



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

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August 8, 1997

MEMORANDUM TO: Chairman Jackson
Commissioner Dicus
Commissioner McGaffigan
Commissioner Diaz

FROM: B. Paul Cotter, Jr. *B. Paul Cotter*
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: COMMENTS ON SECY-97-154, "RESOLUTION OF LICENSING
SUPPORT SYSTEM (LSS) ISSUES AND DRAFT PROPOSED
RULE, 10 C.F.R. PART 2, SUBPART J"

Rather than resolve the perceived problems with the Licensing Support System (LSS), the proposals in SECY-97-154 could well significantly compound the difficulty of timely completion of the high level waste repository (HLWR) licensing hearing. ASLBP's analysis of the reasons for this conclusion are set forth in some detail in the attached document.

To review briefly, the HLWR is a complex, approximately \$30 billion facility required by statute to be licensed in an extraordinarily short period of time. The HLWR proceeding will require a document database estimated to total up to 20 million pages and a hearing record for decision estimated at up to 2 million pages. The parties with potential interests include the Department of Energy; the state of Nevada and, possibly, most of the rest of the lower 48 states; several Native American tribes; Nevada and California counties; and any number of environmental and trade association groups. The statute requires a final licensing decision to be issued in, at most, four years. NRC staff review of the application, which staff has said will take eighteen months, the hearing, and any appeals must all be completed in this time period.

Consequently, the LSS, a centralized electronic database of millions of pages of technical and related material and an electronic hearing docket, was conceived to: (1) facilitate pre-license application technical review by NRC and other parties; (2) preserve the years and resources that otherwise would be consumed by document discovery and FOIA requests; and (3) eliminate, through electronic service of filings, the time that otherwise would be lost in the litigation by mail service.

Much of subject proposal is driven by the misapprehension in early LSS thinking that an LSS system would require an expensive R & D effort and a new, separate office to run any newly developed system. That is no longer the case.

ASLBP's fifteen years of experience in developing and operating electronic filing and large electronic databases lead us to conclude that the proposed changes in SECY-97-154 would not accomplish these purposes. First, putting aside the fact that the proposal abandons any attempt to create a coherent, central database for technical review of the application, we have serious concerns about the reliability and security of the proposed decentralized, Internet-based system as a discovery document repository. Since the LSS was conceived some ten years ago, document management systems and approaches have been developed and are in operation in the courts of several states that, taken together, could satisfy the proposal's deficiencies and meet the needs of all users. Some of these systems are free to the court because they are user financed. Because of these developments since the LSS was first conceived, it may well be that an LSS system could be obtained and operated at roughly the same cost and FTE expense as that listed in subject proposal.

Additionally, we are concerned about the new definition of "documentary material" proposed in SECY-97-154. This definition has the potential to exclude party preapplication access to a significant volume of relevant materials, creating the possibility of substantial postapplication delay due to additional discovery requests and disputes.

Accordingly, ASLBP recommends that the Commission:

1. Order an independent systems analysis that would identify and analyze existing technologies and systems that could be used for establishing a discovery document database; and
2. Retain the existing 10 C.F.R. Part 2, Subpart J definition of "documentary material."

Attachment:
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ASLBP Analysis and Comments on SECY-97-154,
"Resolution of Licensing Support System (LSS)
Issues and Draft Proposed Rule,
10 C.F.R. Part 2, Subpart J"

SECY-97-154, "Resolution of Licensing Support System (LSS) Issues and Draft Proposed Rule, 10 C.F.R. Part 2, Subpart J," (July 21, 1997) [hereinafter SECY-97-154], provides a proposed revised 10 C.F.R. Part 2, Subpart J, that would alter significantly the existing preapplication procedures regarding the future Department of Energy (DOE) request for an agency license to construct a high-level waste repository (HLWR) under the provisions of the Nuclear Waste Policy Act of 1982 (NWPA). In particular, the SECY-97-154 proposal would eliminate both the Licensing Support System (LSS), the centralized document repository that is to be created before the HLWR licensing proceeding begins to hold party discovery and official docket materials, and the LSS Administrator (LSSA), the agency official with responsibility for the operation of the LSS. The proposal also would significantly change the role of the LSS Advisory Review Panel (LSSARP).

For the reasons set forth below, the ASLBP is concerned about (1) the ability of the proposed decentralized, Internet-dependent discovery document database system to fulfill the important role of the LSS in ensuring timely completion of the HLWR licensing proceeding; and (2) the impact of narrowing the definition of the documentary information the potential parties are required to place in that system.

I. BACKGROUND

A. The LSS Under the Existing Subpart J

As originally envisioned by the parties to the Subpart J negotiated rulemaking and the Commission in adopting Subpart J, the LSS is to be the electronic information management system for the HLWR licensing proceeding. As was noted in the statement of considerations accompanying the final rule that is the existing Subpart J, the LSS is to be created before any DOE construction permit application is filed to help ensure the timely completion of the HLWR construction authorization hearing during the three-year period afforded under section 114(d) of the NWPA, 42 U.S.C. § 10134(d). Specifically, the Commission declared that the LSS was being established to serve the following purposes:

1. Eliminating the "most burdensome and time-consuming" aspect of document discovery,

i.e., the physical production of documents after a license application has been filed, by providing for the preapplication identification and submission of discoverable documents.

