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December 5, 1988

Secretary of the Commission
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste

Gentlemen:

On November 3, 1988, the Nuclear Regulatory Commission published in the Federal Register a notice of proposed rulemaking to amend 10 CFR Part 2. 53 Fed. Reg. 44411. The proposed rule deals largely with the submission and management of documentary material related to the licensing of the nuclear waste repository. This would be accomplished by an electronic information management system known as the Licensing Support System ("LSS"). The proposed rule would also establish certain procedures for the adjudicatory hearing on DOE's construction authorization application for the geologic repository. The Edison Electric Institute ("EEI") and the Utility Nuclear Waste Management Group ("UNWMG") appreciate the opportunity to submit these comments, including the detailed comments attached hereto. For the reasons set forth below, we respectfully urge that the Commission not adopt the proposed rule in its present form.

EEI is the association of the Nation's investor-owned electric utilities. Its members generate about seventy-three percent of the Nation's electricity and serve over sixty-seven million customers. UNWMG is a group of forty-five electric utilities providing active oversight of the implementation of the federal statutes and regulations governing radioactive waste management. Together, EEI and UNWMG represent most of the holders of contracts with DOE for disposal of spent nuclear fuel under

the Nuclear Waste Policy Act ("NWPA"), as amended. To date, electric utilities have contributed the vast majority of the $3.3 billion that has been paid into the Nuclear Waste Fund and are currently paying for the entire civilian nuclear waste program. These funds are collected from electricity consumers. It is extremely important that the nuclear waste program be carried out in an efficient and cost-effective manner.

EEI and UNWMG were members of the negotiating committee formed by the NRC to develop the proposed LSS rule. Together with the U.S. Council for Energy Awareness, EEI and UNWMG comprised a coalition representing the nuclear industry in the negotiated rulemaking proceeding. The industry coalition took an active role in seeking to create a proposed rule to meet the objective of the rulemaking. That objective was set forth in the notices that lead to the establishment of the negotiating committee and repeated frequently throughout the negotiated rulemaking -- to allow the NRC to reach a decision on the construction authorization for the repository within the three year time frame specified in § 114(d) of the NWPA. (Section 114(d) allows a one year extension for good cause.)

EEI and UNWMG took part in the negotiating process in a good faith attempt to reach consensus on a rule that would have a realistic chance of leading to repository licensing within the three to four year statutory period. For most of the negotiations, the industry coalition was the only party focusing attention on the broader issues of the licensing process, issues that would determine whether or not the Commission's objective of a three to four year licensing process could be met.

Notwithstanding the substantial efforts EEI and UNWMG invested in the rulemaking process, we reluctantly concluded at the close of the negotiations that we could not support the proposed rule as drafted. The proposed rule would create a gigantic, highly complicated, and extraordinarily expensive system that would not do what was intended. The LSS as proposed would be to our knowledge the largest and costliest litigation support system ever created. But notwithstanding its massive size -- 40 million pages -- and enormous cost -- $195 million predicted by DOE (which we believe is substantially underestimated) -- the LSS will not result in a three to four year licensing process.

Even if the LSS functions as DOE predicts, we believe the licensing of the geologic repository under the procedures set forth in the proposed rule will extend far beyond the three to

four year statutory period. Few recent NRC licensing proceedings have been concluded in less than three years. Typical NRC operating license hearings extend five years or more. The more sharply contested ones have lasted seven years and longer. The repository licensing proceeding will almost certainly be more hotly litigated than anything the NRC has yet faced and will involve technical and procedural issues not previously reviewed in NRC adjudication. The LSS will not save significant amounts of time in the licensing proceeding. Indeed, the LSS' unparalleled scope and size makes it probable that the LSS will lengthen -- rather than shorten -- the repository licensing proceeding. It will create new legal issues that could delay the proceedings and provide the tools for generating longer hearings and more extended discovery. Without dramatic changes to NRC procedures, far more so than the LSS rule proposes, repository licensing will be much longer than contemplated by NWPA.

With the tremendous cost of the LSS, and the lack of benefits, we were compelled to withhold our support for the system. For the same reasons, we urge that the Commission not adopt the proposed rule in its present form. Our cost-benefit based opposition to the LSS is all the more significant since a viable alternative exists that we believe would cost significantly less, accomplish many of the same functions, and avoid the technological pitfalls we believe await the LSS development and implementation. Our proposed alternative would involve the same collection of documentary material contemplated by the LSS and the same computerized indexing that the LSS will have. By using microfiche, it would avoid the financial costs and technological difficulties we believe are likely to befall the LSS as a result of its attempt to provide electronic storage, full-text search capability, and remote retrieval of the 40 million pages of documents that are contemplated for the LSS. The alternative system would substitute overnight mail service for electronic document transmission. Because this more conventional system would be available well before the repository license application was docketed -- and indeed well before the LSS could be available -- it could provide the same benefits in terms of early document availability that the LSS is intended to provide.

