

# UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

Title: BRIEFING ON FINAL RULE REGARDING THE HIGH LEVEL  
WASTE MANAGEMENT LICENSING SUPPORT SYSTEM

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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BRIEFING ON FINAL RULE REGARDING THE HIGH LEVEL  
WASTE MANAGEMENT LICENSING SUPPORT SYSTEM

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PUBLIC MEETING

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Nuclear Regulatory Commission  
One White Flint North  
Rockville, Maryland

Tuesday, February 7, 1989

The Commission met in open session, pursuant  
to notice, at 2:00 p.m., the Honorable LANDO W. ZECH,  
JR., Chairman of the Commission, presiding.

COMMISSIONERS PRESENT:

LANDO W. ZECH, JR., Chairman of the Commission  
THOMAS M. ROBERTS, Member of the Commission  
KENNETH M. CARR, Member of the Commission  
KENNETH C. ROGERS, Member of the Commission  
JAMES R. CURTISS, Member of the Commission

1 STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE

2 SAMUEL J. CHILK, Secretary

3 WILLIAM C. PARLER, General Counsel

4 WILLIAM J. OLMSTEAD, NRC Negotiating Representative

5 FRANCIS X. CAMERON, OGC

6 FOR U.S. DEPARTMENT OF ENERGY

7 JEROME SALTZMAN, Deputy Associate Director for

8 Siting and Development, Office of Civilian

9 Radioactive Waste Management

10 BARBARA CERNY, Director of Information Resources

11 Management Division, Office of Programs

12 Administration and Resources Management, OCRWM

13 FOR INDUSTRY COALITION (EDISON ELECTRIC INSTITUTE,

14 UTILITY NUCLEAR WASTE MANAGEMENT GROUP, U.S. COUNCIL

15 ON ENERGY AWARENESS)

16 STEVEN P. KRAFT, Director of Nuclear Waste and

17 Transportation Activities, Edison Electric

18 Institute

19 JAY SILBERG, Shaw, Pittman, Potts and Trowbridge

20 FELIX M. KILLAR, JR., Project Manager, Nuclear Fuel

21 Cycle, USCEA

22 FOR THE STATE OF NEVADA

23 JAMES DAVENPORT

24 MAL MURPHY

25

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1 COALITION OF NEVADA LOCAL GOVERNMENTS (NYE, CLARK,  
2 LINCOLN COUNTIES)

3 DENNIS BECHTEL

4 NATIONAL CONGRESS OF AMERICAN INDIANS

5 DEAN R. TOUSLEY

6 OTHER ATTENDEES

7 HOWARD S. BELLMAN, Facilitator

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P R O C E E D I N G S

(2:00 p.m.)

CHAIRMAN ZECH: Good afternoon, ladies and gentlemen.

Today the Commission is going to be briefed by the NRC staff and a number of other presentations, also, on our negotiated rulemaking for the High-Level Waste Repository Licensing Proceedings. We will hear from other members of the Negotiating Committee, as well.

I welcome all of you here today, and commend each of you for your hard work and careful thought you have given to this rulemaking. This is an information briefing. The Commission will not be voting this afternoon.

The Waste Policy Act of 1982, as amended, allows three years for the Nuclear Regulatory Commission to review the Department of Energy's license application to construct a high-level waste repository. In August of 1987, the Commission recognized that if we are to meet this very tight schedule, we must, among other things, streamline our licensing process. Accordingly, the Commission established a Negotiating Committee to develop a rulemaking to achieve this objective.

Using the product of the committee's deliberations, the Commission published a proposed rule

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1 on November the 3rd, 1988. After considering the public  
2 comments, a proposed final rule has been prepared which  
3 is now before the Commission. This rule is contained in  
4 a Commission paper, SECY-89-027, which is available by  
5 the entry doors to the meeting room this afternoon.

6 The key component of this rulemaking is an  
7 electronic information system known as the Licensing  
8 Support System. This system is intended to permit the  
9 entry of and access to potentially relevant licensing  
10 information as early as possible, before DOE submits its  
11 repository application to the Commission.

12 Among the expected benefits of such a system  
13 are, first, the initial time-consuming discovery process  
14 will be substantially reduced; second, that the DOE and  
15 NRC staffs will be able to quickly identify relevant  
16 documents and issues from among millions of pages of  
17 licensing materials; and, third, that potential parties  
18 to the proceeding will submit earlier and better focused  
19 contentions which, in turn, will save substantial time  
20 during the proceeding.

21 Another part of the rulemaking would revise  
22 certain of the Commission's rules of practice that are  
23 not directly related to the Licensing Support System.  
24 These changes involve modifications to our rules for  
25 discovery, admission of contentions, petitions to

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1 intervene, and other procedural changes designed to  
2 facilitate completion of the repository license review  
3 within the mandatory three-year period.

4 After each presentation by a member of the  
5 Negotiating Committee, I will ask if my fellow  
6 Commissioners have any questions before we hear from the  
7 next presenter.

8 Commissioner Curtiss has asked -- has a number  
9 of question that he would like to pose to the group,  
10 after all of the presentations have been made. And,  
11 therefore, I will ask that a person from each  
12 organization represented here today come to the table  
13 after the last presentation, to respond to Commissioner  
14 Curtiss's questions and, also, to any questions that any  
15 other Commissioners may have at that time.

16 Do any of my fellow Commissioners have any  
17 opening remarks, before we begin?

18 (No response)

19 CHAIRMAN ZECH: If not, Mr. Olmstead, you may  
20 proceed.

21 MR. OLMSTEAD: Thank you, Mr. Chairman,  
22 members of the Commission, and ladies and gentlemen.

23 At the outset I would like to take a moment of  
24 personal privilege to say thank you to the Commission  
25 because, over the past seven years, in the time that we

1 have been working on procedural rules and changes to  
2 streamline the process to meet the statutory three-year  
3 licensing period that is provided in the Waste Policy  
4 Act, I have felt that your support has been with me.

5 It has been in the interest of the country and  
6 the nation at-large that we have undertaken this. And I  
7 have appreciated the fact that in spite of all of the  
8 controversy and acrimony associated with this program,  
9 that we have all shared the common concern of doing  
10 those things that would make it likely that we could  
11 solve this serious problem as expeditiously and as  
12 reasonably as possible, and I appreciate your support,  
13 and I wanted to say thanks.

14 CHAIRMAN ZECH: Thank you for those remarks.

15 MR. OLMSTEAD: Today -- if I could have slide  
16 number one -- (slide) -- we are discussing the final  
17 rule that deals with revision of procedures dealing with  
18 discovery, principally, commonly referred to as the  
19 Licensing Support System, and associated rule changes  
20 related to time in conducting adjudicatory proceedings.

21 On slide number two -- (slide) -- I show the  
22 subjects I would like to cover with you today. I want  
23 to cover the purpose of the rule and the charge that you  
24 gave to the Advisory Committee, give you a little  
25 background of the negotiations and some of the issues

1 that the negotiating team both, within the NRC, covered  
2 and the Advisory Committee, in negotiations, covered,  
3 that discuss some key characteristics of the Licensing  
4 Support Systems; discuss some changes to the procedural  
5 rules that are proposed as a part of this package, and  
6 then react to some of the public comments that have been  
7 received as a result of the proposed rulemaking.

8 If we could go to slide number three.

9 (Slide) I don't think the statutory  
10 background requires me to go into great detail about how  
11 we got where we are. Essentially, after the Nuclear  
12 Waste Policy Act of 1982 was passed, in January of 1983,  
13 John Davis, then Director of NMSS, and I met with Mr.  
14 Morgan, at DOE, who was then the Acting Director of  
15 Civilian Radioactive Waste Management, and there were a  
16 number of things that became abundantly clear to us at  
17 that time.

18 One was that we could expect a great deal of  
19 attrition in the government over the course of time that  
20 we were talking about. That prophecy certainly has  
21 proved to be true. We have had three directors of that  
22 office in DOE, we have had three directors of NMSS here.  
23 We have had a change of three Commissioners on the  
24 Nuclear Regulatory Commission. We have had two division  
25 directors of High-Level Waste Management. And I haven't

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1 counted up all of the different branch chiefs we've had,  
2 both in DOE and at NRC.

3 And one of the concerns that we had at that  
4 time was that what happens to the documentation of the  
5 decision process and the issues that have been cleared?  
6 Are we going to constantly go back and reinvent the  
7 wheel?

8 And, so, one of the things that was abundantly  
9 clear was, we needed to have a method of managing issues  
10 so that people could tell what the issues were, what  
11 decisions had been made, how they were documented, and  
12 whether they were, indeed, closed, or not.

13 The other thing that was clear was that the  
14 adjudicatory processes at the NRC in the reactor  
15 licensing cases had been running three to five years in  
16 length, and they were not consistent with the three-year  
17 licensing process that was outlined in the Nuclear Waste  
18 Policy Act, even if you took account of the additional  
19 fourth year that was allowed if the Commission went back  
20 to the Congress. So, we needed a mechanism to  
21 streamline the process.

22 At about that same time, we had a meeting at  
23 which Commissioner Zech said something -- Commissioner  
24 then, Chairman now -- that struck me. He said, "I don't  
25 want to hear why we can't do it, I want to hear how we

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1 can do it".

2 And, so, the guiding principle to me  
3 throughout all of this time has been to devise a system  
4 that would work, or at least had a chance of working.

5 I am well aware that there are plenty of  
6 things that you can say won't work. And it does take the  
7 dedication on the part of the leadership of this agency,  
8 and the leadership of DOE to make this system work.

9 Well, a DOE/NRC Memorandum of Understanding  
10 was executed by Ben Rusche and John Davis, which set  
11 forth the mechanism for having this negotiated  
12 rulemaking. The Commission approved that, and the things  
13 that we set out to do in that rulemaking were to look at  
14 Part 60, Part 2, and QA/QC requirements and see if we  
15 could come up with a licensing support system that would  
16 serve as the central point for data depository, to meet  
17 the needs of those three aspects of our rules, and that  
18 was what we undertook.

19 And if you turn to slide four -- (slide) -- we  
20 will see that the purpose of the rule was -- and this  
21 was set out in the Commission's notice that constituted  
22 the Advisory Committee and established this process--  
23 to facilitate discovery by comprehensive and easy access  
24 to relevant licensing information.

25 Two, to establish the information base for the

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1 licensing proceeding before the submission of the  
2 application.

3 Three, to facilitate review by all parties, to  
4 the extent practicable, with full text capability -- and  
5 I will speak about the full text a little bit later--  
6 and to reduce the time associated with the submission of  
7 motions and other documents. This latter point was  
8 very important because motion practice in NRC  
9 proceedings today, if you don't do something to expedite  
10 it, allows five days for mail every time a motion is  
11 filed; five days for mail every time somebody responds,  
12 and five days for mail every time the Board serves its  
13 decision.

14 So, every time one piece of paper is filed in  
15 a proceeding, you lose 15 days. One of the things we  
16 wanted to do was knock that time out, and this rule does  
17 that.

18 If I can go to slide number five.

19 (Slide) Following the recommendations of the  
20 Administrative Conference of the United States in 1982,  
21 regarding the use of negotiated rulemaking by agencies,  
22 we established an advisory committee, a federal advisory  
23 committee, headed with a contract to the Conservation  
24 Foundation and with Howard Bellman as the  
25 Convener/Negotiator.

1           The committee originally had far more members  
2           than I have listed there, but in the middle of our  
3           negotiations the 1987 amendments to the Nuclear Waste  
4           Policy Act were passed, and eliminated three of the  
5           states that were then going to be used for site  
6           characterization.

7           Incidentally, this caused a problem in the  
8           negotiations just beyond reconstituting the advisory  
9           committee because Part 60, as you know, is based on the  
10          supposition that you would have site characterization  
11          data from three sites. So, there was some confusion on  
12          everybody's part as to how to go forward in terms of  
13          developing the comparative data necessary to evaluate  
14          the adequacy of the site in Nevada.

15          That is now on a separate track. And Bob  
16          Browning's people are working on those technical  
17          problems.

18          At any rate, we reconstituted in February,  
19          with NRC staff, DOE, Nevada, the Nevada local  
20          governments, the National Congress on American Indians,  
21          the Environmental Coalition, which represented Sierra  
22          Club and the Environmental Defense Fund, NRDC and some  
23          other environmental groups; the Industry Coalition,  
24          which represented the major utilities and contributors  
25          to the Nuclear Waste Fund, and completed our

1 negotiations in July of 1988, which led to the proposed  
2 rule that we have before us.

3 And on slide six -- (slide) -- I have outlined  
4 some of the key issues that we spent a lot of time on in  
5 the negotiations. One of the things that you hear--  
6 and it is an over-simplification, but it is certainly  
7 easy to talk about and horrify people is, 10 million  
8 documents. Nobody can read 10 million documents. That  
9 is certainly true, nobody can. Nobody can manage 10  
10 million documents if it is not done in a systematic way,  
11 either.

12 And the fact that our discovery rules apply a  
13 legal standard which says that you have to produce all  
14 documents that have relevant information in them, and  
15 relevant information is that information which can lead  
16 to the discovery of relevant information. And what is  
17 relevant information? It is that information that tends  
18 to make material information -- namely, that that you  
19 need to decide the issue -- more or less likely.

20 So, that broad definition that courts use  
21 tends, in a nuclear waste policy program, to give you a  
22 large volume of documents because there are literally  
23 thousands of people out there working on the waste  
24 isolation issue, each of them has thousands of documents  
25 in their files, and those are all subject to discovery.

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1 If you give a party to the proceeding time to read all  
2 of those documents, you will be here another hundred  
3 years, while everybody tries to dissimilate that.

4 What the Licensing Support System is designed  
5 to do is to provide a mechanism for compartmentalizing  
6 and narrowing those down for each party, so that they  
7 are dealing with that thousand or so documents that are  
8 most critical to the presentation of their case.

9 And, secondly, to avoid the charge that "I am  
10 surprised by this new piece of information I never saw  
11 before". Because, if you have full text retrieval  
12 capability of that information and you can find it, then  
13 you can't say this new document just came to light, that  
14 I never had an opportunity to review or see before.

15 The system has been very carefully designed to  
16 allow that kind of compartmentalization, so that each  
17 party can take that total database and break it down  
18 into those documents that it thinks is key to its case,  
19 and yet, at the same time, avoid surprise to any other  
20 party, that that party is going to rely on information  
21 that they didn't know about.

22 The other thing, time -- can it be done in  
23 three years? We think it can be done in three years.  
24 We are not so naive as to believe that it will be done  
25 in three years if you don't have strong management of

1 the proceeding by the administrative law judge, or by  
2 the chair of the board or panel that the Commission  
3 might choose to hear the case.

4 Access became another important problem  
5 because even if you put a lot of documents in a system  
6 and you say to people "We have given you the strongest  
7 search software program that we can to access this  
8 information", one of the key issues becomes "How long do  
9 I have to prepare?"

10 And the time is not critical in this  
11 proceeding until the staff's review work is done. Giving  
12 people access to this information 18 to 24 months in  
13 advance of the time they are actually going to need it,  
14 doesn't penalize anybody. It doesn't cost any time.

15 Once the SER comes out, however, time becomes  
16 extremely critical, and you don't want a lot of charges  
17 in the proceeding that "I need more time to review the  
18 documentation".

19 So, one of the things in the negotiations that  
20 was very key was getting access early to as much  
21 documentation as possible, to take away the element of  
22 surprise, to the extent practicable.

23 Cost. Is the cost excessive, when compared to  
24 expected time savings? I have heard a lot of people  
25 say this is an awfully expensive system.

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1 Well, one thing I think you should keep in  
2 mind when you look at the cost analysis is that three-  
3 quarters of the cost predicted by the Department of  
4 Energy is labor, manpower. That cost is associated with  
5 document handling and production, no matter which  
6 alternative you look at. So the hardware/software costs  
7 are really not driving the total costs of document  
8 handling and management in this proceeding.

9 Anybody who undertakes to manage 10 million  
10 documents, no matter what system they have, is going to  
11 be faced with incurring a lot of person-manyear costs in  
12 just managing the documents, bringing them from here to  
13 there; microfiching them, photographing them, scanning  
14 them, whatever you do with them technologically, you've  
15 still got to have these people that you use to manage  
16 the documents.

17 So, one of the things to keep in mind when you  
18 look at a cost analysis is what portion of it is really  
19 hardware/software, and what portion of it is manpower.

20 Well, we resolved those issues to the  
21 satisfaction of the people who were at the negotiating  
22 table, and brought a proposed rule to the Commission,  
23 which you promulgated in accordance with the original  
24 agreement, with the Advisory Committee on November the  
25 3rd, 1988.

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1 If I could go to slide seven.

2 (Slide) That proposal had the following  
3 attributes of the Licensing Support System: The  
4 Licensing Support System contains the relevant documents  
5 of all parties -- and I am going to have something to  
6 say about the topical guidelines because they go beyond  
7 relevance, in some particulars, in a little bit later.

8 All parties would have full text access, which  
9 means that they have a LEXIS/NEXUS type search  
10 capability, where they can use key words to organize the  
11 database in the way that they wish.

12 The system would be available before the  
13 license application was filed. It has the capability of  
14 allowing electronic filing of motions, which means you  
15 eliminate that 15 days for mail and service time that  
16 was in existing Part 2.

17 And it provides for quality assurance/quality  
18 control of data management, and that is a very important  
19 aspect of this. This is a piece of the pie that hasn't  
20 been emphasized too much in our negotiations because it  
21 was on the technical side of the house, and we were  
22 dealing with the procedural side of the house, but you  
23 do have to have a QA/QC documentation trail, and the LSS  
24 provides the capability to do that.

25 If I could have slide eight.

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1           (Slide) You will notice that this matches the  
2 objectives that were in the Notice of the Commission's  
3 original rulemaking that I showed you, a little bit  
4 further. We think the Licensing Support System will  
5 facilitate discovery. It will provide an adequate  
6 information base for the licensing proceeding, prior to  
7 the application. It will facilitate review by all  
8 parties, with full text capability. It will reduce the  
9 time associated with motions practice. And it allows  
10 you, as managers of the program, to early identify  
11 issues that are causing problems and establish a means  
12 for managing them to resolution.

13           If I could go to slide nine.

14           (Slide) There are some other changes to Part  
15 2 that are important to point out. We had a great deal  
16 of discussion in the negotiations about these. One is  
17 there is change to interrogatory practice.  
18 Interrogatories by document discovery would all but be  
19 abolished here, on the grounds that the system provides  
20 that document production.

21           Interrogatories for purposes of admissions  
22 would still be allowed. Deposition discovery would still  
23 be allowed, but we think we have taken a two-year  
24 process and condensed it into a process that can be  
25 accomplished in approximately 90 days.

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1           It also puts a very high threshold for  
2 contentions, higher than any threshold that has ever  
3 been proposed by the Commission before, at the point at  
4 which the SER is issued. We could not get agreement in  
5 the committee to put it at an earlier point, although  
6 the industry representative pushed for putting it in an  
7 earlier point. And several of the participants did not  
8 want it at all, but it is placed in the rule at the  
9 point in time at which time becomes critical, namely, at  
10 the time the SER comes out, you want to be able to  
11 conduct this proceeding in 18 months and get it done.

12           You don't want lots of new issues coming into  
13 the proceeding at that point in time, that are not  
14 manageable, and they would extend the process. That  
15 high threshold is in this rule.

16           It does provide for a change in the immediate  
17 effectiveness review, which you may want to look at  
18 carefully because it impacts your decision, and it does  
19 provide for a different type of appeal procedure.

20           And I would make one final note, and that is  
21 that all of these changes are related to time. We  
22 didn't make other changes to Part 2. In fact, the  
23 Commission noted in its original rulemaking, that it  
24 would continue to consider other changes to Part 2, to  
25 make improvements in the process, and it ought to do

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1 that. Nothing in this rulemaking prejudices your right  
2 to do that. You can even change these rules, at some  
3 future time, if it becomes necessary to do it. All of  
4 those options have been preserved.

5 What are some major issues?

6 (Slide) I have listed two here. One is are  
7 time reductions in the final rule worth the LSS costs?

8 If you do it just in terms of delay, I think  
9 almost everybody says if you, in fact, get this  
10 proceeding done in three years, the cost is worth it.  
11 If you look at it by taking the labor costs out and just  
12 look at the hardware cost comparison, I think you will  
13 find that the cost is even smaller than it first  
14 appears.

15 The topical guidelines is an issue that people  
16 have raised because they are afraid that the topical  
17 guidelines will dictate the issues that are relevant to  
18 NRC licensing.

19 And I wanted to point out that we had some  
20 concern about putting the topical guidelines in, as NRC  
21 staff. We really didn't think it was necessary, but  
22 there are people using the LSS before it gets to the  
23 NRC, for purposes of commenting on DOE's environmental  
24 impact statement, for purposes of reacting to data that  
25 DOE develops, and DOE itself needs the LSS for a number

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1 of purposes unrelated to our licensing process, and the  
2 topical guidelines were an effort to define the universe  
3 of documents, so that the data automation people at DOE  
4 could do what they call "size the system". How much  
5 hardware did they need to buy? How big did the search  
6 engine have to be?

7 And because there were these other things that  
8 needed to be in the LSS, the feeling at the negotiations  
9 were that those things ought to be delineated in  
10 something like the topical guidelines.

11 We have made it clear from the outset that we  
12 would not use those to define admissibility in the NRC  
13 proceeding, and I think that is clear in the proposed  
14 rule.

15 Well, the last thing that I wish to cover for  
16 just a minute -- I think I have covered most of the  
17 concerns that have been raised, but there were some  
18 comments that we got from people that did not  
19 participate in the rulemaking.

20 (Slide) And one set of comments that I would  
21 commend to you, that I think were very thoughtful, were  
22 those filed by Joe Gallo, who formerly had the chief  
23 hearing position in the NRC. And I do agree with his  
24 points, where he points out that this does go to the  
25 major time inhibitors in NRC licensing, but that there

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1 are other changes in Part 2 that you might want to  
2 consider, which would further improve the process.

3 I won't go through and repeat the other  
4 advisory committee responses, since they are here today.  
5 And I think I will be able to respond, in terms of  
6 analysis, at the end of today's briefing to the  
7 Commissioners.

8 CHAIRMAN ZECH: Thank you very much.

9 Questions my fellow Commissioners?

10 Commissioner Roberts?

11 COMMISSIONER ROBERTS: No.

12 CHAIRMAN ZECH: Commissioner Carr?

13 COMMISSIONER CARR: No.

14 CHAIRMAN ZECH: Commissioner Rogers?

15 COMMISSIONER ROGERS: No, I don't.

16 CHAIRMAN ZECH: Commissioner Curtiss, would  
17 you like --

18 COMMISSIONER CURTISS: I have just two or  
19 three quick questions.

20 Bill, you mentioned that the threshold for  
21 contentions that you've established for the admission of  
22 contentions after the filing of the SER, goes beyond  
23 what we have today in the current practice.

24 The question I have, given the nature of the  
25 system and the benefits that it provides to the party--

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1 \$200 million worth of document retrieval and  
2 distribution at a point considerably in advance of when  
3 the proceeding will actually get geared up -- is there a  
4 basis for us to consider, at the outset of the hearing  
5 as opposed to the point in time when the SER is filed,  
6 demanding more in terms of the statement in support of  
7 the contention, and then demanding that an affirmative  
8 case be made in the hearing itself, given the benefit  
9 that the parties have from all of the information that  
10 is available?

11 Traditionally, as you know, we would permit--  
12 have permitted interveners to make the case on cross-  
13 examination. Part of the argument for that is that the  
14 information is not readily accessible and not as easily  
15 as it would be here, first.

16 And, secondly, I must say, in my own view, I  
17 guess the threshold for contentions that applies today  
18 at the outset -- and I guess you can argue whether it is  
19 stringent enough or not -- but the question is, do you  
20 achieve sufficient benefit from this system to be able  
21 to say that that threshold ought to be elevated?

22 MR. OLMSTEAD: In my opinion, you can elevate  
23 the threshold, and I certainly don't object to that  
24 argument.

25 We did change the contention rule, even at

1 that stage, with regard to requiring a party to  
2 designate the rule or rules that they felt was not met.

3 The problem that I had is that if you move  
4 that threshold we now have at the SER stage, up to the  
5 front, we would not have had consensus among the  
6 environmental groups and some of the other participants  
7 at the negotiating table, and they would have clearly  
8 challenged this rule when it was promulgated.

9 Since the time-sensitive point at which those  
10 contentions have to -- that threshold has to be there  
11 was at the point of the SER, that is where it affects  
12 the length of the proceeding. I thought we were better  
13 off taking what we could get than to not address the  
14 issue, but I would certainly agree with you that you can  
15 raise the threshold and you can put it earlier. And you  
16 can justify that on the grounds that there is a high  
17 quality of information available, but I think you do  
18 that in full recognition of the risks that you take in  
19 subsequent litigation on that rule.

20 COMMISSIONER CURTISS: Okay.

21 MR. OLMSTEAD: The advantage of this rule is  
22 that you have people saying that they support you in the  
23 rule and they are not going to litigate it.

24 COMMISSIONER CURTISS: One other quick  
25 question, just on the mechanics of how the pre-licensing

1 phase works. If a party wants to seek access to the LSS  
2 system -- just a hypothetical party comes in the door  
3 and petitions the pre-licensing board for access to the  
4 system and, in that petition, in addition to  
5 establishing the standing that that party has to -- the  
6 interest that that party has in the proceeding, the  
7 party also references one or more topical guidelines as  
8 the basis for the issue and interest, at that point when  
9 the pre-licensing board makes the determination on the  
10 petition to participate in the LSS, is a judgment  
11 rendered as to whether the topic that is referenced is  
12 relevant to the decisions that will arise in the high-  
13 level waste proceeding?

14 MR. OLMSTEAD: It was not our intent to do it  
15 at that point. You certainly could do it at that point.  
16 And it might become necessary to do it at that point, if  
17 you had a high number of petitions, and you had to  
18 consider consolidation under the rules.

19 It would not be my recommendation that you let  
20 a hundred parties in -- and the rules provide for  
21 consolidating parties and interests -- but I think you  
22 make that judgment based on when is it time-sensitive.

23 COMMISSIONER CURTISS: Well, I guess what I am  
24 wondering is how the rule -- how you envision the rule  
25 working as it is drafted now. Would the pre-licensing

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1 board make a judgment on relevancy at the time that a  
2 party comes in to participate in the LSS, or would that  
3 determination be made by the licensing board on the  
4 hearing itself?

5 MR. OLMSTEAD: They would have to make that--  
6 once the application was docketed, the decision on  
7 whether one had a valid contention would have to be  
8 made. And there is no presumption that their  
9 participation in the pre-licensing phase -- no  
10 presumption attaches that would allow them into the  
11 proceeding. They still have to be admitted to the  
12 proceeding on the basis of Part 60 standing.

13 COMMISSIONER CURTISS: But you do take into  
14 account when you make that decision, the fact that a  
15 party was participating -- allowed to participate in the  
16 LSS. Under 1014? --

17 MR. OLMSTEAD: No.

18 COMMISSIONER CURTISS: -- one of the factors  
19 that you look at is whether the party can participate.

20 MR. OLMSTEAD: Well, yes. That is one of the  
21 factors that one might look at, I would agree with that,  
22 but I do not think that that carries a presumption.  
23 Standing is one thing, contentions is the second thing,  
24 and they have got to have the valid contention to get  
25 in.



1           If they had standing to be admitted to the  
2 pre-licensing phase, they should still have standing  
3 when they come in to file their petition for  
4 intervention, but they must at that point also have a  
5 valid interest, as demonstrated by their contention.  
6 And the contention -- the valid contention is the thing  
7 that excludes parties far more frequently than the  
8 standing issue.

9           COMMISSIONER CURTISS: Just one final quick  
10 question. Can you explain, under the rule, how the sua  
11 sponte authority works, and a little bit of detail on  
12 the immediate effectiveness? I am not quite sure I  
13 understood what the change was from the status quo on  
14 that. Does the hearing board have sua sponte authority?

15           MR. OLMSTEAD: I don't believe we changed the  
16 sua sponte rule. I think that that is the same as  
17 existing practice.

18           MR. CAMERON: That's right. That may change  
19 the immediate effectiveness.

20           COMMISSIONER CURTISS: Right. All right.

21           MR. OLMSTEAD: In the immediate  
22 effectiveness, we went back to the provision that the  
23 Commission had in the rules before the latest change.

24           COMMISSIONER CURTISS: Okay, that's all I  
25 have.

1 CHAIRMAN ZECH: Thank you very much. Thank  
2 you very much for an excellent presentation.

3 We will call on the Department of Energy, Mr.  
4 Saltzman and Ms. Cerny, is that correct?

5 Welcome, and you may proceed.

6 MR. SALTZMAN: Good afternoon, Chairman Zech  
7 and members of the Commission.

8 I would like to thank you for inviting DOE to  
9 make this presentation to you today. I am Jerry  
10 Saltzman, the Deputy Associate Director for Facility  
11 Siting and Development, of the Office of Civilian  
12 Radioactive Waste Management.

13 Joining me today is Barbara Cerny, who is the  
14 Director of Information Management -- Resources  
15 Management Division of the Office of Program  
16 Administration and Resources Management for OCRWM.

17 Also with me today is Stan Eckles, from the  
18 DOE's Office of General Counsel.

19 The three of us constituted the negotiating  
20 team for the Department of Energy.

21 The purpose of my presentation today is to  
22 describe the development of the LSS and DOE's role in  
23 the negotiations, leading to the Notice of Proposed  
24 Rulemaking published in the Federal Register on November  
25 3rd, 1988, to amend 10 CFR Part 2.

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1           As you know, negotiated rulemaking resulted in  
2 proposed revisions to the Commission's Rules of Practice  
3 in 10 CFR Part 2 for the adjudicatory proceeding on  
4 repository license applications.

5           DOE fully supports the consensus that was  
6 reached among most of the parties to the negotiation, as  
7 represented in the proposed rulemaking. While DOE, as  
8 well as other parties to the consensus, would have  
9 preferred different courses in some respects than those  
10 finally taken in the proposed rulemaking, it believes  
11 that the consensus reached by most parties is a  
12 reasonable accommodation of all views.

13           DOE places considerable weight on the  
14 statement of the Commission that it is optimistic that  
15 the effective implementation of the LSS rule will allow  
16 the Commission to meet the schedule set forth in Section  
17 114(d) of the Nuclear Waste Policy Act.

18           For a number of years, DOE has been proceeding  
19 with the development of a computerized system to  
20 collect, store and retrieve information needed to  
21 support the licensing of a repository. It was  
22 recognized that DOE would need rapid access to all  
23 information affecting basic program decisions on health  
24 and safety and protection of the environment, including  
25 access to reference material upon which such decisions

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1 were based.

2 To avoid critical path delays in the hearing  
3 process, DOE also recognized that NRC must be given  
4 access to the DOE system, not just for information  
5 retrieval, but for input as well.

6 DOE was considering options that included  
7 access by it alone, by DOE and federal/state regulatory  
8 agencies, access by all parties to the licensing  
9 hearings, access by the public at-large, and suboptions  
10 for selected access among different parties.

11 We were considering full text storage of a  
12 large number of documents, combined with rapid search,  
13 access from diverse geographic locations, and hard-copy  
14 production on terminal locations.

15 DOE and NRC had been participating on an  
16 interagency coordinating committee that met several  
17 times to provide a preliminary evaluation of the major  
18 issues related to the development and implementation of  
19 the LSS. States and Indian tribes participated in these  
20 sessions, which were open to the public.

21 In December 1986, NRC proposed the formation  
22 of a negotiating committee to develop the proposed rule  
23 and, in August 1987, the Commission announced the  
24 formation of the High-Level Waste Licensing Support  
25 System Advisory Committee, which we call the LSS

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1 Advisory Committee.

2           The Commission identified 14 parties that  
3 could participate, including first and second repository  
4 states and Indian tribes, local governments,  
5 environmental groups, utility representatives, DOE and  
6 the NRC.

7           In commenting on the NRC proposal, DOE  
8 supported the purpose of the negotiation, and was in  
9 general agreement with the preliminary identification of  
10 interests and issues. It called attention to the fact  
11 that it was already well underway in its procurement  
12 action for the LSS design and implementation, and that  
13 it would continue the process in parallel with the  
14 proposed negotiation.

15           It said that it was committed to coordinating  
16 the LSS design with the negotiating proceedings, and to  
17 make any changes that may be required to bring the LSS  
18 into compliance with the final rulemaking.

19           In February 1987, DOE and NRC established an  
20 agreement in principle on the development of the LSS.  
21 This was alluded to by Mr. Olmstead. The agencies  
22 committed to the prompt development of the LSS, with the  
23 objective being to allow NRC to reach a decision on the  
24 construction authorization within the time period  
25 specified by Section 114(d) of the NWPA.

1           The agreement supported the NRC negotiated  
2 rulemaking, and the DOE responsibility for designing and  
3 funding the LSS.

4           All parties in the licensing proceedings would  
5 participate fully in the use of the LSS, in the  
6 licensing process.

7           In its opening statement in September 1987, at  
8 the first meeting of the LSS Advisory Committee, DOE  
9 expressed its optimism that a consensus could be  
10 achieved on many, if not all, of the main issues, but  
11 cautioned the committee to be realistic about the  
12 capabilities of the LSS.

13           In response to questions from the State of  
14 Nevada, DOE said that from its perspective, all issues  
15 were negotiable, and that it was not locked into any  
16 position on any issue, including the question of who  
17 would administer the system. DOE stated that nothing in  
18 the LSS procurement precluded the DOE system from  
19 meeting the requirements or guidelines that might be  
20 imposed through the rulemaking, and it restated its  
21 commitment to abide by the results of the rulemaking in  
22 designing the LSS.

23           The LSS Advisory Committee established  
24 detailed procedures for conducting meetings, including a  
25 protocol specifying that the committee would operate by

1 consensus, and stated that a consensus would be reached  
2 only if there was no dissent by any member.

3 It was agreed early in negotiations that  
4 documents to be entered into the LSS would be those that  
5 would have been discoverable through the traditional  
6 discovery processes, including documents that may be  
7 relevant and documents likely to lead to the discovery  
8 of other relevant documents. By making all information  
9 related to the repository available to participants  
10 through the LSS, it was anticipated that the time needed  
11 to complete the initial time-consuming discovery process  
12 would be substantially reduced.

13 The universe of discoverable documents would  
14 be guided by topical guidelines that would be published  
15 in a supplementary information portion of the Federal  
16 Register pertaining to the rule, and in an NRC  
17 regulatory guide.

18 It was always understood, although not  
19 explicitly stated in the topical guidelines, that any  
20 materials to be entered into the LSS within the scope of  
21 the topical guidelines, would have to bear a nexus to  
22 the repository that was subject to the licensing  
23 proceeding. It would be useful to future users of the  
24 topical guidelines, including the pre-license  
25 application board and the hearing licensing board, if

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1 this nexus was made clear in a supplementary information  
2 for the effective rule, and in regulatory guide.

3 The question of who would administer the LSS  
4 was answered relatively early. While DOE expressed its  
5 view that it should and could administer the LSS, it was  
6 clear that many of the other parties to the negotiation  
7 -- for example, the states, the tribes, the  
8 environmental coalition, the NRC -- did not believe that  
9 the applicant, DOE, should administer a system made up  
10 of documents from all of the parties, nor should DOE be  
11 relied on to assure that all of its material had been  
12 submitted.

13 DOE agreed to the proposal that NRC be the  
14 administrator. However, it was stipulated that the LSS  
15 administrator should not be in the line management  
16 function pertaining to the licensing and regulation of  
17 the repository.

18 In March of 1988, the Edison Electric  
19 Institute and the Utility Nuclear Waste Management Group  
20 provided a letter to all parties of the LSS Advisory  
21 Committee that suggested a number of changes to the  
22 Commission's procedures for the repository licensing  
23 process that would enable the Commission to meet the  
24 statutory time table for repository licensing.

25 During the March negotiation, NRC commented

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1 that some of these suggested changes had major policy  
2 implications, and therefore, were outside the range of  
3 the negotiations. This position was strongly supported  
4 by Nevada and the environmental coalition  
5 representatives.

6 DOE stated that more important than changes to  
7 the Commission's procedures would be a rigorous  
8 application of NRC's present procedures for licensing.

9 The LSS Advisory Committee held several  
10 discussions throughout the Spring and Summer of 1988,  
11 concerning these and other proposed changes to the  
12 Commission's licensing procedures.

13 In Sam Russo's presentation to the Commission,  
14 in December, and in DOE's comments in support of the  
15 proposed LSS rule, we pointed out that parties had made  
16 a number of suggested changes to 10 CFR Part 2, that  
17 could assist in streamlining the licensing process, but  
18 that were deferred from the negotiations.

19 DOE continues to support the discussion  
20 outside of this negotiated rulemaking, of those issues  
21 raised during the negotiations that were deemed to be  
22 out of the scope of the negotiations.

23 At this time, I would like to turn to Barbara  
24 Cerny, to make her presentation to the Commission on  
25 matters of cost, schedule and feasibility of the LSS.

1 CHAIRMAN ZECH: Thank you very much.

2 You may proceed.

3 MS. CERNY: Thank you.

4 I will mainly focus on the schedule, the  
5 implementation schedule of the LSS as we see it now.

6 If I could really start with the second slide,  
7 because the first was on cost, and I think Mr. Olmstead  
8 covered that quite thoroughly. I have little to add at  
9 this point. If we could go on to the next.

10 (Slide) The next -- (slide) Thank you.

11 We have passed a major milestone. The LSS was  
12 on President Reagan's List of Presidential Priority  
13 Systems, and these were 17 systems so named because of  
14 their size, their technical complexity and their  
15 national importance, but they were also systems that the  
16 Administration felt needed very close scrutiny in order  
17 to get them properly launched.

18 In President Reagan's Farewell Address on  
19 management issues, he named four systems that had been  
20 graduated from the list, and the Licensing Support  
21 System was one of them.

22 In talking to OMB about this, the Office of  
23 Information and Regulatory Affairs, with whom I have  
24 been working for a year and a half, they said this  
25 represents a vote of confidence on their part, that the

1 system is technically feasible, it is cost-justifiable,  
2 and that the management is in place to implement.

3 The next slide, please.

4 (Slide) The schedule for the LSS -- I will go  
5 very quickly through this. We awarded a contract in  
6 October 1987, for design and implementation, to Science  
7 Applications International. Its initial value was about  
8 \$5.5 million.

9 1988 was what I describe as the information  
10 engineering phase of the LSS, when we did our needs and  
11 requirements analysis, sized the system, did our  
12 conceptual design, our cost-benefit, specified a  
13 prototype that we are putting in place, and it was this  
14 work that led to us graduating from the Presidential  
15 Priority List.

16 In 1989 -- if I could have the next -- (slide)  
17 -- we are beginning the design and initial procurement  
18 phase of this work. We are looking at a prototype  
19 implementation of 200,000 pages of relevant information,  
20 to give us a test set and to answer some questions we  
21 need for technical reasons, and we are specifying the  
22 first module of the procurement, which is the capture  
23 systems that will begin to capture all of the  
24 information from DOE, and then NRC, and the other  
25 parties.

1           We expect to install the first capture station  
2           and begin with our own backlog, to get some experience,  
3           but then, very importantly, begin our work with NRC and  
4           other parties, so that we can standardize our capture  
5           procedures and coordinate the LSS capabilities within  
6           the existing environments of the parties.

7           Next, please.

8           (Slide)   1990 continues procurement and  
9           administration. We will procure a database management  
10          and the remaining capture systems, do our specifications  
11          for the big engine, the search and image system that  
12          will be located in at the University of Nevada, Las  
13          Vegas -- those two parts that will be there -- and then  
14          go through a component review and acceptance by DOE and  
15          NRC, and the other parties.

16          Next, please.

17          (Slide)   Continuing in 1991 with the  
18          procurement, installation and integration, we see the  
19          large system installed in Nevada, all of the software  
20          complete, the telecommunications installed and terminals  
21          installed remotely, where they are necessary.

22          Upon acceptance then, in 1992, we will see the  
23          final system integration, loading of the 4 million pages  
24          of text, and then LSS will be available to outside  
25          users.

1 COMMISSIONER CURTISS: Is that cumulative, the  
2 4 million?

3 MS. CERNY: Cumulative -- that is what is  
4 specified in the SAIC contract that will comprise the  
5 test for acceptance of the LSS. That is not the number  
6 we expect to have by then.

7 COMMISSIONER CURTISS: Okay.

8 MS. CERNY: Next, please.

9 (Slide) By 1993, we expect to have the  
10 majority of backlog data loaded by all of the parties or  
11 potential parties who have applied for standing and, by  
12 1994, certification by NRC, that the LSS is  
13 "substantially loaded", in the words of the -- wording  
14 of the rule.

15 CHAIRMAN ZECH: Thank you very much.

16 Questions, Commissioner Roberts?

17 COMMISSIONER ROBERTS: No.

18 CHAIRMAN ZECH: Commissioner Carr?

19 COMMISSIONER CARR: No.

20 CHAIRMAN ZECH: Commissioner Rogers?

21 COMMISSIONER ROGERS: Well, just -- how is  
22 this supposed to work with respect to documents that are  
23 not -- that can't be fed in, that have some parts -- the  
24 graphics and things of that sort, materials? How--  
25 when will the software be available for installation or

1 introduction of those documents into the system and  
2 qualifications of that part of the system run? What is  
3 the timing for that?

4 MS. CERNY: By 1992, the software for handling  
5 such documents will be available because that is when we  
6 intend to have it -- anticipate having it up.

7 As for the documents themselves and how they  
8 will be handled, it will be either of two ways: that  
9 information which we can scan in and put the image of  
10 the information, such as data capture sheets, will be  
11 out on optical disks and images but, when you go to  
12 search, you will just see a header saying "Such  
13 information is available" and you can get the image.

14 In the case of information such as magnetic  
15 tapes, very large graphs, core samples, there will be  
16 headers in the system naming the location of these  
17 materials, people to contact for them, and the  
18 procedures as to how to go about getting them.

19 COMMISSIONER ROGERS: Well, what, precisely is  
20 the software development that is going to be completed  
21 in 1991? What parts of the software are those?

22 MS. CERNY: You will be able -- in 1992, when  
23 the system is available, you will be able to sit down at  
24 your terminal and call the LSS, and do full text search  
25 over remote telecommunications lines, call up images for

1 browsing at your terminal, if you have such, request  
2 overnight production of documents to be mailed out to  
3 you. Essentially, it will be the completed system at  
4 that point.

5 COMMISSIONER ROGERS: Well, when is the  
6 prototype first looked at?

7 MS. CERNY: The prototype, by summer we will  
8 have the prototype system up and available. And we will  
9 be asking people within the NRC and other parties this  
10 summer --

11 COMMISSIONER ROGERS: This summer?

12 MS. CERNY: Yes, the 200,000 -- at least we  
13 will have 100,000 pages up by then.

14 COMMISSIONER ROGERS: All right. Thank you.

15 CHAIRMAN ZECH: Commissioner Curtiss?

16 COMMISSIONER CURTISS: Your comment letter on  
17 the rule announces a two-year delay in the full access  
18 to the system, the point at which the parties to our  
19 proceeding will have full access to the system.

20 Two questions. Number one, does that affect  
21 the extent to which you can backload the -- load the  
22 backlog documents, or do you intend to load those on the  
23 same pace and have those in the system by 1993 or '4,  
24 whatever the date was?

25 And, two, in your judgment, does the

1 availability of the system in 1993, have any bearing on  
2 the hearing whatsoever?

3 MS. CERNY: The first question, on loading the  
4 documents. The first procurement we are going out with  
5 now is for the capture station. So, as soon as we get  
6 screening procedures in place, we will be able -- and  
7 the capture station installed at the end of the year, we  
8 will be able to start scanning documents.

9 The 1992 -- the operation of the system, that  
10 assumes we have the whole search engine, the computer at  
11 Las Vegas in, but, no, that procurement is separate from  
12 the capture stations, and that's why we are doing it  
13 like that, so that we don't jeopardize the timing.

14 The two-year delay is simply because when the  
15 original RFP was written that SAIC responded to, the  
16 problem just simply wasn't that well understood. That is  
17 part of the answer. The other is this is an ADP  
18 procurement and, when we really sit down to look at the  
19 time involved in ADP procurement, that's what we come  
20 out to.

21 As far as your other question, no, this -- we  
22 believe we can have it loaded by 1994.

23 COMMISSIONER CURTISS: What do you understand  
24 the term "substantially loaded" to mean? What would  
25 that require of you?



1 MS. CERNY: That will be as you people --

2 MR. SALTZMAN: Let me say that we have  
3 received from the State of Nevada, and would be willing  
4 to receive from any of the parties, a list of their  
5 priorities, as to how they would like the material--  
6 the backlog material to be loaded. And we will follow  
7 those priorities, so that we presume this helps them in  
8 preparing for their case, and it would put the least  
9 important subjects to be loaded last. So we think it  
10 should not affect the proceeding at all.

11 COMMISSIONER CURTISS: So "substantially  
12 loaded" doesn't refer to a percentage of the documents.  
13 It may refer to a priority of the issues, as the parties  
14 see them arising in the hearing, so that if ground water  
15 travel time were an early issue in the proceeding, or  
16 the construction of the surface handling facilities, you  
17 would view "substantially loaded" to mean you have all  
18 of the documents -- all of the documents, or a large  
19 percentage of them, in the system for those issues that  
20 will be litigated early?

21 MR. SALTZMAN: Well, the issues -- the matters  
22 that are produced in the course of the work will be  
23 loaded on real-time basis. What we are talking about  
24 here is the backlog.

25 So, yes, we will go -- we will work through

1 our backlog on the basis of the priorities, and the  
2 priorities will be given to us by the other parties.

3 MS. CERNY: But we believe we will have the  
4 backlog loaded, under the present schedule, by 1994, and  
5 be dealing with the current --

6 COMMISSIONER CURTISS: So you will have gone  
7 through all the documents, high and low priority?

8 MS. CERNY: Yes, by then.

9 COMMISSIONER CURTISS: All right. My question  
10 goes to the six-month certification that comes just  
11 prior to the filing of the application where, unless you  
12 have "substantially loaded" the system, the whole  
13 proceeding gets considered under Subpart G, rather than  
14 the Subpart J proceeding.

15 MR. SALTZMAN: Well, it becomes a choice. It  
16 becomes a choice for the DOE as to whether the whole  
17 proceeding is under the other subpart, or whether we  
18 want to delay the application until such time as we can  
19 meet that six-month pocket.

20 COMMISSIONER CURTISS: Right. But what do you  
21 understand the term "substantially loaded" to mean at  
22 that point? What would you envision to be  
23 "substantially loaded", 90 percent, or 100 percent?

24 MS. CERNY: Yes. By that point, we expect to  
25 have the backlog loaded and to be dealing on a real-time

1 basis with the current material, under the current  
2 schedule.

3 The "substantially loaded", to me, has to do  
4 with how we define the screening criteria for materials  
5 that will go into the LSS, based on the topical  
6 guidelines that we are to use. And that is an issue  
7 that we have already started to work with the staff here  
8 on, on what materials -- since the administrator will  
9 have to certify the loading, we want to work with him  
10 from the beginning -- well, with NRC from the beginning,  
11 on how we define the material.

12 COMMISSIONER CURTISS: Just one other quick  
13 question.

14 Jerry, you mentioned that the rule should  
15 explain somewhere in the supplementary information, the  
16 list of topical guidelines is understood to mean topics  
17 that have a nexus to Yucca Mountain.

18 MR. SALTZMAN: That's correct.

19 COMMISSIONER CURTISS: Is that sufficiently  
20 clear in the rule today, as it is written, or in the  
21 supplementary --

22 MR. SALTZMAN: I don't believe it is. I  
23 believe that we understood it that way but, when I go  
24 back through the words, and even through the Minutes, I  
25 can read the Minutes to say that's what is in there, but

1 it is because I expect it to be in there.

2 I think that it could use a little more  
3 clarification in the supplementary information, and  
4 certainly in the regulatory guide, so that anyone can  
5 read it that way from now on, and know that when a  
6 subject is there in the topical guidelines, to be  
7 captured, it is because it has a nexus to the  
8 repository, if it is in Nevada, the repository in  
9 Nevada.

10 COMMISSIONER CURTISS: Stated differently  
11 then, topical guidelines -- documents that are entered  
12 under topical guidelines would have to have a nexus to  
13 Nevada, or the issue would have to be relevant to the  
14 licensing of Yucca Mountain under Part 60?

15 MR. SALTZMAN: That's right.

16 COMMISSIONER CURTISS: That's all I have.

17 CHAIRMAN ZECH: Thank you very much.

18 We will call on the industry group.  
19 Representing Edison Electric Institute, Utility Nuclear  
20 Waste Management Group, and the U.S. Council on Energy  
21 Awareness, Mr. Kraft and Mr. Silberg.

22 MR. KRAFT: And Mr. Killar, from USCEA.

23 CHAIRMAN ZECH: Fine. Thank you.

24 MR. KRAFT: You are welcome.

25 CHAIRMAN ZECH: You may proceed.

1 MR. KRAFT: Thank you.

2 Mr. Chairman, Commissioners, ladies and  
3 gentlemen, good afternoon. My name is Steven Kraft, and  
4 I have the privilege of serving as the Director of  
5 Nuclear Waste and Transportation Activities for the  
6 Edison Electric Institute.

7 With me today are Felix Killar, on my far  
8 left, Project Manager, Nuclear Fuel Cycle for the U.S.  
9 Council for Energy Awareness and, on my immediate left,  
10 Jay Silberg, of the law firm of Shaw, Pittman and Potts  
11 and Trowbridge.

12 The three of us represented the Coalition of  
13 industry groups in the negotiated rulemaking proceeding  
14 on the Licensing Support System. We greatly appreciate  
15 the opportunity to present our views on this important  
16 rulemaking.

17 After actively and in good faith,  
18 participating in the negotiated rulemaking that led up  
19 to the proposed rule before you today, the Industry  
20 Coalition reluctantly concluded that we could not  
21 support the negotiations' final product.

22 As a result, despite what you have heard so  
23 far today, there was no consensus on the proposed rule,  
24 in accordance with the rules that the negotiating  
25 committee had established. Our negative vote on the

1 proposed rule does not mean that we disagree with the  
2 philosophy --

3 CHAIRMAN ZECH: Did you not at anytime agree?

4 MR. KRAFT: I think the best way to say it,  
5 Mr. Chairman, is that at the very beginning we agreed  
6 with the purpose of the negotiation. And every party to  
7 the negotiation held open their option throughout the  
8 course of the negotiation to make a final judgment. And  
9 in the protocols of the committee, there was a statement  
10 that we all agreed to, that allowed us to come to -- I  
11 think it was called "tentative consensus", to permit the  
12 process to go forward, so we could attempt to write the  
13 best rule that we could write.

14 And then at the very end, everyone was  
15 permitted to review the rule in toto, and render one  
16 final judgment.

17 CHAIRMAN ZECH: So you came to tentative  
18 agreement?

19 MR. KRAFT: Yes, we did, throughout the course  
20 of the negotiations.

21 CHAIRMAN ZECH: All right, but you didn't come  
22 to final agreement, is that what you are saying?

23 MR. KRAFT: Yes, sir, correct.

24 CHAIRMAN ZECH: All right, thank you.

25 Proceed.

1 MR. KRAFT: Thank you.

2 This negative vote on the proposed rule did  
3 not mean that we disagreed with the philosophy  
4 underlying the proposal -- that is, the early  
5 availability of all information concerning the proposed  
6 geologic repository in lieu of judicial type discovery.  
7 Indeed, the industry has been publicly urging this  
8 course of action for more than five years.

9 Our concern is that the method being proposed  
10 will be counter-productive. Apart from costing electric  
11 consumers an exorbitant amount of money, the LSS is  
12 likely to make the repository hearing longer, more  
13 complicated and more controversial.

14 Contrary to statements in the SECY paper  
15 before you today, which I greatly appreciate being  
16 permitted to view early, our opposition to the proposed  
17 rule was not based solely on cost considerations.

18 Since the start of the rulemaking process, we  
19 have been pointing out that the system being proposed is  
20 without precedent in judicial and administrative agency  
21 history -- an estimated 40 million pages of documents  
22 instantaneously retrievable in full text and image form.  
23 No litigation support system, or licensing support  
24 system that we have discovered, has attempted anything  
25 approaching the scope of the proposed LSS.

