

19. HEARING PROCESS OVERVIEW

This section presents an overview of the ASLBP formal, trial-type hearing procedures, such as would be applicable to the HLW repository proceeding, and provides the context for how documents from the discovery (LSN) phase are introduced into an NRC docket via the administrative process. Additionally, it provides insight on the NRC's requirements with regard to data formatting, data exchange, and bibliographic controls outlined in 10 C.F.R. Part 2, Subpart J.

19.1 Pre-Hearing Stage

19.1.1 Requests for Hearing and Designation of Licensing Board(s)

An ASLBP case generally begins when the Commission, through SECY, sends ASLBP one or more requests for hearing (possibly with some related documents, including the Federal Register notice in response to which the hearing request(s) has/ve been filed), and directs the ASLBP to conduct a hearing. (This generally will be the first item in any "official record" of any case - called the "Hearing Docket" at the NRC.) The Chief Administrative Judge then issues an order assigning an Atomic Safety and Licensing Board of three judges to the case (which will be filed with SECY and be the next item in the official record). In complex proceedings such as the high-level radioactive waste repository case, more than one Board may be assigned to different parts of the case.

For the Yucca Mountain case, DOE's license application must be filed in electronic format capable of being uploaded into the Agency's EHD, which will reside in ADAMS.

19.1.2 Licensing Boards

Each Licensing Board consists of a legal judge who will chair the Board, along with two other judges who are both generally technical/scientific judges. During the proceedings, the Chairman of the Board will "direct" the proceedings and preside at all pre-hearing conferences and hearing sessions. Although the Chairman acts on behalf of the Board on some procedural matters, all three judges participate in rulings (by majority vote if all are not in agreement) on all significant matters such as discovery disputes, disputes over whether particular evidence is admissible, the final decision "on the merits" of the case, etc.

19.1.3 Pleadings

During the pre-hearing stage of the proceedings, the parties or their lawyers will file various papers called "pleadings" (documents in which parties "plead" their case/viewpoints/arguments on anything in dispute - for example, motions, briefs, petitions, responses, contentions, etc.). These are required to be filed with SECY in the official Hearing Docket and will also become part of the official record.

For the Yucca Mountain case, pleadings are to be submitted electronically via the NRC's EIE process.

19.1.4 Pre-Hearing Issuances

Also during the pre-hearing stage, various orders, memoranda, notices, and other issuances will be sent out by the Licensing Board (or its Chairman on behalf of the Board) at various points, generally in response to pleadings but sometimes on the Board's own initiative, as needed. These may be short issuances on "procedural matters" (setting deadlines for the filing of various motions, etc.), or longer issuances on various legal matters (such as discovery-related motions, motions "in limine" to limit or exclude certain evidence that is expected to be presented at the hearing, summary disposition motions, and a multitude of other matters that may arise in a legal proceeding). All issuances will be filed with SECY to be made part of the official Hearing Docket.

For the Yucca Mountain case, issuances will be released electronically via the NRC's EIE process.

19.1.5 Discovery

Except as needed to resolve disputes on discovery issues, the Licensing Board does not take part in discovery, which is between the parties, and is a method for parties to learn about other parties' evidence in preparation for the hearing (so that the hearing will be more "to the point" and organized, and less a Perry-Mason-like "trial by ambush," a generally discredited model for litigation). Discovery may include requests for each other's documents, written questions called "interrogatories" and "requests for admission," "depositions" (verbal questioning of a witness that is transcribed), and other methods.

The LSN is designed to simplify discovery by doing away with party requests for documentary information by requiring all parties to put all their documentary material in the LSN so that all other parties can get access to it.

19.1.6 Pre-Hearing Conferences

Prior to the actual evidentiary hearing, pre-hearing conferences may be held for various purposes, including scheduling of various steps in the proceeding; narrowing the issues to get them into more organized and manageable form, etc. These conferences may be held in person or by telephone or video-conference, and generally will be transcribed, with the transcripts made part of the official record maintained by SECY. Pre-hearing conferences generally will consist of discussion between the judges and attorneys (and parties representing themselves), and often will include more formal "legal argument" by attorneys (and parties representing themselves), and generally will not include witness testimony or the introduction of exhibits, but may in certain circumstances. An order may be issued after a pre-hearing conference, in the same manner as all other pre-hearing orders (filed with SECY with copies sent to the parties).

