

April 24, 2001

COMMISSION VOTING RECORD

DECISION ITEM: SECY-01-0039

TITLE: FINAL RULE TO AMEND 10 CFR PART 2,
 SUBPART J, IN REGARD TO THE LICENSING
 SUPPORT NETWORK

The Commission (with all Commissioners agreeing) approved the subject paper as noted in an Affirmation Session and recorded in the Affirmation Session Staff Requirements Memorandum (SRM) of April 24, 2001.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Meserve
 Commissioner Dicus
 Commissioner Diaz
 Commissioner McGaffigan
 Commissioner Merrifield
 OGC
 EDO
 PDR

VOTING SUMMARY - SECY-01-0039

RECORDED VOTES

| | APRVD | DISAPRVD | ABSTAIN | PARTICIP | NOT COMMENTS | DATE |
|------------------|-------|----------|---------|----------|-----------------|---------|
| CHRM. MESERVE | X | | | | X | 3/16/01 |
| COMR. DICUS | X | | | | X | 4/2/01 |
| COMR. DIAZ | X | | | | | 3/16/01 |
| COMR. McGAFFIGAN | X | | | | X | 3/30/01 |
| COMR. MERRIFIELD | X | | | | X | 4/2/01 |

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and some provided additional comments. Subsequently, the comments of the Commission were affirmed the final rule as reflected in the Affirmation Session SRM issued on April 24, 2001.

Commissioner Comments on SECY-01-0039

Chairman Meserve

I approve the final rule to amend 10 CFR Part 2, Subpart J, with the attached minor edits to the draft Federal Register notice. I commend OGC, the ASLBP, and the LSN Administrator for resolving the issue of the timing of initial compliance with the LSN rule.

SECY-01-0039 identifies a compatibility issue associated with the adjudicatory docket and ADAMs concerning single-image and multi-image TIFF images. OGC should keep the Commission informed of the resolution of this and of any other serious compatibility issues that may emerge.

I also certify that the rule, if promulgated, will not have a significant impact on a substantial number of small entities.

Commissioner Dicus

I commend the staff for doing an admirable job of making a highly technical, jargon rich, subject matter relatively understandable for the public. I approve the final rule, subject to one change. NEI, DOE, and the State of Nevada have all agreed that 6 months is an adequate time period for review of DOE documents prior to DOE submittal of a repository application. I believe we should accept the proposed timeframe on which all three of these commenters seem to agree. My approval, therefore, is contingent on changing the final rule to reflect that DOE certification related to document availability must occur 6 months prior to submittal of a repository application.

Commissioner McGaffigan

I vote to approve publication of the Federal Register notice subject to the attached specific marked-up edits and subject to the final rule containing the requirement that DOE certify that it has made all its documents available at least 6 months before “submitting” (i.e. tendering) the application. I agree with the DOE, State of Nevada, and NEI comments that six months before DOE submits its license application appears to be an adequate amount of time for advance availability of DOE documents.

In order to clarify the Commission’s statement in this notice regarding NRC’s interpretation of the word “submission” in section 114(d) of the Nuclear Waste Policy Amendments Act, OGC should add a footnote in the location indicated in the attached mark-up of page 2 of the FRN explaining the Commission’s interpretation and contrasting that usage with the other references in the FRN and the rule to the date DOE “submits” (i.e. “tenders) the license application in compliance with its NWPA requirement under § 114(b). The attached mark-up attempts to remove the word “submission,” where possible, to avoid confusion, but OGC should review the usage of the words “submission” and “submits” in the Statement of Considerations and in the final rule language, to

be sure the terms are used consistently and explained appropriately, or to determine whether another term may be more appropriate to avoid confusion.

Some of the attached edits have attempted to clarify, but OGC should review and confirm, that the “compliance” element in this rule, §2.1012, should state that the Director of NMSS may determine that the application is not acceptable for docketing review (preliminary acceptance review) until 6 months have passed since the DOE certification of availability of DOE documents. (The draft provision referred to acceptability for docketing. However, the decision about docketing the application will not be made at the time the DOE application is received, but instead, that decision would be made after the staff’s acceptance review has been completed: after an additional estimated 60-90 days.) The addition of this concept may require additional explanation in the Statements of Consideration.

Commissioner Merrifield

I approve the staff’s recommendations for final amendments to the Commission’s rules of Practice applicable to the use of the Licensing Support Network (LSN) subject to the following comments. First, I agree with the recommendations of the Department of Energy (DOE), the Nuclear Energy Institute (NEI) and the State of Nevada that the rule should be amended to link the requirement for DOE to make its documents publicly available to the timing of DOE’s submission of its application to the NRC pursuant to the Nuclear Waste Policy Act (NWPA) § 114(b). Second, I agree with DOE’s and NEI’s recommendations and Nevada’s suggested example that the rule require DOE’s documents to be made available six months before DOE must submit its application pursuant to NWPA § 114(b). If there is a proceeding on Yucca Mountain, these entities will have significant stake in its outcome, and will represent a diverse group of stakeholder interests. In such a controversial matter it is not often that the would-be applicant, the industry, and a large public stakeholder agree on a matter. There is no compelling reason I am aware of to disagree with their recommendations.

Third, the Federal Register notice, including the mark up of the final rule, uses the description of “submission of the application” to refer to the timing of two different events. The first use of the phrase refers to the timing of DOE’s submission of its application to the NRC pursuant to NWPA § 114(b). The second use of the phrase refers to the triggering date for the start of the adjudicatory proceeding pursuant to NWPA § 114(d). Obviously, this is very confusing. The Federal Register must be revised throughout to indicate whenever the timing of an activity is linked to “submission of the application,” whether the submission is in accordance with NWPA § 114(b), or NWPA § 114(d). Otherwise, it will be very difficult for parties to the proceeding to understand the timing of certain activities. Similarly, the Federal Register notice should make it clear that the two dates may be different, and that the Commission’s interpretation of “submission” for purposes of NWPA § 114(b) does not attempt to interpret, nor does it affect DOE’s submission requirement pursuant to section 114(d).

Similarly, the Federal Register notice should make it clear that DOE is responsible for meeting both the 6-month LSN rule for making documents available prior to submitting its application pursuant to section 114(b), and its obligation to timely submit its application pursuant to the deadlines set in that section. DOE’s comments on the final rule, regarding its preference for the timing of making its documents publicly available, implies that DOE agrees that LSN deadline is

reasonable and that it will not interfere with DOE's ability to meet its statutory obligations under the NWPA.