

RULEMAKING ISSUE NOTATION VOTE

October 28, 2003

SECY-03-0180

FOR: The Commissioners

FROM: Karen D. Cyr
General Counsel

SUBJECT: PROPOSED RULE TO AMEND 10 CFR PART 2, SUBPART J, IN REGARD TO
THE LICENSING SUPPORT NETWORK

PURPOSE:

To seek Commission review and approval of proposed amendments to the Commission's Rules of Practice applicable to the use of the Licensing Support Network (LSN) for the licensing proceeding on the disposal of high-level waste (HLW) at a geologic repository.

BACKGROUND:

The Commission's regulations in 10 CFR Part 2, Subpart J, provide for the use of an electronic information management system, including the Licensing Support Network (LSN), in the HLW licensing proceeding. Originally promulgated on April 14, 1989 as the Licensing Support System, (54 FR 14944), the LSN required by Subpart J is to have the following functions:

- (1) To provide full text search and retrieval access to the relevant documents of all parties and potential parties to the HLW repository licensing proceeding beginning in the time period before the Department of Energy (DOE) license application for the repository is submitted;
- (2) To provide for electronic submission of filings by the parties, as well as the orders and decisions of the Atomic Safety and Licensing Board Panel, during the proceeding; and
- (3) To provide access to an electronic version of the HLW repository licensing proceeding docket.

The staff is recommending that the Commission's Rules of Practice in 10 CFR Part 2, Subpart J, be revised to establish specific requirements and standards for the submission of adjudicatory materials to the electronic hearing docket by parties to the high-level radioactive waste licensing proceeding (function "2" above). The draft proposed rule in Attachment A proposes amendments to the Commission's rules to establish these standards for electronic transmission, as well as to address other issues.

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DISCUSSION:

The proposed amendments would address five aspects of the current rules:

- The requirements and standards for a party's submissions to the electronic docket for the HLW licensing proceeding;
- Those provisions that result in the loading of duplicate documents on individual participant LSN document collection servers;
- Those provisions related to the continuing obligation of LSN participants to update their documentary material;
- The provisions related to the Secretary of the Commission's determination that the DOE license application is electronically accessible; and
- The provisions on material that may be excluded from the LSN.

Submissions to the electronic docket for the hearing

The primary motivation for the proposed amendments is to establish the basic standards and requirements for the electronic submission of filings during the HLW adjudicatory hearing. 10 CFR 2.1013(c)(1) requires that all filings in the HLW licensing proceeding be transmitted electronically by the submitter to the Presiding Officer, the parties, and the Secretary of the Commission. The purpose of this requirement is to reduce the time that it takes to serve filings by substituting electronic transmission for the physical mailing of filings that is typically used in NRC licensing proceedings. The staff believes that the majority of these filings will consist of simple documents that can be readily transmitted through the NRC's Electronic Information Exchange (EIE). However, after further considering the nature of some of the documents that may be submitted by the parties during the proceeding, the staff believes that it is necessary to specify requirements for submitting large and/or complex documents.

The staff anticipates that some of the filings in the HLW adjudicatory proceeding will be of a size and nature that will create transmission, viewing, or downloading challenges for the NRC staff, the parties to the HLW licensing proceeding, and the public (e.g., significant delays in transmission, uploading, or downloading times). Examples of potential large documents are:

- DOE Site Characterization Plan
- DOE License Application and supporting materials
- DOE Environmental Impact Statement
- Adjudicatory documents (e.g., motions, responses, transcripts, exhibits, and orders)

In electronic format, some of these files could be up to several hundreds of megabytes (MB) in size.

In addition, some of the filings will be "complex documents". Complex documents consist (entirely or in part) of electronic files having substantial portions that are neither textual nor image in nature. As part of complex document submittals, the NRC anticipates receiving files that--

(1) Due to their file size, may preclude easy transmission, retrieval, and use; or

- (2) May require specialized software and/or hardware for faithful display and subsequent use; and
- (3) May not be suitable for inclusion in a “generic” file format such as the Adobe® Acrobat Portable Document Format (PDF).

Examples of files that could be part of a complex document are:

- maps
- databases
- simulations
- audio files
- video files
- executable programs

In response to these potential problems, the staff is recommending that Section 2.1001 be revised to establish three categories of electronic filings for purposes of the HLW licensing proceeding. Specifically, Section 2.1013(c)(1) would be revised to specify the submission requirements for the following three categories of electronic filings:

“Simple documents” are textual or graphic oriented material that are less than 50 megabytes (MB) in size. These documents are transmitted electronically via EIE as contemplated by the current 10 CFR 2.1011. Test results have demonstrated that 50 MB is a reasonable size for downloading files across wide area networks or from the Internet via phone lines.

