

June 20, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 REQUEST FOR STAY OF THE APRIL 11 AND JUNE 9, 2011 BOARD ORDERS

INTRODUCTION

On June 9, 2011, the Construction Authorization Board (Board) issued an order granting in part and denying in part the NRC staff (Staff) request for reconsideration¹ of an April 11 Board order,² which directed (1) parties to submit their Licensing Support Network (LSN) document collections in portable document format (PDF) to the NRC Office of the Secretary (SECY) by August 31, 2011, and (2) SECY to install the documents in a separate LSN docket library of the Agencywide Documents Access and Management System (ADAMS) for public access via www.nrc.gov. See Order (Granting in Part and Denying in Part Reconsideration Motion), dated June 9, 2011, at 3-4 (unpublished) (June Order) (citing April Order at 3-4).

For the reasons set forth below, Staff requests a stay of the effectiveness of the April Order and June Order, pursuant to 10 C.F.R. § 2.342, or, in the alternative, a housekeeping stay pending resolution of Staff's petition for review.³

¹ See 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).

² Order (Concerning LSNA Memorandum and Parties' LSN Document Collections), dated April 11, 2011 at 3 (unpublished) (April Order).

³ See NRC Staff Petition for Review of April 11 and June 9, 2011 Board Orders, dated June 20, 2011 (Petition).

DISCUSSION

A. Applicable Legal Standards

The Commission's regulations provide that the filing of a petition does not "stay[] the proceeding or extend[] the time for the performance of any act." 10 C.F.R. § 2.341(e).

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.'" (quoting *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994))).

Alternatively, the Commission may issue a housekeeping stay to give the parties "a sufficient opportunity to respond to Staff's pleadings, and to maintain the status quo pending . . . review of 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); *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 & 4), No. 52-012-COL & 52-013-COL (Feb. 17, 2010) (unpublished Commission order); *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").

B. A Stay Should be Granted.

As described below, the Commission should grant a stay of the effectiveness of the April Order and June Order because Staff has satisfied the factors for consideration in determining whether to grant a stay. *See* 10 C.F.R. § 2.342(e).

1. Staff Made a Strong Showing that it is Likely to Prevail on the Merits.

In its Petition, Staff made a strong showing that the Commission should exercise its inherent supervisory authority to reverse and remand, or, in the alternative, suspend the effectiveness of rulings requiring delivery of LSN document collections to SECY.

Staff demonstrated that the Board's document preservation efforts are inconsistent with Commission policy because implementation of the April and June Orders would create a central repository of discovery documents to be administrated by the NRC. Petition at 11. The Commission rejected this approach when it revised its discovery rules to create the LSN. *Id.* at 15 (citing Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 29,543, 29,454 (May 31, 2001)).⁴ The LSN was specifically designed "to link geographically dispersed sites rather than relying on a complex and expensive centralized system" and "*place[] responsibility for document conversion, loading, and maintaining and operating a web server on each of the individual parties or potential parties.*" Petition at 11-12 (quoting 66 Fed. Reg. at 29,454; Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository, 63 Fed. Reg. 71,729, 71,732-33 (Dec. 30, 1998) (emphasis added)).

In addition, Staff demonstrated that the Board did not address why LSN document collections must be delivered to SECY for preservation at this juncture considering the uncertainty surrounding this proceeding. Petition at 12-13. As Staff explained, there is no evidence that the parties will fail to preserve their own LSN collections where the proceeding

⁴ The Staff also notes that the order requiring the NRC to take custody of LSN collections as agency records is inconsistent with prior Commission decisions regarding the LSN and the handling of discovery documents in other NRC proceedings. See Petition at 10 (citing Reconsideration Motion at 6-7). Neither 10 C.F.R. Part 2, Subpart J nor the Commission's regulations require SECY to place all applicant and intervenor discovery documents in ADAMS for public access. See 10 C.F.R. §§ 2.1003(a), (e), 2.1011(b); 2.336 (mandatory disclosures).

