

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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William C. Ostendorff

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High-Level Waste Repository)

Docket No. 63-001-HLW

CLI-11-13

MEMORANDUM AND ORDER

The Staff has requested that we reverse two related Board orders issued April 11, 2011, and June 9, 2011, directing the parties to submit their Licensing Support Network (LSN) document collections to the NRC for preservation.¹ As discussed below, we deny the Staff's request.

¹ *NRC Staff Petition for the Commission to Exercise its Inherent Supervisory Authority to Review April 11 and June 9, 2011 Board Orders* (June 20, 2011). See Order (Concerning LSNA Memorandum and Parties' LSN Document Collections) (Apr. 11, 2011) (April 11 Order) (unpublished); Order (Granting in Part and Denying in Part Reconsideration Motion) (June 9, 2011) (June 9 Order) (unpublished). Nye County, Nevada, opposes the Staff's request; the State of Nevada takes no position. See *Nye County, Nevada's Response in Opposition to NRC Staff's June 20, 2011 Petition for Review of Board Orders* (June 30, 2011); *State of Nevada Answer to NRC Staff Petition for the Commission to Exercise its Inherent Supervisory Authority to Review April 11 and June 9, 2011 Board Orders* (June 30, 2011).

On February 18, 2011, the LSN Administrator notified Construction Authorization Board 04 that the funding to support the LSN would likely end by the close of fiscal year 2011.² In response, on April 11, 2011, the Board directed the parties to submit their LSN document collections to the NRC's Office of the Secretary by August 31, 2011. The Board further directed the Office of the Secretary to install the documents in a separate LSN docket library in the Agencywide Documents Access and Management System (ADAMS) for public access via the agency's website.³

The Staff requested reconsideration, arguing that the Board's order conflicts with policy decisions the Commission made when enacting the rules that created the LSN.⁴ The Staff argued that, in creating the LSN, the Commission specifically rejected a centralized system,⁵ and argued that the order imposed "significant financial burdens on the NRC without addressing budgetary and administrative issues."⁶

In response to the Staff's Reconsideration Motion, the Board modified its order on June 9, 2011, to relieve the Staff from the obligation to provide its document collection to the

² The LSN Administrator subsequently advised the Board that the LSN components operated by the Atomic Safety and Licensing Board Panel would cease operations on or about August 5, 2011. See Memorandum from Daniel J. Graser, LSN Administrator, to the Administrative Judges, "Shutdown of the Licensing Support Network" (July 26, 2011). The Board, in turn, provided additional direction to the LSN Administrator, the Secretary, and the parties based on this notification. See Order (Concerning LSNA July 26, 2011 Memorandum) (July 28, 2011) (unpublished) (July 28 Order). The LSN system is now shut down due to lack of funds.

³ April 11 Order at 3.

⁴ 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* (Apr. 21, 2011) (Reconsideration Motion), at 5.

⁵ See *id.* at 7-8 (citing Licensing Proceedings for Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites, 66 Fed. Reg. 26,453-54 (May 31, 2001)).

⁶ *Id.* at 7.

Secretary, because the Staff's collection already is available on ADAMS.⁷ The Board denied the remainder of Staff's request. The Board observed that it expected the Secretary to comply only to the extent that funds were available to do so.⁸ The Board further pointed out that, while it had directed the parties to make their documents available to the Secretary by August 31, 2011 (one month before the then-anticipated shutdown of the LSN), it did not require the Secretary to make the documents available in ADAMS by any particular date. The Board reasoned that "[t]he April 11 order imposes no deadline on the Secretary and requires no actions for which funding is not available."⁹

As the Staff recognizes, the particular NRC rules governing this high-level waste proceeding do not contemplate the kind of interlocutory review that the Staff seeks.¹⁰ As we observed earlier in this proceeding, the rule in question, 10 C.F.R. § 2.1015, provides for review only in the limited circumstances prescribed by the rule itself.¹¹ Those circumstances are not present here; we therefore decline to consider the Staff's request.

In any event, however, were the appeal properly before us, the Board's handling of this matter has been reasonable, and we would not be inclined to disturb the challenged decisions as a matter of discretion.