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1           Unfortunately, none of the lawyers for the  
2           staff and DOE involved in the LSS project have had, to  
3           our knowledge, any first-hand experience with a full-  
4           scale litigation support system, or with discovery on  
5           the scale contemplated for the repository licensing  
6           proceeding.

7           We believe that this lack of experience has  
8           allowed them to be seduced by the prospect of a high-  
9           tech solution.

10           We have recently been able to uncover  
11           specifics of some of the recent major litigation support  
12           systems. This has confirmed our fears that the LSS is  
13           stepping off into a new dimension.

14           The Washington Public Power Supply System bond  
15           default case, involving the largest municipal bond  
16           default in history, was one of the truly big cases,  
17           involving more than 600 defendants, five years, legal  
18           fees and expenses for plaintiffs alone exceeding \$150  
19           million, and ultimately, being settled for \$700 million.

20           According to a published estimate, more than  
21           200 million pages were produced during discovery, but  
22           less than one-half of one percent, a very tiny fraction  
23           of these documents, was entered into any kind of  
24           computerized database. None were in full text. About  
25           300,000 documents were entered in the database, none of



1     them in full text, but used a series of descriptors--  
2     the bibliographic headings that are referred to in the  
3     LSS rule.

4             When we asked the attorneys involved in that  
5     litigation why more documents were not entered in full  
6     text, the answer we got was that full text slowed down  
7     the research. An interesting observation by one of the  
8     trial lawyers was that the only common denominator for  
9     these computerized support systems, is that someone will  
10    make a lot of money. And in this case, the source of the  
11    money is the electric consumer.

12            The supply system litigation is not unique.  
13    The AT&T case involved 250 million pages of discovery  
14    documents, none were entered into the litigation system  
15    in full text.

16            The South Texas litigation involved 65 million  
17    pages, none entered in full text.

18            Even in the IBM anti-trust case, one of the  
19    most complicated court cases in history, discovery  
20    documents are entered into the litigation support system  
21    only by descriptors.

22            The asbestos litigation was conducted in the  
23    same manner.

24            It is true that computerized databases exist  
25    that are comparable in size to the predicted LSS, or

1 even larger, but such systems as JURIS and LEXIS bear no  
2 resemblance to the LSS, if only because the LSS will  
3 include an extraordinarily wide range of document types.

4 Commissioner Rogers just asked a question  
5 about that, and it is worth noting that the documents  
6 will include scientific reports, field data, maps,  
7 charts, contracts, letters, legal documents -- a whole  
8 panoply of different formats. JURIS, LEXIS and similar  
9 systems have a highly uniform database that makes both  
10 document entry and retrieval relatively straightforward.

11 The delays that DOE has already been forced to  
12 acknowledge in the creation of the LSS are testimony to  
13 the complexity of the system, and the likelihood that it  
14 will suffer further delays and problems.

15 The three- to four-year window established by  
16 Congress for licensing a repository, creates a very  
17 difficult dilemma for the Commission. The Federal  
18 Register Notice accompanying the proposed rule states  
19 that, "The proposed rule, if implemented, sets in place  
20 a procedure for hearings that will allow the Commission  
21 to reach a decision on the construction authorization",  
22 for the repository within the statutory period.

23 Unfortunately, we are unable to agree with  
24 this rosy prediction. And it is no more than a  
25 prediction. Neither DOE nor NRC have analyzed whether

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1 the LSS will actually result in a three- to four-year  
2 licensing period. We are afraid that the glamor of a  
3 high-tech fix has clouded the vision of the LSS  
4 proponents.

5 I urge that you seriously consider the  
6 alternative to the LSS, which we proposed during the  
7 negotiated rulemaking and in our comment on the proposed  
8 rule. A centralized document repository with a  
9 computerized index of the documents and overnight  
10 delivery of documents to participants is much closer to  
11 the litigation system used in every large-scale  
12 litigation, than is the LSS.

13 Instead of gambling with going beyond the  
14 state-of-the-art, all parties -- NRC, DOE, state and  
15 local governments, environmental groups, utilities and  
16 their consumers -- would be much better served by a  
17 system with a track record -- with a known track record.

18 Having a sophisticated computerized toy paid  
19 for by utility consumers is simply not necessary for the  
20 conduct of repository licensing, anymore than it was a  
21 prerequisite for the conduct of the IBM, AT&T, or supply  
22 system lawsuits.

23 We would urge the Commission not endorse an  
24 untried, unproven and costly system, especially since  
25 that system will likely impose further delay in an

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1     overly delayed program.

2             If the Commission desires to come as close as  
3     possible to conducting the repository hearings in three  
4     to four years -- and it is our judgment that those time  
5     frames are probably not achievable in an adjudicatory  
6     proceeding -- two things, we believe, must be done.

7             First, the NRC must resolve many of the  
8     complex technical issues through generic rulemaking.  
9     Complex issues or methodology are not unique to the  
10    repository program. NRC has frequently dealt with such  
11    issues in the reactor context on a generic basis.  
12    Issues such as ECCS, design, transportation impacts,  
13    fire protection, and station blackout come to mind. A  
14    great many matters can be dealt with in a notice and  
15    comment rulemaking, off the critical path.

16            By promulgating rules covering such issues,  
17    all interested persons can participate, challenge the  
18    results in court should they so desire, and the issue  
19    can be settled well in advance of the adjudicatory  
20    hearing. Those issues are therefore settled by the time  
21    that the licensing hearing starts.

22            We understand that the staff is initiating  
23    efforts along these lines, and we encourage this effort  
24    to continue.

25            The second set of actions that are necessary

1 if the repository proceeding is to approach the three-  
2 to four-year statutory period, involve changes to the  
3 Commission's Rules of Practice, 10 CFR Part 2.

4 At the very first meeting of the negotiating  
5 committee, we raised the question of changes to Part 2.  
6 The NRC staff said that everything was on the table. We  
7 took the staff at its word, and sought to incorporate  
8 the kind of improvements that would help the NRC achieve  
9 the statutory time table.

10 Because these improvements are absent from the  
11 proposed rule before you today, we urge that you take  
12 the necessary steps to assure that the final rule will  
13 include these measures.

14 NRC hearings have traditionally been  
15 characterized by a very informal, and some might say,  
16 undisciplined approach. Licensing boards have often  
17 gone down their own path, rather than that provided by  
18 Part 2. The Commission must assure that the licensing  
19 boards and appeal board, if one is used, for the  
20 repository licensing proceeding, adhere to the NRC's  
21 procedural rules, a statement just made by Mr. Saltzman,  
22 from DOE.

23 Discovery requirements must be modified beyond  
24 those reflected in the proposed rule if an appropriate  
25 balance is to be struck between the benefits conferred

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1 by the LSS and the other discovery mechanisms to remain  
2 in the proposed rule.

3 Where parties have had access to all the  
4 significant records concerning the repository program,  
5 the very broad discovery rights included in the proposed  
6 rule do not represent an appropriate quid pro quo.  
7 Unlimited depositions and a novel concept of informal  
8 discovery which, under the proposed rule, could easily  
9 ripen into formal discovery, would seriously undercut  
10 whatever efficiencies the LSS would achieve.

11 While the proposed rule allows the licensing  
12 board to establish some limits on non-LSS discovery,  
13 past experience with licensing boards does not provide  
14 much confidence to us, that they will exercise their  
15 discretion to control discovery.

16 The Commission should also establish more  
17 sensible standards for the threshold on admitting  
18 contentions, especially late filed ones. NRC practice  
19 has historically been overly generous in admitting  
20 contentions.

21 The recent Ninth Circuit decision demonstrates  
22 the need for better standards, particularly with the  
23 fish bowl approach to information in which the  
24 repository program will function.

25 The Commission should adopt thresholds like

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1 those used by other agencies, such as the FCC.

2 Mr. Chairman, Commissioners, thank you for the  
3 opportunity to present our views on this important  
4 issue. We would be pleased to answer any questions you  
5 might have.

6 CHAIRMAN ZECH: Thank you very much.

7 Questions, Commissioner Roberts?

8 COMMISSIONER ROBERTS: No.

9 CHAIRMAN ZECH: Commissioner Carr?

10 COMMISSIONER CARR: Do you have any data on  
11 the cost of those other litigations that you mentioned  
12 there, on how much it cost them to take care of their  
13 records?

14 MR. SILBERG: Well, we do know in the Supply  
15 System litigation that the total expenses for all the  
16 plaintiffs was \$54 million. That would include  
17 everything. I don't have the precise costs on the  
18 database itself, but it must be some small fraction of  
19 that number.

20 Whenever I have mentioned the cost of the  
21 system to the numbers of consultants and lawyers who  
22 have been involved in these big cases, they, frankly,  
23 have been shocked at the 200 million number. It is  
24 beyond anything that I have heard of from existing  
25 experience.

1 MR. KRAFT: If I could respond a moment on the  
2 cost. We are, as the industry, in general, and our rate  
3 regulators, are appalled at the cost of the entire waste  
4 program. The \$200 million in 1988 dollars that are  
5 being proposed for the LSS, exceeds the cost some  
6 utilities paid for the entire nuclear power plants in  
7 the early 1970s. These are remarkably high numbers.

8 COMMISSIONER CARR: But you don't have any  
9 data on -- that's comparable to the \$200 million --

10 MR. SILBERG: No. I have some breakdown. I  
11 was told, for instance -- I don't have the data here, I  
12 have it back at our --

13 COMMISSIONER CARR: Could you get us a set of  
14 data that would be comparable A to A, and B to B?

15 MR. SILBERG: We can try. The data that I got  
16 was that in one -- in the Supply System litigation, one  
17 of the parties was renting their computer equipment for  
18 -- I believe the figure was \$13,000 a month. They had  
19 had to make a one-time payment for software of 70-odd  
20 thousand dollars. And they were using 15 to 20 people  
21 at about a cost of \$15 an hour, for their indexing and  
22 sorters.

23 COMMISSIONER CARR: And did they have access  
24 to all of the documents?

25 MR. SILBERG: This was the system that had no



1 documents -- none of these systems had any documents in  
2 full text, but they were all being entered into the  
3 computer system by indexing, by head notes.

4 COMMISSIONER CARR: I say, did they have  
5 access to all of the documents?

6 MR. SILBERG: Yes.

7 COMMISSIONER CARR: And how long did it take  
8 them to get the access?

9 MR. SILBERG: Oh, that particular working  
10 group?

11 COMMISSIONER CARR: Yes.

12 MR. SILBERG: I don't know, I haven't asked  
13 that question, but they were trained to find those  
14 documents and get them out to the parties. I would  
15 suspect it didn't take them more than a day.

16 COMMISSIONER CARR: Well, I would appreciate  
17 -- if you could find an equal comparison, wWe would like  
18 those numbers.

19 CHAIRMAN ZECH: Commissioner Rogers?

20 COMMISSIONER ROGERS: I think that is very  
21 important. You've quoted a \$54 million figure, and  
22 also, 200 million documents. I don't know what is a  
23 reasonable number for handling these documents, but it  
24 would seem to me there ought to be some rough measure of  
25 cost of handling a document, in some way. People are

1 paid to mail these things back and forth, to search them  
2 out of files, to do things with them and so on and so  
3 forth. And I think that it is very important that we  
4 understand what is a reasonable cost for dealing with 40  
5 million documents in anyway whatsoever.

6 Do you have a cost for your estimate of your  
7 microfiche system that you are proposing --

8 MR. KRAFT: No, sir, we --

9 COMMISSIONER ROGERS: -- and I am talking  
10 about the total cost now -- I mean, of actual handling  
11 of these documents, which is what is the cost that is  
12 involved with the \$200 million figure, 70 percent of  
13 which is labor, and that is really document handling, to  
14 a very large extent -- putting it in and getting it out,  
15 I take it.

16 And, so, one has to make a cost comparison on  
17 some reasonably comparable basis that includes the labor  
18 of handling those documents and dealing with them. And  
19 I don't have any particular feeling about that, but the  
20 \$40 million and the \$140 million over a 10-year period  
21 for the labor, comes out to a little more than \$3 a  
22 document.

23 Now, I don't know whether that is high or not,  
24 but I know it costs you about \$3 to write a letter.  
25 And, so, you know, what is a reasonable number here?

1 MR. SILBERG: Well, we do know that in the  
2 Supply System, that they were able to handle all of the  
3 expenses for litigation that went on for five years,  
4 involved parties all around the country, of which,  
5 obviously, discovery was only one portion. And that  
6 total cost was one-fourth of what we are now looking at,  
7 just for documents here.

8 COMMISSIONER ROGERS: Well, I guess my  
9 question is whether that really was the full cost --

10 MR. KRAFT: Those were full costs --

11 COMMISSIONER ROGERS: -- or whether there were  
12 other costs that were borne in another way, that didn't  
13 appear in that \$54 million. If you are talking about  
14 200 million documents, and anybody is doing anything  
15 with any of them, it's got to cost some money.

16 MR. SILBERG: Well, one of the things that we  
17 learned in talking to people who have handled these vast  
18 numbers of documents, is that in any big case, when you  
19 are dealing with large numbers of documents, the great  
20 majority of them are of little value in the litigation.  
21 And you can screen them out. And a very important point  
22 that I am afraid has been missed by this system, is any  
23 attempt to screen out documents that are unimportant in  
24 the long run.

25 One of the comments that was referred to--

1 that is included in Mr. Gallo's comment letter, but not  
2 referred to in the SECY papers analysis of that comment,  
3 is the need to reduce the number of documents you are  
4 putting into the system.

5 If you screen the documents carefully, you can  
6 get down to a few hundred thousand that really have some  
7 value in the proceeding. If you don't, and you put  
8 every document in there, you are going to have a system  
9 that won't work because, when you do a key word search,  
10 and even if you make that key word phrase very narrow,  
11 if you've got 200 million pages, or 40 million pages,  
12 you are going to get back so many positives that you  
13 will be totally at-sea.

14 And that's why in a lot of these cases, the  
15 lawyers, even when they had computerized systems, found  
16 that the system that they had just wasn't helping them.  
17 They were getting garbage out because they had put  
18 garbage in. And that's one of the things that we are  
19 very afraid of with this system.

20 COMMISSIONER ROGERS: Well, but with these big  
21 -- large numbers of documents, someone has to make a  
22 decision at some point, whether it is relevant or not,  
23 on every document, to just not use them.

24 MR. SILBERG: The way this system is set up,  
25 every document is going to go into the system.

1 CHAIRMAN ZECH: But the documents that you are  
2 talking about, a smaller number, maybe that satisfies  
3 you, but would it satisfy others that are going to be  
4 parties to this issue? Would they all agree with you,  
5 that you just need this many documents, or would they  
6 want part of those, and maybe some others?

7 MR. SILBERG: All I can say is that in every  
8 other litigation, where people have to bear their own  
9 expenses, people make a decision. And you don't look at  
10 every document to the same degree. You make a  
11 reasonable cut at eliminating those documents which are  
12 unlikely to be worth anything. You take those documents  
13 that are important, and you work on those documents.

14 If you are having a system that, in essence,  
15 is an open checkbook -- if someone else is going to pay  
16 for all of the work -- well, certainly, I want to put  
17 more into the system. And that, unfortunately, the only  
18 party that has to pay for this system are the utilities  
19 and their customers.

20 Nevada won't have to pay for the system. NRC  
21 won't have to pay for the system. DOE won't have to pay  
22 for the system. So, the incentives -- there are no  
23 incentives to reduce the scope.

24 CHAIRMAN ZECH: Well, we all are customers,  
25 aren't we, one way or another?

1 MR. SILBERG: One way or another. And we are  
2 in the position of representing all of the customers.

3 CHAIRMAN ZECH: No, we are, too. And your  
4 point is an important one, but, also, we are involved in  
5 an issue that there are other views, than yours. And it  
6 would seem to me that those views should be considered,  
7 just as your views are considered.

8 MR. SILBERG: And we would hope that the  
9 Commission would do that.

10 CHAIRMAN ZECH: Well, we certainly intend to.

11 COMMISSIONER ROGERS: Do you believe that your  
12 microfiche system that you proposed would be able to  
13 result in meeting the three-year licensing period?

14 MR. KRAFT: No LSS system will do that, in and  
15 of itself, Commissioner Rogers. That's why we focused  
16 on the need for changes to Part 2 procedures.

17 COMMISSIONER ROGERS: All right.

18 CHAIRMAN ZECH: Is there any system designed  
19 that could assist in perhaps our responsibility to try  
20 to meet this three-year licensing process? You are  
21 saying there isn't anything that we could do to meet the  
22 deadline?

23 MR. KRAFT: No. What I said was -- unless I  
24 misspoke, Mr. Chairman, what I said was that no LSS  
25 system -- and I believe the question was by itself.

1 Certainly, there are systems that could be designed that  
2 will aid the Commission in meeting the statutory  
3 requirement.

4 Our view is that the LSS contemplated by the  
5 rule, would raise so many other questions and issues, by  
6 the nature of its own operation and its own uniqueness,  
7 as to extend the process. We believe a microfiche-  
8 based, warehouse-type system, which is what we are  
9 fundamentally talking about, is low-tech enough that the  
10 issues that could be raised about its operation are  
11 fairly minor, and it would serve the same purpose, in  
12 our view. And I grant you, that are many other views.

13 COMMISSIONER CARR: That's an opinion. You  
14 don't really have data to support either side of that.

15 MR. SILBERG: Well, we have the data, in that  
16 that is the type of system which every other litigation  
17 -- big case litigation has used.

18 COMMISSIONER CARR: But before we used  
19 computers at all, we had a different type of system, I  
20 assume.

21 MR. SILBERG: And no one ever used --

22 COMMISSIONER CARR: You wouldn't propose to go  
23 back to that, whatever it was?

24 MR. SILBERG: No, but before you had  
25 computers, no one ever tried to do discovery involving

1 the numbers of documents you have, that we have done in  
2 cases in the past ten years, but there obviously are  
3 things the Commission can do, and those are the changes  
4 to Part 2, and the substantive rulemaking proceedings  
5 that we have talked about.

6 CHAIRMAN ZECH: Mr. Rogers, anything else?

7 COMMISSIONER ROGERS: Well, just it seems to  
8 me, there are two separate issues here, that you are  
9 talking about. One is the cost itself, and the other is  
10 a system which will deliver the results within the  
11 three-year, or maximum four-year period.

12 And I think we have to keep those separate,  
13 and look at them separately because I don't think we  
14 have the data -- we would like to see it -- on cost. If  
15 you are going to make an argument on the cost alone,  
16 with -- still dealing with the same number of documents,  
17 \$40 million -- I don't know, I haven't heard anything  
18 yet that says that there is a much less costly approach  
19 to handling 40 million documents.

20 What you are saying is that that number itself  
21 should be reduced, and then the cost would be lower, but  
22 that's a separate consideration.

23 If you grant that there are 40 million  
24 documents that have to be dealt with, then -- so far, I  
25 haven't heard anything that you have said that pins the



1 cost down, as outrageous -- maybe it is, but I don't see  
2 any reference to tie it to -- that if you are going to  
3 deal with 40 million -- if we have to deal with 40  
4 million documents, whether it is with a microfiche  
5 system or some other system, there still is going to be  
6 cost per document. And my guess is that that is going  
7 to be a couple of dollars.

8 So, then the cost is whatever the cost is in  
9 handling 40 million documents. You are saying that  
10 should be cutback to a smaller number of documents, but  
11 that is a separate consideration.

12 So, the cost itself, I think, we have to  
13 compare cost -- if you are going to talk about cost, we  
14 have to compare the same kinds of entities, 40 million  
15 documents that have to be dealt with. And then if the  
16 number of documents is reduced, then everything is  
17 reduced. Then the cost will be reduced for the  
18 electronic system, as well as for the manual system.

19 MR. KRAFT: It also depends upon the manner in  
20 which you are going to handle the documents, whether or  
21 not you have full text retrieval and image production  
22 capability on a remote screen versus just being able to  
23 produce a searchable header, and then have the document  
24 delivered, you know, in the overnight mail, which is the  
25 concept you were talking about. So, that has an effect

1 on costs, too. And I believe that it also has the  
2 effect on the most uncertain part of the cost.

3 I believe DOE probably knows with greater  
4 certainty the \$3-\$4 a page cost that you are mentioning,  
5 which is the document capture, verification, QA --

6 COMMISSIONER ROGERS: I'm talking about  
7 document, not page, but go ahead. And we are talking  
8 about 40 million documents.

9 MR. KRAFT: Pages.

10 COMMISSIONER ROGERS: Pages?

11 MR. KRAFT: Pages.

12 COMMISSIONER ROGERS: Well, okay. I don't  
13 know.

14 MR. KRAFT: That's been a confusion of ours  
15 for quite sometimes.

16 COMMISSIONER ROGERS: I'm not sure. I think  
17 that's documents that we are talking about, isn't it?

18 MR. OLMSTEAD: It is pages.

19 MS. CERNY: It is pages.

20 COMMISSIONER ROGERS: All right, let's be  
21 clear that it is pages then, not documents.

22 MR. KRAFT: But the point is that the  
23 uncertainty in the cost estimate lies in the development  
24 of the hardware and software to do the full text and the  
25 image production, and things like that. I think DOE

1 probably knows with greater certainty what it costs per  
2 page to take the page, do what they have to do to enter  
3 it, and verify it was entered correctly, and all of  
4 that. That is, I think, fairly -- those are fairly well  
5 known. So, the uncertainty lies, perhaps, in the costs  
6 that go beyond the initial several dollars per page.

7 COMMISSIONER CARR: But it seems to me that  
8 your curiosity would be more aroused by an index and  
9 headline retrieval system, than it would be to scan the  
10 document when you see it, and then be able to say "I  
11 don't need that one".

12 And if you are going to send these things by  
13 overnight mail, my experience -- overnight mail is kind  
14 of expensive.

15 MR. KRAFT: I don't know what the total  
16 capitalized worth of Federal Express is anymore, but at  
17 one point you could have bought it for 200 million.

18 (Laughter)

19 COMMISSIONER CARR: Well, maybe I should have.

20 (Laughter)

21 COMMISSIONER CARR: But they still charge \$4  
22 or \$5 --

23 MR. KRAFT: Oh, they charge quite a bit more  
24 than that, but that concept is still workable. One of  
25 the concerns that we have regarding the system is that,

1 as Mr. Silberg pointed out, with the full text  
2 retrievability of all the documents and the machinery  
3 that has to reside at, now we know at the UNLV, to  
4 support, to scan for a set of key words in all these  
5 millions of pages of documents, will produce so many  
6 documents, so many positive hits, that you would want to  
7 sit there and look at all these different documents.

8 It just becomes -- maybe it's untenable in all  
9 cases, Commissioner. Maybe it's untenable no matter  
10 which way you look at it.

11 COMMISSIONER CARR: But seeing the title  
12 without the document raises my curiosity a lot more than  
13 knowing I don't need it and throwing it out immediately.  
14 That seems to me like it's a --

15 MR. SILBERG: Well, the indexing system  
16 involves more than just a title. It also involves a set  
17 of descriptors that presumably will tell you what's in  
18 it.

19 MR. KRAFT: Key words.

20 COMMISSIONER ROGERS: But that's included in  
21 the proposed electronics system header, with this kind  
22 of information that would be the basis on which most  
23 people would access the system, is it not? So, isn't  
24 there a commonality there between what you are proposing  
25 -- you are proposing some kind of an electronic system

1 for storing the information basically in the header --

2 MR. KRAFT: Right.

3 COMMISSIONER ROGERS: -- so, that's the same.  
4 It's the retrievability of the full text electronically,  
5 that --

6 MR. KRAFT: It's the full text word search.  
7 It's sitting at your computer and being able to type in,  
8 from a remote location, every time the word "significant  
9 concern" appears in any document, for example. Now, how  
10 many times is that going to arise in this proceeding?  
11 Millions of times? How many different documents are  
12 going to flush up on your screen?

13 The whole thing strikes me as someone who--  
14 I'm, you know, a complete novice when it comes to  
15 computers, but the whole thing strikes me as untenable.  
16 You're not going to be able to make it work. Maybe it  
17 won't work either way. Maybe we need to search for  
18 other ways to streamline the process, such as document  
19 screening. Maybe that's a better answer to the entire  
20 situation than what's been proposed either way.

21 COMMISSIONER CARR: We'll know this summer,  
22 right, when we try the prototype out.

23 MR. KRAFT: Yes.

24 MR. SILBERG: Well, that will have a very  
25 small number of documents.

1 MR. KRAFT: Two hundred thousand pages.

2 MR. SILBERG: I don't think that's going to  
3 tell you very much.

4 COMMISSIONER ROGERS: That won't deal with  
5 this particular issue --

6 MR. SILBERG: It would tell you whether the  
7 system architecture would work, I think.

8 COMMISSIONER ROGERS: -- of the hits on 10,000  
9 documents that it can dump on you when you make a  
10 request.

11 CHAIRMAN ZECH: Commissioner Curtiss?

12 COMMISSIONER CURTISS: I'm surprised that you  
13 are opposed to discretionary intervention, since that's  
14 the only way that you may get into the proceeding.

15 MR. SILBERG: Well, I don't think that's  
16 necessarily correct.

17 COMMISSIONER CURTISS: You disagree with what  
18 the staff has said?

19 MR. KRAFT: Yes.

20 MR. SILBERG: Yes, and we told them so.

21 COMMISSIONER CURTISS: Just in a nutshell,  
22 what is your standing argument?

23 MR. SILBERG: I think there are a number of  
24 standing arguments, and we have done some legal  
25 research. I don't really think that this is the right

1 time to get into that --

2 COMMISSIONER CURTISS: Okay. All right.

3 MR. SILBERG: -- especially before a body that  
4 ultimately may be making that decision.

5 COMMISSIONER CURTISS: Just a quick question.  
6 If all the Part 2 changes that you have proposed were  
7 adopted, would that tip the balance, in your judgment,  
8 on the LSS?

9 MR. KRAFT: I think you would find the  
10 industry more readily open to these expenditures of  
11 funds, Commissioner.

12 CHAIRMAN ZECH: Well, just a comment. I think  
13 you've told us that although you had tentative  
14 agreement, apparently, during the course of events, that  
15 you end up disagreeing. You --

16 MR. SILBERG: Can I expand on that a little?

17 CHAIRMAN ZECH: Yes, please do.

18 MR. SILBERG: The way the process worked, we  
19 were taking the provisions of the Proposed Rule -- there  
20 was a "stalking horse" rule that the staff proposed--  
21 and going at them one provision, one section at a time,  
22 and the parties would negotiate and, sooner or later,  
23 eventually, you would reach a stopping point, and either  
24 people were not willing to go any further or everyone  
25 agreed that it was the best possible result.

1 I think it's really not an accurate  
2 characterization to say that we had agreed, in all  
3 cases, to the end result of what's in the Proposed Rule.  
4 In a lot of cases, we just agreed to disagree, and we  
5 went on to the next topic, rather than exercising --

6 CHAIRMAN ZECH: But you didn't agree to a  
7 certain -- up to a certain level, and then disagree?

8 MR. SILBERG: No.

9 CHAIRMAN ZECH: You didn't agree with  
10 anything.

11 MR. SILBERG: There were tentative consensus  
12 positions, and tentative stopping places. The rule said  
13 nothing is final until everything is final.

14 CHAIRMAN ZECH: Right.

15 MR. SILBERG: And in some cases, we simply  
16 negotiated as best we can, and then we went on to the  
17 next section.

18 CHAIRMAN ZECH: I see.

19 MR. SILBERG: So, I don't think it's fair to  
20 say that we agreed on everything in the rule because we  
21 didn't.

22 CHAIRMAN ZECH: Well, I -- but I thought there  
23 was tentative agreement. As I understood earlier, there  
24 was tentative agreement as you went along, but that's  
25 not true, you say.



1           MR. KRAFT: Well, had we not put together as a  
2 group, under Mr. Bellman's tutelage, the process that  
3 Mr. Silberg just described, we would never have gotten  
4 beyond the first day, and that was not what we were  
5 there to do. We were there to try to get the rule -- a  
6 rule written. And I have to say that we probably earned  
7 the enmity of most of the other parties because every  
8 time we went through the rule in draft, which I don't  
9 know how many times Chip had to rewrite this thing, but  
10 -- and he should win an award for that alone -- but we  
11 forced the committee to stop at every issue we wanted to  
12 revisit, and renegotiated, and we just kept on trying  
13 and trying and trying to get the rule into a condition  
14 that we could ultimately accept because we wanted to  
15 ultimately accept something but, at the very end, when  
16 we read the thing in its entirety and considered the  
17 costs, we decided as an industry that we could not  
18 support the final --

19           MR. SILBERG: As an example, you talked about  
20 the threshold for contentions. We tried very hard  
21 during the negotiation, to raise that threshold. We  
22 failed. We stopped at a provision as it now appears in  
23 the proposed rule because no one else would agree with  
24 us. We stopped. We didn't agree with it. Our position  
25 on that, for instance, is as we said in our comments and

1 as we said here today.

2 CHAIRMAN ZECH: Well, I think you've made  
3 yourself very clear. Mr. Kraft, I think, in his  
4 comments -- I took a couple notes -- said that he  
5 thought the group was "seduced by high technology",  
6 thought it was, you know, the glamour of the high tech  
7 system. I think you referred to a computerized toy, and  
8 a novel approach of informal discovery, and the fishbowl  
9 approach. So, I think we've got your message. I think  
10 --

11 MR. KRAFT: I said all those things, yes.

12 (Laughter)

13 CHAIRMAN ZECH: So, we recognize that you were  
14 a participant, but you had problems with it, but I guess  
15 the only thing I'd say, before we ask the next group to  
16 come forward, is that it seems clear to most of us that  
17 this is a very unique undertaking and, if we are going  
18 to do our job properly and do it the way that we expect  
19 it should be done, that we need a better system for  
20 getting together and being able to gather all this  
21 information on this very unique undertaking.

22 So, it looks like we need some kind of a  
23 system, and I think that the group, with your  
24 participation, too, has at least attempted to come up  
25 with some kind of a licensing support system that will

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1 help us do our job in the three years, or four years, or  
2 whatever it would take to get the job done. We do feel  
3 we need some kind of a system.

4 All right, let's call the next group. We  
5 thank you very much.

6 MR. KRAFT: Thank you.

7 CHAIRMAN ZECH: State of Nevada, Mr. Murphy  
8 and Mr. Davenport, I believe.

9 Welcome. You may proceed.

10 MR. DAVENPORT: Thank you very much.

11 Mr. Chairman, members of the Commission,  
12 ladies and gentlemen, I'm Jim Davenport. I have with me  
13 today Mal Murphy. We are Special Deputy Attorney  
14 Generals to the State of Nevada. Also participating for  
15 the State of Nevada in the Negotiating Committee was  
16 Harry Swingston, Deputy Attorney General. He is in  
17 Carson City today.

18 As an initial statement, we want to make it  
19 quite clear that Nevada supports the rule as negotiated.  
20 Now, like the previous witnesses, we got to issues in  
21 the negotiation which we didn't like, and we had to stop  
22 also.

23 We didn't get everything in the rule that we  
24 wanted. We made compromises, but we are prepared to  
25 support the rule because we believe that the

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1 participants in the process engaged in that process in  
2 good faith, negotiated in earnest, compromised, made  
3 agreements, and that that was a proper and right system  
4 to go forward on this issue and, because of that  
5 outcome, we want to continue to live with what we agreed  
6 to live by.

7 Now, if the Commission feels for any reason,  
8 that all or part of the rule should be rejected, our  
9 commitment to this rule is, of course, undermined. It  
10 is the rule in total which we are supporting.

11 If the Commission were to choose to take the  
12 rule apart and begin over again, I think that we would  
13 want to go back and revisit some of the issues which we  
14 gave away, in arriving at the ultimate conclusion. We  
15 would hope that the Commission would not do that. I  
16 think that would probably be a waste of time, if that  
17 were to happen.

18 I'd like to make some observations about the  
19 process of negotiated rulemaking, as we have used it in  
20 this issue. You, of course, all know that the matter of  
21 high-level waste has been a very contentious issue. The  
22 State of Nevada has not suffered the system readily.

23 There have been disputes between Nevada and  
24 the Commission. There have been disputes between Nevada  
25 and the Department of Energy. Here we have a

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1 circumstance in which the parties got together and  
2 actually agreed to agree, actually agreed to negotiate  
3 things and, when we got to the end, agreed to abide by  
4 what we agreed to.

5 I think that the tenor that comes out of that  
6 agreement is much more positive to this process, in  
7 getting a licensing proceeding that will happen in three  
8 years, than any of the specific recommendations for  
9 procedural change which the utilities have.

10 If we can go into a licensing proceeding with  
11 the contentiousness removed, if we can go through the  
12 resolution of these early issues by the kind of process  
13 that we used here, we're going to stand a much better  
14 chance of you realizing your objective of issuing a  
15 license in a three or four-year time period.

16 So, we feel quite good about the process that  
17 was used. One of the reasons that the negotiated  
18 rulemaking worked as well as it did, you saw here today  
19 as Mr. Saltzman was reporting the process from his point  
20 of view.

21 DOE, in this proceeding, acted in a  
22 responsible, uncolored way. They attempted to represent  
23 their interest in an open and above-board way. We were  
24 able to identify where differences were and compromise  
25 them. That kind of process is much better than

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1 litigation, to resolve disputes.

2 Now, we will be into a litigation and, as you  
3 know, we believe that there are issues in the proceeding  
4 which can't be resolved any other way than litigation,  
5 and we will be dealing with those in the end but, before  
6 we get there, let's use systems like this, which were  
7 able to produce compromise.

8 As we went into the proceeding, the basic  
9 posture of the parties was, at least with respect to  
10 Nevada, that we were prepared to discuss a discovery  
11 system -- and that was the only thing that we saw  
12 noticed in the Commission's Notice about what this  
13 negotiation was going to be about -- that we were  
14 prepared to discuss that if it resulted in a discovery-  
15 enhancing system -- enhancing, meaning it made it easier  
16 to do, easier on all the parties -- not that it made a  
17 greater scope or that you would end up with more  
18 documents or anything like that, but that it would be an  
19 easier process for the parties to engage in.

20 All of the parties declared that they would  
21 negotiate in good faith and that they would be prepared  
22 to compromise, and I think a great deal of compromise,  
23 even on the part of the utilities, took place in that  
24 proceeding.

25 The justification for the process was the

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1 three-year time period, and our position on that is that  
2 that is a legitimate justification, but we want to  
3 remind the Commission that the Commission has a higher  
4 duty than to merely meet the three-year time period, and  
5 this needs to be taken into consideration, in  
6 considering the utility's position, that this system may  
7 not get you there.

8 The more important duty which you have -- and  
9 I apologize for reminding you about something which you  
10 know all so well -- is to protect the public health and  
11 safety from radiological risks and, if it takes a longer  
12 proceeding to do that, we feel that it is incumbent upon  
13 the Commission to see that that interest is performed--  
14 that interest is protected, even though the three-year  
15 time period wasn't legalistically met.

16 Now, we hope -- we recognize that you do have  
17 a duty to attempt to meet that time period. We feel it  
18 was a legitimate justification for this rule.

19 The process almost worked. In fact, I think  
20 it's fair to say that it did work. It didn't -- it  
21 wasn't technically complete in that we had one party who  
22 wouldn't agree but, in fact, it worked in that it showed  
23 the ability to compromise and resolve issues in this  
24 highly contentious area, if the parties get down to it  
25 and declare their willingness to agree to compromises.

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1           There is one other legal matter that relates  
2 to the process that we have defined here, and that is  
3 the right of the public to participate in this  
4 proceeding. The Nuclear Waste Policy Act, section  
5 111(a)(6) says that "State and public participation is  
6 important in the planning of repositories, to garner  
7 public confidence in what you're doing".

8           That suggests that a system like this, even if  
9 it brings in documents which you wouldn't ordinarily  
10 bring in, and provides them and makes them available to  
11 the public, let's assume even causes more parties to be  
12 brought into the proceeding, is a valuable goal even if  
13 it costs more time.

14           So, I think that you need to remember that  
15 there are objectives of this that are realized by this  
16 kind of a system, which may be worthwhile even if the  
17 three-year time period is brought into question because  
18 of this rule. And that is not to say that we agree with  
19 the utilities that this system will cost more time. I  
20 think that's really only going to be open to experience.  
21 We'll be able to look back and know that but, at this  
22 juncture, to look forward and say it will cost more or  
23 less time, I think, is difficult.

24           Next I want to address the issue of scope of  
25 discovery. It's something that Commissioner Curtiss

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1 asked about earlier and about which I know he is  
2 interested, that all of you are interested.

3 The way these guidelines, topical guidelines  
4 and the relevant scope of discovery work is this. You  
5 have a rule, a functional test, which is included in the  
6 definition of documentary material. That's the  
7 functional test, it has to be relevant or lead to the  
8 discovery of relevant information.

9 Then it refers over to this list of topical  
10 guidelines. That list was developed primarily by Nevada  
11 and the Environmental Coalition to present to the  
12 Department of Energy, as a way of showing them what we  
13 felt could be the universe from which relevant or  
14 potentially relevant documents could be discovered but,  
15 if it's on the list but it doesn't pass the functional  
16 test, it does not have to be admitted to the LSS.

17 So, just to look at the list and see the  
18 breadth of the list doesn't answer how broad the system  
19 is. It's the functional test which really declares how  
20 broad this system will be.

21 Now, we agree with Mr. Silberg and Mr. Kraft,  
22 that there are documents in the system which, if  
23 screened out -- which could be screened out, that the  
24 system is probably not as large, the number of documents  
25 is not as great as the system has been sized.

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1           And one of the reasons that we agree on that  
2           is that Mr. Murphy and I participated in some discovery  
3           in the Ninth Circuit litigation against Department of  
4           Energy a couple of years ago, in which we actually were  
5           permitted to do discovery in the Department of Energy  
6           documents in Las Vegas and here in Washington and, in  
7           that process, we found a great deal of duplication. We  
8           found a great number of documents -- we had a list of  
9           the subjects that were in the documents which we went  
10          through. We found a lot of them were mere  
11          correspondence on that topic, which wasn't really very  
12          relevant. There's a lot of fluff in those documents,  
13          and I think a good screening system would screen some of  
14          that out.

15               We did, early in --

16               COMMISSIONER CARR: But you had to look at  
17          each one of those to decide that.

18               MR. DAVENPORT: An entire waste of time.

19               COMMISSIONER CARR: But you had to look.

20               MR. DAVENPORT: But we had to do it, yes, and  
21          we would have been much better off, we could have saved  
22          a great deal of time had we had some screening mechanism  
23          to bring documents up on a screen and say, "Oh, that's  
24          just a cover letter, correspondence that has the word in  
25          it that I'm looking for. Throw that away". So, this

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1 kind of a system would have saved us quite a bit of time  
2 in that process.

3 Another matter that I'd like to talk about is  
4 the question that Commissioner Curtiss raised, about if  
5 you once get into this system as a potential party  
6 participating in the process, do you somehow bootstrap  
7 your right -- your standing? You get standing by  
8 participating in the discovery system.

9 It was never the intention of the parties to  
10 accomplish that. I think the rule specifically provides  
11 otherwise, and I think you've heard that from other  
12 witnesses here today.

13 COMMISSIONER CURTISS: Well, the section that  
14 I was citing was the one that goes to intervention in  
15 the proceeding, itself. I understand that the statement  
16 of considerations on the rules says that list of topical  
17 guidelines should not guide -- is not relevant for  
18 purposes of determining which contentions are admissible  
19 but, if you look at the standing requirements and what  
20 is required to be established at two phases in this  
21 proceeding, I think the rule itself effectively  
22 accomplishes that.

23 Under 1008, for intervention in the LSS  
24 system, the pre-licensing phase, you are required to  
25 cite a topical guideline. Well, that's the basis for

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1 determining whether you have standing to intervene.

2 If an intervenor comes in and says "My topical  
3 guideline" -- I'm looking at 1008(b)(1) --

4 MR. DAVENPORT: Yes, I am, too.

5 COMMISSIONER CURTISS: -- as determined in  
6 reference to the topical guidelines. I take that to  
7 mean that the petitioning party has to say, "Here's the  
8 topic that I'm interested in". So, just to take one, he  
9 or she says, "I'm interested in population density along  
10 any of all of the projected routes of travel, that's my  
11 only topical guideline that I'm interested in".

12 Now, I take it that the purpose of the  
13 language in the statement of considerations is to say,  
14 even though we permit a party to participate in the pre-  
15 licensing LSS phase and to enter documents during this  
16 entire phase, that fact is not dispositive -- in fact,  
17 it's irrelevant for purposes of determining his or her  
18 standing in the proceeding itself.

19 And I guess the provision that I had  
20 difficulty reconciling that with is over in the  
21 intervention section 1014(c)(4), where the Board itself  
22 is directed to consider, in addition to the three  
23 conventional tests for standing, number four, whether  
24 the petitioner participated in the pre-licensing phase  
25 under 2.1008. And it looks to me like that's a relevant

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1 relevant factor to consider, and kind of tilts the  
2 balance or gives the person a leg up on intervention in  
3 the proceeding, if he or she participated --

4 MR. DAVENPORT: That specific language was  
5 added to avoid the opposite problem where parties laid  
6 out of the discovery, only to come in as a late  
7 intervenor.

8 The purpose of that was to make sure that  
9 parties, if they want to raise contentions down the  
10 line, come in early and participate and contribute their  
11 documents into the records system.

12 Now, I agree with you that it's capable of  
13 being read, as you have, that it could be used as a  
14 basis to bootstrap someone in who had merely been in the  
15 earlier process, but that was not the intention of the  
16 negotiating parties.

17 COMMISSIONER CURTISS: I don't want to get off  
18 on a tangent but, as I read the Statement of  
19 Consideration on that section, it seemed to me to say  
20 that if a party -- I think it cuts either way -- if a  
21 party cites a topical guideline and participates in the  
22 pre-licensing phase -- let's say, national  
23 transportation issues -- that's the only issue that the  
24 Governor of, say, Vermont is interested in, and that's  
25 the one that's cited in the pre-licensing phase and

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1 standing is granted. I think that provision cuts in  
2 favor of saying that the Board, the Hearing Board  
3 constituted when the application comes in, should  
4 consider that as a factor, and I read that to say if you  
5 participated in the pre-licensing phase, that's a factor  
6 in determining whether you have standing. It's not  
7 entirely neutral on that question.

8 MR. DAVENPORT: It was intended to mean that  
9 if he failed to appear early, that that would work  
10 against him later on.

11 COMMISSIONER CURTISS: Okay. I'll go back and  
12 look at it.

13 MR. DAVENPORT: Just in brief response to the  
14 testimony that you heard immediately prior, I think it's  
15 a little risky to compare what we have here against what  
16 exists in other litigation systems.

17 One problem is that in a number of those  
18 instances which were cited, you had settlement of those  
19 cases. It may have been that the parties -- the lawyers  
20 in those cases decided they didn't want to go forward in  
21 that litigation because the document base was so bad  
22 they wouldn't know how to handle the case. I'm not  
23 suggesting that, in fact, happened, but -- the other  
24 thing is, because those litigations involved document  
25 systems which developed out of discovery as opposed to

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1 developed into discovery, they're really  
2 distinguishable.

3 Those were documents which lawyers found in  
4 hard copy and said, "We think they need to be in the  
5 system, we'll put them into the document management  
6 system". Here, what we are trying to do is define the  
7 universe of documents so the documents can actually be  
8 found readily, and thereby join the issues for a  
9 potential litigation. So, I think it's -- it may be  
10 apples and oranges, to try to compare other litigation  
11 systems.

12 I guess that's all I have except to say thank  
13 you for letting us express our point of view. Mr.  
14 Murphy, who was present during all of the negotiation  
15 and who is very rarely inclined to sit on his hands and  
16 say nothing --

17 (Laughter.)

18 COMMISSIONER ROBERTS: He's not a potted  
19 plant?

20 MR. DAVENPORT: -- I'm sure would like to say  
21 a few words.

22 MR. MURPHY: I have nothing to add to --

23 (Laughter)

24 CHAIRMAN ZECH: Mr. Murphy is an old friend,  
25 Mr. Davenport; he's been here many times, and we agree

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1 with you, though. He would speak up if he wanted to,  
2 I'm sure.

3 MR. DAVENPORT: I know that all too well.

4 CHAIRMAN ZECH: So do we.

5 (Laughter)

6 CHAIRMAN ZECH: Commissioner Roberts, do you  
7 have anything else?

8 COMMISSIONER ROBERTS: No.

9 CHAIRMAN ZECH: Commissioner Carr?

10 COMMISSIONER CARR: No.

11 CHAIRMAN ZECH: Commissioner Curtiss, anything  
12 else?

13 COMMISSIONER CURTISS: Just one quick, final  
14 question. In the previous presentations, it sounded to  
15 me like there were two schools of thought on the topical  
16 guidelines. Bill indicated that in certain respects,  
17 they went beyond material that is relevant to the  
18 proceeding, or might be relevant, and the purpose for  
19 that was to be overly-inclusive for the sizing of the  
20 DOE system. In other words, we need to know how many  
21 topics we've got for internal agency management  
22 purposes, and independent beyond relevancy purposes, so  
23 that DOE can go out and size the system, find out how  
24 big of a computer we need.

25 I guess the other school of thought maybe

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1 reflected by Mr. Saltzman is that the topical guidelines  
2 really do have more to do with relevance, but with the  
3 caveat that we need to state that there has to be a  
4 specific nexus between the topical guideline and the  
5 suitability of Yucca Mountain under Part 60.

6 Do you come down on either side of that and,  
7 with respect to Mr. Saltzman's point, would you agree  
8 that you need a nexus or, in your judgment, do the  
9 topical guidelines define the topics that have to be  
10 addressed in DOE's application?

11 MR. DAVENPORT: Well, let me say preparatory  
12 to answering your question, that the way this kind of a  
13 list gets developed if you were in normal discovery, if  
14 you're writing interrogatories or a request for  
15 production of documents, whatever you were doing, you  
16 would attempt to define questions which were  
17 dragnetting, that went out and got whole masses of  
18 subject matter categories of documents and brought them  
19 in so that you could look at them and distinguish which  
20 ones you didn't need.

21 There is some of that logic in the way these  
22 lists were developed. DOE asked us to make a list which  
23 could -- what we thought would be all-encompassing of  
24 potentially discoverable documents.

25 So, the lists are bigger than what may be

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1 relevant or could lead to the development of relevant  
2 information, but it's possible that within that list,  
3 any one of them might, in fact, have some documents in  
4 it which would meet the test.

5 Now, as to the question of whether there must  
6 be a nexus, yes, there must be a nexus, but that nexus  
7 is relevancy, at the point of determining what is the  
8 record base.

9 Now, when you get into the actual proof of  
10 evidence, you get tighter tests than that, but at the  
11 discovery point you are looking at the standard Federal  
12 Rules test, which we tried to incorporate into this  
13 rule.

14 The nexus, though -- and this is a point that  
15 I don't want to fully discuss because it's something  
16 that we need to do in a different setting -- the nexus  
17 is not to whether Yucca Mountain meets 10 CFR 60  
18 requirements. In our opinion, Nevada's opinion, the  
19 question is whether it's relevant to the Commission's  
20 duty to find out whether this system, including this  
21 repository, is going to work in such a way that it  
22 protects the public health and safety, which gets us  
23 into the system licensing question, which is, I think,  
24 perhaps bigger than just the 10 CFR 60 question. In  
25 other words, I want to answer the question consistent

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1 with Mr. Saltzman, except to distinguish that we look at  
2 the overall question as somewhat bigger.

3 COMMISSIONER CURTISS: So, you really do  
4 envision the topical guidelines as substantively  
5 important. The topical guidelines establish the topics  
6 that have to be addressed in the application (a) and (b)  
7 that are contestable in the proceeding.

8 Take a specific example. Mr. Saltzman said  
9 that there ought to be a nexus that says that the  
10 topical guideline -- all the topical guidelines have to  
11 relate to the suitability of Yucca Mountain under Part  
12 60. And I gather at an early point in the discussions,  
13 that actual formulation was discussed, but the reference  
14 to Part 60 was dropped, which leaves the question in my  
15 mind as to whether -- let's say, transportation issues,  
16 where we clearly consider those issues in the DOT  
17 context, with DOT, but they are not Part 60 issues.

18 What I'm trying to get a feel for is whether  
19 you envision these topical guidelines kind of setting  
20 the framework for a systems approach where, in the  
21 repository proceeding, you all would like to see us  
22 address not just the suitability of Yucca Mountain under  
23 Part 60, but the transportation issues, the MRS-related  
24 issues, the spent fuel burnup rate issues, cask design,  
25 routing --

1 MR. DAVENPORT: Well, Commissioner Curtiss, it  
2 at least leaves that option open to you. It doesn't  
3 foreclose your ability to choose a systems approach. If  
4 you start today, knocking items out of the topical  
5 guidelines on the basis that we would never want to  
6 consider this, you are cutting your options.

7 We would suggest, at this point, if you are  
8 defining the support for your decisionmaking, that you  
9 define it in a way which is encompassing enough that  
10 your options remain open until you decide really what  
11 issues you want to litigate, what issues are relevant  
12 for you to evaluate.

13 We think -- we are always going to be  
14 recommending to you that you look at the broadest  
15 possible question because of our client's interest, but  
16 that question you can leave open to yourself if you have  
17 your discovery mechanism be broad.

18 COMMISSIONER CURTISS: But for some of those  
19 issues, it's not the Commission that would foreclose the  
20 litigation of those issues by striking them from the  
21 list of topical guidelines, it's the Congress that has  
22 said, for example, that you don't consider alternatives  
23 to Yucca Mountain, and you don't consider alternatives  
24 to geologic disposal, yet both of those topics show up  
25 on the topical guidelines.

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1           And I guess the question that I have is, if  
2       it's for the system as an internal document management  
3       system, I can understand the need to say that, but if  
4       the list of topical guidelines has much more significant  
5       litigative significance, then the list --

6           MR. DAVENPORT:   The topical guidelines will  
7       not be asserted, could not be asserted, as a basis to  
8       raise issues into the proceeding which were not proper  
9       to be there, by virtue of the issue which is under  
10      adjudication.   You can't expand the scope of the  
11      proceeding just because it's on the topical guideline  
12      list.

13           You have to be able to prove that it's  
14      relevant to the question at issue in the proceeding in  
15      order to put documents into the system or present them  
16      in evidence later on.   And the scope of that proceeding  
17      is defined, of course, by this body.

18           COMMISSIONER CURTISS:   I guess one final  
19      comment, not a question, really.   The difficulty that  
20      I've had with the topical guidelines -- and they really  
21      do consist of two lists; the list that you all prepared  
22      which is introduced by, really, almost a verbatim  
23      reference to Section 112 in the guidelines, and the list  
24      that EDF prepared which is pretty much the table of  
25      contents from the environmental assessments.   Both of

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1 those references, the EAs and the 112 guidelines, it  
2 seemed to me, were relevant and significant for the  
3 decision that was taking place at the time.

4 Take the EAs and the table of contents. There  
5 are a number of topical guidelines there that go to the  
6 comparison of nine sites that were under consideration  
7 and, for purposes of the EA, it would be wholly  
8 appropriate to say "We're going to look at alternative  
9 sites". In fact, the Congress, at that time, had  
10 directed the Commission to look at alternate sites, but  
11 since the EAs were prepared, and those EAs are  
12 referenced here, Congress passed the '87 statute that  
13 said you don't consider alternative sites.

14 So, I guess that the trouble that I've been  
15 having is the topical guidelines refer back to a  
16 document that preceded the Congressional decision  
17 selecting Yucca Mountain. I guess I wonder how relevant  
18 a lot of those questions are, given the 1987 action.

19 MR. DAVENPORT: Well, let me try to just  
20 approach it quickly and make two points, Commissioner  
21 Curtiss. I think we can't get away from focusing on  
22 what the topical guidelines were drafted for originally.  
23 They were drafted at DOE's request, virtually, to help  
24 the -- you know, I like to say the young kids who are  
25 loading this system, to give them some key in dealing

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1 with this so-called 40-million universe of documents--  
2 and we don't agree that 40 million is the correct  
3 figures, we think it's smaller than that -- but if we  
4 are to take 40 million pages of documents, the DOE asked  
5 for categories of documents which would assist the  
6 people who are loading the system, in making the first  
7 cut at whether or not a document was to go in or go out  
8 of the system.