It is certainly correct that our proposed alternative would exclude some of the functions for which the LSS is designed. It would not provide electronic full-text search of the 40 million pages of documents stored in the system. Nor would it provide essentially instantaneous document retrieval. But we are aware of no comparably sized litigation support

systems (whether judicial or administrative) that have these capabilities. Nor are we aware of any reason why these functions are required for the repository licensing proceeding. While this type of high-tech litigation support would certainly be welcomed by participants, particularly if they did not have to pay for it, it must still survive a cost-benefit test. The LSS does not.

EEI and UNWMG presented this alternative system during the negotiated rulemaking proceeding. Unfortunately, DOE did not analyze this system when it evaluated alternatives to the LSS. Nor has the NRC staff. It is perhaps not surprising that the industry coalition -- one party who will pay for the LSS (as part of its funding of the entire nuclear waste program) -- was the only party to focus on its cost-benefit evaluation. We respectfully urge that the Commission adopt our alternative system instead of the LSS, or, at the very least, subject both systems to a rigorous cost-benefit evaluation.

The Commission will be facing an unprecedented challenge when it conducts the licensing proceeding for the geologic repository. The LSS, even if it were to function flawlessly and at a reasonable cost, would only address a small part of the licensing schedule. Many other changes to the Commission's procedures are needed if the three to four year statutory licensing period is even remotely to be approached. These include:

- Resolution of substantial numbers of technical issues by generic rulemaking well in advance of the hearing.
- The establishment of a more appropriate threshold for admitting contentions.
- Tighter standards for late-filed contentions.
- Limitations on other discovery mechanisms beyond those in the proposed LSS rule.
- Imposition of a requirement for the proponents of a contention to present an affirmative case.
- Intervention based on judicial standards.
- Seriatum hearings and decisions.

The detailed comments attached hereto elaborate on these concepts. We would urge that the Commission incorporate these concepts into its licensing procedures for the geologic repository.

Although the industry coalition ultimately withheld its consensus from the outcome of the negotiated rulemaking, we credit the NRC and its Staff for undertaking the effort. The negotiated rulemaking process can be an excellent way for parties to come to grips with difficult and highly technical issues in a rulemaking setting. The parties to the LSS proceeding negotiated in good faith. It is unfortunate that the parties' efforts could not yield a result that will accomplish the objective established at the outset.

EEI and UNWMG remain willing to work with the Commission and with other interested parties to develop a licensing process that will allow legitimate technical issues to be explored in an appropriate adjudicatory or regulatory forum, and at the same time, stand a reasonable chance of meeting the timetable that the NWPA set for carrying out the licensing process. In this context, the Commission should make clear that representatives of the utility industry will be included on the LSS Advisory Committee (proposed § 2.1011(e)(2)). The industry has both a major stake in the process and the ability to make a significant contribution to the Committee. Yet, they are the only interested party not included. The Commission should correct this oversight.

Very truly yours,

John J. Kearney
Senior Vice President
Energy and Environment

Enclosure

December 5, 1988

EDISON ELECTRIC INSTITUTE AND UTILITY
NUCLEAR WASTE MANAGEMENT GROUP
DETAILED COMMENTS ON
PROPOSED RULE ON THE SUBMISSION AND
MANAGEMENT OF RECORDS AND DOCUMENTS
RELATED TO THE LICENSING OF A GEOLOGIC
REPOSITORY FOR THE DISPOSAL OF
HIGH-LEVEL RADIOACTIVE WASTE

Edison Electric Institute ("EEI") and the Utility Nuclear Waste Management Group ("UNWMG") present the following detailed comments on the proposed rule for the Licensing Support System ("LSS") published in the Federal Register on November 3, 1988. In addition, we would like to address some comments to the negotiated rulemaking process employed by the Commission. While these latter comments do not directly affect the proposed rule, we believe that they would be useful to the Commission in future negotiated rulemakings.

I. Negotiating Process

At the outset of the negotiated rulemaking process, the Commission identified fourteen parties as "first tier" participants, i.e., those who could vote. Those fourteen included first and second repository states and Indian Tribes, local governments, environmental groups, EEI and UNWMG, DOE, and NRC. EEI and UNWMG by letter to the Commission dated August 15, 1987 pointed out that the large number of groups and the lack of

balance among the groups were inconsistent with negotiated rulemaking guidelines published by the Administrative Conference of the United States.

