(1218)

1

September 16, 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.

On September 15, 2001, I submitted the first part of my comments (dated September 14, 2001) on the Proposed Rule. It had been my intention to submit the first part of my comments on September 14. However, towards the end of the day on September 14 when I went to the NRC Website noticed in the April 16 Federal Register Notice (FRN) to submit my comments electronically, after much searching it was still not apparent how my comments should be submitted. Finally, on September 15, I located the proper button to click on at the very bottom of a very long list of previously submitted comments. Nowhere else on the Public Comment Webpage was there any indication that that was exactly where one was to go to find the online form for comment.

I respectfully request that my comments of September 14 be considered. I also respectfully request my additional comments September 16 that have been submitted two days beyond the closing date of the comment period also be considered.

Sincerely,

Sarah M. Fields

September 16, 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 l6 Federal Register Notice (FRN).

II. Part 2

Comments:

1. Page 19634, col. 2 (Subpart C, Sec. 2.303, Docket)

The regulation should contain a statement that all the documents that accrue to the docket of a proceeding be made publicly available on ADAMS in a timely manner. Currently this is not happening. A party to a proceeding should not have to contact the Office of the Secretary to bring to their attention the fact that some of the records that are on the docket of a proceeding have not been made publicly available in a timely manner.

Additionally, when oral proceedings or teleconferences are recorded and transcribed, it is imperative that the oral proceeding or teleconference is fully recorded, transcribed, promptly made available to the parties to the proceeding without cost, and promptly made publicly available on ADAMS. Again, a party to a proceeding should not have to keep track of all this. It would be advisable to have back-up recordings and a reliable, trained, and competent contractor to make the recordings and transcribe them. Something is lacking when a contractor looses a portion of a teleconference that is being recorded and continually transcribes the legal term "moot" as "mute."

2. Page 19634, col. 3 (Sec. 2.204, Formal requirements for documents; acceptance for filing).

The proposed Section 2.204(b) it states that "each document must be bound on the left side." What exactly meant by "bound?" What is the usual practice? Can a document be stapled once in the left-hand corner? Will a clip on the top suffice? One can only assume that a document might be copied and that any sort of binding or stapling would have to be removed in order to facilitate copying.

3. Page 19635, col. 2-3 (Sec. 2.306, Computation of time).

At this time, documents generated by the NRC are Word Perfect documents. These documents are then e-mailed to parties of proceedings as attachments. However, some parties to some proceedings do not have computers with programs that can open Word Perfect documents. The NRC should send documents in a format that a party can access without going through an electronic rig-a-marole that may take a couple of days if they want that e-mailing to count as service on a date certain.

4. Page 19636, col. 1 (Sec. 309, Hearing requests, petitions to intervene, requirements for standing, and contentions).

Section 2.306(b)(2)(ii) gives a 45-day time period (after an agency action on an application) as the last deadline for a hearing request on an agency action not noticed in the Federal Register. This is a major change in Part 2, which currently allows 180 days.

The problem here is that the NRC staff often does not make the granting of an amendment or other agency action publicly available until long after such a 45-day time period. Not all agency actions are responsive to a specific application. Some times applications and other pertinent information regarding an application are not made publicly available for months.

The NRC does not now, nor has it ever, had a system in place to assure that all documents that should be made publicly available in a timely manner pursuant 10 C.F.R 2.790 are, in fact, made publicly available. This past year several license amendments over a six-month time period on a single docket were only made publicly available after a member of the public brought the inadvertence to the attention of NRC staff.

In no manner does ADAMS assure that the documentation of applications and agency actions will be made publicly available in a timely manner so that a member of the public will even learn of an application or agency action within 45 days of such application or action.

NRC should retain the 180-day time limit, which, hopefully (but not necessarily), give the NRC staff sufficient time to make relevant documents publicly available.

5. Page 19637, col. 1-2 ((Sec. 309, Hearing requests, petitions to intervene, requirements for standing, and contentions).