2. Eliminating the "equally burdensome and numerous" Freedom of Information Act (FOIA) requests for the same information from both DOE and the NRC.
3. Enabling the comprehensive and early technical review of relevant licensing material by the DOE and NRC staffs.
4. Enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the HLWR proceeding, thereby permitting the earlier submission of better focused contentions with a substantial time savings during the proceeding.
5. Providing for electronic transmission of filings, thereby eliminating a significant amount of delay.

54 Fed. Reg. 14,925, 14,925 (1989).

Relative to the LSS system itself, although DOE is assigned responsibility for designing and developing the LSS computer system, the LSSA, an NRC employee, is responsible for managing and administering the system. The LSSA's duties include providing operation and maintenance personnel, materials, and services; ensuring LSS availability and integrity; receiving and entering "documentary material" into the LSS; maintaining security and establishing access protocols; establishing user training and support programs; and certifying DOE has complied with its Subpart J responsibilities, including making its "documentary material" available. See 10 C.F.R. § 2.1011(b)-(d). This last duty -- certification -- is particularly important because without it, DOE's application would be subject to adjudication under the usual Subpart G procedures, see id. § 2.1003(h)(1), raising the specter that the statutorily-mandated three year completion date might not be met.

In addition, Subpart J assigns LSS administrative responsibilities to the LSS Advisory Review Panel (LSSARP) and a Pre-License Application Presiding Officer (Pre-Application Board). The LSSARP is an advisory committee consisting of potential LSS users who are to provide DOE and/or the LSSA with recommendations on LSS design and development issues and LSS operation and maintenance, including format standards, access protocols, and electronic filing procedures and standards. See id. § 2.1011(e)-(f). The Pre-Application Board is an Atomic Safety and Licensing Board or other Commission-appointed official who is to rule on access petitions; disputes concerning preapplication document entry, including relevance and privilege issues; disputes regarding LSSA substantial compliance certification; LSS design, development, or operation disputes; and disputes concerning implementation of LSSARP recommendations. See id. § 2.1010(a)-(b).

B. Proposals to Revise the LSS

1. SECY-96-178

In SECY-96-178, "Action Plan to Address Outstanding LSS Issues," (Aug. 9, 1996) [hereinafter SECY-96-178], it was first suggested to the Commission that revisions to the existing Subpart J might be appropriate. According to SECY-96-178 "[t]ime and events" had overtaken the regulatory and technical assumptions upon which the LSS was footed. Although declaring that the "primary LSS functions . . . should be preserved," SECY-96-178 suggested strategies for reexamining Subpart J. SECY-96-178, at 1.

Because the delay in the DOE HLWR construction permit application and the accompanying funding uncertainties that surrounded the HLWR program had delayed the implementation of the LSS, it was asserted in SECY-96-178 that as a result of this delay the LSS function of providing an early discipline to the tracking of DOE decisions had not been realized. With this purported loss of a carefully documented DOE decision-making trail, SECY-96-178 declared that the LSS could no longer be relied upon to aid the staff in ensuring that its technical review would meet the three-year application processing schedule. In addition, this delay was found to be significant because it had resulted in a large accumulation of documentary material awaiting LSS conversion, much of which might no longer be relevant to the licensing proceeding. See id. at 4-5.

At the same time, it was asserted in SECY-96-178 that the intervening years had resulted in significant developments in document automation technology such that the "commercially available off-the-shelf" (COTS) software and Internet-related document exchange and browse/search/retrieval engines made the existing LSS concept of a central, dedicated, custom-built document management system outmoded. Moreover, according to SECY-96-178, NRC's own technological innovations had shown that such non-COTS functionalities as electronic filing and docketing that were to be part of the LSS could be done without putting the LSS into place. See id. at 5-6.

Declaring that this technological innovation as well as the budget and regulatory uncertainties regarding the HLWR mitigated against further LSS development, a four component plan was put forth in SECY-96-178 for addressing the perceived LSS deficiencies, which included: (1) reassessing the fundamental technological approach for the LSS, including evaluating the technological feasibility and resource constraints/requirements of a decentralized Internet-type system in which (a) the parties would maintain their own document databases that could be accessed via hyperlinks, and (b) the LSSA would oversee the system through automated, on-line reviews; (2) studying the possibility of changes to the LSS rule in Part 2, Subpart J; (3) seeking to retain important LSS features negotiated by the affected parties, such as timely access to appropriate documents; and (4) establishing a mechanism for ongoing technical coordination with the LSSARP (or a similar non-advisory committee group) using the Internet and videoconferencing. SECY-96-178 indicated that, unless the Commission directed otherwise, this four-pronged strategy would be pursued, including beginning electronic discussions about possible LSS changes with the LSSARP members. See id. at 7-10.

2. LSSNet

Shortly after the Commission gave its approval to the four-prong approach outlined in SECY-96-178, the agency established the LSSNet site on the Internet to foster communication with LSSARP members and the public regarding changes to the LSS. Initially, in Phase I, the agency sought comments on seven different general topics concerning possible changes to the LSS. Then, in Phase II, comments were sought on three narrower issues, including elimination of the LSS or retention as a decentralized system. Finally,

in Phase III, a specific proposal for revising Subpart J to eliminate the centralized LSS and the LSSA was put forth with a request for comments on the three issues of the acceptability of the general concept of the proposed rule, its specific provisions, and the concept of allowing DOE to file an electronic application with hypertext links to the various supporting documents.

