



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

August 22, 1988

MEMORANDUM FOR: William G. McDonald, Director
Office of Administration and
Resource Management

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

SUBJECT: ADMINISTRATION OF THE HIGH LEVEL WASTE
MANAGEMENT LICENSING SUPPORT SYSTEM (LSS)

I cannot concur in your August 9, 1988 draft SECY paper analyzing LSS Administrator alternatives and recommending that your office be designated for that purpose. Much as I appreciate your analysis, I am deeply concerned that your recommendation could unnecessarily delay completion of the High Level Waste Management licensing proceeding. To avoid any delay, I am convinced that the ASLBP must be designated Administrator of the LSS.

That designation would not preclude interface with ARM and other Commission offices in relation to other long term NRC programs and goals.

I. Background

The basis for my conviction lies in the nature of the High Level Waste proceeding itself -- the largest, most sensitive, most time constrained proceeding the NRC has ever conducted. Aside from the sheer, unprecedented size of the case and the national issue at stake, the statute mandates a seemingly impossible time frame of 18 months for completing the case (from first filing to initial decision). Even allowing for some subsequent extension of that time frame, we are faced with completing the largest, most technically novel case in NRC (and possibly administrative law) history in a time frame more like that for a license amendment

case.¹ Any delay in the completion of this \$27 to \$32 billion case will have wide-ranging, national consequences.

The LSS was thus conceived:

- (1) to meet statutory time limits for case completion by sharply restricting discovery (the most time consuming element in litigation); and
- (2) to render the extraordinary number of documents that will form the record of the case manageable by the judges who must decide the issues.

ASLBP has closely followed the creation of the LSS from the beginning. We have participated in the standardization of all NRC full text systems, including the HLW Transitional Licensing System (TLSS). We advised OGC in the development of the LSS rule and in the negotiations with the parties in that rule making. Currently, we are consulting with SAIC and Commission offices on the design analysis of the LSS data base. Consequently, we are fully conversant with the objectives and the administrative considerations governing development of the LSS.

To meet statutory time constraints, the HLW case will have to be divided into discrete issues to be heard simultaneously by multiple licensing boards. Thus, the case will have to proceed in parallel litigation segments. Each segment will have to be supported by separate, albeit related, subject matter data bases or a single data base using fields to enhance the accessibility of such discrete subject matter.

Consequently, at this point in planning for the LSS, the data base could be divided into as many as several hundred sub-data bases, all of which are legal in nature. The entire data base will consist of four broad categories of data: (1) Discovery materials; (2) Limited Appearance

¹In Fiscal Year 1987, the average length of time on the docket for operating license cases was 50 months, a 14% decrease over the prior year. "Annual Report of the ASLBP for Fiscal Year 1987," p. ES-2.

Statements and Related Correspondence; (3) the Pre-Adjudicatory Record; and (4) the Adjudicatory Record.

Databases (3) and (4) will be further subdivided, again by subject matter category, into four sub-data bases (Notices, Pleadings, Evidence, and Issuances). Each of the four categories in each subject matter data base will be further subdivided. Those subcategories will number over 25 or 30, including matters such as Motions, Briefs, Replies, Transcripts of various types, Findings of Fact and Conclusions of Law, Exhibits, and a variety of rulings by Licensing and Appeal Boards and the Commission.

Thus, thousands of decisions as to the correct data base entry category will have to be made. Many documents will have to be entered into more than one legal data base field. If a document is entered incorrectly, additional time would be required to search for and correct the entry. Or the erroneous entry may go undiscovered. Consequently, precious time would be lost in deciding the substantive issue at hand, or the issue may be decided incorrectly if the error goes undetected.

II. Location of the LSS Administrator

Rationale

My conviction that ASLBP must be the LSS Administrator is based on the following:

1. Building and Using the Record. Given the severe time constraints in the case and the multiple data bases involved, the LSS must be user friendly to both the parties (the front-end users) and the Boards (the back-end users). To ensure that result, the LSS administrator should be directly associated, physically and organizationally, with the ultimate end-user of the system -- the judges who will be building the record and rendering a decision in the case.

2. Quality Control. Only ASLBP Boards have the authority to determine that each of the 5 million or more documents in the High Level Waste proceeding are entered into the proper legal categories within the LSS. The ASLBP Staff has the requisite level of expertise to insure that

those documents are entered without delay or error. Errors in entry will delay the completion of the case.

3. Flexibility. Because the needs of the LSS will evolve and change with actual use, the LSS Administrator must be directly associated with the judges who are managing the parties, the record, and the proceeding on each subject matter issue, so that necessary reconfigurations can be accomplished in the minimum amount of time to best serve the users' needs and meet statutory time constraints.

4. Qualifications. ASLBP is the only NRC office fully qualified to manage, working closely with the judges, the full text automated litigation system for this case. For example, ASLBP has just hired Dr. Charles Kelber to serve as our Senior Technical Advisor. Dr. Kelber developed codes for Class VI mainframes at Argonne and can bring his extensive experience to bear in the administration of the LSS. Five of the Panel's current staff are certificated in the use of INQUIRE. As far as I know, no one outside ASLBP has completed training in the full scope of that software although it is used by NRC contractors in three current automation projects.

