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September 14, 2001

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Attn: Rulemaking and Adjudications Staff

Re: Comments on 66 Fed. Reg. 19610 (April 16, 2001), Changes to Adjudicatory Process, Proposed Rule.

The comments that are herein presented are based, in part, upon commentor's personal experiences as a *pro se* petitioner in three Nuclear Regulatory Commission (NRC) Atomic Safety and Licensing Board Panel (ASLBP) Subpart L proceedings—Docket No. 40-3453-MLA4/5, where standing was granted, and Docket No. 40-8681-MLA-8, where standing was not granted. These proceedings involved source material licenses at a former uranium mill site and an operating uranium mill sites.

Comments will generally follow the outline of the April 16 Federal Register Notice (FRN).

I. Background

Comments:

1. Page 19610, col. 2.

The first citation on the first page of the FRN is a 1975 Commission decision (CLI-75-1). Throughout the FRN other NRC documents (e.g., CLI-81-8; CLI-82-2) are also cited. Many of these cited documents are not available on the NRC Website related to the proposed rule, nor have then been made available on ADAMS. The NRC certainly could have made sure that all NRC documents that were cited in the FRN were readily available to the public on the NRC Website.

2. Page 19610, col. 3.

The FRN states that "one of the cornerstones of at the NRC's regulatory approach has always been ensuring that its review processes and decisionmaking are open, understandable, and accessible to all interested parties."

I would question that statement as it applies to parties that have an interest in uranium processing sites.

In order to ensure that the NRC review and decision making processes are open,

understandable, and accessible, the NRC needed to make all decision making records publicly available in a timely manner and place those documents in the vicinity of the uranium processing and disposal sites. The NRC did not do this.

Although the NRC established Local Public Document Rooms (LPDRs) at the sites of nuclear power houses, the NRC did not maintain the LPDRs that had been established by the Atomic Energy Commission (AEC) in communities neighboring uranium mills. Eventually, in the early 1980s, the NRC just dropped uranium mill LPDR program without public notice.

The cost of keeping up with NRC decision making by ordering documents through the NRC Public Document Room, would become prohibitively expensive. Note too that a large population surrounding several of the uranium mill sites lived in rural areas and spoke English as a second language, or did not speak English at all.

Although the Public Document Room program was in existence, the NRC did not place any information in the vicinity of uranium mills regarding the LPDR program.

Additionally, from during the time that the Uranium Recovery Field Office operated (about 1982 to 1994) approximately 20,000 documents pertaining to Uranium Mill Tailings Radiation Control Act (UMTRCA) Title I and Title II sites, which should have been made publicly available, were withheld from the public. The NRC's failure to make these documents publicly available in a timely manner constituted a gross violation of the Atomic Energy Act of 1954, as amended, (i.e., Section 114(e) of the Uranium Mill Tailings Radiation Control Act of 1978) and NRC regulation (i.e.,10 C.F.R. 2.790), and 5 U.S.C. 552.

As is often the case, the NRC states that they will ensure such and such and, then, does little or nothing to implement such assurances.

3. Page 19616, col. 2.

In a response to a comment regarding Commission review of the performance of licensing boards, the FRN states that "the Commission has been carefully monitoring all licensing board proceedings to ensure that they are being appropriately managed to avoid unnecessary delay."

That is either a boldly false statement, Commission's review process is totally inadequate, or the Commission is completely incapable of determining whether or not a proceeding is being "appropriately managed."

Any reasonable person who reviewed the conduct of the presiding officer in 40-3453-MLA-4/5, could only come to the conclusion that the proceeding was continuously, unreasonably, and illegally delayed to the complete detriment of the petitioner, who was granted standing in 1999 and 2000, and to this day has not had a hearing, and never will have a hearing.

I can only conclude that the Commission, in fact, does not see to it that all licensing board proceedings are appropriately managed.