“Large documents” are those that have textual or graphic oriented material larger than 50 MB in size. Under proposed Section 2.1013(c)(1)(ii), these documents must be submitted via the EIE in multiple transmissions of 50 MB each.

“Complex documents” are any combination of the following:

- Textual or graphic-oriented electronic files
- Electronic files that cannot be segmented into 50 MB files
- Other electronic objects, such as computer programs, simulations, video, audio, data files, and files with special printing requirements.

Under proposed Section 2.1013(c)(1)(iii), those portions of complex documents that can be electronically submitted through the EIE, again in 50 MB or less segments, will be transmitted electronically. Those portions that are not amenable to electronic transmission will be delivered on optical storage media. The optical storage media must include the complete document, i.e., include the portions of the document that have been delivered via the EIE. In addition to these proposed revisions, Section 2.1013 (c)(1) would also be amended to require electronic submissions to have 300 dots per inch (dpi) as the minimum resolution for bi-tonal, color, and grayscale resolution; to be in the appropriate PDF output format; to be free of hyperlinks to other documents or websites; and to be free of any security restrictions imposed by the author of the document.

Additional information for LSN participants on the submission of these filings will be provided in a guidance document prepared by the staff, “Guidance for Submission of Electronic Docket

Materials Under 10 CFR Part 2, Subpart J”, U.S. Nuclear Regulatory Commission, October, 2003. See Attachment B.

Other proposed revisions

- The proposed revisions would also clarify the responsibility of the Secretary of the Commission, under §§ 2.1012(a) and 2.1013 (a)(2), to determine if the DOE license application for a HLW repository can be properly accessed under the Commission’s “electronic docket rules”. Under § 2.1012(a), the DOE license application cannot be docketed unless the Secretary of the Commission finds that it can be effectively accessed. The proposed revisions would not change this requirement. However, the staff believes that this compliance requirement needs to be clarified to refer to the accessibility of the DOE license application as part of the NRC staff **licensing** docket rather than the Commission’s **hearing** docket (emphasis added). This is consistent with traditional NRC practice where a license application is part of the NRC staff licensing docket but is not added to the Commission’s hearing docket unless a party offers all or part of the license application as evidence. §§ 2.1012(a) and 2.1013(a)(2) would be revised to specify that the Secretary’s determination on electronic accessibility would be based on whether the DOE license application could be effectively accessed through the Commission’s Agencywide Document Access and Management System (ADAMS) rather than the electronic hearing docket.
- Section 2.1003 of the current LSN rule requires a party, a potential party, or an interested governmental participant (hereinafter “participant”) to make its documentary material available in electronic form. The definition of “documentary material” includes material prepared by an individual participant, for example, all reports or studies prepared by, or on behalf of, a participant. It also includes other material in the possession of the participant on which the participant intends to rely and/or cite in support of its position in the HLW licensing proceeding, as well as material that does not support its position. This provision can be read to obligate a party who possesses a document prepared by another participant to make that document available on its LSN document collection server even though it is already available on the LSN document collection server of the party who had prepared the document. The staff believes that it would be beneficial to eliminate or at least significantly reduce the loading of duplicate documents. Reducing duplication will not only alleviate burdens on the participants, but will also make search and retrieval of the LSN collection more efficient. Therefore, the proposed amendment to § 2.1003(a)(1) would allow a LSN participant to avoid loading a document created by another LSN participant if that document has already been made available by the LSN participant who created the document or on whose behalf the document was created.
- The staff is also recommending that § 2.1003 be revised by adding a new paragraph (e) to this section. Proposed § 2.1003(e) would require LSN participants to supplement the documentary material provided under § 2.1003(a) in its initial certification with documentary material produced after that event. While much of an LSN participant’s documentary material will be made available early, it is reasonable to expect that additional material will be created after the initial compliance period specified in § 2.1003(a).

- In the Supplementary Information to the proposed rule, the staff has included language that clarifies the responsibilities of LSN participants in regard to the three classes of documentary material in Section 2.1001. These three classes are:
 1. Any information on which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in the HLW proceeding;
 2. Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information noted in item 1 or that party's position; and
 3. All reports and studies prepared by or on behalf of a potential party, interested governmental participant, or party, regardless of whether they will be relied upon or cited by a party.