The LSN was indeed intended to be primarily a discovery tool, enabling parties to quickly view materials generated by the others without the time delays associated with traditional

⁷ See June 9 Order at 6.

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ See 10 C.F.R. § 2.1015.

¹¹ See CLI-10-10, 71 NRC 281, 283 (2010). The Staff asks that we invoke our inherent supervisory authority over adjudications. We disfavor such requests. See, e.g., CLI-10-13, 71 NRC ___ (Sept. 10, 2010) (slip op. at 3 n.6) (citing *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 138 (2009)).

discovery. Among the considerations the Commission stated in establishing the LSN was to “allow full text search and retrieval access to the relevant documents for all parties and potential parties to the HLW repository licensing proceeding.”¹² A readily available search and retrieval function is now lost, since the LSN has been discontinued.

Aside from the Staff (who has been relieved of its obligations under the April 11 Order), the record reflects that no party has objected to the Board’s direction regarding preservation of the LSN collection. Notably, DOE, whose documents make up 98.8 percent of the LSN collection,¹³ has complied with the Board’s April 11 Order.¹⁴ And all other participants (save the

¹² 66 Fed. Reg. at 29,453.

¹³ See Memorandum from Daniel J. Graser, LSN Administrator, to the Administrative Judges, “Issues Regarding Funding for Continued Operation of the Licensing Support Network” (Dec. 17, 2009).

¹⁴ DOE requested relief from certain technical criteria associated with submittal of its LSN collection, which the Board granted. See *U.S. Department of Energy’s Motion for Clarification and Status Report Regarding the Board’s Order Dated April 11, 2011* (Apr. 21, 2011); Order (Granting DOE’s Motion for Clarification) (May 13, 2011) (unpublished). DOE subsequently transmitted its LSN document collection to the Office of the Secretary in four installments. See *The Department of Energy’s Notice of Submission of LSN Document Collection* (Aug. 31, 2011).

On June 10, the Board directed the parties to make good faith efforts to access LSN documents relevant to the depositions of certain previously-identified “Phase I” witnesses, specifically directing DOE, Nevada, and other parties wishing to participate in those depositions to endeavor to identify and obtain documents from the LSN that they might wish to use in deposing those witnesses. The Board directed the parties defending those depositions to make efforts to identify and obtain LSN documents that must be indexed for the benefit of other parties pursuant to 10 C.F.R. § 2.1019(i), and to circulate those indices “as soon as practicable.” See Order (Regarding Use of the LSN) (June 10, 2011) (unpublished). DOE moved for reconsideration of the Board’s June 10 Order and sought rescission of the indexing requirement, noting, among other things, that it planned to provide Nevada with a copy of its public LSN collection, and make available to other parties copies of that collection upon request. See *U.S. Department of Energy’s Motion for Leave to File Motion for Reconsideration of June 10, 2011 CAB Order* (June 20, 2011), at 2. Nevada supported DOE’s request, also noting “the intent of the parties to make their LSN collections available to each other . . .” See *State of Nevada Answer to DOE Motion for Leave to File Motion for Reconsideration of June 10, 2011 CAB Order* (June 30, 2011), at 6. The Board granted DOE’s motion following receipt of an agreement between DOE and Nevada that memorialized their plan to exchange document collections, and in which DOE represents that it will make available its LSN collection to the other parties upon request, at a reasonable cost. See Order (Granting DOE’s Partial Reconsideration Motion) (July 18, 2011) (unpublished). See generally *Department of Energy’s* (continued . . .)

Staff, whose LSN collection as noted above, already is on ADAMS) have transmitted their LSN collections to the Secretary.¹⁵ Further, DOE and other parties have committed to maintain their

and State of Nevada's Joint Response to July 7, 2011 CAB Order (July 12, 2011). Given that the Secretary is not bound to create the new stand-alone LSN database by a particular time, this agreement (and any similar exchanges of information among the parties) might facilitate Phase I discovery if that becomes necessary or appropriate. We note that the Board provided additional case management direction to facilitate access to LSN documents. See generally July 28 Order.

