolidation of its contentions with those of another party, if it were to face the elimination, in that process, of any issues it raised in its own contention. This principle is particularly true where, as here, the consolidation under discussion involves only contentions which the CAB and the Commission have already ruled are admissible in their entirety.

The "Comments" made by Staff directly contradict the letter and spirit of its June 10 commitment. Thus, Staff correctly observes that the Consolidation Proposal proposes to consolidate NEV-SAFETY-153, CLK-SAFETY-006, and INY-SAFETY-003. Staff then asserts that, while those three contentions are similar, INY-SAFETY-003 uniquely raises an additional issue about DOE's failure to meet the provisions of NUREG-1804. That is precisely the circumstance foreseen by the parties who joined in the June 10 commitment to respect and include each and every such unique issue. But Staff, abandoning its specific commitment to the contrary, argues (Comments at 2) "[T]he proposed inclusion of INY-SAFETY-003, if adopted, would interject an issue separate and distinct from that raised in CLK-SAFETY-006 and NEV-SAFETY-153." True. And all the parties, including Staff, agreed on June 10 exactly how that specific and foreseeable situation would be handled: the contentions to be consolidated would be rewritten in such a way as to "preserve all the issues contained within" each admitted contention.
In a similar vein, Staff addresses the proposed consolidation of NEV-SAFETY-150 through 158 with CLK-SAFETY-003 through 011, which it concedes are "virtually identical" (Comments at 2). But then Staff addresses an additional issue that is raised in NEV-SAFETY-150 through 156, but not raised in the corresponding Clark County contentions (i.e., its impact on DOE's TSPA). Staff urges "the Board should clarify whether or not this allegation will be considered as part of the consolidated contentions" (Comments at 3). There is nothing to be clarified. All parties agreed that, in the event of consolidation of various parties' admitted contentions, all the issues raised in any of the already-admitted contentions would be preserved in the rewritten, consolidated version.

Staff appears to be seeking "two bites at the apple" through its filing of these Comments. It agrees with the Consolidation Proposal's schedule: submission of rewritten, consolidated versions of contentions within 20 days of an order permitting consolidation, with provision for replies by any other party to be filed within 10 days after that. Thus, Staff will have ample opportunity to register any opposition to a consolidated contention which it wants to argue embraces inappropriate content. It is accordingly both unnecessary for Staff to now ask the Board to "direct" the rewriting of the contentions to be consolidated, and it is unseemly for Staff to try to "write out of existence" admitted contention issues which it previously promised would be preserved in the course of any consolidation.

Conclusion

For the foregoing reasons, the Staff's "Comments" should be rejected and denied. In addition, Nevada respectfully requests the Board to issue an order (consistent with CMO #2 at 5) setting forth the contentions for consolidation as requested in the Consolidation Proposal.

Respectfully submitted,
(signed electronically)
Charles J. Fitzpatrick *
Martin G. Malsch *
John W. Lawrence *
Egan, Fitzpatrick, Malsch & Lawrence, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Tel: 210.496.5001
Fax: 210.496.5011
cfitzpatrick@nuclearlawyer.com
mmalsch@nuclearlawyer.com
jlawrence@nuclearlawyer.com
*Special Deputy Attorneys General

Dated: November 9, 2009
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

In the Matter of

U.S. DEPARTMENT OF ENERGY

High Level Waste Repository

Docket No. 63-001-HLW

November 9, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Reply to NRC Staff's Comments Regarding Contention Consolidation has been served upon the following persons by the Electronic Information Exchange:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001

CAB 01
William J. Froehlich, Chair
Administrative Judge
E-mail: wjf1@nrc.gov
Michael C. Farrar
Administrative Judge
E-mail: tsm2@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

CAB 02
Michael M. Gibson, Chair
Administrative Judge
E-mail: mmg3@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: axr@nrc.gov
Nicholas G. Trikouros
Administrative Judge
E-mail: NGT@NRC.GOV

CAB 03
Paul S. Ryerson, Chair
Administrative Judge
E-mail: psr1@nrc.gov
Mark O. Barnett
Administrative Judge
E-mail: mob1@nrc.gov

