



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 20, 2004

SECRETARY

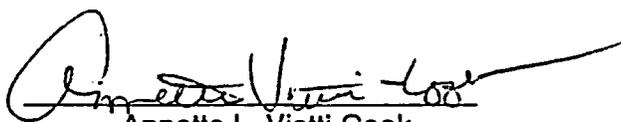
COMMISSION VOTING RECORD

DECISION ITEM: SECY-04-0069

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

The Commission (with all Commissioners agreeing) approved the final rule as noted in an Affirmation Session and recorded in the Staff Requirements Memorandum (SRM) of May 20, 2004.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.


Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
 Commissioner McGaffigan
 Commissioner Merrifield
 OGC
 EDO
 PDR

VOTING SUMMARY - SECY-04-0069

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	5/17/04
COMR. McGAFFIGAN	X				X	5/12/04
COMR. MERRIFIELD	X				X	5/6/04

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the final rule and provided additional comments. Subsequently, the comments of the Commission were incorporated into the final rule as noted in an Affirmation Session and reflected in the SRM issued on May 20, 2004.

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN DIAZ
SUBJECT: **SECY-04-0069 - FINAL RULE TO AMEND 10 CFR
PART 2, SUBPART J, IN REGARD TO THE LICENSING
SUPPORT NETWORK**

Approved ^{w/comment} XX *[Signature]* Disapproved _____ Abstain _____
Not Participating _____

COMMENTS:

I support the comments of Commissioners McGaffigan and Merrifield regarding supplementation of participant's submissions to the LSN until the discovery period in the proceeding has concluded. I also recommend several edits as shown in the attached pages. In particular, I recommend that the staff make the attached edits to, or otherwise clarify, the discussion of modifications concerning the Secretary's determination of the electronic accessibility of the application in connection with docketing.

[Signature]

SIGNATURE
May 17, 04

DATE

Entered on "STARS" Yes No _____

- Electronic submissions to the EHD may rely on the use of hyperlinks within the same PDF file.
- Electronic submissions must be free of any security restrictions imposed by the author (proposed section 2.1013(c)(1)(vii)).

Additional information on the submission of these filings will be provided in the Guidance Document, discussed earlier. The Guidance Document is available on the NRC web site (www.nrc.gov). The NRC expects parties, interested governmental participants, and potential parties to use the detailed instructions in the Guidance Document to ensure that their electronic filings are effectively submitted. Areas covered by the Guidance Document address the need for and format of the transmittal letter for electronic filings, file naming conventions, copyrighted information, and instructions on sensitive or classified information.

Docketing

The final revisions clarify the responsibility of the Secretary of the Commission, under sections 2.1012(a) and 2.1013 (a)(2), to determine whether the DOE license application for a HLW repository can be properly accessed under the Commission's "electronic docket rules." Under section 2.1012(a), the DOE license application cannot be docketed unless the Secretary of the Commission finds that it can be effectively accessed.

The final revisions will not change this requirement. However, the Commission is clarifying that this compliance requirement refers 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 when 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.

Sections 2.1012(a) and 2.1013(a)(2) are revised to ^{clarify} specify that the Secretary's determination on electronic accessibility would be based on whether the tendered

documentary material available in electronic form no later than six months in advance of DOE's submission of its license application to the NRC. The NRC must make its documentary material available in electronic form no later than thirty days after the DOE certification of compliance. All other participants must make their documents available in electronic form no later than ninety days after the DOE certification of compliance. However, these commenters noted that although DOE may have all of its documentary material available on its LSN document server by the time required for certification, it is possible that the DOE collection would not yet have been indexed and audited by the LSN Administrator. Therefore, the entire DOE collection would not yet be "available" to the public. The commenters recommended that the Commission add an additional certification by the LSN Administrator that the DOE collection had been indexed and audited. This LSN Administrator certification would then become the tolling event for the certification by all other LSN participants, rather than the DOE certification.

Response

At the outset, the Commission notes that an amendment such as that recommended by the commenters is outside the scope of this rulemaking. This issue was not raised in the proposed rule and was not intended to be part of this rulemaking effort. However, the Commission also recognizes the importance of this concern. The NRC is pursuing an approach with DOE to ensure that the DOE collection has been indexed and audited by the LSN Administrator in approximately the same time frame as the DOE certification. This ^{should} will ensure that an indexed and baselined DOE collection will be available to other LSN participants well in advance of the point at which the NRC docket an acceptable DOE license application.

7. Transportation issues

Lincoln County and the City of Caliente, in their comments on the proposed rule, urged the Commission to clarify the extent to which Yucca Mountain repository system transportation

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-04-0069 - FINAL RULE TO AMEND 10 CFR
PART 2, SUBPART J, IN REGARD TO THE LICENSING
SUPPORT NETWORK**

Approved ^{w/edits} Disapproved _____ Abstain _____
Not Participating _____

COMMENTS:

Approved subject to attached edits.