¹⁵ See generally *Notice of NARUC Submission of LSN Documents to the Secretary as per the April 11, 2011 Construction Authorization Board Order* (Aug. 9, 2011); *Aiken County's Notice of Submission of Licensing Support Network Documents* (Aug. 12, 2011); *Notice of the State of Nevada's Submission of LSN Documents to the Secretary per the April 11, 2011 CAB Order* (Aug. 15, 2011); *Notice of Joint Timbisha Shoshone Tribal Group's Submission of Licensing Support Documents* (Aug. 18, 2011); *Notice of Clark County, Nevada Submission of Licensing Support Network Documents to the Secretary per the April 11, 2011 Construction Authorization Board Order* (Aug. 19, 2011); *Nye County Notice of Submission of LSN Documents* (Aug. 19, 2011); *Nuclear Energy Institute Notice of Submission of LSN Documents to the Secretary in Accordance with the April 11, 2011 Construction Authorization Board Order* (Aug. 19, 2011); *State of South Carolina Notice of Submission of LSN Documents* (Aug. 23, 2011); *Notice of the County of Inyo's Submission of LSN Documents to the Secretary per the April 11, 2011 CAB Order* (Aug. 23, 2011); *White Pine County Certification of Accuracy and Completeness of Licensing Support Network Document Collection Submission* (Aug. 23, 2011); *Eureka County's Notice Regarding Submission of LSN Document Collection* (Aug. 24, 2011); *Notice of Prairie Island Indian Community (PIIC) Submission of LSN Documents to the Secretary in Accordance with the April 11, 2011 Construction Authorization Board Order* (Aug. 24, 2011); *Notice of Lincoln County, Nevada Submission of Licensing Support Network Documents to the Secretary per the April 11, 2011 Construction Authorization Board Order* (Aug. 26, 2011); *The California Energy Commission's Notice of Submission of LSN Document Collection* (Aug. 26, 2011); *State of Washington Notice of Submission of Licensing Support Network Documents* (Aug. 29, 2011); *Florida Public Service Commission Response to Requirements of April 11, 2011, Order Regarding LSN Documents* (Aug. 30, 2011); *Native Community Action Council's Notice of Submission of Licensing Support Network Documents to the Secretary per the April 11, 2011 CAB Order* (Aug. 30, 2011); *Four Nevada Counties' Notice of Submission of Licensing Support Network Documents to the Secretary per the April 11, 2011 CAB Order* (Aug. 31, 2011). See also Memorandum from Daniel J. Graser, LSN Administrator, to the Administrative Judges, "CD Submission of LSN Accession Numbers/Participant Access Numbers and Transmittal of DOE License Application Supporting Documents Identifiers" (Aug. 8, 2011) (notifying the Board that the LSN Administrator had provided to the Secretary (and to the parties, if requested), a compact disk containing the full list of LSN Accession Numbers and corresponding Participant Accession Numbers as of August 5, 2011, and attaching a "finding tool" containing information for the 196 primary references to the construction authorization application); Order (Concerning Preservation of Certain LSN Documents) (Sept. 16, 2011) (unpublished) (directing the LSN Administrator to submit to the Secretary redacted Employee Concern Program Documents, and directing each party to retain all documentary material in its possession represented in the LSN only by bibliographic header information).

LSN document collections for the duration of this proceeding.¹⁶ That the Secretary is storing these materials until funding to develop and operate an LSN document library in ADAMS becomes available does not relieve the parties of their commitments.