The proposed Section 2.306(f)(2) will unduly limit a petitioner's ability to present contentions pertinent to a proposed licensing action. The end result of such a rule would be that significant issues pertinent to a licensing action would not be brought forward within the proceeding. This would be especially true if a petitioner has only 45 days after the publication of an FRN, or actual notice, within which to submit contentions. A full and fair consideration of the facts of the case would be inappropriately constrained.

It would be an unreasonable burden on a petitioner with having to extensively justify, by addressing the 3 requirements in 2.306(f)(2)(i)-(iii), every time a petitioner wishes to address new information that was previously not available to the petitioner.

This Proposed Rule ignores some the realities of the conduct of a proceeding.

The Proposed Rule does not even mention the right of a petitioner to address new information contained in supplements to an application. Often these supplements are not proffered until long after the request for hearing is submitted.

The rule proposed ignores the fact that it often takes a fair amount of time to identify, obtain, and review pertinent information, such as NRC records on the same or related docket (including those records that the NRC has failed to accession on the appropriate docket), previous NRC decisions, related state and federal agency documents, and other pertinent materials. Sometimes it is necessary to submit Interlibrary Loan request to obtain relevant information. The Proposed Rule does not take into consideration that applications often reference a number of documents that are not readily available to a petitioner, if they are available at all.

The Proposed Rule ignores the difficulties that might be encountered by *pro se* petitioners who cannot devote their workday hours to a proceeding because they have job and/or family responsibilities during the day.

The rule ignores the fact that the NRC staff has a habit of withholding from the public (and petitioners) documents (such as supplements to the application and the issuance of the subject licensing action) that are pertinent to an application or a licensing action. In an NRC adjudicatory proceeding, such documents were withheld from the public and the petitioner during the time frame from the publication of the FRN announcing the opportunity for a hearing and the time that a decision regarding the standing of the petitioner was made.

Considering the above, a petitioner should have the right, based on new information previously unavailable, to amend their request for hearing prior to determination on standing. If standing is granted, a petitioner should have an automatic right to add or amend contentions based of new information from the NRC or the licensee or based on new information that the petitioner has obtained with due diligence.

The severe limitations on contentions that the NRC proposes will be of benefit to neither the parties to a proceeding, nor the public, and, in the end, cause delay in proceedings as parties haggle over whether a new or amended contentions should be allowed.

The proposed Section 2.306 (h)(2) only allows 5 days for a reply to an answer to a request for hearing. The time period should be at least 10 days. Such a reply answer is usually an important pleading.

Again, the NRC should consider the fact that a petitioner might have only the weekends to work on a reply. A 5-day time frame is unnecessarily restrictive and would not really make any appreciable difference in the conduct of the proceeding.

I have always wondered why the NRC insists on timing limitations for submittals by the parties, while the presiding officer might take months to respond to the briefs, if, indeed, the presiding officer bothers to respond to the briefs at all.

6. Page 19638, col. 3 (Sec. 2.314, Separate hearings; consolidation of proceedings).

The proposed Section 2.314 (b) regarding consolidation of proceedings should include a requirement that if a presiding officer or a party proposes to consolidate one or more proceeding with other proceeding where the parties to the proceedings are not identical, the parties to all of the proceedings that might possibly be consolidated be permitted to comment on the proposed consolidation.

Additionally, if a party or a presiding officer proposes the consolidation of two or more proceedings and the various parties comment on the a proposed consolidation, it is the duty of the presiding officer to then issue a ruling, within a set time period, as to whether or not the proceedings will be consolidated. The presiding officer should not just leave the question hanging with no ruling on the matter.

The Presiding Officer in Docket No. 40-3453-MLA-4/5 asked the parties to that proceeding their opinion on consolidating that proceeding with Docket No. 40-3453-MLA-3, a related proceeding with different petitioners. The parties to 40-3453-MLA-3 were not asked their opinion on the consolidation of that proceeding with MLA-4/5. Two parties to MLA-4/5 filed briefs, but the Presiding Officer did not respond to those briefs, and the subject was never mentioned again. Additionally, the parties to MLA-4/5 were never informed that the other proceeding (MLA-3) was eventually dropped. So much for proper case management.

