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JAY E. SILBERG, P.C.

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To: HLW Licensing Support System
Advisory Committee Members

Dear Colleague:

The LSS negotiated rulemaking process is moving rapidly towards its conclusion. Yet, there has been little, if any, discussion as to the changes that would be made to NRC's Rules of Practice to reflect the information retrieval system that most of the parties appear to favor. For example, it is not at all clear what other changes to current NRC discovery rules will accompany the inclusion of the LSS. There has also been no discussion of whether other changes to the Rules of Practice are needed to meet the statutory timetable for repository licensing.

EEI/UNWMG believe that the LSS, if implemented without other rule changes, will result in little if any change in the duration of the licensing process. It seems clear to us that significant changes to NRC rules, in addition to those incorporating an LSS, will be required if any progress is to be made towards meeting the statutory timetable.

Throughout the negotiated rulemaking, the parties have been told that "everything is on the table." EEI/UNWMG therefore submit the enclosed memorandum outlining the changes in NRC Rules of Practice that we believe should accompany any LSS system. EEI/UNWMG respectfully request that this topic be discussed at the earliest practical time.

Sincerely,

Jay E. Silberg

Jay E. Silberg
Counsel for Edison Electric Institute/
Utility Nuclear Waste Management Group

JES:dj
Enclosure

EEI/UNWMG POSITION ON LSS AND CHANGES TO NRC RULES OF PRACTICE

I. Introduction

The NRC initiated the on-going negotiated rulemaking "to develop recommendations for revision of the Commission's discovery rules and selected other rules of practice in 10 CFR Part 2, related to the adjudicatory proceeding for the issuance of a license for a geologic repository for the disposal of high-level [waste] (HLW)." 51 Fed. Reg. 45338 (December 18, 1986). NRC justified the rulemaking based primarily on the need to meet the licensing timetable established by the Nuclear Waste Policy Act. Under §114(d)(2) of the Act, NRC must issue a final decision on a construction authorization for the repository within three years after DOE submits the license application. (The statute would allow a one year extension for good cause).

In its notice of intent to form the negotiated rulemaking advisory committee, the Commission stated that measures must be taken to streamline the NRC review process if the statutory deadline is to be met. 51 Fed. Reg. at 45339. One of these measures was the development of an electronic information management system, generally referred to as the licensing support system (LSS). According to the Commission:

> If the Commission is to reach its construction authorization decision within the allotted time-frame, it will be necessary to facilitate the discovery process, as well as to reduce the delay normally associated with the physical service of documents. Id.

To date, the LSS negotiated rulemaking has focused entirely on the operational aspects of the LSS as a information/document storage and retrieval system. Little if anything has been said about how the LSS would fit into the NRC's rules of practice for licensing of the repository or what specific changes would be made to the rules of practice so that NRC will be able to meet the licensing timetable of §114(d)(2). In addition, several parties, including EEI/UNWMG, have repeatedly requested a cost/benefit analysis for the LSS. For any party to be able to assess whether the LSS is worthwhile, it is necessary to know what it will cost and the benefits (whether in terms of a shorter licensing process for the repository or otherwise) which it will provide.

The purpose of this memorandum is to focus on the nature and scope of licensing benefits to be derived from development and implementation of the LSS. EEI/UNWMG believe that the LSS, if implemented without other significant changes to NRC's rules of practice will result in little, if any, shortening of the licensing process. Indeed, it may result in longer overall discovery and longer hearings. EEI/UNWMG also believe that the licensing duration for the first repository, absent other significant modifications to the NRC's rules of practice, is likely to be in the range of five to nine years. Whatever savings NRC might believe will occur from establishing the LSS

will not result in a licensing duration even approaching the schedule contemplated by §114(d)(2). As a result, EEI/UNWMG propose that the NRC adopt additional procedural modifications which will allow the process to meet its statutory timetable.

II. 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 which 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. 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 very 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 reasonable.

Obviously, it is very difficult to predict the total duration of the construction authorization proceeding. There are almost an infinite number of variations in which the proceeding can unfold. Given the characterizations identified in the preceding paragraph, however, we would estimate that the minimum duration would be:

Notice of opportunity for hearing to licensing board orders defining contentions	12 months
Discovery	12 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

While some of these time periods exceed the nominal durations set forth in 10 CFR Part 2, the unique nature of the proceeding makes these estimates more appropriate to use than the Part 2 time periods. For example, a straightforward reactor proceeding might succeed in moving from notice of opportunity for hearing to contentions definition in perhaps 5 months.[1/] Since it would not

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1/ For example, notice of opportunity for hearing to intervention petition, 1 month; intervention petition to prehearing order, 1 month; prehearing order to special

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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 appeals board or Commission to resolve the inevitable appeals.