In the new Part 2 there must be a process whereby a petitioner can appeal directly to the Commission if the petitioner believes that a presiding officer or officers are grossly mismanaging a hearing. By mismanagement, I mean, for example: a presiding officer failing to rule on motions (that demanded a ruling) that were submitted to the presiding officer and responded to by the parties; a presiding officer failing to rule on (or even subsequently mention) briefs that the presiding officer requested that the parties submit; a presiding officer failing to take actions that the presiding officer previously committed to take; a presiding officer deferring the submittal of the hearing file by the NRC staff (when there is no reasonable, or even stated, reason for such deferral); and a presiding officer granting continual delay in the proceeding (and initiating such delay themselves) without a basis in fact or law. When all these things, and more, happen in a single proceeding (as is the case in 40-3453-MLA-4/5) something is very wrong, and a petitioner should be able to take such a situation directly to the Commission, or other body, before everything gets completely out of hand.

The Commission has a duty to demonstrate to petitioners, especially pro se petitioners, who are at a distinct disadvantage, that the Commission will not tolerate mismanaged adjudications and unreasonable delay, no matter how beneficial such mismanagement or delay may be to NRC staff.

Statements by the Commission that they expect presiding officers/boards to manage all adjudications carefully and attentively are meaningless without an established procedure to grant remedy when proper management does not happen. Thus far, the Commission's oversight has been inadequate.

It should not be the responsibility of a petitioner to make sure that the presiding officers/boards do their jobs, but when a petitioner has to make it their job, it should not be a difficult and complex procedure with little or no remedy available. Gross violations of due process cannot just be left to a vague notion the Commission is watchful, because the Commission is not.

There has to be an established procedure within Part 2 whereby a petitioner can readily seek remedy when a presiding officer in completely indifferent to an administrative judge's most basic responsibilities pursuant NRC regulation and the Administrative Procedures Act.

4. Page 19617, col. 1.

Here, the FRN mentions NRC staff requests for additional information (RAIs) and licensee responses as sources of information regarding licensing actions. Unfortunately, it is now an NRC habit to make verbal RAIs; thus, members of the public, including petitioners have no way of ascertaining whether an RAI has been completely or appropriately responded to.

NRC staff should return to its former practice of putting RAIs in writing. When the NRC publishes, or intends to publish an FRN providing an opportunity for comment or a hearing, it is especially incumbent upon NRC staff to document the RAIs and make

them publicly available, so that they will be included in the record of any proceeding that might ensue. It is irresponsible for NRC staff to do otherwise.

With respect meetings between NRC staff and licensees, these meetings often take place in Rockville, or some other inconvenient place, many miles from the site of the subject facility.

The NRC should establish a means for interested persons to participate (via teleconference line) in any meeting that is attended by NRC staff and a licensee, even if the meeting is called by another agency.

5. Page 19622, col. 1 (Standing).

The FRN states that the "Commission expects its boards and presiding officers to look to the ample NRC caselaw on standing to interpret and apply this standard."

What this statement really means is that the boards and presiding officers should to look to how the Commission has gradually and inexorably sought to limit public participation in adjudicatory proceedings for appropriate guidance.

As it currently stands, Subpart L (10 C.F.R. 2.1205(h)) states that "the presiding officer also shall determine that the requestor meets the judicial standards for standing."

The NRC does not state what these "judicial standards for standing" actually are. Apparently the NRC intends to rely solely on the very limited and severely restricted NRC case law, rather than U.S. Circuit Courts and U.S. Supreme Court decisions as its "judicial standard."

The NRC should not rely on NRC case law as a "judicial standard." The NRC should go to the broadest judicial standards that have been established by the Circuit Courts and the Supreme Court.

Additionally, the NRC should provide information on the NRC Website to the public and potential petitioners (who might be appearing *pro se*) so that the public or potential petitioner can have a firm grasp of what is actually meant by "judicial standards for standing." The NRC should provide the text of all decisions upon which the NRC intends to rely upon when determining standing.

