

direct that additional discovery must take place.

Finally, the Commission is providing further information and a clarification on the responsibilities of LSN participants in regard to the three classes of documentary material in § 2.1001. These three classes are:

1. Any information on which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in the HLW proceeding;

2. Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information noted in item 1 or that party's position; and

3. All reports and studies prepared by or on behalf of a potential party, interested governmental participant, or party, including all related "circulated drafts" relevant to the license application and the issues set forth in the Topical Guidelines, regardless of whether they will be relied upon or cited by a party.

The first two classes of documentary material are tied to a "reliance" criterion. Reliance is fundamentally related to a position that a party in the HLW licensing proceeding will take in regard to compliance with the Commission regulations on the issuance of a construction authorization for the repository. These compliance issues take the form of "contentions" of law or fact that a party has successfully had admitted for litigation in the HLW proceeding under § 2.1014(a)(2) of the regulations. The third class of material, "reports and studies prepared for or on behalf of the potential party, * * *" has meaning independent of any contentions that might be offered. The material in this class must be available on the LSN regardless of whether it has any relation to a contention offered at the hearing. It is also a likely source of the material that a party would use to develop its contentions. "Reports" and "studies" will also include the basic documents relevant to licensing such as the DOE environmental impact statement, the NRC Yucca Mountain Review Plan, as well as other reports or studies prepared by a LSN participant or its contractor.

To fall within the definition of "documentary material", reports or studies must have a nexus to both the license application (emphasis added) and the Topical Guidelines contained in NRC Regulatory Guide 3.69. This dual requirement is designed to ensure that LSN participants do not have to identify, and include as documentary material, reports or studies that have no bearing on the DOE license application

for a geologic repository at the Yucca Mountain site, such as reports or studies on other potential repository sites or on issues outside of the NRC licensing criteria. In addition, § 63.21 of the Commission's regulations requires that the DOE Environmental Impact Statement (EIS) must accompany the license application. Therefore, reports and studies relevant to issues addressed by the DOE EIS must also be made available as Class 3 documentary material. This is also consistent with the coverage of the Topical Guidelines.

To assist participants in identifying documentary material that may be relevant to the future license application in the time period before it is submitted, the Commission is recommending that LSN participants use the NRC Yucca Mountain Review Plan (NUREG-1804, Rev. 2, July, 2003) as a guide. The Yucca Mountain Review Plan provides guidance to the NRC staff on evaluating the DOE license application. As such, it anticipates the form and substance of the DOE license application and can be used as a reliable guide for identifying documentary material.

The Commission also notes that the history of the LSN and its predecessor, the Licensing Support System, makes it apparent it was the Commission's expectation that the LSN, among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application. These purposes still obtain. Nonetheless, the Commission is clarifying that, because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted by the Presiding Officer in the proceeding, an LSN participant would not be expected to identify specifically which of its documents fall within either Class 1 or Class 2 documentary material in the pre-license application phase.

In this regard, the Commission still expects all participants to make a good faith effort to include on their LSN document collection servers all of the Class 1 and Class 2 documentary material that reasonably can be identified by the date specified for initial compliance in § 2.1003(a) of the Commission's regulations. Thereafter, in conjunction with its license application submission, DOE would be required to supplement its Class 1 and Class 2 documents to the degree the application

makes it apparent the scope of the DOE documentary material in those classes had changed, a process that might well be repeated by all parties following the admission of contentions. Finally, as part of the regular post-contention admission discovery process under § 2.1018, a party could be required to identify the specific documents that comprise its Class 1 and Class 2 documentary material. As a consequence, while it is not possible to say there are no special circumstances that would necessitate a ruling by the PAPO on the availability of a particular document in the pre-license application stage based on its Class 1 or Class 2 status, disputes over Class 1 and Class 2 documentary material generally would be of a type that would be more appropriately raised before the Presiding Officer designated in the Notice of Hearing during the fifteen months following the admission of contentions that are allotted to the NRC staff to complete the Safety Evaluation Report in its entirety.

IV. Exclusions

The Commission has reviewed its procedural rules for the HLW licensing proceeding, including the LSN requirements, to assess whether they appropriately reflect the evolution of the relevant technology, law, and policy since the rules were originally promulgated in 1987, being mindful of a recent report by the House Committee on Appropriations, issued July, 2003, expressing concern on the extent of documentation that DOE may be required to provide as part of the LSN. The Committee encouraged the Commission to review its regulatory requirements regarding the LSN to ensure that they do not require the duplication of information otherwise easily obtainable, focus on information that is truly relevant to the substantive decisions that will have to be made, and establish a time frame in accord with the traditional conduct of an adjudicatory proceeding.¹ Based on our review, the Commission has determined that the LSN rule could be further revised to address the Committee's concerns, while still maintaining the overall purpose and functionality of the LSN.

The Commission is proposing to revise § 2.1005 of the rule to specify an additional category of documents, "congressional correspondence", that may be excluded from the LSN. Section 2.1005 of the Commission's regulations establishes several categories of documents that do not have to be

¹ H.R. Rep. No. 108, 108th Cong. 1st Sess. (2003).