As a party to MLA-4/5, I can only conclude that the presiding officer only used the proposal for consolidated proceedings as an improper tactic to further delay the proceeding to which I was a party.

Needless to say, the Commission has a responsibility to see that such an avoidance of procedural responsibility by a presiding officer or board should never happen again.

7. Page 19644, col. 1-3 (Sec. 2.336, General discovery).

The proposed Section 2.336 does not discuss under what specific circumstances presiding officers/boards can be permitted in a proceeding to defer the implementation of

the provisions for general discovery, especially the provisions at 2.336 (b) related to the responsibilities of NRC staff.

On a least one occasion, the Presiding Officer deferred the submittal of a 2.1231 hearing file by NRC staff, pending notification by the presiding officer, and this deferral became an indefinite deferral lasting from 1999 to the present. The lack of a hearing file over a two-year time period, over the objection of the petitioner, meant that the Presiding Officer and the petitioner were not kept currently and timely informed of NRC and licensee activities that were pertinent to the proposed licensing actions. Additionally, the Presiding Officer recently used that lack of a hearing file as one of the excuses for not conducting a hearing prior to a date certain (when the proceeding might be considered moot) because there was no longer enough time.

Therefore, it is incumbent upon the NRC to disallow the deferral of any aspect of the provisions for general discovery without very good cause and without the agreement of all the parties to a proceeding. Such stipulations should be incorporated into 2.336 and 2.1203 (see below).

The proposed 2.336 does not address the responsibilities of the licensee and the NRC staff during the time from the date of the publication of an FRN and the date a petitioner files a request for hearing, or the final suspense date for response to the FRN. The proposed 2.336 does not address the responsibilities of the licensee and the NRC staff during the time from the date that a petitioner files a request for hearing and the date that a presiding officer/board issues an ruling on standing.

That time period between the publication of an FRN and the decision on standing might be over six months long. During that time, the request for hearing is submitted, additional briefs regarding standing may be submitted, and contentions are being formulated and submitted (whether as part of the initial request for hearing or later).

Therefore, it is imperative that throughout this important time period the licensee and the NRC make available to the petitioner any supplements to the application, requests for additional information, environmental reports, newly established standard operating procedures, draft environmental impact statements, technical evaluation reports, legal briefs correspondence, correspondence with other agencies, the issuance of the subject licensing action itself, and any other document that directly bears upon the proposed licensing action.

The information contained in such documents can bear directly upon the question of the standing of the petitioner and the contentions that the petitioner must provide. Such information should not be withheld from the petitioner and from the public, as has happened in the past.

Additionally, if the Commission determines that a petitioners will not have to file contentions until after the filing of the initial request for hearing, is would be especially important for the licensee and the NRC staff to keep the petitioner and the public currently and timely informed as those contentions are being formulated.

The more information that is available to the parties to a proceeding at the outset of a proceeding and as the proceeding goes along,, the less likely that there will be confusion, frustration, and wasted time and effort for all involved.

It is also important to keep any agency that might wish to participate in a hearing as an interested state or tribe fully and timely informed. Members of the public who are considering intervention if a hearing is granted, or who are considering making limited appearance statements, should also be kept fully and timely informed.

Keeping petitioners, presiding officers/boards, and the public currently and timely informed can be accomplished by 1) establishing a distribution list of petitioners, the presiding officer/board, and interested persons who wish to receive NRC and licensee documents pertaining to the application and 2) placing all documents related to a licensing action on ADAMS in a timely manner.

A distribution list is necessary because is affords a guaranteed timely notification. A distribution list should be established as soon as a FRN announcing an application is published. ADAMS is far too unreliable to be depended upon to provide anyone with anything in a timely fashion.