9           If you look at the document and it doesn't fit  
10 anywhere within the topical guidelines, it's out. Put  
11 it over to the left-hand side. If it fits somewhere  
12 within the topical guidelines, you put it on this side,  
13 the right side, and then look at it and, if, even though  
14 it fits within a topical guideline, it discusses the  
15 impact of beta radiation on swamp grass in Louisiana,  
16 it's out. It goes back over to the left because it is  
17 obviously not relevant to either a Part 60 suitability  
18 determination with respect to Yucca Mountain, or the  
19 larger system licensing approach that we at an  
20 appropriate time, the State of Nevada at an appropriate  
21 time, will urge the Commission's consideration of, but  
22 take one other consideration.

23           If, at some point in time, someone -- either  
24 your successors, as Commissioners, or an Atomic Safety  
25 and Licensing Board panel -- will establish the

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1 parameters, the relevancy parameters of a licensing  
2 proceeding -- will determine what issues will be  
3 litigated and which will not be litigated.

4 If, at that point in time, a panel or a future  
5 Commission decides that a systems licensing approach,  
6 for example, is appropriate, and may even be called for  
7 under the Nuclear Waste Policy Act, and you have not  
8 loaded the system with the documents necessary to manage  
9 such a licensing proceeding, you have rendered  
10 absolutely hopeless any chance of ever meeting the  
11 three- or four-year Congressionally mandated deadline.

12 If, on the other hand, you have loaded the  
13 system with some documents which may then, at the  
14 licensing stage, prove to be either irrelevant or fail  
15 to meet the more stringent test of admissibility, you've  
16 spent a little extra money, we grant you that, and  
17 you've taken a little more time, which there is plenty  
18 of in this process right now, but you have given  
19 yourself more confidence that your staff, Nevada staff,  
20 Department of Energy staff, potential interveners, have  
21 had a chance to look at everything produced in this  
22 process, and you have a system in front of you which at  
23 least makes it possible to achieve the three- or four-  
24 year deadline. Without such a system, in our judgment  
25 at least, it's absolutely hopeless.

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1 CHAIRMAN ZECH: Thank you very much,  
2 gentlemen, appreciate it.

3 MR. DAVENPORT: Thank you very much.

4 CHAIRMAN ZECH: We'll call on the Coalition of  
5 Nevada Local Governments, Mr. Bechtel, please.

6 MR. BECHTEL: Thank you very much, Mr.  
7 Chairman and members of the Commission. My name is  
8 Dennis Bechtel. For the record, I'm a Planning  
9 Coordinator with the Department of Comprehensive  
10 Planning in Las Vegas, Nevada, and I, along with  
11 representatives from Nye and Lincoln Counties,  
12 participated on the committee considering this ruling.

13 I'd like to take this opportunity, on behalf  
14 of the Coalition of Local Nevada Governments, to commend  
15 the Nuclear Regulatory Commission and staff, for its  
16 initiation of the negotiated rulemaking process designed  
17 to develop procedures to govern the high-level waste  
18 licensing proceeding, including the use and development  
19 of an electronic information management system, which  
20 has been designated as a licensing support system.

21 I'd also like to commend the Conservation  
22 Foundation for conducting the negotiated rulemaking  
23 sessions. I think they did an excellent job.

24 As representatives from a coalition of units  
25 of Nevada governments, we have appreciated the

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1 opportunity to participate in the negotiated rulemaking  
2 process.

3 As you are aware, the Nuclear Waste Policy  
4 Amendments Act of 1987 provided a stronger role for  
5 local governments within the Nuclear Waste Policy Act.  
6 The site county, which is Nye County, and adjacent  
7 counties, which are Clark and Lincoln Counties, have  
8 been designated as affected local governments.

9 The ability to obtain direct funding from  
10 Department of Energy to conduct independent studies  
11 determined potential impacts on the proposed repository  
12 at Yucca Mountain on our respective communities. These  
13 communities, of course, are adjacent to the repository  
14 site.

15 The Coalition of Nevada Local Governments  
16 believe that the negotiated rulemaking process has been  
17 extremely productive. Although a consensus was not  
18 reached, negotiations were entered into in good faith by  
19 all parties, and it is important to note that all but  
20 one of the parties, including groups of widely divergent  
21 views and interests, were able to substantially agree on  
22 provisions of the proposed rule.

23 There was also almost a consensus concerning  
24 the ability of the licensing support system to assist  
25 potential participating parties in obtaining sufficient

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1 information to meet the health, safety and other  
2 concerns of all participants' respective constituencies.

3 We also feel that this, as well, will meet the  
4 three- or four-year time frame of the licensing, as  
5 specified in the Nuclear Waste Policy Act.

6 The Coalition of Nevada Local Governments have  
7 agreed, through consensus, that the proposed rule in LSS  
8 would offer a vehicle to begin to meet the requirements  
9 of our constituents and the provisions of the Act. And  
10 we, therefore, with the majority of the negotiating  
11 committee, agree to the draft text of the proposed rule.

12 We are, of course, sensitive to the concerns  
13 of the Coalition of Industrial Groups on the negotiating  
14 team. There is no doubt that the costs and a timely  
15 adherence to the requirements of the Nuclear Waste  
16 Policy Act, as amended, to resolve what is becoming an  
17 increasingly significant national issue, are important.

18 Ratepayers that, of course, are providing the  
19 funding for the waste disposal program should be assured  
20 that their funds are being employed prudently to resolve  
21 the complex problems associated with the determination  
22 of whether the Yucca Mountain site is suitable as a  
23 repository for the permanent storage of high level  
24 radioactive waste and spent fuel.

25 Likewise, the extremely tight time frame

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1 available to resolve licensing issues necessitate the  
2 ability to access and analyze considerable amounts of  
3 information in an expeditious manner.

4 The three- or four-year time frame is, indeed,  
5 ambitious, in light of the highly unknown nature of many  
6 of the issues associated with the storage of spent fuel  
7 and high-level waste.

8 The time frame allotted may be especially  
9 ambitious, since the licensing nuclear power plants in  
10 what is generally acknowledged as a known technology,  
11 has taken years longer.

12 With these potential shortcomings  
13 acknowledged, however, the Coalition of Nevada Local  
14 Governments support the draft rule being considered by  
15 the Commission today, for the following reasons.

16 The LSS provides the opportunity for all  
17 potential parties to have access to the complete text of  
18 information relative to the health and safety concerns  
19 of their respective constituents. This, we feel, is  
20 superior to indexed information, perhaps indexed by  
21 other parties who may or may not be able to abstract or  
22 synthesize the information sufficiently to meet  
23 anticipated and unanticipated queries of all parties.

24 The LSS, as envisioned, will make data  
25 available, a complete forum that will permit all

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1 potential users to have a complete record of site  
2 characterization activities.

3 Having a system developed and with relevant  
4 information input before the licensing application  
5 process begins, provides the early opportunity for  
6 interested parties to obtain information and thereby  
7 determine the relevance of issues in a manner to meet  
8 their respective needs and concerns.

9 We view this as being consistent with  
10 achieving the requirements of the Nuclear Waste Policy  
11 Act, which were formulated to ensure the expeditious  
12 but -- I'd like to emphasize -- safe siting of a nuclear  
13 waste repository.

14 The cost issue as posed by the nuclear  
15 industry, as I indicated before, is important. There  
16 will undoubtedly be substantial costs in any system that  
17 is required to manage the extremely large quantity of  
18 information necessary to evaluate the issues associated  
19 with the long-term storage of nuclear waste. Any such  
20 effort will be labor-intensive and costly.

21 Likewise, since the issues involved can be  
22 characterized as primarily health and safety concerns,  
23 considerations of cost-benefits should go beyond mere  
24 accounting analyses and should enable a full airing of  
25 the complex and list currently unknown questions of

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1     siting of high-level waste over an almost  
2     incomprehensible time period. To the residents of an  
3     area that may have to live with the results of a  
4     repository with potential problems, this is significant.

5             The technical questions surrounding the  
6     establishment of the LSS will no doubt be challenging.  
7     Unless Congress decides to relax the time requirements  
8     of the licensing process, which they should, indeed,  
9     consider given the uncertainties of the task at hand as  
10    well the need to ensure that the job is performed  
11    properly -- which, by example, they have done for other  
12    problems, such as the Clean Water Act, and was generally  
13    acknowledged as known technology, the alleviation of  
14    water pollution control -- there will be a need to make  
15    available large amounts of often highly technical  
16    information in a timely manner.

17            Because the most important time is needed for  
18    analysis of the complete record, time should not be  
19    wasted in actually trying to obtain the information.  
20    Information should be obtained in a complete form as  
21    quickly as possible. The LSS, we feel, offers this  
22    capability.

23            In addition, I would like to speak to the  
24    general topic section. The Coalition of Nevada Local  
25    Governments also supports the issues defined within the

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1 topical guideline section, as relevant material that  
2 should be submitted and considered by LSS participants.

3 The characterization of a repository, through  
4 respect to EIS preparation and other issues associated  
5 with the site characterization, would be required to  
6 evaluate a host of other issues that are important as  
7 the analysis of the site.

8 Consideration of transportation of the waste  
9 as well as the effect on communities are all deserving  
10 of consideration as part of the total system of  
11 repository development.

12 To summarize, the Nevada Coalition of Local  
13 Governments believes that the LSS system offers the  
14 opportunity to meet the no doubt challenging needs of  
15 achieving licensing within the three- or four-year time  
16 frame defined in the Nuclear Waste Policy Act.

17 There is no doubt that there will be technical  
18 challenges of development of such a system. The  
19 complexity of the system as well as the large quantities  
20 of information will provide that challenge under any  
21 system.

22 The important question, though, is that all  
23 the necessary data to properly evaluate the Yucca  
24 Mountain site be available. There should be no  
25 shortcuts taken on this important licensing question.

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1 With that, I would like to conclude my  
2 comments, and appreciate the opportunity to express  
3 these views.

4 CHAIRMAN ZECH: Thank you very much.

5 Questions? Commissioner Roberts?]

6 COMMISSIONER ROBERTS: No.

7 CHAIRMAN ZECH: Commissioner Carr?

8 COMMISSIONER CARR: No.

9 CHAIRMAN ZECH: Commissioner Rogers?

10 COMMISSIONER ROGERS: No.

11 CHAIRMAN ZECH: Commissioner Curtiss?

12 COMMISSIONER CURTISS: No.

13 CHAIRMAN ZECH: Thank you very much. We  
14 appreciate it.

15 MR. BECHTEL: Thank you.

16 CHAIRMAN ZECH: We will call on the National  
17 Congress of American Indians, Mr. Tousley and Ms.  
18 Chehak. Is she with you?

19 MR. TOUSLEY: No, she's not.

20 CHAIRMAN ZECH: This is Mr. Tousley, right?

21 MR. TOUSLEY: Yes.

22 CHAIRMAN ZECH: Thank you. You may proceed.

23 MR. TOUSLEY: Mr. Chairman, Commissioners, my  
24 name is Dean Tousley. I'm an attorney with the law firm  
25 Harmon, Kern and Tousley, here in Washington. I'm

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1 pleased to have this opportunity to address you on  
2 behalf of the National Congress of American Indians,  
3 about the proposed LSS rule. I apologize that my  
4 colleague, Gail Chehak, was unable to be with us. She  
5 was taken ill.

6 I was privilege to represent, initially, the  
7 Yakima Indian Nation and, later, the National Congress  
8 of American Indians, as a member of the Commission's LSS  
9 Advisory Committee.

10 I'd like to express to you NCAI's appreciation  
11 for being included in the negotiated rulemaking process  
12 for this proposed rule. We sincerely believe that the  
13 process was productive and ultimately successful,  
14 notwithstanding the absence of consensus due to the  
15 nuclear industry's non-acquiescence in the outcome.

16 We can think of no greater testament to the  
17 success of the negotiated rulemaking process than the  
18 fact that interest ranging from the license applicant to  
19 the project's most vociferous likely opponents and,  
20 including the Commission staff, stand before you today  
21 in support of the proposed rule.

22 I believe you would be hard-pressed to  
23 identify another incidence of such broad support for any  
24 Commission undertaking.

25 The lone exception to the consensus which the

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1 negotiated rulemaking sought to achieve, is the position  
2 of the nuclear industry. They have decided to oppose  
3 the proposed LSS rule on the basis of cost and the  
4 absence of additional constraints on the rules of  
5 practice.

6 The utilities argued that the LSS will  
7 probably cost much more than the \$200 million estimated  
8 by DOE. It would be foolhardy to rule out the  
9 possibility of cost over-runs on such a large project,  
10 however, these costs must be considered in relation to  
11 the overall cost of the waste program, in which context  
12 they are relatively insignificant -- about 1 percent,  
13 based on an overall program cost estimate of \$20  
14 billion, which may now be low.

15 It is on the benefit side of the analysis that  
16 we most differ with the position of the utilities.  
17 Whereas the utilities perceive that achievement of the  
18 three-year licensing period is the only conceivable  
19 benefit of an LSS system, potential interveners believe  
20 that an arbitrary limitation on the Commission's  
21 licensing review was ill-advised.

22  
23  
24  
25

1           Public confidence in the government's  
2 repository program would be hard-won under even the most  
3 ideal circumstances. Requiring the Commission to make  
4 this unprecedented complex and contentious determination  
5 in such a short time unnecessarily undercuts both the  
6 reliability of the Commission's license review and  
7 public confidence in that review.

8           That is too high a price for the couple of  
9 years that might be saved in getting a repository  
10 licensed. In short, we believe that achieving an  
11 acceptable, technically successful repository is  
12 infinitely more important than having a repository by  
13 some arbitrary, near-term date. However, we recognize  
14 that the three-year requirement is law, which the  
15 Commission must try to comply with, and we support the  
16 proposed LSS as a legitimate effort in that direction.

17           Like DOE and the NRC staff, we believe that a  
18 competently implemented and managed LSS definitely will  
19 shorten the repository licensing period, by reducing the  
20 need for traditional time-consuming discovery and  
21 speeding communications.

22           If DOE is correct in its projection that each  
23 year of delay in the repository licensing adds about  
24 \$200 million to the cost of the program, the system need  
25 only save one year in order to be cost-effective.

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1           The LSS benefit which is vitally important to  
2 potential interveners and of no interest to the  
3 industry, is its potential to facilitate the  
4 thoroughness of program reviews.

5           We view the NRC licensing for a repository to  
6 be more than a procedural hoop through which DOE must  
7 jump on its way to repository waste acceptance. Indian  
8 tribes, states, local governments, and citizens'  
9 organizations that might become interveners in this  
10 process, have a responsibility to their respective  
11 constituents to ensure that the resolution of serious  
12 questions about the suitability of the proposed  
13 repository site is achieved as meaningfully and  
14 correctly as possible.

15           In other words, our primary interest in this  
16 entire program, one which is manifestly consistent with  
17 the public interest, is to make sure that the  
18 Commission's final determinations are as nearly correct  
19 as possible.

20           To discharge this responsibility, you must be  
21 intimately involved in the review of the program. To  
22 effectively participate in program reviews, perspective  
23 interveners must have excellent early access to the  
24 program's information base. They do not now have even  
25 marginally adequate access to that information.

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1           The LSS, even a flawed, incomplete LSS,  
2 promises to vastly improve that access. The most  
3 important aspect of that access improvement is the  
4 proposed full text search capability of the LSS. That  
5 is where the utilities' alternative electronically  
6 indexed microfiche system falls far short of what is  
7 needed.

8           Unfortunately, the usefulness of such systems  
9 is far too sensitive to the quality of the indexing.  
10 There needs to be close correspondence between the  
11 thought processes of the indexer and those of the  
12 subsequent searcher, for the latter to find the  
13 materials he seeks in an index-only system.

14           And I would ask you to consult your own Office  
15 of General Counsel on that issue, and ask them whether  
16 they prefer doing research on your own decisions, using  
17 the indexes which are published, or using LEXUS, and I  
18 think most of them will tell you that they would much  
19 rather use LEXUS, which provides them the capability to  
20 search the full text of all those decisions.

21           Full text search provides much greater power  
22 and flexibility in accessing relevant information. And,  
23 indeed, the NRC staff provided information in support of  
24 that conclusion, in support of the rule.

25           We conclude that the proposed LSS passes cost-

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1 benefit analysis because the key benefit of improved  
2 access to programmed information would certainly be  
3 served, and the costs of the LSS are not a significant  
4 fraction of the overall waste program costs.

5 We also support the conclusion that the LSS  
6 would shorten the licensing period for a repository.

7 Key aspects of the waste program, in  
8 particular planning for and implementation of site  
9 characterization, are taking place now. Because the  
10 foundation for a repository license application is  
11 already being laid, the benefits of the LSS are sorely  
12 needed by the perspective parties, including DOE and the  
13 NRC staff, as soon as possible.

14 In light of this, the assertion by DOE in its  
15 written clarifications and again today, that it does not  
16 now foresee LSS availability until late 1992 or early  
17 '93, is very troubling. We do not believe that you  
18 require four years for initial implementation of this  
19 system, particularly since the whole licensing  
20 proceeding is supposed to be completed in less time than  
21 that.

22 The major premise of this whole system is that  
23 the parties will be in essential command of the  
24 program's information base, by the time the application  
25 is docketed. Obviously, an LSS which is available only

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1 a few months prior to docketing cannot possibly achieve  
2 that objective.

3 Industry recommends numerous other licensing  
4 reforms beyond the scope of the LSS, which they claim  
5 are necessary to achieve the three- to four-year  
6 licensing. These are the same reforms which the  
7 industry has been seeking in NRC licensing procedures  
8 generally, for the past decade or more, which would have  
9 the effect of making public participation in NRC  
10 licensing an exercise in utter futility.

11 The industry acknowledges that the proposed  
12 LSS rule already places several new restrictions on  
13 intervention, and those have been highlighted today by  
14 Mr. Olmstead. In large part, they are there because of  
15 the industry's insistence in the negotiated rulemaking  
16 process. NCAI and other parties reluctantly agreed to  
17 these additional restrictions, in light of the  
18 availability of the LSS and the countervailing benefits  
19 it would provide.

20 We vigorously oppose any further restrictions  
21 along the lines suggested by the industry. Indeed, as  
22 was pointed out by the State of Nevada, we agreed to the  
23 proposed rule as a whole package. We dealt with  
24 restrictions on intervention as part of the  
25 negotiations. We fought hard to limit restrictions on

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1 things like threshold for contentions, threshold for  
2 admitted additional contentions -- amending contentions,  
3 rather -- the scope of discovery. Those were some of  
4 the things that were the most important to us, and we  
5 agreed to the way they were resolved in the proposed  
6 rule, and would feel that we have not been well dealt  
7 with if the Commission decides to take those aspects out  
8 of this rulemaking and deal with them separately.

9 We believe meaningful participation in the  
10 Commission's licensing activities enhances public  
11 acceptance of the Commission's discharge of its  
12 responsibilities to protect public health and safety.

13 Ultimately, we are convinced that this  
14 enhanced acceptance is more valuable to the proponents  
15 of the repository, than would be a couple of years they  
16 might save by unduly curtailing participation.

17 To conclude, the same considerations which led  
18 the Commission to undertake this rulemaking by  
19 negotiation -- that is, that the resultant more thorough  
20 participation would result in a better and more  
21 acceptable draft rule -- should similarly lead the  
22 Commission to reject the nuclear industry's position in  
23 promulgating the final rule.

24 The proposed system promises to lead to more  
25 meaningful participation in this important government

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1 process, as well as more efficient and effective  
2 management of the vast quantity of information required  
3 for repository licensing, by all parties.

4 NCAI urges the Commission to stick with the  
5 result of the rulemaking negotiations, and promulgate  
6 the final rule as proposed. That proposal is acceptable  
7 to DOE, the agency with primary waste program  
8 responsibility, and the license applicant, and the NRC  
9 staff, which is most familiar with the needs of the  
10 Commission's licensing process. That strongly suggests  
11 that the industry's concerns do not merit rejection of  
12 the LSS as proposed.

13 CHAIRMAN ZECH: All right. Thank you very  
14 much. Any questions? Commissioner Roberts?

15 COMMISSIONER ROBERTS: No.

16 CHAIRMAN ZECH: Commissioner Carr?

17 COMMISSIONER CARR: No.

18 CHAIRMAN ZECH: Commissioner Rogers?

19 COMMISSIONER ROGERS: No.

20 CHAIRMAN ZECH: Commissioner Curtiss?

21 COMMISSIONER CURTISS: No.

22 MR. TOUSLEY: May I add something?

23 CHAIRMAN ZECH: Yes, certainly, go ahead.

24 MR. TOUSLEY: In response to a comment by the  
25 representatives from the nuclear industry, they

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1 suggested a possible unwieldiness from a full text  
2 search system of the scope being contemplated here, and  
3 the idea was laid out that you put in a search term and  
4 you get back 20,000 hits, and then you have to go look  
5 through all of -- the full text of all those documents.

6 And I'd just like to explain that that's not  
7 really how it would work. You put in a search term.  
8 You get back 20,000 hits. You add an additional  
9 restriction. You say "and between these states", and  
10 you see how many hits that gets. Say, that knocks it  
11 down to 8,000. That's still too many. You say "and",  
12 add another subject heading. That knocks it down to  
13 1200. Then you say "and authored by one of these  
14 parties". That knocks it down to 250.

15 All right. At this point, it's worth looking  
16 at the headers of those documents. You can look at the  
17 headers on the screen. Look at the ones that look  
18 relevant to you. You might decide, well, a lot of these  
19 still don't look relevant, but I can't tell from the  
20 header. Let's look at the key words in context. Then  
21 you say, "Show me these 250, or some lesser number, of  
22 documents, with the key words I've searched for in  
23 context in the full text". That shows you a paragraph  
24 or two on either side of your search terms, and you can  
25 tell right away whether you're getting junk or whether

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1 you're getting something that's relevant to you.

2 All of these are things that are available  
3 today on LEXIS. It makes doing legal research an  
4 entirely different ball game -- more efficient, more  
5 effective than it was before. I don't think any lawyer  
6 who has taken the time to learn and use LEXIS, would  
7 choose to go back to the system where they had to rely  
8 on headnotes in the USCA or the Federal Practice Digest,  
9 and not ever use LEXIS.

10 People who know LEXIS use it, and that is the  
11 kind of functional capability that we're looking for  
12 here, that will make it possible to save time in this  
13 proceeding, that will make it possible for your staff to  
14 do what they have to do in the short amount of time they  
15 have, and will make it possible for states, Indian  
16 tribes, and other affected parties, to feel that they  
17 are meaningfully participating in this proceeding.

18 CHAIRMAN ZECH: Thank you.

19 Commissioner Curtiss, did you want to ask any  
20 other questions from the assembled group, or have you  
21 have a chance --

22 COMMISSIONER CURTISS: Well, I do have a  
23 number more questions to cover, but due to the lateness  
24 of the day, I do want to say that I thought the  
25 presentations were all stimulating and -- certainly, for

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1 me. I really enjoyed the presentations. I want to  
2 thank Mr. Bellman, for the effort that he's contributed  
3 to this process. It's the first time that I've been  
4 involved in a negotiated rulemaking with the Commission,  
5 and I must say I've found it most stimulating, very  
6 helpful.

7 CHAIRMAN ZECH: Then, if there's no other  
8 comments from the presenters, I, too, Mr. Bellman, would  
9 like to thank you very much for your participation as  
10 Facilitator. Would you care to make any brief comments  
11 while you're here with us today?

12 MR. BELLMAN: Thank you for the opportunity.

13 CHAIRMAN ZECH: Thank you very much.

14 Let me thank all of you who participated on  
15 the negotiating team, as members, not only for your work  
16 on the team, but also for being here today and  
17 presenting us your views. I can assure you the  
18 Commission appreciates the work all of you have done in  
19 this negotiated rulemaking.

20 I mentioned at the outset of the meeting that  
21 this rulemaking was but one of the measures the  
22 Commission must take if we are to complete the  
23 repository license review in the time that's been given  
24 us, but we are also considering a number of other future  
25 rulemakings that will be designed to resolve significant

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1 technical issues in advance of receiving DOE's license  
2 application.

3 I'd also expect that the Commission will be  
4 considering further changes to our rules of practice, to  
5 further streamline the licensing process, while meeting  
6 our primary responsibilities which is to conduct, in  
7 this case, a thorough safety review of the repository  
8 license application.

9 Now, the Commission is well aware of our  
10 public health and safety responsibilities. This, I'm  
11 sure -- and future Commissions, too -- will always be  
12 keenly aware of and -- of the special trust and  
13 confidence that's placed in us by the American people,  
14 for their public health and safety.

15 We intend to keep that in mind as we go  
16 through this process, as well as we do all of our other  
17 processes that come to us on a daily basis. Public  
18 health and safety is our primary responsibility. We  
19 intend to do the job, and we intend to do it right. I'm  
20 sure future Commissions have the same -- will have the  
21 same views, but I do feel that this negotiated  
22 rulemaking has been a very important process.

23 We have tried to bring people together. You  
24 have gotten together. You have worked together. You've  
25 tried hard to work out the differences. You have worked

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1 out differences in most cases, it would appear. And the  
2 fact that it wasn't entirely satisfactory to the  
3 industry and utility group is well presented here today,  
4 but we will take into consideration all we've heard and,  
5 hopefully, be able to move forward with some kind of a  
6 licensing support system that will, indeed, allow us to  
7 exercise those responsibilities that, again, the  
8 American people place in us, with that special trust and  
9 responsibility.

10 Are there any other comments from my fellow  
11 Commissioners?

12 (No response.)

13 If not, we stand adjourned. We thank you very  
14 much for your fine presentations.

15 (Whereupon, at 4:25 p.m., the meeting was  
16 adjourned.)

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CERTIFICATE OF TRANSCRIBER

This is to certify that the attached events of a meeting  
of the United States Nuclear Regulatory Commission entitled:

TITLE OF MEETING: BRIEFING ON FINAL RULE REGARDING THE HIGH  
LEVEL WASTE MANAGEMENT LICENSING SUPPORT  
PLACE OF MEETING: SYSTEM  
ROCKVILLE, MARYLAND  
DATE OF MEETING: FEBRUARY 7, 1989

were transcribed by me. I further certify that said transcription  
is accurate and complete, to the best of my ability, and that the  
transcript is a true and accurate record of the foregoing events.

Phyllis Young

Reporter's name: \_\_\_\_\_  
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## SCHEDULING NOTES

TITLE: BRIEFING ON FINAL RULE REGARDING THE HIGH  
LEVEL WASTE MANAGEMENT LICENSING SUPPORT  
SYSTEM

SCHEDULED: 2:00 P.M., TUESDAY, FEBRUARY 7, 1989 (OPEN)

DURATION: APPROX 2 HRS

PARTICIPANTS: NRC STAFF 20 MINS  
- WILLIAM J. OLMSTEAD  
- FRANCIS X. CAMERON

US DOE 10 MINS  
- JEROME SALTZMAN  
- BARBARA CERNY

INDUSTRY COALITION 10 MINS  
(EDISON ELECTRIC INSTITUTE  
UTILITY NUCLEAR WASTE  
MANAGEMENT GROUP  
U.S. COUNCIL ON ENERGY AWARENESS)  
- STEVEN P. KRAFT  
- JAY SILBERG

STATE OF NEVADA 10 MINS  
- MAL MURPHY  
- JAMES DAVENPORT

COALITION OF NEVADA LOCAL 10 MINS  
GOVERNMENTS  
(NYE, CLARK, LINCOLN COUNTIES)  
- DENNIS BECHTEL

NATIONAL CONGRESS OF AMERICAN 10 MINS  
INDIANS  
- DEAN R. TOUSLEY  
- GAIL CHEHAK

OTHER ATTENDEES  
CONSERVATION FOUNDATION  
- HOWARD S. BELLMAN, FACILITATOR



**U.S. Nuclear Regulatory Commission**

**February 7, 1989**

**SECY-89-027**

**Rulemaking Issue**  
(Affirmation)

**FINAL RULE - PART 2 LICENSING SUPPORT SYSTEM**

# **SUBJECTS COVERED IN BRIEFING**

**Purpose of Rule/Advisory Committee**

**Negotiations**

**Licensing Support System**

**Part 2 Changes**

**Public Comments Analysis**

## **STATUTORY BACKGROUND**

**NWPA - 1982: Established Three Year Licensing Goal**

**DOE/NRC Memorandum of Understanding**

**1987 Amendments**

## **RULEMAKING BACKGROUND**

**Part 60    Part 2    QA/QC**

**Licensing Support System (LSS) Negotiations**

## **PURPOSE OF RULE**

**Facilitate Discovery by Comprehensive & Easy  
Access to Relevant Licensing Information**

**Establish the Information Base for the Licensing  
Proceeding Before Submission of Application**

**Facilitate Review by All Parties to extent  
practicable with full text capability**

**Reduce Time Associated with Submission of  
Motions & Other Documents**

## **NEGOTIATED RULEMAKING - AUGUST 5, 1987**

**CONVENOR:** Conservation Foundation, H. Bellman

**COMMITTEE:** NRC, DOE, Nevada, Nevada Local Governments,  
NCAI, Environmental Coalition, Industry  
Coalition

**TIME:** September 1987 to July 1988

## **KEY NEGOTIATED ISSUES**

**LSS - Volume of Documents**

**TIME - Can it be done in three years?**

**ACCESS - How long before docketing will parties have access?**

**COST - Is the cost excessive when compared to expected time savings?**

## **PROPOSED RULE 11/3/88**

## **LSS ATTRIBUTES**

**Contains RELEVANT Documents of All Parties**

**All Parties have FULL TEXT Access**

**System is Available before License Application**

**Motions can be filed Electronically**

**QA/QC Data Management**

## **LSS OBJECTIVES**

**Facilitate Discovery**

**Establish the Information Base for HLW  
Proceeding Prior to Application**

**Facilitate Technical Review of ALL Parties with  
Full Text Capability**

**Reduce Time Associated with Motions Practice**

**Provide for Early Issues ID/Management**



## **OTHER PART 2 CHANGES**

**Discovery - Interrogatory practice**

**Intervention/Contentions**

**Immediate Effectiveness**

**Appeals**

**NOTE: All Changes to Part 2 are related to Time**

## **MAJOR ISSUES**

**Are Time Reductions in Final Rule Worth LSS Costs?**

**Are Topical Guidelines Clearly Excluded from NRC's Contention Practice?**

# **COMMENTS**

**Concerns Raised**

**Advisory Committee Member Responses**

**Analysis**

**STATUS OF THE LICENSING SUPPORT SYSTEM**

**BARBARA A. CERNY**

**U.S. DEPARTMENT OF ENERGY**

**OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT**

**FEBRUARY 7, 1989**

**LSS 10 YEAR LIFE CYCLE COST - \$200 MILLION**

<b>LABOR</b>	<b>70%</b>
<b>HARDWARE/SOFTWARE</b>	<b>18%</b>
<b>FACILITY</b>	<b>7%</b>
<b>TELECOMMUNICATIONS</b>	<b>5%</b>

**COST AVOIDANCE TO WASTE FUND - \$195 ANNUALLY  
BEYOND 3 YEAR CONSTRUCTION AUTHORIZATION**

**LSS "GRADUATED" FROM OMB'S PRESIDENTIAL PRIORITY SYSTEM LIST**

- TECHNICALLY FEASIBLE**
- COST JUSTIFIABLE**
- MANAGEMENT IN PLACE TO IMPLEMENT**

## SCHEDULE FOR THE LSS

**OCTOBER, 1987      DESIGN AND IMPLEMENTATION CONTRACT AWARDED TO  
SCIENCE APPLICATIONS INTERNATIONAL, INC.**

- 1988   -   INFORMATION ENGINEERING PHASE**
  - NEEDS ANALYSIS**
    - o   NEGOTIATED RULEMAKING**
    - o   SURVEY OF USERS**
  - DATA SCOPE-ANALYSIS**
  - CONCEPTUAL SYSTEM DESIGN**
  - COST-BENEFIT ANALYSIS**
  - PROTOTYPE SPECIFICATION**

**SCHEDULE FOR THE LSS (CONTINUED)**

- 1989 - DESIGN AND INITIAL PROCUREMENT**
- PROTOTYPE IMPLEMENTATION OF 200,000 PAGES**
- CAPTURE SYSTEM SPECIFICATIONS**
- INSTALLATION OF FIRST CAPTURE SYSTEM**
  - o BEGIN WITH DOE BACKLOG LOAD**
- WORK WITH NRC AND OTHERS**
  - o STANDARDIZE CAPTURE PROCEDURES**
  - o COORDINATION OF CAPABILITIES WITHIN EXISTING ENVIRONMENTS**



**SCHEDULE FOR THE LSS (CONTINUED)**

- 1990 - PROCUREMENT AND INSTALLATION**
- DATABASE MANAGEMENT SYSTEM PROCUREMENT**
- REMAINING CAPTURE SYSTEMS PROCUREMENT**
  - o BEGIN DOCUMENT COLLECTION FOR NRC AND OTHERS**
- SEARCH SYSTEM SPECIFICATIONS**
- IMAGE SYSTEM SPECIFICATIONS**
- COMPONENT REVIEW AND ACCEPTANCE BY DOE, NRC AND OTHERS**

**SCHEDULE FOR THE LSS (CONTINUED)**

- 1991 - PROCUREMENT, INSTALLATION, INTEGRATION**
  - SEARCH AND IMAGE SYSTEM PROCUREMENT AND INSTALLATION**
  - SOFTWARE DEVELOPMENT COMPLETED**
  - TELECOMMUNICATIONS INSTALLED**
  - COMPONENT REVIEW AND ACCEPTANCE BY DOE, NRC AND OTHERS**
- 1992 - FINAL SYSTEM INTEGRATION**
  - TEXT OF 4 MILLION PAGES LOADED**
  - INSTALLATION AND ACCEPTANCE TESTS COMPLETED**
  - LSS AVAILABLE TO USERS**

**SCHEDULE FOR THE LSS (CONTINUED)**

- 1993 - MAJORITY OF BACKLOG DATA LOADED BY ALL PARTIES**
- 1994 - CERTIFICATION BY NRC THAT LSS IS "SUBSTANTIALLY  
LOADED"**



## **RULEMAKING ISSUE**

January 30, 1989

**(Affirmation)**

SECY-89-027

**For:** The Commissioners

**From:** William J. Olmstead  
NRC Negotiating Representative

**Subject:** FINAL RULEMAKING ON THE LICENSING SUPPORT SYSTEM FOR  
THE HIGH-LEVEL WASTE LICENSING PROCEEDING

**Purpose:** To request Commission review and approval of a final  
revision to 10 CFR Part 2 which would establish the  
procedures for the High-level waste licensing proceeding

**Summary:** On August 5, 1987, the Commission established the  
High-level Waste Licensing Support System Advisory  
Committee ("negotiating committee") to develop  
recommendations on the procedures to govern the High-Level  
Waste (HLW) licensing proceeding, including the use of an  
electronic information management system know as the  
Licensing Support System ("LSS"). The LSS would contain  
the documentary material of DOE, NRC, and the other  
parties to the HLW licensing proceeding that may be  
relevant to the licensing of the repository. The  
negotiating committee completed its deliberations in July  
1988. Based on the committee deliberations, the NRC  
Negotiator ("Negotiator") submitted a draft proposed rule  
for Commission review that would revise 10 CFR Part 2 to  
establish the procedures for the HLW proceeding. The  
proposed rule was published on November 3, 1988. The  
comment period closed on December 5, 1988. After  
consideration of the public comments, the Negotiator has  
developed the draft final rule for Commission review.  
(Attachment A)

**Background:** On August 5, 1987, the Commission announced (52 FR 29024)  
the formation of the High-level Waste Licensing Support  
System Advisory Committee ("negotiating committee") to  
develop recommendations for revising the Commission's  
Rules of Practice in 10 CFR Part 2 for the adjudicatory  
proceeding on the application for a license to receive and

CONTACT:  
F.X. Cameron, OGC  
x21623

possess high-level radioactive waste ("HLW") at a geologic repository operations area ("HLW licensing proceeding").<sup>1/</sup> The negotiating committee sought consensus on the procedures that would govern the HLW licensing proceeding, focusing primarily on the use of an electronic information management system known as the Licensing Support System ("LSS"). The objective of the negotiated rulemaking was to develop the essential features of the procedural rules for effective Commission review of the U.S. Department of Energy (DOE) license application within the three-year time period required by Section 114(d) of the Nuclear Waste Policy Act of 1982, as amended ("NWSA").

The LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application for the repository to the Commission. The LSS would contain the documentary material generated by DOE, NRC and other parties to the licensing proceeding, which are relevant to licensing of the repository. All parties would then have access to this system well before the proceeding begins. Access to these documents will be provided through electronic full-text search capability. This provides the flexibility of searching on any word or word combinations within a document, and thus facilitates the rapid identification of relevant documents and issues. Because the relevant information would be readily available through access to the LSS, the initial time-consuming discovery process, including the physical production and on-site review of documents by parties to the HLW licensing proceeding, will be substantially reduced.

The use of the LSS in the HLW licensing proceeding is to provide for timely review of the DOE license application by --

- ° eliminating the most burdensome and time-consuming aspect of the current system of document discovery -- i.e., the physical production of documents after the license application has been filed -- because the LSS will provide for the identification and submission of

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<sup>1/</sup> See Agreement in Principle Between the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC) on the Development of a Licensing Support System (LSS), February 27, 1987. Attachment G.

discoverable documents before the license application is submitted;

- ° eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed if the LSS does not become a reality;
- ° enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability which will allow the quick identification of relevant documents and issues;
- ° enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding;
- ° providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Negotiating Committee. The Commission used the process of negotiated rulemaking to develop the proposed rule. In negotiated rulemaking, the representatives of parties who may be affected by a proposed rule, including the Commission, convene as a group over a period of time to attempt to reach consensus on the proposed rule.

The first meeting of the negotiating committee was held in September 1987. The negotiating committee completed its deliberations in July 1988.

The members of the negotiating committee are --

- ° DOE
- ° NRC
- ° State of Nevada
- ° a coalition of Nevada local governments

- ° a coalition of industry groups (Edison Electric Institute/Utility Nuclear Waste Management Group/U.S. Council for Energy Awareness)
- ° National Congress of American Indians
- ° a coalition of national environmental groups (Environmental Defense Fund/Sierra Club/Friends of the Earth).

The NRC negotiating positions were developed on a consensus basis by the internal NRC negotiating team composed of representatives of the Office of the General Counsel, the Office of the Secretary, the Atomic Safety and Licensing Board Panel, the Atomic Safety and Licensing Appeal Panel, the former Office of Administration and Resources Management, the Office of Nuclear Material Safety and Safeguards, and the Office of Governmental and Public Affairs.

All members of the negotiating committee, with the exception of the industry coalition, agreed to the draft text of the proposed rule that was discussed by the committee at its final meeting ("final negotiating text"). Under the committee protocols, the dissenting vote by the industry precluded committee consensus on the proposed rule. <sup>2/</sup>

Those participants who approved the final negotiating text are DOE, the State of Nevada, the coalition of Nevada local governments, the National Congress of American Indians, the coalition of national environmental groups, and the NRC staff. The final negotiating text was carefully drafted with the full participation of people

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2/ In the August 5, 1987, Federal Register Notice that initiated the negotiated rulemaking, the Commission clearly indicated that the LSS was only one of the mechanisms that the Commission was considering to streamline the licensing process. However, all participants on the negotiating committee, including the industry, initially agreed that a significant contributor to licensing delay was document discovery and motions practice -- issues that the LSS was intended to address. In this regard, the industry, in a March 14, 1988 letter to the negotiating committee, later stated a contrary position that the LSS would result in little change in the length of the licensing proceeding without further procedural changes.

with strong experience and background in NRC practice. It reflected the concerns of the major interests affected by the rulemaking. In fact, the industry coalition, although dissenting on the final negotiating text, fully participated in the drafting of the final text, and had considerable influence on the wording of the final text. <sup>3/</sup>

The proposed rule was issued for a thirty-day comment period. The participants on the negotiating committee who approved the final negotiating text agreed to refrain from commenting negatively on the final negotiating text, if that text was published by the Commission as a proposed rule. The industry coalition, as well as any nonparticipants in the negotiation, were free to comment critically on any aspect of the proposed rule, including cost aspects of the LSS. Consistent with the negotiating committee's function to advise the Commission on the LSS rulemaking, the staff submitted the comments on the proposed rule to the negotiating committee for review and comment. The public comments on the proposed rule, and any comments from the negotiating committee (the Commission received comments from the State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada), are summarized below.

The comment period on the proposed LSS rule closed on December 5, 1988. The Commission received nine comments (Attachment B). Seven of these comments were from various segments of the nuclear industry, one was from DOE expressing support for the LSS rulemaking and recommending several clarifications, and one was from formal trial counsel in the Commission's Office of the General Counsel, now with the firm of Hopkins, Sutter, Hamel & Park. Most of the industry comments consisted of an endorsement of the recommendations contained in the comment letter submitted by the Edison Electric Institute and the Utility Nuclear Waste Management Group("EEI/UNWVG"). As noted earlier, EEI/UNWVG, along with the U.S. Council on Energy Awareness, represented the industry on the negotiating committee. The industry comments will be discussed in the context of the EEI/UNWVG comments, except where there is a

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<sup>3/</sup> The Negotiator notes that the industry coalition's dissent on the final negotiating text was based on the same rationale -- the cost of the LSS -- that it had set forth at the initial meeting of the negotiating committee some ten months earlier.



significant difference in an individual comment letter. The discussion of the public comments will focus on the issues of cost-benefit, the topical guidelines for the submission of documents to the LSS, and the non-LSS aspects of the rule.

Benefit-cost. The industry argues that the LSS is a "gigantic, highly complicated, and extraordinarily expensive system" that will not significantly assist Commission decision-making on the construction authorization for the repository within the NWPA timeframe. Rather than leading to a reduction of the time for licensing, the industry believes that the LSS would lead to an extension of the licensing time. Therefore, the industry does not believe that the benefits of the LSS justify the costs (estimated by DOE to be \$200 million over a ten year period), and consequently, does not support the LSS.

The industry argument against of the LSS has two basic components: (1) the LSS would not enable the Commission to meet the three-year schedule for the issuance of the construction authorization mandated by the NWPA; and (2) the costs of the LSS have been underestimated. As an alternative to the LSS, the industry has proposed a microfiche-based system in which relevant documents would be stored on microfiche but would not be captured in electronic searchable full text. However, the indexes to the documents and the bibliographic headers for the documents would be "computerized", presumably in electronic searchable full text. Parties could request a copy of a document from the LSS Administrator, and receive it by overnight mail.

According to the industry, the LSS would lengthen the licensing process for the following reasons:

- ° The industry argues that the LSS will create new procedural issues over which litigation is likely -- for example, the LSS Administrator's certification that DOE is in substantial and timely compliance with the document submission requirements in the rule. In response, the Negotiator notes that, although the LSS rule does establish some new procedural requirements, these requirements are necessary to ensure that the parties subject to the rule are in substantial and timely compliance with its provisions, and thereby facilitate compliance with the NWPA's three-year time frame. In particular, the certification of DOE.

compliance is necessary to assure that relevant documents are in the LSS as soon as possible, so as to allow for early, pre-license application discovery. Any disputes over compliance with the rule will be resolved by the Pre-License Application Licensing Board established in section 2.1010 before the license application is submitted.

- ° The industry argues that the actual performance of the LSS is unlikely to live up to the expectations of the parties because documents that should be in the data base will be missed entirely, and that some of the documents captured could easily be incomplete in their electronic form. This will lead to attacks on the accuracy and completeness of the data base. The Negotiator notes that the final LSS rule contains several provisions intended to minimize and correct inaccuracies and incompleteness. Section 2.1009 requires each party to establish procedures to capture the required documents. This section also establishes an early and continuous certification process, in which a party's designated official must certify that the party is in compliance with document submission requirements of the rule. Section 2.1003(h)(2)(i) requires the LSS Administrator to begin monitoring DOE compliance with the document submission requirements well before the license application is submitted. Section 2.1004 provides a mechanism for amendments and additions to be made to the data base. In addition, the LSS will be operational before the license application is submitted, allowing time for any errors or omissions to be corrected. Furthermore, an image of all documents will be available as a backup for the electronic text. Finally, as noted above, the rule establishes a Pre-License Application Licensing Board to resolve any disputes over accuracy and completeness of documents before the license application is submitted.
- ° The industry argues that the vast quantities of data available in electronic full text will provide parties with the opportunity to generate even greater amounts of discovery. The Negotiator notes that the LSS rule establishes requirements for the submission of relevant documents in advance of the license application. Because of the substantial amount of information that will therefore be provided, the Negotiator does not anticipate continual discovery

requests for large amounts of additional documents. Furthermore, the Hearing Licensing Board is authorized to limit discovery, specifically taking into account the early availability of information provided by the LSS, and compliance with the NWPA's three-year schedule. See sections 2.1018(c), 2.1021(a)(5), 2.1022(a)(6).

- ° The industry argues that disputes over the use of written interrogatories are certain to "plague the licensing board and discovery master." Section 2.1018(a)(2) provides for the use of written interrogatories only if authorized by the discovery master or Hearing Licensing Board upon a showing that informal discovery, which, as indicated below, is limited to such matters as the names of witnesses, has failed. Furthermore, in ruling upon a motion to authorize written interrogatories, the discovery master, or the Hearing Licensing Board, may consider whether the request creates the potential for unreasonably interfering with meeting the three-year schedule in the NWPA. For these reasons, the Negotiator does not believe that disputes over written interrogatories will "plague" the boards, or lengthen the licensing process.
- ° The industry argues that system failures will trigger action to bring the entire licensing process to a halt. The Negotiator does not anticipate that the LSS will be unavailable for critical periods or lengths of time. DOE will design and develop the LSS well in advance of the license application. This period also includes development of a prototype system, as well as testing of the LSS before it becomes operational. Furthermore, the DOE design, development, and testing program will be conducted with input from NRC and other affected parties. The Negotiator believes that the design, testing, and development process will eliminate the major causes of system failure before the hearing process begins.

In summary, the Negotiator does not agree with the industry opinion that the LSS would add time to the licensing process. The staff continues to believe that the LSS is the best alternative for providing a high quality and efficient review of the DOE license application within the schedule mandated by the NWPA. As noted above, this will be accomplished through --

- ° eliminating the most burdensome and time-consuming aspect of the current system of document discovery -- i.e., the physical production of documents after the license application has been filed -- because the LSS will provide for the identification and submission of discoverable documents before the license application is submitted;
- ° eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed if the LSS does not become a reality;
- ° enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability, which will allow the quick identification of relevant documents and issues;
- ° enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions, resulting in a substantial saving of time during the proceeding;
- ° providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Negotiator believes that any document management system for the HLW proceeding must meet all of these objectives in order for the Commission to meet the NWPA schedule, while still providing for a high quality review of the license application. No other alternative, including the industry microfiche proposal, will accomplish this.

As stated by the National Congress of American Indians (NCAI) in its review of the benefits of the LSS --

The LSS benefit which is vitally important to potential intervenors--and of no interest to the industry--is its potential to facilitate the thoroughness of program reviews. Unlike the nuclear

industry, Indian tribes, states and other potential intervenors view the NRC licensing for a repository to be more than a troublesome procedural hoop through which DOE must jump on its way to repository waste acceptance.

Indian tribes, states, local governments and citizens' organizations that might become intervenors in that process have a responsibility to their respective constituents to see that the resolution of those questions is done as meaningfully and correctly as possible. In other words, these entities' primary interest in this entire program--one which is manifestly consistent with the general public interest--is to make sure that the Commission's final determinations in this matter are as nearly correct as possible.

To discharge this responsibility, which is also mandated by the Nuclear Waste Policy Act ("NWPA") with respect to the host state and any affected Indian tribe, they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. They do not now have even marginally adequate access to that information. The LSS--even a flawed, incomplete LSS--promises to vastly improve that access. Attachment C.

NCAI concluded that --

the proposed LSS passes the cost/benefit analysis because the key benefit of improved access to program information will certainly be served by the LSS and the costs of the LSS are not a significant fraction of the overall waste program costs. We also support DOE's and NRC's conclusion that the LSS would shorten the licensing period for a repository and, in that respect, would be likely to reduce overall program costs rather than increase them. Attachment C.

One public commenter, the former NRC trial counsel, endorses the benefits of the LSS and agrees with the staff belief that "the LSS will facilitate greatly the objective of realizing an initial decision within 3 years of the filing of the application." This commenter goes on to state that "the HLW license hearings will be delayed substantially" without the LSS. This is due to the fact

that the LSS rulemaking will remove document discovery as an obstacle to timely completion of the HLW proceeding by providing relevant documents well in advance of the license application. As further stated by this commenter --

Potential parties will have access to the LSS well in advance of the time for submitting requests for a hearing. Thus, the time needed for prospective parties to digest pertinent information will not become a critical path matter because it should be largely completed before the prehearing process begins. Moreover, all hearing requesters should be better informed with respect to the subject matter, and they should be able to frame meaningful and material issues for litigation.... Finally, the establishment of the Pre-License Application Licensing Board to hear and rule on document production controversies should assure that the delay attendant to legal posturing over document production will not impact the hearing schedule. In sum, the proposed regulations would ... remove one of the greatest causes of delay from the NRC adjudicatory hearing process. Attachment B (Hopkins, et al.).

The DOE benefit-cost analysis indicates that approximately \$200 million would be saved for each year of licensing delay eliminated due to the LSS. The final rule establishes procedures for the HLW proceeding, including a model hearing schedule, that will allow the Commission to reach a decision on the construction authorization within the timeframe specified in section 114(d) of the NWPA. However, even if the process were to take up to one-third longer than the final rule envisions, the LSS would still result in eliminating substantial time from current licensing practice. Under these circumstances, the benefits of the final rule would exceed the costs of implementing the LSS. Moreover, the staff is pursuing still other methods for streamlining the licensing process, such as the use of rulemaking to resolve substantive licensing issues before the license application is submitted. See SECY-89-23 and SECY-88-265, and the discussion below.

The second part of the industry comments on the costs and benefits of the LSS is the adequacy of the DOE benefit-cost analysis. The industry does not believe that the DOE analysis is adequate for a number of reasons,

primarily because the DOE analysis did not consider alternatives to the LSS such as the industry microfiche system. In addition, the industry notes that the estimated \$200 million cost is only projected over a ten year period, and that cost is only presented in 1988 dollars. Finally, the industry claims that the size, complexity, and "revolutionary" nature of the LSS will significantly escalate the costs of the system.

In response, the Negotiator notes that the scope of the DOE benefit-cost analysis was determined in reference to the objectives of the LSS identified earlier -- facilitating the discovery and review of relevant documents. The staff, DOE, and other participants on the negotiating committee did not believe that any alternative other than an electronic full text search system could satisfy these objectives, and thereby allow the Commission to meet the NWPA schedule, while still providing for a high quality review of the relevant licensing information. Therefore, the DOE did not evaluate the benefits and cost of alternatives that did not include an electronic full text search capability of the documents in the system.

Although the industry microfiche alternative might provide for the collection of relevant documents in advance of licensing, it does not provide for the electronic full text search within those documents, such as the 7000-page Site Characterization Plan. The Negotiator does not believe that the mere availability of documents in hard copy or microfiche without electronic full text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWPA timeframe. For example, in the 18-month period following submission of the license application, the current schedule calls for the NRC staff to review the application, to prepare its Safety Evaluation Report, and to evaluate and respond to contentions proffered by the parties in the hearing. The LSS furnishes an important tool for the staff to use to ensure that its review is both timely and comprehensive and will enable the Staff to complete its review of both contested and uncontested issues without having an impact on the schedule of the adjudication.

NCAI, commenting on the full text search capability of the LSS, stated --

The most important aspect of that access is the proposed full-text search capability of the LSS. That is where the nuclear industry's alternative, a microfiche-based system, falls far short of what is needed. The nuclear industry would implement an electronic index only to the relevant information, which would be stored and provided in microfiche form. Unfortunately, the usefulness of such systems is far too sensitive to the quality of the indexing. Particularly with respect to subject descriptors or abstracts, there needs to be near-perfect correspondence between the thought processes of the indexer and those of the subsequent searcher in order for the latter to find materials in an index-only system.