Subsequent events, particularly the designation of the Yucca Mountain site by the Nuclear Waste Policy Amendments Act of 1987, to some extent resolved EEI and UNWMG's stated concerns. The negotiating committee was reconstituted to reflect the changed emphasis of the program and the number of groups reduced to seven. However, the lessons learned in attempting to conduct the negotiated rulemaking with the larger group confirmed the wisdom of EEI and UNWMG's earlier comments. The large number of participants made even the smallest amount of progress painfully slow. And the lack of balance, with EEI and UNWMG virtually the only voice for broader regulatory changes to meet the statutory timetable, made it all too easy for the other parties to disregard positions put forward by EEI and UNWMG, and made our eventual lack of consent more likely.

For these reasons, EEI and UNWMG would again urge that the Commission in convening future negotiated rulemakings pay greater heed to the Administrative Conference recommendations on the size and composition of the negotiating committee.

II. Need for an Adequate Cost-Benefit Analysis

Before the NRC (or any other entity) undertakes any new initiative, common sense dictates that it should perform a cost-benefit analysis of its proposed course of action and reasonable alternatives. Although DOE has estimated the costs of the LSS, neither DOE nor NRC has adequately evaluated the costs or benefits of the LSS or its alternatives. The costs (discussed in Section III below) are seriously understated. And reasonable alternatives to the LSS were never evaluated. DOE's cost-benefit "does not extend to estimating the costs or benefits of attempting to achieve the licensing decisions [for the geologic repository] without an LSS." "Licensing Support System Benefit-Cost Analysis" (Science Applications International Corp., July 8, 1988) (referred to below as DOE Cost-Benefit) at ii. Furthermore, DOE assumes that the LSS will allow the licensing proceeding to be completed within the three to four year statutory window, and assumes that the LSS will perform as advertised. DOE fails to consider some of the potential technical pitfalls inherent in such a text retrieval system, particularly one of the size and dimensions of the LSS. The DOE Cost-Benefit, the only one performed for the LSS, is inadequate on its face and fails to establish that the LSS is worth its extremely high cost.

III. Cost of the LSS

The DOE Cost-Benefit estimates that the cost of the Base Conceptual Design LSS will be $195 million. This staggeringly high cost is greater than that of any other litigation support system of which we are aware. That, by itself, is enough to raise questions about the size and scope of the LSS.

Our review however, concludes that the LSS will cost substantially more than $195 million. For example, DOE projects the costs only for the first ten years. See 53 Fed. Reg. at 44413; DOE Cost-Benefit at 2. "[T]he initial hardware is expected to be suitable for replacement in ten years." DOE Cost-Benefit at ii. DOE incorporates no costs for follow-on design or replacement. Id. at 2. Yet the repository licensing will likely still be in progress in 1998, the year that DOE assumes that the LSS will need to be replaced. And there is no indication that the NRC would not require a system at least as elaborate well beyond 1998. Thus, DOE has unfairly underpriced the LSS by ignoring all costs beyond 1998.

The $195 million cost is also likely to underestimate the ultimate expense of the LSS, even if only the first ten years are considered. The LSS will be a unique system, pushing the state-of-the-art in both its size and scope. No other text

retrieval system has ever before addressed such a diversity of document types. This diversity will necessarily expand the technical requirements (and associated costs) of the system. (Indeed, the University of Nevada, Las Vegas has characterized the LSS as "revolutionary" in nature and has proposed that "at least two full time scientists would be required just to monitor the main technological issues which dominate the cost of and benefit provided by this system." Proposal for the Nevada Information Storage Technology Institute, by the Howard R. Hughes College of Engineering of the University of Nevada, Las Vegas (draft) at 1, 2.) This makes it highly likely that significant cost escalations not now anticipated will occur.

DOE also presents the costs in 1988 dollars. (While this is clearly set forth in the DOE Cost-Benefit, the NRC's Federal Register notice merely presents the LSS cost as "approximately $200 million.") A significant portion of LSS expenditures will be incurred in later years. We estimate that the actual dollars expended will be closer to $500 million than to $200 million, based on escalating the year-by-year expenditures by an assumed inflation rate of four percent.

Other very large information management systems developed or planned by the Federal Government, such as the Department of Justice's JURIS system and the Security and

Exchange Commission's EDGAR system, have experienced dramatic alterations in original system design which resulted in more excessive cost increases (JURIS) or have experienced significant cost overruns coupled with severe technological problems (EDGAR). See, for example, GAO/IMTEC-87-2, "ADP Acquisition: SEC Needs to Resolve Key Issues Before Proceeding with its EDGAR System" (October 1986). In that the LSS is far more revolutionary and complex than those systems, there is no reason to think that the LSS will be immune from this phenomenon.