6. Page 19622, col. 1-2 (Discretionary Intervention).

At this time the so-called "NRC case law" that has been built up over the years prevents petitioners that have a reasonable interest in a licensing action, and have legitimate issues that have not heretofore been adjudicated, from bringing those issues forward in a hearing. The demands that the NRC makes on a potential petitioner, particularly a *pro se* petitioner, who might not have access to legal advise or "expert opinion" are unreasonable.

The NRC should adopt a simpler test for permitting discretionary intervention.

One standard should be the fact that the petitioner lives within the community near to a NRC licensed facility or lives within a community that is continuously impacted

by NRC licensed activities; for example, a community that serves as a daily transportation corridor for NRC licensed material on its way to an NRC licensed facility.

Another standard should be an ability to bring forth important health, safety, environmental, and legal issues that have previously not been considered or adjudicated by the NRC.

These two standards should be sufficient to assure a meaningful hearing on issues that will contribute to a sounder legal basis for NRC regulation and encourage the NRC to address health, safety, and environmental issues in a more complete and timely manner.

The NRC should not cut petitioner's out of the hearing process, by denying standing, based upon the merits of the petitioner's concerns or contentions, as is now the case in Subpart L proceedings. The NRC should not deny standing based upon a determination that a petitioner's potential exposure to radiological materials could not possibly harm them, i.e., the merits of a petitioner's concern for their health and safety, as is now the case in Subpart L proceedings.

I do not think that such a simpler test will result in members of the public rushing to the NRC with requests for hearing. No matter how simplified, a hearing is a demanding process, especially for a *pro se* petitioner. It involves money, time, and effort, and inevitably leads to stress and frustration.

Having been involved in a hearing that was continuously delayed by both the licensee and the presiding officer, over my continuous objection, I think that the NRC's concerns regarding hearings being conducted in a timely fashion should be directed to the presiding officers themselves, as they can be the primary source of unreasonable and unwarranted delay.

6. Page 19622, col. 2-3 (Timings of Requests for Hearings/Petitions to Intervene and Contentions).

A Federal Register notice announcing a application and opportunity for a hearing should not be made until the NRC staff makes sure that the application has been been made publicly available on ADAMS. More than once has the NRC announced an opportunity for a hearing on an application that was not made publicly available until shortly before, or even after, the close of a suspense period. Lack of public availability of a the application should be an automatic justification for late filing of a request for hearing

The NRC staff should be required to promptly make publicly available all pertinent records pertaining to any application or licensing action, especially applications and licensing actions that have been noticed for hearing. Unfortunately, in the past, NRC staff has not always done this.

The NRC cannot equate documents being available on ADAMS with documents being available on the NRC Website.

The NRC should take into consideration the fact that not all members of the public have access to ADAMS. Also, some people who access ADAMS at a public

place, such as a library, are not able to print ADAMS documents that are longer than a few pages because they cannot download documents and it takes too long to print out ADAMS documents on a shared printer. That was my own circumstance for over a year.

It sometimes takes up to a week to receive a lengthy document from the NRC Public Document Room (PDR).

Whether or not a petitioner is required to submit contentions at the time of the request for hearing, there should be at least a 45-day period for submittal of a request for hearing.

Petitioners should automatically be able to supplement their request for hearing and add or amend contentions based upon additional information that is provided to the NRC staff by a licensee. A petitioner should not have provide any special justification for such supplementation.

In the discussion regarding contentions, the NRC does not make mention of the role of the hearing file. Shouldn't a petitioner have available the hearing file prior to any final submittal of contentions?

