

April 21, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

NRC STAFF MOTION FOR STAY OF APRIL 11, 2011 BOARD ORDER

INTRODUCTION

On April 11, 2011, the Construction Authorization Board (Board) issued an Order directing (1) parties to preserve and submit all Licensing Support Network (LSN) documents in portable document format (PDF) along with associated bibliographic files to the Nuclear Regulatory Commission (NRC) Office of the Secretary (SECY), and (2) SECY to “install the documents and associated bibliographic information into a separate LSN docket library of ADAMS for public access via www.nrc.gov.” Order (Concerning LSNA Memorandum and Parties’ LSN Document Collections), dated April 11, 2011, at 3 (Order) (unpublished). For the reasons set forth below, the Staff requests a stay of the effectiveness of the Order pursuant to 10 C.F.R. § 2.342, or a housekeeping stay pending resolution of the Staff’s request for reconsideration or certification¹ and request for a stay.

DISCUSSION

On this date, the Staff filed a motion for reconsideration of the Order, or in the alternative, petition for certification to the Commission. Reconsideration Motion at 1. The Commission’s regulations provide that neither the filing of a motion nor a petition for certification “stays the proceeding or extends the time for the performance of any act.” 10 C.F.R. § 2.323(g).

¹ NRC Staff Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board’s April 11, 2011 Order, or Petition for Certification, dated April 21, 2011 (Reconsideration Motion).

In order to preserve the status quo until the Board has an opportunity to consider the Reconsideration Motion or the Commission has an opportunity to consider the certification, the Staff respectfully requests a stay of the effectiveness of the provision that all parties submit their LSN document collections to the NRC SECY and that SECY install the documents into a “separate LSN docket library of ADAMS for public access.” Order at 3.

Section 2.342(e) lists four factors for consideration in determining whether to grant a stay: 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits; 2) Whether the party will be irreparably injured unless a stay is granted; 3) Whether the granting of a stay would harm other parties; and 4) Where the public interest lies. 10 C.F.R. § 2.342(e); *see also Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 399 (2008) (“The moving party [requesting a stay] must show that four factors weigh in its favor: ‘likelihood of success on the merits, irreparable harm, absence of harm to others, and the public interest.’”).

Alternatively, a housekeeping stay may be issued to give parties “a sufficient opportunity to respond to the Staff’s pleadings, and to maintain the *status quo* pending . . . review of the Staff’s stay application.” *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), No. 52-034-COL & 52-035-COL (Mar. 30, 2010) (unpublished Commission order); *see also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 60 (1996) (referencing the “customary practice of issuing a short housekeeping stay to facilitate orderly judicial review”).

1. Staff Made a Strong Showing that Reconsideration or Certification is Appropriate

The Staff made a strong showing that compelling circumstances exist that could not have been reasonably anticipated warranting reconsideration. Reconsideration Motion at 5-6. Specifically, the Staff demonstrated that it could not have reasonably anticipated that the Board would act contrary to Commission policy and decisions regarding the LSN. *Id.* at 5. As the LSNA observed, assumptions underlying the Board’s earlier LSN preservation efforts changed

due to potential lack of NRC funding for LSN. See *id.* at 5-6 (citing Memorandum from Daniel J. Graser, Licensing Support Network Administrator (LSNA), to Administrative Judges, dated February 18, 2011 (2011 LSNA Memorandum)). Further, the Board did not seek comments from the parties regarding implications the 2011 LSNA Memorandum as it did for the December 17, 2009, Memorandum from the LSNA to the Administrative Judges (2009 LSNA Memorandum). See *id.* at 6 (*comparing* Order at 3 *with* Order (Concerning LSNA Memorandum), dated December 22, 2009 (unpublished)).