Also of concern is the fact that the LSS is "primarily labor intensive." The DOE Cost-Benefit states that labor contributes 70% of the LSS costs. While it may seem strange that an electronic information management system would have most of its costs attributable to labor, in this situation it also raises a serious risk that the labor costs have been underestimated. Most of the labor costs are associated with data capture. We would expect that the accuracy and completeness of the data capture process will be among the most contentious aspects of LSS operation. As a result, we would anticipate that the LSS Administrator will spend considerably greater effort (and therefore greater cost) on data capture in an attempt to minimize problems with the adequacy and completeness of the data base.

For all of these reasons, EEI and UNWMG believe that the costs of the LSS have been seriously understated.

IV. Benefits of the LSS

The NRC defines the benefits it hopes to achieve with the LSS in terms of meeting the licensing objective specified in the Nuclear Waste Policy Act of 1982:

> The objective of the negotiated rulemaking was to provide for the effective review of the U.S. Department of Energy ("DOE") license application within the three-year time period required by section 114(d) of the Nuclear Waste Policy Act of 1982 ("NWPA"), as amended.

53 Fed. Reg. at 44412. (The NWPA permits a one year extension to this three-year period for good cause.) The Commission expresses considerable confidence that the LSS will result in a three to four year licensing period.

> The proposed rule, if implemented, sets in place a procedure for hearings that will allow the Commission to reach a decision on the construction authorization within the timeframe specified in section 114(d) of the NWPA.

53 Fed. Reg. at 44413. The Commission also states that it "is optimistic that the effective implementation of the rule proposed in this notice will allow the Commission to meet the schedule set forth in section 114(d) of the NWPA." 53 Fed. Reg. at 44416. But no basis that can withstand scrutiny is articulated for that optimism.

By making essentially all information related to the geologic repository readily available to participants through the LSS, the NRC anticipates that the time needed to complete initial discovery, including physical production and on-site review of documents by parties to the licensing proceeding, would be substantially reduced. Unfortunately, it is EEI and UNWMG's opinion, based on the accumulated experience with licensing proceedings before the NRC over the last two decades, that the LSS will not result in any significant shortening of the licensing process. We see absolutely no likelihood that the LSS will allow the NRC to complete the licensing proceeding in three to four years. In fact, for the reasons set forth below, the LSS likely will result in a significant lengthening of the proceeding.

V. Duration of Repository Licensing Proceeding

The NRC proceeding on DOE's application for construction authorization will likely be among the most hotly contested and complicated proceedings that NRC has ever faced. Unlike the reactor licensing proceedings that NRC has experienced, the repository hearing will be unique -- the first (and perhaps only) one of its kind. It will involve technical issues never before litigated by NRC staff and licensing boards and never before reviewed by the Appeal Board and the Commission. It will bring

together major opposing parties (i.e., DOE and Nevada) with, for all practical purposes, unlimited technical and financial resources. It will certainly attract a large number of other parties. The regulations and regulatory guidance for the repository will not have previously been explored in the adjudicatory arena. Those opposing the application will have had more than a decade prior to submittal of the license application in which to identify issues, retain experts, and undertake the most elaborate preparations aimed at defeating DOE's application. It therefore appears that streamlining the licensing process is both required and reasonable.

Obviously, it is very difficult to predict the total duration of the construction authorization proceeding. There are many ways in which the proceeding can unfold. Given the characterizations identified in the preceding paragraph, however, based on industry experience we would estimate that the minimum duration would be:

Notice of opportunity for hearing to licensing board order defining contentions	12 months
Discovery	24 months
Summary disposition motions and decisions	6 months
Preparation of testimony through evidentiary hearings	12 months

Proposed findings of fact and licensing board decision	12 months
Initial internal appeals	12 months
Total	78 months (6½ years)

Some of these time periods exceed the nominal durations set forth in 10 CFR Part 2 because of the unique nature of the proceeding.

For example, a straightforward reactor proceeding might succeed in moving from notice of opportunity for hearing to contentions definition in perhaps five months.[1/] Since it would not be surprising if the number of contentions filed in the construction authorization proceeding would far exceed those filed in the most complicated reactor licensing proceeding, substantial additional time will certainly be needed by the parties to brief and argue these contentions, by the licensing board to admit or reject them, and by the Appeal Board or Commission to resolve the inevitable appeals. Based upon the industry's experience, the "model timeline" published by the Commission, 53 Fed. Reg. at

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1/ For example, notice of opportunity for hearing to intervention petition, one month; intervention petition to prehearing order, one month; prehearing order to special prehearing conference, two months; special prehearing converence to special prehearing conference order, one month. Even a relatively simple proceeding on a proposed amendment to a reactor's technical specifications can take this long. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant), "Memorandum and Order (Scheduling of a Prehearing Conference)" (March 1, 1988) i.e., (four months from notice of hearing to special prehearing conference).