19.1.7 Witness Lists, Pre-Filed Testimony, and Exhibits

At some point near the end of the pre-hearing stage, the parties will file their witness lists, the pre-filed "direct" testimony of witnesses, and their pre-filed exhibits, according to deadlines that have previously been set by order. These documents, and non-documentary electronic and physical exhibits, will be filed with SECY.

For the Yucca Mountain case, pre-filed testimony and exhibits, unless they are classified, safeguards, physical things, etc., must be filed in electronic format capable of being uploaded into the EHD, which will reside in ADAMS.

19.1.8 Interlocutory Appeals

It is possible during the pre-hearing stage that some Licensing Board orders may be appealed to the Commission on an "interlocutory" (interim) basis. In this event, there will likely be an order issued by the Commission that will be entered into the official record in the same manner as pleadings and Licensing Board orders. (Most Commission orders and any Licensing Board orders that dispose of any part of a case or are otherwise considered significant will be published in the *Nuclear Regulatory Commission Issuances*, and will also be included in Westlaw and Lexis.)

19.2 Hearing and Decision Stage

19.2.1 Preliminary Matters

The hearing will begin with the Licensing Board Chair introducing the Board and all attorneys and unrepresented parties introducing themselves. From the first word spoken "on the record" as indicated by the Chairman of the Board, everything said aloud during the hearing will be transcribed, unless the Chair affirmatively announces a recess or other adjournment to go "off the record." There may be some preliminary matters at the beginning of a hearing session, involving the filing of documents that need to be filed, possible verbal motions, rulings on various issues, etc. Anything filed at this point would be made part of the record by their introduction at the hearing, and would later be filed with SECY along with the rest of the record created on that day (week, etc.) of the hearing.

For the Yucca Mountain case, all transcriptions will be loaded into the EHD on a daily basis to be available for review and search by the parties the next day.

19.2.2 Opening Statements

After all preliminary issues have been taken care of, each party (through counsel if represented by an attorney) may be given the opportunity to make an "opening statement" to explain what it intends to show in the hearing.

19.2.3 Presentation of Evidence

After opening statements, the presentation of evidence begins. The order of the parties' presentation of their witnesses and evidence likely will have been determined prior to the hearing. The evidence may include witness testimony (either pre-filed "direct" written testimony offered by one side, deposition written testimony consisting of questioning from both sides, or live verbal testimony in response to questions at the hearing) and exhibits in various forms. Generally, the testimony of a witness or panel of witnesses would begin with his or her pre-filed "direct" testimony, which would be noted for the record at the point at which it would be presented, with any corrections that are necessary, followed by questioning of the witness at the hearing by the various lawyers and unrepresented parties (or spokespersons for various groups of parties with similar interests).

19.2.4 Testimony

"Direct" testimony is testimony elicited by questions from the lawyer, who is offering the testimony of his or her own witness (or witness panel), through "direct examination." NRC cases differ from regular court cases in that often the direct testimony is pre-filed in written form, as noted above. The other form of questioning and testimony is "cross-examination" by other parties of each other's witnesses, with each party generally having the right to cross-examine the witnesses of all other parties. All direct examination, cross-examination, "redirect," "recross," and back-and-forth continuation of questioning of one witness (or witness panel) generally will be completed before the questioning of another witness starts. The judges may also question witnesses as necessary to clarify various issues. The presentation of all verbal testimony proceeds in question-and-answer format, and if any "objections" to questions or answers are raised, the Board generally rules on those before the question-and-answer process continues.

19.2.5 Transcript

All of the on the record testimony and interaction between the Board and the attorneys and parties will be memorialized via a transcript prepared by a court reporter. However, if portions of the hearing are closed for security reasons, portions of the transcript, as well as any exhibits that refer to safeguards, classified, proprietary, or other confidential material, may be sealed.

For the Yucca Mountain case, all transcriptions will be loaded to the EHD on a daily basis to be available for review and search by the parties the next day.

19.2.6 Exhibits

By pre-filing exhibits and allowing pre-hearing “in limine” objections beforehand, much of the work of “authenticating” exhibits to establish a basis for their admission can be avoided at the hearing. If necessary, a witness may be called upon to “authenticate” an exhibit (i.e., say the exhibit is what it is purporting to be) through testimony. The process is as follows: the lawyer “proffering” the exhibit will have the exhibit “marked for identification” (the court reporter will do this or it may have been done prior to the hearing) and will give or otherwise display it to the witness through whom it is to be introduced. After asking the witness certain questions to establish a “foundation” for relevance, etc. (grounds for finding the exhibit appropriate for entry into the record in the case), the lawyer will ask that the exhibit be introduced into evidence. If there is no objection, the exhibit is introduced and the court reporter marks it (with a pen or stamp or electronically) as “admitted.” If there is an objection, the Board generally will rule on the objection before the process continues. If the objection is “overruled” and the exhibit admitted, it will be physically (or electronically) marked “admitted” by the court reporter; if the objection is “sustained” the exhibit will be marked “rejected.” In both cases it will become part of the official record, but it will not be considered by the Board in making its decision if the exhibit is rejected.

