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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

April 7, 1989

MEMORANDUM FOR: William C. Parler, General Counsel

FROM: Samuel J. Chilk, Secretary

SUBJECT: STAFF REQUIREMENTS - AFFIRMATION/DISCUSSION AND VOTE, 3:30 P.M., THURSDAY, MARCH 30, 1989, COMMISSIONERS' CONFERENCE ROOM, ONE WHITE FLINT NORTH, ROCKVILLE, MARYLAND (OPEN TO PUBLIC ATTENDANCE)

I. SECY-89-027 - Final Rulemaking on the Licensing Support System for the High-Level Waste Licensing Proceeding

The Commission, as noted below, approved a final rule which amends 10 CFR Part 2 to establish procedures to govern the high-level waste licensing proceeding, including the use of an electronic information management system known as the Licensing Support System ("LSS") .

By a 5-0 vote,* the Commission approved those portions of the rule dealing with the LSS. By a 3-2 vote the Commission (with Chairman Zech and Commissioners Carr and Rogers agreeing) also approved the procedural changes recommended by the Negotiating Committee. Commissioners Roberts and Curtiss disapproved the "non-LSS" procedural portions of the rule; they would have considered the procedural changes at a later time when additional procedural changes are considered by the Commission. commissioner Curtiss has separate views (attached) to be published with the rule.

* Section 201 of the Energy Reorganization Act, 42 U.S.C. Sec. 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Rogers was not present when this item was affirmed. Accordingly, the formal vote of the Commission was 4-0 in favor of the decision to establish the LSS. -In addition, in order to allow the will of the majority to prevail, Commissioner Curtiss did not participate on the vote for the non-LSS portions of the rule. Accordingly, the formal vote on the non-LSS portions of

the rule was 2-1. Commissioner Rogers had previously indicated his approval of the entire rule, if he had been present he would have affirmed his prior votes.

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Approval of the rule was subject to the staff incorporating the following modifications:

1. Section 2.1014(c)(4) should be deleted.

2. The following language should be added to the Supplementary Information to the rule as appropriate.

a. The Commission is committed to do everything it can to streamline its licensing process and at the same time conduct a thorough safety review of the Department of Energy's application to construct a high-level waste repository. The negotiators to this rulemaking have made a number of improvements to our existing procedures. However, more improvements may be necessary if the Commission is to meet the tight licensing deadline established by the Nuclear Waste Policy Act of 1982, as amended. By publishing this rule, the Commission is not ruling out further changes to its rules of practice, including further changes to the rules contained in the negotiated rulemaking.

b. The Topical Guidelines included in this rulemaking package are interim guidelines, which will only be used until a more precise set is approved by the Commission and published in a regulatory guide. The Topical Guidelines will not be used for determining the scope of contentions that can be offered in the licensing proceeding under the intervention rule (Section 2.1014).

C. In determining which documents must be placed in the LSS by a LSS participant, the document must fall within the definition of "documentary material" in Section 2.1002, i.e., it must be relevant to, or likely to lead to information that is relevant to, the licensing of the likely candidate site for a geologic repository. Therefore, a document must not only fall within the topical guidelines, but also have a nexus to a geologic repository.

d. The NRC staff is responsible for preparing the Regulatory Guide on the topical guidelines.

e. Practice before the PALB is essentially a motions pre-hearing phase in a Part 50 proceeding before a licensing board. oral presentations are not precluded, but rather will be left to the discretion of the board (as is now the case), depending on the nature of the dispute. See, for example, Sections 2.1010(d) and (e), Section 2.1015, and Section 2.1016.

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The staff, in coordination with the LSS Advisory Panel, should develop recommendations to the Commission on whether particular categories of documents should remain within the scope of the topical guidelines. The staff should also consider the outcome of the rulemaking on the Commission's NEPA responsibilities in preparing these recommendations.

The final rule should be revised as noted and forwarded for signature and publication.
(OGC) (SECY Suspense: 4/21/89)

Attachment:
As stated

cc: Chairman Zech
Commissioner Roberts
Commissioner Carr
Commissioner Rogers
Commissioner Curtiss
EDO
GPA
PDR - Advance
DCS - Pl-24

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COMMISSIONER CURTISS' COMMENTS ON SECY-89-027:

For a number of reasons, discussed in more detail below, I have significant reservations about proceeding at this point with the so-called "non-LSS" portion of this rule, wherein the

Negotiating Committee has recommended extensive changes to our Part 2 procedures, as those procedures will apply to the Department of Energy's application for a construction authorization for the high-level waste repository.