44420, is completely overoptimistic. We see little prospect that a licensing board would be able to rule on the admission of parties, on the hundreds of contentions likely to be submitted, and on a schedule for discovery and other activities within 100 days after the notice of hearing is published. That expeditious a schedule has been unattainable even in simple proceedings.

Similarly, the 24 months estimated for discovery, even with the LSS, is probably a conservative figure absent significant additional changes to NRC regulations. The proposed rule still leaves many discovery routes available beyond the LSS, including depositions, requests for admissions, informal requests for information, and (by order of a discovery master) interrogatories and depositions on written questions. See proposed § 2.1021. While the proposed rule would have the licensing board "[take] into account the objective of meeting the three year schedule specified in section 114(d)" in establishing discovery schedules, see proposed §§ 2.1021(a)(5) and 2.1022(a)(6), the board is under no obligation to assure that this schedule is met. Indeed, the model schedule that accompanied the proposed rule (53 Fed. Reg. at 44420) is presented by the Commission "for general guidance only." Without much more rigorous direction to the licensing board, these "objectives" are likely to be no more successful in expediting the adjudicatory process than the existing guidelines in Appendix C to 10 CFR Part 2 have been.

For a number of reasons, a six year duration for the construction authorization hearing is very optimistic. Many of the most recent reactor licensing proceedings lasted that long notwithstanding the absence of the unique issues to be litigated in the repository proceeding and intervenors comparable in resources to those that will most likely be participating in the repository hearing.[2/] It is more likely that the hearing will take as long as the longest reactor proceedings,[3/] not as short

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2/ For example:

81 months - Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440, 50-441, from notice of opportunity for hearing to NRC decision authorizing full power license;

53 months - Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Docket No. 50-382;

51 months - Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit No. 1), Docket No. 50-400.

3/ For example:

78 months - GPU Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart proceding);

129 months - Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275 and 50-323;

85 months (so far) - Public Service Co. of New Hampshire (Seabrook Station) Docket No. 50-443;

152 months (so far) - Long Island Lighting Co. (Shoreham Nuclear Power Station), Docket No. 50-322.

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as the average ones. Much of the delay in any proceeding can come from the addition of late contentions. The duration estimated above does not explicitly contemplate any delays due to late contentions, yet the repository program is much more likely to result in such issues than are the reactor licensing cases, if only because of the unique nature of the proceeding. Although the proposed LSS makes some changes in the standards for admitting late-filed contentions,[4/] these added requirements may well be applied so liberally that they provide no protection against delays from untimely contentions. In any event, the NRC's "model timeline" woefully underestimates the time needed to litigate late-filed contentions.[5/]

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117 months - Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), Docket Nos. 50-445, 50-446.

4/ Proposed §2.1014(a)(4) would require that a contention filed after the issuance of the Safety Evaluation Report must show (in addition to the factors currently required to be shown for late-filed contentions by 10 CFR § 2.714(a)(1)(i)-(v)) that a significant environmental or safety issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by 10 CFR § 60.112 and 60.113. As the Supplementary Information indicates, the "material issues" contemplated need not constitute significant safety or environmental issues. 53 Fed. Reg. at 44418.

5/ The "model timeline" assumes that all discovery on late-filed contentions admitted at the Second Prehearing Conference would be finished in 82 days, allows no time for summary disposition motions on these contentions, and has evidentiary hearings beginning 30 days after completion of discovery.

One aspect of the proposed LSS rule that will save some time as compared with the current Rules of Practice is the electronic transmission of pleadings. Proposed § 2.1013(c)(1). The five days normally allowed for service by mail, 10 CFR § 2.710, would be reduced to one day. However, a substantial amount of the time saved in this manner by using electronic mail could be achieved at far lower cost by the use of express mail. Under current rules, the five day period allowed for mailing is reduced to two days if express mail is used. 10 CFR § 2.710. In any event, the LSS as proposed is not the only mechanism by which electronic document transmission can be accomplished. In fact, electronic mail could be a part of the EEI and UNWMG alternative to the LSS discussed below.

VI. Delays Due to LSS

The LSS, even if implemented in accordance with the proposed rule, is likely to extend the licensing time rather than shorten it. This is attributable to at least five separate factors.