The NRC staff's current inability to make official records pertaining to licensing actions available to interest persons and the general public is just not acceptable.

8. Page 2.390, col. 3 (Sec. 390, Public inspections, exemptions, requests for withholding).

Section 2.390(a) appears to equate the NRC Website with the PARS portion of ADAMS. However, they are not equal.

Not all members of the public have the capability of copying an NRC official record even though they might have access to the NRC Website. Although some people can access ADAMS through the NRC Website, having access to the NRC Website is not the same as having access to ADAMS for downloading and/or copying documents. For example, I cannot access ADAMS through the NRC Website. In order to copy documents from ADAMS I must download them first to my computer and then open them using a software program (obtained through the NRC Website) that is the only one that I can use and that I was obliged to pay a fee for. Further, accessing, downloading, viewing, and printing ADAMS documents takes some specific training and understanding beyond what is required for the ordinary person to access information on a typical Website.

Unless the NRC significantly alters the ADAMS program to make it accessible as part of the regular Website (in a typical Web, or Windows, format), it is misleading for the NRC to state that documents "will be made available for inspection and copying at the NRC Website."

The NRC must clearly differentiate between the availability of documents on the NRC Website and the availability of documents on the PARS portion of ADAMS.

(Note that the NRC does make some NRC documents available on both the NRC Website and on PARS/ADAMS.)

9. Page 19651, col 1-2 (Sec. 2.402, Separate hearings on separate issues;

consolidation of proceedings).

Here, I can only reiterate my discussion of Section 2.314, at 6. (above).

10. Page 19661, col. 2 (Subpart L, Sec 2.1203, Hearing file; prohibition on discovery.

I would reiterate that the Commission should give guidance by severely restricting the circumstances under which a presiding officer/board can defer or suspend the presentation of the hearing file by NRC staff.

Therefore, it is incumbent upon the NRC to disallow the deferral of establishment of the hearing file without very good cause and without the agreement of all the parties to a proceeding. Such stipulations should be incorporated into 2.336 (see above) and 2.1203. Please see discussions on Section 2.336, at 7., and 2.390, at 8. (above).

III. Additional Comments.

1. Although the Commission is obviously concerned about delay in proceedings, for some reason the Proposed Rule does not address the question of the placement of a proceeding in abeyance or the granting of a temporary delay in a proceeding. The Commission should provide guidance regarding these issues so that proceedings are not unnecessarily delayed for superfluous reasons.

The Commission should severely restrict the granting of requests for abeyance or delay. Except for very short delays and in circumstances that are obviously beyond a party's control, any delay in a proceeding or placement of a proceeding in abeyance must have a firm basis in fact and law. Parties to a proceeding should not use delay in a proceeding as a legal tactic. Presiding officers/boards should only consider written motions for abeyance or delay and responses thereto. Presiding officers/boards should only grant requests for abeyance in the most exceptional circumstances after a showing of great necessity, with a sound legal and factual basis.

Also, please see my comments of September 14, 2001, at 10, regarding delay in proceedings.

2. The Commission should acknowledge that the presiding officer/boards have special responsibilities toward *pro se* petitioners, who might not be aware of all the legal tricks of the trade and might have a greater faith in the presiding officer/board than is actually warranted.

3. The Proposed Rule does not require the re-noticing of an opportunity for a hearing when action by the NRC renders the original FRN obsolete. For example, an FRN was published that stated that a licensee's application would be reviewed in accordance with a certain published NRC policy guidance. A hearing was requested, but before a standing determination was made, the NRC issued a new policy guidance (without noticing it in the Federal Register), reviewed the licensee's application based

upon the new policy guidance, and announced that fact at the issuance of the license amendment.

Both the new guidance and the amendment issuance occurred before all pleadings regarding standing in the proceeding had been submitted to the Presiding Officer. However, the NRC staff did not notify either the parties or the Presiding Officer in the pending proceeding that a new guidance had been issued by the Commission, that the subject amendment request had been approved, and that such approval was based upon the new guidance.