First, it does not appear to me that the original charge to the Negotiating Committee envisioned that the Committee would address, in a wide-ranging manner, the so-called Part 2 procedural provisions that will govern the high-level waste proceeding, except to the extent that changes in these provisions. proved to be necessary for the purpose of implementing the Licensing Support System (LSS). The rule before us includes a number of provisions that are necessary to implement the LSS; but it also includes a number of "non-LSS" provisions that are unrelated to the LSS and that, in my judgment, go far beyond the scope of the Committee's charge.

Second, we have not had a sufficient opportunity to reflect upon the "non-LSS" procedural changes that have been proposed -- to ensure that the procedures are clear and unambiguous and to reach a decision as to whether, as a matter of policy, the approach reflected in the proposed procedures should be endorsed. My own view is that there is considerable ambiguity, reflected in part by the apparent lack of consensus on key issues that emerged in the February 7, 1989 commission meeting, about the meaning of certain important provisions.

Third, my concerns in this regard have been heightened by the responses that we recently received from the Negotiating Committee members to the questions that I posed on February 24, 1989. In short, with the exception of the Industry Coalition, the Negotiating Committee members and the lead convenor and facilitator have individually declined to answer the questions, suggesting that inquiries about the purpose and intent of this rule somehow threaten the integrity of the negotiating process and will lead to the collapse of whatever consensus has been achieved.

In posing these questions, it was not my intent to plow new ground or raise new issues that go beyond the topics that are addressed in the proposed rule recommended by the Negotiating Committee in SECY-89-027. Indeed, in every instance, the questions concern the purpose, the intent, and the meaning of the procedural provisions contained within the four corners of this rulemaking package and involve matters that, in my judgment, need to be clarified if our objective here is to have a rational, well-understood set of procedures to govern the high-level waste adjudicatory proceeding. If these matters were discussed and addressed by the Negotiating Committee -- and a consensus achieved -- then the response should require no further negotiation. A

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simple reference to the text of the rule or to the minutes of the negotiations would suffice. On the other hand, if these matters did not receive the attention of the Negotiating Committee -- or a consensus does not exist -- then in my judgment that should give us pause about proceeding with changes that are not clearly understood. If we have any hope of meeting the three-year statutory schedule for the high-level waste proceeding, I think we should clear up these ambiguities now.

Whether a consensus was achieved or not, we are nevertheless entitled to a response from the Negotiating Committee about the purpose and intent of the rule that has been proposed for our consideration. We are ill-served by the Negotiating Committee's inability or unwillingness to respond to reasonable questions about the meaning and purpose of key provisions in this rule.'

Fourth and finally, there are a number of procedural changes that go beyond, or involve changes in, what the Negotiating Committee has proposed that warrant consideration (see, e.g., Memorandum from Christine N. Kohl to William C. Parler, January 19, 1989; SECY-89-023, "Consideration of Revisions to the Commission's Rules of Practice in Order to Further Streamline the High-Level Waste Licensing Process", January 26, 1989). I am pleased that these additional changes will be coming to the Commission shortly for our consideration and I hope that we can move forward expeditiously with our deliberations on these additional changes. But it seems to me that it would be far preferable to make these changes all at one time and in a single package, where we can consider the policy matters related to our HLW procedures in a comprehensive and coordinated way, rather than through the bifurcated approach that we are now taking.

For the foregoing reasons, I would disapprove the "non-LSS" provisions of the rule (sections 2.1014-2.1023, 2.714, 2.722, 2.743, and 2.764, as well as the topical guidelines and the model timeline). I would approve those provisions of the rule that are directly related to implementation of the LSS (2-1000-2.1013).

1 Indeed, the position taken by the Negotiating committee in response to the questions that have been posed about the purpose and intent of the rule leads me to question the wisdom of relying on the negotiated rulemaking process for future rulemaking initiatives.