SIGNATURE
May 12, 2004

DATE

Entered on "STARS" Yes No _____

Regulatory Guide 3.69, was a proposed new exclusion for "congressional correspondence."

Therefore, the Commission does not believe that the existing regulatory framework will in any way be "destabilized." The final revision of the Topical Guidelines will be completed immediately after this rule is finalized.

2. Technical standards

DOE had several comments on the technical standards for the submission of electronic filings to the adjudicatory proceeding.

A. Complex Documents

Section 2.1013(c)(1)(iii) of the proposed rule would have required that those portions of "complex documents" that are amenable to being transmitted electronically as a filing in the HLW adjudicatory proceeding be transmitted electronically, while those parts of complex documents that were not amenable to electronic transmission be submitted on optical media. DOE, in its comment letter, questioned the advantage of electronically transmitting only some portions of a complex document. If a complex document is not amenable to submittal in its entirety via electronic transmission through the EIE, the advantage of submitting only portions of it is unclear because those portions may not be useful by themselves. DOE recommended that the entire document be submitted on optical storage media, with a transmittal letter submitted via the EIE providing notification of the submittal of that document.

Response

The final rule maintains the approach of the proposed rule to the submission of complex documents. In terms of the usefulness of submitting portions of the document by electronic transmittal, the Commission believes that this would serve several useful purposes. First, it provides early notification that a complex document is coming in and consequently allows other parties to plan their review and possible response. Second, there often will be substantial

benefit in receiving the text portion of a complex document via electronic transmission, notwithstanding the delay in receiving the additional attachments. Various Atomic Safety and Licensing Boards have been issuing orders for several years that use this practice. This has allowed the parties and the Boards to review the text portion, which contains the arguments of the parties, while awaiting the rest of the pleading. However, for purposes of the service requirements in section 2.1013(c) or the computation of time requirements in section 2.1017, the filing of a complex document or a large document is not complete until all portions of the document have been submitted.

B. Image Resolution

Section 2.1013(c)(1)(iv) of the proposed rule would have required that all electronic submissions to the EHD have 300 dots per inch (dpi) minimum resolution for bi-tonal, color, and grayscale. DOE noted the inconsistency between these EHD requirements and the requirements in section 2.1011(b)(2)(iv) for documents placed on individual LSN participant web sites. The LSN participant web site documents are required to have 300 dpi for bi-tonal but 150 dpi minimum resolution for grayscale and color. DOE recommended that the final rule on the EHD be consistent with the LSN participant web site requirements to avoid having to convert the color and grayscale parts of existing documents from 150 dpi to 300 dpi. According to DOE, this would not be "an efficient use of resources". The Commission interprets this latter phrase to mean that the conversion would be not only costly, but unnecessary because 150 dpi color and gray scale would be fully readable. DOE also noted that the Guidance Document states that there is flexibility with respect to the minimum resolution as long as the integrity and quality of the document results in readable copies. The DOE suggests that this flexibility should be added to the rule if the technical requirements are to be retained in the rule. X

Response

Records submitted to the NRC as part of the Electronic Hearing Docket are Federal "official agency records". The National Archives and Records Administration (NARA) issued a standard that records scanned after December 23, 2002, must meet the minimum standard of 300 dpi for bi-tonal, color, and grayscale documents. The NRC adopted this standard on January 1, 2004, the effective date for the NRC final rule on the electronic maintenance and submission of information to the NRC (68 FR 58792; October 10, 2003). The NRC has considered the DOE's concern with regard to the "efficient use of resources." In response, the NRC has modified language in the rule to: (1) require submitters to use the 300 dpi standard for documents created after the January 1, 2004, effective date of the electronic maintenance rule, except in limited circumstances in which (a) submitters may need to use an image scanned before January 1, 2004, in a document created after January 1, 2004, or (b) the scanning process for a large, one-page image may not successfully complete at the 300 dpi standard resolution; and (2) require that documents created or scanned before January 1, 2004, (or for those documents in 1(a) or (b) above), meet the standards for documents placed on LSN participant web sites in section 2.1011(b)(2)(iv) which is 150 dpi for color and grayscale documents and 300 dpi for bi-tonal documents. The Commission is also assuming that this document image resolution requirement for LSN participant web sites would meet the criterion of "readability."

C. Image Format

Section 2.1013(c)(1)(v) of the proposed rule would have required electronic submissions to be generated in Adobe Acrobat Portable Document Format (PDF). DOE noted that this PDF requirement was inconsistent with the requirement for LSN participant web sites in section 2.1011(b)(2)(iv) that allows Tagged Image File Format (TIFF). DOE suggests that files on LSN

participant web sites that are submitted to the adjudicatory proceeding be allowed to be submitted in the TIFF format. Converting images in the LSN that are usable in TIFF format to PDF format for the EHD would again, according to DOE, "not be an efficient use of resources".