First, the LSS rule will create new procedural issues over which litigation is likely. For example, proposed sections 2.1003(h)(1) and 2.1012(a) require a certification by the LSS

Administrator that DOE is in substantial and timely compliance with its obligations to submit material to the LSS for the proposed new regulations to apply. A party bent on delaying or defeating the repository will certainly seek to challenge this certification as a way to hold up the process.

Second, the actual performance of the system is unlikely to live up either to the expectations of at least some of the parties or to the overly optimistic assessments of its proponents, again leading to legal challenges in and out of the hearing process. For example, the accuracy and completeness of the electronic data base will surely come under attack. Documents that should be in the data base may be missed and some documents included could easily be incomplete in their electronic form.

Third, the vast quantities of documents available in electronic full text should be anticipated to provide parties the opportunity to generate even greater amounts of discovery, beyond reasonable limits, and otherwise extend the hearing process. While the licensing board would have the authority to limit discovery, proposed § 2.1018(c), licensing boards have typically not been willing to effectively exercise this authority in the past.

Fourth, disputes over which discovery techniques will be allowed (i.e., whether written interrogatories and depositions

upon written questions can be submitted) are certain to plague the licensing board and discovery master.

And finally, system failures (let alone a computer virus) should they occur will certainly trigger calls to bring the entire licensing process to a halt.[6/] Given what the University of Nevada, Las Vegas has called the "revolutionary" nature of the LSS, the occurrence of such problems cannot be discounted.

For all the above reasons, the LSS, and the other changes to Part 2 proposed by the Commission, by themselves will not allow NRC to meet its statutory timetable. Based on the foregoing discussion, and the licensing experience of over 100 operating reactors, it is our judgment that the licensing proceeding for the geologic repository will take eight to ten years. The LSS if implemented as the NRC has proposed would not shorten this period. Indeed, one of the factors that causes us to envision an eight to ten year proceeding is the LSS. It is for this reason that we are unable to justify spending $500 million (or even $200 million) for the LSS, and urge the Commission to reject the proposed rule.

6/ Proposed § 2.1017 provides that if the LSS is unavailable for more than four access hours of any day counted in computing the time allowed for any act, that day is not counted.

In order for EEI/UNWMG and the electricity consumer to be able to accept the costs of a LSS system, we believe that the NRC must make significant additional changes to the procedures which the repository licensing hearing will follow.

VII. Early Resolution of Technical Issues

The NRC proceeding on the construction authorization for the repository will involve many technical issues that the NRC is addressing for the first time. Because these issues have not previously been the subject of NRC adjudicatory proceedings, litigation of them would likely be particularly time-consuming. Although steps to address this problem are not directly related to the LSS, they are certainly of direct bearing on the Commission's ability to meet the three to four year licensing timetable. Indeed, the early resolution of these issues together with the institution of a disciplined adjudicatory process hold out the most hope for meeting the statutory requirement.

EEI and UNWMG strongly recommend that the Commission take appropriate steps to resolve these technical issues prior to the adjudicatory hearing and therefore, off the critical path for repository licensing. The only way that such issues can be definitively resolved outside the hearing process is through rulemaking. Using established rulemaking procedures, the NRC

would be able to decide technical issues for the repository as it has in other areas of its regulatory responsibility.

Examples of the types of issues that would be suitable for resolution by rulemaking include:

1. Acceptable methods for evaluating groundwater travel time.

2. Acceptable methods of evaluating radio-nuclide releases from the waste package.

3. Criteria for evaluating the impact of seismic activity on underground structures and on waste containment.

4. Acceptable methods for selecting scenarios of future processes and events.

5. Acceptable methods to interpret and identify the extent of the disturbed zone.

VIII. Proposed Changes to NRC Rules of Practice

NRC must make modifications to its rules of practice that will go beyond those proposed in the LSS rule if it is to have any hope of even approaching the three to four year statutory timetable of § 114(d)(2) of the NWPA. Over the years, numerous studies have examined the NRC licensing process and made recommendations to improve it.[7/] Some of these recommendations,

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7/ See, e.g., Tourtellotte, Nuclear Licensing Litigation: Come On In, the Quagmire is Fine, 33 Admin. L. Rev. 367 (1981);

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if applied to repository licensing, could result in significant savings of time without dramatic changes in the nature of the proceeding. EEI/UNWMG recommended such modifications in the negotiated rulemaking. By and large the recommendations were ignored. Only if these changes are linked to the LSS is there any hope of meeting Congress' goal.

