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USNRC

U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attention: Rulemakings and Adjudications Staff

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Dear Sir/Madam:

**PETITION BY THE STATE OF NEVADA FOR RULEMAKING TO
SPECIFY ISSUES FOR THE YUCCA MOUNTAIN MANDATORY HEARING**

The State of Nevada hereby petitions the Commission to issue a rule that would fill a gap in its current Rules of Practice by specifying the issues to be heard in the mandatory formal hearing that will be required should the NRC docket a Department of Energy ("DOE") application for a construction authorization for the proposed Yucca Mountain repository. In theory, this gap could be filled by a declaratory order. However, Nevada believes that a rulemaking proceeding is more appropriate because of the wide public interest in Yucca Mountain and the opportunities for participation by interested stakeholders that a rulemaking proceeding would afford.

In routine cases, the NRC Staff issues a notice of hearing or of an opportunity for hearing that specifies the scope of issues for such hearing, but the scope of issues in these routine cases is specified by regulation, and Staff exercises no judgment regarding the content of the notice. In the case of Yucca Mountain, the issues for the mandatory hearing are *not* specified by regulation, and it would be entirely inappropriate for the Commission to delegate this function to its Staff, who will be an adversary party in the proceeding.

Basis for the Petition

In most cases, NRC's Rules of Practice and underlying statutory law provide for a hearing in a nuclear licensing or other adjudicatory proceeding only when an interested person requests one. However, in some cases (for example, cases involving nuclear power reactor construction permits) statutory law requires a hearing even if nobody requests one. *See* section 189(a)(1)(A) of the Atomic Energy Act. These hearings are

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commonly called “mandatory” hearings, and over fifty such hearings have been held, most recently in several early site permit cases.¹ Since, by definition, these mandatory hearings are held even in the absence of intervention petitions and contested issues, they necessarily entail evidentiary hearings and findings of fact by a presiding officer on both contested issues (if any) and uncontested issues, as specified in the notice of hearing. In effect, a mandatory hearing is an additional mandatory layer of NRC review of an entire application, on top of the review of the application by NRC Staff and (if required) by the Advisory Committee on Reactor Safeguards or Advisory Committee on Nuclear Waste.

Pursuant to section 161c. of the Atomic Energy Act, the Commission reserves the power to require that a “mandatory hearing” be held in cases where the statute does not require one. This power is reflected in 10 C.F.R. § 2.104(a), which provides that a notice of hearing will be issued on an application not only when a hearing is required by the Atomic Energy Act or the Commission’s regulations, but also when “the Commission finds that a hearing is required in the public interest.” In the ultimate exercise of its power under section 161c., the Commission ordered mandatory hearings in the Indian Point and Three Mile Island Unit 1 restart cases when neither the Atomic Energy Act nor the Rules of Practice would have required a hearing even on request of an interested person.² As will be explained below, the Commission also decided to direct the holding of a mandatory hearing for every case involving a high-level waste repository construction authorization, including the proposed Yucca Mountain repository.

NRC developed its procedures for licensing of a high-level waste repository in the early 1980s. These procedures were set forth in a notice of final rulemaking published on February 25, 1981 (46 Fed. Reg. 13974), which reflected careful Commission consideration of Staff recommendations in SECY-80-474 (LSN Doc. No. 000024671). The Staff recommended, and the Commission agreed, that there should be a “mandatory hearing” at the repository construction authorization stage. Accordingly, the Commission added language to 10 C.F.R. § 2.101(e)(8) which states that, for a geologic repository, “the Commission finds that a hearing is required in the public interest, prior to issuance of a construction authorization.” This finding that a “hearing is required in the public interest” mirrors the language in 10 C.F.R. § 2.104(a), quoted above.

¹ The term “mandatory” is a bit of a misnomer because the Atomic Energy Act also requires (mandates) a hearing in cases where an interested person requests one and satisfies NRC’s contention requirements. Nevertheless, NRC practitioners well understand that a “mandatory hearing” is one that is held notwithstanding whether any request for one, proper or otherwise, has been made.

² *Consolidated Edison Co. of New York, Inc. (Indian Point, Unit No. 2) and Power Authority of the State of New York (Indian Point, Unit No. 3)*, CLI-81-1, 13 N.R.C. 1 (1981); *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1)*, CLI-79-8, 10 N.R.C. 141 (1979).