has not been suspended and the parties have a continuing obligation to supplement and maintain their LSN collections. See *id.* at 9; April Stay at 5 (citing 10 C.F.R. §§ 2.1003, 2.1011, Memorandum from Daniel J. Graser, LSNA, to Administrative Judges, dated December 17, 2009 at 1) (2009 LSNA Memorandum)). In addition, over 98 percent of LSN documents reside at DOE, an agency that has independent records retention obligations under the FRA. Petition at 9.⁵ Requiring the NRC to retain and maintain DOE's LSN documents is an inefficient use of agency resources since DOE has an independent obligation to preserve its own records. See *id.*; see also Reconsideration Motion at 7; *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), LBP-82-81, 16 NRC 1128, 1139 (1982) ("ordinarily parties are to bear their own litigation expense").⁶ Therefore, Staff has made a strong showing that the Board's actions are not consistent with Commission policy and may require significant agency resources previously borne by the parties, and that the Commission should provide guidance as to whether limited agency resources should be expended by the NRC in order to fulfill the Board's preservation goals.

Finally, Staff makes a strong showing that, in the alternative, the Commission should suspend the effectiveness of the Board's rulings requiring delivery of LSN collections to SECY until the Commission is able to determine whether these rulings are warranted. *Id.* at 15. Staff demonstrated that such a suspension is appropriate in order to avoid unnecessary expenditure of funds in light of the uncertainty (pending appeals and congressional funding) surrounding this

⁵ See, e.g., The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference, dated February 4, 2010 (DOE February 4 Answer) (committing to preserve and archive records "in compliance with federal requirements"). Other governmental entities have independent records retention obligations. 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 at 9 n.18 (Reconsideration Motion) (citing County of Inyo's Response to December 22, 2009 ASLB Order Regarding Disposition of LSN Documents, dated January 22, 2010 (stating it would retain LSN documents in accordance with California law)).

⁶ The Statements of Consideration reflect the concern that it may not be permissible for the NRC to maintain electronic availability of participants' documents because the NRC is prohibited from paying intervenors' expenses in licensing proceedings. See Reconsideration Motion at 8 n.15 (citing 63 Fed. Reg. at 71,732) (discussing prohibitions in 5 U.S.C. § 504 on intervenor funding).

proceeding. *Id.* Accordingly, as demonstrated in the Petition, Staff has made a strong showing that the Commission should review and reverse, or alternatively suspend rulings requiring delivery of LSN collections to SECY.

2. Staff Will Be Irreparably Injured Unless a Stay is Granted

As described below, without a stay of the effectiveness of the April Order and June Order, the agency will suffer imminent, irreparable harm. 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) (alternation in original) (quoting *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984)).

Significantly here, counsel for DOE has informed Staff that DOE plans to comply with the Board’s orders and make its first delivery of hard drives by July 7, 2011. See Petition at 12. Once the NRC receives the parties’ LSN document collections, the documents would become NRC records⁷ and SECY will have to start, in good faith, the “administrative, budgetary, and financial processes and procedures necessary [to comply with the Order].” See *id.* at 10 (quoting June Order at 7). If SECY completes the necessary processes and procedures, the NRC would incur substantial administrative and financial costs in order to install and maintain public accessibility of the parties’ LSN document collections in a separate LSN docket library in ADAMS. See *id.* (citing Boyce Affidavit). Specifically, Staff projected that ADAMS system

⁷ The Federal Records Act (FRA) defines “record” as “[a]ll books, papers, maps, photographs, machine readable materials, or other documentary materials, *regardless of physical form or characteristics* made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them” 44 U.S.C. § 3301(a) (emphasis added).

modifications, hardware and software would be needed to install the parties' LSN document collections and make them accessible via www.nrc.gov. *Id.* at 8 n.14 (citing Reconsideration Motion at 8 (citing Boyce Affidavit at ¶¶ 4, 6, 9)). In addition, implementation is expected to cost the agency up to \$4.0 million in the first year and up to \$2.0 million per year in subsequent years to operate and maintain a separate LSN docket library in ADAMS. *Id.* (citing Boyce Affidavit at ¶ 5). Agency costs incurred as a result of maintaining the other parties' records is contrary to Commission policy decisions made in promulgating LSN requirements because it requires the NRC to create and maintain a docket for all LSN discovery documents in ADAMS, and assume litigation expenses previously borne by the parties. *See id.* at 12-14 (citing 66 Fed. Reg. at 29,453-54); *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), LBP-82-81, 16 NRC 1128, 1139 (1982) (stating that parties are to bear their own litigation expense in proceedings before the NRC).