A. Contentions: Current NRC rules, 10 CFR § 2.714(a)(2), allow the admission of contentions on a showing of "basis" and "specificity." In practice, NRC adjudicatory decisions have allowed the admission of contentions with no foundation and no semblance of factual support. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542 (1980); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). A recent decision by the U.S. Court of Appeals for the Ninth Circuit, Sierra Club v. NRC, No. 87-7481 (November 30, 1988) describes

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Cotter, Nuclear Licensing: Innovation Through Evolution in Administration Hearings, 34 Admin. L. Rev. 497 (1982); Draft Report of the Regulatory Reform Task Force, SECY-82-447 (November 3, 1982); 49 Fed. Reg. 14698 (1984); 51 Fed. Reg. 24365 (1986); H.R. 1029 and 5448, 99th Cong. 1st sess. (1985).

as follows the "correct" tests for admitting contentions based on current NRC case law:

> The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising non-justiciable issues, such as the propriety of statutory requiremetns or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding.

This judicial intrepretation demonstrates just how weak the current thresholds are.

The current proposal, § 2.1014, adds two minor modifications by requiring reference to the specific documentary material (or absence thereof) providing a basis for the contention and the specific regulatory or statutory requirement to which the contention is relevant. However, as pointed out in the Supplementary Information accompanying the proposed rule, these merely codify existing NRC practice, 53 Fed. Reg. at 44418.

A more substantial threshold for the admission of contentions is warranted. The volume of data and documents that will be available years in advance of the start of the hearing strongly support requiring a more rigorous standard before a contention may be admitted. NRC should require that a party demonstrate that there

is a genuine and substantial issue of disputed fact requiring a hearing for its resolution. If this standard were adopted and rigorously applied, many frivolous issues could be excluded at the start, thus reducing the overall duration of the proceeding.

B. Late Contentions: Current NRC practice is overly liberal in admitting contentions filed after the period for initial definition of contentions. Although NRC regulations establish a series of tests to be met for the admission of late contentions, 10 CFR § 2.714(a), these tests are both unnecessarily weak and often weakly applied. Frequently, an intervenor is required to show little more than that he had recently become aware of "new" information concerning the late contention. Since there is always going to be "new" information, especially with respect to a unique effort like the geologic repository, the current NRC standard may well cause a never-ending stream of "late" contentions. A tighter standard is both necessary and appropriate.

The current proposal makes some changes in existing rules. See fn. 4 above. However, the proposal in one significant respect appears to relax existing standards by permitting contentions based upon the NRC Staff's

Safety Evaluation Report. Generally, such contentions have been objectionable.[8/] In addition, the proposed new standard is likely to be very loose in that it would permit late contentions that do not constitute significant safety or environmental issues so long as they raise a "material" issue related to the 10 CFR §§ 60.112 or 60.113 performance evaluation.

A more appropriate standard would require an evidentiary showing that: (1) there is significant new information which would require a modification in facility design/construction to protect the public health and safety (and the common defense and security); and (2) such modification would substantially enhance such protection by improving overall safety. Contentions that do not meet this standard should be excluded.

C. Discovery: The LSS is essentially a substitute for requests for production of documents. The proposed rule leaves intact a party's right to take depositions,

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8/ In a reactor operating license proceeding, only the license application is at issue, not the adequacy of the Staff's safety review. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 56 (1985); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 N.R.C. 777, 807, review declined, CLI-83-32, 18 N.R.C. 1309 (1983).

requests for admission, inspection and access to raw data, and informal requests for information. Proposed § 2.1018(a). Written interrogatories and depositions upon written questions may be authorized by a discovery master. Id. The proposed rule also calls for the licensing board to establish discovery schedules which "take into account the objective of meeting the three-year time schedule specified in section 114(d)" of the NWPA.

Although the proposed rule makes some effort to restrict discovery beyond the LSS, a number of provisions open avenues for extensive and time-consuming discovery disputes. For example, proposed § 2.1018(a)(1) allows a party to submit "informal requests for information not available in the Licensing Support System." A resourceful party will be able to deluge DOE with informal requests for information "not available" in the LSS. Merely responding to informal requests to show that the information is available in the LSS can tie up significant litigation resources. Since all relevant documentary material will be in the LSS, depositions are available, and existing information channels such as FOIA remain unaffected, EEI and UNWMG do not believe that there is any need to insert

new discovery vehicles (such an informal information requests) into NRC practice.

We also believe that some limitations on depositions ought to be imposed. Federal courts routinely include such limits in their local rules. The Eastern District of Virginia, for example, allows only five non-party depositions.[9/] We would recommend that the period for taking depositions be limited to six months, commencing from the issuance of the first prehearing conference order, and that a party be limited to not more than twenty depositions. An expansion of these limits would be only on a strong showing of good cause and a demonstrated inability to otherwise develop the information sought.