Response

The electronic documentary material submitted to the EHD will be entered as official agency records in ADAMS. The PDF became the NRC standard for official agency records on January 1, 2004, the effective date for the NRC final rule on the electronic maintenance and submission of information to the NRC (68 FR 58792; October 10, 2003). The NRC has adopted PDF as the NRC standard for this official agency records system based on the following:

- PDF represents a "generic" format that behaves consistently across multiple hardware and operating systems;
- When files are distributed in PDF, the information is "locked down" for the general user, who can access the content through the use of PDF viewer software;
- The PDF standard, though it is proprietary to Adobe, has been published, is freely available, and the capability to create PDF documents has been integrated into many other software applications;
- PDF documents can be generated from any application that can generate Postscript printer files; thus anything that can be printed can be represented in PDF;
- PDF supports file generation options for text-oriented files produced on a word processing or publishing system;
- PDF supports file generation options for scanned image-oriented files; and

governmental participant or party shall make available no later than ninety days after the DOE certification of compliance under § 2.1009(b)--

(1) An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant or party; provided, however, that an electronic file need not be provided for acquired documentary material that has already been made available by the potential party, interested governmental participant or party that originally created the documentary material. Concurrent with the production of the electronic files will be an authentication statement for posting on the LSN web site that indicates where an authenticated image copy of the documents can be obtained.

* * * * *

(e) Each potential party, interested governmental participant or party shall continue to ^(supplement its documentary material with any additional) ~~make~~ ^{made} available to other participants via the LSN, documentary material created after the time of its initial certification in accordance with paragraph (a)(1) through (a)(4) of this section until the discovery period in the proceeding has concluded.

4. In § 2.1005, paragraph (i) is added to read as follows:

§2.1005 Exclusions.

* * * * *

(i) Correspondence between a potential party, interested governmental participant, or party and the Congress of the United States.

5. In § 2.1012, paragraph (a) is revised to read as follows:

§2.1012 Compliance.

(a) If the Department of Energy fails to make its initial certification at least six months prior to tendering the application, upon receipt of the tendered application, notwithstanding the provisions of §2.101(f)(3), the Director of the NRC's Office of Nuclear Material Safety and Safeguards will not docket the application until at least six months have elapsed from the time of the certification. The Director may determine that the tendered application is not acceptable for docketing under this subpart if the application is not accompanied by an updated certification pursuant to § 2.1009(b), or if the Secretary of the Commission determines that the application is not submitted on optical storage media in a format consistent with NRC regulations and guidance, or for non-compliance with any other requirements identified in this Subpart.

* * * * *

6. In § 2.1013, paragraphs (a)(2) and (c)(1) are revised to read as follows:

§ 2.1013 Use of the electronic docket during the proceeding.

* * * * *

(a) * * *

AFFIRMATION ITEM

RESPONSE SHEET

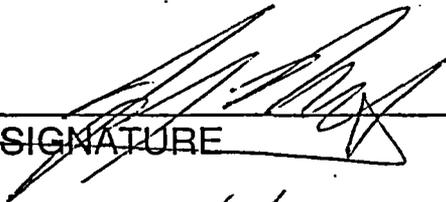
TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-04-0069 - FINAL RULE TO AMEND 10 CFR
PART 2, SUBPART J, IN REGARD TO THE LICENSING
SUPPORT NETWORK**

Approved Disapproved Abstain

Not Participating

COMMENTS:

See attached comments.



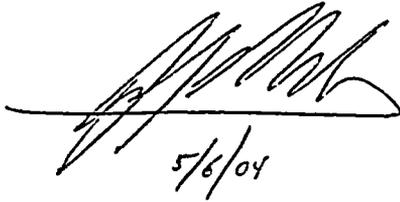
SIGNATURE

DATE *5/6/04*

Entered on "STARS" Yes No

Commissioner Merrifield's Comments on SECY-04-0069

I approve publication of the notice of final rulemaking with the following change. In response to comments, the staff recommends that a Licensing Support Network (LSN) participant's obligation to supplement web sites with new documents should end after close of discovery. I agree that for the most part the duty to supplement should end after discovery closes. However, there should be an exception for information which the participant later learns is in some material respect incomplete or incorrect, consistent with the requirements in 10 C.F.R. Part 2 § 2.705(e) (*effective* Feb. 13, 2004). This change will reflect longstanding Commission practice to require supplements in these circumstances and will ensure that Subpart J's discovery provisions are consistent with other Part 2 sections relating to discovery.



5/6/04