CAB 04
Thomas S. Moore, Chair
Administrative Judge
E-mail: tsm2@nrc.gov
Paul S. Ryerson
Administrative Judge
E-mail: psr1@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
Email: ace1@nrc.gov
Daniel J. Graser, LSN Administrator
Email: djg2@nrc.gov
Lauren Bregman
Email: lrb1@nrc.gov
Sara Culler  
Email: sara.culler@nrc.gov  
Joseph Deucher  
Email: jhd@nrc.gov  
Patricia Harich  
Email: patricia.harich@nrc.gov  
Zachary Kahn  
Email: zxk1@nrc.gov  
Erica LaPlante  
Email: eal1@nrc.gov  
Matthew Rotman  
Email: matthew.rotman@nrc.gov  
Andrew Welkie  
Email: axw5@nrc.gov  
Jack Whetstine  
Email: jgw@nrc.gov

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop - O-16 C1  
Washington, DC 20555-0001  
Hearing Docket  
Email: hearingdocket@nrc.gov  
Andrew L. Bates  
Email: alb@nrc.gov  
Adria T. Byrdsong  
Email: atb1@nrc.gov  
Emile L. Julian, Esq.  
Email: elj@nrc.gov  
Evangelina S. Ngbea  
Email: esn@nrc.gov  
Rebecca L. Gitter  
Email: rlg@nrc.gov

Marian L. Zobler, Esq.  
Email: mlz@nrc.gov  
Andrea L. Silvia, Esq.  
Email: alc1@nrc.gov  
Daniel Lenehan, Esq.  
Email: dwl2@nrc.gov  
Margaret J. Bupp, Esq.  
Email: mjb5@nrc.gov  
Adam S. Gendelman  
Email: Adam.Gendelman@nrc.gov  
Christopher C. Chandler  
Email: Christopher.Chandler@nrc.gov  
Joseph S. Gilman, Paralegal  
Email: jsg1@nrc.gov  
Karin Francis, Paralegal  
Email: kfx4@nrc.gov  
OGCMailCenter  
Email: OGCMailCenter@nrc.gov

Hunton & Williams LLP  
Counsel for the U.S. Department of Energy  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219  
Kelly L. Faglioni, Esq.  
Email: kfaglioni@hunton.com  
Donald P. Irwin, Esq.  
Email: dirwin@hunton.com  
Michael R. Shebelskie, Esq.  
Email: mshebelskie@hunton.com  
Pat Slayton  
Email: pslayton@hunton.com

U.S. Department Of Energy  
Office of General Counsel  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
George W. Hellstrom  
Email: george.hellstrom@ymp.gov

U.S. Department of Energy  
Office of General Counsel  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
Martha S. Crosland, Esq.  
Email: martha.crosland@hq.doe.gov
Radioactive Waste Watchdog
Beyond Nuclear
6930 Carroll Avenue, Suite 400
Takoma Park, MD 20912
Kevin Kamps
Email: kevin@beyondnuclear.org

Abigail Johnson
612 West Telegraph Street
Carson City, NV 89703
Email: abbyj@gbis.com

National Congress of American Indians
1301 Connecticut Ave. NW - Second floor
Washington, DC 20036
Robert I. Holden, Director
Nuclear Waste Program
Email: robert_holden@ncai.org

Churchill County (NV)
155 North Taylor Street, Suite 182
Fallon, NV 89406
Alan Kalt
Email: comptroller@churchillcounty.org

Inyo County Water Department
Yucca Mtn Nuclear Waste
Repository Assessment Office
163 May St.
Bishop, CA 93514
Matt Gaffney, Project Associate
Email: mgaffney@inoyucca.org

Mr. Pat Cecil
Inyo County Planning Director
P.O. Box L
Independence, CA 93526
Email: pcecil@inoyocounty.us

Robert S. Hanna
233 E. Carrillo St., Suite B
Santa Barbara, CA 93101
Email: rshanna@bsglaw.net

Michael C. Berger
233 E. Carrillo St., Suite B
Santa Barbara, CA 93101
Email: mberger@bsglaw.net

Environmental Protection Agency
Ray Clark
Email: clark.ray@epa.gov

Nuclear Waste Technical Review Board
Joyce Dory
Email: dory@nwtrb.gov

Intertech Services Corporation
(for Lincoln County)
P.O. Box 2008
Carson City, NV 89702-2008
Dr. Mike Baughman
Email: bigboff@aol.com