Of the ninety-two comments filed during the eight-month LSSNet process, most were from NRC or DOE personnel. Individuals representing the State of Nevada, two Nevada counties, a California county, and a Native American group did submit comments, although a substantial portion of the non-NRC/DOE comments (nine of twenty-three) were submitted by the State and two local governments in the last week of Phase III and consisted of short comments by each entity on each of the three issues being addressed in that phase.

3. SECY-97-154

SECY-97-154 marks the culmination of the LSS review effort. Asserting (1) the LSS as envisioned under the existing Subpart J would require "an enormously expensive custom designed system" that would not take advantage of current and future technology; and (2) there is a large document backlog containing a substantial amount of documents of questionable relevancy that create a "substantial chance" DOE will be unable to obtain LSSA compliance certification, SECY-97-154 recommends significant revisions to Subpart J. See SECY-97-154, at 4-5. The proposals in SECY-97-154 are to:

- a. Eliminate the centralized, NRC-administered LSS and substitute a system of party-maintained and operated electronic databases accessible through the Internet.
- b. Revise the definition of "documentary material" required to be placed in the electronic database from the existing "any material or other information that is relevant to, or likely to lead to the discovery of information that it relevant to," 10 C.F.R. § 2.1001, to include only that material or information that a party, potential party, or interested governmental participant "intends to rely and cite in support of its position in the proceeding" or that is "relevant to, but does not support, that material or

information or that party's position,"
SECY-97-154, attach. 1, at 11.

- c. Eliminate the LSSA and make the parties responsible for certifying to the Pre-Application Board that they are in compliance with the requirements for establishing and operating an accessible electronic database.
- d. Rename the LSSARP or eliminate that advisory committee and substitute a voluntary users group.

See SECY-97-154, at 5-6.

II. ASLBP Concerns

Over the past year, ASLBP has expressed its concern about establishing a decentralized, Internet-based system for LSS materials, particularly absent some kind of independent systems/cost-benefit analysis comparing such systems. Moreover, near the conclusion of the LSSNet process in June 1997, ASLBP and OGC representatives met to discuss the scope and direction of changes to Subpart J, in particular the scope of the definition of "documentary materials," which governs what materials parties are required to place in their databases, and the roles of the LSSA/Pre-Application Board in any revised Subpart J.

After this June 1997 meeting, the Chief Administrative Judge expressed concerns about several of the concepts involved in the proposed rule, including the definition of "documentary material" and the move to a decentralized system. See Exhibit 1. Subsequently, the working definition of "documentary material" was changed in a way that, at least in some measure, addressed ASLBP objections about how that term was being redefined. ASLBP's concerns otherwise remained unresolved, however.

Two premises underlie ASLBP's comments on the proposal now contained in SECY-97-154. The first is that, as the Commission recognized in adopting Subpart J, providing potential parties to the HLWR adjudicatory proceeding with access to documentary material that otherwise would be discoverable during a 10 C.F.R. Subpart G hearing before that hearing is convened will play a significant role in allowing the agency to meet the existing statutory deadline for completing the HLWR construction permit review process. See 54 Fed. Reg. at 14,927, 14,929. The second, is that, as

was recognized in SECY-96-178, for any Subpart J rule change the agency must be sensitive to the often-expressed position of the parties involved in the rulemaking negotiations on Subpart J that they receive the major benefits they bargained for. These benefits include timely access to documents and assurance that appropriate documents are available. See SECY-96-178, at 9.

A. Move Away from a Centralized Discovery Document Depository

1. Need for a Systems/Cost-Benefit Analysis

The LSS was intended to be a centralized electronic database containing the HLWR proceeding discovery material and the official docket for the proceeding. Party documents, generally in both text and image versions with an accompanying bibliographic header, are to be submitted to the LSSA for incorporation into the LSS. Access to the centralized database would be through terminals placed in various public locations in the Washington area and in Nevada, and, for the parties to the proceeding, by telephone dialup access for which the parties would have to bear the expense. See 10 C.F.R. § 2.1007(a), (c). The parties would be able to access the documents through header and full-text searches.

In proposing elimination of the LSSA-administered centralized discovery document database in favor of individual party-maintained and operated discovery document databases, SECY-97-154 relies on two "post-LSS adoption" developments: (1) the "universally available" Internet, which will make the individual party databases accessible to all other parties regardless of their location; and (2) the ready availability of COTS that can perform the LSS document management functions. See SECY-97-154, attach. 1, at 3-4. The extent to which either of these factors supports abandoning the LSS concept of a centralized database is not, however, wholly apparent.

