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STATE OF NEVADA

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~~DOCKET NUMBER~~
PROPOSED RULE **PR 2**
(68FR 66372)



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USNRC

January 9, 2004 (3:20PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

January 9, 2004

VIA FACSIMILE

Secretary
U.S. Nuclear Regulatory Commission
Attn: Rulemaking and Adjudications Staff
Washington, D.C. 20555-0001

Re: RIN 3150-AH31
Comments on Proposed Rule, 10 C.F.R. Part 2, Licensing Proceeding for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Submissions to the Electronic Docket, 68 Fed. Reg. 66,372-82, November 26, 2003

Dear Sir:

The following comments on the subject Proposed Rule are being submitted on behalf of the State of Nevada and the Nevada Agency for Nuclear Projects. The Nevada Agency for Nuclear Projects was established by the legislature in 1985, to carry out the State's oversight duties related to the federal high-level nuclear waste program. Commenting on this Proposed Rule is within the Agency's assigned purview.

The Nuclear Regulatory Commission ("NRC") is proposing this amendment to 10 C.F.R. 2 for the purpose, among other things, of clarifying the respective roles and obligations of the United States Department of Energy ("DOE"), the NRC's Licensing Support Network ("LSN") Administrator, as well as other parties and potential parties with respect to the LSN. The LSN is an electronic information management system anticipated to be utilized in connection with a licensing proceeding for the proposed nuclear waste repository at Yucca Mountain, Nevada. As stated in the preamble to the Proposed Rule, "The Licensing Support Network (LSN) provides full text search and retrieval access to the relevant documents of all parties and potential parties to the HLW licensing proceeding in the time period before the U.S. Department of Energy (DOE) license application for the repository is submitted." (68 Fed. Reg. 66,372).

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The evolution of the LSN (originally denominated the "Licensing Support System") is instructive and confirms the intention of NRC from the inception of the program to establish an orderly sequence for the preparation of databases first by DOE, then by NRC, and finally, by Nevada and other parties and potential parties, containing all the documents considered relevant to the licensing proceeding by those parties. This sequence is captured in 10 C.F.R. Section 2.1003(a), which provides that DOE, the party with the burden of proof to establish its entitlement to an NRC license, would be the first to file its LSN database. The section goes on to prescribe deadlines of 30 days after DOE for the NRC, and 90 days after DOE for Nevada and other parties to file their respective LSN databases, all triggered by DOE's certification of its own database.

It is clear from the preamble of NRC's Proposed Rule that the foregoing step-wise approach was carefully calculated to (1) enable the parties to the anticipated proceeding other than DOE to have a reasonable time to review the DOE LSN database before preparing and filing their own and (2) make sure that the filing of all the respective databases was complete substantially prior to the docketing of DOE's License Application. Thus, NRC emphasizes in its preamble that the provisions of 10 C.F.R. 2.1003(a) "require the DOE to make its documentary material available to other potential parties and the public in electric form via the LSN no later than six months in advance of DOE's submission of its License Application to the NRC." (68 Fed. Reg. 66,373). Likewise, NRC made clear its intention that the entire sequence of LSN database filings was (akin to document production before trial in civil litigation) intended to be complete well before the time of DOE's License Application, and was intended to expedite the licensing process by supplanting what otherwise could be lengthy document production initiatives between and among the parties: "The Commission believed that the LSN could facilitate the timely review of DOE's License Application by providing for electronic access to relevant documents via the LSN before the License Application is submitted, rather than the traditional, and potentially time consuming, discovery process associated with the physical production of documents after a license application is submitted. In addition, the Commission believed that early access to these documents in an electronically searchable form would allow for a thorough and comprehensive technical review of the license application by all parties and potential parties to the HLW licensing proceeding, resulting in better focused contentions in the proceeding." (Vol. 68 Fed. Reg. 66,372-73) (emphasis supplied). NRC reiterates this point later in the Proposed Rulemaking, confirming its expectation that the LSN "would provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application. These purposes still obtain." (Vol. 68 Fed. Reg. 66,376) (emphasis supplied).

Given the desired goals of the sequential filing of databases by licensing proceeding participants - to avoid chaos and to ensure orderly preparation for the licensing proceeding by completing document exchange among the parties prior to the docketing of DOE's License Application, Nevada is deeply concerned that the present wording of the Proposed Rulemaking will fail to achieve NRC's goal. Specifically, it is very apparent to Nevada, from public pronouncements by DOE forecasting inclusion of over 40 million pages in its LSN database, and due to the necessary

administrative processing steps required by NRC after receipt of DOE's LSN database in order to render it available and accessible to the other parties, that a period of time, perhaps substantial, will expire after DOE's submission before such availability is achieved. In other words, the date when DOE's LSN database will be available and accessible to the other parties and to the public is not the date on which DOE certifies delivery of its LSN database, but a later date.

Hypothetically, were it to take 25 days from the time of DOE's certification before its database was actually available and accessible, the time period available to Nevada and other non-federal parties to review the enormous DOE database and deliver their own would shrink from 90 days to 65. Even more ominously, the time for the NRC staff itself to meet its filing obligation would shrink from 30 days to 5! Clearly, this result would defeat the clear intention of the sequential database filing timetable articulated by NRC in its Proposed Rulemaking.

Fortunately, the "vice" of this dilemma and its remedy are fairly easy to perceive. Specifically, the risk of compression is occasioned by allowing DOE's certification to be the "trigger" for the deadlines of the other parties, when obviously, the intent of NRC in its rulemaking, clear from both the historical perspective and its preambular statements in this very Proposed Rulemaking, bespeaks a quite different intention -- that NRC and the other parties be guaranteed a reasonable time (30 and 90 days, respectively) to prepare and submit their databases after DOE's is available and accessible.