Full-text search, on the other hand, provides much greater power and flexibility in accessing relevant information. Surveys cited by the NRC staff in support of the LSS rulemaking consistently showed greater accuracy and efficiency of searching in full-text plus header systems--such as is envisioned for the LSS--relative to other alternatives. Attachment C.

As noted by the State of Nevada in its review of the industry proposal, the system the industry recommends --

would not more greatly assist the Commission in meeting its congressional time goals, and would not provide the parties with effective and efficient document discovery. Most importantly, it would not give the Commission the commensurate higher level of confidence that all issues have been fully explored and that the public health and safety will be protected before the Commission arrives at its construction authorization decision. Attachment C.

Furthermore, the State of Nevada believes that the industry microfiche alternative "fail[s] to take into account the fact that any other system, either hard copy or the microfiche based system which they [the industry] espouse, would be as labor intensive, potentially more time consuming, probably unwieldy, and more likely than not would involve as much cost as the proposed LSS." For example, a microfiche data base would have to be duplicated for each potential party as well as for each public document room. The latter, in particular, would require substantial additional physical space and



personnel to oversee the microfiche library, compared with an electronic database requiring only computer terminals.

The DOE benefit-cost analysis was only projected over a ten year period because that period corresponds to the period where the major costs of system design and development, and document entry, as well as the benefits of the LSS, will be realized, i.e., from the pre-license application phase to the decision on the construction authorization. Although, the projected costs were expressed in 1988 dollars, so were the expected benefits. Therefore, the conclusions of the analysis would be the same whether in constant or adjusted dollars. Finally, the Negotiator does not agree with the industry statement that the the LSS is a "revolutionary" system. There are many successful commercial information management systems such as Dialog, LEXIS, and Westlaw that provide full text search and retrieval of millions of pages. The U.S. Congress also has a data base (SCORPIO) that contains substantial legislative material in searchable full text.

Seventy percent of the \$200 million cost for the LSS is for the labor associated with assembling and organizing the documents, converting them to electronic format, and preparing bibliographic headers. However, much of the cost associated with these activities will be incurred, in any event, as part of the records management function for the repository, including the costs for checking the document conversion for completeness and accuracy. Therefore, the Negotiator does not believe that the \$200 million cost accurately represents the incremental cost attributable to the full text search capability of the LSS. Rather, the \$200 million includes costs that would be incurred in any system of records selected by the agency for storing and retrieving documents pertinent to the HLW proceeding.

In addition, the LSS cost projections are sensitive to the actual volume of information to be entered and to the processing costs per page. Significant cost reductions may be achieved through competitive procurement of data entry services. Cost reductions may also be realized by scaling down the universe of documents to be entered into the LSS, as discussed below. In light of the fact that the elimination of even one year of licensing delay by use of the LSS would result in a savings of approximately \$200 million, the cost of the LSS is reasonable. In addition, the projected \$200 million cost over ten years is less

than three percent of the total annual DOE budget for the high-level waste program.

Topical Guidelines. Several of the comments, explicitly or implicitly, addressed the size of the data base that would result from the use of the topical guidelines for determining what documents must go into the LSS. One commenter, the former NRC trial counsel, recommended that reasonable limits be established on the scope of document production, for example, excluding documents concerning alternative sites or limiting the documents to those produced after the 1982 enactment of the NWPA, or to an earlier date when the primary research and development work being relied on by DOE was completed. According to this commenter, meaningful limits on document production should reduce the cost of, and the potential for delay in the use of, the LSS; and such limits may well provide the type of alternative sought by Commissioner Roberts. Limitation of the topical guidelines to the Yucca Mountain site was also recommended by another industry commenter. This commenter also recommended that the scope of documents should be further limited to the documents supporting a license application. Attachment B (Fluor Daniel).

The topical guidelines were modeled after the Environmental Assessments prepared in connection with the DOE site selection process. The topical guidelines are necessarily broad, reflecting a concern by several participants on the negotiating committee that documents related to potential licensing issues not be excluded from the LSS until the Commission determined what would be the permissible scope of substantive licensing issues. As noted by the Commission in the Supplementary Information to the proposed rule, the topical guidelines will not be used for the purpose of determining the scope of contentions that can be offered in the HLW proceeding under section 2.1014. Participants on the negotiating committee fully agreed with this statement. As noted, their concern was to ensure that documents on potential licensing issues were not prematurely excluded.

The Negotiator is sympathetic to the need for excluding material that is not relevant to the licensing of the likely candidate site for the repository. Inasmuch as the existing scope of the topical guidelines (many of which are specifically limited to the Yucca Mountain site) was developed as part of the consensus process on the entire rulemaking, the staff believes that a reduction in scope

should be discussed by the negotiating committee or its successor. The Topical Guidelines are not cast in stone. They are to be set forth as a Regulatory Guide, rather than as part of the regulations themselves, and thus are to be accorded lesser status and legal effect. For example, the Supplementary Information to the proposed LSS rule stated that the LSS Advisory Review Panel may develop recommendations to the Commission on whether particular categories of documentary material (e.g., those limited by date or subject) should still be included within the topical guidelines.

Moreover, there are other possibilities for ensuring that the document production requirements do not become unwieldy. The rulemaking on the Commission's NEPA responsibilities will specify many of the areas that will be outside the scope of the hearing. After this rulemaking is finalized, the Commission could amend the topical guidelines accordingly. Until these issues are resolved, the identification and loading of selected categories of documents could be postponed. In effect, priority would be given to the identification and loading of documents directly relevant to the Yucca Mountain site, DOE contractor reports, or documents generated after DOE began investigations at Yucca Mountain. The NRC LSS Internal Steering Committee will develop a list of priorities, as well as potential amendments to the topical guidelines, in preparation for discussion with the other affected participants.

On a final point, the Negotiator disagrees with the commenter (Fluor Daniel) who recommended limiting the data base to only documents supporting the license application. This would eliminate many of the documents available through the existing discovery process, thereby depriving parties of documents that they would normally have access to under the Commission's current rules. More important, it would deny DOE and the NRC staff comparable electronic access to the expected numerous technical documents prepared by Nevada's contractors on which the State will base its case.

Non-LSS Provisions. In addition to the provisions in the proposed rule that concerned the development and implementation of the LSS, the final rule also contains several revisions to the rules of practice that are not directly related to the LSS, but which should also provide for a more streamlined licensing process than the current licensing procedures. The industry comments on the

proposed rule contained several additional recommendations in this area. These same recommendations were also included in a memorandum that the industry originally presented to the negotiating committee on the LSS rule. Many of these recommendations were addressed by the negotiating committee and incorporated into the proposed LSS rule, although not always in the exact form proposed by the industry. The revisions to the rules of practice proposed in the industry comments on the LSS rule are those revisions that were not fully adopted by the negotiating committee. The industry recommendations are as follows --

- ° Establish a new threshold for contentions. According to the industry "NRC adjudicatory decisions have allowed the admission of contentions with no foundation and no semblance of factual support." Accordingly, the industry recommends that the NRC require that a party demonstrate that there is a genuine and substantial issue of disputed fact requiring a hearing for its resolution. This issue received extensive consideration by the negotiating committee. Many of the participants on the committee did not agree that the industry position reflected NRC practice since 1980, nor did they believe that a higher standard for contentions was necessary to exclude "frivolous issues," particularly in light of the early availability of information through the LSS. Furthermore, although the final LSS rule does not include the standard proposed by the industry, the final rule does require that the petition for intervention include a party's contentions, which must refer with particularity to the specific documentary material or absence thereof that provides the basis for the contention, and the specific regulatory or statutory requirement to which the contention is relevant. This provides a basis on which to reject clearly frivolous contentions. Moreover, contentions which rely on incorrect facts can be tested through existing summary disposition procedures at the outset of the hearing.

As part of its efforts on regulatory reform, the Commission issued a proposed rule on July 3, 1986, that would amend certain provisions of its rules of practice, 51 Fed. Reg. 24365. The draft final rule on regulatory reform addresses standards for the admission of contentions, the elimination of unnecessary discovery against the NRC staff, the use

of cross-examination plans, and the timing of motions for summary disposition. Section 2.1000 of the LSS rule cross-references any sections of general applicability in subpart G of Part 2 that will continue to apply to the HLW licensing proceeding. As such, all but one of the provisions in the draft final regulatory reform rule (Section 2.714, which requires contentions to show that a genuine dispute exists on an issue of law, fact, or policy), if adopted, will automatically apply to the HLW proceeding. The LSS rule contains a new provision on contentions, Section 2.1014, and consequently Section 2.714 would no longer apply to the HLW proceeding. The staff intends to further evaluate the need to extend the "genuine issue of fact" standard to the HLW proceeding if the Commission approves this provision in the draft final regulatory reform rule.

- ° Late contentions. The industry comments state that current NRC practice is "overly liberal in admitting contentions filed after the period for initial definition of contentions." The industry recommends that a new standard be established which would require an evidentiary showing that: (1) there is significant new information which would require a modification in facility design/construction to protect the public health and safety; and (2) such modification would substantially enhance such protection by improving overall safety.

The industry fails to substantiate its charge that the adjudicatory boards are too liberal in admitting late contentions. A review of all such decisions since 1980 reveals that less than 25 percent of late contentions have been admitted. Of those, the great majority were based on very special circumstances and thus understandably admitted (e.g., new TMI-accident-related regulatory requirements, prior unavailability of emergency plans, discovery of potentially serious safety and quality assurance problems.) Thus, the industry's premise is unsupported. Nonetheless, the negotiating committee deliberations on this issue resulted in new standards for certain types of late contentions. Any petitions to amend or add contentions made more than forty days after the issuance of the NRC Staff Safety Evaluation Report (SER) must include, in addition to the usual factors for late-filed contentions, a showing that the contention involves a significant safety or

environmental issue or raises a material issue related to the performance evaluation anticipated by 10 CFR 60.112 or 60.113.

- ° Discovery. Citing as an example the local rules of only one federal district court (out of 101) the industry proposed that limitations be placed on the number of depositions and the time period during which those depositions may be taken. Section 2.1018 of the final rule, and the model schedule in the Supplementary Information of the final rule, already limit deposition discovery to approximately 21-months. The Board is also authorized by the rules to prevent abuse of the discovery process. Further restrictions on deposition discovery were given extensive consideration during the negotiation. The magnitude of this proceeding and the need for meaningful public review of health and safety issues, however, make arbitrary limits on depositions, imposed by rule, inappropriate and unwarranted.

The industry also states that the informal discovery provisions contained in section 2.1018(a)(1) of the final rule will enable a party to "deluge DOE with informal requests for information not available in the LSS." The informal discovery procedures represent a method to allow parties to the hearing to obtain the type of information normally gathered through interrogatories (names of witnesses, nature of testimony, etc.) through a less onerous and less time-consuming method than the use of written interrogatories. As such, it will be confined to a narrower band of information than implied in the industry comment. Abuse of the informal discovery process can also be prevented by the Pre-License Application Licensing Board or the Hearing Licensing Board under section 2.1018(c) of the final rule. However, in order to minimize the potential for abuse of the informal discovery process, section 2.1018(a)(1) has been revised to include examples of the type of material that will be available through informal discovery.

- ° Intervention. According to the industry, the Commission "has allowed its licensing boards to grant intervention status to parties that failed to meet judicial standing requirements." According to the industry this "discretionary intervention" tends to "add additional parties to the proceeding, does not

serve the public interest, complicates pre-hearing procedures, and should be removed." The Negotiator does not agree that discretionary intervention "does not serve the public interest" or "complicates pre-hearing procedures," and recommends against removing such discretion from the licensing boards. The Commission's licensing boards do follow judicial standards for intervention. However, the Commission does allow discretionary intervention under certain circumstances, and has established specific factors to guide a licensing board's determination on whether discretionary intervention should be permitted. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Since Pebble Springs, discretionary intervention has been authorized only four times, and in one of those instances, the grant of intervention was later vacated as moot. It is also worth noting that, because the industry's interest in the HLW proceeding is economic, it may not satisfy the Commission's traditional, judicial test for standing and thus might well have to rely on the Pebble Springs doctrine to participate in the proceeding.

- ° Affirmative case on contentions. The industry recommends that the Commission require that a party sponsoring a contention present an affirmative evidentiary case for that contention. Under NRC case law, an intervenor does have the burden of going forward, but may do so by either direct evidence or by cross-examination, as to the issues raised by the intervenor's contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 191 (1975). The Negotiator believes that this more substantive proposal, which is beyond the scope of the instant rulemaking, warrants further consideration later, at the same time the Commission addresses the related issue of whether the threshold of contentions should be raised.

- ° Seriatim hearings. The industry recommends that the Commission direct the licensing board to resolve contentions on an ongoing basis and that internal agency appeals for these decisions need not await resolution of the last group of issues. As noted above, the proposed LSS rule already dramatically

alters existing practice by requiring (rather than prohibiting) appeals from certain types of interlocutory orders, such as rulings on the admissibility and amendment of contentions and motions for summary disposition, to be filed within ten days (rather than at the conclusion of the proceeding) See section 2.1015. Further, under long established agency precedent, rulings disposing of a major segment of a case are immediately appealable.

In addition, the staff has previously informed the Commission on the potential for using parallel boards in the HLW proceeding. In SECY-86-323 (October 30, 1986) and again in SECY-89-23 (January 27, 1989), the staff discussed the concept of a "Managing Board" to coordinate multiple licensing boards. Each board would decide different issues and the "Managing Board" would have primary responsibility for: (1) issuing the final Initial Decision; and (2) management responsibility for the entire case. Multiple boards have been used in reactor licensing, and the addition of the Managing Board concept would complement the use of Partial Initial Decisions in the HLW proceeding.

Negotiating  
Committee  
Review:

The State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada submitted written comments on the public comment letters. Attachment C. The State of Nevada supports the LSS rule as proposed. According to the State, "[t]he rule is the product of a very successful negotiation process, during which all major interests, except the utilities, engaged in significant compromises. The give and take resulted in a proposed electronic discovery and motions practice system which will enhance the parties' ability to fully inform the hearing panel, and thus the Commission, on the difficult issues involved in licensing a repository. It will therefore assist in meeting the Commission's ultimate health and safety responsibility." Furthermore, the State is convinced that the proposed rule will provide a greater possibility that the Commission can meet its congressional time goals, or at least reduce the time which would be necessary to reach a construction authorization decision than by using either traditional hard-copy discovery, or the industry's proposed microfiche based system. The State also emphasized that it had "agreed to relinquish



traditional hard copy discovery rights, and in return received what we are confident is a vehicle which will allow for a more enhanced use of discovery, and thus a more effective means of participating in the licensing process, and assisting the Commission in fulfilling it[s] ultimate responsibility; that is, a construction authorization decision based on a full and complete airing of all of the complex and novel technical issues....".

The National Congress of American Indians continues to support the LSS, because the benefits to be derived--primarily in the form of improved access to program information-- will greatly facilitate effective participation in the program on the part of Indian tribes and other potential intervenors. The cost of the system, while high, is justified by the benefits and is an insignificant fraction of overall nuclear waste program costs. NCAI supports the conclusion of the Department of Energy and the NRC Staff that the LSS will significantly shorten the time required to license a repository.

Furthermore, NCAI --

reaffirmed its commendation of the Commission for undertaking this rulemaking by negotiation and for including NCAI to represent national Indian interests in that negotiation. The result of the lengthy negotiation process necessarily represents a great deal of compromise on the part of all the parties. We do not like every aspect of the draft rule, but we certainly understand the rule and its derivation infinitely better than we would had we not been able to participate so thoroughly in its initial drafting. All those representing intervenor interests yielded on many points in the negotiations to accommodate the positions of the nuclear industry. We would not have done so in any case if we had known that the industry ultimately would not yield to accommodate the LSS concept as a whole.

The same considerations which led the Commission to undertake this rulemaking by negotiation--that the results of more thorough participation would yield a better and more acceptable draft rule--should similarly lead the Commission to reject the nuclear industry's position in promulgating the final rule. The proposed system is admittedly elaborate and costly, but it promises to lead to more efficient and effective management of the vast quantity of

information required for repository licensing and more meaningful participation in this important government process. The Commission should not be overly reluctant to engage in a bit of information age pioneering, as this is unquestionably the direction in which information management in complex government regulation and litigation is going. The costs are not out of line relative to overall program costs.

Lincoln County, one of the members of the Nevada local government coalition on the negotiating committee noted that --

The utilities appear to be requesting rulemaking and other administrative relief to expedite licensing in a manner which may jeopardize the full and effective participating rights of potentially affected parties. The NWP provision calling for a three-year licensing period was enough of a time concession for the utilities. Any further concessions for the sake of expediency may cause harm to the balance of affected parties.

Coordination:

In the Staff Requirements Memorandum of January 11, 1989, the Commission voted to establish an independent Office of the LSS Administrator reporting to the Commission for policy direction, and to the Chairman for day-to-day management supervision. In addition, the Commission renamed the current NRC LSS Negotiating Team as the NRC LSS Internal Steering Committee effective immediately. The Steering Committee is to serve as the focal point within the Commission to identify, develop, and coordinate internal requirements and procedures, and to represent NRC's interests in the LSS. In order to carry out these responsibilities, and to prepare for coordination with DOE on the design and development of the LSS, the Steering Committee has begun the preparation of a draft LSS implementation plan. The plan will address the following --

- ° identification and prioritization of the LSS design and development issues that need to be addressed with DOE;
- ° identification and prioritization of the issues that need to be addressed for implementation of the LSS within the NRC, including a delineation of the role

of the LSS Administrator vis-a-vis the Steering Committee and the affected NRC Offices;

- ° preparation of a draft Memorandum of Understanding between NRC and DOE that would delineate the responsibilities of the respective agencies in regard to the LSS;
- ° preparation of a draft charter for the LSS Advisory Committee;
- ° a schedule for implementation of the plan;
- ° proposed amendments to the topical guidelines.

On a final point, the Negotiator would emphasize that, in order to accomplish the LSS objectives, DOE must have the LSS operational as far in advance of the submission of the license application as feasible. The Negotiator is somewhat concerned over the DOE statement in its comment on the proposed rule that --

The January 1991 date cited for availability of the Licensing Support System ... is no longer a realistic date. Based on the findings of the preliminary design effort to date and on the best available estimates of an anticipated schedule of procurement for system hardware and software components, elements of the system will be available in late 1992, with comprehensive capabilities now estimated to be available in early 1993.

The Negotiator realizes that the schedule for submission of the DOE license application may also be delayed beyond the 1995 date now anticipated by DOE. However, until such a schedule adjustment is an actuality, DOE, with the assistance of NRC and the other affected parties, must make their best efforts to see that the LSS is operational as soon as practicable before the license application is submitted. In this regard, DOE, NRC, and other parties subject to the rule must now begin preparation for compliance with the document submission requirements in Section 2.1003. Furthermore, the LSS Administrator's evaluation of DOE compliance, pursuant to Section 2.1003(h)(2), will begin six months after his or her appointment.

The Final Rule:

The final rule adds a new Subpart J to 10 CFR Part 2 setting forth the procedures that govern the Commission's HLW licensing proceeding, including the use of the LSS for the submission and management of documents in the proceeding. The final rule applies only to the HLW proceeding, and does not apply to licensing proceedings involving any other type of facility or activity licensed by the Commission. The rule will be applicable to all parties to the HLW licensing proceeding regardless of whether a particular party was a member of the negotiating committee. No substantive changes have been made to the rule as proposed. However, in order to address the Commission concerns expressed in its January 11, 1989 Staff Requirements Memorandum on minimizing constraints on the Commission and the Chairman in their policy direction of the Office of the LSS Administrator, the Supplementary Information to the final rule has been revised to indicate that the LSS Administrator (like other Commission-level offices) will report to the Commission for overall policy direction on all LSS matters except the certification of DOE compliance required by § 2.1003(h)(1). The LSS Administrator will make that determination on his/her own, subject to formal adjudicatory review (upon request) by the Pre-License Application Licensing Board (§ 2.1010(a)(1)), the Appeal board (§ 2.1015(b)(i)), and, finally, the Commission itself (§ 2.1015(e)). That way, the Commission will have the final word on this important matter; the parties can "litigate" the issue fully, if they so desire; and the LSS Administrator will have some real independence and authority, subject only to an objective adjudicatory review.

Resources:

As stipulated by Chairman Zech in the Staff Requirements Memorandum on SECY-88-140, the NRC staff is negotiating an agreement with DOE to provide that all NRC costs associated with the LSS will be paid by DOE.

Recommendation:

That the Commission:

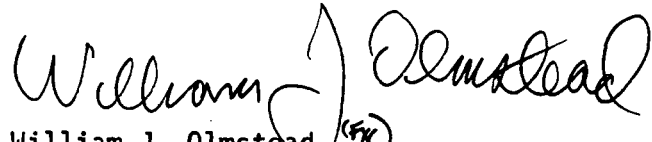
1. Approve for publication in the Federal Register the final amendments to Part 2 enclosed here (Enclosure A) which would establish procedures for the HLW licensing proceeding.
2. Certify that this rule, if adopted, will not have a significant economic on a substantial number of small entities. This certification is necessary in order

to satisfy the requirements of the Regulatory Flexibility Act, 5 U.S.C. 605(a).

3. Note:

- a. The final regulation is the type of action described in categorical exclusions 10 CFR § 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final regulation.
- b. Appropriate Congressional committees will be informed by a letter similar to Enclosure E.
- c. The final rule contains no information collection requirements and subject to the Paperwork Reduction Act of 1980.
- d. The Office of Public Affairs has determined that it is necessary to issue a public announcement similar to Enclosure F in connection with these amendments.
- e. If approved, this final rule would become effective 60 days after publication in the Federal Register.
- f. The provisions of 10 CFR § 50.109 on backfitting do not apply to this rulemaking because the final regulation is not applicable to production and utilization facilities licensed under 10 CFR Part 50.
- g. NMSS, ARM, GPA, EDO, SECY, ASLBP, and ASLAP have reviewed this paper.

- h. OGC views on the draft final rule were submitted to the Commission in SECY-89-23.

  
William J. Olmstead (FK)  
NRC Negotiating Representative

Enclosures:

- A. Draft Federal Register Notice
- B. Public Comments
- C. Negotiating Committee Comments
- D. DOE Cost-Benefit Study (copy to Commissioners, SECY, OGC, GPA, EDO)
- E. Draft Congressional Letter
- F. Draft Public Announcement
- G. DOE/NRC Agreement in Principle

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Friday, February 17, 1989.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, February 10, 1989, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is scheduled for discussion at an Open Meeting on Tuesday, February 7, 1989.

DISTRIBUTION:

Commissioners

OGC

OIA

GPA

REGIONAL OFFICES

EDO

ACRS

ACNW

ASLBP

ASLAP

SECY

ATTACHMENT A

NUCLEAR REGULATORY COMMISSION

10 CFR PART 2

RULE ON THE SUBMISSION AND MANAGEMENT OF RECORDS AND  
DOCUMENTS RELATED TO THE LICENSING OF A GEOLOGIC  
REPOSITORY FOR THE DISPOSAL OF HIGH-LEVEL  
RADIOACTIVE WASTE

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rulemaking.

SUMMARY: The Nuclear Regulatory Commission is amending the Commission's Rules of Practice in 10 CFR Part 2 for the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to 10 CFR Part 60. The revisions would establish the basic procedures for the licensing proceeding, including procedures for the use of the Licensing Support System, an electronic information management system, in the proceeding. The revisions are based on the deliberations of the Commission's High-Level Waste Licensing Support System Advisory Committee. The Advisory Committee was composed of organizations representing the major interests likely to be affected by the rulemaking, and was established by the Commission pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 1, in September 1987.

EFFECTIVE DATE: [INSERT DATE SIXTY DAYS AFTER PUBLICATION].

FOR FURTHER INFORMATION CONTACT:

Francis X. Cameron, Office of the General Counsel, U.S. Nuclear  
Regulatory Commission, Washington D.C. 20555, Telephone:  
301-492-1623.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 1987, the Commission announced (52 FR 29024) the formation of the High-level Waste Licensing Support System Advisory Committee ("negotiating committee") to develop recommendations for revising the Commission's Rules of Practice in 10 CFR Part 2 for the adjudicatory proceeding on the application for a license to receive and possess high-level



radioactive waste ("HLW") at a geologic repository operations area ("HLW licensing proceeding"). <sup>1/</sup> The negotiating committee sought consensus on the procedures that would govern the HLW licensing proceeding, focusing primarily on the use of an electronic information management system known as the Licensing Support System ("LSS"), in the HLW licensing proceeding. The objective of the negotiated rulemaking was to develop the essential features of the procedural rules for effective Commission review of the U.S. Department of Energy (DOE) license application within the three-year time period required by Section 114(d) of the Nuclear Waste Policy Act of 1982, as amended ("NWPA"). The negotiating committee completed its deliberations in July 1988. Based on the committee deliberations, the Commission approved a proposed rule that would revise 10 CFR Part 2 to establish the procedures for the HLW proceeding. The proposed rule was published on November 3, 1988. The comment period closed on December 5, 1988. After consideration of the public comments, the Commission is promulgating this final rule.

The LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application for the repository to the Commission. The LSS would contain the documentary material generated by DOE, NRC and other parties to the licensing proceeding, which are relevant to licensing of the repository. All parties would then have access to this system well before the proceeding begins. Access to these documents will be provided through electronic full text search capability. This provides the flexibility of searching on any word or word combinations within a document and thus facilitates the rapid identification of relevant documents and issues. Because the relevant information would be readily available through access to the LSS, the initial time-consuming discovery process, including the physical production and on-site review of documents by parties to the HLW licensing proceeding, will be substantially reduced.

The use of the LSS in the HLW licensing proceeding is to provide for timely review of the DOE license application by --

- ° eliminating the most burdensome and time-consuming aspect of the current system of document discovery -- i.e., the physical production of documents after the license application has been filed -- because the LSS will provide for the identification and submission of discoverable documents before the license application is submitted;
- ° eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed if the LSS does not become a reality;

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<sup>1/</sup> See Agreement in Principle Between the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC) on the Development of a Licensing Support Systems (LSS), February 27, 1987.

- ° enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability which will allow the quick identification of relevant documents and issues;
- ° enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding;
- ° providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Negotiating Committee. The Commission used the process of negotiated rulemaking to develop the proposed rule. In negotiated rulemaking, the representatives of parties who may be affected by a proposed rule, including the Commission, convene as a group over a period of time to attempt to reach consensus on the proposed rule.

The first meeting of the negotiating committee was held in September 1987. The negotiating committee completed its deliberations in July 1988.

The members of the negotiating committee are --

- ° DOE
- ° NRC
- ° State of Nevada
- ° a coalition of Nevada local governments
- ° a coalition of industry groups (Edison Electric Institute/Utility Nuclear Waste Management Group/U.S. Council for Energy Awareness)
- ° National Congress of American Indians
- ° a coalition of national environmental groups (Environmental Defense Fund/Sierra Club/Friends of the Earth).

All members of the negotiating committee, with the exception of the industry coalition, agreed to the draft text of the proposed rule that was discussed by the committee at its final meeting ("final negotiating text"). Under the

committee protocols, the dissenting vote by the industry precluded committee consensus on the proposed rule. <sup>2/</sup>

Those participants who approved the final negotiating text are DOE, the State of Nevada, the coalition of Nevada local governments, the National Congress of American Indians, the coalition of national environmental groups, and the NRC staff. The final negotiating text was carefully drafted with the full participation of people with strong experience and background in NRC practice. It reflected the concerns of the major interests affected by the rulemaking. In fact, the industry coalition, although dissenting on the final negotiating text, fully participated in the drafting of the final text, and had considerable influence on the wording of the final text. <sup>3/</sup>

The proposed rule was issued for a thirty-day comment period. The participants on the negotiating committee who approved the final negotiating text agreed to refrain from commenting negatively on the final negotiating text, if that text was published by the Commission as a proposed rule. The industry coalition, as well as any nonparticipants in the negotiation, were free to comment critically on any aspect of the proposed rule, including cost aspects of the LSS. Consistent with the negotiating committee's function to advise the Commission on the LSS rulemaking, the staff submitted the comments on the proposed rule to the negotiating committee for review and comment. The public comments on the proposed rule, and any comments from the negotiating committee (the Commission received comments from the State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada), are summarized below.

The comment period on the proposed LSS rule closed on December 5, 1988. The Commission received nine comments. Seven of these comments were from various segments of the nuclear industry, one was from DOE expressing support for the LSS rulemaking and recommending several clarifications, and one was from

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<sup>2/</sup> In the August 5, 1987, Federal Register Notice that initiated the negotiated rulemaking, the Commission clearly indicated that the LSS was only one of the mechanisms that the Commission was considering to streamline the licensing process. However, all participants on the negotiating committee, including the industry, initially agreed that a significant contributor to licensing delay was document discovery and motions practice -- issues that the LSS was intended to address. In this regard, the industry, later stated that the LSS would result in little change in the length of the licensing proceeding without further procedural changes.

<sup>3/</sup> The Commission notes that the industry coalition's dissent on the final negotiating text was based on the same rationale -- the cost of the LSS -- that it had set forth at the initial meeting of the negotiating committee some ten months earlier.

formal trial counsel in the Commission's Office of the General Counsel, now with the firm of Hopkins, Sutter, Hamel & Park. Most of the industry comments consisted of an endorsement of the recommendations contained in the comment letter submitted by the Edison Electric Institute and the Utility Nuclear Waste Management Group("EEI/UNWGM"). As noted earlier, EEI/UNWGM, along with the U.S. Council on Energy Awareness, represented the industry on the HLW LSS Advisory Committee. The industry comments will be discussed in the context of the EEI/UNWGM comments, except where there is a significant difference in an individual comment letter. The discussion of the public comments will focus on the issues of cost-benefit, the topical guidelines for the submission of documents to the LSS, and the non-LSS aspects of the rule.

Benefit-cost. The industry argues that the LSS is a "gigantic, highly complicated, and extraordinarily expensive system" that will not significantly assist Commission decision-making on the construction authorization for the repository within the NWPA timeframe. Rather than leading to a reduction of the time for licensing, the industry believes that the LSS would lead to an extension of the licensing time. Therefore, the industry does not believe that the benefits of the LSS justify the costs (estimated by DOE to be \$200 million over a ten year period), and consequently, does not support the LSS.

The industry argument against the LSS has two basic components: (1) the LSS would not enable the Commission to meet the three-year schedule for the issuance of the construction authorization mandated by the NWPA; and (2) the costs of the LSS have been underestimated. As an alternative to the LSS, the industry has proposed a microfiche-based system in which relevant documents would be stored on microfiche but would not be captured in electronic searchable full text. However, the indexes to the documents and the bibliographic headers for the documents would be "computerized", presumably in electronic searchable full text. Parties could request a copy of a document from the LSS Administrator, and receive it by overnight mail.

According to the industry, the LSS would lengthen the licensing process for the following reasons:

- ° The industry argues that the LSS will create new procedural issues over which litigation is likely -- for example, the LSS Administrator's certification that DOE is in substantial and timely compliance with the document submission requirements in the rule. In response, the Commission notes that, although the LSS rule does establish some new procedural requirements, these requirements are necessary to ensure that the parties subject to the rule are in substantial and timely compliance with its provisions, and thereby facilitate compliance with the NWPA's three-year time frame. In particular, the certification of DOE compliance is necessary to assure that relevant documents are in the LSS as soon as possible, so as to allow for early, pre-license application discovery. Any disputes over compliance with the rule will be resolved

by the Pre-License Application Licensing Board established in section 2.1010 before the license application is submitted.

- ° The industry argues that the actual performance of the LSS is unlikely to live up to the expectations of the parties because documents that should be in the data base will be missed entirely, and that some of the documents captured could easily be incomplete in their electronic form. This will lead to attacks on the accuracy and completeness of the data base. The Commission notes that the final rule contains several provisions intended to minimize and correct inaccuracies and incompleteness. Section 2.1009 requires each party to establish procedures to capture the required documents. This section also establishes an early and continuous certification process, in which a party's designated official must certify that the party is in compliance with document submission requirements of the rule. Section 2.1003(h)(2)(i) requires the LSS Administrator to begin monitoring DOE compliance with the document submission requirements well before the license application is submitted. Section 2.1004 provides a mechanism for amendments and additions to be made to the data base. In addition, the LSS will be operational before the license application is submitted, allowing time for any errors or omissions to be corrected. Furthermore, an image of all documents will be available as a backup for the electronic text. Finally, as noted above, the rule establishes a Pre-License Application Licensing Board to resolve any disputes over accuracy and completeness of documents before the license application is submitted.
- ° The industry argues that the vast quantities of data available in electronic full text will provide parties with the opportunity to generate even greater amounts of discovery. The Commission notes that the LSS rule establishes requirements for the submission of relevant documents in advance of the license application. Because of the substantial amount of information that will be provided, the Commission does not anticipate continual discovery requests for large amounts of additional documents. Furthermore, the Hearing Licensing Board is authorized to limit discovery, specifically taking into account the early availability of information provided by the LSS, and compliance with the NWPAs three-year schedule. See sections 2.1018(c), 2.1021(a)(5), 2.1022(a)(6).
- ° The industry argues that disputes over the use of written interrogatories are certain to "plague the licensing board and discovery master." Section 2.1018(a)(2) provides for the use of written interrogatories only if authorized by the discovery master or Hearing Licensing Board upon a showing that informal discovery, which, as indicated below, is limited to such matters as the names of witnesses, has failed. Furthermore, in ruling upon a motion to authorize written interrogatories, the discovery master, or the Hearing Licensing Board may consider whether the request creates the potential for unreasonably

interfering with meeting the three-year schedule in the NHPA. For these reasons, the Commission does not believe that disputes over written interrogatories will "plague" the boards, or lengthen the licensing process.

- ° The industry argues that system failures will trigger action to bring the entire licensing process to a halt. The Commission does not anticipate that the LSS will be unavailable for critical periods or lengths of time. DOE will design and develop the LSS well in advance of the license application. This period also includes development of a prototype system, as well as testing of the LSS before it becomes operational. Furthermore, the DOE design, development, and testing program will be conducted with input from NRC and other affected parties. The Commission believes that the design, testing, and development process will eliminate the major causes of system failure before the hearing process begins.

In summary, the Commission does not agree with the industry opinion that the LSS would add time to the licensing process. The staff continues to believe that the LSS is the best alternative for providing a high quality and efficient review of the DOE license application within the schedule mandated by the NHPA. As noted above, this will be accomplished through --

- ° eliminating the most burdensome and time-consuming aspect of the current system of document discovery -- i.e., the physical production of documents after the license application has been filed -- because the LSS will provide for the identification and submission of discoverable documents before the license application is submitted;
- ° eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed if the LSS does not become a reality;
- ° enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability, which will allow the quick identification of relevant documents and issues;
- ° enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions, resulting in a substantial saving of time during the proceeding;
- ° providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Commission believes that any document management system for the HLW proceeding must meet all of these objectives in order for the Commission

to meet the NWPA schedule, while still providing for a high quality review of the license application. No other alternative, including the industry microfiche proposal, will accomplish this.

As stated by the National Congress of American Indians (NCAI) in its review of the benefits of the LSS --

The LSS benefit which is vitally important to potential intervenors--and of no interest to the industry--is its potential to facilitate the thoroughness of program reviews. Unlike the nuclear industry, Indian tribes, states and other potential intervenors view the NRC licensing for a repository to be more than a troublesome procedural hoop through which DOE must jump on its way to repository waste acceptance.

Indian tribes, states, local governments and citizens' organizations that might become intervenors in that process have a responsibility to their respective constituents to see that the resolution of those questions is done as meaningfully and correctly as possible. In other words, these entities' primary interest in this entire program--one which is manifestly consistent with the general public interest--is to make sure that the Commission's final determinations in this matter are as nearly correct as possible.

To discharge this responsibility, which is also mandated by the Nuclear Waste Policy Act ("NWPA") with respect to the host state and any affected Indian tribe, they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. They do not now have even marginally adequate access to that information. The LSS--even a flawed, incomplete LSS--promises to vastly improve that access.

NCAI concluded that --

the proposed LSS passes the cost/benefit analysis because the key benefit of improved access to program information will certainly be served by the LSS and the costs of the LSS are not a significant fraction of the overall waste program costs. We also support DOE's and NRC's conclusion that the LSS would shorten the licensing period for a repository and, in that respect, would be likely to reduce overall program costs rather than increase them.

One public commenter, the former NRC trial counsel, endorses the benefits of the LSS and agrees with the staff belief that "the LSS will facilitate greatly the objective of realizing an initial decision within 3 years of the filing of the application." This commenter goes on to state that "the HLW license hearings will be delayed substantially" without the LSS. This is due to the fact that the LSS rulemaking will remove document discovery as an obstacle to timely completion of the HLW proceeding by providing relevant

documents well in advance of the license application. As further stated by this commenter --

Potential parties will have access to the LSS well in advance of the time for submitting requests for a hearing. Thus, the time needed for prospective parties to digest pertinent information will not become a critical path matter because it should be largely completed before the prehearing process begins. Moreover, all hearing requesters should be better informed with respect to the subject matter, and they should be able to frame meaningful and material issues for litigation.... Finally, the establishment of the Pre-License Application Licensing Board to hear and rule on document production controversies should assure that the delay attendant to legal posturing over document production will not impact the hearing schedule. In sum, the proposed regulations would ... remove one of the greatest causes of delay from the NRC adjudicatory hearing process.

The DOE benefit-cost analysis indicates that approximately \$200 million would be saved for each year of licensing delay eliminated due to the LSS. The final rule establishes procedures for the HLW, including a model hearing schedule, that will allow the Commission to reach a decision on the construction authorization within the timeframe specified in section 114(d) of the NWPA. However, even if the process were to take up to one-third longer than the final rule envisions, the LSS would still result in eliminating substantial time from current licensing practice. Under these circumstances, the benefits of the final rule would exceed the costs of implementing the LSS. Moreover, the Commission is pursuing still other methods for streamlining the licensing process, such as using rulemaking to resolve substantive licensing issues before the license application is submitted.

The second part of the industry comments on the costs and benefits of the LSS is the adequacy of the DOE benefit-cost analysis. The industry does not believe that the DOE analysis is adequate for a number of reasons, primarily because the DOE analysis did not consider alternatives to the LSS such as the industry microfiche system. In addition, the industry notes that the estimated \$200 million cost is only projected over a ten year period, and that cost is only presented in 1988 dollars. Finally, the industry claims that the size, complexity, and "revolutionary" nature of the LSS will significantly escalate the costs of the system.

In response, the Commission notes that the scope of the DOE benefit-cost analysis was determined in reference to the objectives of the LSS identified earlier -- facilitating the discovery and review of relevant documents. The staff, DOE, and other participants on the negotiating committee did not believe that any alternative other than an electronic full text search system could satisfy these objectives, and thereby allow the Commission to meet the NWPA schedule, while still providing for a high quality review of the relevant licensing information. Therefore, the DOE did not evaluate the



benefits and cost of alternatives that did not include an electronic full text search capability of the documents in the system.

Although the industry microfiche alternative might provide for the collection of relevant documents in advance of licensing, it does not provide for the electronic full text search within those documents, such as the 7000-page Site Characterization Plan. The Commission does not believe that the mere availability of documents in hard copy or microfiche without electronic full text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWPA timeframe. For example, in the 18-month period following submission of the license application, the current schedule calls for the NRC staff to review the application, to prepare its Safety Evaluation Report, and to evaluate and respond to contentions proffered by the parties in the hearing. The LSS furnishes an important tool for the staff to use to ensure that its review is both timely and comprehensive, and will enable the Staff to complete its review of both contested and uncontested issues without having an impact on the schedule of the adjudication.

NCAI, commenting on the full text search capability of the LSS, stated --

The most important aspect of that access is the proposed full-text search capability of the LSS. That is where the nuclear industry's alternative, a microfiche-based system, falls far short of what is needed. The nuclear industry would implement an electronic index only to the relevant information, which would be stored and provided in microfiche form. Unfortunately, the usefulness of such systems is far too sensitive to the quality of the indexing. Particularly with respect to subject descriptors or abstracts, there needs to be near-perfect correspondence between the thought processes of the indexer and those of the subsequent searcher in order for the latter to find materials in an index-only system.

Full-text search, on the other hand, provides much greater power and flexibility in accessing relevant information. Surveys cited by the NRC staff in support of the LSS rulemaking consistently showed greater accuracy and efficiency of searching in full-text plus header systems--such as is envisioned for the LSS--relative to other alternatives.

As noted by the State of Nevada in its review of the industry proposal, the system the industry recommends --

would not more greatly assist the Commission in meeting its congressional time goals, and would not provide the parties with effective and efficient document discovery. Most importantly, it would not give the Commission the commensurate higher level of confidence that all issues have been fully explored and that the public health and

safety will be protected before the Commission arrives at its construction authorization decision.

Furthermore, the State of Nevada believes that the industry microfiche alternative "fail[s] to take into account the fact that any other system, either hard copy or the microfiche based system which they [the industry] espouse, would be as labor intensive, potentially more time consuming, probably unwieldy, and more likely than not would involve as much cost as the proposed LSS." For example, a microfiche data base would have to be duplicated for each potential party as well as for each public document room. The latter, in particular, would require substantial additional physical space and personnel to oversee the microfiche library.

The DOE benefit-cost analysis was only projected over a ten year period because that period corresponds to the period where the major costs of system design and development, and document entry, as well as the benefits of the LSS, will be realized, i.e., from the pre-license application phase to the decision on the construction authorization. Although, the projected costs were expressed in 1988 dollars, so were the expected benefits. Therefore, the conclusions of the analysis would be the same whether in constant or adjusted dollars. Finally, the Commission does not agree with the industry statement that the the LSS is a "revolutionary" system. There are many successful commercial information management systems such as Dialog, LEXIS, and Westlaw that provide full text search and retrieval of millions of pages. The U.S. Congress also has a data base (SCORPIO) that contains substantial legislative material in searchable full text.

Seventy percent of the \$200 million cost for the LSS is for the labor associated with assembling and organizing the documents, converting them to electronic format, and preparing bibliographic headers. However, much of the cost associated with these activities will be incurred, in any event, as part of the records management function for the repository, including the costs for checking the document conversion for completeness and accuracy. Therefore, the Commission does not believe that the \$200 million cost accurately represents the incremental cost attributable to the full text search capability of the LSS. Rather, the \$200 million includes costs that would be incurred in any system of records selected by the agency for storing and retrieving documents pertinent to the HLW proceeding.

In addition, the LSS cost projections are sensitive to the actual volume of information to be entered and to the processing costs per page. Significant cost reductions may be achieved through competitive procurement of data entry services. Cost reductions may also be realized by scaling down the universe of documents to be entered into the LSS, as discussed below. In light of the fact that the elimination of even one year of licensing delay by use of the LSS would result in a savings of approximately \$200 million, the cost of the LSS is reasonable. In addition, the projected \$200 million cost over ten

years is less than three percent of the total annual DOE budget for the high-level waste program.

Topical Guidelines. Several of the comments, explicitly or implicitly, addressed the size of the data base that would result from the use of the topical guidelines for determining what documents must go into the LSS. One commenter, the former NRC trial counsel, recommended that reasonable limits be established on the scope of document production, for example, excluding documents concerning alternative sites or limiting the documents to those produced after the 1982 enactment of the NWPA, or to an earlier date when the primary research and development work being relied on by DOE was completed. According to this commenter, meaningful limits on document production should reduce the cost of, and the potential for delay in the use of, the LSS; and such limits may well provide the type of alternative sought by Commissioner Roberts. Limitation of the topical guidelines to the Yucca Mountain site was also recommended by another industry commenter. This commenter also recommended that the scope of documents should be further limited to the documents supporting a license application.

The topical guidelines were modeled after the Environmental Assessments prepared in connection with the DOE site selection process. The topical guidelines are necessarily broad, reflecting a concern by several participants on the negotiating committee that documents related to potential licensing issues not be excluded from the LSS until the Commission determined what would be the permissible scope of substantive licensing issues. As noted by the Commission in the Supplementary Information to the proposed rule, the topical guidelines will not be used for the purpose of determining the scope of contentions that can be offered in the HLW proceeding under section 2.1014. Participants on the negotiating committee fully agreed with this statement. As noted, their concern was to ensure that documents on potential licensing issues were not prematurely excluded.

The Commission is sympathetic to the need for excluding material that is not relevant to the licensing of the likely candidate site for the repository. Inasmuch as the existing scope of the topical guidelines (many of which are specifically limited to the Yucca Mountain site) was developed as part of the consensus process on the entire rulemaking, the staff believes that a reduction in scope should be discussed by the negotiating committee or its successor. The Topical Guidelines are not cast in stone. They are to be set forth as a Regulatory Guide, rather than as part of the regulations themselves, and thus are to be accorded lesser status and legal effect. For example, the Supplementary Information to the proposed LSS rule stated that the LSS Advisory Review Panel may develop recommendations to the Commission on whether particular categories of documentary material (e.g., those limited by date or subject) should still be included within the topical guidelines.

Moreover, there are other possibilities for ensuring that the document production requirements do not become unwieldy. The rulemaking on the Commission's NEPA responsibilities will specify many of the areas that will

be outside the scope of the hearing. After this rulemaking is finalized, the Commission could amend the topical guidelines accordingly. Until these issues are resolved, the identification and loading of selected categories of documents could be postponed. In effect, priority would be given to the identification and loading of documents directly relevant to the Yucca Mountain site, DOE contractor reports, or documents generated after DOE began investigations at Yucca Mountain. The NRC LSS Internal Steering Committee will develop a list of priorities, as well as potential amendments to the topical guidelines, in preparation for discussion with the other affected participants.

On a final point, the Commission disagrees with the commenter that recommended limiting the data base to only documents supporting the license application. This would eliminate many of the documents available through the existing discovery process, thereby depriving parties of documents that they would normally have access to under the Commission's current rules. More important, it would deny DOE and the NRC staff comparable electronic access to the expected numerous technical documents prepared by Nevada's contractors on which the state will base its case.

Non-LSS Provisions. In addition to the provisions in the proposed rule that concerned the development and implementation of the LSS, the final rule also contains several revisions to the rules of practice that are not directly related to the LSS, but which should also provide for a more streamlined licensing process than the current licensing procedures. The industry comments on the proposed rule contained several additional recommendations in this area. These same recommendations were also included in a memorandum that the industry originally presented to the negotiating committee on the LSS rule. Many of these recommendations were addressed by the negotiating committee and incorporated into the proposed LSS rule, although not always in the exact form proposed by the industry. The revisions to the rules of practice proposed in the industry comments on the LSS rule are those revisions that were not fully adopted by the negotiating committee. The industry recommendations are as follows --

- ° Establish a new threshold for contentions. According to the industry "NRC adjudicatory decisions have allowed the admission of contentions with no foundation and no semblance of factual support." Accordingly, the industry recommends that the NRC require that a party demonstrate that there is a genuine and substantial issue of disputed fact requiring a hearing for its resolution. This issue received extensive consideration by the negotiating committee. Many of the participants on the committee did not agree that the industry position reflected NRC practice since 1980, nor did they believe that a higher standard for contentions was necessary to exclude "frivolous issues," particularly in light of the early availability of information through the LSS. Furthermore, although the final LSS rule does not include the standard proposed by the industry, the final rule does require that the petition for intervention include a party's contentions, which must refer with

particularity to the specific documentary material or absence thereof that provides the basis for the contention, and the specific regulatory or statutory requirement to which the contention is relevant. This provides a basis on which to reject clearly frivolous contentions. Moreover, contentions which rely on incorrect facts can be tested through existing summary disposition procedures at the outset of the hearing.

As part of its efforts on regulatory reform, the Commission issued a proposed rule on July 3, 1986, that would amend certain provisions of its rules of practice, 51 Fed. Reg. 24365. The draft final rule on regulatory reform addresses standards for the admission of contentions, the elimination of unnecessary discovery against the NRC staff, the use of cross-examination plans, and the timing of motions for summary disposition. Section 2.1000 of the LSS rule cross-references any sections of general applicability in subpart G of Part 2 that will continue to apply to the HLW licensing proceeding. As such, all but one of the provisions in the draft final regulatory reform rule (Section 2.714, which requires contentions to show that a genuine dispute exists on an issue of law, fact, or policy), if adopted, will automatically apply to the HLW proceeding. The LSS rule contains a new provision on contentions, Section 2.1014, and consequently Section 2.714 would no longer apply to the HLW proceeding. The Commission intends to further evaluate the need to extend the "genuine issue of fact" standard to the HLW proceeding after its review of this provision in the draft final regulatory reform rule.

- ° Late contentions. The industry comments state that current NRC practice is "overly liberal in admitting contentions filed after the period for initial definition of contentions." The industry recommends that a new standard be established which would require an evidentiary showing that: (1) there is significant new information which would require a modification in facility design/construction to protect the public health and safety; and (2) such modification would substantially enhance such protection by improving overall safety.

The industry fails to substantiate its charge that the adjudicatory boards are too liberal in admitting late contentions. A review of all such decisions since 1980 reveals that less than 25 percent of late contentions have been admitted. Of those, the great majority were based on very special circumstances and thus understandably admitted (e.g., new TMI-accident-related regulatory requirements, prior unavailability of emergency plans, discovery of potentially serious safety and quality assurance problems.) Thus, the industry's premise is unsupported. Nonetheless, the negotiating committee deliberations on this issue resulted in new standards for certain types of late contentions. Any petitions to amend or add contentions made more than forty days after the issuance of the NRC Staff Safety Evaluation Report (SER) must include, in addition to the usual factors for late-filed contentions, a

showing that the contention involves a significant safety or environmental issue or raises a material issue related to the performance evaluation anticipated by 10 CFR 60.112 or 60.113.

- ° Discovery. Citing as an example the local rules of only one federal district court (out of 101) the industry proposed that limitations be placed on the number of depositions and the time period during which those depositions may be taken. Section 2.1018 of the final rule, and the model schedule in the Supplementary Information of the final rule already limit deposition discovery to approximately 21-months. The Board is also authorized by the rules to prevent abuse of the discovery process. Further restrictions on deposition discovery were given extensive consideration during the negotiation. The magnitude of this proceeding and the need for meaningful public review of health and safety issues, however, make arbitrary limits on depositions, imposed by rule, inappropriate and unwarranted.

The industry also states that the informal discovery provisions contained in section 2.1018(a)(1) of the final rule will enable a party to "deluge DOE with informal requests for information not available in the LSS." The informal discovery procedures represent a method to allow parties to the hearing to obtain the type of information normally gathered through interrogatories (names of witnesses, nature of testimony, etc.) through a less onerous and less time-consuming method than the use of written interrogatories. As such, it will be confined to a narrower band of information than implied in the industry comment. Abuse of the informal discovery process can also be prevented by the Pre-License Application Licensing Board or the Hearing Licensing Board under section 2.1018(c) of the final rule. However, in order to minimize the potential for abuse of the informal discovery process, section 2.1018(a)(1) has been revised to include examples of the type of material that will be available through informal discovery.

- ° Intervention. According to the industry, the Commission "has allowed its licensing boards to grant intervention status to parties that failed to meet judicial standing requirements." According to the industry this "discretionary intervention" tends to "add additional parties to the proceeding, does not serve the public interest, complicates pre-hearing procedures, and should be removed." The Commission does not agree that discretionary intervention "does not serve the public interest" or "complicates pre-hearing procedures," and recommends against removing such discretion from the licensing boards. The Commission's licensing boards do follow judicial standards for intervention. However, the Commission does allow discretionary intervention under certain circumstances, and has established specific factors to guide a licensing board's determination on whether discretionary intervention should be permitted. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Since Pebble Springs, discretionary intervention has been authorized only four times, and in

one of those instances, the grant of intervention was later vacated as moot. It is also worth noting that, because the industry's interest in the HLW proceeding is economic, it may not satisfy the Commission's traditional, judicial test for standing and thus might well have to rely on the Pebble Springs doctrine to participate in the proceeding.