Timeliness is a significant factor in the HLWR proceeding. Therefore, system reliability is at a premium for the LSS. Yet, one need look no further than the front page of the daily paper to see there are substantial questions about whether the Internet yet provides the degree of reliability and security that is needed for the LSS system. See Rajiv Chandrasekaran, Group Blocks Postings of UUNet Customers, Wash. Post, Aug. 5, 1997, at C1 (Exhibit 2); Rajiv

Chandrasekaran & Elizabeth Corcoran, Human Errors Block E-Mail, Web Sites in Internet Failure, Wash. Post, July 18, 1997, at A1 (Exhibit 3). Moreover, anyone who has used the Internet with any frequency knows that connections can be frustratingly slow.¹

As to the availability of COTS software that may make unnecessary the degree of "customization" that was once envisioned for the LSS, it is not clear why this factor makes a centralized system outmoded. Indeed, there are centralized "COTS" document database management systems now available, such as the Delaware State Courts' LEXIS/NEXIS-based Complex Litigation Automated Docket (CLAD) system, that might be utilized.²

¹ By its very nature, the Internet is an evolving technology undergoing development without a strong, central point of control. Thus, besides the problems of intermittent failures and security, using an Internet-based system has the potential to bring into play a number of elements that could be the cause of disputes or delays, including lack of standardization in telecommunications hardware and software, server technology, and party work processes, and cost uncertainties due to possible telecommunications transmission charges and taxes.

² The CLAD system, which has been operating for approximately five years in the Delaware state courts, was designed for use in complex, multi-party litigation. The system has two components, an automated docket and a database of party pleadings, both of which are operated using the existing LEXIS-NEXIS legal database system. Parties are charged a per-document fee to file documents electronically in the database, which also can be electronically served on other parties to the proceeding. Parties also have twenty-four hour, toll-free electronic access both to the court docket and a LEXIS private library that allows full-text searches on all docketed filings at LEXIS commercial rates.

In its present form, the CLAD system is more analogous to the electronic docket that would be a component of the LSS. It may be, however, that something like it could be developed with LEXIS/NEXIS or with WESTLAW, the other commercial entity that has experience in managing large legal document databases, to contain and provide access to a centralized HLWR discovery database.

Ultimately, what this suggests, and what ASLBP has been recommending, is that before abandoning the centralized database concept at the heart of the LSS, an independent systems analysis should be done to take a closer look at the costs and benefits of the centralized system versus the decentralized system now suggested in SECY-97-154. When the LSS was being planned in the late 1980's, Science Applications International Corp. (SAIC) did a series of system analysis studies to try to establish the scope and cost of the project under then-existing technology. A major change in the system such as that proposed in SECY-97-154 arguably merits a similar, albeit appropriately scaled-down approach.

Any independent study involves time and money. There nonetheless does appear to be as much as a year available now for such a study. Given the importance of this system to the timely completion of the HLWR proceeding, ASLBP believes such an analysis is vital to ensuring that the LSS, in whatever form or under whatever name, fulfills the central purpose for which it was intended.³

2. Other Issues

In making a systems/cost-benefit study, a number of factors should be considered, including comparing a centralized with a decentralized system in terms of Internet/direct dialup connectivity and customization/COTS availability. Relative to the SECY-97-154 decentralization proposal, however, there are other questions that should be considered as well.

For instance, decentralizing the LSS and leaving it to the individual parties to operate and maintain their own databases arguably increases the chance that one or more of the party discovery databases, particularly those of the parties who may have more limited resources to devote to system upkeep and repair, will be unavailable for indeterminate periods of time. The statement of considerations seems to suggest one possible solution to this problem, i.e., that a party could "provid[e] its

³ The proposed statement of considerations makes the standard reference to a regulatory analysis, which ASLBP understands is currently being prepared. See SECY-97-154, attach. 1, at 9. It might be that the study ASLBP recommends herein could be done in conjunction with, or in lieu of, that analysis.

documents either to the NRC or to the DOE, to have the NRC or the DOE maintain the documents for electronic access." SECY-97-154, attach. 1, at 6. There are important unanswered questions with respect to this solution, however. First, would there be any cost to the parties to have DOE or NRC accept their documents and maintain them as part of the DOE or NRC databases. If so, and the parties find this cost excessive, this may negate the purpose this proposal is designed to achieve. On the other hand, if it is more cost effective for the nonfederal parties to give NRC or DOE their documents, they may simply forego setting up their own databases. The result would be only two databases, one run by NRC and one run by DOE, which seemingly leads right back to the issue of centralization. See SECY-95-153, "[LSS] Senior Management Team Recommendations on Direction of the [LSS]," (June 14, 1995), at 5 (LSS provides economies of administration, including eliminating the need to acquire information from multiple sources and avoiding duplication of records).

There also is the question of the use of bibliographic header fields, which apparently have been almost entirely eliminated in the move to decentralization. Subpart J now provides that all documents supplied by a party for inclusion in the LSS are to be accompanied by a bibliographic header. See 10 C.F.R. § 2.1003(a)-(c). This, in turn, allows for two search capabilities, full-text word searches and searches based on the series of predefined header fields such as type of document, date of issuance, author, recipient, etc. Under the SECY-97-154 proposal, headers generally would be required only for those documents for which some kind of a nondisclosure privilege is claimed, in lieu of submitting the text of the privileged document, or for materials not suitable for image or full-text search. See SECY-97-154, attach. 1, at 13. Yet, no matter how narrowly defined, full-text word searches on a database the size of those being contemplated for DOE and NRC documents are likely to produce a significant number of "hits." Without the capability to search on header fields as well, searches may become so unwieldy as to be of little value. Moreover, curtailing header fields may make it more difficult to produce useful reports and listings regarding database information.

Of course, headers generally require manual input, which is an additional cost, and may require some software customization for systems integration. Nonetheless, before

abandoning or significantly curtailing this search tool, ASLBP hopes some further analysis will be done.