Therefore, in such circumstances, the NRC should re-notice the receipt of the application and provide a new opportunity for a hearing. The NRC should not change the rules regarding NRC staff review of a licensing action without proper notice to the public and to the petitioner.

5. The Commission should address the special responsibilities of NRC staff to see to it that proceedings are conducted in a fair and proper manner. NRC staff has a duty to bring to the attention of presiding officers/boards, or the Commission, any situation that can be considered to be mismanagement of a proceeding. Even minor procedural errors can have important consequences.

6. The Proposed Rule does not provide sufficient guidance when a circumstance arises where an order is issued by NRC staff with an opportunity for a hearing, the licensee requests a hearing, a member of the public requests a hearing, and the licensee and the NRC staff attempt to negotiate their differences.

A number of years ago the NRC staff issued an order that, among other, things denied an application for the renewal of a source material license based on the fact that the licensee had not submitted a certain surety amount.

The licensee requested a hearing; a member of the public requested a hearing. Before the presiding officer ruled on the request for hearing of a member of the public, the licensee and the NRC staff went into settlement negotiations. The member of the public was not invited to be a participant in the negotiations. A settlement was reached, and the hearing was dismissed, even though various concerns that had been brought forward by the member of the public (in their response to an order providing an opportunity for a hearing) were not addressed or resolved in the settlement agreement. No ruling on the standing of the member of the public was ever made.

It is my opinion that this situation was handled improperly by the NRC. There was no due process, There were significant consequences due to the lack of due process.

The licensee and the NRC staff had been haggling over the surety for about 10 years. Once the order was issued and an opportunity for a hearing was announced, it was improper for the NRC to enter into further negotiations with the licensee prior to a ruling by the presiding office on the standing of the member of the public. If standing were granted to that petitioner, then that petitioner should have the right to a hearing and the right to participate in any negotiations.

If that was not the proper way to go about it, then after the NRC staff and the licensee reached an agreement, the presiding officer should have ruled on the standing of

the petitioner, and if the petitioner was granted standing, a proceeding should have ensued. Either way, the member of the public who requested a hearing, in response to an announcement of a hearing opportunity, should not have been subsequently denied that opportunity to have a hearing on their own concerns regarding the order just because the licensee had finally decided to come up with the amount of the surety that the NRC required.

I bring this up because, as subsequent events revealed, the concerns that that member of the public brought forward regarding the adequacy of the surety amount that the licensee was to provide were 100% on the button. The surety amount that the NRC staff negotiated has not even been enough clean up all balance of site materials and to place the former Atlas tailings impoundment in a safe condition while the community awaits the takeover of the former Atlas Moab Mill site by the Department of Energy. This takeover was partly necessitated by the fact that the NRC grossly underestimated the amount it would take to even reclaim the impoundment in place, implement a corrective action program, and provide for long term care.

If the hearing that the member of the public had request back in 1987 regarding the surety amount had gone forward, as it should have, maybe things would have turned out a little bit, if not a lot, better. Certainly, it couldn't have hurt.

Therefore, I request that the Commission consider how the circumstances as such as those outlined above could be fairly resolved and provide guidance if similar circumstances should ever arise again.

6. Because of the many new proposals for different types of hearings in the Proposed Rule, I request that the Commission consider noticing a draft Final Rule for a 30-day notice and comment period prior to issuing the Final Rule. I request this because a number a aspects of the Proposed Rule might be significantly altered by any Final Rule and the public should have an additional opportunity to comment on those proposed changes.

7. Finally, I wish to express my appreciation for all the work the NRC staff did on bringing together this Proposed Rule. The Proposed Rule obviously reflects a lot of hard thought and a serious attempt to clarify and expand the regulations pertaining to adjudications in order to make the process more understandable and less onerous for everyone concerned.

Respectfully submitted,

Sarah M. Fields