- ° Affirmative case on contentions. The industry recommends that the Commission require that a party sponsoring a contention present an affirmative evidentiary case for that contention. Under NRC case law, an intervenor does have the burden of going forward, but may do so by either direct evidence or by cross-examination, as to the issues raised by the intervenor's contentions. Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 191 (1975). The Commission believes that this more substantive proposal, which is beyond the scope of the instant rulemaking, warrants further consideration later, at the same time the Commission addresses the related issue of whether the threshold of contentions should be raised.
- ° Seriatim hearings. The industry recommends that the Commission direct the licensing board to resolve contentions on an ongoing basis and that internal agency appeals for these decisions need not await resolution of the last group of issues. As noted above, the proposed LSS rule already dramatically alters existing practice by requiring (rather than prohibiting) appeals from certain types of interlocutory orders, such as rulings on the admissibility and amendment of contentions and motions for summary disposition, to be filed within ten days (rather than at the conclusion of the proceeding) See section 2.1015. Further, under long established agency precedent, rulings disposing of a major segment of a case are immediately appealable.

Negotiating Committee Review. The State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada submitted written comments on the public comment letters. The State of Nevada supports the LSS rule as proposed. According to the State, "[t]he rule is the product of a very successful negotiation process, during which all major interests, except the utilities, engaged in significant compromises. The give and take resulted in a proposed electronic discovery and motions practice system which will enhance the parties' ability to fully inform the hearing panel, and thus the Commission, on the difficult issues involved in licensing a repository. It will therefore assist in meeting the Commission's ultimate health and safety responsibility." Furthermore, the State is convinced that the proposed rule will provide a greater possibility that the Commission can meet its congressional time goals, or at least reduce the time which would be necessary to reach a construction authorization decision than by using either traditional hard-copy discovery, or the industry's proposed microfiche based system. The State also emphasized that it had "agreed to relinquish traditional hard copy discovery rights, and in return received what we are confident is a vehicle which will allow for a more enhanced use of discovery,

and thus a more effective means of participating in the licensing process, and assisting the Commission in fulfilling it[s] ultimate responsibility; that is, a construction authorization decision based on a full and complete airing of all of the complex and novel technical issues....".

The National Congress of American Indians continues to support the LSS, because the benefits to be derived--primarily in the form of improved access to program information-- will greatly facilitate effective participation in the program on the part of Indian tribes and other potential intervenors. The cost of the system, while high, is justified by the benefits and is an insignificant fraction of overall nuclear waste program costs. NCAI supports the conclusion of the Department of Energy and the NRC Staff that the LSS will significantly shorten the time required to license a repository.

Furthermore, NCAI --

reaffirmed its commendation of the Commission for undertaking this rulemaking by negotiation and for including NCAI to represent national Indian interests in that negotiation. The result of the lengthy negotiation process necessarily represents a great deal of compromise on the part of all the parties. We do not like every aspect of the draft rule, but we certainly understand the rule and its derivation infinitely better than we would had we not been able to participate so thoroughly in its initial drafting. All those representing intervenor interests yielded on many points in the negotiations to accommodate the positions of the nuclear industry. We would not have done so in any case if we had known that the industry ultimately would not yield to accommodate the LSS concept as a whole.

The same considerations which led the Commission to undertake this rulemaking by negotiation--that the results of more thorough participation would yield a better and more acceptable draft rule--should similarly lead the Commission to reject the nuclear industry's position in promulgating the final rule. The proposed system is admittedly elaborate and costly, but it promises to lead to more efficient and effective management of the vast quantity of information required for repository licensing and more meaningful participation in this important government process. The Commission should not be overly reluctant to engage in a bit of information age pioneering, as this is unquestionably the direction in which information management in complex government regulation and litigation is going. The costs are not out of line relative to overall program costs.

Lincoln County, one of the members of the Nevada local government coalition on the negotiating committee noted that --

The utilities appear to be requesting rulemaking and other administrative relief to expedite licensing in a manner which may jeopardize the full and effective participating rights of potentially



affected parties. The NWPA provision calling for a three-year licensing period was enough of a time concession for the utilities. Any further concessions for the sake of expediency may cause harm to the balance of affected parties.

Coordination. On January 11, 1989, the Commission voted to establish an independent Office of the LSS Administrator reporting to the Commission for policy direction, and to the Chairman for day-to-day management supervision. In addition, the Commission renamed the current NRC LSS Negotiating Team as the NRC LSS Internal Steering Committee effective immediately. The Steering Committee is to serve as the focal point within the Commission to identify, develop, and coordinate internal requirements and procedures, and to represent NRC's interests in the LSS. In order to carry out these responsibilities, and to prepare for coordination with DOE on the design and development of the LSS, the Steering Committee has begun the preparation of a draft LSS implementation plan. The plan will address the following --

- ° identification and prioritization of the LSS design and development issues that need to be addressed with DOE;
- ° identification and prioritization of the issues that need to be addressed for implementation of the LSS within the NRC, including a delineation of the role of the LSS Administrator vis-a-vis the Steering Committee and the affected NRC Offices;
- ° preparation of a draft Memorandum of Understanding between NRC and DOE that would delineate the responsibilities of the respective agencies in regard to the LSS;
- ° preparation of a draft charter for the LSS Advisory Committee;
- ° a schedule for implementation of the plan;
- ° proposed amendments to the topical guidelines.

The Commission would emphasize that, in order to accomplish the LSS objectives, DOE must have the LSS operational as far in advance of the submission of the license application as feasible. The Commission is somewhat concerned over the DOE statement in its comment on the proposed rule that --

The January 1991 date cited for availability of the Licensing Support System ... is no longer a realistic date. Based on the findings of the preliminary design effort to date and on the best available estimates of an anticipated schedule of procurement for system hardware and software components, elements of the system will be available in late 1992, with comprehensive capabilities now estimated to be available in early 1993.

The Commission realizes that the schedule for submission of the DOE license application may also be delayed beyond the 1995 date now anticipated by DOE. However, until such a schedule adjustment is an actuality, DOE, with the assistance of NRC and the other affected parties, must make their best efforts to see that the LSS is operational as soon as practicable before the license application is submitted. In this regard, DOE, NRC, and other parties subject to the rule must now begin preparation for compliance with the document submission requirements in Section 2.1003. Furthermore, the LSS Administrator's evaluation of DOE compliance, pursuant to Section 2.1003(h)(2), begins six months after his or her appointment.

The Final Rule. The final rule adds a new Subpart J to 10 CFR Part 2 setting forth the procedures that govern the Commission's HLW licensing proceeding, including the use of the LSS for the submission and management of documents in the proceeding. The final rule applies only to the HLW proceeding, and does not apply to licensing proceedings involving any other type of facility or activity licensed by the Commission. The rule will be applicable to all parties to the HLW licensing proceeding regardless of whether a particular party was a member of the negotiating committee. No substantive changes have been made to the rule as proposed.

#### 2.1000 Scope of subpart.

The final rule establishes a new Subpart J in 10 CFR Part 2 setting forth the procedures that govern the Commission's HLW licensing proceeding, including the use of the LSS for the submission and management of documents in the proceeding. Generally, the procedures in the new Subpart take precedence over the provisions of general applicability in 10 CFR Subpart G. However, Section 2.1000 cross-references any sections of general applicability in Subpart G that will continue to apply to the HLW licensing proceeding. The final rule applies only to the HLW proceeding, and does not apply to licensing proceedings for any other type of facility or activity licensed by the Commission. The rule will be applicable to all parties to the HLW licensing proceeding regardless of whether a particular party was a member of the negotiating committee.

#### 2.1001 Definitions.

Section 2.1001 sets forth the definitions of terms used throughout Subpart J. These definitions will be discussed with the relevant sections of the final rule.

#### 2.1002 High-level Waste Licensing Support System.

Section 2.1002 describes the purpose and scope of the LSS. The LSS is intended to provide full text search capability of, or easy access to, the "documentary material" of DOE, NRC, other parties to the HLW licensing proceeding; government entities participating in the HLW proceeding as "interested governmental participants" under 10 CFR 2.715(c); persons who

qualify as "potential parties" under section 2.1008; and their contractors ("parties," "interested governmental participants," and "potential parties," will be collectively referred to hereinafter as "LSS participants"). LSS participants must ensure that their contractors, consultants, grantees, or other agents, comply with the applicable requirements of Subpart J.

For the purposes of the information that will be in the LSS, "documentary material" means any material or other information generated by or in the possession of an LSS participant that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. The identification of material that is within the universe of "relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository" will be determined by the topical guidelines set forth later in this Supplementary Information. It is also the Commission's intent to issue these topical guidelines as an NRC Regulatory Guide. The Commission expects all LSS participants to make a good faith effort to identify the documentary material within the scope of section 2.1003. However, a rule of reason must be applied to an LSS participant's obligation to identify all documentary material within the scope of the topical guidelines. For example, DOE will not be expected to make an exhaustive search of its archival material that conceivably might be within the topical guidelines but has not been reviewed or consulted in any way in connection with DOE's work on its license application. It is also anticipated that the LSS Advisory Review Panel established pursuant to section 2.1011(e), in evaluating the implementation of the LSS, may make occasional recommendations to the Commission on whether particular categories of documentary material (e.g., those limited by date or subject) should still be included within the topical guidelines.

Although the topical guidelines will guide the selection of relevant information for entry into the LSS, they will not be used for the purpose of determining the scope of contentions that can be offered in the HLW proceeding under proposed section 2.1014. The scope of contentions will be governed by the Commission's authority under relevant statutes and regulations.

Section 2.1002(d) specifies that Subpart J is not intended to affect any independent right of a potential party, interested governmental participant, or party to receive information or documents. These independent rights consist of statutory rights under such statutes as the Freedom of Information Act (FOIA), or the Nuclear Waste Policy Act, as amended, or rights derived from grant requirements such as those between DOE and the State of Nevada.

#### 2.1003 Submission of material to the LSS.

Section 2.1003 sets forth the requirements for the submission of documentary material by LSS participants to the LSS Administrator for entry into the LSS. LSS participants, excluding DOE and NRC, must submit an ASCII file, a

bibliographic header, and an image for all documents generated by the LSS participant or its contractor after the LSS participant gains access to the LSS pursuant to either section 2.1008 or section 2.1014. Submission of these documents must be made reasonably contemporaneous with their creation. For documents generated or acquired before the LSS participant gains access to the LSS, the LSS participant need only submit a header and an image for each document. The LSS Administrator will be responsible for entering these documents into the LSS in searchable full text. DOE and NRC, the generators of the largest volumes of documentary material, will be responsible for submitting to the LSS Administrator ASCII files, bibliographic headers and images of documents within the scope of the topical guidelines. The format criteria for the submission and acceptance of ASCII, images, and headers will be initially established by DOE in concert with the LSS Advisory Committee established pursuant to proposed section 2.1011(e)(2), to be later supplemented as necessary by the LSS Administrator in concert with the LSS Advisory Review Panel.

The submission requirements of section 2.1003 generally apply only to final documents, e.g., a document bearing the signature of an employee of an LSS participant or its contractors. However, paragraphs (a) and (b) of section 2.1003 also require the submission of "circulated drafts" for entry into the LSS. A "circulated draft" means a nonfinal document circulated for supervisory concurrence or signature and in which the original author or others in the concurrence process have non-concurred. The intent of this exception to the general rule on final documents is to capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process (the concurrence process) of an LSS participant or its contractor. In effect, the Commission and the other government agencies who are LSS participants are waiving their deliberative process privilege for these circulated drafts. The objection or non-concurrence must be unresolved. Any draft documents to which such a formal, unresolved objection exists must be submitted for entry into the LSS. Although many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their document approval process.

This requirement applies regardless of whether any final document ultimately emerges from the LSS participant's decision-making process. A determination not to issue a final document, or allowing a substantial period of time to elapse with no action being taken to issue a final document, shall be deemed to be the completion of the decision-making process. If a decision is made not to finalize a document to which there has been an objection, the draft of that document must be entered into the LSS after the decision-making process on the document has been completed, i.e., the requirements of section 2.1003 do not require a LSS participant to submit a circulated draft to the LSS while the internal decision-making process is ongoing. In addition, under section 2.1006(c), circulated drafts that are subject to withholding under a privilege or exception other than the deliberative process privilege (e.g.,

attorney work product), are not required to be submitted for entry in searchable full text to the LSS under section 2.1003.

As a general rule, all documentary material is to be in the LSS in searchable full text. However, the proposed rule provides for exceptions to this general rule. Section 2.1003(c) addresses graphic-oriented documentary material that is not appropriate for entry into the Licensing Support System in searchable full text. Graphic-oriented documentary material is material that is printed, scripted, handwritten, or otherwise displayed in hard copy form, and is capable of being captured in electronic image by a digital scanning device. Graphic-oriented material includes raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, and photographs which have been printed, scripted, handwritten or otherwise displayed in any hard copy form and which, while capable of being captured in electronic image by a digital scanning device, may be captured and submitted to the LSS Administrator in any form of image, along with a bibliographic header. Section 2.1003(c) also addresses documentary material that is not suitable for entry into the Licensing Support System in either image or searchable full text. Such material shall be described in the Licensing Support System by a sufficiently descriptive bibliographic header. The timeframe for entry of graphic-oriented material, or material that is not suitable for entry in either image or searchable full text, will be established pursuant to the access protocols in section 2.1011(d)(10). In addition, submission of images will be determined by the protocols on digitizing equipment established by the LSS Advisory Review Panel. However, in any case, this type of documentary material must be entered into the LSS after the principal investigator decides that the data are in a usable form, including the completion of quality assurance procedures. The access protocol should ensure that any collection or "package" of documentary material, as the term is used in section 2.1003(c)(3), which relates to a study, should be submitted reasonably contemporaneous with the completion of such a "package," including any quality assurance that may be required.

Section 2.1005 sets forth categories of documents that are to be completely excluded from the LSS, and section 2.1006 sets forth the categories of documents that may be withheld from entry into the LSS on the basis of a privilege or exception. The details of these provisions will be discussed below.

To ensure that progress is made in designing, developing and loading the LSS, section 2.1003(h) provides for evaluations of DOE compliance with the requirements of section 2.1003 at six month intervals. The DOE license application cannot be docketed under Subpart J, thus losing the benefits of Subpart J, unless the LSS Administrator certifies at least six months before the license application is submitted that DOE is in substantial compliance with the provisions of the Subpart. Although section 2.1003(h)(1) requires the certification decision six months before submission of the DOE license application, the Commission anticipates that the LSS participants will have access to the LSS well before the license application is submitted. The LSS

Administrator's decision on DOE compliance may be reviewed by the Pre-License Application Licensing Board established pursuant to section 2.1010, if the Board receives a properly filed petition. Under sections 2.1003(a)(2) and (b)(2), LSS participants are required to submit any documentary material generated or acquired before the LSS participant is given access to the LSS ("backlog"), no later than six months before the license application for the repository is submitted. However, the Commission encourages LSS participants to submit this material for entry as soon as possible after they have been given access to the LSS.

In the event that the LSS Administrator cannot certify DOE compliance with Subpart J, DOE may either postpone the filing of the application until compliance is certified, or can file the license application for docketing under 10 CFR Part 2, Subpart G. In the latter event, the Commission would note that it will be unlikely to meet the three year NHPA timeframe for a decision on the issuance of a construction authorization, in the event of a contested adjudicatory proceeding. Although DOE may ultimately come into compliance with the provisions of Subpart J at some point after the license application has been docketed under Subpart G, the Commission may still not be able to certify that the statutory timeframe will be met. However, section 2.1003(h)(3)(ii) does authorize the Commission to specify the extent to which Subpart J will apply if DOE later comes into compliance. The Commission is optimistic that the effective implementation of the rule proposed in this notice will allow the Commission to meet the schedule set forth in Section 114(d) of the NHPA.

#### 2.1004 Amendments and additions.

This section provides for the addition to, and amendment of, records submitted by the LSS participants. The submitter has sixty days to verify whether a document has been entered correctly in the pre-license application phase, and five days to verify correct entry after the license application has been submitted. Any errors in entry discovered during the sixty and five day periods may be corrected by the submitter. After the time period for verification has run, any errors may not be corrected by revising the original document. Rather, the submitter must submit a corrected version to the LSS Administrator, with a separate bibliographic header. Both the bibliographic header for the revised document and the original document must note that two versions of the document are in the LSS.

Section 2.1004 also addresses the issue of updates of documents that are already in the LSS. Updated pages must be submitted to the LSS Administrator for entry as a separate document with a separate bibliographic header. The bibliographic header of the original document must specify that an update is available. All the pages in a particular update will be entered as a single document.

Section 2.1004 addresses amendments and additions to the documentary material in the LSS. This section does not preclude the LSS Administrator from making

revisions to headers necessary to maintain and enhance the usefulness of the header information. Such revisions would include the following --

- ° updating assigned subject index terms as the thesaurus is enhanced and expanded,
- ° where a field containing pointers to cross-reference related documents subsequently added to the database must be updated,
- ° where the ability to annotate a document record to show later use(s) as exhibits to depositions and testimony may be required at a later time.

Section 2.1004(e) requires that any document that has been incorrectly excluded from the LSS must be submitted to the LSS Administrator for entry within two days of its identification by the LSS participant who is responsible for the submission of the document.

#### 2.1005 Exclusions.

Section 2.1005 establishes several categories of documents that do not have to be entered into the LSS, either under the requirements of section 2.1003 or under the derivative discovery requirements of section 2.1019. These exclusions include documents typically referred to as official notice material; reference books and text books; administrative materials such as general distribution cover memoranda, budget, finance, personnel, and procurement materials; press clippings and press releases; junk mail; and classified material. The scope of work on a procurement related to repository siting, construction, or operation, or the transportation of spent nuclear fuel or high-level waste is not within the scope of these exclusions.

#### 2.1006 Privilege.

The submission of documents to the LSS is subject to the traditional privileges from discovery recognized in NRC adjudicatory proceedings, as well as all the exceptions from disclosure contained in 10 CFR 2.790 of the Commission's regulations. These privileges and exceptions include the attorney-client privilege, the attorney work product privilege, the government's deliberative process exemption, protection for privileged or confidential commercial or financial information, and the protection of safeguards information. The Pre-License Application Licensing Board, pursuant to section 2.1010(b), will rule on any claims of withholding based on these privileges or exceptions. As in any NRC adjudicatory proceeding, the Board may rule that the release of privileged or excepted material is necessary to a proper decision in the proceeding, or may order the disclosure of a document under a protective order. Section 2.1006(a) extends the deliberative process privilege normally available to federal government agencies to state and local governments and Indian Tribes. Safeguards information is to be protected under the provisions of 10 CFR 73.21. Subpart I of 10 CFR Part 2 will govern the protection and disclosure of any

Restricted Data and National Security Information during the proceeding. The existence of any material of this type should be identified to the Licensing Board and the parties pursuant to 10 CFR 2.907 and is not subject to the requirements of section 2.1003. Accordingly, no headers need be submitted for Subpart I information.

## 2.1007 Access.

Section 2.1007 establishes the provisions for access to the LSS by the public and by LSS participants. In terms of public access, the NRC and DOE will provide public access terminals at their respective Public Document Rooms at headquarters in Washington D.C., at NRC regional offices, and at various locations in the vicinity of the likely candidate site for the repository. In the pre-license application phase, access to the LSS through these public access terminals will consist of full text search capability of the full headers for documents in the LSS. The NRC and DOE Public Document Rooms will provide access, consistent with current practice, to the paper copy or microfiche of the documents of that agency before access to the LSS is available (currently projected for January 1992). Once the LSS is operational, public access to the LSS headers will be available within the same timeframe that the headers and LSS documents are available to LSS participants. In addition, copies of specific DOE or NRC documents may be requested under the procedures of the agencies' Public Document Rooms and the FOIA regulations of the NRC, 10 CFR Part 9, or DOE, 10 CFR Part 1004. These regulations provide for a ten day response time to requests, 10 CFR 9.25(e) and 10 CFR 1004.5(d)(1), and the waiver of copying fees to qualified persons, 10 CFR 9.39 and 10 CFR 1004.9(a). Public access to the full text of all documents in the LSS, except for documents withheld from disclosure under section 2.1006, shall be provided after the notice of hearing is issued for the HLW licensing proceeding. DOE and NRC will ensure that adequate terminal access facilities are provided at the public document rooms.

Remote access to the LSS from individual computer facilities will be available to LSS participants both during the pre-license application phase and after the notice of hearing has been issued. The cost of the computer facility and the telephone connect charge must be borne by the LSS participant. However, they will not be assessed a central processing unit (CPU) charge for access to the LSS. LSS participants will be able to file an electronic request for paper copies of LSS documents from their individual computer facilities, and also will be able to file an electronic request for a fee waiver when requesting paper copies of documents in the LSS. This waiver is currently available to qualified persons or groups seeking a fee waiver for copies of NRC documents who submit a written request to the Commission under the Commission's Freedom of Information Act (FOIA) regulations in 10 CFR Part 9. The criteria in 10 CFR 9.39 would be used to determine if the requestor should be granted a fee waiver. Section 2.1007(c)(4) would authorize the Commission to grant a generic fee waiver to a qualifying LSS participant after the initial request for a fee waiver has been made.



Documents in the LSS will not be considered NRC agency records solely by virtue of the NRC being the LSS Administrator. However, any of those documents that were generated by or submitted to the NRC as part of the NRC's licensing responsibility for the repository will be NRC agency records. As noted above, documents considered agency records may be requested under a FOIA request to the NRC. Similarly, DOE records may be requested from DOE under a FOIA request, and the records of any other governmental entity that may be obligated to provide documents by virtue of a freedom of information statute (e.g., a State agency) may be requested. It is anticipated that the public availability of headers for LSS documents will facilitate freedom of information requests and responses.

#### 2.1008 Potential parties.

Section 2.1008 establishes the procedures for a person becoming a potential party during the pre-license application phase, thereby gaining access to the LSS during this period. Upon a petition from an interested person, the Pre-License Application Licensing Board, established pursuant to section 2.1010, will determine in accordance with section 2.1008(c) if the person meets the criteria in section 2.1008(b). These criteria consist of the factors for determining intervention status under section 2.1014(c) or the criteria in 10 CFR 2.715 for interested governmental participation, both as evaluated in reference to the topical guidelines set forth below.

A grant of access to the LSS pursuant to section 2.1008 before an application is filed does not carry a presumption that a potential party will be admitted as a party after an application is filed under section 2.1014 or as an interested governmental participant under 10 CFR 2.715. However, the Hearing Licensing Board will consider this as one factor in ruling on petitions for intervention under proposed section 2.1014(c). An LSS participant's access to the LSS obligates it to comply with the regulations in Subpart J, including compliance with all orders of the Pre-License Application Licensing Board.

#### 2.1009 Procedures.

Section 2.1009 specifies the procedures each LSS participant must follow to ensure implementation of the requirements in Subpart J, including establishing procedures to ensure that documentary material is identified and submitted for entry into the LSS. Each LSS participant must identify a specific individual as the LSS point-of-contact. This individual must certify, at six month intervals, that all documentary material for which the LSS participant is responsible under this subpart has been identified and submitted to the LSS.

#### 2.1010 Pre-License Application Licensing Board.

Section 2.1010 establishes an NRC Pre-License Application Licensing Board to rule on requests for access to the LSS during the pre-license application phase, and to resolve disputes over the entry of documents and the

development and implementation of the LSS by DOE and the LSS Administrator. The Board will be appointed six months before access to the LSS is scheduled to become available. The Board possesses the same general powers as other NRC Licensing Boards possess under 10 CFR 2.718 and 10 CFR 2.721(d). In order to gain access to the LSS during the pre-license application phase, an LSS participant must agree to comply with all orders of the Pre-License Application Licensing Board, and all LSS regulations.

#### 2.1011 LSS management and administration.

Section 2.1011 establishes an LSS Administrator who will be responsible for managing, operating, and maintaining the LSS. Because the LSS will contain in electronic form, the documentary material constituting the Commission's docket and official record for the repository licensing proceeding, and

because use of the LSS will be an integral part of the Commission's adjudicatory hearing on the license application, the NRC will serve as the LSS Administrator. In order to avoid any conflict-of-interest problems, the LSS Administrator cannot be any person or organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste licensing proceeding or a part of the management chain reporting to the Director of the Office of Nuclear Material Safety and Safeguards. The Commission has decided to establish an independent Office of the LSS Administrator reporting to the Commission for policy direction and to the Chairman for day-to-day management supervision. The LSS Administrator (like other Commission-level offices) will report to the Commission for overall policy direction on all LSS matters except the certification of DOE compliance required by § 2.1003(h)(1). The LSS Administrator will make that determination on his/her own, subject to formal adjudicatory review (upon request) by the Pre-License Application Licensing Board (§ 2.1010(a)(1)), the Appeal Board (§ 2.1015(b)(i)), and, finally, the Commission itself (§ 2.1015(e)).

On a related issue, with the exception of the Commission in its role as LSS Administrator (see the definition of "LSS Administrator in section 2.1001), the LSS cannot reside in any computer system that is controlled by any LSS participant, including its contractors, and cannot be physically located on the premises of any LSS participant or its contractors.

The LSS is to be designed and developed by DOE consistent with the requirements in Subpart J. This responsibility includes all procurement of hardware and software. However, the design and development of the LSS by DOE must be undertaken in consultation with the LSS Administrator. After the LSS has been designed and becomes operational, all redesign and procurement by DOE must be with the concurrence of the LSS Administrator.

Section 2.1011(e) provides for the establishment of an LSS Advisory Review Panel, which will be chartered under the Federal Advisory Committee Act, to advise DOE on the design and development of the LSS, and to advise the LSS Administrator on the implementation of the LSS. The LSS Administrator appoints the members of the Advisory Review Panel from members of the Licensing Support System Advisory Committee established pursuant to section 2.1011(e)(2) within sixty days after the LSS Administrator has been designated. The Licensing Support System Advisory Committee will be composed of the State of Nevada, the coalition of affected units of local government in Nevada that served on the negotiating committee, DOE, NRC, the National Congress of American Indians, the coalition of national environmental groups that served on the negotiating committee, and other members as the Commission may designate pursuant to the balanced membership requirements of FACA. Because DOE is now in the process of designing the LSS, the Advisory Review Panel is not yet available to provide advice and recommendations to DOE. In the interim period between publication of the final rule and appointment of the Advisory Review Panel by the LSS Administrator, the LSS Advisory Committee will perform the functions of the Advisory Review Panel set forth in section 2.1011(e).

It is the Commission's intent that, after the commencement of the hearing, the primary focus of the Advisory Review Panel will be on broad, long-term, technical issues. Any immediate problems with the functioning of the LSS during the hearing will be addressed by the LSS Administrator or the Hearing Licensing Board.

It is anticipated that the DOE and NRC will enter into a Memorandum of Understanding (MOU), consistent with the requirements of the proposed rule, on the design and development of the LSS.

Section 2.1011(d) sets forth the responsibilities of the LSS Administrator including providing the necessary personnel, materials, and services for the operation and maintenance of the LSS, and entering the documentary material submitted pursuant to section 2.1003 in searchable full text, as appropriate.

#### 2.1012 Compliance.

Section 2.1012 establishes provisions to ensure compliance with the requirements of Subpart J, particularly the document submission requirements of section 2.1003. DOE may not submit the license application for docketing under Subpart J unless the LSS Administrator certifies that DOE is in substantial and timely compliance with section 2.1003. In addition, under section 2.1012(b)(1), no person may be granted party or interested governmental participant status in the hearing if it is not in substantial and timely compliance with the requirements of section 2.1003. A person who is not in substantial and timely compliance at the time specified for the submission of petitions to intervene or to become an interested governmental participant, may later come into compliance and be admitted to the hearing, assuming they meet all the other requirements in section 2.1014 or 10 CFR 2.715(c) for admission. However, persons admitted to the hearing under this provision must take the proceeding as they find it. The Hearing Licensing Board will not entertain any requests from such a person to delay the proceeding in order for that person to compensate for time missed in the hearing. Section 2.1012(d) provides for the termination or suspension of an LSS participant's access rights if it is in noncompliance with any applicable order of the Pre-License Application Licensing Board or the Hearing Licensing Board. However, any loss of access under this section does not relieve an LSS participant of its responsibilities in connection with the service of pleadings under section 2.1013 of this subpart.

#### 2.1013 Use of LSS during adjudicatory proceeding.

Section 2.1013 establishes procedures for the electronic submission of pleadings during the hearing, or during the pre-license application phase for practice before the Pre-License Application Licensing Board under section 2.1010, for the electronic transmission of Board and Commission issuances and orders, as well as for on-line access to the LSS during the hearing. Under section 2.1013(a) the Secretary of the Commission maintains the official docket pursuant to the requirements of 10 CFR 2.702. In this regard, each potential party, party, or interested governmental participant must submit a signed paper copy of each electronic adjudicatory filing to the Secretary. The staff would emphasize that section 2.1003 also applies to the submission

of pleadings during the hearing. Therefore, an ASC II file, a header, and an image of the pleading must also be submitted to the LSS Administrator. The final rule gives the Secretary the flexibility to establish the official docket in either hard copy or electronic form depending on the details of LSS design and the records management requirements of the Federal Archives. Absent good cause, all exhibits tendered during the hearing must have already been entered into the LSS prior to the commencement of that portion of the hearing where the exhibit is to be offered.

#### 2.1014 Intervention.

Section 2.1014 establishes the standards for intervention in the HLW proceeding. Section 2.1014 incorporates several of the provisions currently in the 10 CFR 2.714 general standards for intervention. Accordingly, any provisions of section 2.1014 that remain unchanged from the 10 CFR 2.714 provisions are to be interpreted according to the existing practice. Section 2.1014(a) requires petitions for intervention and proposed contentions to be filed at the same time, as well as petitions to participate under section 2.715(c) -- both within thirty days after the notice the hearing. In addition to the factors now in 10 CFR 2.714(a)(2), section 2.1014(a)(2) requires the petition to reference with particularity the specific documentary material, or absence thereof, that provides the basis for the contention, and the specific regulatory or statutory requirement to which the contention is relevant. This codifies existing Commission practice in regard to contentions.

Section 2.1014(a)(4) allows the adding or amending of contentions, including contentions based on the NRC Staff Safety Evaluation Report (SER). Contentions added or amended before the issuance of the SER will be evaluated according to the factors for nontimely filings in section 2.1014(a)(1). Contentions based on information or issues raised in the SER must be made within forty days after the issuance of the SER and will be evaluated according to the factors in 2.1014(a)(1). The SER is to be issued within eighteen months after the license application is docketed. Any petitions to amend or add contentions made more than forty days after the issuance of the SER, in addition to the factors for nontimely filing in section 2.1014(a)(1), must include a showing that the contention involves a significant safety or environmental issue or raises a material issue related to the performance evaluation anticipated by 10 CFR 60.112 or 10 CFR 60.113. In this context, "material" may involve items that are material to demonstrating compliance with sections 60.112 or 113 but which in and of themselves may not constitute a significant safety or environmental issue.

Although section 2.1014(a)(4) places some added restrictions on the amending or adding of contentions compared to 10 CFR 2.714, the Commission believes that the early availability of documents through access to the LSS will facilitate the preparation of timely and better based contentions at the outset of the proceeding, as compared to the traditional NRC licensing proceeding where contentions must be prepared without the benefit of prior discovery.

Section 2.1014(c) establishes the standards for permitting intervention in the HLW proceeding. Intervention is permitted as a matter of right by an affected unit of local government as defined in section 2(31) of the NWPA or by any affected Indian Tribe as defined in 10 CFR Part 60 of the Commission's regulations. The State of Nevada, like DOE or the NRC, is automatically a party to the HLW proceeding, assuming that a Nevada site is the subject of the DOE license application. All other petitions to intervene will be evaluated according to the factors in section 2.1014(c)(1) through (4).

#### 2.1015 Appeals.

Section 2.1015 sets forth the procedures for appealing decisions of the Pre-License Application Licensing Board or of the Hearing Licensing Board. Unlike the existing appeals process, appeals from certain types of interlocutory orders, such as rulings on the admissibility of contentions, must be filed within ten days, rather than at the conclusion of the proceeding.

#### 2.1016 Motions

Section 2.1016 establishes the procedures for motions practice in the HLW proceeding. The proposed rule does not contain a provision similar to 10 CFR 2.730(d) in regard to oral arguments on motions. However, this omission is not intended to change existing practice, i.e., requests for oral argument on substantive motions are liberally granted. It is within the discretion of the Board to allow arguments on motions under 10 CFR 2.755.

#### 2.1017 Computation of time.

Section 2.1017 specifies the computation of time for an act or an event for the HLW licensing proceeding. Because of the availability of the electronic transmission of pleadings through the LSS, one day instead of five days is allowed for the transmission of documents in response to the service of a notice or other document. This will save substantial time during the hearing. The use of electronic transmission is addressed in section 2.1013. If the LSS is unavailable for more than four access hours of any day that would normally be counted in the computation of the time for filing, that day will not be counted in the computation of time. However, this would not include periods of LSS unavailability due to a malfunction of the LSS participant's equipment or to the operation of that equipment.

#### 2.1018 Discovery.

Section 2.1018 specifies the scope and timing of discovery in the HLW licensing proceeding. The LSS provides the document discovery in the HLW licensing proceeding, supplemented by the derivative discovery in section 2.1019. Discovery is limited to access to the documentary material in the LSS; entry upon land for inspection and access to raw data; oral depositions; requests for admissions; and informal requests for information. These informal requests would be for the type of information normally gathered through the use of written interrogatories, such as the names of all party's witnesses and the subjects they will address. Therefore, the proposed rule

does not generally provide for the use of written interrogatories or depositions upon written questions. However, if the informal discovery process does not satisfy a request for information, 2.1018(a)(2) provides a mechanism for the use of written interrogatories or depositions upon written questions, by order of a Discovery Master appointed under section 2.1018(g). If no Discovery Master has been appointed, the Hearing Licensing Board itself may consider these petitions. Although informal discovery may begin in the pre-license application phase, an order compelling discovery through written interrogatories or through depositions on written questions can be issued by the Discovery Master or the Hearing Licensing Board only after the license application has been docketed.

The required showing of substantial need in regard to discovery for an LSS participant's "representatives" in section 2.1018(b)(2) does not include "consultants" to a LSS participant, unless the consultant's responsibilities are to assist in preparation for litigation.

Section 2.1018(c) empowers the Board to issue an order to protect a party from abuse of the discovery process. As noted earlier, the objective of the negotiated rulemaking is to provide for the effective review of and hearing on the DOE license application within the three year time period specified in Section 114(d) of the NWPAA. Consistent with this objective, section 2.1018(c) includes criteria to prevent abuse of the discovery process from frustrating this objective. In ruling on motions to protect a party from a particular discovery request, the Board may consider any "undue delay" that would result from the discovery request, as well as the failure to respond to a discovery request. Under this criterion, the Board will review any motion for a protective order from a particular discovery request, including a request for a written deposition, to determine whether the request creates the potential for unreasonably interfering with meeting the three year schedule. When a party or an interested governmental participant reasonably believes that the Board has not ruled in accordance with this rule and its underlying policy, it may seek review pursuant to directed certification under section 2.718(i) of this part. The Commission itself may entertain such requests and will apply the criteria for granting directed certification liberally. The Hearing Licensing Board or Discovery Master may also consider undue delay as a basis for granting a petition for the use of written interrogatories or depositions on written questions under section 2.1018(a)(2).

In addition, sections 2.1021 and 2.1022, on the first and second pre-hearing conferences respectively, provide for the establishment of discovery schedules by the Board. In establishing these discovery schedules, the Board must consider the objective of meeting the three-year schedule specified in the NWPAA, as well as the early availability of information made possible by the Licensing Support System. Furthermore, the Board should exercise all due diligence to ensure that discovery is completed within two years of the notice of hearing. However, this would not prevent the Board from establishing a schedule that provided for less than a continuous two-year period of discovery, or determining whether any discovery is necessary after the second pre-hearing conference.

Section 2.1018(f) anticipates the application of the traditional sanctions by the Licensing Board for failure to respond to a discovery request, including the issuance of an order for a response or answer to a discovery request.

#### 2.1019 Depositions.

Section 2.1019 provides for discovery through the taking of depositions. Proposed section 2.1019 basically follows the content of the general deposition rule in 10 CFR 2.740a. However, section 2.1019(i) provides for the derivative discovery of documents during the deposition. This provision establishes requirements for the disclosure, and entry into the LSS, of material in a deponent's possession that would not be required to be initially entered into the LSS under section 2.1003. This includes personal records, travel vouchers, speeches, preliminary drafts, and marginalia. "Preliminary drafts" means any nonfinal document that is not a circulated draft, i.e., on which no formal, unresolved objection or nonconcurrence has been made. "Marginalia" means handwritten, printed, or other types of notations added to a document, excluding underlining and highlighting.

#### 2.1020 Entry upon land for inspection.

Section 2.1020 establishes the procedures for parties to gain access to the land or property in the possession or control of another party or its contractor for the purpose of inspection and access to raw data. However, this provision should not be construed as expanding any of the rights contained in Section 116 or Section 118 of the NWPA, or any other applicable statutory or regulatory restrictions, related to site investigation.

#### 2.1021 First prehearing conference.

Section 2.1021 establishes a first pre-hearing conference in the HLW proceeding. The first pre-hearing conference will identify the key issues in the proceeding, and consider petitions for intervention.

#### 2.1022 Second prehearing conference.

Section 2.1022 establishes a second pre-hearing conference in the HLW licensing proceeding. The second pre-hearing conference is to be held not later than seventy days after the NRC staff Safety Evaluation Report is issued. The second pre-hearing conference will consider new or amended contentions, stipulations and admissions of fact, identification of witnesses, and the setting of a hearing schedule.

#### 2.1023 Immediate effectiveness.

Section 2.1023 provides for an immediate effectiveness review of the Licensing Board's initial decision on the issuance of a construction authorization. The Commission's existing regulations in 10 CFR 2.764 do not provide for an immediate effectiveness review. Rather 10 CFR 2.764 requires a Commission decision on the substantive merits of the Licensing Board decision before a construction authorization decision can be final. Section



2.1023 would authorize the Director of the NRC Office of Nuclear Material Safety and Safeguards to allow DOE to proceed with construction, assuming a favorable Licensing Board decision, if the Commission did not suspend the Licensing Board decision after its supervisory immediate effectiveness review, or the Appeal Board did not stay the effectiveness of the initial decision under 10 CFR 2.788. The Appeal Board and the Commission would then undertake a review of the substantive merits of the initial Licensing Board decision. Issuance of the construction authorization under these circumstances would be the event that tolls the time period for determining whether the NWA three year time frame for the decision on the construction authorization had been satisfied.

### Schedule

In order to assist the Hearing Licensing Board in establishing a schedule for the HLW proceeding that will facilitate meeting the timeframe specified in the NWA for a Commission decision on construction authorization, the Commission has prepared the following model timeline. This timeline is intended for general guidance only, and is not intended to suggest any predisposition by the Commission on the merits of DOE's future license application.

<u>Day</u>	<u>Regulation</u>	<u>Action</u>
0	10 CFR 2.101(f)(8) 2.105(a)(5)	Fed. Reg. Notice of Hearing
30	2.1014(a)(1) 2.715(c)	Pet. to intervene/request for hearing, w/ contentions Pet. for status as interested govt. participant (IGP)
50	2.1014(b)	Answers to intervention & IGP petitions
70	2.1021	1st Prehearing Conference
100		1st Prehearing Conference Order: identifies participants in proceeding, admits contentions, and sets discovery and other schedules
	2.1018(b)(1) 2.1019	Deposition discovery begins
110	2.1015(b)	Appeals from 1st Prehearing Conference Order, w/ briefs
120	2.1015(b)	Briefs in opposition to appeals

150		AB order ruling on appeals from 1st Prehearing Conference Order
548		NRC staff issues SER
588	2.1014(a)(4)	Petitions to amend contentions based on SER
608	2.1014(b)	Answers to petitions to amend SER-related contentions
618	2.1022	2nd Prehearing Conference
648		2nd Prehearing Conference Order: rules on amended contentions, sets any further discovery schedule, and sets schedule for prefiled testimony and hearing
658	2.1015(b)	Appeals from 2nd Prehearing Conference Order, w/ briefs
668	2.1015(b)	Briefs in opposition to appeals
698		AB order ruling on appeals from 2nd Prehearing Conference Order
700	2.749 (set by LB)	Final Motions for summary disposition
720	2.749	Replies to final motions for summary disposition
730	Supp. Info.	Discovery complete
740		LB order on final motions for summary disposition
750	2.1015(b)	Appeals from final summary disposition order, w/ briefs
760		Evidentiary hearing begins
	2.1015(b)	Briefs in opposition to appeals from final summary disposition orders
790		AB order on appeals from final summary disposition orders
850		Evidentiary hearing ends

880	2.754(a)(1)	Applicant's proposed findings
890	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings
900	2.754(a)(2)	NRC staff's proposed findings
905	2.754(a)(3)	Applicant's reply to proposed findings
995	2.760	Initial Decision
1005	2.788(a) 2.762(a) 2.1015(c)	Stay motions to AB Notices of Appeal
1015	2.788(d)	Replies to stay motions
1035		AB ruling on stay motion
	2.762(b)	Appellant's briefs
1045	2.788(a)	Stay motions to Commission
1055	2.788(d)	Replies to stay motions
1065	2.762(c)	Appellee's brief
1075	2.762(c)	NRC staff brief
1095	2.1023 Supp. Info.	Completion of NMSS and Commission supervisory review; Commission ruling on any stay motions; issuance of construction authorization; NWPA 3-year period tolled
1105	2.763	Oral argument on appeals
1165		Appeal Board decision
1180	2.1015(e) 2.786(b)(1)	Petitions for Commission review
1190	2.786(b)(3)	Replies to petitions
1250		Commission decision

#### Topical Guidelines

The following topical guidelines are to be used for identifying the documentary material that should be submitted by LSS participants for entry

into the LSS under section 2.1003. The topical guidelines will also be used by the Pre-License Application Licensing Board for evaluating petitions for access to the LSS during the pre-license application phase under section 2.1008.

## I. CATEGORIES OF DOCUMENTS

- Technical reports and analyses including those developed by contractors
- QA/QC records including qualification and training records
- External correspondence
- Internal memoranda
- Meeting minutes, including DOE/NRC meetings, Commission meetings
- Drafts (i.e., those submitted for decision beyond the first level of management or similar criterion)
- Congressional Q's & A's
- "Regulatory" documents related to HLW site selection and licensing, such as:
  - Draft and final environmental assessments
  - Site characterization Plans
  - Site characterization study plans
  - Site characterization progress reports
  - Issue resolution reports
  - Rulemakings
  - Public and agency comments on documents
  - Response to public comments
  - Environmental Impact Statement, Comment Response Document, and related references
  - License Application (LA), LA data base, and related references
  - Topical reports, data, and data analysis
  - Recommendation Report to President
  - Notice of Disapproval, if submitted

## II. GENERAL TOPICS

1. Any document pertaining to the location and potential of valuable natural resources, hydrology, geophysics, tectonics (including volcanism), geomorphology, seismic activity, atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, proximity to components of the National Park System, the National Wildlife Refuge System, the National Wildlife and Scenic River System, the National Wilderness Preservation System, or National Forest Lands, proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored, spent fuel and nuclear waste transportation, safety factors involved in moving spent fuel or nuclear waste to a repository, the cost and impact of transporting spent fuel and nuclear waste to a repository site, the advantages of regional distribution in siting of repositories, and various geologic media in which sites for repositories may be located.

2. Any document related to repository design, siting, construction, or operation, or the transportation of spent nuclear fuel and high-level nuclear waste, not categorized as an "excluded document", generated by or in the possession of any contractor of the Department of Energy, the Nuclear Regulatory Commission, or any other party to the HLW licensing proceeding.

3. All documents related to the physical attributes of the Basin and Range Province of the continental United States.

4. Any document listing and/or considering any site or location other than Yucca Mountain as a possible location for a high-level nuclear waste repository, or any alternative technology to deep geologic disposal.

5. Any document analyzing the effect of the development of a repository at Yucca Mountain on the rights of users of water in the Armagosa ground-water basin in Nevada.

6. Any document analyzing the health and safety implications to the people and environment of the transportation of spent fuel between locations where spent fuel is generated or stored and Yucca Mountain, Nevada, or any other site nominated for repository characterization on May 28, 1986, including, but not limited to:

a. Any analysis of possible human error in the manufacture of spent fuel casks;

b. Any analysis of the actual population density along all of any specific projected routes of travel;

c. Any analysis of releases from any actual radioactive material transportation incidents;

d. Any analysis of the emergency response time in any actual radioactive materials transportation incident;

e. Any actual accident data on any specific projected routes of travel;

f. Any calculations or projections of the probabilities of accidents on any specific projected routes of travel;

g. Any data on the physical properties or containment capabilities of spent fuel casks which have been used or which are projected to be used at any hypothetical or actual projected repository;

h. Any analysis of modeling of the containment capabilities of spent fuel casks under a stress scenario;

i. Any analysis or comparison of spent fuel casks projected to be used against the spent fuel cask certification standards of the Nuclear Regulatory Commission;

j. Any analysis of the containment capabilities of spent fuel casks containing spent fuel which has been burned up over an extended period.

7. Any document analyzing or comparing Yucca Mountain, Nevada, with any other site in the same geohydrologic setting.

8. Any document relating to potential interference or incompatibility between a Yucca Mountain, Nevada, high-level nuclear waste repository and atomic energy defense activities at the Nevada Test Site and Nellis Airforce base.

9. Any document related to the land status, use or ownership of Yucca Mountain, Nevada.

10. Any document considering or analyzing the attributes or detriments of any engineered barrier upon the radionuclide isolation capability of Yucca Mountain, Nevada, or any other site considered.

11. Any document evaluating the effect of extended fuel burn-up on Yucca Mountain, Nevada's adequacy as a repository site for disposal of spent fuel or upon the design of any such theoretical repository.

12. Any document analyzing or investigating the potential for discharge of radionuclides into the Death Valley National Monument.

13. Any document analyzing the recharge of the underlying saturated zone or the hydroconductivity of the unsaturated zone at Yucca Mountain.

14. Any document containing any data or analysis of volcanism in the geologic setting of which Yucca Mountain is a part.

15. Any document containing any data or analysis of tectonic events at Yucca Mountain, or pertaining to the tectonic framework of the Yucca Mountain area or any document containing any data or analysis of faults with or without surface expression in the area of Yucca Mountain.

16. Any document containing instructions or other limitations on the scope of work to be performed by Department of Energy personnel or contractors' personnel.