Finally, as part of this study, further consideration should be given to the issue of whether or not to retain the LSSA position. It may well be, depending on what is available, that even a centralized discovery database system could now be operated and maintained under the direction of the Pre-Application Board, as is done with the court-administered CLAD system.⁴

B. Definition of Documentary Material

Under the existing Subpart J, the "documentary material" to be placed in the LSS is defined as "any material or other information that is relevant to, or likely to lead to the discovery of information that is relevant to" the licensing of a HLWR site, with the additional instruction that the scope of any documentary material is to be guided by a set of NRC Regulatory Guide topical guidelines. See 10 C.F.R. § 2.1001. Thus, as originally envisioned, a central feature of the LSS was that prior to any construction permit application being filed, the potential parties to the HLWR proceeding, including DOE, the NRC staff, the State of Nevada, interested local governments, Native America tribes and organizations, and environmental groups, would have access to those documents they normally could obtain in an adjudication by utilizing discovery document production requests (see id. § 2.741(a)) after an application was filed and, in the case of intervenors, they were admitted as parties with litigable contentions. See id. § 2.1002(a). As a quid pro quo for receiving this "up front" document production, the parties generally would not be entitled to any document discovery once the HLWR construction permit application was filed other than in connection with a party

⁴ ASLBP agrees with SECY-97-154 that, assuming adequate funding is provided for timely development, an electronic docket for filings in agency adjudicatory proceedings constructed outside the LSS framework could serve as the electronic docket for the HLWR proceeding. In doing so, however, care must be taken to ensure that the systems architecture of any discovery database (or databases) is fully compatible with the electronic docket so that materials can be transferred easily into the electronic docket.

deposition or a nonparty subpoena. See id. §§ 2.1018(b)(1), (f)(3); 2.1019(a).

The SECY-97-154 proposal would revise this definition to encompass that documentary material a potential party "intends to rely and cite in support of its position in the proceeding" or "which is relevant to, but does not support," that relied upon/cited material or information, or that party's position. SECY-97-154, attach. 1, at 5. It seems apparent that the change in wording from the existing definition is intended to require disclosure of a different, more limited scope that focuses more narrowly on what a party intends to utilize in the proceeding, i.e., "rely [on] and cite," rather than simply what is relevant to licensing a HLWR.

Thus, depending on how broadly this proposed definition is interpreted, rather than having its disclosure responsibilities defined in terms of what is relevant to licensing a HLWR, DOE's obligations might be delineated almost solely in terms of its application, which undoubtedly will be the principal document it relies upon/cites in support of its positions in the licensing proceeding. Just how detailed application will be is yet to be seen. Further, although contrary material is to be included under the proposed new definition, the document submitter arguably has more latitude to exclude materials in making the determination about what is contrary to its position, a subjective (and perhaps self-serving) determination. In addition, narrowing the scope of preapplication disclosure with this new definition enhances the possibility of postapplication disclosure disputes that could delay the hearing.⁵

⁵ The availability of the FOIA, 5 U.S.C. § 552, means that notwithstanding the more limited definition of "documentary materials," the nonfederal parties may still have access to DOE and NRC materials "relevant" to the HLWR that they would have had access to under the existing Subpart J definition. As originally designed, the LSS was intended to defuse any party incentive to use the FOIA by making all potentially relevant HLWR-related materials available without having to invoke the DOE or NRC FOIA processes, thereby saving time and resources for the parties and the agencies. The new, arguably less comprehensive definition may spark party interest in the parallel use of the FOIA. This, in turn, increases the possibility of

(continued...)

Given the affected parties lack of participation in the LSSNet, which included a definition of "documentary material" different from the existing Subpart J and the SECY-97-154 proposed revision,⁵ it cannot be said with any certainty what the positions of the other parties to the negotiated rulemaking will be regarding this language change. Nonetheless, to the extent it can be read to give them something less than they have under the existing rule, they likely will protest.⁷ This, in turn, raises the question why this language change is necessary.

The proposed rule statement of considerations accompanying SECY-97-154, seems to suggest that this change in the scope of available materials is necessary because of a high likelihood that LSSA certification cannot be granted in that (1) much of the early material may no longer be relevant to the licensing proceeding; (2) all accumulated documents may not have been identified and properly maintained; and (3) there may be larger backlogs than originally contemplated, making the risk of not capturing all the material originally required to be in place substantially larger. See SECY-97-154, attach. 1, at 3. Putting aside the question of

(...continued)

FOIA-related delays, such as disclosures that result in postapplication issues about the reasonableness of preapplication party document disclosure determinations. If found to be meritorious, these issues could require additional postapplication discovery that could delay the proceeding.

⁶ The LSSNet Subpart J proposal defined documentary material as "material or information that a party or potential party plans to produce either during discovery by subpoena or deposition or during the licensing of a likely candidate site for a geologic repository."

⁷ What the parties' views are on this definition, or indeed on the major benefits of Subpart J they wish to retain, is less than clear. Despite the considerable efforts of those involved with the LSSNet to get the potentially affected parties to comment on possible changes to Subpart J, they provided little informative input. This lack of participation likely is not assent; it is equally possible to infer they are biding their time and conserving their resources until the agency actually proposes something concrete.

the validity of these reasons,⁹ each is something over which the potential parties, other than DOE and NRC, had little or no control. Therefore, the upshot of this change is that, because of the inability of DOE/NRC to make the LSS work, the parties now must accept access to a more restricted universe of available documents while continuing to have their ability to conduct regular document discovery sharply curtailed. This may prove to be a difficult concept for the agency to explain to the parties' satisfaction, particularly in light of the parties' previous dissatisfaction with agency-initiated changes in the original negotiated rulemaking. See 56 Fed. Reg. 7787, 7788 (1991).