19.2.7 Demonstrations

There may also be various demonstrations (using charts, models, etc.) during the hearing, which may or may not be introduced into evidence as some form of exhibit, depending upon what the parties request, any objections raised and rulings thereon, and the capabilities available to put electronic demonstrations into the record. Even if an objection to a demonstration is sustained, there may be a need to allow some form of reference to it, as “rejected,” into the record.

19.2.8 Legal Argument and Rulings During Hearing

During the hearing various legal issues may arise that lead to verbal motions and/or legal argument by counsel (and unrepresented parties) and verbal rulings by the Board (often after conferring privately off the record). All of this will generally be reflected in the official record through the transcript, unless a written order subsequently is issued. Generally, however, a hearing will consist almost totally of the presentation of evidence through the introduction of pre-filed testimony, questioning witnesses verbally during the hearing, and the introduction of exhibits through the testimony of witnesses, as recounted above.

19.2.9 Closing Arguments and Closing the Record

After all the parties have presented their witnesses and exhibits, they may be provided an opportunity to make closing arguments (through their lawyers if they have them), which will also be transcribed. At that point, or some time shortly thereafter, the Board may order the record closed relative to the matters at issue in the hearing.

19.2.10 Post-Hearing Written Arguments of Counsel and Initial Decision of the Board

After the hearing, the parties generally will file “proposed findings of fact and conclusions of law,” along with legal briefs, and responses to each other’s proposed findings and conclusions. The Board members will then begin the deliberation process, conferring off the record with each other, and referring as necessary to the record (see 19.2.1. above), to the parties’ proposed findings and conclusions, and to relevant law. Through this process an initial decision will be drafted, which the Board will, when it is completed, sign and issue. If all judges do not agree on all issues, one or more judges may issue dissenting and/or concurring opinions on various issues, which will be attached to the majority decision.

For the Yucca Mountain case, decisions, like issuances and orders, will be released electronically via the NRC’s EIE process.

19.2.11 Initial Decision and Reconsideration/Reopening Requests

Under NRC practice, a Licensing Board “initial decision” on the merits of any of the particular matters in controversy need not await the receipt of all evidence on all issues in the case. Instead, the Board can issue a partial initial decision on the merits of any significant portion of the case in which the evidentiary record is complete, although any “final” decision by a Board (or Boards) authorizing a requested licensing action generally must abide the resolution of all issues in the case. Moreover, parties have the opportunity to request that the Board “reconsider” an initial decision or that it “reopen the record” relative to the issues involved in that decision. Either request could lead to additional legal arguments and pleadings and the latter request, if granted, could result in additional discovery and evidentiary hearings on the issues involved.

19.2.12 “The Record”

During the process described above, a hearing record is being created and maintained by SECY as part of the EHD. This record includes all pleadings, orders, transcripts of pre-hearing conferences and hearings, and exhibits. (The record may also contain some “limited appearance statements,” which are written letters or other documents or transcribed statements of members of the public made during public limited appearance session scheduled by the Licensing Board.) Although there generally will be only one official record for each case, various parts of a case may at various points be separated out in various ways, according to the matters at issue.

For the Yucca Mountain case, the official record materials must be submitted in such a way, and in such electronic formats, as to allow those records to be retired according to NRC and NARA guidelines.

19.3 Post-Decision Stage

In addition to filing an appeal with the Commission from a Licensing Board prehearing decision granting or denying a hearing request, parties can seek Commission review of any Licensing Board initial decision, which can include challenges to Board pre-hearing rulings on items (e.g., discovery disputes) relating to the subject matter of the initial decision. Once the Commission has resolved all review requests regarding Licensing Board initial decisions and related rulings, parties to those appeals generally may seek judicial review of the Commission's determination on the requested licensing action in an appropriate United States Court of Appeals and, thereafter, in the United States Supreme Court. At any of these review levels, matters may be remanded to the Licensing Board for further proceedings that could involve additional legal arguments, pleadings, discovery, evidentiary hearings, and Board decisions.