

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

NRC Staff Response to Joint Motion to Establish Hearing Procedures

On January 3, 2019, the Sierra Club, Don't Waste Michigan, Citizens Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Nuclear Issues Study Group, San Luis Obispo Mothers for Peace, and Public Citizen ("Movants") filed a Joint Motion requesting that the Commission enter an order establishing that the procedures in Subpart G of 10 C.F.R. Part 2 be used to conduct the Holtec proceeding.¹ Because the Movants do not identify a cognizable basis for the use of Subpart G, the Joint Motion should be denied. Should a hearing be granted in the proceeding, it should be conducted under the procedures of Subpart L.

A. Use of Subpart G Hearing Procedures is Strictly Limited

In 2004, the NRC revised its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient.² With the goal of better focusing the limited resources of involved parties and the NRC, the Commission amended its regulations to significantly reduce the number of proceedings that followed the formal hearing procedures set

¹ "Joint Motion to Establish Hearing Procedures by Sierra Club, Don't Waste Michigan, Citizens Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Nuclear Issues Study Group, San Luis Obispo Mothers for Peace, and Public Citizen" ("Joint Motion") (Jan. 3, 2019). While the language of the motion refers to the Commission, the filing is captioned as before the Board, and the Staff assumes that the Joint Motion is seeking action by the Board, not the Commission.

² Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2182 (Jan. 14, 2004).

forth in Subpart G and to greatly increase the number of proceedings conducted under the informal hearing procedures in Subpart L.³

Section 2.310, “Selection of Hearing Procedures,” was revised so that “proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to parts 30, 32, through 36, 39, 40, 50, 52, 54, 55, 61, 70 and 72,”⁴ would be conducted under 10 C.F.R. Part 2 Subpart L.⁵ The use of Subpart G proceedings is now required in only four types of proceedings: (1) enforcement matters; (2) the construction and operation of uranium enrichment facilities; (3) the initial issuance of a license to receive and possess high-level waste (HLW) at a HLW geologic repository; and (4) nuclear power reactor licensing in which issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness are material.⁶

And while 10 C.F.R. § 2.310 does not on its face mandate the use of Subpart L procedures for proceedings subject to paragraph (a),⁷ the Commission has narrowly construed the circumstances under which it is appropriate to conduct a hearing under Subpart G procedures over those contained in Subpart L. Specifically, recognizing that Subpart L

³ See, e.g., *id.* at 2182 (“Commission experience suggested that in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures in subpart G is not essential to the development of an adequate hearing record; yet all too frequently their use resulted in protracted, costly proceedings.”), 2193 (“The Commission has decided to continue using the approach set out in the proposed rule, whereby most adjudications would be conducted under the hearing procedures in Subpart L, unless one of the more specialized hearing tracks in Subparts G, K, M, or N, apply.”).

⁴ 10 C.F.R. § 2.310(a).

⁵ 69 Fed. Reg. at 2222 (“Thus, Subpart L procedures will be used, as a general matter, for hearings on nuclear power reactor construction permit and operating license applications under Parts 50 and 52, nuclear power reactor license renewal applications under Part 54, nuclear power reactor license amendments under Part 50, reactor operator licensing under Part 55, and nearly all materials and spent fuel storage licensing matters.”).

⁶ 10 C.F.R. § 2.310(b)–(d), (f); see also 69 Fed. Reg. at 2192 (characterizing the areas subject to Subpart G in the Final Rule as “narrowly-prescribed”).

⁷ See 10 C.F.R. § 2.310(a).

procedures “provide for a full and fair adjudication”, the Commission has described the use of procedures in Subpart G instead of Subpart L as an “extraordinary step.”⁸

B. Movants Do Not Offer an Adequate Basis for the Use of Subpart G Procedures

Because the proceeding concerns Holtec International’s HI-STORE license application to construct a consolidated interim storage facility to store spent nuclear fuel pursuant to 10 C.F.R. Part 72, for the reasons discussed above, a hearing is presumptively governed by Subpart L procedures. The Movants nevertheless request that the proceeding be conducted under Subpart G due to the “complex and technical” nature of the case, which they assert renders Subpart L inadequate “for the parties to properly litigate the contentions or to allow the ASLB to make an informed decision.”⁹ Specifically, Movants assert that without formal Subpart G discovery “intervenors would have no opportunity to develop systematic or targeted evidence.”¹⁰ Movants also assert that under Subpart L “[i]ntervenors’ attorneys are forbidden from conducting the examination and cross-examination of witnesses . . . which greatly hinders the search for truth.”¹¹ However, these reasons are inadequate to support the Movants’ request.