Consistent with our direction, the Board has suspended this proceeding.¹⁷ Given the lack of budgeted funds, the LSN has been shut down,¹⁸ and the Board has taken reasonable measures to ensure that documents necessary for the proceeding are maintained in a format easily accessible to all parties. We generally defer to the Board on case management issues,¹⁹ an approach we have followed in this proceeding.²⁰

We would find no reason to depart from that approach here. The Board has made a pragmatic decision, in order to provide for a smooth resumption of discovery and other activities in the proceeding, should that prove necessary. Insofar as the Board's decisions maintain the

¹⁶ See *U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) Dated April 21, 2010* (May 24, 2010) (DOE May 24 Answers), at 22. See also *id.* at 44, 47; *Order (Questions for Several Parties and LSNA)* (Apr. 21, 2010) (unpublished) at Appendix A, noting that all parties (except the Staff and DOE) had committed to store their LSN collections on a compact disk. Other governmental participants also may be subject to particular records retention obligations. See, e.g., *County of Inyo's Response to December 22, 2009 ASLB Order Regarding Disposition of LSN Documents* (Jan. 22, 2010) (Inyo County would retain LSN documents in accordance with California law). The Department of Energy has independent records retention obligations under the Federal Records Act (the "Federal Records Act" is the common name of a series of statutes that govern the creation, management, and disposal of records by federal agencies. See 44 U.S.C. §§ 2101-18, 2901-09, 3101-07, 3301-24).

¹⁷ See LBP-11-24, 74 NRC ___ (Sept. 30, 2011) (slip op. at 3); CLI-11-7, 74 NRC ___ (Sept. 9, 2011) (slip op. at 1-2). The Staff focuses much of its argument on the Commission's intent at the time the LSN was created. However, the case is now in a posture that was not anticipated at that time.

¹⁸ See *supra* note 2.

¹⁹ *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-28, 72 NRC ___ (Nov. 5, 2010) (slip op. at 2) (citing *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC ___ (July 8, 2010) (slip op.); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-08-7, 67 NRC 187,192 (2008)). See generally 10 C.F.R. § 2.319.

²⁰ See, e.g., CLI-08-14, 67 NRC 402, 406 (2008).

LSN document collection in a searchable, retrievable form that will continue to be of use in the proceeding, as a matter of our discretion, we would decline to disturb those decisions in this unique case.

As discussed above, we *deny* the Staff's request.²¹

IT IS SO ORDERED.²²

For the Commission

[NRC SEAL]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of November, 2011.

²¹ With its petition, the Staff also sought a stay of effectiveness of the April 11 and June 9 Board Orders, pending our consideration of its request. See *NRC Staff Request for Stay of the April 11 and June 9, 2011 Board Orders* (June 20, 2011). Given that the participants have delivered their LSN collections to the Office of the Secretary, the Staff's stay application is denied as moot.

²² The States of Washington and South Carolina, Aiken County, South Carolina, and White Pine County, Nevada sought the recusal or disqualification of Commissioners Apostolakis, Magwood, and Ostendorff from this matter. Commissioner Apostolakis recused himself from the adjudication for reasons unrelated to that request and, therefore, did not participate in this matter. See Notice of Recusal (July 15, 2010). Commissioners Magwood and Ostendorff declined to recuse themselves. See [Commissioner Magwood's] Decision on the Motion of the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada for Recusal/Disqualification (Aug. 11, 2010); [Commissioner Ostendorff's] Decision on the Motion of the State of Washington, the State of South Carolina, Aiken County, South Carolina, and White Pine County, Nevada for Recusal/Disqualification (Aug. 11, 2010).

Chairman Jaczko's separate concurring opinion:

I agree with the outcome of the majority decision, denying the Staff's request that we take review of the Board's rulings. As the decision points out, the parties have committed to maintain their document collections consistent with the direction of the Board.²³ Substantively, the Board lacks the authority to direct the Secretary's administrative activities regarding the handling of documents relating to this proceeding.²⁴ Indeed, the Board acknowledged as much when it observed that the Secretary need not comply with its order if funding is not available.²⁵ These considerations lead me to conclude that Commission review is not warranted and, for that reason, I concur with the majority decision.

²³ See July 28 Order at 1.

²⁴ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 74 (2004).

²⁵ See June 9 Order at 7.

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Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-11-13), (Review of April 11 and June 9, 2011 Board Orders)**, dated November 29, 2011, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
COMMISSION MEMORANDUM AND ORDER (CLI-11-13), (Review of April 11 and June 9, 2011 Orders)

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
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[Original Signed by Linda D. Lewis] _____
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Dated at Rockville, Maryland
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