Nye County Department of Natural
Resources & Federal Facilities
1210 E. Basin Road, Suite 6
Pahrump, NV 89048
David Swanson
Email: dswanson@nyecounty.net

Lincoln County Nuclear Oversight Prgm
100 Depot Ave., Suite 15; P.O. Box 1068
Caliente, NV 89008-1068
Lea Rasura-Alfano, Coordinator
Email: jcciac@co.lincoln.nv.us

Nye County Regulatory/Licensing Adv.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy
Email: mrmurphy@chamberscable.com

Nye County Nuclear Waste Repository Project
Office (NWRPO)
2101 E. Calvada Blvd., Suite 100
Pahrump, NV 89048
Zoie Choate, Secretary
Email: zchoate@co.nye.nv.us
Sherry Dudley, Admin. Technical Coordinator
Email: sdudley@co.nye.nv.us
Mineral County Board of Commissioners
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Administrator
Office of Nuclear Projects
Email: yuccainfo@mineralcountynv.org

State of Nevada
100 N. Carson Street
Carson City, NV 89710
Marta Adams
Email: madams@ag.state.nv.us

White Pine County (NV) Nuclear Waste Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
(Heidi Williams, Adm. Assist.)
Email: wpnucwst1@mwpower.net

Fredericks & Peebles, L.L.P.
1001 Second Street
Sacramento, CA 95814
916-441-2700
FAX 916-441-2067
Darcie L. Houck
Email: dhouck@ndnlaw.com
John M. Peebles
Email: jpeebles@ndnlaw.com
Joe Kennedy, Chairman
Email: chairman@timbisha.org
Barbara Durham
Tribal Historic Preservation Officer
Email: dvdurbarbara@netscape.com

Susan Durbin
Deputy Attorney General
California Department of Justice
1300 I St.
P.O. Box 944255
Sacramento, CA, 94244-2550
Email: susan.durbin@doj.ca.gov

Brian Hembacher
Deputy Attorney General
California Department of Justice
300 S. Spring St
Los Angeles, CA 90013
Email: brian.hembacher@doj.ca.gov

Timothy E. Sullivan
Deputy Attorney General
California Department of Justice
1515 Clay St., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
Email: timothy.sullivan@doj.ca.gov

Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

Kevin W. Bell
Senior Staff Counse
California Energy Commission
1516 9th Street
Sacramento, CA 95814
Email: kwbell@energy.state.ca.us

Jeffrey D. VanNiel
530 Farrington Court
Las Vegas, NV 89123
Email: nbridvnr@gmail.com

Ethan I. Strell
Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005
Email: strell@clm.com

Jennings, Strouss & Salmon, PLC
1700 Pennslyvania Avenue, N.W., Suite 500
Washington DC 20006-4725
Alan I. Robbins
Email: arobbins@jsslaw.com
Debra D. Roby
Email: droby@jsslaw.com
Steven A. Heinzen  
Godfrey & Kahn, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53701-2719  
Email: sheinzen@gklaw.com

Douglas M. Poland  
Godfrey & Kahn, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53701-2719  
Email: dpoland@gklaw.com

Arthur J. Harrington  
Godfrey & Kahn, S.C.  
780 N. Water Street  
Milwaukee, WI 53202  
Email: aharing@gklaw.com

Gregory Barlow  
P.O. Box 60  
Pioche, NV 89043  
Email: lcda@lcturbonet.com

Connie Simkins  
P.O. Box 1068  
Caliente, NV 89008  
Email: jcciac@co.lincoln.nv.us

Bret O. Whipple  
1100 South Tenth Street  
Las Vegas, NV 89104  
Email: bretwhipple@nomademail.com

Eric Hinckley  
Email: erichinckley@yahoo.com

Richard Sears  
801 Clark Street, Suite 3  
Ely, NV 89301  
Email: rwsears@wpceda.org

Alexander, Berkey, Williams & Weathers  
2030 Addison Street, Suite 410  
Berkeley, CA 94704  
Curtis G. Berkey  
Email: cberkey@abwwlaw.com

Scott W. Williams  
Email: swilliams@abwwlaw.com

Rovianne A. Leigh  
Email: rleigh@abwwlaw.com

_(signed electronically)_

Susan Montesi