The Staff demonstrated that the Order is contrary to the LSN design and stated purpose because it requires SECY to create and maintain a docket for discovery documents in ADAMS,² resulting in the NRC assuming litigation expenses previously borne by the parties. *Id.* at 8-9. LSN was designed and implemented to put the “responsibility for document conversion, loading, and maintaining and operating on each of the individual parties or potential parties.” *Id.* at 7 (quoting 63 Fed. Reg. at 71,732)). In addition, the Staff demonstrated that the Order imposes significant financial burdens on the NRC without addressing budgetary and administrative issues. *Id.* at 8. For example, actions required to comply with the Order are not currently budgeted and unless the NRC Office of Information Services (OIS) is provided with additional resources, implementing the Order would adversely impact ongoing and planned information technology activities and work schedules. See Affidavit of Thomas M. Boyce Regarding the April 21, 2001 Board Order (Boyce Affidavit) at ¶¶ 1, 6, dated April 20, 2011. Finally, the Staff demonstrated that the Order imposes significant administrative burdens by requiring the NRC to add party discovery documents to an ADAMS library, thereby creating a docket with millions of agency records. Reconsideration Motion at 8. The LSN is, however, a discovery tool and the Commission previously rejected the premise that all discovery documents

² Discovery documents are not routinely part of the adjudicatory record or in the Electronic Hearing Docket unless filed in the proceeding by a party. See 10 C.F.R. §§ 2.302 (providing rules for filing documents in Commission adjudicatory proceedings), 2.303 (explaining that the Secretary maintains the docket and that all documents, records and exhibits filed in a proceeding must be filed with the Secretary).

would be agency records. *Id.* at 8 (quoting 44 Fed. Reg. at 14,936). The Order does not explain why preservation of discovery documents as agency records in an ADAMS library is necessary, and there is no evidence that the parties, particularly DOE, will not preserve their own LSN collections. *Id.* at 9.

In the alternative, the Staff made a strong showing that certification is appropriate because the Order raises significant policy and legal issues, the resolution of which would materially advance the orderly disposition of the proceeding. *Id.* at 9 (citing 10 C.F.R. § 2.341(f)(1)). As discussed above, the Order is contrary to Commission policy and decisions regarding the LSN and would impose substantial records, financial and administrative burdens on the NRC, but does not address these issues or whether there are legal sources of funding to implement the Order. *Id.* at 9. The Staff explained that the Board should receive Commission guidance as to whether the NRC must maintain electronic accessibility of discovery documents in circumstances where uncertainty exists regarding funding and future appropriations. *Id.* at 10. In addition, because the proceeding is ongoing and participants have an ongoing obligation to supplement their LSN collections, resolution of these significant policy and legal issues would advance the orderly disposition of the proceeding. *Id.* (citing 10 C.F.R. § 2.341(f)(1)). Accordingly, as demonstrated in the Reconsideration Motion, the Staff has made a strong showing that reconsideration or certification is appropriate.

2. The Staff will be Irreparably Injured Unless a Stay is Granted

Without a stay of the Order, the Staff and the agency will suffer imminent, irreparable harm because as described below, implementing the Order requires the NRC to incur significant costs, in excess of mere litigation expenses. To satisfy the irreparable injury factor, the moving party must show that irreparable harm is imminent. *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006). The Commission has indicated that “[m]ere litigation expense[s] . . . does not constitute irreparable injury.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-9, 40 NRC 1, 6 (1994) (alteration in

original) (quoting *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984)).

The Order directs the NRC to take costly actions and bear litigation expenses of other litigants by installing, storing and making publicly accessible via the internet millions of documents in an LSN facsimile (*i.e.*, ADAMS library), rendering them official agency records. See Order at 3; see *also* The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference, dated Feb. 4, 2010, at 3 (indicating that DOE had 3.65 million documents in its LSN collection as of February 2010). Compliance with the Order will require the NRC to purchase hardware and software, and to expend significant resources to make the documents publicly accessible. See Boyce Affidavit at ¶¶4-6. Further, these activities are not currently budgeted and unless additional resources are provided, compliance with the Order would have an adverse impact on current and planned information technology activities and work schedules. *Id.* at ¶ 6. Finally, if a stay is not granted, parties could deliver their CDs to SECY before the Board has an opportunity to consider the Staff's request for reconsideration or petition for certification. See Order at 3 (requiring delivery by August 31, 2011). Thus, irreparable injury is imminent for the NRC if a stay is not granted.