17. Any document pertaining to prevention or control of human intrusion at the Yucca Mountain site.

### III. SPECIFIC TOPICS

#### 1. The Site

A. LOCATION, GENERAL APPEARANCE AND TERRAIN, AND PRESENT USE

B. GEOLOGIC CONDITIONS

1. Stratigraphy and volcanic history of the Yucca Mountain area

- a. Caldera evolution and genesis of ash flows
    - b. Timber Mountain Tuff
    - c. Paintbrush Tuff
    - d. Tuffaceous beds of Calico Hills
    - e. Crater Flat Tuff
    - f. Older tuffs
    - g. sedimentary units
    - h. basalts
  - 2. Structure
  - 3. Seismicity
  - 4. Energy and mineral resources
    - a. Energy resources
    - b. Metals
    - c. Nonmetals
  - 5. Paleontology
  - 6. Mineralology
  - 7. Geomorphology
  - 8. Tectonics
    - a. Faulting
    - b. Stress
    - c. Uplift/subsidence
    - d. Volcanism
- C. HYDROLOGIC CONDITIONS
- 1. Surface water
  - 2. Ground water
    - a. Ground water movement
    - b. Ground water quality
  - 3. Present and projected water use in the area
  - 4. Groundwater resources
  - 5. Climatology
  - 6. Meteorology
- D. GEOCHEMISTRY
- 1. Rock chemistry of the overlying and underlying host units
  - 2. Water chemistry of unsaturated or saturated zones
  - 3. Alteration
  - 4. Retardation and transport
- E. ENVIRONMENTAL SETTING
- 1. Land use
    - a. Federal use
    - b. Agricultural
      - i. Grazing land
      - ii. Cropland
    - c. Mining
    - d. Recreation
    - e. Private and commercial development
  - 2. Terrestrial and aquatic ecosystems

- a. Terrestrial vegetation
    - i. Larrea-Ambrosia
    - ii. Larrea-Ephedra or Larrea-Lycium
    - iii. Coleogyne
    - iv. Mixed transition
    - v. Grassland-burn site
  - b. Terrestrial wildlife
    - i. Mammals
    - ii. Birds
    - iii. Reptiles
  - c. Special-interest species
  - d. Aquatic ecosystems
  - 3. Air quality and weather conditions: Air quality
  - 4. Noise
  - 5. Aesthetic resources
  - 6. Archaeological, cultural, and historical resources
  - 7. Radiological background
    - a. Monitoring program
    - b. Dose assessment
- F. TRANSPORTATION
- 1. Highway infrastructure and current use
  - 2. Railroad infrastructure and current use
- G. SOCIOECONOMIC CONDITIONS
- 1. Economic conditions
    - a. Nye County
    - b. Clark County
    - c. Lincoln County
    - d. Methodology
  - 2. Population density and distribution
    - a. Populations of the State of Nevada
    - b. Population of Nye County
    - c. Population of Clark County
    - d. Population of Lincoln County
  - 3. Community services
    - a. Housing
    - b. Education
    - c. Water supply
    - d. Waste-water treatment
    - e. Solid waste
    - f. Energy utilities
    - g. Public safety services
    - h. Medical and social services
    - i. Library facilities
    - j. Parks and recreation
  - 4. Social conditions
    - a. Existing social organization and social structure
      - i. Rural social organization and structure
      - ii. Social organization and structure in urban Clark County



- b. Culture and lifestyle
  - i. Rural culture
  - ii. Urban culture
- c. Community attributes
- d. Attitudes and perceptions toward the repository
- 5. Fiscal and governmental structure

## 2. Expected Effects of the Site Characterization Activities

### A. SITE CHARACTERIZATION ACTIVITIES

- 1. Field studies
  - a. Exploratory drilling
  - b. Geophysical surveys
  - c. Geologic mapping
  - d. Standard operating practices for reclamation of areas disturbed by field studies
  - e. trenching
- 2. Exploratory shaft facility
  - a. Surface facilities
  - b. Exploratory shaft and underground workings
  - c. Secondary egress shaft
  - d. Exploratory shaft testing program
  - e. Final disposition
  - f. Standard operating practices that would minimize potential environmental damage
- 3. Other studies
  - a. Geodetic surveys
  - b. Horizontal core drilling
  - c. Studies of past hydrologic conditions
  - d. Studies of tectonics, seismicity, and volcanism
  - e. Studies of seismicity induced by weapons testing
  - f. Field experiments in G-Tunnel facilities
  - g. Laboratory studies
  - h. Waste package design, testing, and analysis

### B. EXPECTED EFFECTS OF SITE CHARACTERIZATION

- 1. Expected effects on the environment
  - a. Geology, hydrology, land use and surface soils
    - i. Geology
    - ii. Hydrology
    - iii. Land use
    - iv. Surface soils
  - b. Ecosystems
  - c. Air quality
  - d. Noise
  - e. Aesthetics
  - f. Archaeological, cultural, and historical resources
- 2. Socioeconomic and transportation conditions
  - a. Economic conditions
    - i. Employment
    - ii. Materials

- b. Population density and distribution
- c. Community services
- d. Social conditions
- e. Fiscal and governmental structure
- f. Transportation
- 3. Worker safety
- 4. Irreversible and irretrievable commitment of resources

### C. ALTERNATIVE SITE CHARACTERIZATION ACTIVITIES

#### 3. Regional and Local Effects of Locating a Repository at the Site

##### A. THE REPOSITORY

- 1. Construction
  - a. The surface facilities
  - b. Access to the subsurface
  - c. The subsurface facilities
  - d. Other construction
    - i. Access route
    - ii. Railroad
    - iii. Mined rock handling and storage facilities
    - iv. Shafts and other facilities
  - e. Utilities
- 2. Operations
  - a. Emplacement phase
    - i. Waste receipt
    - ii. Waste emplacement
  - b. Caretaker phase
- 3. Retrievability
- 4. Decommissioning and closure
- 5. Schedule and labor force
- 6. Material and resource requirements

##### B. EXPECTED EFFECTS ON THE PHYSICAL ENVIRONMENT

- 1. Geologic impacts
- 2. Hydrologic impacts
- 3. Land use
- 4. Ecosystems
- 5. Air quality
  - a. Ambient air-quality regulations
  - b. Construction
  - c. Operations
  - d. Decommissioning and closure
- 6. Noise
  - a. Construction
  - b. Operations
  - c. Decommissioning and closure
- 7. Aesthetic resources
- 8. Archaeological, cultural, and historical resources
- 9. Radiological effects
  - a. Construction

- b. Operation
  - i. Worker exposure during normal operation
  - ii. Public exposure during normal operation
  - iii. Accidental exposure during operation
- C. EXPECTED EFFECTS OF TRANSPORTATION ACTIVITIES
  - 1. Transportation of people and materials
    - a. Highway impacts
      - i. Construction
      - ii. Operations
      - iii. Decommissioning
    - b. Railroad impacts
  - 2. Transportation of nuclear wastes
    - a. Shipment and routing nuclear waste shipments
      - i. National shipment and routing
      - ii. Regional shipment and routing
    - b. Radiological impacts
      - i. National impacts
      - ii. Regional impacts
      - iii. Maximally exposed individual impacts
    - c. Nonradiological impacts
      - i. National impacts
      - ii. Regional impacts
    - d. Risk summary
      - i. National risk summary
      - ii. Regional risk summary
    - e. Costs of nuclear waste transportation
    - f. Emergency response
- D. EXPECTED EFFECTS ON SOCIOECONOMIC CONDITIONS
  - 1. Economic conditions
    - a. Labor
    - b. Materials and resources
    - c. Cost
    - d. Income
    - e. Land use
    - f. Tourism
  - 2. Population density and distribution
  - 3. Community services
    - a. Housing
    - b. Education
    - c. Water supply
    - d. Waste-water treatment
    - e. Public safety services
    - f. Medical services
    - g. Transportation
  - 4. Social conditions
    - a. Social structure and social organization
      - i. Standard effects on social structure and social organization
      - ii. Special effects on social structure and social organization

- b. Culture and lifestyle
    - c. Attitudes and perceptions
  - 5. Fiscal conditions and government structure
4. Suitability of the Yucca Mountain Site for Site Characterization and for Development as a Repository
- A. SUITABILITY OF THE YUCCA MOUNTAIN SITE FOR DEVELOPMENT AS A REPOSITORY: EVALUATION AGAINST THE GUIDELINES THAT DO NOT REQUIRE SITE CHARACTERIZATION
- 1. Technical guidelines
    - a. Postclosure site ownership and control
      - i. Data relevant to the evaluation
      - ii. Favorable condition
      - iii. Potentially adverse condition
      - iv. Evaluation and conclusion for the qualifying condition on the postclosure site ownership and control guidelines
    - b. Population density and distribution
      - i. Data relevant to the evaluation
      - ii. Favorable conditions
      - iii. Potentially adverse conditions
      - iv. Disqualifying condition
      - v. Evaluation and conclusion for the qualifying condition on the population density and distribution guideline
    - c. Preclosure site ownership and control
      - i. Data relevant to the evaluation
      - ii. Favorable condition
      - iii. Potentially adverse condition
      - iv. Evaluation and conclusion for the qualifying condition on the preclosure site ownership and control guideline
    - d. Meteorology
      - i. Data relevant to the evaluation
      - ii. Favorable condition
      - iii. Potentially adverse condition
      - iv. Evaluation and conclusion for the qualifying condition on the meteorology guideline
    - e. Offsite installations and operations
      - i. Data relevant to the evaluation
      - ii. Favorable conditions
      - iii. Potentially adverse conditions
      - iv. Disqualifying condition
      - v. Evaluation and conclusion for the qualifying condition on the offsite installations operations guideline
    - f. Environmental quality
      - i. Data relevant to the evaluation
      - ii. Favorable conditions
      - iii. Potentially adverse conditions

- iv. Disqualifying conditions
    - v. Evaluation and conclusion for the qualifying condition on the environmental quality guidelines
  - g. Socioeconomic impacts
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Disqualifying condition
    - v. Evaluation and conclusion for the qualifying condition on the socioeconomic guideline
  - h. Transportation
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Evaluation and conclusion for the qualifying condition on the transportation guideline
- 2. Preclosure System
  - a. Preclosure system: radiological safety
    - i. Data relevant to the evaluation
    - ii. Evaluation of the Yucca Mountain site
    - iii. Conclusion for the qualifying condition on the preclosure system guideline radiological safety
  - b. Preclosure system: environment, socioeconomics, and transportation
    - i. Data relevant to the evaluation
    - ii. Evaluation of the Yucca Mountain site
    - iii. Conclusion for the qualifying condition on the preclosure system guideline: environment, socioeconomics, and transportation
- 3. Postclosure technical
  - a. Geohydrology
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Disqualifying condition
    - v. Evaluation and conclusion for the qualifying condition on the postclosure geohydrology guideline
  - b. Geochemistry
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Evaluation and conclusion for the qualifying condition on the postclosure geochemistry guideline
    - v. Plans for site characterization
  - c. Rock characteristics
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Evaluation and conclusion for the qualifying condition on the postclosure rock characteristics guideline

- d. Climatic changes
  - i. Data relevant to the evaluation
  - ii. Favorable conditions
  - iii. Potentially adverse conditions
  - iv. Evaluation and conclusion for the climate changes qualifying condition
- e. Erosion
  - i. Data relevant to the evaluation
  - ii. Favorable conditions
  - iii. Potentially adverse conditions
  - iv. Disqualifying condition
  - v. Qualifying condition
- f. Dissolution
  - i. Data relevant to the evaluation
  - ii. Favorable condition
  - iii. Potentially adverse condition
  - iv. Disqualifying condition
  - v. Evaluation and conclusion for the qualifying condition on the postclosure and dissolution guideline
- g. Tectonics
  - i. Data relevant to the evaluation
  - ii. Favorable condition
  - iii. Potentially adverse condition
  - iv. Disqualifying condition
  - v. Evaluation and conclusion for the qualifying condition on the postclosure tectonics guideline
- h. Human interference: natural resources and site ownership and control
  - i. Data relevant to the evaluation
  - ii. Favorable conditions
  - iii. Potentially adverse conditions
  - iv. Disqualifying conditions
  - v. Evaluation and conclusion for the qualifying condition on the postclosure human interference and natural resources technical guideline
- 4. Postclosure system
  - a. Evaluation of the Yucca Mountain Site
    - i. Quantitative analyses
    - ii. Qualitative analysis
  - b. Summary and conclusion for the qualifying condition on the postclosure system guideline
- 5. Preclosure technical
  - a. Surface characteristics
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Evaluation and conclusion for the qualifying condition on the preclosure surface characteristics guideline
  - b. Rock characteristics

- i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse conditions
    - iv. Disqualifying condition
    - v. Evaluation and conclusion for the qualifying condition on the preclosure rock characteristics guideline
  - c. Hydrology
    - i. Data relevant to the evaluation
    - ii. Favorable conditions
    - iii. Potentially adverse condition
    - iv. Disqualifying condition
    - v. Evaluation and conclusion for the qualifying condition on the preclosure hydrology guideline
  - d. Tectonics
    - i. Data relevant to the evaluation
    - ii. Favorable condition
    - iii. Potentially adverse conditions
    - iv. Disqualifying condition
    - v. Evaluation and conclusion for the qualifying condition on the preclosure tectonics guideline
- 6. Ease and cost of siting, construction, operation, and closure
  - a. Data relevant to the evaluation
  - b. Evaluation
  - c. Conclusions for the qualifying condition on the ease and cost of siting, construction, operation, and closure guideline
- 7. Conclusion regarding suitability of the Yucca Mountain Site for site characterization

B. PERFORMANCE ANALYSES

- 1. Preclosure radiological safety assessments
  - a. Preclosure radiation protection standards
  - b. Methods for preclosure radiological assessment
    - i. Radiological assessment of construction activities
    - ii. Radiological assessment of normal operations
    - iii. Radiological assessment of accidental releases
- 2. Preliminary analysis of postclosure performance
  - a. Subsystem descriptions
    - i. Engineered barrier subsystem
    - ii. The natural barrier subsystem
  - b. Preliminary performance analyses of the major components of the system
    - i. The waste package lifetime
    - ii. Release rate from the engineered barrier subsystem
  - c. Preliminary system performance description and analysis
  - d. Comparisons with regulatory performance objectives
  - e. Preliminary evaluation of disruptive events: disruptive natural processes
  - f. Conclusions

5. Transportation

- A. REGULATIONS RELATED TO SAFEGUARDS
  - 1. Safeguards
  - 2. Conclusion
- B. PACKAGINGS
  - 1. Packaging design, testing, and analysis
  - 2. Types of packaging
    - a. Spent fuel
    - b. Casks for defense high-level waste and West Valley high-level waste
    - c. Casks for use from an MRS to the repository
  - 3. Possible future developments
    - a. Mode-specific regulations
    - b. Overweight truck casks
    - c. Rod consolidation
    - d. Advanced handling concepts
    - e. Combination storage/shipping casks
- C. POTENTIAL HAZARDS OF TRANSPORTATION
  - 1. Potential consequences to an individual exposed to a maximum extent
    - a. Normal transport
    - b. Accidents
  - 2. Potential consequences to a large population from very severe transportation accidents
  - 3. Risk assessment
    - a. Outline of method for estimating population risks
    - b. Computational models and methods for population risks
    - c. Changes to the analytical models and methods for population risks
    - d. Transportation scenarios evaluated for risk analysis
    - e. Assumption about wastes
    - f. Operational considerations for use in risk analysis
    - g. Values for factors needed to calculate population risks
    - h. Results of population risk analyses
    - i. Uncertainties
  - 4. Risks associated with defective cask construction, lack of quality assurance, inadequate maintenance and human error
- D. COST ANALYSIS
  - 1. Outline method
  - 2. Assumptions
  - 3. Models
  - 4. Cost estimates
  - 5. Limitations of results
- E. BARGE TRANSPORT TO REPOSITORIES
- F. EFFECT OF A MONITORED RETRIEVABLE STORAGE FACILITY ON TRANSPORTATION ESTIMATES
- G. EFFECT OF AT-REACTOR ROD CONSOLIDATION ON TRANSPORTATION ESTIMATES



- H. CRITERIA FOR APPLYING TRANSPORTATION GUIDELINE
- I. DOE RESPONSIBILITIES FOR TRANSPORTATION SAFETY
  - 1. Prenotification
  - 2. Emergency response
  - 3. Insurance coverage for transportation accidents
- J. MODAL MIX
  - 1. Train shipments
    - a. Ordinary
    - b. Dedicated train
  - 2. Truck shipments
    - a. Legal weight
    - b. Overweight

#### Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

#### Paperwork Reduction Act Statement

This rule does not contain information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C 3501 et seq.).

#### Regulatory Analysis

The DOE analysis of the costs and benefits of the LSS (U.S. Department of Energy, "Licensing Support System Benefit-Cost Analysis" July, 1988) and companion DOE reports ("Preliminary Needs Analysis;" "Preliminary Data Scope Analysis;" and "Conceptual Design Analysis;") are available for inspection in the NRC Public Document Room, 2120 L Street NW, Washington, DC. Single copies may be obtained from Francis X. Cameron, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington DC, 20555; Telephone: (301)-492-1623.

#### Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act of 1980, (5 U.S.C. 605(b)), the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The final rule affects participants in the Commission's HLW licensing proceeding. The substantial majority of these participants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

#### Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this rule and, therefore, that a backfit analysis is not required for this rule because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 2.

PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 continues to read as follows:

AUTHORITY: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section 2.700 is revised to read as follows:

§2.700 Scope of subpart.

The general rules of this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to section 2.205(e), a notice of hearing, a notice of proposed action pursuant to section 2.105, or a notice issued pursuant to section 2.102(d)(3). The procedure applicable to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are set forth in subpart J of this part.

3. A new paragraph (i) is added to section 2.714 to read as follows:

§2.714 Intervention.

(i) The provisions of this section do not apply to license applications docketed under subpart J of this part.

\* \* \* \* \*

4. In section 2.722, paragraph (a)(4) is added to read as follows:

§2.722 Special assistants to the presiding officer.

(a) \* \* \*

(4) Discovery Master to rule on the matters specified in section 2.1018(a)(2) of this part.

\* \* \* \* \*

5. In section 2.743, paragraph (f) is revised to read as follows:

§2.743 Evidence.

\* \* \* \* \*

(f) Exhibits. A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence. Exhibits in the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are governed by section 2.1013 of this part.

\* \* \* \* \*

§2.764 [Amended]

6. In section 2.764, paragraph (d) is removed.
7. In Part 2, a new Subpart J is added to read as follows:

Sec.

- 2.1000 Scope of subpart.
- 2.1001 Definitions.
- 2.1002 High-level Waste Licensing Support System.
- 2.1003 Submission of material to the LSS.
- 2.1004 Amendments and additions.
- 2.1005 Exclusions.
- 2.1006 Privilege.
- 2.1007 Access.
- 2.1008 Potential parties.
- 2.1009 Procedures.
- 2.1010 Pre-License Application Licensing Board.
- 2.1011 LSS management and administration.
- 2.1012 Compliance.
- 2.1013 Use of LSS during adjudicatory proceeding.
- 2.1014 Intervention.
- 2.1015 Appeals.
- 2.1016 Motions
- 2.1017 Computation of time.
- 2.1018 Discovery.
- 2.1019 Depositions.
- 2.1020 Entry upon land for inspection.
- 2.1021 First prehearing conference.
- 2.1022 Second prehearing conference.
- 2.1023 Immediate effectiveness.

SUBPART J - PROCEDURES APPLICABLE TO PROCEEDINGS FOR THE ISSUANCE OF LICENSES FOR THE RECEIPT OF HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLIC REPOSITORY

2.1000 Scope of Subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to section 2.101(f)(8) or section 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR Subpart G, rules of general applicability, except for the following provisions: 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.749, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.762, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.785, 2.786, 2.787, 2.788, and 2.790.

2.1001 Definitions.

"ASCII File" means a computerized text file conforming to the American Standard Code for Information Interchange which represent characters and symbols.

"Bibliographic header" means the minimum series of descriptive fields that a potential party, interested governmental participant, or party must submit with a document or other material. The bibliographic header fields are a subset of the fields in the full header.

"Circulated draft" means a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

"Document" means any written, printed, recorded, magnetic, graphic matter, or other documentary material, regardless of form or characteristic.

"Documentary material" means any material or other information that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. The scope of documentary material shall be guided by the topical guidelines in Regulatory Guide \_\_.

"DOE" means the U.S. Department of Energy or its duly authorized representatives.

"Full header" means the series of descriptive fields and subject terms given to a document or other material.

"Image" means a visual likeness of a document, presented on a paper copy, microform, or a bit-map on optical or magnetic media.

"Interested governmental participant" means any person admitted under section 2.715(c) of this part to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter.

"LSS Administrator" means the person within the U.S. Nuclear Regulatory Commission responsible for administration, management, and operation of the Licensing Support System. The LSS Administrator shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste licensing proceeding or is a part of the management chain reporting to the Director of the Office of Nuclear Material Safety and Safeguards. For purposes of this subpart the organizational unit within the NRC selected to be the LSS Administrator shall not be considered to be a party to the proceeding.

"Marginalia" means handwritten, printed, or other types of notations added to a document excluding underlining and highlighting.

"NRC" means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

"Party" for purposes of this subpart means the DOE, the NRC staff, the host State and any affected Indian Tribe in accordance with section 60.63(a) of this chapter, and a person admitted under section 2.1014 of this subpart to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter; provided that a host State or affected Indian Tribe shall file a list of contentions in accordance with the provisions of sections 2.1014(a)(2)(ii), (iii), and (iv) of this subpart.

"Personal record" means a document in the possession of an individual associated with a party, interested governmental participant, or potential party that was not required to be created or retained by the party, interested governmental participant, or potential party, and can be retained or discarded at the possessor's sole discretion, or documents of a personal nature that are not associated with any business of the party, interested governmental participant, or potential party.

"Potential party" means any person who, during the period before the issuance of the first pre-hearing conference order under section 2.1021(d) of this subpart, is granted access to the Licensing Support System and who consents to comply with the regulations set forth in Subpart J of this part, including the authority of the Pre-License Application Licensing Board established pursuant to Section 2.1010 of this subpart.

"Pre-license application phase" means the time period before the license application to receive and possess high-level radioactive waste at a geologic repository operations area is docketed under section 2.101(f)(3) of this part.

"Preliminary draft" means any nonfinal document that is not a circulated draft.

"Searchable full text" means the electronic indexed entry of a document in ASCII into the Licensing Support System that allows the identification of specific words or groups of words within a text file.

## 2.1002 High-Level Waste Licensing Support System.

(a) The Licensing Support System is an electronic information management system containing the documentary material of the DOE and its contractors, and the documentary material of all other parties, interested governmental participants and potential parties and their contractors. Access to the Licensing Support System by the parties, interested governmental participants, and potential parties provides the document discovery in the proceeding. The Licensing Support System provides for the electronic transmission of filings by the parties during the high-level waste proceeding, and orders and decisions of the Commission and Commission adjudicatory boards related to the proceeding.

(b) The Licensing Support System shall include documentary material not privileged under section 2.1006 or excluded under section 2.1005 of this subpart.

(c) The participation of the host State in the Licensing Support System during the pre-license application phase shall not have any affect on the State's exercise of its disapproval rights under Section 116(b)(2) of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10136(b)(2).

(d) This subpart shall not affect any independent right of a potential party, interested governmental participant or party to receive information.

#### 2.1003 Submission of material to the LSS.

(a) Subject to the exclusions in section 2.1005 of this subpart and paragraphs (c) and (d) of this section, each potential party, interested governmental participant or party, with the exception of the DOE and the NRC, shall submit to the LSS Administrator--

(1) subject to paragraph (a)(3) of this section, an ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party after the date on which such potential party, interested governmental participant or party is given access to the Licensing Support System.

(2) an image, a bibliographic header, and, if available, an ASCII file, no later than six months before the license application is submitted under section 60.22 of this chapter, for all documentary material (including circulated drafts but excluding preliminary drafts), generated by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party, on or before the date on which such potential party, interested governmental participant, or party was given access to the Licensing Support System.

(3) an image and bibliographic header for documentary material included under paragraphs (a)(1) of this section that were acquired from a person that is not a potential party, party, or interested governmental participant.

(b) Subject to the exclusions in section 2.1005 of this subpart, and subject to paragraphs (c) and (d) of this section, the DOE and the NRC shall submit to the LSS Administrator--

(1) an ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC after the date on which the Licensing Support System is available for access.

(2) an ASCII file, an image, and a bibliographic header no later than six months before the license application is submitted under section

60.22 of this chapter for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC on or before the date on which the Licensing Support System is available for access.

(c)(1) Each potential party, interested governmental participant, or party shall submit, subject to the claims of privilege in section 2.1006, an image and a bibliographic header, in a time frame to be established by the access protocols under section 2.1011(d)(10) of this subpart, for all graphic oriented documentary material. Graphic-oriented documentary material includes, raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs which have been printed, scripted, hand written or otherwise displayed in any hard copy form and which, while capable of being captured in electronic image by a digital scanning device, may be captured and submitted to the LSS Administrator in any form of image. Text embedded within these documents need not be separately entered in searchable full text. Such graphic-oriented documents may include: Calibration procedures, logs, guidelines, data and discrepancies; Gauge, meter and computer settings; Probe locations; Logging intervals and rates; Data logs in whatever form captured; Test data sheets; Equations and sampling rates; Sensor data and procedures; Data Descriptions; Field and laboratory notebooks; Analog computer, meter or other device print-outs; Digital computer print-outs; Photographs; Graphs, plots, strip charts, sketches; Descriptive material related to the information above.

(2) Each potential party, interested governmental participant, or party, in a time frame to be established by the access protocols under section 2.1011(d)(10) of this subpart, shall submit, subject to the claims of privilege in section 2.1006, only a bibliographic header for each item of documentary material that is not suitable for entry into the Licensing Support System in image or searchable full text. The header shall include all required fields and shall sufficiently describe the information and references to related information and access protocols. Whenever any documentary material is transferred to some other media, a new header shall be supplied. Any documentary material for which a header only has been supplied to the system shall be made available to any other party, potential party or interested governmental participant through the access protocols determined by the LSS administrator under section 2.1011(d)(10) or through entry upon land for inspection and other purposes pursuant to section 2.1020.

(3) Whenever documentary material described in paragraphs (c)(1) or (c)(2) of this section has been collected or used in conjunction with other such information to analyze, critique, support or justify any particular technical or scientific conclusion, or relates to other documentary material as part of the same scope of technical work or investigation, then an appropriate bibliographic header shall be submitted for a table of contents describing that package of information, and documentary material contained within that package shall be named and identified.

(d) Each potential party, interested governmental participant, or party shall submit a bibliographic header for each documentary material--



- (1) for which a claim of privilege is asserted; or
- (2) which constitutes confidential financial or commercial information; or
- (3) which constitutes safeguards information under section 73.21 of this Chapter.

(e) In addition to the submission of documentary material under paragraphs (a) and (b) of this section, potential parties, interested governmental participants, or parties may request that another potential party's, interested governmental participant's, party's, or third party's documentary material be entered into the Licensing Support System in searchable full text if they or the other potential party, interested governmental participant, or party intend to rely on such documentary material during the licensing proceeding.

(f) Submission of ASCII files, images, and bibliographic headers shall be in accordance with established criteria.

(g) Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be submitted to the LSS Administrator by the respective agency that generated the document.

(h)(1) Docketing of the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall not be permitted under subpart J of this part unless the LSS Administrator has certified, at least six months in advance of the submission of the license application, that the DOE has substantially complied with its obligations under this section.

(2)(i) The LSS Administrator shall evaluate the extent of the DOE's compliance with the provisions of this section at six month intervals beginning six months after his or her appointment under section 2.1011 of this subpart.

(ii) The LSS Administrator shall issue a written report of his or her evaluation of DOE compliance under paragraph (h)(1) of this section. The report shall include recommendations to the DOE on any actions necessary to achieve substantial compliance pursuant to paragraph (h)(1) of this section.

(iii) Potential parties may submit comments on the report prepared pursuant to paragraph (h)(2)(ii) to the LSS Administrator.

(3)(i) In the event that the LSS Administrator does not certify substantial compliance under paragraph (h)(1) of this section, the proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall be governed by subpart G of this part.

(ii) If, subsequent to the submission of such application under subpart G of this part, the LSS Administrator issues the certification described in paragraph (h)(1) of this section, the Commission may, upon request by any party or interested governmental participant to the proceeding, specify the extent to which the provisions of subpart J of this part may be used in the proceeding.

#### 2.1004 Amendments and additions.

(a) Within sixty days after a document has been entered into the Licensing Support System by the LSS Administrator during the pre-license application phase, and within five days after a document has been entered into the Licensing Support System by the LSS Administrator after the license application has been docketed, the submitter shall make reasonable efforts to verify that the document has been entered correctly, and shall notify the LSS Administrator of any errors in entry.

(b) After the time period specified for verification in paragraph (a) of this section has expired, a submitter who desires to amend an incorrect document shall--

(1) submit the corrected version to the LSS Administrator for entry as a separate document; and

(2) submit a bibliographic header for the corrected version that identifies all revisions to the corrected version.

(3) the LSS Administrator shall ensure that the bibliographic header for the original document specifies that a corrected version is also in the Licensing Support System.

(c)(1) A submitter shall submit any revised pages of a document in the Licensing Support System to the LSS Administrator for entry into the Licensing Support System as a separate document.

(2) The LSS Administrator shall ensure that the bibliographic header for the original document specifies that revisions have been entered into the Licensing Support System.

(d) Any document that has been incorrectly excluded from the Licensing Support System must be submitted to the LSS Administrator by the potential party, interested governmental participant, or party responsible for the submission of the document within two days after its exclusion has been identified unless some other time is approved by the Pre-License Application Licensing Board or the Licensing Board established for the high-level waste proceeding, hereinafter the "Hearing Licensing Board"; provided, however, that the time for submittal under this paragraph will be stayed pending Board action on a motion to extend the time of submittal.

#### 2.1005 Exclusions.

The following material is excluded from entry into the Licensing Support System, either through initial entry pursuant to section 2.1003 of this subpart, or through derivative discovery pursuant to section 2.1019(i) of this subpart--

- (a) official notice materials;
- (b) reference books and text books;
- (c) material pertaining exclusively to administration, such as material related to budgets, financial management, personnel, office space, general distribution memoranda, or procurement, except for the scope of work on a procurement related to repository siting, construction, or operation, or to the transportation of spent nuclear fuel or high-level waste;
- (d) press clippings and press releases;
- (e) junk mail;
- (f) references cited in contractor reports that are readily available;
- (g) classified material subject to Subpart I of this Part.

#### 2.1006 Privilege.

(a) Subject to the requirements in section 2.1003(d) of this subpart, the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in section 2.790 of this part may be asserted by potential parties, interested governmental participants, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by State and local government entities and Indian Tribes.

(b) Any document for which a claim of privilege is asserted but is denied in whole or in part by the Pre-license Application Licensing Board or the Hearing Licensing Board shall be submitted by the party, interested governmental participant, or potential party that asserted the claim to--

(1) the LSS Administrator for entry into the Licensing Support System into an open access file; or

(2) to the LSS Administrator or to the Board, for entry into a Protective Order file, if the Board so directs under section 2.1010(b) or section 2.1018(c) of this subpart.

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be submitted for entry into the Licensing Support System pursuant to sections 2.1003(a) and 2.1003(b) of this subpart.

#### 2.1007 Access.

(a)(1) Terminals for access to full headers for all documents in the Licensing Support System during the pre-license application phase, and images of the non-privileged documents of DOE, shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository.

(2) Terminals for access to full headers for all documents in the Licensing Support System during the pre-license application phase, and images of the non-privileged documents of NRC, shall be provided at the headquarters Public Document Room of NRC, and at all NRC Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, and at the NRC Regional Offices, including the Uranium Recovery Field Office in Denver, Colorado.

(3) The access terminals specified in paragraphs (a)(1) and (a)(2) of this section shall include terminals at Las Vegas, Nevada; Reno, Nevada; Carson City, Nevada; Nye County, Nevada; and Lincoln County, Nevada.

(4) The headers specified in paragraphs (a)(1) and (a)(2) of this section shall be available at the same time that those headers are made available to the potential parties, parties, and interested governmental participants.

(5) Public access to the searchable full text and images of all the documents in the Licensing Support System, not privileged under section 2.1006, shall be provided by the LSS Administrator at all the locations specified in paragraphs (a)(1) and (a)(2) of this section after a notice of hearing has been issued pursuant to section 2.101(f)(8) or section 2.105(a)(5) on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area.

(b) Public availability of paper copies of the records specified in paragraph (a) of this section, as well as duplication fees, and fee waiver for those records, will be governed by the Freedom of Information Act regulations of the respective agencies.

(c) Access to the Licensing Support System for potential parties, interested governmental participants, and parties will be provided in the following manner--

(1) full text search capability through dial-up access from remote locations at the requestor's expense;

(2) image access at remote locations at the requestor's expense;

(3) the capability to electronically request a paper copy of a document at the time of search;

(4) generic fee waiver for the paper copy requested under paragraph (c)(3) of this section for requestors who meet the criteria in section 9.41 of this chapter.

(d) Documents submitted to the LSS Administrator for entry into the Licensing Support System shall not be considered as agency records of the LSS Administrator for purposes of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and shall remain under the custody and control of the agency or organization that submitted the documents to the LSS Administrator. Requests for access pursuant to the FOIA to documents submitted by a Federal agency shall be transmitted to that federal agency.

#### 2.1008 Potential parties.

(a) A person may petition the Pre-License Application Licensing Board established pursuant to section 2.1010 of this subpart for access to the Licensing Support System.

(b) A petition must set forth with particularity the interest of the petitioner in gaining access to the Licensing Support System with particular reference to --

(1) the factors set out in section 2.1014(c)(1), (2), and (3) of this subpart as determined in reference to the topical guidelines in Regulatory Guide     ; or

(2) the criteria in section 2.715(c) of this part as determined in reference to the topical guidelines in Regulatory Guide     ..

(c) The Pre-License Application Licensing Board shall, in ruling on a petition for access, consider the factors set forth in paragraph (b) of this section.

(d) Any person whose petition for access is approved pursuant to paragraph (c) of this section shall comply with the regulations set forth in this subpart, including section 2.1003, and agree to comply with the orders of the Pre-License Application Licensing Board established pursuant to section 2.1010 of this subpart.

#### 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall--

(1) designate an official who will be responsible for administration of its Licensing Support System responsibilities;

(2) establish procedures to implement the requirements in section 2.1003 of this subpart;

(3) provide training to its staff on the procedures for implementation of Licensing Support System responsibilities;

(4) ensure that all documents carry the submitter's unique identification number;

(5) cooperate with the advisory review process established by the LSS Administrator pursuant to section 2.1011(e) of this subpart.

(b) The responsible official designated pursuant to paragraph (a)(1) of this section shall certify to the LSS Administrator, at six month intervals designated by the LSS Administrator, that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in section 2.1003 of this subpart has been identified and submitted to the Licensing Support System.

#### 2.1010 Pre-License Application Licensing Board.

(a)(1) A Pre-License Application Licensing Board designated by the Commission shall rule on all petitions for access to the Licensing Support System submitted under section 2.1008 of this subpart; disputes over the entry of documents during the pre-license application phase, including disputes relating to relevance and privilege; disputes relating to the LSS Administrator's decision on substantial compliance pursuant to section 2.1003(h) of this subpart; discovery disputes; disputes relating to access to the Licensing Support System; disputes relating to the design and development of the Licensing Support System by DOE or the operation of the Licensing Support System by the LSS Administrator under section 2.1011 of this subpart, including disputes relating to the implementation of the recommendations of the LSS Advisory Review Panel established under section 2.1011(e) of this subpart.

(2) The Pre-License Application Licensing Board shall be designated six months before access to the Licensing Support System is scheduled to be available.

(b) The Board shall rule on any claim of document withholding to determine--

(1) whether it is documentary material within the scope of this subpart;

(2) whether the material is excluded from entry into the Licensing Support System under section 2.1005 of this subpart;

(3) whether the material is privileged or otherwise excepted from disclosure under section 2.1006 of this subpart;

(4) if privileged, whether it is an absolute or qualified privilege;

(5) if qualified, whether the document should be disclosed because it is necessary to a proper decision in the proceeding;

(6) whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a potential

party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of section 73.21 of this chapter. The Board may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Board for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to section 2.205 of this part. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

(c) Upon a final determination that the material is relevant, and not privileged, exempt from disclosure, or otherwise exempt from entry into the Licensing Support System under section 2.1005 of this subpart, the potential party, interested governmental participant, or party who asserted the claim of withholding must submit the document to the LSS Administrator within two days for entry into the Licensing Support System.

(d) The service of all pleadings, discovery requests and answers, orders, and decisions during the pre-license application phase shall be made according to the procedures specified in section 2.1013(c) of this subpart.

(e) The Pre-License Application Licensing Board shall possess all the general powers specified in sections 2.721(d) and 2.718 of this part.

#### 2.1011 LSS Management and Administration.

(a) The Licensing Support System shall be administered by the LSS Administrator who will be designated within sixty days after the effective date of the rule.

(b)(1) Consistent with the requirements in this subpart, and in consultation with the LSS Administrator, DOE shall be responsible for the design and development of the computer system necessary to implement the Licensing Support System, including the procurement of computer hardware and software, and, with the concurrence of the LSS Administrator, the follow-on redesign and procurement of equipment necessary to maintain the Licensing Support System.

(2) With respect to the procurement undertaken pursuant to paragraph (b)(1) of this section, a representative of the LSS Administrator shall participate as a member of the Source Evaluation Panel for such procurement.

(3) DOE shall implement consensus advice from the LSS Advisory Review Panel under paragraph (f)(1) of this section that is consistent with the requirements of this subpart.

(c)(1) The Licensing Support System, described in section 2.1002, shall not be part of any computer system that is controlled by any party, interested governmental participant, or potential party, including DOE and its contractors, or that is physically located on the premises of any party, interested governmental participant, or potential party, including DOE and that of its contractors.

(2) Nothing in this subpart shall preclude DOE, NRC, or any other party, potential party, or interested governmental participant, from using the Licensing Support System computer facility for a records management system for documentary material independent of the Licensing Support System.

(d) The LSS Administrator shall be responsible for the management and administration of the Licensing Support System, including the responsibility to--

(1) implement the consensus advice of the LSS Advisory Review Panel under paragraph (f) of this section that is consistent with the requirements of this subpart;

(2) provide the necessary personnel, materials, and services for operation and maintenance of the Licensing Support System;

(3) identify and recommend to DOE any redesign or procurement actions necessary to ensure that the design and operation of the Licensing Support System meets the objectives of this subpart;

(4) make a concurrence decision, within thirty days of a request from DOE, on any redesign and related procurement performed by DOE under paragraph (b) of this section;

(5) consult with DOE on the design and development of the Licensing Support System under paragraph (b) of this section;

(6) evaluate and certify compliance with the requirements of this subpart under section 2.1003(h);

(7) ensure LSS availability and the integrity of the LSS data base;

(8) receive and enter the documentary material specified in section 2.1003 of this subpart into the Licensing Support System in the appropriate format;

(9) maintain security for the Licensing Support System data base, including assigning user password security codes;

(10) establish access protocols for raw data, field notes, and other items covered by section 2.1003(c) of this subpart;

(11) maintain the thesaurus and authority tables for the Licensing Support System;

(12) establish and implement a training program for Licensing Support System users;

(13) provide support staff to assist users of the Licensing Support System;

(14) other duties as specified in this subpart or necessary for Licensing Support System operation and maintenance.

(e)(1) The LSS Administrator shall establish an LSS Advisory Review Panel composed of the LSS Advisory Committee members identified in paragraph (e)(2) of this section who wish to serve within sixty days after designation of the LSS Administrator pursuant to paragraph (a) of this section. The LSS



Administrator shall have the authority to appoint additional representatives to the Advisory Review Panel consistent with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, giving particular consideration to potential parties, parties, and interested governmental participants who were not members of the the NRC HLW Licensing Support System Advisory Committee.

(2) Pending the establishment of the LSS Advisory Review Panel under paragraph (e)(1) of this section, the NRC will establish a Licensing Support System Advisory Committee whose membership will initially include the State of Nevada, a coalition of affected units of local government in Nevada who were on the NRC High-Level Waste Licensing Support System Advisory Committee, DOE, NRC, the National Congress of American Indians, the coalition of national environmental groups who were on the NRC High-Level Waste Licensing Support System Advisory Committee and such other members as the Commission may from time to time designate to perform the responsibilities in paragraph (f) of this section.

(f)(1) The LSS Advisory Review Panel shall provide advice to--

(i) DOE on the fundamental issues of the design and development of the computer system necessary to implement the Licensing Support System under paragraph (b) of this section; and

(ii) the LSS Administrator on the operation and maintenance of the Licensing Support System under paragraph (d) of this section.

(2) The responsibilities of the LSS Advisory Review Panel shall include advice on--

(i) format standards for the submission of documentary material to the Licensing Support System by the parties, interested governmental participants, or potential parties, such as ASCII files, bibliographic headers, and images;

(ii) the procedures and standards for the electronic transmission of filings, orders, and decisions during both the pre-license application phase and the high-level waste licensing proceeding;

(iii) access protocols for raw data, field notes, and other items covered by section 2.1003(c) of this subpart;

(iv) a thesaurus and authority tables;

(v) reasonable requirements for headers, the control of duplication, retrieval, display, image delivery, query response, and "user friendly" design;

(vi) other duties as specified in this subpart or as directed by the LSS Administrator.

2.1012 Compliance.

(a) In addition to the requirements of section 2.101(f) of this part, the Director of the NRC Office of Nuclear Materials Safety and Safeguards may determine that the tendered application is not acceptable for docketing under this subpart, if the LSS Administrator has not issued the certification described in section 2.1003(h)(1) of this part.

(b) (1) A person, including a potential party granted access to the Licensing Support System under section 2.1008 of this subpart, shall not be granted party status under section 2.1014 of this part, or status as an interested governmental participant under section 2.715(c) of this part, if it cannot demonstrate substantial and timely compliance with the requirements of section 2.1003 of this subpart at the time it requests participation in the high-level waste licensing proceeding under either section 2.1014 or section 2.715(c) of this part.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of section 2.1003 of this subpart. Admission of such a party or interested governmental participant under section 2.1014 of this subpart or section 2.715(c) of this part, respectively, shall be conditioned on accepting the status of the proceeding at the time of admission.

(c) The Hearing Licensing Board shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this subpart for any person who is not in compliance with all applicable orders of the Pre-License Application Licensing Board established pursuant to section 2.1010 of this subpart.

(d) Access to the Licensing Support System may be suspended or terminated by the Pre-license Application Licensing Board or the Hearing Licensing Board for any potential party, interested governmental participant or party who is in noncompliance with any applicable order of the Pre-license Application Licensing Board or the Hearing Licensing Board or the requirements of this subpart.

#### 2.1013 LSS use during the adjudicatory proceeding.

(a)(1) Pursuant to section 2.702, the Secretary of the NRC will maintain the official docket of the proceeding on the application for a license to receive and possess waste at a geologic repository operations area.

(2) Commencing with the docketing of the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, the LSS Administrator shall establish a file within the Licensing Support System to contain the official record materials of the high-level radioactive waste licensing proceeding in searchable full text, or for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been entered into the Licensing Support System before the commencement of that portion of the hearing in which the exhibit will be offered. The official record file in the Licensing Support System will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. Transcripts will be entered into the Licensing Support System by the LSS Administrator on a daily basis in order to provide next-day availability at the hearing.

(c)(1) All filings in the adjudicatory proceeding on the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter shall be transmitted electronically by the submitter to the board(s), parties, the LSS Administrator, and the Secretary, according to established format requirements. Parties and interested governmental participants will be required to use a password security code for the electronic transmission of these documents.

(2) Filings required to be served shall be served upon either the parties and interested governmental participants, or their designated representatives. When a party or interested governmental participant has appeared by attorney, service must be made upon the attorney of record.

(3) Service upon a party or interested governmental participant is complete when the sender receives electronic acknowledgment ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox.

(4) Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, by--

- (i) electronic acknowledgment ("delivery receipt"); or
- (ii) the affidavit of the person making the service; or
- (iii) the certificate of counsel.

(5) One signed paper copy of each filing shall be served promptly on the Secretary by regular mail pursuant to the requirements of sections 2.708 and 2.701 of this part.

(6) All Board and Commission issuances and orders will be transmitted electronically to the parties, interested governmental participants, and the LSS Administrator.

(d) Online access to the Licensing Support System, including a Protective Order File if authorized by a Board, shall be provided to the board(s), the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use during the hearing. Use of paper copy and other images will also be permitted at the hearing.

2.1014 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to section 2.105 of this part, any person whose interest may be affected may also request a hearing. The petition and/or request, and any request to participate under section 2.715(c) of this part, shall be filed within thirty days after the publication of the notice of hearing in the Federal Register. Nontimely filings will not be entertained absent a determination by the Commission, or the Hearing Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors, in addition to satisfying those set out in paragraphs (a)(2) and (c) of this section:

(i) good cause, if any, for failure to file on time;

(ii) the availability of other means whereby the petitioner's interest will be protected;

(iii) the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) the extent to which the petitioner's interest will be represented by existing parties;

(v) the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(2) The petition shall set forth with particularity--

(i) the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (c) of this section;

(ii) a list of the contentions that petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity;

(iii) reference to the specific documentary material, or the absence thereof, that provides a basis for each contention; and

(iv) as to each contention, the specific regulatory or statutory requirement to which the contention is relevant.

(3) Any petitioner who fails to satisfy paragraphs (a)(2)(ii), (iii), and (iv) of this section with respect to at least one contention shall not be permitted to participate as a party.

(4) Any party may amend its contentions specified in paragraph (a)(2)(ii) of this section. The Hearing Licensing Board shall rule on any

petition to amend such contentions based on the balancing of the factors specified in paragraph (a)(1) of this section. Petitions to amend that are based on information or issues raised in the Safety Evaluation Report (SER) issued by the NRC staff shall be made no later than forty days after the issuance of the SER. Any petition to amend contentions that is filed after this time shall include, in addition to the factors specified in paragraph (a)(1) of this section, a showing that a significant safety or environmental issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by sections 60.112 and 60.113 of this chapter.

(b) Any party or interested governmental participant may file an answer to a petition for leave to intervene or a petition to amend contentions within twenty days after service of the petition.

(c) Subject to paragraph (a)(3) of this section, the Commission, or the Hearing Licensing Board designated to rule on petitions to intervene and/or requests for hearing shall permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by an affected unit of local government as defined in section 2(31) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101. In all other circumstances, the Commission or Board shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

(1) The nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding;

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding;

(3) The possible effect of any order that may be entered in the proceeding on the petitioner's interest;

(4) The petitioner's participation as a potential party under section 2.1008(c) of this subpart.

(d) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, or the designated Hearing Licensing Board may direct in the interests of:

(1) restricting irrelevant, duplicative, or repetitive evidence and argument,

(2) having common interests represented by a spokesman, and

(3) retaining authority to determine priorities and control the compass of the hearing.

(e) In any case in which, after consideration of the factors set forth in paragraph (c) of this section, the Commission or the Hearing Licensing Board finds that the petitioner's interest is limited to one or more of the issues

involved in the proceeding, any order allowing intervention shall limit the petitioner's participation accordingly.

(f) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (e) of this section.

(g) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

## 2.1015 Appeals.

(a) No appeals from any board order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), (d), and (e).

(b) A notice of appeal from (i) a Pre-License Application Licensing Board order issued pursuant to section 2.1010 of this subpart, (ii) a Hearing Licensing Board First or Second Prehearing Conference Order issued pursuant to section 2.1021 or 2.1022 of this subpart, (iii) a Hearing Licensing Board order granting or denying a motion for summary disposition issued in accordance with section 2.749 of this part, or (iv) a Hearing Licensing Board order granting or denying a petition to amend one or more contentions pursuant to section 2.1014(a)(4) of this subpart, shall be filed with the Atomic Safety and Licensing Appeal Board no later than ten (10) days after service of the order. A supporting brief shall accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten days after service of the appeal.

(c) Appeals from a Hearing Licensing Board initial decision or partial initial decision shall be filed and briefed before the Atomic Safety and Licensing Appeal Board in accordance with the requirements of section 2.762 of this part.

(d) When, in the judgment of a Board, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Board may refer the ruling promptly to the Appeal Board or Commission, as appropriate, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Board certify, pursuant to section 2.718(i) of this part, rulings not immediately appealable under paragraph (b) of this section.

(e) A party, interested governmental participant, or potential party may seek Commission review of any Appeal Board decision or order issued under this section in accordance with the procedures in section 2.786(b) of this part.

(f) Unless otherwise ordered, the filing of an appeal, petition for review, referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

#### 2.1016 Motions.

(a) All motions shall be addressed to the Commission or, when a proceeding is pending before a Board, to the Board. All motions, unless made orally on the record, shall be filed according to the provisions of section 2.1013(c) of this subpart.

(b) A motion shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.

(c) Within ten days after service of a motion a party, potential party, or interested governmental participant may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the Board or the Secretary or the Assistant Secretary.

(d) The Board may dispose of motions either by order or by ruling orally during the course of a prehearing conference or hearing.

(e) Where the motion in question is a motion to compel discovery under section 2.720(h)(2) of this part or section 2.1018(f) of this subpart, parties, potential parties, and interested governmental participants may file answers to the motion pursuant to paragraph (c) of this section. The Board in its discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than filed electronically. If responses are given over the telephone the Board shall issue a written order on the motion which summarizes the views presented by the parties, potential parties, and interested governmental participants unless the conference has been transcribed. This does not preclude the Board from issuing a prior oral ruling on the matter which is effective at the time of its issuance, provided that the terms of the ruling are incorporated in the subsequent written order.

#### 2.1017 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party, potential party, or interested governmental participant, has the right or is required to do some act within a prescribed period after the service of a notice or other document upon it, one day shall be added to the prescribed period. If the Licensing Support System is unavailable for more than four access hours of any day that would be counted in the computation of time, that day will not be counted in the computation of time.

## 2.1018 Discovery.

(a)(1) Parties, potential parties, and interested governmental participants in the high-level waste licensing proceeding may obtain discovery by one or more of the following methods: access to the documentary material in the Licensing Support System submitted pursuant to section 2.1003 of this subpart; entry upon land for inspection, access to raw data, or other purposes pursuant to section 2.1020 of this subpart; access to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to section 2.1003(c) and section 2.1003(d) of this subpart; depositions upon oral examination pursuant to section 2.1019 of this subpart; requests for admission pursuant to section 2.742 of this part; informal requests for information not available in the Licensing Support System, such as the names of witnesses and the subjects they plan to address; and interrogatories and depositions upon written questions, as provided in paragraph (a)(2) of this section.

(2) Interrogatories and depositions upon written questions may be authorized by order of the discovery master appointed under paragraph (g) of this section, or if no discovery master has been appointed, by order of the Hearing Licensing Board, in the event that the parties are unable, after informal good faith efforts, to resolve a dispute in a timely fashion concerning the production of information.

(b)(1) Parties, potential parties, and interested governmental participants, pursuant to the methods set forth in paragraph (a) of this section, may obtain discovery regarding any matter, not privileged, which is relevant to the licensing of the likely candidate site for a geologic repository, whether it relates to the claim or defense of the person seeking discovery or to the claim or defense of any other person. Except for discovery pursuant to section 2.1018(a)(2) and section 2.1019 of this subpart, all other discovery shall begin during the pre-license application phase. Discovery pursuant to section 2.1018(a)(2) and section 2.1019 of this subpart shall begin after the issuance of the first pre-hearing conference order under section 2.1021 of this subpart, and shall be limited to the issues defined in that order or subsequent amendments to the order. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A party, potential party, or interested governmental participant may obtain discovery of documentary material otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of, or for the hearing by, or for another party's, potential party's, or interested governmental participant's representative (including its attorney, surety, indemnitor, insurer, or similar agent) only upon a showing that the party, potential party, or interested governmental participant seeking discovery has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the Board shall protect against disclosure of



the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, potential party, or interested governmental participant concerning the proceeding.

(c) Upon motion by a party, potential party, interested governmental participant, or the person from whom discovery is sought, and for good cause shown, the Board may make any order that justice requires to protect a party, potential party, interested governmental participant, or other person from annoyance, embarrassment, oppression, or undue burden, delay, or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Board; (6) that, subject to the provisions of section 2.790 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the Board may, on such terms and conditions as are just, order that any party, potential party, interested governmental participant or other person provide or permit discovery.

(d) Except as provided in paragraph (b) of this section, and unless the Board upon motion, for the convenience of parties, potential parties, interested governmental participants, and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party, potential party, or interested governmental participant is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's, potential party's, or interested governmental participant's discovery.

(e) A party, potential party, or interested governmental participant who has included all documentary material relevant to any discovery request in the Licensing Support System or who has responded to a request for discovery with a response that was complete when made is under no duty to supplement its response to include information thereafter acquired, except as follows:

(1) To the extent that written interrogatories are authorized pursuant to paragraph (a)(2) of this section, a party or interested governmental participant is under a duty to seasonably supplement its response to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the witness is expected to testify, and the substance of the witness's testimony.

(2) A party, potential party, or interested governmental participant is under a duty seasonably to amend a prior response if it obtains information upon the basis of which (i) it knows that the response was incorrect when

made, or (ii) it knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Board or agreement of the parties, potential parties, and interested governmental participants.

(f)(1) If a deponent or a party, potential party, or interested governmental participant upon whom a request for discovery is served fails to respond or objects to the request, or any part thereof, the party, potential party, or interested governmental participant submitting the request or taking the deposition may move the Board, within five days after the date of the response or after failure to respond to the request, for an order compelling a response in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party, potential party, interested governmental participant, or other person upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person, party, potential party, or interested governmental participant failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the Board may make such a protective order as it is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) An independent request for issuance of a subpoena may be directed to a nonparty for production of documents. This section does not apply to requests for the testimony of the NRC regulatory staff pursuant to section 2.720(h)(2)(i) of this part.

(g) The Hearing Licensing Board pursuant to section 2.722 of this part may appoint a discovery master to resolve disputes between parties concerning informal requests for information as provided in paragraphs (a)(1) and (a)(2) of this section.

#### 2.1019 Depositions upon oral examination and upon written questions.

(a) Any party or interested governmental participant desiring to take the testimony of any person by deposition on oral examination shall, without leave of the Commission or the Hearing Licensing Board, give reasonable notice in writing to every other party and interested governmental participant, to the person to be examined, and to the Hearing Licensing Board of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or her or the class or group

to which he or she belongs; the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission. Depositions may be conducted by telephone or by video teleconference at the option of the party or interested governmental participant taking the deposition.

(c) The deponent shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless the deponent is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly transmit the deposition to the LSS Administrator for submission into the Licensing Support System.

(e) Where the deposition is to be taken on written questions as authorized under section 2.1018(a)(2) of this subpart, the party or interested governmental participant taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party and interested governmental participant with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be asked. Within ten days after service, any other party or interested governmental participant may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, returned, and transmitted to the LSS Administrator as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the evidentiary record in the hearing unless received in evidence. If only part of a deposition is offered in evidence by a party or interested governmental participant, any other party or interested governmental participant may introduce any other parts. A party or interested governmental participant shall not be deemed to make a person its own witness for any purpose by taking his or her deposition.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party or interested governmental participant at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

(i)(1) After receiving written notice of the deposition under paragraph (a) or paragraph (e) of this section, and ten days before the scheduled date of the deposition, the deponent shall submit an index of all documents in his or her possession, relevant to the subject matter of the deposition, including the categories of documents set forth in paragraph (i)(2) of this section, to all parties and interested governmental participants. The index shall identify those records which have already been entered into the Licensing Support System. All documents that are not identical to documents already in the Licensing Support System, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents.

(2) The following material is excluded from initial entry into the Licensing Support System, but is subject to derivative discovery under paragraph (i)(1) of this section--

- (i) personal records;
- (ii) travel vouchers;
- (iii) speeches;
- (iv) preliminary drafts;
- (v) marginalia.

(3) Subject to paragraph (i)(6) of this section, any party or interested governmental participant may request from the deponent a paper copy of any or all of the documents on the index that have not already been entered into the Licensing Support System.

(4) Subject to paragraph (i)(6) of this section, the deponent shall bring a paper copy of all documents on the index that the deposing party or interested governmental participant requests that have not already been entered into the Licensing Support System to an oral deposition conducted pursuant to paragraph (a) of this section, or in the case of a deposition taken on written questions pursuant to paragraph (e) of this section, shall submit such documents with the certified deposition.

(5) Subject to paragraph (i)(6) of this section, a party or interested governmental participant may request that any or all documents on the index that have not already been entered into the Licensing Support System, and on which it intends to rely at hearing, be entered into the LSS by the deponent.

(6) The deposing party or interested governmental participant shall assume the responsibility for the obligations set forth in paragraphs (i)(1), (i)(3), (i)(4), and (i)(5) of this section when deposing someone other than a party or interested governmental participant.

(j) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the Board, by subpoena or otherwise: Provided, That the Board may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations, require the attendance and testimony of named NRC personnel.

Section 2.1020 Entry upon land for inspection and other purposes.

(a) Any party, potential party, or interested governmental participant may serve on any other party, potential party, or interested governmental participant a request to permit entry upon designated land or other property in the possession or control of the party, potential party, or interested governmental participant upon whom the request is served for the purpose of access to raw data, inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of section 2.1018 of this subpart.

(b) The request may be served on any party, potential party, or interested governmental participant without leave of the Commission or the Board.

(c) The request shall describe with reasonable particularity the land or other property to be inspected either by individual item or by category. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party, potential party, or interested governmental participant upon whom the request is served shall serve on the party, potential party, or interested governmental participant submitting the request a written response within ten days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

2.1021 First Prehearing conference.

(a) In any proceeding involving an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter the Commission or the Hearing Licensing Board will direct the parties, interested governmental participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, within seventy days after the notice of hearing is published, or

such other time as the Commission or the Hearing Licensing Board may deem appropriate, for a conference to:

- (1) permit identification of the key issues in the proceeding;
- (2) take any steps necessary for further identification of the issues;
- (3) consider all intervention petitions to allow the Hearing Licensing Board to make such preliminary or final determination as to the parties and interested governmental participants, as may be appropriate;
- (4) establish a schedule for further actions in the proceeding; and
- (5) establish a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d).