Considering the timing of the public availability of various pertinent records, it is totally unreasonable for the NRC to expect that all contentions can be submitted prior to a petitioner having access to all pertinent records. For example, in a previous local licensing action, the NRC noticed the opportunity for a hearing on a reclamation plan in 1994. The Draft Environmental Impact Statement (DEIS) and the Draft Technical Evaluation Report (DTER) were not issued by the NRC until January 1996, the Final Reclamation Plan was not submitted until October 1996, the Final TER was issued in March 1997, the Draft Standard Review Plan for the Review of a Reclamation Plan for Mill Tailings Sites Under Title II of the Uranium Mill Tailings Radiation Control Act was issued by the NRC in January 1999, the Final EIS was issued in March 1999, and a Supplement to the TER was issued in April 1999. From 1994 to 1999 numerous other reports, RAIs, responses to RAIs, etc., were generated.

Obviously, it would have impossible for any petitioner to form a complete set of contentions in 1994. Any petitioner should not have had to provide extensive justification for any additional contentions brought forward in a proceeding.

The best arrangement would be for the submittal of a hearing request within a 30-45 day time period, then an additional 30-45 day time period for the submittal of contentions, with a simple allowance for additional contentions based upon new information contained in the hearing file, submitted to the NRC by the licensee or formulated by the NRC (such as an EIS).

The NRC should return to its former practice of making publicly available the Memo Copy of the FRN announcing an application and an opportunity for a hearing.

At this time, NRC staff that the publicly availability of such Memo Copies are not in the interest of NRC staff or the public. This policy should change.

7. Page 19624, col. 3 (Other Proceedings).

I do not support the NRC's efforts to take proceedings on applications for reactor construction permits and operating licenses outside of the requirements for formal proceeding. Although there is legislation pending in Congress that would direct the NRC to do this, it is not in the best interest of the NRC, the public, prospective licensees, and prospective petitioners, for this major change in NRC policy to take place. The industry's desire to build additional nuclear power houses is the sole basis for this proposed change to Part 2. The NRC is deluding itself if thinks that this policy change will greatly enhance the possibility of a rejuvenated nuclear power industry.

8. Page 19627, col. 3 - page 19626, col. 1 (Subpart G)

Subpart G should continue to be used in all initial power reactor construction permit and operating license proceedings. The numerous, complex issues affecting the health, safety, and the environment of not just the community in the vicinity of a power reactor, but of the whole world, necessitates that all issues relevant to the construction and operation of any new power houses be addressed within a formal proceeding. The stakes are too high to limit the conduct of such a proceeding by restricting it to an informal hearing process.

9. Page 196.27, col. 3 - page 19628, col. 1 (Subpart L).

While some of a Subpart L proceeding might be an oral proceeding, having a whole proceeding based solely on oral testimony would be a serious mistake. A hearing based on oral testimony would unnecessarily and unfairly limit the ability of a petitioner, especially a *pro se* petitioner, to present their whole case and effectively rebut any presentations by the other parties. A *pro se* petitioner probably would not have the experience necessary to effectively present a case orally, while other parties who are represented by counsel experienced in presenting oral testimony would have an distinct advantage.

I have participated as a petitioner is a few teleconferences related to NRC proceedings. I have found them to be exceedingly difficult and unfair aspect of the hearing process. Oral argument does not give a petitioner a fair chance to consider and rebut statements made by the presiding officers, parties to a proceeding, and any other participants. Statements of dubious truthfulness and validity are made, and the petitioner does not have the wherewithal to immediately challenge those statements.

A determination as to whether an informal hearing is to be based on oral testimony, on written submissions, or a combination of both, should be the sole discretion

of the petitioner. Different petitioners have different experience, abilities, and limitations. Anything other than this would be a direct violation of due process.

Should a petitioner participate in an oral hearing, the petitioner and other parties should automatically be allowed to submit follow-up briefs following the oral hearing and the availability of the transcript of the hearing. The purpose of a hearing is to make sure that all the issues are fairly considered, not arbitrarily limit the ability of one party or another to present their case completely.

In long running, complex, or difficult cases it would be advisable that a 3-judge panel be appointed. That way the proper conduct of the proceeding is not dependent on the vagaries of a single presiding officer. A petitioner should have the right in any proceeding to request that a 3-judge panel be appointed, give the reasons for such a request, and have that request fairly considered by the ASLBP or the Commission.