3. The Granting of a Stay Will Not Harm Other Parties

For several reasons, a stay of the Order will not harm other parties. First, the LSN is currently operational and participants have a continuing obligation to make their documentary material available via the LSN and to supplement those collections. 10 C.F.R. § 2.1003(a), (e). Second, maintaining the status quo will not harm other parties because LSN participants are currently responsible for operating and maintaining their own document collections via the internet. See 10 C.F.R. §§ 2.1003, 2.1011; 2009 LSNA Memorandum at 1. Third, DOE, the party that has over 98% of the documents accessible in the LSN, has committed to preserve its LSN document collection in a searchable and accessible format until the appeal process is exhausted, and as a Federal agency, is required to preserve its agency records in accordance

with Federal records requirements.³ Finally, a stay would delay the need for some parties to expend funds to comply with the Order. Therefore, a stay will not harm the other parties.

4. The Public Interest Lies in Granting a Stay

The public has a strong interest in conserving government and agency resources. See, e.g., *SL Commc'ns, Inc. v. FCC*, 168 F.3d 1354, 1359 (D.C. Cir. 1999) (referencing the public interest in “conserv[ing] agency resources”); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 963 (D.C. Cir. 1990) (recognizing the public interest in “conserv[ing] agency resources”). A stay of the Order would conserve agency resources and limited Nuclear Waste Funds, and will avoid the NRC incurring significant expenses, estimated up to \$4.0 million in the first year alone. See Boyce Affidavit at ¶ 5. There is no evidence that the LSN participants will not take good faith efforts preserve their LSN collections. In addition, it is contrary to the public interest to require the NRC to assume such significant expenses when DOE, the party with over 98% of the documents available in the LSN, has committed to preserving its LSN document collection until the appeal process is exhausted. Moreover, DOE is obligated to comply with Federal records requirements apart from the Order.⁴ Therefore, it is in the public’s interest to grant the Staff’s request for a stay.

Accordingly, each of the four factors weigh in favor of granting the requested stay.

Request for Housekeeping Stay

If the Board concludes that the stay criteria are not met, the Staff alternatively requests that the Board issue a housekeeping stay of the Order to provide an opportunity for the parties

³ See, e.g., U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) Dated April 21, 2010, dated May 24, 2010, at 21-22, 44, 51 (demonstrating a commitment to preserve its LSN document collection until the appeal process is exhausted); Tr. at 348 (Jan. 27, 2010) (indicating that DOE had 98.9% of the documents retrievable via the LSN in its LSN collection as of January 2010); The Department of Energy’s Answers to the Board’s Questions at the January 27, 2010 Case Management Conference, dated February 4, 2010 (DOE “will preserve and archive its project records . . . in compliance with federal records requirements”).

⁴ See, e.g., U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) dated April 21, 2010, dated May 24, 2010, at 21-22, 44, 51; Tr. at 366 (Jan. 27, 2010).

to respond to, and the Board to consider, the Staff's requests for reconsideration or certification and a stay of the effectiveness of the Order. See, e.g., *Luminant Generation Co., LLC* (Comanche Peak Nuclear Power Plant, Units 3 & 4), No. 52-034-COL & 52-035-COL (Mar. 30, 2010) (unpublished Commission order) (SECY granted a "housekeeping" stay in order "to give Intervenors and the applicant a sufficient opportunity to respond to the Staff's pleadings, and to maintain the *status quo* pending the Commission's review of the Staff's stay application"); see also *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-5, 43 NRC 53, 60 (1996) (referencing the "customary practice of issuing a short housekeeping stay to facilitate orderly judicial review").

CONCLUSION

For the foregoing reasons, the request for a stay pursuant to § 2.342, or in the alternative a housekeeping stay, should be granted.

CERTIFICATION

Pursuant to 10 C.F.R. § 2.323(b), Staff Counsel certifies that it made a sincere effort to contact other parties in the proceeding regarding the issues herein and efforts to resolve the issues have been unsuccessful. Counsel for the State of Nevada, California, Nuclear Energy Institute, Inyo County, Clark County, Nye County, Aiken County, Eureka County, the Prairie Island Indian Community, and Native Community Action Council took no position and each reserved the right to respond. Counsel for the National Association of Regulatory Utilities and South Carolina took no position. Counsel for Florida Public Service Commission, an *amicus curiae*, took no position. Counsel for the U.S. Department of Energy (DOE) does not oppose the motion. The Staff did not receive any other responses.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.304(d)/

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Dated at Rockville, Maryland
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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF MOTION FOR STAY OF APRIL 11, 2011 BOARD ORDER" in the above-captioned proceeding have been served on the following persons this 21st day of April, 2011, by Electronic Information Exchange.

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