In *Crow Butte Resources*, the Commission rejected a similar request to hold a hearing under Subpart G. The Commission rejected the assertion that mandatory disclosures which apply to Subpart L proceedings, in lieu of more formal discovery, are inadequate. In denying the request to use Subpart G procedures, the Commission found mandatory disclosures to be “wide-reaching, requiring parties (other than the NRC Staff) to provide, among other things, a copy or description of ‘all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions.’”¹² Additionally, the Commission noted

⁸ *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 573 (2009).

⁹ Joint Motion at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Crow Butte Resources*, CLI-09-12, 69 NRC at 572–73 (quoting 10 C.F.R. § 2.336(a)(2)(i)).

that parties who fail to comply may be subject to Board imposed sanctions and that the First Circuit has “upheld the mandatory disclosure rules, finding that they ‘provide meaningful access to information from adverse parties in the form of a system of mandatory disclosure.’”¹³ Similarly, the Commission refuted arguments that Subpart L does not permit cross-examination. The Commission emphasized that “Subpart L does, in fact, contemplate requests for cross-examination by parties” and that “the cross-examination rules in Subpart L have been upheld, and found to meet the requirements of the Administrative Procedure Act.”¹⁴ Just as the Commission found that the procedures in Subpart L “provide for a full and fair adjudication” such that use of Subpart G procedures was unwarranted in *Crow Butte Resources*, so too should the Board find here.¹⁵

Furthermore, Movants do not explain why the factual and technical arguments regarding the Holtec application are so atypical as to require the use of Subpart G. Movants simply state that “full discovery and cross-examination” is necessary because the case “involve[s] the licensing of a facility that would store over 100,000 MTU of radioactive waste transported from across the country.”¹⁶ However, Movants do not identify any specific factual or technical disputes which might warrant more formal discovery or cross-examination. These generalized assertions are insufficient to support the “extraordinary” application of Subpart G procedures.

To the extent Movants also suggest that the *Private Fuel Storage* proceeding demonstrates that a more formal proceeding is needed here, Movants’ argument is misplaced.¹⁷ As the Movants acknowledge,¹⁸ the *Private Fuel Storage* litigation began well before the 2004

¹³ *Id.* at 573 (quoting *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 350 (1st Cir. 2004)) (internal citation omitted).

¹⁴ *Id.* at 572 (citing *Citizens’ Awareness Network*, 391 F.3d at 351); see also 10 C.F.R. § 2.1204(b).

¹⁵ *Id.* at 573.

¹⁶ Joint Motion at 5.

¹⁷ *Id.* at 3–4 (quoting *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 508 (2001)).

¹⁸ *Id.*

Part 2 rulemaking and the designation of Subpart L as the customary track for Part 72 licensing proceedings.¹⁹ Finally, to the extent the Movants assert that this case requires Subpart G procedures due to its complexity and the number of substantive contentions filed,²⁰ the Commission in its 2004 Part 2 Final Rule specifically rejected the idea that complexity and number of issues would inherently require the use of Subpart G.²¹ In sum, because the Movants have not explained how the issues raised in their motion meet the standards for the “extraordinary” use of subpart G, the Joint Motion should be denied.

C. Conclusion

Because the Movants do not identify an adequate basis to support their request to conduct the Holtec proceeding under the procedures of Subpart G, rather than Subpart L, the Joint Motion should be denied. Any hearing granted in this proceeding should be governed by the procedures of Subpart L.

Respectfully submitted,

/Signed (electronically) by/

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Dated in Rockville, MD
this 9th day of January 2019

¹⁹ See *supra* n. 2.

²⁰ Joint Motion at 1–2.

²¹ See *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 696 (2004) (citing 69 Fed. Reg. at 2196).

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305 (as revised), I hereby certify that copies of the foregoing "NRC Staff Response to Joint Motion to Establish Hearing Procedures," dated January 9, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 9th day of January, 2019.

Respectfully submitted,

/Signed (electronically) by/

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Dated in Rockville, MD
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