5. Cost and Efficiency. Because of existing resources and experience, ASLBP can act as LSS Administrator at the least cost to the Government with the maximum efficiency.

In short, the LSS is a uniquely legal computer system intended to support a particularly complex legal proceeding having consequences far into the next century. The needs of the case it is being created to support and the judges it is intended to serve must be paramount in designating the LSS Administrator.

III. ASLBP Qualifications

A. Staff Expertise in Automated Litigation Support

ASLBP has been designing and implementing, in house, full text, computer data bases for individual cases since 1983. We have experience in a large mainframe system under our contract with Mead Data and have designed and compiled several large, full text data bases in individual cases for

use on personal computers. We have been consulted for our expertise in full text, litigation data bases by many judges, court systems, other Government agencies, the Public Service Commission of the State of New York, and the Government of Canada.

Currently, we are designing a mainframe system using INQUIRE. INQUIRE, as you know, is the mainframe software used to build the Congressional correspondence systems and the TLSS. INQUIRE is currently used by many legal activities, including the Air Force Legal Services Center (which we have visited and been briefed on) and the Ford Motor Company legal office (which we plan to examine). INQUIRE should be used in the operation of the LSS.

The experience of ASLBP Staff and judges in the creation and use of full text litigation data bases on personal computers will be closely interrelated with the operational use of the LSS. ASLBP judges and staff are fully equipped with personal computers that are being hardwired into the Commission's IBM 9370 mainframe computer.

ASLBP has been accessing and using the NIH mainframe since 1982. ASLBP has been accessing by modem national data bases like LEXIS, WESTLAW, and ABA Net for many years. Thus, we have extensive experience in accessing and using computer data bases via telecommunications.

More importantly, ASLBP has been building and using litigation data bases and has vitally important experience in the work of properly categorizing, in both hard copy and electronic form, pleadings, exhibits, and other legal documents for entry into such data bases. No other Commission office has that depth and quality of experience.

B. Contracting Experience

Much of the LSS work will be performed by contract. A University of Nevada computer may house the data. The system itself will be designed by SAIC under contract with DOE. Consequently, the principal requirement for the LSS Administrator will be for: (1) a qualified contract administrator; and (2) a manager knowledgeable in the day-to-day use of a litigation support system and the proceeding it is intended to serve.

ASLBP has extensive, relevant contracting experience. In 1983, ASLBP contracted with Mead Data to establish a full text data base for the Indian Point proceeding. As will the LSS, that data base remained in use for several years, both by ASLBP and other Commission offices.

In addition, ASLBP has, for a number of years, been managing a contract budgeted at \$600,000 to \$1 million per year for Commission-wide court reporting services (other than the Commissioners themselves) and has routinely used electronic copies of transcripts for entry in our existing litigation support system. As will the LSS, this contract has been used at locations nationwide by Commission offices, EDO offices, and a broad range of private sector organizations.

IV. Other Considerations

Clearly, other offices and other considerations bear on the choice of the LSS Administrator. However, it bears repeating that the purpose of the LSS, and the principal duty of the LSS Administrator is to facilitate an efficient and timely ASLBP decision on the High Level Waste Management license application.

In that context, the primary agency mission in this matter must be kept in mind. It is clear that other agency missions such as automation development and uniformity in docket operations are important. But they can be served by transferring the lessons learned from operating the LSS, rather than subordinating the adjudication of a nationally important issue to the administrative goals of the NRC.

Moreover, ASLBP has the necessary resources in place to administer the LSS. Other agency offices that might serve in this capacity either are thinly manned or have a broad range of other missions and duties. Consequently, SECY and ARM would have to reassign some of those technical and managerial resources to the LSS task, thereby "robbing Peter to pay Paul." ASLBP can perform the LSS Administrator function at least cost and maximum efficiency.

Finally, I believe the Appeal Board Chairman's concern regarding a possible conflict of interest were the ASLBP designated LSS Administrator to be one more of appearance than of fact. In my view, the LSS Administrator should

function much like a specialized clerk of court. Such offices traditionally operate under the supervision of the Chief Judge and make preliminary decisions in entering documents into the record subject to review by the particular judge assigned to the matter. A separate Board for that purpose could be easily constituted.

Designating ASLBP as LSS Administrator could also forestall another potential conflict of interest problem. Section 2.1001, "Definitions," of the proposed LSS rule defines a "party" as, *inter alia*, the NRC Staff. The definition of the LSS Administrator concludes that the NRC organizational unit selected to be the Administrator "shall not be considered to be a party to the proceeding." Those two statements are, at best, an oxymoron, and, at worst, an invitation to conflict of interest litigation if the Administrator is housed in the NRC Staff.

V. Conclusion

The LSS is being created to support a single, first-of-a-kind case which is severely constrained by time and vitally important to national energy policy. The needs of that case must be paramount. Other Commission concerns such as a uniform docketing system and the automation of the Commission's record keeping system must be secondary. However, those needs may be served by consultation and support.

The LSS is inextricably intertwined with the judges and parties. ASLBP can administer the LSS at least cost with maximum efficiency. To house the LSS Administrator in other than the ASLBP is to invite the kind of administrative and quality control delays in the High Level Waste Licensing proceeding that the Commission and the country simply cannot afford.

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