The decision to hold a mandatory hearing on an application for a repository construction authorization was made over twenty years ago.³ However, more recently, when the Commission re-examined and revised its Rules of Practice in 2004, it considered whether the 1981 decision should be changed and it declined to do so, despite the pleas of Yucca Mountain proponents. After summarizing its earlier rulemaking decision as “providing for a mandatory Subpart G [formal on-the-record] hearing at the construction authorization stage,” the Commission found that the Yucca Mountain proceeding would be “unique” and “first-of-a-kind,” that it had long promised a mandatory formal hearing at the construction authorization stage, and that to change this decision now “would not advance public confidence in the Commission’s repository licensing process.” 69 Fed. Reg. 2182, 2204 (January 14, 2004). Moreover, while it relaxed its formal hearing requirements for other complex applications, the Commission stated that “it continues to believe that, while not required by statute, any hearings in connection with the initial authorization to construct a HLW repository... should be held using Subpart G [formal, on-the-record] hearing procedures.” Accordingly, “the hearing procedure selection provision in § 2.310(f) specifies the use of Subparts G and J hearing procedures for the initial authorization to construct a high-level radioactive waste geologic repository....” *Id.*⁴

In sum, in 1981 the Commission decided that there would be a mandatory, formal (on-the-record) adjudicatory hearing on any application for a construction authorization for the proposed Yucca Mountain repository, and in 2004 it expressly re-affirmed that decision. Nothing has changed since then.

10 C.F.R. § 2.101(e)(8) provides that the notice of mandatory hearing on a repository construction authorization “shall recite the matters specified in § 2.104(a) of this part.” Section 104(a) provides only that the notice of hearing will state the “time, place, and nature of the hearing and/or prehearing conference, if any,” the “authority under which the hearing is to be held,” the “matters of fact and law to be considered,” and “the time within which answers to the notice shall be filed.” However, the “matters of fact or law to be considered” are not specified. This is in stark contrast to the notices of mandatory hearings for nuclear power reactors, which under § 2.104(b) require the presiding officer to consider the evidence and make all of the safety and environmental

³ When Congress passed the Nuclear Waste Policy Act in 1982, it was well aware of the Commission’s decision to hold a mandatory hearing on a repository construction authorization. It imposed a deadline for the Commission’s decision on the application but provided in section 114(d) that, except for the deadline, “the Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications.” It is evident that, in enacting section 114(d), Congress effectively endorsed the Commission’s decision to hold a mandatory hearing.

⁴ The reference in § 2.310(f) apparently contains a typographical error. It refers to a notice under § 2.101(f)(8), but this should be to § 2.101(e)(8), which, as noted, calls for a mandatory hearing “in the public interest. Section 2.101(f) applies only to *low-level* waste applications and there is no § 2.101(f)(8).

findings necessary for issuance of the license, and also to find whether “the review of the application by the Commission’s staff has been adequate.”

Thus, there is a regulatory gap in NRC’s Rules of Practice. We know that there will be a mandatory formal hearing on the application for a Yucca Mountain construction authorization, and we may presume that, as required by section 189a. of the Atomic Energy Act, the mandatory hearing will include contested issues (admitted contentions), but the scope of issues for that hearing is not specified further. The scope of issues and of required findings by the presiding officer *must extend beyond admitted contentions*, which typically address alleged problems with the license application or accompanying NEPA statement, because otherwise the decision to hold a mandatory hearing would be nothing more than an empty gesture.

Proposed Rule

We do not begin from scratch in framing the issues for the mandatory hearing for Yucca Mountain. Since the 1960s, the Commission (and its predecessor agency) have held over fifty mandatory hearings on applications, and the issues specified for the hearing have *always* included those as set forth in 10 C.F.R. § 2.104(b).⁵ The Commission must have had this consistent and long-standing practice in mind when it decided to hold a mandatory hearing in the case of applications for construction authorizations for repositories. Given this precedent, and the well-established principle of Administrative Law that requires agencies to “adhere to their own precedents or explain any deviations from them,” *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977), the proposed rule that follows is patterned essentially after 10 C.F.R. §2.104(b) together with the notices or hearings for nuclear power construction and early site permits and uranium enrichment facilities. However, because 10 C.F.R. 2.104(b) has extensive language that is applicable only to nuclear power reactors, Nevada believes the recent notices of hearing for uranium enrichment facilities (for example, in *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 N.R.C. 426 (2004), may offer an easier template to follow.

Also, because there is no reason to distinguish the mandatory hearing for Yucca Mountain from the mandatory hearing for other high-level waste repositories subject to 10 C.F.R. Part 60, the proposal that follows would apply to repository facilities subject to either Part 60 or Part 63.

⁵ Slight variations to § 2.104(b) were made for mandatory hearings for uranium enrichment facilities to reflect that reactor licensing standards did not apply. *See, e.g., USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 N.R.C. 426, 428 (2004). Also, notices of hearing on early site permit cases, which are partial construction permit cases, were tailored to address site suitability issues. It is notable that, following enactment of section 193 of the Atomic Energy Act, which imposed a mandatory hearing requirement for one-step licenses for uranium enrichment facilities, the Commission recognized the applicability of its prior practice in specifying issues for power reactor mandatory hearings, and it drafted notices of hearing for uranium enrichment facilities that were patterned closely after those for power reactors.

