

April 7, 2004

Mr. Joseph D. Ziegler
Acting Director
Office of License Application and Strategy
U.S. Department of Energy
P.O. Box 364629
North Las Vegas, Nevada 89036-8629

SUBJECT: DEPARTMENT OF ENERGY (DOE) HIGH-LEVEL WASTE (HLW)
DOCUMENTS ON THE LICENSING SUPPORT NETWORK (LSN)

Dear Mr. Ziegler:

Subsequent to our meeting of March 9, 2004, on an approach for early loading of DOE documents proposed in my letter of February 5, 2004, we advised the Commission of what we understand to be your major concerns with the NRC's proposal. As you know, a new LSN Guideline 23, Access Control Prior to Initial Certification, which attempts to accommodate your concerns, was included in the Licensing Support Network Guidelines (March 2004), which was sent to members of the Licensing Support Network Advisory Review Panel on March 11, 2004. As indicated, we will strictly control access to materials and indices related to pre-certification loading/indexing in accordance with LSN Guideline 23.

We have also been informed that the Commission does not consider documents provided (by any LSN participant) to the LSNA solely for pre-certification loading/indexing in the LSN to be "agency records," subject to FOIA disclosure. For DOE documents provided to the LSNA for LSN loading/indexing, the decision on release to the public under FOIA prior to DOE's 10 C.F.R. 2.1003/2.1009 certification would rest with DOE, not the NRC. This position is consistent with LSN Guideline 23. Moreover, as applied to DOE, even if these DOE documents were somehow deemed to constitute NRC "agency records," under long-standing Federal agency practice and NRC regulations (10 C.F.R. §9.25(i)) a FOIA request for those records would be referred to DOE for response as the originating agency. Similarly, the NRC would make a referral to or consult with DOE regarding a FOIA request for indices of DOE records generated prior to initial certification and thus subject to modification or change prior to certification. Of course, DOE itself could receive a FOIA request for documents submitted for pre-certification loading/indexing and for associated indices, statutory FOIA exemptions from

disclosure may apply to the "agency records" of a responding agency, and any Federal agency's response to a FOIA request is subject to review in a Federal court.

The Commission is concerned about further delays in loading the large amount of materials that must go in to the LSN. We again request that you now begin providing the LSNA with documents for loading into the LSN, utilizing all available means to accelerate the loading.

Sincerely,

/RA/

Daniel J. Graser
Licensing Support Network Administrator

Copies:

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