9. Page 19628, col. 3 (Section 2.1206—Informal hearings).

Whether or not an informal hearing should be based on written submittals, an oral hearing, or a combination of both, should be the decision made only by the petitioner. The NRC should not favor one type of proceeding over another in Subpart L.

The FRN does not discuss where such "oral hearings" would be held. It is hard to believe that presiding officers/boards, counsel for NRC staff, and counsel for a licensee would wish to travel a couple of thousand miles in order to participate in an oral proceeding. Making travel arrangements for a time that was convenient to everyone would probably result in a lot of unnecessary delay.

Perhaps the NRC thinks that teleconferences qualify as "oral proceedings"? The FRN is not clear in this regard.

Teleconferences should definitely not be considered a proper substitute for an in-person oral proceeding. Not everyone has access to a phone conducive to conference calls. Also see discussion at 8., above.

If a party to a proceeding is not allowed to question a witness, then a party should be allowed anytime during a proceeding to present a question for the presiding officer to present to the witness.

The purpose of a proceeding is to air the factual and legal aspects of issues that have been placed in contention, resulting in a fair decision by the presiding officers/boards. It is not the purpose of the proceeding to unnecessarily limit and frustrate the presentation of relevant information that would lead to a sound decision in such a proceeding.

10. Page 19630, col. 2 (Regulatory Analysis).

From my experience, delay in a proceeding has been as result of the neglect of the proceeding by the presiding officer. If the NRC really wants to tighten-up proceedings

they must establish within Part 2 a regulation that states that if a party to a proceeding requests that a proceeding be placed in abeyance or that a proceeding be delayed that the party making the motion submit the request in writing and provide a factual and legal basis (in writing) for the request of such delay. Other parties should be allowed the usual 10 days to respond. The presiding officer should then be required to make a prompt written decision on such request.

A presiding officer's failure to even bother to respond to a written request for a proceeding to be held in abeyance and an opposing request that the proceeding not be held in abeyance (as happened in 40-3453-MLA-4) is inexcusable.

Part 2 should contain a regulation that states that if a presiding officer determines that a proceeding should be held in abeyance or be temporarily delayed, that such a granting of delay be based upon absolute necessity and be substantially justified. Such a decision should not be made on some vague notion that another decision, which might occur in another proceeding (to which a petitioner is not a party), before another agency or judicial body, might possibly moot the presiding officer's decision in the proceeding.

Part 2 should contain a regulation that states that if a presiding officer/board allows delay in a proceeding that as part of an order permitting such delay that the presiding officer/board will state specifically what specific date, event, or action will cause the proceeding to be taken out of the state of abeyance or delay. There should be no open-ended allowance of delay in a proceeding. A petitioner should not have to continually request that a presiding officer allow the proceeding to proceed. A proceeding should not exist in a state of limbo because of the failure of a presiding officer to make the proper rulings.

A presiding officer should not be allowed to state that there will be a delay until such and such a report is submitted by a party, whereby the presiding officer will make a decision regarding further delay; then, after that report is submitted, fail to take any further action. Incompetence by a presiding officer in the conduct of a proceeding should not be permitted within Part 2.

Presiding officers/boards have special responsibilities in proceedings with *pro se* petitioners to insure that proceedings are conducted properly. A *pro se* petitioner might not understand how far off the track a proceeding has gotten and what the proper remedy should be.

The Commission should also give direction to NRC staff. NRC staff should not stand idly by when a proceeding is being mismanaged. They should take the initiative and speak up when things are amiss. Just because a mismanaged case is to the staff's benefit does not mean that the NRC staff has no responsibilities with regard the proper management of a proceedings.

A review of 40-3453-MLA-4/5 would reveal that not once did the NRC staff call into question the presiding officer's management of the proceeding. Such a situation should not reoccur.

These comments will be supplemented by additional comments within the next

two days.

Respectfully submitted,

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