The first two classes of documentary material are based on a “reliance” criterion. The concept of reliance is tied to the position that a party takes with regard to an issue at the hearing, i.e., a contention offered under Section 2.1014(a)(2) for litigation in the proceeding. Because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted by the Presiding Officer in the proceeding, the staff has included a clarification in the Supplementary Information for the proposed rule that an LSN participant would not be expected to specifically identify which of its documents fall within either Class 1 or Class 2 documentary material in the pre-license application phase. However, a participant would still be expected to make a good faith effort to make available on its LSN document collection server all the Class 1 and Class 2 documentary material that can be identified by the date specified for initial compliance in Section 2.1003(a) of the Commission's regulations. A party would later be required to identify the specific documents that comprise its Class 1 and Class 2 documentary material after contentions have been admitted in the HLW licensing proceeding.

OGC believes that this clarification will facilitate compliance with the LSN rule. The history of the LSN and its predecessor, the Licensing Support System, makes it apparent that it was the Commission's expectation that the LSN, among other things, would provide potential participants with the opportunity to frame meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application. The clarification discussed above does not alter this expectation. In addition, the clarification provided in the Supplementary Information should substantially reduce the potential for disputes over Class 1 and Class 2 documentary material being brought before the Pre-license application Presiding Officer in the pre-license application stage.

- Finally, we have conducted a review of the Commission's procedural rules applicable to the HLW proceeding, including the LSN requirements, to assess whether they appropriately reflect the evolution of the relevant technology, law, and policy since the rules were originally promulgated in 1987, being mindful of the July 2003 report of the House Committee on Appropriations expressing concern on the extent of documentation

that DOE may be required to provide as part of the LSN. The Committee encouraged the Commission to review its regulatory requirements regarding the LSN to ensure that they do not require the duplication of information otherwise easily obtainable, focus on information that is truly relevant to the substantive decisions that will have to be made, and establish a time frame in accord with the traditional conduct of an adjudicatory proceeding.¹ Based on this review, we have recommended an additional change to address the Committee's concerns, while still maintaining the overall purpose and functionality of the LSN. The proposed rule would amend § 2.1005 of the Commission's regulations to specify an additional category of documents, "congressional correspondence", that may be excluded from the LSN. Section 2.1005 of the Commission's regulations establishes several categories of documents that do not have to be entered into the LSN, either under the documentary material requirements of § 2.1003, or under the derivative discovery provisions of § 2.1019. These include materials that are either widely available or do not have any significant relevance to the issues that might be litigated in the HLW licensing proceeding. The staff is proposing to add "correspondence between a party, potential party, or interested governmental participant and the Congress of the United States" to these exclusions. We do not believe that this type of material will have a significant bearing on repository licensing issues. Much of it either relates to budgetary or other administrative issues or is merely a reiteration of an agency primary document. It would normally not be the source of material that a party would rely on for its case in the hearing or as a source of material that would be contrary to such reliance information. However, the material directed to federal entities will still be available as part of the normal federal recordkeeping requirements. If a particular item of Congressional correspondence does become relevant to a contention admitted in the HLW proceeding, it can be made available at that time.

Coordination:

The attached rulemaking proposal was coordinated with the Atomic Safety and Licensing Board Panel and the LSN Administrator, SECY, NMSS, and OCIO.

The staff has consulted the LSN Advisory Review Panel (LSNARP) on the document format standards and document duplication issues that are the subject of these proposed revisions. The staff anticipates additional interaction with the LSNARP on other matters raised in the proposed rule and will further evaluate the LSNARP advice in conjunction with its evaluation of the public comments received on these proposed revisions.

Recommendations:

The Office of the General Counsel recommends that the Commission:

1. Approve publication of the attached notice of proposed rulemaking allowing 45 days for public comment.

¹H.R. Rep. No. 108, 108th Cong. 1st Sess. (2003).

2. To satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(b), certify that this rule, if promulgated, will not have a significant impact on a substantial number of small entities. This certification is included in the attached Federal Register Notice.

Scheduling:

Given the schedule for the submission of the DOE license application for a HLW repository in December 2004, expeditious Commission action on the attached proposal will facilitate the ability of the LSN participants to prepare for the HLW licensing proceeding. The OGC target date for the final rule is the first quarter of CY 2004.

/RA/

Karen D. Cyr
General Counsel

Attachments:

- A. Draft Federal Register Notice
- B. "Guidance for Submission of Electronic Docket Materials Under 10 CFR Part 2, Subpart J", U.S. Nuclear Regulatory Commission, October, 2003.

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