The solution to avoiding what could be a chaotic result is readily suggested by other provisions of NRC's Rulemaking. Specifically, Section 2.1011(c) provides that the LSN administrator shall have the responsibility to "identify any problems experienced by the participants regarding LSN availability, including the availability of individual participant's data." It is the availability of DOE's database which is critical and not merely its filing date. Likewise, Section 2.1011 defines the LSN administrator as "the person within the U.S. Nuclear Regulatory Commission responsible for coordinating access to and the integrity of data available on the Licensing Support Network." Obviously, it is NRC's LSN administrator who will be uniquely situated to define the point in time when DOE's LSN database is available and accessible to the parties and to the public.

Accordingly, Nevada proposes that NRC change the "trigger" for the filing of LSN databases by parties other than DOE (including NRC itself, as well as Nevada and other parties) to the date on which the NRC's LSN administrator confirms the availability and accessibility of the DOE LSN database -- for this is the true and meaningful starting point which would give vitality to the stated intention of NRC.

Nevada proposes that NRC's LSN administrator provide, both to the public by Federal Register notice and to the director of NRC's Office of Nuclear Materials Safety and Safeguards ("NMSS"), Notice of Acceptance of DOE's LSN database certification, confirming its availability and accessibility to the public and to the parties to the licensing proceeding. It is that event, rather than the mere DOE certification, which would be the critical date, *vis a vis* the preparation by the

other parties of their concomitant LSN databases. Such a scenario would be totally consistent with the stated intentions of NRC that there be an orderly exchange of documents prior to the License Application and the facilitation of focused contentions by the parties. Then, the 30-day and 90-day LSN filing deadlines for the NRC staff and for Nevada and other parties, respectively, set out in Section 2.1003(a) ought be measured from the truly meaningful date – the date DOE's database is available and accessible, as signaled by the NRC LSN administrator's Notice of Acceptance, rather than the date of the DOE's certification. In a related context, 10 C.F.R. 2.1012(a) provides that the NMSS director will not docket the DOE License Application until at least six months have elapsed from the time of the DOE certification. This provision should likewise be changed to provide that the six-month period would be measured from the NRC LSN administrator's Notice of Acceptance.

Significantly, Nevada's proposed language is directly parallel to language already used by the Commission in discussing the accessibility of the License Application itself: "The Director may determine that the tendered application is not acceptable for docketing . . . if the Secretary of the Commission determines that the application cannot be effectively accessed through the Commission's electronic docket system." (10 C.F.R.2.1012(a)). This is consistent with Nevada's suggestion that the docketing of the License Application (and the LSN filing deadlines discussed above) be measured from the actual time of availability and accessibility of DOE's LSN database, rather than from the certification date on which DOE asserts its submission is complete.

Nevada believes that by adopting the following three brief modifications, the Proposed Rulemaking can be rendered entirely consistent with NRC's expressed intent, and can avoid what otherwise promises to become a chaotic pre-License Application document dilemma. Accordingly, Nevada urges adoption of these provisions:

1. Sec. 2.1003 Availability of Material.

(a) the NRC shall make available no later than 30 days after the LSN Administrator's Notice of Acceptance to the Director of NRC's Office of Nuclear Materials Safety and Safeguards of DOE's certification of compliance..., and each other potential party...no later than ninety days after the LSN Administrator's Notice of Acceptance to the Director of NRC's Office of Nuclear Materials Safety and Safeguards of DOE's certification of compliance...

2. In Sec. 2.1011(c), subparagraph (8) should be added, to read as follows:

(8) Issue, and cause to be published in the Federal Register, a Notice of Acceptance to the Director of the NRC's Office of Nuclear Materials Safety and Safeguards when the documentary material included in DOE's initial certification, pursuant to Sec. 2.1009, and all subsequent certifications, is fully accessible to all users and potential users of the Licensing Support Network, within the meaning of this Subpart.

3. In Sec. 2.1012, paragraph (a) should be revised to read as follows:

(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 - *delete*] [N]otwithstanding the provisions of Sec. 2.101(f)(3), the Director of the NRC's Office of Nuclear Materials Safety and Safeguards will not docket the application until at least six months have elapsed from the time of the Federal Register publication of the LSN Administrator's Notice of Acceptance of DOE's initial certification. The Director may determine . . .

Finally, Nevada suggests that an appropriate addition be made to new Section 2.1003(e) in the Proposed Rulemaking, to ensure its consistency with NRC's stated philosophy in regard to the parties' exercise of good faith in the completeness of their submittals. Specifically, subsection (c) to Section 2.1003 in the Proposed Rulemaking addresses the continuing supplementation by the parties of their respective LSN database submissions. In the preamble, the Commission explains that it "still expects all participants to make a good faith effort to include on their LSN document collection servers all of the . . . documentary material that reasonably can be identified by the date specified for initial compliance in Section 2.1003(a) of the Commission's regulations." That observation by the Commission, in turn, is consistent with the basic requirement of its regulation 10 C.F.R. 63.21, which similarly provides that DOE's License Application "must be as complete as possible in light of information that is reasonably available at the time of docketing." Nevada accordingly suggests that in order to effect to this NRC principle, the following sentence be added to 2.1003(e) in the Proposed Rulemaking: "However, the documentary material must be as complete as possible in the light of information that is reasonably available at the time of initial certification."

Nevada urges that each of the changes proposed by Nevada are both consistent with effecting stated NRC policy and intent and necessary to avoid extreme prejudice to Nevada, the NRC staff, and other licensing parties in the preparation and submission of their LSN databases.

Thank you for the opportunity to comment on this Proposed Rule amendment.

Sincerely,



Robert R. Loux
Executive Director