Nevada proposes to amend 10 C.F.R. Part 2 as follows:

1. 10 C.F.R. § 2.101(e)(8) is amended by striking the reference to § 2.104(a) and replacing it with a reference to § 2.104(f).

2. 10 C.F.R. § 2.104 is amended by adding a new subsection (f) to read as follows:

(1) In the case of an application for a construction authorization for a high-level waste repository pursuant to parts 60 or 63 of this chapter, the notice of hearing will state that the matters of fact and law to be considered are whether the application complies with the Nuclear Waste Policy Act of 1982, as amended, and the standards set forth in 10 C.F.R. §§ 60.10, 60.21, and 60.24(a), or 10 C.F.R. §§ 63.10, 63.21, and 63.24(a), as applicable, and whether the requirements of 10 C.F.R. § 60.31 or 10 C.F.R. § 63.31, as applicable, have been met.

(2) Regardless of whether the proceeding is contested or uncontested, the Atomic Safety and Licensing Board will determine the following, without conducting a *de novo* review of the application: (i) whether the application and record of the proceeding contain sufficient information, and whether the NRC Staff's review of the application has been adequate, to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards with respect to the matters set forth in paragraph (1) of this subsection; and (ii) whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.⁶

(3) Regardless of whether the proceeding is contested or uncontested, the Atomic Safety and Licensing Board will, in its initial decision, in accordance with Subpart A of 10 C.F.R. Part 51, and the Nuclear Waste Policy Act of 1982, as amended: (i) determine whether the requirements of section 102(2)(A), (C), and (D) of NEPA, section 114(f) of the Nuclear Waste Policy Act of 1982, as amended, and subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding; (ii) independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and (iii) determine whether the authorization should be issued, denied, or further conditioned to protect the environment.⁷

(4) If the proceeding becomes a contested proceeding, the Board shall also make findings of fact and conclusions of law on admitted contentions within

⁶ Nevada has filed a petition for rulemaking with the Commission asking that Part 51, as it applies to Yucca Mountain, be modified to conform to the argument and decision in *Nuclear Energy Institute v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004). To date, the Commission has taken no action on this petition.

⁷ We say "further" conditioned because 10 C.F.R. §§ 60.32 and 63.32 already impose certain conditions on the construction authorization.

the scope of paragraphs (1), (2), and (3) of this subsection. With respect to matters set forth in paragraph (1) but not covered by admitted contentions, the Atomic Safety and Licensing Board will make the determinations set forth in paragraph (2) without conducting a *de novo* evaluation of the application.

3. 10 C.F.R. § 2.700 is amended by deleting “2.101(f)(8)” and replacing it with “2.104(f).”

The Commission will note that the language in proposed § 2.104(f) departs somewhat from the language in 10 C.F.R. § 2.104(b) and recent notices of hearing in such cases as *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 N.R.C. 426 (2004). Proposed 10 C.F.R. § 2.104(f)(2) applies to both contested and uncontested proceedings. The reasons for this are as follows. The safety findings required by proposed § 2.104(f)(2) focus on the adequacy of the record of the proceeding, the license application, and the Staff’s review. Limiting these findings to uncontested cases (as in prior practice) creates a very misleading suggestion that, in litigating contested issues, these matters are irrelevant. However, this cannot be so, because litigation and findings on contested issues will necessarily also involve findings on the adequacy of the record, the application, and the Staff review (so long as Staff presents evidence, as is its customary practice), insofar as these are relevant to contested issues. Indeed, if otherwise were to be the case, the grant of intervention would have the perverse and unlawful effect of penalizing an intervenor for requesting a hearing because, once the case became contested, there would no longer be any focus on the adequacy of the record, the application, and the Staff review.

The second departure is that proposed 10 C.F.R. § 2.104(f)(1) and (3) reference the Nuclear Waste Policy Act of 1982, as amended, which is necessary and appropriate for completeness, and because of the special NEPA provision in section 114(f) of that Act.

The third departure is that proposed 10 C.F.R. § 2.104(f)(4) includes a specific reference back to paragraphs (1)-(3). This is intended for clarity, since these three paragraphs define the scope of material issues that may be placed in controversy.

The Department of Energy has recently reaffirmed its intent to file a Yucca Mountain construction authorization license application with NRC no later than June 30, 2008. Accordingly, the State requests that the Commission act on this rulemaking proposal in as expeditious a manner as possible.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a long, sweeping horizontal line that tapers to the right.

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