With the number and diversity of the documents involved in the HLWR application and review process, questions of relevance are difficult to address in the abstract. Clearly, however, the preapplication disclosure process currently embodied in Subpart J to ensure the agency is able to fulfill its licensing responsibilities in a timely manner has a significant impact on the parties' ability to invoke the discovery processes they normally are afforded under the agency's rules of practice. It also has significant implications as the preapplication avenue for resolving or avoiding discovery-related disputes that can delay the postapplication adjudication. ASLBP thus continues to favor the existing definition that arguably leaves less discretion to a party (such as DOE) to exclude materials from disclosure. If, however, the Commission believes the

⁹ For instance, the question of old documents becoming irrelevant arguably is one that can be addressed adequately in ways other than changing the definition of what the database should contain. Prior to the decision to delay any further LSS development in conjunction with SECY-96-178, the LSSARP had some discussions about the problem of narrowing the scope of relevant documents. If continued and intensified, these discussions might have resulted in LSSARP recommendations limiting the scope of "relevant" documents in the LSS database. By the same token, the concern that documents may not have been identified apparently is footed in concerns about DOE maintenance of contractor reports based on a review of some of the documents contained in a Washington-area DOE HLWR document storage facility. As far as ASLBP is aware, however, there has never been any formal attempt to discuss this concern with DOE or obtain its position on whether it can or cannot meet the requirements of Subpart J to provide access to "relevant" contractor documents.

existing definition is no longer viable, then at a minimum any new definition of "documentary material" for preapplication disclosure must clearly encompass all party reports and studies, including all related "circulated drafts," relevant to the issues set forth in the Topical Guidelines in Regulatory Guide 3.69 regardless of whether they are being "relied" on and "cited" by DOE or others.

III. CONCLUSION

The HLWR proceeding has the potential to be one of the largest and most complex federal administrative adjudications ever conducted. In originally adopting 10 C.F.R. Part 2, Subpart J, the Commission acted to ensure that the parties, and particularly the nonfederal participants, could take in the HLWR licensing proceeding with some confidence that they were receiving all relevant information and so could frame and litigate issues fully and fairly. Ultimately, any changes to Subpart J should be scrutinized to make sure this goal of ensuring fair and meaningful participation is not compromised.

To this end, ASLBP recommends that the Commission (1) direct that an independent systems/cost-benefit analysis be undertaken to determine, in light of technological advances over the past ten years, the best manner for establishing and operating the preapplication document discovery database for the HLWR proceeding; and (2) retain the existing Subpart J definition for the "documentary material" that would go into that system.

EXHIBIT 1



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D.C. 20555

June 5, 1997

MEMORANDUM TO: William J. Olmstead
Associate General Counsel
for Licensing and Regulation
Office of the General Counsel

FROM: B. Paul Cotter, Jr. *B. Paul Cotter, Jr.*
Chief Administrative Judge
Atomic Safety and Licensing Board Panel

SUBJECT: LICENSING SUPPORT SYSTEM REVISIONS

During your meeting yesterday with Judge Paul Bollwerk, Lee Dewey, and Jack Whetstine of this office, you, along with Chip Cameron and Kathryn Winsberg of the General Counsel's Office, discussed the possible future course for revising 10 C.F.R. Part 2, Subpart J, and the Licensing Support System (LSS) that is a central feature of that provision. As you move toward making further recommendations to the Commission on this subject next month, I want to make you aware of significant concerns we have about the direction of the current revision effort.

As you know, in SECY-96-178, the Senior Management Team (SMT) studying the direction of the LSS recommended to the Commission that technological advances warranted changing the LSS from a centralized electronic database system to one that was decentralized, with each of the parties to the high-level waste repository (HLWR) proceeding maintaining its own Internet-linked database containing those party's discoverable documents. Subsequently, comments were sought on this proposal via an LSSNet homepage established on the World Wide Web. In the final stage of that process, a revised version of Subpart J has been put out for comment. This revision not only would create a decentralized system, but arguably would narrow the scope of the documents that the parties are required to place in their preapplication databases and would eliminate the LSS Administrator who, under the existing Subpart J, is the agency official directly responsible for the management, operation, and integrity of the LSS.

Recognizing that the discussion yesterday was wide-ranging and included consideration of a number of different approaches and alternatives, ultimately your preference appeared to be for these and other changes that would significantly alter the existing LSS concept. The revised

rule apparently would mandate only that each party's preapplication database include those documents upon which it intends to rely to support its position on the HLWR construction application. The suggested revised rule also would abandon the existing Subpart J approach that requires the adequacy of the parties' preapplication database be certified by the agency. Instead, the parties would police the completeness of the preapplication database through Freedom of Information Act (FOIA) requests. The existing ban on any postapplication document discovery, other than information obtained relative to a deposition, subpoena, or preapproved interrogatory would be retained.