(b) The Board may order any further formal and informal conferences among the parties and interested governmental participants including teleconferences, to the extent that it considers that such a conference would expedite the proceeding.

(c) A prehearing conference held pursuant to this section shall be stenographically reported.

(d) The Board shall enter an order which recites the action taken at the conference, the schedule for further actions in the proceeding, and any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties and interested governmental participants in the proceeding, and provides for the submission of status reports on discovery.

#### 2.1022 Second Prehearing Conference.

(a) The Commission or the Hearing Licensing Board in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than seventy days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

(1) any amended contentions submitted under section 2.1014(a)(4) of this subpart;

(2) simplification, clarification, and specification of the issues;

(3) the obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

(4) identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(5) the setting of a hearing schedule;

(6) establishing a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d); and

(7) such other matters as may aid in the orderly disposition of the proceeding.

(b) A prehearing conference held pursuant to this section shall be stenographically reported.

(c) The Board shall enter an order which recites the action taken at the conference and the agreements by the parties, limits the issues or defines the matters in controversy to be determined in the proceeding, sets a discovery schedule, and sets the hearing schedule.

#### 2.1023 Immediate effectiveness of initial decision.

(a) Pending review and final decision by the Commission, an initial decision resolving all issues before the Hearing Licensing Board in favor of issuance or amendment of a construction authorization pursuant to section 60.31 of this chapter or a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to section 60.41 of this chapter, will be immediately effective upon issuance except --

(1) as provided in any order issued in accordance with section 2.788 of this part that stays the effectiveness of an initial decision; or

(2) as otherwise provided by the Commission in special circumstances.

(b) The Director of Nuclear Material Safety and Safeguards, notwithstanding the filing or pendency of an appeal or a petition for review pursuant to section 2.1015 of this subpart, promptly shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area, or amendments thereto, following an initial decision resolving all issues before the Hearing Licensing Board in favor of the licensing action, upon making the appropriate licensing findings, except--

(1) as provided in paragraph (c) of this section; or

(2) as provided in any order issued in accordance with section 2.788 of this part that stays the effectiveness of an initial decision; or

(3) as otherwise provided by the Commission in special circumstances.

(c)(1) Before the Director of Nuclear Material Safety and Safeguards may issue a construction authorization or a license to receive and possess waste

at a geologic repository operations area in accordance with paragraph (b) of this section, the Commission, in the exercise of its supervisory authority over agency proceedings, shall undertake and complete a supervisory examination of those issues contested in the proceeding before the Hearing Licensing Board to consider whether there is any significant basis for doubting that the facility will be constructed or operated with adequate protection of the public health and safety, and whether the Commission should take action to suspend or to otherwise condition the effectiveness of a Hearing Licensing Board decision that resolves contested issues in a proceeding in favor of issuing a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area. This supervisory examination is not part of the adjudicatory proceeding. The Commission shall notify the Director in writing when its supervisory examination conducted in accordance with this paragraph has been completed.

(2) Before the Director of Nuclear Material Safety and Safeguards issues a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission shall review those issues that have not been contested in the proceeding before the Hearing Licensing Board but about which the Director must make appropriate findings prior to the issuance of such a license. The Director shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area only after written notification from the Commission of its completion of its review under this paragraph and of its determination that it is appropriate for the Director to issue such a construction authorization or license. This Commission review of uncontested issues is not part of the adjudicatory proceeding.

(3) No suspension of the effectiveness of a Hearing Licensing Board's initial decision or postponement of the Director's issuance of a construction authorization or license that results from a Commission supervisory examination of contested issues under paragraph (c)(1) of this section or a review of uncontested issues under paragraph (c)(2) of this section will be entered except in writing with a statement of the reasons. Such suspension or postponement will be limited to such period as is necessary for the Commission to resolve the matters at issue. If the supervisory examination results in a suspension of the effectiveness of the Hearing Licensing Board's initial decision under paragraph (c)(1) of this section, the Commission will take review of the decision sua sponte and further proceedings relative to the contested matters at issue will be in accordance with procedures for participation by the DOE, the NRC staff, or other parties and interested governmental participants to the Hearing Licensing Board proceeding established by the Commission in its written statement of reasons. If a postponement results from a review under paragraph (c)(2) of this section,





ATTACMENT B



U.S. Council for Energy Awareness

DOCKET NUMBER  
PROPOSED RULE **PR 2**  
**53 FR 44411**

①

'88 DEC -6 P1:21

Suite 400  
1776 I Street, N.W.  
Washington, DC 20006-2495  
(202) 293-0770

**John Siegel**  
Vice President, Technical Programs

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LIBRARY  
SERVICE

December 5, 1988

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Attn: Docketing and Servicing Branch

Re: Proposed Rulemaking "10 CFR Part 2 Rule on the Submission and Management of Records and Documents Related to the Licensing of Geologic Repository for the Disposal of High-Level Radioactive Waste" (53 Fed. Reg. 44411)

Dear Sir:

These comments are submitted on behalf of the High Level Waste Task Force of the U.S. Council for Energy Awareness (USCEA) in response to the above referenced notice. The U.S. Council for Energy Awareness provides information on energy issues, with emphasis on the importance of electricity and the roles of nuclear energy and coal in providing it, and examines technical issues related to peaceful uses of nuclear technology.

As noted in the background of the proposed rulemaking, USCEA participated with the Edison Electric Institute and the Utility Nuclear Waste Management Group in the Licensing Support System negotiated rulemaking process. Therefore, we had a deep understanding of the rule and its purpose. As we reviewed this rulemaking we did not find any substantial changes which would result in changing our position from that which the nuclear industry articulated during the negotiated rulemaking process. Accordingly, USCEA is of the view that the rule as presented should not be adopted without significant modification.

The purpose of the rulemaking is to facilitate the NRC's reaching a decision on the construction authorization for the repository within the three year time frame (plus allowance for a one year extension) specified in Section 114(d) of the Nuclear Waste Policy Act as amended (NWPA).

We believe the proposed rule will not accomplish this objective. The repository licensing would be accomplished through reliance on an electronic information management system known as the Licensing Support System (LSS). We have reviewed the DOE proposed LSS and do not believe it will function as DOE predicts. This will result in questions of quality control and timeliness of document availability, as well as completeness of documentation. This alone is likely to result in an extension of the planned three to four year NRC licensing proceedings.

Due to the unprecedented scope and size of the proceeding, the NRC will encounter technical and procedural issues not present in previous NRC adjudications. Without dramatic changes to the NRC rulemaking procedure, far more than currently contained in the proposed rule, the proceeding could take two to three times as long as specified in the NWPA. Therefore, we do not believe the rule should be adopted in its present form.

Beyond the problems with the rulemaking there is the additional question of the cost-benefit of the method of implementing the proposed rule. The LSS as proposed by the DOE does not justify the expenditure of dollars that have been proposed. It is a beyond-the-state-of-the-art concept with unprecedented availability and quality control requirements. We believe a simpler, more straight-forward, well-tested approach using microfiche and computerized indexing of the pertinent documents would achieve the same result at a significantly lower cost and avoid the technological pitfalls.

Other aspects the Commission should be considering in order to accomplish a three to four year licensing period include:

- Generic rulemakings on appropriate technical issues well in advance of the construction authorization hearing.
- A more appropriate threshold for admitting contentions.
- More stringent standards for late-filed contentions.
- A more appropriately limited discovery (beyond those inherent in the LSS).
- Affirmative burden of going forward requirements.
- Intervention based on judicial standards.
- Separate hearings and decisions.

USCEA is willing to continue to work with the NRC and other interested parties in the development of a licensing proceeding that will allow legitimate technical issues to be examined in an appropriate manner and at the same time provide a schedule which meets the statutory limits established in the NWPA.

Sincerely,

  
John R. Siegel

JRS/ar

**R**

DOCKET NUMBER  
PROPOSED RULE

PR 2

53 FR 44411

DOCKETED



NEW  
YORK  
STATE

ROCHESTER GAS AND ELECTRIC CORPORATION • 89 EAST AVENUE, ROCHESTER, N.Y. 14649-0001

'88 DEC -6 P1:18

TELEPHONE  
AREA CODE 716 546-2700

December 5, 1988

Hon. Samuel J. Chilk  
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Attention: Docketing and Service Branch

RE: NOPR on records management/geologic repository  
licensing (53 F.R. 44411)

Dear Mr. Secretary:

Enclosed please find the comments of Rochester Gas and Electric Corporation in the above-captioned rulemaking. In the interest of complying with the Commission's deadline, we are forwarding today by electronic means a copy of the Company's comments. At the same time, we are forwarding by regular mail the signed originals of this letter and the comments together with an extra copy of each to be date-stamped and returned to the undersigned. We trust this form of service will be satisfactory.

Very truly yours,

Anton A. Fuierer

AAF:meg

Enclosure

xc: Mr. R. Kober  
Mr. D. Laniak  
Mr. E. Ierardi

BEFORE THE  
UNITED STATES  
NUCLEAR REGULATORY COMMISSION

Rule on the Submission and  
Management of Records and  
Documents Related to the Licens-  
ing of a Geologic Repository  
for the Disposal of High-level  
Radioactive Waste

Proposed  
Amendment  
to  
10 CFR 2

COMMENTS OF  
ROCHESTER GAS AND ELECTRIC CORPORATION

These comments respond to the Notice of Proposed Rulemaking issued by the Commission on October 25, 1988 and published in the Federal Register of November 3, 53 F.R. 44411 et seq. They urge that the Commission reconsider this rulemaking and particularly the need to submit to a cost/benefit analysis that portion which would establish a gargantuan Licensing Support System to the detriment of the timely operation of a federal repository.

Rochester Gas and Electric Corporation is a member of the Utility Nuclear Waste Management Group and generally supports the comments filed herein by the Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWMG). We have followed the negotiated rulemakings in which EEI and UNWMG participated and will not repeat their arguments; our comments emphasize particular concerns of the Company.

The Company is an investor-owned utility serving electricity and gas in an upstate New York area, centered generally on Rochester, where some 900,000 people live. It owns

and operated the 470 MW Ginna Nuclear Power Plant and has a 14% ownership interest in the 1080 MW Nine Mile Point Nuclear Unit No. 2. In 1987, Ginna generated nearly 3.8 billion kwh while NMP-2, which has been in commercial operation less than a year, has already contributed more than 350 million kwh to the Company's system. Under the Nuclear Waste Policy Act and regulations thereunder, the Company currently collects from customers and forwards to the Department of Energy one mill per kwh for the disposal of its nuclear fuel in a repository to be built by DOE and licensed by the Commission. Accordingly, the Company has a high degree of interest in the timely and cost-effective licensing of a nuclear waste repository.

The Company is concerned that an enterprise of the scale, cost and complexity of the proposed Licensing Support System would cause the system itself to become a focal point in that the Commission would simply be substituting a big, flashy toy for real hard thought and careful planning. The real purpose of the waste repository licensing effort and the interests of participants in that process would be subverted, all to the detriment of the national policy favoring achievement of prompt and efficient waste repository licensing. The concern of the Company is that the proposal will fail to shorten the repository licensing period and could even lengthen it, at greatly increased cost.

The worth of the proposed Licensing Support System has yet to be tested by a rigorous cost benefit analysis, at least one

which considers practical alternatives well-adapted to meeting the need for document review and exchange such as that proposed by representatives of EEI/UNWGMG during the negotiated rulemaking. The societal cost of the NRC-proposed LSS needs to be carefully examined as the DOE and the Commission have an obligation, parallel to that of utilities, to assure the effective use of customer-funded moneys. Presumably those dollars should be committed to facilitate aspects of the repository licensing which appear likely to inhibit its timely completion and which represent cost effective investments. There remain a number of aspects of the licensing process that require agency attention, areas which our experience shows are much more likely (see EEI/UNWGMG comments) than document retrieval to cause substantial delay in that process.

The Company has had considerable experience with computerized litigation support systems. They are unwieldy, grossly expensive and generally mismatched with respect to the limited purpose to be achieved. The proposed Licensing Support System shows every earmark of these same attributes. The only significant difference is that the proposed system will be on a scale and at a cost which dwarfs anything in the experience of most managers of these complex systems -- indeed, we are advised that this would be the single largest such system ever created. All this augurs ill for a process on which an important element of national policy is totally dependent.



The cost of the Licensing Support System, which we believe to be substantially underestimated, will impose a tremendous burden on Commission licensees. The costs of the other -- hopefully more beneficial in terms of societal protection -- regulatory requirements of this Commission are already very substantial and already run the risk of turning a relatively economical electric supply source into a prohibitively expensive one. There is a limit beyond which increasing costs of nuclear regulation will render prohibitive the continuing operation of the nation's commercial nuclear power facilities. For the Company, that day is fast approaching. The Licensing Support System would simply bring that prospect even closer to current reality.

For the foregoing reasons, Rochester Gas and Electric Corporation urges the Commission to reconsider the proposed rule and to modify substantially that portion which would establish a computerized Licensing Support System.

Respectfully submitted,  
ROCHESTER GAS AND ELECTRIC CORPORATION

By Roger W. Kober  
Roger W. Kober  
President and Chief Operating Officer

Date: December 5, 1988

# YANKEE ATOMIC ELECTRIC COMPANY

Telephone (508) 779-6711

TWX 710-380-7619



DOCKET NUMBER  
PROPOSED RULE

PR

2

53FR44411

580 Main Street, Boston, Massachusetts 02114-1398

FYC 88-017

GLA 88-130

3

December 5, 1988

Secretary of the Commission  
United States Nuclear Regulatory Commission  
Washington, DC 20555

Attention: Docketing and Service Branch

Subject: Rule on the Submission and Management of Records and Documents  
Related to the Licensing of a Geologic Repository for the  
Disposal of High-Level Radioactive Waste (53FR44411)

Dear Sir:

Yankee Atomic Electric Company (YAEC) appreciates the opportunity to comment on the subject proposed rule change regarding the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository. Yankee owns and operates a nuclear power plant in Rowe, Massachusetts. Our Nuclear Services Division also provides engineering and licensing services for other nuclear power plants in the Northeast, including Vermont Yankee, Maine Yankee, and Seabrook.

The Utility Nuclear Waste Management Group (UNWGM), in coalition with EEI and the U.S. Council on Energy Awareness, represented the nuclear industry in the negotiated rulemaking proceedings on this subject proposed rule. The UNWGM is filing a detailed response to the subject NRC proposed rule. YAEC is an active member of UNWGM and strongly endorses its comments. We would also like to take this opportunity to iterate and add to the comments made by the UNWGM.

On December 18, 1986, the Commission published for comment a notice of intent to use negotiated rulemaking to develop the changes to 10 CFR Part 2 that would be needed to institute an electronic information management system (the "Licensing Support System") for records and documents associated with the licensing of a geologic repository. In our comment letter of February 11, 1987, we commended the Commission for its innovativeness in using such a process. We continue to believe that the objective of this negotiated rulemaking activity, i.e. a decrease in the amount of time necessary for information processing during the docketing, discovery, and adjudicatory stages of the geologic repository licensing proceedings, would benefit all parties.

We noted in our comment letter that such a system, among other things, must be cost-effective. However, as the UNWGM has stated, the Licensing Support System (LSS) now being proposed by the Commission is not only exorbitant in cost at a price tag of \$200 million, but it is also unlikely to be completed within the time frame needed to support the licensing schedule called for by the NWA. The UNWGM has recommended an alternative to the Commission's proposed LSS, which would result in the use of microfiche, rather than electronic, full text search capability. Both the NRC and DOE have extensively and successfully used microfiche for capturing, retaining, and

accessing documents. Both intend to continue using microfiche up to the time that the LSS is made available. Given this established record, and the fact that the enhancements that the UNWGMG has suggested in using microfiche would accomplish the objective set forth by the Commission, we urge adoption of the UNWGMG recommendations.

In our comment letter we also supported the Commission in its efforts to include all "prospective" intervenor groups in the negotiated rulemaking process. We believe that all parties which are likely to use the LSS must have the same high level of confidence in the system's capabilities. In that same vein, we also support access to the LSS prior to a party being admitted as an intervenor. However, we disagree that a "prospective" intervenor be allowed to admit documents and records to the docket prior to that party's admittance as an intervenor. The very nature of the LSS affords a certain level of credence to the records and documents that are admitted, and thus to the groups serving as the sponsors of these records or documents. The proposed rule is contrary to the longstanding rules and practices of 10 CFR Part 2, which appropriately reserve such a level of credence for only those parties who meet stringent intervenor requirements. Title 10 CFR Part 2 requires that a party must have intervenor status prior to participating in certain activities, such as admittance of records to the docket.

Furthermore, this proposed rule is contrary to NRC's rules and practices of 10 CFR Part 2 regarding what is required to be submitted by an applicant and subsequently allowed to be litigated in a licensing hearing. The Commission has proposed that "circulated drafts" be required to be admitted into the LSS. We take exception to this proposal to change what has been the practice of the Commission to allow litigation of only the application - for example, in the case of a power reactor operating license, the Final Safety Analysis Report as defined by 10 CFR Sections 50.33, 50.33a, and 50.34. To suggest that outside parties are entitled to have access to draft documents is completely unwarranted. Such a requirement would undoubtedly result in unlimited "second guessing" of decisions that are likely to have been resolved through a well-defined and orderly process. We urge the Commission to follow the course set forth by the existing rules and practices of 10 CFR Part 2 and allow only litigation of the final application as submitted by DOE, and thus only "final" documents.

In conclusion, we urge the Commission to adopt the recommendations discussed above and those delineated by the UNWGMG. It is the utilities which will bear the brunt of the costs of the LSS. It is therefore imperative that the Commission give serious consideration to alternative, acceptable, less costly approaches for accomplishing the objective of the LSS rulemaking.

Sincerely,



Andrew C. Kadak  
Vice President

ACK/mjc

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Atlanta, Georgia 30308  
Telephone 404 526-3195

Mailing Address:  
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Post Office Box 1295  
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Telephone 205 868-5581

DOCKET NUMBER **PR 2**  
PROPOSED RULE **53 FR 44411**

(4)

'88 DEC -7 AIO :01

the southern electric system

W. G. Hairston, III  
Senior Vice President  
Nuclear Operations

December 5, 1988

RECEIVED  
DOCKETING SERVICE  
BRANCH

Docket Nos. 50-321 50-424  
50-366 50-425

Mr. Samuel J. Chilk  
Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Attention: Docketing and Service Branch

**GEORGIA POWER COMPANY  
COMMENTS ON NRC PROPOSED RULE - RECORDS RELATED TO LICENSING  
HIGH-LEVEL RADIOACTIVE WASTE GEOLOGIC REPOSITORY  
(53 FEDERAL REGISTER 44,411 OF NOVEMBER 3, 1988)**

Dear Mr. Chilk:

The Nuclear Regulatory Commission (NRC) published a proposed rule on the submission and management of records and documents related to the licensing of a geologic repository for the disposal of high-level radioactive waste (10 CFR Part 2) in the Federal Register on November 3, 1988, and invited comments by December 5, 1988. Georgia Power Company (GPC) has followed the development of this proposed rule through the Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWMG). Both EEI and UNWMG represent the industry coalition on the NRC created negotiating committee which was formed to address this proposed rulemaking. GPC agrees with this industry coalition group on their conclusions on the current record system, the Licensing Support System (LSS), being contemplated; i.e., that the system will be extremely costly, technologically and logistically difficult to implement, and will lengthen the repository licensing proceeding. For these reasons, GPC hereby endorses the EEI comments to be submitted to the NRC on December 5, 1988 and urges the Commission not to adopt the rule in its current form.

GPC appreciates the opportunity to comment on the proposed rule. If you have any questions, please contact our office.

Sincerely,

*W. G. Hairston, III*

W. G. Hairston, III

c: see distribution

Mr. Samuel J. Chilk  
December 5, 1988  
Page 2

c: Georgia Power Company

Mr. P. D. Rice, Vice President and Vogtle Project Director  
Mr. G. Bockhold, Jr., General Manager - Plant Vogtle  
Mr. C. K. McCoy, Vice President - Nuclear, Plant Vogtle  
Mr. J. T. Beckham, Vice President - Nuclear, Plant Hatch

U. S. Nuclear Regulatory Commission, Washington, D. C.

Mr. J. B. Hopkins, Licensing Project Manager - Vogtle  
Mr. L. P. Crocker, Licensing Project Manager - Hatch

U. S. Nuclear Regulatory Commission, Region II

Mr. M. L. Ernst, Acting Regional Administrator  
Mr. J. F. Rogge, Senior Resident Inspector, Operations - Vogtle  
Mr. J. E. Menning, Senior Resident Inspector - Hatch

Alabama Power Company  
600 North 18th Street  
Post Office Box 2641  
Birmingham, Alabama 35291-0400  
Telephone 205 250-1837

W. G. Hairston, III  
Senior Vice President  
Nuclear Operations

DOCKET NUMBER  
PROPOSED RULE PR 2

53 FR 4411

'88 DEC -7 A10:21

Alabama Power

the southern electric system

December 5, 1988

DOCKET  
VICE

Docket Nos. 50-348  
50-364

Mr. Samuel J. Chilk  
Secretary of the Commission  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Attention: Docketing and Service Branch

Dear Mr. Chilk:

RE: Comments on NRC Proposed Rule - Records Related to Licensing  
High-Level Radioactive Waste Geologic Repository  
(53 Federal Register 44,411 of November 3, 1988)

The Nuclear Regulatory Commission (NRC) published a proposed rule on the submission and management of records and documents related to the licensing of a geologic repository for the disposal of high-level radioactive waste (10 CFR Part 2) in the Federal Register on November 3, 1988, and invited comments by December 5, 1988. Alabama Power Company (APC) has followed the development of this proposed rule through the Edison Electric Institute (EEI) and the Utility Nuclear Waste Management Group (UNWGM). Both EEI and UNWGM represent the industry coalition on the NRC created negotiating committee which was formed to address this proposed rulemaking. APC agrees with this industry coalition group on their conclusions on the current record system, the Licensing Support System (LSS), being contemplated; i.e., that the system will be extremely costly, technologically and logistically difficult to implement, and will lengthen the repository licensing proceeding. For these reasons, APC hereby endorses the EEI comments to be submitted to the NRC on December 5, 1988 and urges the Commission not to adopt the rule in its current form.

APC appreciates the opportunity to comment on the proposed rule. If you have any questions, please contact our office.

Sincerely,

  
W. G. Hairston, III

cc: Mr. L. B. Long  
Mr. M. L. Ernst  
Mr. E. A. Reeves  
Mr. G. F. Maxwell

# EDISON ELECTRIC INSTITUTE

The association of electric companies

'88 DEC -6 P3:59

1111 19th Street, N.W.  
Washington, D.C. 20036-3691  
Tel: (202) 778-6400

December 5, 1988

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Attention: Docketing and Service Branch

Re: Proposed Rule on the Submission  
and Management of Records and  
Documents Related to the Licensing of  
a Geologic Repository for the Disposal  
of High-Level Radioactive Waste

Gentlemen:

On November 3, 1988, the Nuclear Regulatory Commission published in the Federal Register a notice of proposed rulemaking to amend 10 CFR Part 2. 53 Fed. Reg. 44411. The proposed rule deals largely with the submission and management of documentary material related to the licensing of the nuclear waste repository. This would be accomplished by an electronic information management system known as the Licensing Support System ("LSS"). The proposed rule would also establish certain procedures for the adjudicatory hearing on DOE's construction authorization application for the geologic repository. The Edison Electric Institute ("EEI") and the Utility Nuclear Waste Management Group ("UNWMG") appreciate the opportunity to submit these comments, including the detailed comments attached hereto. For the reasons set forth below, we respectfully urge that the Commission not adopt the proposed rule in its present form.

EEI is the association of the Nation's investor-owned electric utilities. Its members generate about seventy-three percent of the Nation's electricity and serve over sixty-seven million customers. UNWMG is a group of forty-five electric utilities providing active oversight of the implementation of the federal statutes and regulations governing radioactive waste management. Together, EEI and UNWMG represent most of the holders of contracts with DOE for disposal of spent nuclear fuel under

the Nuclear Waste Policy Act ("NWSA"), as amended. To date, electric utilities have contributed the vast majority of the \$3.3 billion that has been paid into the Nuclear Waste Fund and are currently paying for the entire civilian nuclear waste program. These funds are collected from electricity consumers. It is extremely important that the nuclear waste program be carried out in an efficient and cost-effective manner.

EEI and UNWNG were members of the negotiating committee formed by the NRC to develop the proposed LSS rule. Together with the U.S. Council for Energy Awareness, EEI and UNWNG comprised a coalition representing the nuclear industry in the negotiated rulemaking proceeding. The industry coalition took an active role in seeking to create a proposed rule to meet the objective of the rulemaking. That objective was set forth in the notices that lead to the establishment of the negotiating committee and repeated frequently throughout the negotiated rulemaking -- to allow the NRC to reach a decision on the construction authorization for the repository within the three year time frame specified in § 114(d) of the NWSA. (Section 114(d) allows a one year extension for good cause.)

EEI and UNWNG took part in the negotiating process in a good faith attempt to reach consensus on a rule that would have a realistic chance of leading to repository licensing within the three to four year statutory period. For most of the negotiations, the industry coalition was the only party focusing attention on the broader issues of the licensing process, issues that would determine whether or not the Commission's objective of a three to four year licensing process could be met.

Notwithstanding the substantial efforts EEI and UNWNG invested in the rulemaking process, we reluctantly concluded at the close of the negotiations that we could not support the proposed rule as drafted. The proposed rule would create a gigantic, highly complicated, and extraordinarily expensive system that would not do what was intended. The LSS as proposed would be to our knowledge the largest and costliest litigation support system ever created. But notwithstanding its massive size -- 40 million pages -- and enormous cost -- \$195 million predicted by DOE (which we believe is substantially underestimated) -- the LSS will not result in a three to four year licensing process.

Even if the LSS functions as DOE predicts, we believe the licensing of the geologic repository under the procedures set forth in the proposed rule will extend far beyond the three to



four year statutory period. Few recent NRC licensing proceedings have been concluded in less than three years. Typical NRC operating license hearings extend five years or more. The more sharply contested ones have lasted seven years and longer. The repository licensing proceeding will almost certainly be more hotly litigated than anything the NRC has yet faced and will involve technical and procedural issues not previously reviewed in NRC adjudication. The LSS will not save significant amounts of time in the licensing proceeding. Indeed, the LSS' unparalleled scope and size makes it probable that the LSS will lengthen -- rather than shorten -- the repository licensing proceeding. It will create new legal issues that could delay the proceedings and provide the tools for generating longer hearings and more extended discovery. Without dramatic changes to NRC procedures, far more so than the LSS rule proposes, repository licensing will be much longer than contemplated by NWP.

With the tremendous cost of the LSS, and the lack of benefits, we were compelled to withhold our support for the system. For the same reasons, we urge that the Commission not adopt the proposed rule in its present form. Our cost-benefit based opposition to the LSS is all the more significant since a viable alternative exists that we believe would cost significantly less, accomplish many of the same functions, and avoid the technological pitfalls we believe await the LSS development and implementation. Our proposed alternative would involve the same collection of documentary material contemplated by the LSS and the same computerized indexing that the LSS will have. By using microfiche, it would avoid the financial costs and technological difficulties we believe are likely to befall the LSS as a result of its attempt to provide electronic storage, full-text search capability, and remote retrieval of the 40 million pages of documents that are contemplated for the LSS. The alternative system would substitute overnight mail service for electronic document transmission. Because this more conventional system would be available well before the repository license application was docketed -- and indeed well before the LSS could be available -- it could provide the same benefits in terms of early document availability that the LSS is intended to provide.

It is certainly correct that our proposed alternative would exclude some of the functions for which the LSS is designed. It would not provide electronic full-text search of the 40 million pages of documents stored in the system. Nor would it provide essentially instantaneous document retrieval. But we are aware of no comparably sized litigation support

systems (whether judicial or administrative) that have these capabilities. Nor are we aware of any reason why these functions are required for the repository licensing proceeding. While this type of high-tech litigation support would certainly be welcomed by participants, particularly if they did not have to pay for it, it must still survive a cost-benefit test. The LSS does not.

EEI and UNWGMG presented this alternative system during the negotiated rulemaking proceeding. Unfortunately, DOE did not analyze this system when it evaluated alternatives to the LSS. Nor has the NRC staff. It is perhaps not surprising that the industry coalition -- one party who will pay for the LSS (as part of its funding of the entire nuclear waste program) -- was the only party to focus on its cost-benefit evaluation. We respectfully urge that the Commission adopt our alternative system instead of the LSS, or, at the very least, subject both systems to a rigorous cost-benefit evaluation.

The Commission will be facing an unprecedented challenge when it conducts the licensing proceeding for the geologic repository. The LSS, even if it were to function flawlessly and at a reasonable cost, would only address a small part of the licensing schedule. Many other changes to the Commission's procedures are needed if the three to four year statutory licensing period is even remotely to be approached. These include:

- ° Resolution of substantial numbers of technical issues by generic rulemaking well in advance of the hearing.
- ° The establishment of a more appropriate threshold for admitting contentions.
- ° Tighter standards for late-filed contentions.
- ° Limitations on other discovery mechanisms beyond those in the proposed LSS rule.
- ° Imposition of a requirement for the proponents of a contention to present an affirmative case.
- ° Intervention based on judicial standards.
- ° Seriatum hearings and decisions.

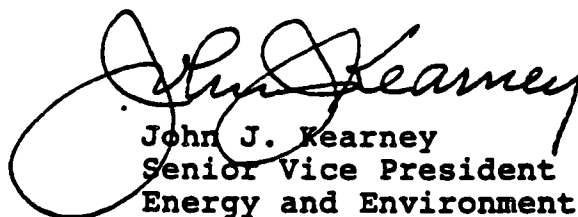
Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
December 5, 1988  
Page 5

The detailed comments attached hereto elaborate on these concepts. We would urge that the Commission incorporate these concepts into its licensing procedures for the geologic repository.

Although the industry coalition ultimately withheld its consensus from the outcome of the negotiated rulemaking, we credit the NRC and its Staff for undertaking the effort. The negotiated rulemaking process can be an excellent way for parties to come to grips with difficult and highly technical issues in a rulemaking setting. The parties to the LSS proceeding negotiated in good faith. It is unfortunate that the parties' efforts could not yield a result that will accomplish the objective established at the outset.

EEI and UNWGM remain willing to work with the Commission and with other interested parties to develop a licensing process that will allow legitimate technical issues to be explored in an appropriate adjudicatory or regulatory forum, and at the same time, stand a reasonable chance of meeting the timetable that the NRC set for carrying out the licensing process. In this context, the Commission should make clear that representatives of the utility industry will be included on the LSS Advisory Committee (proposed § 2.1011(e)(2)). The industry has both a major stake in the process and the ability to make a significant contribution to the Committee. Yet, they are the only interested party not included. The Commission should correct this oversight.

Very truly yours,



John J. Kearney  
Senior Vice President  
Energy and Environment

Enclosure

December 5, 1988

EDISON ELECTRIC INSTITUTE AND UTILITY  
NUCLEAR WASTE MANAGEMENT GROUP  
DETAILED COMMENTS ON  
PROPOSED RULE ON THE SUBMISSION AND  
MANAGEMENT OF RECORDS AND DOCUMENTS  
RELATED TO THE LICENSING OF A GEOLOGIC  
REPOSITORY FOR THE DISPOSAL OF  
HIGH-LEVEL RADIOACTIVE WASTE

Edison Electric Institute ("EEI") and the Utility Nuclear Waste Management Group ("UNWMG") present the following detailed comments on the proposed rule for the Licensing Support System ("LSS") published in the Federal Register on November 3, 1988. In addition, we would like to address some comments to the negotiated rulemaking process employed by the Commission. While these latter comments do not directly affect the proposed rule, we believe that they would be useful to the Commission in future negotiated rulemakings.

I. Negotiating Process

At the outset of the negotiated rulemaking process, the Commission identified fourteen parties as "first tier" participants, i.e., those who could vote. Those fourteen included first and second repository states and Indian Tribes, local governments, environmental groups, EEI and UNWMG, DOE, and NRC. EEI and UNWMG by letter to the Commission dated August 15, 1987 pointed out that the large number of groups and the lack of

balance among the groups were inconsistent with negotiated rulemaking guidelines published by the Administrative Conference of the United States.

Subsequent events, particularly the designation of the Yucca Mountain site by the Nuclear Waste Policy Amendments Act of 1987, to some extent resolved EEI and UNWGMG's stated concerns. The negotiating committee was reconstituted to reflect the changed emphasis of the program and the number of groups reduced to seven. However, the lessons learned in attempting to conduct the negotiated rulemaking with the larger group confirmed the wisdom of EEI and UNWGMG's earlier comments. The large number of participants made even the smallest amount of progress painfully slow. And the lack of balance, with EEI and UNWGMG virtually the only voice for broader regulatory changes to meet the statutory timetable, made it all too easy for the other parties to disregard positions put forward by EEI and UNWGMG, and made our eventual lack of consent more likely.

For these reasons, EEI and UNWGMG would again urge that the Commission in convening future negotiated rulemakings pay greater heed to the Administrative Conference recommendations on the size and composition of the negotiating committee.

## II. Need for an Adequate Cost-Benefit Analysis

Before the NRC (or any other entity) undertakes any new initiative, common sense dictates that it should perform a cost-benefit analysis of its proposed course of action and reasonable alternatives. Although DOE has estimated the costs of the LSS, neither DOE nor NRC has adequately evaluated the costs or benefits of the LSS or its alternatives. The costs (discussed in Section III below) are seriously understated. And reasonable alternatives to the LSS were never evaluated. DOE's cost-benefit "does not extend to estimating the costs or benefits of attempting to achieve the licensing decisions [for the geologic repository] without an LSS." "Licensing Support System Benefit-Cost Analysis" (Science Applications International Corp., July 8, 1988) (referred to below as DOE Cost-Benefit) at ii. Furthermore, DOE assumes that the LSS will allow the licensing proceeding to be completed within the three to four year statutory window, and assumes that the LSS will perform as advertised. DOE fails to consider some of the potential technical pitfalls inherent in such a text retrieval system, particularly one of the size and dimensions of the LSS. The DOE Cost-Benefit, the only one performed for the LSS, is inadequate on its face and fails to establish that the LSS is worth its extremely high cost.

### III. Cost of the LSS

The DOE Cost-Benefit estimates that the cost of the Base Conceptual Design LSS will be \$195 million. This staggeringly high cost is greater than that of any other litigation support system of which we are aware. That, by itself, is enough to raise questions about the size and scope of the LSS.

Our review however, concludes that the LSS will cost substantially more than \$195 million. For example, DOE projects the costs only for the first ten years. See 53 Fed. Reg. at 44413; DOE Cost-Benefit at 2. "[T]he initial hardware is expected to be suitable for replacement in ten years." DOE Cost-Benefit at ii. DOE incorporates no costs for follow-on design or replacement. Id. at 2. Yet the repository licensing will likely still be in progress in 1998, the year that DOE assumes that the LSS will need to be replaced. And there is no indication that the NRC would not require a system at least as elaborate well beyond 1998. Thus, DOE has unfairly underpriced the LSS by ignoring all costs beyond 1998.

The \$195 million cost is also likely to underestimate the ultimate expense of the LSS, even if only the first ten years are considered. The LSS will be a unique system, pushing the state-of-the-art in both its size and scope. No other text

retrieval system has ever before addressed such a diversity of document types. This diversity will necessarily expand the technical requirements (and associated costs) of the system. (Indeed, the University of Nevada, Las Vegas has characterized the LSS as "revolutionary" in nature and has proposed that "at least two full time scientists would be required just to monitor the main technological issues which dominate the cost of and benefit provided by this system." Proposal for the Nevada Information Storage Technology Institute, by the Howard R. Hughes College of Engineering of the University of Nevada, Las Vegas (draft) at 1, 2.) This makes it highly likely that significant cost escalations not now anticipated will occur.

DOE also presents the costs in 1988 dollars. (While this is clearly set forth in the DOE Cost-Benefit, the NRC's Federal Register notice merely presents the LSS cost as "approximately \$200 million.") A significant portion of LSS expenditures will be incurred in later years. We estimate that the actual dollars expended will be closer to \$500 million than to \$200 million, based on escalating the year-by-year expenditures by an assumed inflation rate of four percent.

Other very large information management systems developed or planned by the Federal Government, such as the Department of Justice's JURIS system and the Security and



Exchange Commission's EDGAR system, have experienced dramatic alterations in original system design which resulted in more excessive cost increases (JURIS) or have experienced significant cost overruns coupled with severe technological problems (EDGAR). See, for example, GAO/IMTEC-87-2, "ADP Acquisition: SEC Needs to Resolve Key Issues Before Proceeding with its EDGAR System" (October 1986). In that the LSS is far more revolutionary and complex than those systems, there is no reason to think that the LSS will be immune from this phenomenon.

Also of concern is the fact that the LSS is "primarily labor intensive." The DOE Cost-Benefit states that labor contributes 70% of the LSS costs. While it may seem strange that an electronic information management system would have most of its costs attributable to labor, in this situation it also raises a serious risk that the labor costs have been underestimated. Most of the labor costs are associated with data capture. We would expect that the accuracy and completeness of the data capture process will be among the most contentious aspects of LSS operation. As a result, we would anticipate that the LSS Administrator will spend considerably greater effort (and therefore greater cost) on data capture in an attempt to minimize problems with the adequacy and completeness of the data base.

For all of these reasons, EEI and UNWGM believe that the costs of the LSS have been seriously understated.

#### IV. Benefits of the LSS

The NRC defines the benefits it hopes to achieve with the LSS in terms of meeting the licensing objective specified in the Nuclear Waste Policy Act of 1982:

The objective of the negotiated rulemaking was to provide for the effective review of the U.S. Department of Energy ("DOE") license application within the three-year time period required by section 114(d) of the Nuclear Waste Policy Act of 1982 ("NWPAA"), as amended.

53 Fed. Reg. at 44412. (The NWPAA permits a one year extension to this three-year period for good cause.) The Commission expresses considerable confidence that the LSS will result in a three to four year licensing period.

The proposed rule, if implemented, sets in place a procedure for hearings that will allow the Commission to reach a decision on the construction authorization within the timeframe specified in section 114(d) of the NWPAA.

53 Fed. Reg. at 44413. The Commission also states that it "is optimistic that the effective implementation of the rule proposed in this notice will allow the Commission to meet the schedule set forth in section 114(d) of the NWPAA." 53 Fed. Reg. at 44416. But no basis that can withstand scrutiny is articulated for that optimism.

By making essentially all information related to the geologic repository readily available to participants through the LSS, the NRC anticipates that the time needed to complete initial discovery, including physical production and on-site review of documents by parties to the licensing proceeding, would be substantially reduced. Unfortunately, it is EEI and UNWMG's opinion, based on the accumulated experience with licensing proceedings before the NRC over the last two decades, that the LSS will not result in any significant shortening of the licensing process. We see absolutely no likelihood that the LSS will allow the NRC to complete the licensing proceeding in three to four years. In fact, for the reasons set forth below, the LSS likely will result in a significant lengthening of the proceeding.

V. Duration of Repository Licensing Proceeding

The NRC proceeding on DOE's application for construction authorization will likely be among the most hotly contested and complicated proceedings that NRC has ever faced. Unlike the reactor licensing proceedings that NRC has experienced, the repository hearing will be unique -- the first (and perhaps only) one of its kind. It will involve technical issues never before litigated by NRC staff and licensing boards and never before reviewed by the Appeal Board and the Commission. It will bring

together major opposing parties (i.e., DOE and Nevada) with, for all practical purposes, unlimited technical and financial resources. It will certainly attract a large number of other parties. The regulations and regulatory guidance for the repository will not have previously been explored in the adjudicatory arena. Those opposing the application will have had more than a decade prior to submittal of the license application in which to identify issues, retain experts, and undertake the most elaborate preparations aimed at defeating DOE's application. It therefore appears that streamlining the licensing process is both required and reasonable.

Obviously, it is very difficult to predict the total duration of the construction authorization proceeding. There are many ways in which the proceeding can unfold. Given the characterizations identified in the preceding paragraph, however, based on industry experience we would estimate that the minimum duration would be:

Notice of opportunity for hearing to licensing board order defining contentions	12 months
Discovery	24 months
Summary disposition motions and decisions	6 months
Preparation of testimony through evidentiary hearings	12 months

Proposed findings of fact  
and licensing board decision

12 months

Initial internal appeals

12 months

Total

78 months (6½ years)

Some of these time periods exceed the nominal durations set forth in 10 CFR Part 2 because of the unique nature of the proceeding.

For example, a straightforward reactor proceeding might succeed in moving from notice of opportunity for hearing to contentions definition in perhaps five months.<sup>1/</sup> Since it would not be surprising if the number of contentions filed in the construction authorization proceeding would far exceed those filed in the most complicated reactor licensing proceeding, substantial additional time will certainly be needed by the parties to brief and argue these contentions, by the licensing board to admit or reject them, and by the Appeal Board or Commission to resolve the inevitable appeals. Based upon the industry's experience, the "model timeline" published by the Commission, 53 Fed. Reg. at

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<sup>1/</sup> For example, notice of opportunity for hearing to intervention petition, one month; intervention petition to prehearing order, one month; prehearing order to special prehearing conference, two months; special prehearing conference to special prehearing conference order, one month. Even a relatively simple proceeding on a proposed amendment to a reactor's technical specifications can take this long. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant), "Memorandum and Order (Scheduling of a Prehearing Conference)" (March 1, 1988) i.e., (four months from notice of hearing to special prehearing conference).

44420, is completely overoptimistic. We see little prospect that a licensing board would be able to rule on the admission of parties, on the hundreds of contentions likely to be submitted, and on a schedule for discovery and other activities within 100 days after the notice of hearing is published. That expeditious a schedule has been unattainable even in simple proceedings.

Similarly, the 24 months estimated for discovery, even with the LSS, is probably a conservative figure absent significant additional changes to NRC regulations. The proposed rule still leaves many discovery routes available beyond the LSS, including depositions, requests for admissions, informal requests for information, and (by order of a discovery master) interrogatories and depositions on written questions. See proposed § 2.1021. While the proposed rule would have the licensing board "[take] into account the objective of meeting the three year schedule specified in section 114(d)" in establishing discovery schedules, see proposed §§ 2.1021(a)(5) and 2.1022(a)(6), the board is under no obligation to assure that this schedule is met. Indeed, the model schedule that accompanied the proposed rule (53 Fed. Reg. at 44420) is presented by the Commission "for general guidance only." Without much more rigorous direction to the licensing board, these "objectives" are likely to be no more successful in expediting the adjudicatory process than the existing guidelines in Appendix C to 10 CFR Part 2 have been.

For a number of reasons, a six year duration for the construction authorization hearing is very optimistic. Many of the most recent reactor licensing proceedings lasted that long notwithstanding the absence of the unique issues to be litigated in the repository proceeding and intervenors comparable in resources to those that will most likely be participating in the repository hearing.<sup>2/</sup> It is more likely that the hearing will take as long as the longest reactor proceedings,<sup>3/</sup> not as short

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2/ For example:

- 81 months - Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-440, 50-441, from notice of opportunity for hearing to NRC decision authorizing full power license;
- 53 months - Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), Docket No. 50-382;
- 51 months - Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant, Unit No. 1), Docket No. 50-400.

3/ For example:

- 78 months - GPU Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), Docket No. 50-289 (Restart proceeding);
- 129 months - Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Docket Nos. 50-275 and 50-323;
- 85 months (so far) - Public Service Co. of New Hampshire (Seabrook Station) Docket No. 50-443;
- 152 months (so far) - Long Island Lighting Co. (Shoreham Nuclear Power Station), Docket No. 50-322.

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as the average ones. Much of the delay in any proceeding can come from the addition of late contentions. The duration estimated above does not explicitly contemplate any delays due to late contentions, yet the repository program is much more likely to result in such issues than are the reactor licensing cases, if only because of the unique nature of the proceeding. Although the proposed LSS makes some changes in the standards for admitting late-filed contentions,<sup>4/</sup> these added requirements may well be applied so liberally that they provide no protection against delays from untimely contentions. In any event, the NRC's "model timeline" woefully underestimates the time needed to litigate late-filed contentions.<sup>5/</sup>

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117 months - Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2),  
Docket Nos. 50-445, 50-446.

<sup>4/</sup> Proposed §2.1014(a)(4) would require that a contention filed after the issuance of the Safety Evaluation Report must show (in addition to the factors currently required to be shown for late-filed contentions by 10 CFR § 2.714(a)(1)(i)-(v)) that a significant environmental or safety issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by 10 CFR § 60.112 and 60.113. As the Supplementary Information indicates, the "material issues" contemplated need not constitute significant safety or environmental issues. 53 Fed. Reg. at 44418.

<sup>5/</sup> The "model timeline" assumes that all discovery on late-filed contentions admitted at the Second Prehearing Conference would be finished in 82 days, allows no time for summary disposition motions on these contentions, and has evidentiary hearings beginning 30 days after completion of discovery.



One aspect of the proposed LSS rule that will save some time as compared with the current Rules of Practice is the electronic transmission of pleadings. Proposed § 2.1013(c)(1). The five days normally allowed for service by mail, 10 CFR § 2.710, would be reduced to one day. However, a substantial amount of the time saved in this manner by using electronic mail could be achieved at far lower cost by the use of express mail. Under current rules, the five day period allowed for mailing is reduced to two days if express mail is used. 10 CFR § 2.710. In any event, the LSS as proposed is not the only mechanism by which electronic document transmission can be accomplished. In fact, electronic mail could be a part of the EEI and UNWMG alternative to the LSS discussed below.

#### VI. Delays Due to LSS

The LSS, even if implemented in accordance with the proposed rule, is likely to extend the licensing time rather than shorten it. This is attributable to at least five separate factors.

First, the LSS rule will create new procedural issues over which litigation is likely. For example, proposed sections 2.1003(h)(1) and 2.1012(a) require a certification by the LSS

Administrator that DOE is in substantial and timely compliance with its obligations to submit material to the LSS for the proposed new regulations to apply. A party bent on delaying or defeating the repository will certainly seek to challenge this certification as a way to hold up the process.

Second, the actual performance of the system is unlikely to live up either to the expectations of at least some of the parties or to the overly optimistic assessments of its proponents, again leading to legal challenges in and out of the hearing process. For example, the accuracy and completeness of the electronic data base will surely come under attack. Documents that should be in the data base may be missed and some documents included could easily be incomplete in their electronic form.

Third, the vast quantities of documents available in electronic full text should be anticipated to provide parties the opportunity to generate even greater amounts of discovery, beyond reasonable limits, and otherwise extend the hearing process. While the licensing board would have the authority to limit discovery, proposed § 2.1018(c), licensing boards have typically not been willing to effectively exercise this authority in the past.

Fourth, disputes over which discovery techniques will be allowed (i.e., whether written interrogatories and depositions

upon written questions can be submitted) are certain to plague the licensing board and discovery master.

And finally, system failures (let alone a computer virus) should they occur will certainly trigger calls to bring the entire licensing process to a halt.<sup>6/</sup> Given what the University of Nevada, Las Vegas has called the "revolutionary" nature of the LSS, the occurrence of such problems cannot be discounted.

For all the above reasons, the LSS, and the other changes to Part 2 proposed by the Commission, by themselves will not allow NRC to meet its statutory timetable. Based on the foregoing discussion, and the licensing experience of over 100 operating reactors, it is our judgment that the licensing proceeding for the geologic repository will take eight to ten years. The LSS if implemented as the NRC has proposed would not shorten this period. Indeed, one of the factors that causes us to envision an eight to ten year proceeding is the LSS. It is for this reason that we are unable to justify spending \$500 million (or even \$200 million) for the LSS, and urge the Commission to reject the proposed rule.

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<sup>6/</sup> Proposed § 2.1017 provides that if the LSS is unavailable for more than four access hours of any day counted in computing the time allowed for any act, that day is not counted.

In order for EEI/UNWMG and the electricity consumer to be able to accept the costs of a LSS system, we believe that the NRC must make significant additional changes to the procedures which the repository licensing hearing will follow.

VII. Early Resolution of Technical Issues

The NRC proceeding on the construction authorization for the repository will involve many technical issues that the NRC is addressing for the first time. Because these issues have not previously been the subject of NRC adjudicatory proceedings, litigation of them would likely be particularly time-consuming. Although steps to address this problem are not directly related to the LSS, they are certainly of direct bearing on the Commission's ability to meet the three to four year licensing timetable. Indeed, the early resolution of these issues together with the institution of a disciplined adjudicatory process hold out the most hope for meeting the statutory requirement.

EEI and UNWMG strongly recommend that the Commission take appropriate steps to resolve these technical issues prior to the adjudicatory hearing and therefore, off the critical path for repository licensing. The only way that such issues can be definitively resolved outside the hearing process is through rulemaking. Using established rulemaking procedures, the NRC

would be able to decide technical issues for the repository as it has in other areas of its regulatory responsibility.

Examples of the types of issues that would be suitable for resolution by rulemaking include:

1. Acceptable methods for evaluating groundwater travel time.
2. Acceptable methods of evaluating radio-nuclide releases from the waste package.
3. Criteria for evaluating the impact of seismic activity on underground structures and on waste containment.
4. Acceptable methods for selecting scenarios of future processes and events.
5. Acceptable methods to interpret and identify the extent of the disturbed zone.

#### VIII. Proposed Changes to NRC Rules of Practice

NRC must make modifications to its rules of practice that will go beyond those proposed in the LSS rule if it is to have any hope of even approaching the three to four year statutory timetable of § 114(d)(2) of the NWSA. Over the years, numerous studies have examined the NRC licensing process and made recommendations to improve it.<sup>7/</sup> Some of these recommendations,

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<sup>7/</sup> See, e.g., Tourtellotte, Nuclear Licensing Litigation: Come On In, the Quagmire is Fine, 33 Admin. L. Rev. 367 (1981);

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if applied to repository licensing, could result in significant savings of time without dramatic changes in the nature of the proceeding. EEI/UNWMG recommended such modifications in the negotiated rulemaking. By and large the recommendations were ignored. Only if these changes are linked to the LSS is there any hope of meeting Congress' goal.

- A. Contentions: Current NRC rules, 10 CFR § 2.714(a)(2), allow the admission of contentions on a showing of "basis" and "specificity." In practice, NRC adjudicatory decisions have allowed the admission of contentions with no foundation and no semblance of factual support. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1) ALAB-590, 11 NRC 542 (1980); Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423 (1973). A recent decision by the U.S. Court of Appeals for the Ninth Circuit, Sierra Club v. NRC, No. 87-7481 (November 30, 1988) describes

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Cotter, Nuclear Licensing: Innovation Through Evolution in Administration Hearings, 34 Admin. L. Rev. 497 (1982); Draft Report of the Regulatory Reform Task Force, SECY-82-447 (November 3, 1982); 49 Fed. Reg. 14698 (1984); 51 Fed. Reg. 24365 (1986); H.R. 1029 and 5448, 99th Cong. 1st sess. (1985).

as follows the "correct" tests for admitting contentions based on current NRC case law:

The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising non-justiciable issues, such as the propriety of statutory requirements or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding.

This judicial interpretation demonstrates just how weak the current thresholds are.

The current proposal, § 2.1014, adds two minor modifications by requiring reference to the specific documentary material (or absence thereof) providing a basis for the contention and the specific regulatory or statutory requirement to which the contention is relevant. However, as pointed out in the Supplementary Information accompanying the proposed rule, these merely codify existing NRC practice, 53 Fed. Reg. at 44418.

A more substantial threshold for the admission of contentions is warranted. The volume of data and documents that will be available years in advance of the start of the hearing strongly support requiring a more rigorous standard before a contention may be admitted. NRC should require that a party demonstrate that there

is a genuine and substantial issue of disputed fact requiring a hearing for its resolution. If this standard were adopted and rigorously applied, many frivolous issues could be excluded at the start, thus reducing the overall duration of the proceeding.