Other modifications to NRC procedural rules to provide for an appropriately expeditious hearing process should also be made. These include:

1. Intervention based upon judicial standards: Since 1976, the Commission has allowed its licensing boards to grant intervention status to parties that failed to meet judicial standing requirements. Portland General

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9/ Rule 11-1(b).

Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). This "discretionary intervention" is legally unnecessary, tends to add additional parties to the proceeding, does not serve the public interest, complicates pre-hearing procedures, and should be removed.

2. Requirement for an affirmative case: Since a contention should not be admitted without substantial evidentiary support, it follows that a party sponsoring a contention should be required to present an affirmative evidentiary case for that contention. Current NRC case law places the burden of going forward on the applicant. This practice should be reversed.

3. Seriatum hearings and decisions: Because of the large number of contentions likely to be raised, the Commission should direct that the licensing board or boards will resolve contentions on an on-going basis and that internal agency appeals for these decisions need not await resolution of the last group of issues. In this way, resolution of the final set of issues by the licensing board will not be a critical path for resolution of earlier issues. While this is not inconsistent with current agency practice, Commission direction in

this area will assure that there will be no dispute on the timing of hearings, decisions and appeals.

IX. An Alternative LSS

EEI and UNWMG primarily object to the proposed LSS because of its extraordinary cost (see Section III above) and its inability to produce a licensing schedule that meets the timetable specified in Section 114(d) of the NWPA. (see Section V above).

To meet the objections that are outlined above while still providing most of the benefits of the proposed LSS, EEI and UNWMG presented an alternative system during the negotiated rulemaking proceeding.

The alternative we propose would function as an information management system in much the same fashion as the LSS but at far less cost and with a greater chance of meeting the goals of this rulemaking, the NWPA, and so serving the public interest. All documentary material relating to the repository would be submitted to a system administrator. The same universe of records covered by the proposed LSS rule would be covered by the alternative system, (i.e., any information that is relevant to, or likely to lead to the discovery of information that is relevant

to, the licensing of the likely candidate site for the geologic repository). As with the LSS, all documents would be indexed and "headers" prepared. These indexes and headers would be computerized and be made available through the same type of remote access contemplated for the LSS. Our alternative would identify the targeted documents and reference the image of the document on microfiche. The major difference would be that the full text of the documents would not be entered into the electronic system. The documents themselves would be retained in microfiche and/or hard copy. Parties seeking copies of a document would request them -- by mail, phone, or computer -- from the system administrator and receive them via overnight mail. The same early access to documentary information that the LSS would provide would be available through this alternative, except that the copy of the requested document would be available within a day, rather than within a few minutes. Although this timing difference might be claimed to be a hardship, that claim is not supportable where the documents would be made available years in advance of the licensing proceeding.

The DOE Cost-Benefit estimates that a very significant portion of the LSS' cost is for "data capture." DOE has stated that the cost of entering documents with the LSS (including the necessary quality assurance) would be $4 for each page. By avoiding the full text aspect of the system, a significant amount

of the projected costs could be saved. At the very least, NRC must evaluate what savings could be achieved with such a system and compare the value of the features which the LSS has that would not be available with our proposed alternative are required.

Unlike the LSS, the alternative system which we proposed would be the same in concept as litigation support systems in actual use. By avoiding the more esoteric design of the LSS, the risks that the LSS will fail to meet its performance objectives would be dramatically reduced. Some (perhaps most) of the potential parties to the licensing proceeding for the repository would prefer to have a system like the LSS, with full text electronic search capability and the ability to retrieve any document within a few minutes time. However, there is no reason for requiring these features in the repository proceeding. The fact that none of these parties would have to pay for these features may explain why they are so highly desired. But that does not warrant a rule imposing them.

We are convinced that an unbiased assessment of all the costs and all the benefits of the LSS and of our proposed alternative will result in a determination that our proposed alternative is strongly preferred. We urge the Commission to undertake such an analysis.

X. Conclusion

Congress has determined that it is in the public interest that a geologic repository be developed for the disposal of this nation's high-level nuclear waste and spent nuclear fuel. Congress has also determined that licensing of the repository is the responsibility of this Commission. The public interest is not served by the creation of a licensing process that is both extravagantly expensive and uncapable of reaching a decision in a reasonable period of time. We believe that the proposed rule that is the subject of these comments would create such a licensing process. For the reasons set forth above, we believe that the alternative system that we have proposed, together with the other changes we have recommended, will lead to a more efficient and cost effective licensing process that will better serve the public interest.