Our major concerns with this proposal are summarized below:

1. A basic premise of the original Subpart J was that, given the massive number of documents that likely would be discoverable material, a concerted effort had to be made before the HLWR application is filed to deal fully and fairly with document discovery if the agency is to meet the three-year statutory deadline imposed by the Nuclear Waste Policy Act of 1982. Nothing we have seen thus far convinces us that this concern has diminished.

The revisions that now seem to be favored appear to cut back on the scope of the materials provided to the affected parties and on the adequacy of measures afforded those parties to ensure that they have received all the discoverable material that is available. The original rule recognized that the less the affected parties are afforded preapplication, the greater the possibility of postapplication delays that would risk noncompliance with the statutorily mandated deadline.

2. Establishing a document database system the size that potentially will accrue to the HLWR proceeding without some mechanism for independent, third-party oversight of that database will complicate and delay the proceeding.
3. Previously, I have expressed my concern about relying on developing Internet-based technology for a proceeding in which time and system reliability are at a premium. Existing litigation database technology warrants further consideration for any discovery document database.
4. In SECY-96-178, the SMT expressed concern about ensuring that the affected parties involved in the negotiations that resulted in Subpart J would receive

the major benefits they bargained for. The present proposals seemingly provide them with substantially less in that regard, and apparently for reasons that have nothing to do with their actions, but instead reflect DOE/NRC implementation problems. This has the potential to undermine significantly the NRC's concerted effort to convince these parties that it can be trusted to conduct the HLWR proceeding fairly.

Thank you for the opportunity to meet with you yesterday and discuss this important matter. We remain ready to review any further proposed revisions to Subpart J and provide you with comments.

cc: F. Cameron, OGC
J. Gleason, ASLBP
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EXHIBIT 2

Group Blocks Postings Of UUNet Customers

Va. Firm Says Internet Ad Protest Is Terrorism

By Rajiv Chandrasekaran

Washington Post Staff Writer

A group of Internet users who are angry over the mass posting of ads on the electronic bulletin boards of the global computer network have blocked or destroyed thousands of postings made by customers of UUNet Technologies Inc. of Fairfax.

Affecting ads and occasional non-commercial postings, the group has effectively declared war on any posting sent through the Internet service company, which it contends has failed to adequately crack down on people who post advertisements.

The action began over the weekend and, in its first 24 hours, organizers say, blocked more than 80,000 postings sent by UUNet customers. Only about 600 of the postings were not product pitches, they said.

It was the first such action aimed at a major Internet provider, according to computer industry specialists, and it prompted a sharp outcry from UUNet and some free-speech advocates. UUNet's chief executive, John Sidgmore, called the cancellations "digital terrorism."

Sidgmore said: "These people are not government agents or the police. They have absolutely no right to cancel service on someone else's infrastructure." In the interim, Sidgmore said he will

pursue "every available legal recourse we have" to stop the action.

Dennis McClain-Furmanaki, a Falls Church, Va., resident who is a spokesman for the group that is trying to eliminate the postings, said: "We're trying to send a message to UUNet. They've been flatly ignoring our complaints. We don't want to punish them or cause them problems. We just want them to stop causing the Net problems."

It is unclear how many Internet users are being affected by the action or even if they are aware that their postings are being canceled. UUNet sells Internet service to other companies, which, in turn, sell the service to consumers with a non-UUNet brand name.

The protest highlights the unregulated and anarchistic nature of the Internet, where a few technically savvy people can have a big impact. Some network users are calling the action a "Usenet death penalty," referring to the section of the Internet that houses electronic bulletin boards where people can post messages for others to read.

Those bulletin boards, like many individual Internet users' mailboxes, increasingly have been filling up with junk postings offering, among other things, pornographic pictures and get-rich-quick schemes. The junk postings almost always are unrelated to the subject of the board, and the volume of those

See UUNET, D2, Col. 1

The Washington Post
Tuesday, August 5, 1997

Protesters Block Thousands of Internet Postings by UUNet Customers

UUNET, From D1

postings has begun to cripple an increasing number of boards, experts say.

A handful of Internet activists have been fighting the ads quietly by sending letters of complaint to the mailer's Internet service provider, asking that the offending account be canceled. Many service providers comply with such requests, because the growing amount of unsolicited commercial traffic is forcing them to buy larger and costlier computers.

Sidgmore said UUNet has tried to go after people originating the commercial postings, but its contracts with the companies that actually sell the service to consumers prevent UUNet from or-

dering that specific accounts be terminated. "They're not technically our customers so there's little we can do," he said.

In the last month, Sidgmore said, UUNet identified 592 junk message authors. The company has notified the firms that resell its service, but some of those users still have not been kicked off the system, he said.

Sidgmore said UUNet decided yesterday to implement technological changes to make it more difficult for users to send out mass Usenet postings and easier to identify offenders.

Protest organizers contend that they are operating within the law. They say they are simply using software programs to identify postings originating at

UUNet, then sending notification of the postings to a special cancellation bulletin board. Technicians at individual Internet service providers monitor that bulletin board and typically cancel any postings they see identified there, though they have the option to let them stand.

The problem of unsolicited electronic mail and bulletin board postings has been receiving more attention from federal regulators. The Federal Trade Commission in June directed computer industry representatives, marketers and privacy advocates to come up with a voluntary system to curb the rising flood of such messages.