If a stay is not granted, parties could deliver their LSN document collections to SECY before the Commission has an opportunity to consider Staff's Petition and provide guidance to the Board. *See* April Order at 3 (requiring delivery by August 31, 2011, or sooner if large collections will take more than one month to convert to PDF). 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 Orders will not harm other parties. First, the parties have a continuing obligation to make their documentary material available and to supplement those collections. Petition at 11 n.14 (citing 10 C.F.R. § 2.1003(a), (e)). 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(a), (e), 2.1011(b); 2009 LSNA Memorandum at 1. Second, parties, including DOE, the party that has over 98 percent of the documents accessible in the LSN, previously committed to preserve its LSN document collections. *See* Petition at 13 (citing April 2010 Order at Appendix A (noting

all parties, except Staff and DOE, committed to put LSN collections on a CD and provide a copy to the LSNA); Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) Dated April 21, 2010, dated May 24, 2010 at 28-35 (DOE May 24 Answers) (explaining preservation plans for DOE's LSN collection and committing to keep its LSN collection "compliant and accessible.")). Finally, a stay would delay the need for some parties to expend funds to comply with the Orders. 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 would conserve agency resources and limited Nuclear Waste Funds. The Board does not explain why preservation in ADAMS is necessary when there is no evidence that the parties would not engage in good faith efforts preserve their LSN collections and the course of this proceeding is uncertain due to funding and other issues. See Petition at 14, 16, 18. In addition, it is contrary to the public interest to require the NRC to assume the expense of maintaining DOE's LSN collection as agency records when DOE has committed to preserve its documents and is obligated to comply with Federal records requirements apart from the Order. DOE February 4 Answer (committing to preserve and archive records "in compliance with federal requirements"); May 24 Answers at 21-22, 44, 51; Tr. at 366 (Jan. 27, 2010). Therefore, it is in the public's interest to grant Staff's request for a stay.

In sum, Staff makes a strong showing that it is likely to prevail on the merits, the agency will be irreparably injured unless a stay is granted, a stay will not harm the other parties, and the public interest lies in granting a stay in this proceeding. Accordingly, each of the four factors required by 10 C.F.R. § 2.342(e) weighs in favor of granting the requested stay.

C. The Commission Should Issue a Housekeeping Stay

Even if the Commission concludes that the 10 C.F.R. § 2.341 stay criteria are not met, Staff requests that the Commission issue a housekeeping stay, pursuant to § 2.342(f), to provide an opportunity for the parties to respond to, and the Commission to consider, Staff's Petition.⁸ 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 Staff's pleadings, and to maintain the *status quo* pending the Commission's review of 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"). Because issuance of a housekeeping stay will preserve the status quo and facilitate orderly judicial review in this proceeding, the Commission should issue a housekeeping stay.⁹

⁹ Staff counsel contacted other parties in the proceeding regarding the issues herein. Counsel for the State of Nevada, Nuclear Energy Institute, Eureka County, Clark County, California, Inyo County, Lincoln County, White Pine County, Nye County, National Association of Regulatory Utilities, Native Community Action Council and Joint Timbisha Shoshone Tribal Group stated they took no position and reserved the right to respond. Counsel for DOE stated that it did not oppose.

CONCLUSION

For the foregoing reasons, the request for a stay pursuant to 10 C.F.R. § 2.342, or in the alternative a housekeeping stay, should be granted.

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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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF REQUEST FOR STAY OF THE APRIL 11 AND JUNE 9, 2011 BOARD ORDERS" in the above-captioned proceeding have been served on the following persons this 20th day of June, 2011, by Electronic Information Exchange.

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