- B. Late Contentions: Current NRC practice is overly liberal in admitting contentions filed after the period for initial definition of contentions. Although NRC regulations establish a series of tests to be met for the admission of late contentions, 10 CFR § 2.714(a), these tests are both unnecessarily weak and often weakly applied. Frequently, an intervenor is required to show little more than that he had recently become aware of "new" information concerning the late contention. Since there is always going to be "new" information, especially with respect to a unique effort like the geologic repository, the current NRC standard may well cause a never-ending stream of "late" contentions. A tighter standard is both necessary and appropriate.

The current proposal makes some changes in existing rules. See fn. 4 above. However, the proposal in one significant respect appears to relax existing standards by permitting contentions based upon the NRC Staff's



Safety Evaluation Report. Generally, such contentions have been objectionable.<sup>8/</sup> In addition, the proposed new standard is likely to be very loose in that it would permit late contentions that do not constitute significant safety or environmental issues so long as they raise a "material" issue related to the 10 CFR §§ 60.112 or 60.113 performance evaluation.

A more appropriate standard would require an evidentiary showing that: (1) there is significant new information which would require a modification in facility design/construction to protect the public health and safety (and the common defense and security); and (2) such modification would substantially enhance such protection by improving overall safety. Contentions that do not meet this standard should be excluded.

- C. Discovery: The LSS is essentially a substitute for requests for production of documents. The proposed rule leaves intact a party's right to take depositions,

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<sup>8/</sup> In a reactor operating license proceeding, only the license application is at issue, not the adequacy of the Staff's safety review. See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 56 (1985); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 N.R.C. 777, 807, review declined, CLI-83-32, 18 N.R.C. 1309 (1983).

requests for admission, inspection and access to raw data, and informal requests for information. Proposed § 2.1018(a). Written interrogatories and depositions upon written questions may be authorized by a discovery master. Id. The proposed rule also calls for the licensing board to establish discovery schedules which "take into account the objective of meeting the three-year time schedule specified in section 114(d)" of the NWPA.

Although the proposed rule makes some effort to restrict discovery beyond the LSS, a number of provisions open avenues for extensive and time-consuming discovery disputes. For example, proposed § 2.1018(a)(1) allows a party to submit "informal requests for information not available in the Licensing Support System." A resourceful party will be able to deluge DOE with informal requests for information "not available" in the LSS. Merely responding to informal requests to show that the information is available in the LSS can tie up significant litigation resources. Since all relevant documentary material will be in the LSS, depositions are available, and existing information channels such as FOIA remain unaffected, EEI and UNWGM do not believe that there is any need to insert

new discovery vehicles (such as informal information requests) into NRC practice.

We also believe that some limitations on depositions ought to be imposed. Federal courts routinely include such limits in their local rules. The Eastern District of Virginia, for example, allows only five non-party depositions.<sup>9/</sup> We would recommend that the period for taking depositions be limited to six months, commencing from the issuance of the first prehearing conference order, and that a party be limited to not more than twenty depositions. An expansion of these limits would be only on a strong showing of good cause and a demonstrated inability to otherwise develop the information sought.

Other modifications to NRC procedural rules to provide for an appropriately expeditious hearing process should also be made. These include:

1. Intervention based upon judicial standards: Since 1976, the Commission has allowed its licensing boards to grant intervention status to parties that failed to meet judicial standing requirements. Portland General

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<sup>9/</sup> Rule 11-1(b).

Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). This "discretionary intervention" is legally unnecessary, tends to add additional parties to the proceeding, does not serve the public interest, complicates pre-hearing procedures, and should be removed.

2. Requirement for an affirmative case: Since a contention should not be admitted without substantial evidentiary support, it follows that a party sponsoring a contention should be required to present an affirmative evidentiary case for that contention. Current NRC case law places the burden of going forward on the applicant. This practice should be reversed.
3. Seriatum hearings and decisions: Because of the large number of contentions likely to be raised, the Commission should direct that the licensing board or boards will resolve contentions on an on-going basis and that internal agency appeals for these decisions need not await resolution of the last group of issues. In this way, resolution of the final set of issues by the licensing board will not be a critical path for resolution of earlier issues. While this is not inconsistent with current agency practice, Commission direction in

this area will assure that there will be no dispute on the timing of hearings, decisions and appeals.

IX. An Alternative LSS

EEI and UNWGM primarily object to the proposed LSS because of its extraordinary cost (see Section III above) and its inability to produce a licensing schedule that meets the timetable specified in Section 114(d) of the NWPA. (see Section V above).

To meet the objections that are outlined above while still providing most of the benefits of the proposed LSS, EEI and UNWGM presented an alternative system during the negotiated rulemaking proceeding.

The alternative we propose would function as an information management system in much the same fashion as the LSS but at far less cost and with a greater chance of meeting the goals of this rulemaking, the NWPA, and so serving the public interest. All documentary material relating to the repository would be submitted to a system administrator. The same universe of records covered by the proposed LSS rule would be covered by the alternative system, (i.e., any information that is relevant to, or likely to lead to the discovery of information that is relevant

to, the licensing of the likely candidate site for the geologic repository). As with the LSS, all documents would be indexed and "headers" prepared. These indexes and headers would be computerized and be made available through the same type of remote access contemplated for the LSS. Our alternative would identify the targeted documents and reference the image of the document on microfiche. The major difference would be that the full text of the documents would not be entered into the electronic system. The documents themselves would be retained in microfiche and/or hard copy. Parties seeking copies of a document would request them -- by mail, phone, or computer -- from the system administrator and receive them via overnight mail. The same early access to documentary information that the LSS would provide would be available through this alternative, except that the copy of the requested document would be available within a day, rather than within a few minutes. Although this timing difference might be claimed to be a hardship, that claim is not supportable where the documents would be made available years in advance of the licensing proceeding.

The DOE Cost-Benefit estimates that a very significant portion of the LSS' cost is for "data capture." DOE has stated that the cost of entering documents with the LSS (including the necessary quality assurance) would be \$4 for each page. By avoiding the full text aspect of the system, a significant amount

of the projected costs could be saved. At the very least, NRC must evaluate what savings could be achieved with such a system and compare the value of the features which the LSS has that would not be available with our proposed alternative are required.

Unlike the LSS, the alternative system which we proposed would be the same in concept as litigation support systems in actual use. By avoiding the more esoteric design of the LSS, the risks that the LSS will fail to meet its performance objectives would be dramatically reduced. Some (perhaps most) of the potential parties to the licensing proceeding for the repository would prefer to have a system like the LSS, with full text electronic search capability and the ability to retrieve any document within a few minutes time. However, there is no reason for requiring these features in the repository proceeding. The fact that none of these parties would have to pay for these features may explain why they are so highly desired. But that does not warrant a rule imposing them.

We are convinced that an unbiased assessment of all the costs and all the benefits of the LSS and of our proposed alternative will result in a determination that our proposed alternative is strongly preferred. We urge the Commission to undertake such an analysis.

X.           Conclusion

Congress has determined that it is in the public interest that a geologic repository be developed for the disposal of this nation's high-level nuclear waste and spent nuclear fuel. Congress has also determined that licensing of the repository is the responsibility of this Commission. The public interest is not served by the creation of a licensing process that is both extravagantly expensive and incapable of reaching a decision in a reasonable period of time. We believe that the proposed rule that is the subject of these comments would create such a licensing process. For the reasons set forth above, we believe that the alternative system that we have proposed, together with the other changes we have recommended, will lead to a more efficient and cost effective licensing process that will better serve the public interest.



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January 5, 1989

Secretary of the Commission  
Attn: Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Subject: Comments on proposed rule to establish an  
LSS for the HLW licensing proceeding --  
53 Fed. Reg. 44411 (Nov. 3, 1988)

Dear Sir:

The undersigned is submitting these comments in response to the NRC's request of November 3, 1988 concerning proposed revisions to 10 C.F.R. Part 2 of the NRC's Rules of Practice. The proposed revisions would establish a Litigation Support System and hearing procedures for the NRC High-Level Waste licensing proceeding.

The undersigned served as a regulatory hearing lawyer in the Office of General Counsel of the U.S. Atomic Energy Commission in 1972, an Assistant Chief Hearing counsel in 1973, and the Chief Hearing Counsel of the AEC/NRC in 1974 and 1975. Thereafter, I entered private practice, and since then, I have devoted a substantial portion of my practice to atomic energy law, including the representation of applicants in NRC licensing proceedings for the construction and operation of nuclear power reactors. In sum, I have represented the AEC Staff, NRC Staff and nuclear utilities in over 40 AEC/NRC adjudicatory hearings involving the issuance of materials licenses; and the issuance of construction permits and operating licenses, and amendments thereto, for nuclear power reactors. All of these proceedings have been conducted under the procedural Rules of Practice in 10 C.F.R. Part 2, as these rules have evolved since 1972. This experience serves as the basis for my comments.

The establishment of the LSS is the showcase of the many changes to Part 2 that are proposed for use in connection with the HLW licensing hearings. The LSS would be the repository for documents related to the licensing of the HLW facility, and it would serve as the primary, if not the sole, source of document discovery for the HLW licensing hearings. It is NRC's belief

that the LSS will facilitate greatly the objective of realizing an initial decision within 3 years of the filing of the application. I agree.

I am unable, without more information, to offer an informed judgment as to whether the LSS will permit the NRC to meet the 3-year objective with certainty. I can state, however, that the HLW licensing hearings will be delayed substantially without it. This is true because the proposed regulations would remove document discovery as an obstacle to timely completion of the HLW hearings.

The LSS and the proposed regulations will cause NRC and DOE and the other parties to commence and complete their document searches in parallel with critical path activities, e.g., the preparation of the application by DOE. Without the LSS, this search will not begin until much later in time, namely after document requests are made by parties to the hearing. Commencement of document discovery at this time would, in my opinion, cause this process to become an obstacle to the timely completion of the HLW licensing hearings. Here, the accumulation of the documents by the two government agencies and the principal parties of interest will, if the proposed rule is promulgated, be able to commence many months earlier. Similarly, once the documents are assembled, the screening for classified, proprietary and privileged documents can be completed, and the process of designing, developing and loading the documents into the LSS can be completed -- all in advance of the time when document discovery might otherwise impede schedule progress.

The LSS and the proposed regulations will avoid a second cause of hearing delay, which is ordinarily experienced in connection with hearings under subpart G. Potential parties will have access to the LSS well in advance of the time for submitting requests for a hearing. Thus, the time needed for prospective parties to digest pertinent information will not become a critical path matter because it should be largely completed before the prehearing process begins. Moreover, all hearing requesters should be better informed with respect to the subject matter, and they should be able to frame meaningful and material issues for litigation as opposed to the many frivolous contentions that are heard under the regulatory structure of subpart G. Finally, the establishment of the Pre-License Application Licensing Board to hear and rule on document production controversies should assure that the delay attendant to legal posturing over document production will not impact the hearing schedule. In sum, the proposed regulations would, if promulgated, remove one of the greatest causes of delay from the NRC adjudicatory hearing process.

The foregoing endorsement is not without qualification, however. First, the concept of the LSS, which is being estab-

lished at great expense, should not be used for other NRC hearing proceedings. This judgment is reiterated in the NRC's proposal; however, it is worth emphasizing here. In this case, -- involving a government applicant with respect to a license application having national implications, the creation of an LSS is, in my opinion, warranted. It would be inappropriate, however, in the instance of the usual license application involving private sector applicants, to create an LSS, and thereby fund party participants at the expense of either federal appropriations and/or license applicants and licenseholders.

Second, the scope of document production under NRC's proposal should be limited. The proposed rule contemplates that the LSS will house substantially all documents that are relevant to, or likely to lead to, the discovery of information that is relevant to the HLW licensing application. The proposed scope of document production is consistent with legal requirements governing discovery processes used by the courts and administrative adjudicatory tribunals where no bounds are established by rule. In the HLW licensing proceeding, the application of this legal standard, without question, will encompass thousands, perhaps tens of thousands, of documents spanning a timeframe from when man first documented consideration of high level waste issues to the present.

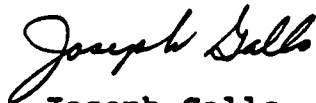
The requirement to produce documents that likely will lead to the discovery of relevant information will undoubtedly encompass materials far afield from the question of whether the Yucca Mountain facility should be licensed. Reasonable limits should be imposed, in the circumstances of the HLW licensing proceeding. The LSS Advisory Review Board and the Pre-License Application Licensing Board, even if so inclined, will not be able to impose reasonable limits. The time to take action is now, in the context of the exercise of the Commission's rulemaking authority. Topical guidelines are not an effective substitute. Indeed, if the proposed rule is not revised to include limits, the Commission, in its adjudicatory role, may later find its hands tied, given the strictures of the Atomic Energy Act, and the Administrative Procedure Act as interpreted by the federal courts, to impose document production limits during the course of the HLW licensing hearings.

The NRC, in the alternative, can in the context of this rulemaking, rationally fashion a basis for limiting the documents that must be made available to the LSS. It may be appropriate, for example, to exclude documents concerning the Deaf Smith and Hanford sites, or to limit the documents to those produced after the 1982 enactment of the Waste Policy Act, or to a date prior to 1982, when the primary research and development work being relied upon by DOE was completed. These suggestions, which require evaluation, are offered to demonstrate that it should be possible to limit document production by a rationally-based time period,

which the NRC, in the proper exercise of its rulemaking authority, can justify and establish by regulation. Meaningful limits on document production should reduce the cost of and the potential for delay in the use of the LSS; and such limits may well provide the type of alternative sought by Commissioner Roberts.

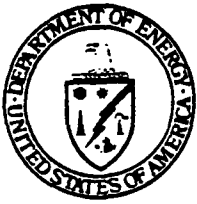
I appreciate the opportunity to submit these comments. They are being submitted after the time specified in the Federal Register, and I hope, nevertheless, that the Commission will have the opportunity to consider them.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph Gallo".

Joseph Gallo

JG/kit



Department of Energy  
Washington, DC 20585

DEC 22 1988

'88 DEC 27 P2:59

OFFICE OF  
DOCKETING  
BRANCH

Secretary  
U. S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
Attention: Docketing and Service Branch

Dear Sir:

The Department of Energy (DOE) has reviewed the notice of proposed rulemaking concerning the "Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste," published November 3, 1988, at 53 FR 44411. The DOE would like to submit the following comments on the proposed rule.

The Department of Energy fully supports the consensus that was reached in the negotiated rulemaking process as represented in the proposed rulemaking. While DOE, as well as other parties to the consensus process, would have preferred different courses in some respects than those finally taken in the proposed rulemaking, DOE believes that the consensus reached is a reasonable accommodation of all views. The DOE is particularly heartened by the Commission's expression in the Background section of the proposed rule that the Commission believes "the proposed rule, if implemented, sets in place a procedure for hearings that would allow the Commission to reach a decision on the construction authorization within the timeframe specified within Section 114(d) of the NWSA."

In keeping with the parties' agreement during the negotiated process not to take exception to items agreed to by consensus, these comments are suggestions and requests for clarification to specific details of the proposed rule.

1. The January 1991 date cited for availability of the Licensing Support System (LSS) (referenced in the proposed rule, SUPPLEMENTARY INFORMATION: Background, p. 44413, column 3, end of paragraph 1) is no longer a realistic date. Based on the findings of the preliminary design effort to date and on the best available estimates of an anticipated schedule of procurement for system hardware and software components, elements of the system will be available in late 1992, with comprehensive capabilities now estimated to be available in early 1993. Nevertheless, DOE reiterates its commitment that the LSS shall be in place prior to submittal of a license application as specified in the rule.

2. Section 2.1003 (c) (1), p. 44426, states that each party shall submit a header and an image for all graphic oriented documents including maps, photographs, and diagrams "which have been printed . . . or otherwise displayed . . . in any hard copy form and which are capable of being captured in electronic image to the LSS Administrator shall be in any form of image." We feel that this section could benefit from a clarification which emphasizes that the submission in any form of image, if that form of image is an already digitized "bit map" of the image, be within protocols established by the Technical Review Panel for approved digitizing equipment. The object here is to avoid having each submitter using different brands of equipment to submit digitized bit maps, thereby requiring the LSS data capture stations to carry each potential brand of equipment in order to be compatible with the equipment upon which the original image was digitized.

3. Sections 2.1003 (h)(1) and 2.1012 (a), pp. 44427 and 44430, require the DOE to obtain certification from the LSS Administrator 6 months prior to submission of a license application. It should be noted that DOE will need additional detail regarding the implementation of this certification requirement.

4. In Section 2.1004 (b), generally, p. 44427, clearer distinction should be made between a submitter and the Administrator for allowability of changes to header records once the 60-day (or 5-day) period (per paragraph (a)) has elapsed. Such distinction will address situations where the LSS Administrator should not be precluded from making changes to header records without submission of new header records, etc. Such changes to a header record are essential:

- a) to update assigned subject index terms as the thesaurus is enhanced and expanded,
- b) where a field containing pointers to cross-reference related documents subsequently added to the database must be updated,
- c) where the ability to annotate a document record to show later use(s) as exhibits to depositions and testimony may be required at a later time, and,
- d) for other similar situations, as yet undefined.

We recommend this capability for specifically identified situations where the nature of the change made by the LSS Administrator is that of routine maintenance to fields of data. These situations should be specifically identified in defined processes and procedures, and restricted to those situations where data were not available when the record was initially accepted into the LSS.

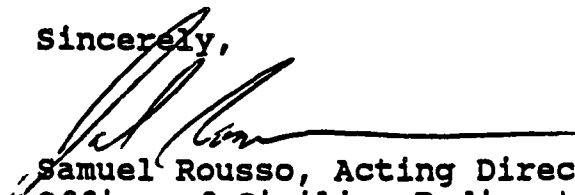
5. Also, in Section 2.1013 (c) (1), p. 44430, we suggest that the required password security capability for the electronic transmission of documents be acknowledged by the LSS Administrator and the Secretary as the de facto mark or signature of the submitter contingent upon the receipt of hard copy versions of a document to which a holographic version of a signature or mark has been affixed.

6. Section 2.1013 (c) (5), p. 44431, requires one signed paper copy of each filing to "be served promptly on the Secretary . . . ." We suggest that an additional copy be made a requirement, for a total of two. This change will provide one hard copy version of the filing for the process of entering an image of the filing into the document image retrieval capability of the LSS. This additional copy would allow the LSS Administrator to enter document images from a first generation version of the document and within as quick a timeframe as possible to provide rapid access to system users.

7. We would like again to bring to the Commission's attention that DOE and others made a number of suggested changes to 10 CFR Part 2 during the negotiations which were agreed to be deferred during the negotiated rulemaking. The Commission agreed to assess the possibility of conducting additional rulemaking proceedings relating to the Part 2 changes to streamline the hearings' process other than those relating to document production and discovery. DOE continues to believe that those suggested changes would assist in streamlining the licensing process and looks forward to further Commission consideration following the completion of this rulemaking.

We appreciate the opportunity to comment on this rulemaking.

Sincerely,



Samuel Rousso, Acting Director  
Office of Civilian Radioactive  
Waste Management



ER 88/971

2  
53 FR 44411  
United States Department of the Interior

OFFICE OF ENVIRONMENTAL PROJECT REVIEW  
WASHINGTON, D.C. 20240

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AMERICA

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DEC 5 1988


Secretary of the Commission  
Attention: Docketing and Service Branch  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Sir:

This is to inform you that the Department of the Interior is planning to respond to your November 3, 1988, Federal Register (Vol. 53, FR 44411) notice for comments on the Proposed Rulemaking on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste. However, we will be unable to reply by December 5, 1988. We hereby request a 2-week extension.

Please consider this letter as a request for an extension of time in which to comment on the proposed rulemaking. We hope this will be satisfactory.

Sincerely,

  
Bruce Blanchard, Director  
Environmental Project Review





**FLUOR DANIEL**

Fluor Daniel, Inc.  
3333 Michelson Drive, Irvine CA 92730  
(714) 975-2000

DOCKETED  
12/16/88

'88 DEC 16 A11:28

December 5, 1988

OFFICE  
DOCKETED  
12/16/88

Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Attention: Docketing and Service Branch

Proposed Rulemaking for a HLW Repository  
Licensing Support System (FR Doc. 88-25223)

This is in response to the notice of proposed rule making published in the November 3, 1988 Federal Register pages 44411 thru 44436. Our attached comments are categorized in three parts; general comments, comments on background explanations of the proposed rule and specific comments on the various sections in Subpart J.

We hope our comments will be helpful to the staff by pointing out areas where a more efficient cost effective LSS gains can be made.

Sincerely,

  
W. R. Mowry  
Attachment

WRM:sls

## Comments on NRC LSS Proposed Rule

### General Comments

The use of an electronic information management and retrieval system is highly desirable. However, caution must be applied lest the system will be over burdened with irrelevant documents and material. This system as proposed will be bloated beyond practicability and will be very expensive to load and maintain. Particularly if all HLW documents without regard to their direct application to the site involved in the licensing process. Responding to Commissioner Roberts' concern, we believe that a much more limited LSS would serve DOE & NRC's licensing interest. The system should only contain those documents presumed or judged to have direct licensing applicability to the Yucca Mountain, Nevada site or any other subsequently proposed alternative site for licensing.

The Licensing Support System Advisory Committee charged with developing the system needs and requirements appears to be too heavily weighted by those funded by the Nuclear Waste Policy Act (NWPA). Cost reduction seems to have had little priority. A much more cost effective system could be implemented if only documents with direct relevance to the licensing of the Yucca Mountain HLW repository or any other HLW/disposal site name subsequent to the Nuclear Waste Policy Act Amendment of 1987. There is no need to place all BWIP & Salt Repository information into the system. Only that information with direct safety analysis application should be a part of the LSS.

Some specific examples of the inexcusable largess in the background of the notice of proposed rule are:

#### FR 44420 Column 3 Typical Guidelines

No statement is contained indicating the requirement for document to have a material relationship with: licensing of the HLW repository of Yucca Mountain or any subsequent disposal site; transportation of HLW; the siting of MRS's, or the storage of HLW at a MRS.

#### FR 44421 Column 1 General Topics Item 2.

This appears to include all documents prepared under NWPA without reasonable qualification to those directly related to licensing Nevada's HLW site (Yucca Mountain). Inclusion of all documents used in the 1982 - 1987 site screening and selection process is morally corrupt and economically excessive.

FR 44421 Column 2 General Topics Item 10.

The qualifying statement is too broad. Insert "subsequently" before the last word considered. The paragraph should be modified to "Any document... Mountain, Nevada or any other site subsequently considered."

FR 44421 Column 2 General Topic Item II.

Again this is too broad. The statement should be modified to delete the phrase "or upon the design of any such theoretical repository". "Any such theoretical repository" would allow any and all HLW repositories analyzed. We would have no objection to any repository sites analyzed subsequent to the NWPA Amendments of 1987.

FR 44421 Column 3 General Topics Item 16.

The statement should be restricted to the documents for Yucca Mountain or sites studied subsequent to the NWPA.

FR 44421 Column 3 Specific Topics.

The listed items provide a good listing of items which should be applied to any site investigated subsequent to the NWPA Amendments of 1987. This would avoid loading the LSS with the plethora of studies, reports and files generated by DOE for other candidate sites.

FR 44425 Subpart J. Specific Comments

Except for a few sub-sections being specifically commented on later, the content of Subpart J is appropriate and well stated.

Subpart J Section 2.1000.

The scope should be limited to documents supporting a license application submitted for a site studied subsequent to the NWPA Amendment of 1987.

Subpart J Section 2.1002 (a)

The section contains no limits on the material requiring placement in the LSS. Conceivably all NWPA related documents and filings by states indian tribes and other interested parties would be required to be appropriately coded, abstracted and placed in the LSS. Only documents from previous sites which have specially determined applicability to the application in question should be placed in the LSS.

Subpart J Section 2.1007.

The inclusion of the Uranium Recovery field office in the LSS system seems inappropriate to the offices intended purpose and the costs related with a LSS station there would be difficult to justify.

ATTACHMENT C

STATE OF NEVADA COMMENTS ON  
PROPOSED LSS RULEMAKING (53 FR 44411)

These comments are submitted on behalf of the State of Nevada in response to earlier comments on the Commission's proposed rulemaking, "10 CFR Part 2, Rule on the Submission and Management of Records and Documents Related to the Licensing of Geologic Repository for the Disposal of High-Level Radioactive Waste" (53 FR 44411) submitted by the U.S. Council for Energy Awareness (USCEA), the Edison Electric Institute (EEI), the Utility Nuclear Waste Management Group (UNWMG), and four utilities which own and operate nuclear power plants. We will refer to the commenters here collectively as "the utilities". Nevada's comments are submitted pursuant to the agreement reached among participants on the negotiating committee, and in accordance with the Commission's proposed supplementary information which provides, in part:

"Consistent with the negotiating committee's function to advise the Commission on the LSS rulemaking, the staff intends to submit the comments on the proposed rule to the Negotiating Committee for review and comment, at which time participants who approve the final negotiating text would be afforded a full opportunity to comment and respond to any criticism or potential revision of the text."

The Commission has the responsibility, under the Nuclear Waste Policy Act, to consider and act upon a Department of Energy application for a construction authorization for a repository within three years, or four years if the Commission extends the time period under §114(d) and (e) of the NWPA. The Act contains no consequences whatsoever for failure to

meet that congressional goal, however. But the Commission also has a significantly more important and substantive statutory responsibility under both the NWPA and the Atomic Energy Act. That responsibility is to authorize construction of a repository, and to license the receipt, possession and disposal of spent fuel and high-level waste at such a repository, only if it is satisfied that DOE has provided reasonable assurance that its standards contained in 10 CFR Part 60, and the EPA standards found in 40 CFR Part 191 (when finally promulgated) have been met and that the public health and safety will thus be adequately protected. The comments submitted by the utilities focus only on the timeliness of Commission action, and the cost of the proposed LSS, and totally ignore the more important, substantive responsibility facing the Commission: assurance of public health and safety, not for a forty year plant life, but for over three hundred generations. Indeed, if the utilities' recommendations were accepted in total, it is Nevada's view that the Commission's ability to meet its important public health and safety responsibilities might even be compromised.

Nevada supports the LSS rule as proposed. The rule is the product of a very successful negotiation process, during which all major interests, except the utilities, engaged in significant compromises. The give and take resulted in a proposed electronic discovery and motions practice system which will enhance the parties' ability to fully inform the hearing panel, and thus the Commission, on the difficult

issues involved in licensing a repository. It will therefore assist in meeting the Commission's ultimate health and safety responsibility.

The utilities' concerns focus entirely on the ability of the LSS to comply with the NWPAs guidelines for a Commission decision on the construction authorization, as well as the system's cost. They express concern, for example, for the "timely and cost effective licensing of a nuclear waste repository", and cite the "national policy favoring achievement of prompt and efficient waste repository licensing".

(Comments of Rochester Gas & Electric Corporation, P. 2)

We agree with the utilities that timing and system cost are legitimate concerns, though addressing neither concern is the responsibility of Nevada. They are not the concerns which justified Nevada's participation in negotiation of the LSS Rule. Rather, Nevada participated because of the commitment from the NRC staff, and later at the first meeting from all negotiating parties, including the utilities, that an electronic licensing support system would enhance discovery in the licensing proceeding, thereby better forming and resolving issues. That is, an LSS would make discovery faster, more efficient, not more encompassing. Nevada's interest in an efficient and fully informed licensing proceeding, made so in part by enhanced discovery capability, is coincident with the Commission's interest and concomitant responsibility to protect the public health and safety. We are convinced that the Commission's staff and negotiating team guided themselves

by that same interest and responsibility throughout the negotiation of the proposed rule.

The utilities' own cost analyses and comparisons fall short. First, they fail to take into account the fact that any other system, either hard copy or the microfiche-based system which they espouse, would be as labor intensive, potentially more time consuming, probably unwieldy, and more likely than not would involve as much cost as the proposed LSS. The system they recommend would not more greatly assist the Commission in meeting its congressional time goals, and would not provide the parties with effective and efficient document discovery. Most importantly, it would not give the Commission the commensurate higher level of confidence that all issues have been fully explored and that the public health and safety will be protected before the Commission arrives at its construction authorization decision.

The utilities assume that the proposed LSS will add to, rather than subtract from, the overall time period required for the Commission to arrive at a construction authorization decision. We do not agree with this view. Nevada is convinced, as are the other concurring members of the negotiating committee, that the proposed LSS will provide a greater possibility that the Commission can meet its congressional time goals, or at least reduce the time which would be necessary to reach a construction authorization decision using either traditional hard copy discovery, or the utilities' proposed microfiche based system.



The microfiche system which the utilities propose will not save time. They assume, unrealistically and optimistically, that their proposed system can improve upon LSS' projected time periods. For example, on page 9 of its comments, the EEI/UNWGMG suggests a period of twenty-four months for discovery as the minimum duration. If the LSS works the way the parties hope and expect, that time period can be reduced. On the other hand, without any LSS, and with either hard copy discovery or the proposed microfiche based system, a twenty-four month discovery period should, at a minimum, be doubled. Without some system such as that which the proposed rule incorporates it will be, in our judgment, virtually impossible for the Commission to come even close to meeting the congressional time goals.

The utilities' views do not balance cost benefits derived from saving time. As the DOE cost benefit analysis points out, for example, a reduction of even one year in the overall licensing period could produce, for the nation's nuclear utilities, enough savings by way of the avoidance of additional at reactor or other interim spent fuel storage costs, to justify the cost of the entire system. This fact was pointed out to utility representatives during the negotiation. We are at a loss to understand the utilities' inability, or unwillingness, to recognize it.

The utilities give passing recognition to one obvious benefit of the proposed LSS, but accord it virtually no weight in their arguments. That is the ability of such a system to

support an electronic motions practice. That alone, we are certain, would produce substantial savings of time in the overall licensing process, and thus, as mentioned above, a significant overall cost savings to the nation's nuclear utilities. While the utilities' comments seem to ignore this factor as well, we trust the Commission will not.

The utilities' stated concerns with respect to cost and timing are pretextual. The crux of their position is, we submit, found in the first paragraph on page 4 of the EEI/UNWVG comments. For ease of reference we here repeat that paragraph.

"In order for EEI/UNWVG and the electricity consumer to be able to accept the costs of a LSS system, we believe that the NRC must make significant additional changes to the procedures which the repository licensing hearing will follow."

Their real position thus seems fairly transparent. The Commission should either accept and adopt the utilities' proposed licensing reforms, or it will withhold its support for the LSS.

We do not propose here to respond in detail to the utilities' suggestions for licensing reform. Our position now remains the same as it was when those suggestions were raised before the negotiating committee. It is simply inappropriate to consider such fundamental changes in the Commission's methods of practice in the context of a rule designed to facilitate electronic document discovery. Nevada made clear, before and during the negotiations, that it would be perfectly willing to consider these proposals, some of which may indeed

have merit, in an independent rulemaking proceeding or negotiation, but, they are beyond the scope of the proposed LSS rule. The State made clear from the outset that it would enter into the negotiations, and do so in good faith, only if it was understood that any proposed changes would be discovery enhancing. In other words, the State would be willing to give up some of its rights to traditional, hard copy document discovery only in the event that whatever was substituted for that method enhanced the State's discovery, rather than detracted from it. By "discovery enhancing" we refer to means which render the parties' discovery more effective, and do not suggest that discovery under the proposed LSS should go beyond the scope of the traditional federal discovery rules. The utilities, on the other hand, are still attempting to eliminate whole categories of discovery. That is something which Nevada will continue to resist vigorously. But we remain willing to participate with the Commission and other interested parties in a review of the Commission's methods of practice, after the LSS is in place.

In conclusion, Nevada supports the adoption of the proposed LSS rule as agreed to by the concurring members of the negotiating committee. We feel compelled to restate the obvious, however. The purpose of the proposed LSS is to make it possible for the Commission to meet the NWPA's goal of a three or four-year time period to arrive at a construction authorization decision. Nevada recognizes that the Commission has an obligation to make a good faith effort to meet that

congressional goal. The State has an overriding interest in effective participation in the licensing process. In the course of the negotiations which produced the proposed LSS rule the State agreed to relinquish traditional hard copy document discovery rights, and in return received what we are confident is a vehicle which will allow for a more enhanced use of discovery, and thus a more effective means of participating in the licensing process, and assisting the Commission in fulfilling its ultimate responsibility; that is, a construction authorization decision based on a full and complete airing of all of the complex and novel technical issues, in keeping with its obligation to ensure the public health and safety. Our support for the proposed LSS rule remains contingent, however, on its discovery enhancing features, and its consequent contribution to our effectiveness in licensing.

# NATIONAL CONGRESS OF AMERICAN INDIANS

*Est. 1944*

## EXECUTIVE DIRECTOR

Suzan Shown Harjo  
*Cheyenne & Creek Nations*

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*Nez Perce Tribe*

#### SACRAMENTO AREA

Denis Turner  
*Rincon Band of Luiseno*

#### SOUTHEASTERN AREA

Billy Cypress  
*Miccosukee Tribe*

January 10, 1989

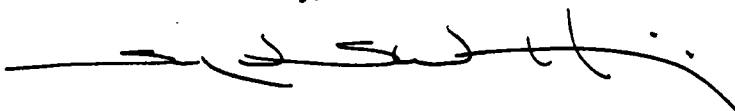
Francis Cameron  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

Dear Mr. Cameron:

Enclosed please find the response of the National Congress of American Indians to the comments of the nuclear industry on the Commission's proposed Licensing Support System rule. As our comments detail, NCAI continues to support the proposed rule.

Thank you for your consideration of our comments.

Sincerely,



Suzan Shown Harjo  
Executive Director

Enclosure

**RESPONSE OF  
NATIONAL CONGRESS OF AMERICAN INDIANS  
TO THE LSS RULE COMMENTS  
OF THE NUCLEAR INDUSTRY**

January 10, 1989

The Edison Electric Institute and Utility Nuclear Waste Management Group ("EEI/UNWMG"), together with several individual utility companies, have submitted comments to the Commission on the Proposed Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 53 Fed. Reg. 44411. As a member of the Commission's Licensing Support System Advisory Committee, the National Congress of American Indians ("NCAI") hereby responds to the comments of the nuclear industry, in accordance with the procedures agreed to at the Committee's last meeting.

NCAI continues to support the Licensing Support System ("LSS"), as detailed in the proposed rule, because the benefits to be derived--primarily in the form of improved access to program information--will greatly facilitate effective participation in the program on the part of Indian tribes and other potential intervenors. The cost of the system, while high, is justified by the benefits and is an insignificant fraction of overall nuclear waste program costs. NCAI supports the conclusion of the Department of Energy and the NRC Staff that the LSS will significantly shorten the time required to license a repository.

EEI/UNWMG have decided to oppose the proposed LSS rule basically for two reasons: 1) they believe the proposed system cannot survive a cost/benefit analysis; and 2) they believe that additional licensing reforms--beyond those in the proposed rule--which would drastically constrain interventions are necessary to achieve the

statutorily-prescribed three-to-four-year licensing period for a repository. These concerns are addressed below.

### **Cost/Benefit**

The nuclear industry argues that the LSS will be too costly and probably will cost much more than the approximately \$200 million estimated by the DOE. Past experience with large government contracts involving unique, high-technology systems would tend to support the contention that the LSS might end up costing considerably more than projected. However, these costs must be considered in relation to the overall costs of the waste program, in which context they are quite reasonable (about one percent, based on an overall program cost estimate of \$20 billion).

Moreover, the same factors which will drive up the cost of the LSS also will drive up the cost of the rest of the waste program. A repository is a unique, complex facility whose design, licensing, construction and operation will often involve the state-of-the-art in earth sciences and engineering. Under the circumstances, not to have significant cost-overruns would be unprecedented. In other words, while the LSS may in fact cost more than \$200 million, its fraction of the overall program cost is probably not likely to exceed the one percent currently projected.

It is on the benefit side of the analysis where we most differ with the position of the nuclear industry. As a threshold matter, it must be acknowledged that the prospective benefits of an LSS are perceived very differently by potential intervenors in the licensing process, such as Indian tribes and states, than by the nuclear industry and the federal government. NRC and DOE stressed from the beginning of this rulemaking process that their primary objective was to achieve licensing within the statutory three-to-four year period.

Potential intervenors have always been of the opinion that an arbitrary limitation on the Commission's licensing review was ill-advised. Public confidence in the repository program would be extremely hard-won under even the most ideal circumstances. Requiring the Commission to make this unprecedented, extremely complex and contentious determination in a period much shorter than has been necessary for much more routine reactor licenses unnecessarily undercuts both the reliability of the Commission's license review and public confidence in that review. That cost is too high a price for the couple of years that might be saved in getting a repository licensed.

We do not believe that the requirement is reasonable or achievable either with or without an LSS system, but we recognize that the requirement is law with which the Commission is compelled to attempt to comply, and we support the proposed LSS rule as a legitimate effort in that direction. We share the nuclear industry belief that repository licensing probably will not be achievable in four years. However, unlike the nuclear industry, we believe that a competently implemented and managed LSS definitely will shorten the repository licensing period by reducing the need for traditional, time-consuming discovery methods and by speeding communications.

As discussed above, the potential "expedition" benefit of the LSS--the only benefit about which the nuclear industry states concern--is not particularly important to us since we do not share the sense of need for such expedition. The LSS benefit which is vitally important to potential intervenors--and of no interest to the industry--is its potential to facilitate the thoroughness of program reviews. Unlike the nuclear industry, Indian tribes, states and other potential intervenors view the NRC licensing for a repository to be more than a troublesome procedural hoop through which DOE must jump on its way to repository waste acceptance.



To potential intervenors, there are serious questions as to whether, and if so under what conditions, the Yucca Mountain site (or any other prospective site) might be suitable for a repository. Indeed, many of them are just as firmly convinced that it is not suitable as the nuclear industry is convinced that it is. Particularly since Congress has chosen to forego the advantages of comparative characterization, the NRC licensing is the primary venue where those questions must be answered.

Indian tribes, states, local governments and citizens' organizations that might become intervenors in that process have a responsibility to their respective constituents to see that the resolution of those questions is done as meaningfully and correctly as possible. In other words, these entities' primary interest in this entire program--one which is manifestly consistent with the general public interest--is to make sure that the Commission's final determinations in this matter are as nearly correct as possible.

To discharge this responsibility, which is also mandated by the Nuclear Waste Policy Act ("NWPA") with respect to the host state and any affected Indian tribe, they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. They do not now have even marginally adequate access to that information. The LSS--even a flawed, incomplete LSS--promises to vastly improve that access.

The most important aspect of that access improvement is the proposed full-text search capability of the LSS. That is where the nuclear industry's alternative, a microfiche-based system, falls far short of what is needed. The nuclear industry would implement an electronic index only to the relevant information, which would be stored and provided in microfiche form. Unfortunately, the usefulness of such systems is far

too sensitive to the quality of the indexing. Particularly with respect to subject descriptors or abstracts, there needs to be near-perfect correspondence between the thought processes of the indexer and those of the subsequent searcher in order for the latter to find materials in an index-only system.

Full-text search, on the other hand, provides much greater power and flexibility in accessing relevant information. Surveys cited by the NRC staff in support of the LSS rulemaking consistently showed greater accuracy and efficiency of searching in full-text plus header systems--such as is envisioned for the LSS--relative to other alternatives. Competent full-text searching is itself an art which usually is not efficiently exercised by the uninitiated. However, the primary direct users of an LSS probably will be either information specialists who are assisting technical experts and lawyers or LSS-experienced experts and lawyers themselves. In the hands of such experienced specialists and experts, the proposed LSS will provide information access functionality, which is extremely important to potential intervenors in discharging their responsibilities under the waste program.

In sum, the key difference between the nuclear industry reading of the cost/benefit analysis for the LSS and ours is that we respectively place value on entirely different benefits. The nuclear industry concludes that the LSS fails the analysis because the only benefit, to them, is a license in under four years, and they do not believe the LSS will succeed in making that possible. The nuclear industry also probably considers the LSS benefit of improved access by intervenors to program information as a detriment from their point of view. They are not interested in having intervenors surface and ventilate licensing issues, because such issues have the potential to frustrate the industry's overarching goal of achieving a repository as soon as possible.

NCAI concludes that the proposed LSS passes the cost/benefit analysis because the key benefit of improved access to program information will certainly be served by the LSS and the costs of the LSS are not a significant fraction of the overall waste program costs. We also support DOE's and NRC's conclusion that the LSS would shorten the licensing period for a repository and, in that respect, would be likely to reduce overall program costs rather than increase them.

### **Other Licensing Reforms**

Because EEI/UNWMG's key concern is obtaining the fastest possible repository license, they recommend numerous other licensing reforms beyond the scope of the LSS which they claim are necessary to achieve a three-to-four-year licensing. These are the same "reforms" the industry has sought in NRC licensing procedures generally for more than a decade and would have the effect of making public participation in NRC licensing an exercise in utter futility.

To summarize, the industry would prefer, among other changes, to compel intervenors to satisfy a summary judgment standard in order to get contentions admitted, to make it virtually impossible to get late contentions admitted no matter what circumstances had changed and to arbitrarily limit discovery, such as depositions. EEI/UNWMG acknowledges that the proposed LSS rule already places new restrictions on these aspects of intervention--in large part because of their own insistence in the negotiated rulemaking process.

NCAI reluctantly agreed to these additional restrictions in light of the availability of the LSS and the countervailing benefits it would provide. We vigorously oppose any further restrictions along the lines suggested by the industry. Making NRC intervention virtually impossible to sustain might have the effect of shortening the

licensing process, but the cost in terms of forfeited public confidence in the Commission, its licensing and the whole waste program would far outweigh that perceived benefit.

The nuclear industry apparently has no qualms about curtailing or severely limiting public participation in the licensing process because it perceives only obstruction, rather than benefits, from public participation. The industry would seem to prefer a situation here like that in Europe, where meaningful public participation in the nuclear licensing process is negligible.

We would urge, in contrast, that even where obstruction is an element motivating participation, the process and its result are *more correct* and *more acceptable to the public* when the public participation process is conducted thoroughly and meaningfully, in its uniquely American, inelegant and sometimes inefficient way. This is true, moreover, even when the opponents of a proposal ultimately lose on the question of whether the proposal goes forward, as their concerns will have to be addressed one way or another, if not at the administrative level, then at the subsequent judicial level.

The industry would no doubt disagree, but we believe that this greater public acceptance which meaningful participation can provide is ultimately more valuable to the proponents of the repository or other proposal than would be the couple of years they might save by unduly curtailing participation. The NRC licensing process is particularly important in achieving a measure of public acceptance in the nuclear waste program because of controversy surrounding the environmental record of the agency charged by Congress with implementation of the program, DOE.

## CONCLUSION

NCAI reaffirms its commendation of the Commission for undertaking this rulemaking by negotiation and for including NCAI to represent national Indian interests in that negotiation. The result of the lengthy negotiation process necessarily represents a great deal of compromise on the part of all the parties. We do not like every aspect of the draft rule, but we certainly understand the rule and its derivation infinitely better than we would had we not been able to participate so thoroughly in its initial drafting. All those representing intervenor interests yielded on many points in the negotiations to accommodate the positions of the nuclear industry. We would not have done so in any case if we had known that the industry ultimately would not yield to accommodate the LSS concept as a whole.

The same considerations which led the Commission to undertake this rulemaking by negotiation--that the resultant more thorough participation would yield a better and more acceptable draft rule--should similarly lead the Commission to reject the nuclear industry's position in promulgating the final rule. The proposed system is admittedly elaborate and costly, but it promises to lead to more efficient and effective management of the vast quantity of information required for repository licensing and more meaningful participation in this important government process. The Commission should not be overly reluctant to engage in a bit of information age pioneering, as this is unquestionably the direction in which information management in complex government regulation and litigation is going. The costs are not out of line relative to overall program costs.

The alternative microfiche-based LSS proposed by the industry would not facilitate the thoroughness and quality of participation which is necessary to a successful,

relatively accepted repository program. For the same reason, the industry's other proposals to curtail participation should be rejected, as well.

NCAI urges the Commission to stick with the result of the rulemaking negotiations and to promulgate the final rule as proposed. That the proposal is acceptable to DOE, the agency with primary waste program responsibility and the license applicant, and the NRC staff, which is most familiar with the needs of the Commission's licensing process, strongly suggests that the industry's concerns do not merit rejection of the LSS as proposed.

# Intertech Consultants, Inc.

PLANNING - ECONOMICS - PROGRAM MANAGEMENT

January 3, 1989

Mr. Francis Cameron  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

RE: Submission of Comments to Public Comments that were  
Received by NRC Concerning the LSS Rule

Dear Mr. Cameron:

On behalf of Lincoln County, I have reviewed the public comments submitted to NRC concerning the LSS Rule and offer the following comments thereto:

1. As the only public comments received by NRC were those submitted by utilities, it would appear only the utilities are concerned about the proposed rule. As such any modification to the rule-making at this point would presumably be to the satisfaction of the utilities.
2. The utilities appear to be requesting rule-making and other administrative relief to expedite licensing in a manner which may jeopardize the full and effective participating rights of potentially affected parties. The NWPA provision calling for a three-year licensing period was enough of a time concession for the utilities. Any further concessions for the sake of expediency may cause harm to the balance of affected parties.
3. I share the utilities' concern about the cost-effectiveness of the system. Before settling upon a final configuration for the LSS, NRC may wish to assure itself of the cost-effectiveness of the system. It is important to local government that the costs of participating in and accessing the LSS not exceed the direct and indirect benefits that such units of government may derive from the system.

Page Two  
Mr. Francis Cameron  
January 2, 1989

I trust these comments will be of value in the final deliberations  
of the NRC on this matter.

Sincerely,

*Mike L. Baughman*  
by MTT

Mike L. Baughman  
President

MLB/mjj

ccs: Joan Craig, Lincoln County  
Judy Foremaster, City of Caliente

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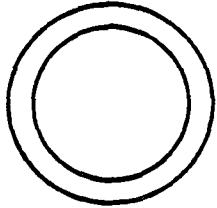


ATTACHMENT D

*Office of Civilian Radioactive Waste Management*

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*Office of Resource Management*



***Licensing Support System  
Benefit-Cost Analysis***

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***July 1988***

***U.S. Department of Energy  
Office of Civilian Radioactive Waste Management***

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**ATTACHMENT E**



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

The Honorable Philip R. Sharp, Chairman  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

The NRC has sent to the Office of the Federal Register for publication the enclosed final amendment to the Commission's rules in 10 CFR Part 2. The amendment would establish the procedures to govern the Commission's high-level waste licensing proceeding, including the use of the Licensing Support System, and electronic information management system, in the proceeding.

Sincerely,

William C. Parler  
General Counsel

Enclosure:  
As stated

cc: The Honorable Carlos J. Moorhead

ATTACHMENT F

NRC ISSUES REGULATIONS ON PROCEDURES FOR LICENSING HIGH-LEVEL  
RADIOACTIVE WASTE REPOSITORY

The Nuclear Regulatory Commission is changing its regulations to provide basic procedures for the licensing proceeding for a high-level radioactive waste repository, including procedures for the use of an electronic information management system for documents related to the proceeding.

The Department of Energy may submit an application to build and operate a waste repository at Yucca Mountain, Nevada, under the Nuclear Waste Policy Act. The NRC has licensing responsibility for the repository and would conduct the licensing proceeding and associated hearing.

The new procedures were developed in a negotiated rulemaking process by a High-Level Waste Licensing Support System Advisory Committee. The objective of the negotiated rulemaking was to provide one mechanism for helping to complete an effective review of DOE's license application within the three-year time period required by the Nuclear Waste Policy Act.

Under the new regulations, an electronic information system, known as the "Licensing Support System" (LSS), would be set up to contain documents of DOE and its contractors, and documents of all other parties to the licensing proceeding, interested governmental participants and potential parties and their contractors. Once the license application is filed, the system would contain the official record materials of the licensing proceeding. All

parties to the proceeding would have access to the system from individual computer facilities.

DOE has assumed responsibility for designing the LSS consistent with the requirements of the new rule and will procure hardware and software.

A Pre-License Application Licensing Board designated by the Commission will rule on all petitions for access to the LSS from individual computer facilities during the pre-license-application phase, disputes over whether specific documents should be entered into the LSS and other related disputes.

Computer terminals for access to documents in the LSS will be available to the public at NRC and DOE headquarters and public document rooms near the repository site; at NRC regional offices; at Las Vegas, Reno, and Carson City, Nevada; and at locations in Nye and Lincoln County, Nevada.

In the pre-license-application phase, public access to the LSS through these terminals will be limited to the capability to search bibliographic headers for documents in the LSS, but not the full text of the actual documents. Access to complete documents identified by the bibliographic search could then be requested through the agencies' public document rooms or through the Freedom of Information Act.

Public access to the full text of all documents in the LSS (except for documents exempt under attorney-client privilege and certain other privileges and exceptions) will be provided after the notice of hearing is issued for the high-level waste repository licensing proceeding.

Until the LSS is operational (currently projected for 1992), the NRC and DOE public document rooms will continue the current practice of providing access to the paper copy or microfiche of agency public documents.

In addition to establishing procedures for the computerized LSS for documents, the amendments to the Commission's regulations establish criteria under which affected persons may formally participate in the licensing proceeding and establish rules for appeals, motions, discovery and other legal procedure matters.

The Director of the NRC's Office of Nuclear Material Safety and Safeguards is authorized to issue a construction authorization or a license to receive and possess high-level radioactive waste for the repository following a favorable initial decision by the NRC Licensing Board. Under the new regulations, the authorization or license could not be issued until the Commission completes a supervisory examination of (1) the issues contested in the proceeding before the Licensing Board and (2) issues about which the Director must make appropriate findings before issuance of a license.

A proposed rule on this subject was published in the Federal Register for public comment on November 3, 1988. Minor changes made in the final regulation are described in a Federal Register notice published on \_\_\_\_\_.



ATTACHMENT G

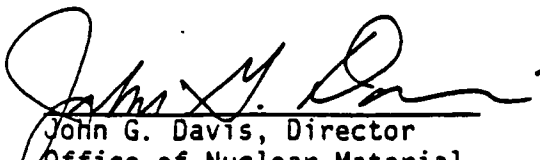
Agreement in Principle  
between the  
Department of Energy (DOE) and  
the Nuclear Regulatory Commission (NRC)  
on the Development of a Licensing Support  
System (LSS)

This Agreement in Principle (AIP) sets forth the mutual policy and commitment by the two agencies for prompt development of a Licensing Support System (LSS), in support of the Commission's high-level radioactive waste (HLW) licensing proceeding. The objective of the LSS will be to facilitate compliance with Section 114d of the Nuclear Waste Policy Act which requires a Commission decision on Construction Authorization for a geologic repository for HLW within three years of DOE submission of a license application. DOE and NRC recognize that one of the most significant contributors to the length of past licensing reviews has been the time associated with finding, sending, receiving and handling of information and data. This is true for both day-to-day technical work to address licensing issues as well as for filing of motions and for the discovery process associated with adjudicatory proceedings.

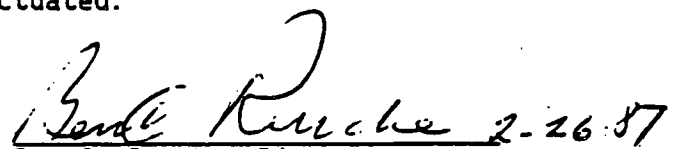
Accordingly, the parties agree that

1. There is a need to promptly develop the LSS as a major step in streamlining the licensing process.
2. In concert with DOE and other interested parties, a negotiated rulemaking should be initiated by NRC to describe the requirements for the system and for all parties in the licensing proceedings to fully participate in the use of the LSS in the licensing process.
3. In concert with the NRC rulemaking, DOE will have the responsibility for designing and providing the LSS and for incorporating on-line full text and image storage and retrieval techniques.
4. In the interim, until the LSS is operational, DOE and NRC both agree that there is a need to promptly collect documents significant to HLW repository licensing in a form that can readily be entered into the LSS.

The undersigned parties (or their successors), representing their Agency's commitments, shall confer not less than quarterly to assure that the objectives of this memorandum are being effectuated.

  
John G. Davis, Director  
Office of Nuclear Material  
Safety and Safeguards (NRC)

2/20/87

 2-26-87  
Ben C. Rusche, Director  
Office of Civilian Radioactive  
Waste Management (DOE)