



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL  
WASHINGTON, D.C. 20555  
March 9, 1994

① BPC Chron  
② LSS

cc: BFB  
IWS

MEMORANDUM FOR: Arnold E. Levin  
Administrator, Licensing Support System

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

SUBJECT: COMMENTS ON MARCH 9 LSSARP-ALTERNATE 3  
DRAFT PAPER

Because of the judicial function that it will perform relative to the licensing of a high-level waste (HLW) repository, the Licensing Board Panel generally has confined its role in the Licensing Support System (LSS) development process to offering comments about procedural matters that impact on the fairness and efficiency of the licensing hearing. Based upon the various drafts of the proposed SECY paper that have been sent to us for review, we offer the following comments:

1. Mechanism 2, "Utilize the Prelicensing Application Presiding Officer in 10 CFR Part 2, Subpart J," would appoint a prelicensing application presiding officer to provide the potential parties to the repository licensing adjudication with a contact point for identifying deficiencies in the "design, development, or operation" of the LSS. We are concerned about how it will be implemented.

The function appears to be nonadjudicatory, the authority to be exercised is undefined, and the task appears to be a typical staff function of making a recommendation to the Commission. This is in contrast to the presiding officer's existing well-defined role as an independent, impartial adjudicator for repository licensing, which is important because it provides all the parties with assurance that the proceeding will be conducted fairly and objectively. We would not want to see this role compromised in any way as a result of the presiding officer's involvement in the nonadjudicatory oversight function that is envisioned in the draft SECY paper.

Consequently, before a presiding officer is assigned this new responsibility, there should be a carefully crafted statement outlining the presiding officer's authority and the nature of the issues the presiding officer can consider.

For example, given the extraordinary requirements of the HLW proceeding, it would seem that a presiding officer in this oversight role could appropriately consider whether LSS design, development, or operation features lend themselves to systematic bias against one or more of the potential parties or contain defects that ultimately would detract from the reliability of the record for the proceeding. Certainly, LSS Advisory Review Panel (LSSARP) input into this statement would be a vital component in avoiding any perception that the presiding officer's judicial role is being compromised by this additional oversight function. The Licensing Board Panel stands ready to provide any assistance needed in preparing such a statement, which should be incorporated in the memorandum of understanding with the Energy Department.

2. During the last internal steering committee meeting, a Licensing Board Panel representative raised a concern about the Commission's June 4, 1993 staff requirements memorandum (SRM) regarding SECY-93-107. The Panel still is particularly concerned about the first numbered paragraph of the SRM which provides:

1. The Commission (with all Commissioners agreeing) has determined that the proposal to require access to the LSS three years before DOE files its application is unnecessarily stringent. The LSS rules should be modified to require access no later than one year before DOE files its application which would provide roughly three years of pre-litigation discovery using the LSS.

As presently constituted, Subpart J calls for completing document discovery well in advance of filing the application for the HLW facility. See 54 Fed. Reg. 14,925, 14,926 (1989). This scheme was intended to accomplish two objectives: 1) clearing the decks for other prehearing and adjudicative functions, and 2) producing sharply focused contentions at the outset of the adjudicatory proceeding. See id. at 14,926, 14,933. The SRM apparently would modify Appendix D to Part 2 to permit document discovery using the LSS for two years into the three-year licensing period.

The Licensing Board Panel believes that this is a significant change in the HLW licensing process that could substantially increase the presiding officer's prehearing burdens and place serious stress on the mandatory schedule set out in Appendix D. The impact of this change has not been discussed in the LSSARP meetings and should be

addressed as early as possible. We would suggest that you make this an agenda item at the meeting and advise the Commission in the SECY paper that it will be a matter for discussion.