At present, more than 1 million junk Usenet postings a week are canceled by

system administrators, said Deborah Howard, chairman of the Internet Service Providers Consortium, an industry organization. Howard said she sympathized with the action against UUNet. "It's a symptom of the extreme frustrations that have been building up for a long time," she said. "It's akin to fighting fire with fire. But now it seems the fire is burning out of control."

Two advocacy groups plan to unveil a Web site today that is intended to help people determine whether a specific junk e-mail message they've received may violate federal regulations. The site, at www.junkemail.org/scamspace, will include information on how to report the message to the FTC.

EXHIBIT 3

Human Errors Block E-Mail, Web Sites in Internet Failure

Garbled Address Files From Va. Firm Blamed

By Rajiv Chandrasekaran
and Elizabeth Corcoran
Washington Post Staff Writers

Traffic on much of the Internet ground to a halt early yesterday after a pair of human errors, an unprecedented glitch at the Herndon company that maintains the Internet's address registry and the accidental severing near Laurel of an important data line.

For much of the day, World Wide Web sites all over the United States were inaccessible and millions of electronic mail messages bounced back to their senders, creating chaos for businesses and individual computer users worldwide. The events added up to one of the largest failures the burgeoning global computer network has suffered.

"A lot of things were broken," said Michael Handler, a network administrator at Erol's Internet, a

network service provider in Springfield. "People couldn't get their mail, they couldn't get on the Web. This was really serious."

Although a small but vocal minority of Internet specialists have been predicting that the network will suffer a catastrophic meltdown because of traffic overload, some computer experts said yesterday's problems were not the result of a flaw in the network's design.

"What occurred . . . wasn't a technical problem," said David Graves, Internet business manager of Network Solutions Inc., the Herndon company that registers Internet addresses. "It was a human problem."

But the event, said some experts, illustrates how dependent the Internet is on one company. Though the Internet was designed with no central control, giving it the ability to reroute traffic if one part of the

See INTERNET, A12, Col. 1

Errant Backhoe Adds to Woes On the Internet

INTERNET, From A1

network goes down, it remains dependent on accurate data from Network Solutions to know where to route it to.

The problems began shortly after midnight yesterday, with the garbling of two huge computer files in which Network Solutions keeps almost a million Internet addresses that end in ".com" and 70,000 that end in ".net."

The files are the equivalent of an electronic White Pages. Information in the files, for example, provides the technical coding necessary to connect a user who types in "<http://www.microsoft.com>" with the Web site for Microsoft Corp.

Every night, the files are shared with about 10 large, Internet-connected computers around the world. Those computers, called "root servers," share the job of sending traffic in the right direction, handling thousands of address requests each second.

Although the garbled files set off an alarm at Network Solutions around 2:30 a.m., the technician on duty nevertheless allowed the files to be sent to the root servers, Graves said. "We don't know what was going through the individual's mind—and we're taking appropriate action," he said, declining to identify the employee.

As soon as the files were sent to the root servers, problems started cropping up for Internet users as automated queries to the servers to find particular sites generated replies saying the sites didn't exist. Users in Europe, where the workday already had begun, were among the first to be affected, officials said.

The problems weren't universal. Addresses ending in suffixes such as .gov and .org generally functioned normally. And efforts to reach .com and .net addresses sometimes succeeded, because most Internet service providers maintain computers that contain address information for Web sites their customers have visited. Providers maintain that information between two hours and two days before deleting it.

If the address data for a particular Web site was still on an Internet provider's computer, users generally didn't have trouble getting to the site. If, however, that information had expired, forcing the Internet provider to query one of the root servers, the user likely received an error message.

Internet users reported difficulties accessing sites for Netscape Communications Corp., Internet search services Yahoo and WebCrawler, Cable News Network and myriad other businesses.

"Almost every Web site was shut down to many users," said Cole Libby, the manager of network engineering at PSINet Inc., a large Internet provider in Herndon.

Network Solutions sent out a corrected file at 6:30 a.m., but it took several hours for operators of the root servers to make use of the new data, officials said. Even then, some Internet users encountered problems because inaccurate data sent from route servers continued to exist on Internet service providers' computers, a problem that could persist until today, experts said.

Among those finding tough going in cyberspace yesterday was Shep Bostin, an Arlington high-tech entrepreneur, who tried to call up a couple of Web sites that he regularly checks at lunch time.

"I couldn't get into CNNfn," he said, referring to CNN's financial news Web site. He said he was forced to look for other sites he could access.

Other human errors helped compound the Internet misery yesterday, particularly for people in the Washington area. At 7:52 a.m., a backhoe cut through a fiber-optic cable belonging to telecommunications carrier WorldCom Inc., just outside of Laurel.

"It is one of our main routes on the Eastern Seaboard, but I'm not sure how many customers would have been affected," said Linda Laughlin, a spokeswoman for WorldCom, which is based in Jackson, Miss. Long-distance telephone calls and Internet traffic had to be rerouted around the broken cable until it was fixed late in the afternoon.

Network Solutions, a subsidiary of privately held Science Applications International Corp., has an exclusive agreement with the National Science Foundation to register addresses that end in .com, .org, .gov, .edu and .net. That deal, which expires next year, has come under fire from some in the Internet industry as an unfair monopoly.

The Department of Justice last month began an antitrust investigation of Network Solutions and the process of assigning Internet addresses.