Similarly, the 12 months estimated for discovery, even with the LSS, is probably a conservative figure absent significant changes to NRC regulations. The NRC has to date indicated that the LSS would only eliminate "first round discovery requests and accompanying search times by the party from whom the records were requested." 51 Fed. Reg. at 45339. Whether this is meant to cover both requests for production of documents and interrogatories or just the former, it would still leave an enormous amount of discovery opportunities available (e.g., additional rounds of interrogatories, depositions, admissions). An LSS, giving full text access to every document generated in the waste

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(Continued)

prehearing conference, 2 months; special prehearing conference to special perhearing conference order, 1 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), LBP-88-__, "Memorandum and Order (Scheduling of a Prehearing Conference)" (March 1, 1988)(4 months from notice of hearing to special prehearing conference).

program, rather than shortening discovery, could also give parties the opportunity for generating even greater amounts of discovery. For example, it would make deposition preparation much easier by identifying every report that the deponent had written for DOE and every other document in the program on the same topic.

For a number of reasons, a five year duration for the construction authorization hearing is very optimistic. Many recent reactor licensing proceedings lasted that long notwithstanding the absence of intervenors comparable in resources to those which 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 as the average ones. Much of the delay in any proceeding can

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2/ For example, Cleveland Electric Illuminating Company (Perry Nuclear Power Plant), Docket Nos. 50-440, 50-441, 81 months from notice of opportunity for hearing to NRC decision authorizing full power license; Lousiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Docket No. 50-382, 53 months; Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit No. 1), Docket No. 50-400, 51 months.

3/ For example, GPU Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart proceeding), 78 months; Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275 and 50-323, 129 months; Public Service Co. of New Hampshire (Seabrook Station), Docket No. 50-443, 77 months so far; Long Island Lighting Co. (Shoreham Nuclear Power Station), Docket No. 50-322, 144 months so far.

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. A nominal duration of seven years is probably a much more realistic estimate.

For all the above reasons, it would appear implausible that the LSS, by itself, will allow NRC to meet its statutory timetable. Even if LSS were to save six months, a conclusion that is easy to question, the licensing proceeding would not remotely approach the three year statutory timetable. As a result, the substantial cost of such a system becomes more and more difficult to justify. For instance, it would be easier to accept a $50 million LSS system which would shorten a construction authorization proceeding from 3½ years to 3 years than one which saves 6 months in a proceeding which could otherwise last for 7 years.

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 other significant changes to the procedures which the repository licensing hearing will follow.

III. Proposed Changes to NRC Rules of Practice to Accompany LSS

NRC must make modifications to its rules of practice that will go beyond the creation of an LSS if it is to have any hope of ever approaching the three year statutory timetable of §114(d)(2) of the Nuclear Waste Policy Act. Over the years, numerous studies have examined the NRC licensing process and made recommendations to improve it.[4/] Some of these recommendations, if applied to repository licensing, could result in significant savings of time without dramatic changes in the nature of the proceeding. EEI/UNWMG recommend that such modifications be included in the consensus rulemaking. Only if these changes are linked to the LSS is there any hope of meeting Congress' goal. And only if there are more significant time savings than are achievable by the LSS alone are the costs of the LSS justifiable.

A. Contentions: Current NRC rules 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

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

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).

By requiring that a party demonstrate that there is a genuine and substantial issue of disputed fact requiring a hearing for its resolution, 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 liberally applied. Often, 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 HLW repository, the current NRC standard may well cause a never-ending stream of "late" contentions. A tighter

standard is both necessary and appropriate. Such a standard could be 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) that such modification would substantially enhance such protection by improving overall safety.

C. Discovery: If the LSS is intended to substitute for first round production of documents (or even all first round discovery), it is unlikely that any time will be saved in the overall licensing process. While the rules do set forth time limits to respond to interrogatories (14 days, 10 CFR §2.740(b)) and to document production requests (30 days, 10 CFR §2.741(d)), NRC regulations provide no guidance on the overall length of the discovery process, the amount of discovery, or the number of rounds of discovery.

Although licensing boards may set time limitations and other restrictions on discovery (see, 10 CFR §2.718), appropriate Commission direction should be given as part of the LSS rule. If the LSS is to result in any overall savings of time, it must be accompanied by

other changes in NRC discovery rules. These should include:

a. No requests for production of documents unless the requesting party affirmatively demonstrates that the requested documents: (i) should have been included in the LSS but were not, or (ii) contain information which is unavailable by other means and for which the party has a substantial need which cannot be met in any other way.

b. A limitation on the number of interrogatories which may be asked. Many federal district courts limit the number of interrogatories. The federal district court for the Eastern District of Virginia, for example, by rule limits the number of interrogatories to 30.[5/] While additional interrogatories may be requested for good cause, the courts do not favor these requests. We would suggest that the number of interrogatories be limited to 100, and that only two rounds of interrogatories be permitted. Expansion of these limits would be allowed only on a strong showing of good cause and a demonstrated inability to otherwise develop the information sought.

5/ Rule 11-1(A).

c. A limitation on the number and time for taking depositions. The Eastern District of Virginia, for example, allows only 5 non-party depositions.[6/] We would recommend that the period for taking depositions be limited to 6 months, commencing from the issuance of the special prehearing conference order, and that a party be limited to not more than 20 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 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 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

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6/ Rule 11-1(b).

additional parties to the proceeding, complicates pre-hearing procedures, and should be removed.

2. Requirement for an affirmative case: Since we believe that 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 aging resolution of earlier issues. While this is not inconsistent with current agency practice, Commission direction will assure that there will be no dispute on the timing of hearings, decisions and appeals.