January 14, 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket No. 72-1051
Holtec International	)	
	)	
(HI-STORE Consolidated Interim Storage Facility)	)	

Holtec International's Answer Opposing
Don't Waste Michigan, et al., and Sierra Club's
Joint Motion to Adopt Hearing Procedures

On January 3, 2019, 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, Inc., (collectively "Combined Petitioners") filed a Joint Motion to Establish Hearing Procedures ("Motion") in this Consolidated Interim Storage Facility ("CISF") license proceeding.[1] The Combined Petitioners ask that the Atomic Safety and Licensing Board (the "Board") adopt the formal adjudication procedures of 10 C.F.R. Part 2 Subpart G, and claim that 10 C.F.R. Part 2 Subpart L hearing procedures are insufficient for this proceeding because of the "complex and technical nature" of the case. Motion at 3. Holtec International ("Holtec") respectfully opposes the Motion because (1) the Combined Petitioners' request is untimely, (2) this proceeding is not included within the scope of Subpart G, and (3) Subpart L procedures are sufficient and appropriate for this proceeding. Accordingly, the Board should deny this motion for the reasons set out below.

[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, dated Jan. 3, 2019.

I. Combined Petitioners' Motion Should be Denied

Combined Petitioners argue that the Board should adopt 10 C.F.R. Part 2 Subpart G procedures because the parties have pled numerous contentions on "complex legal and factual issues." Motion at 1. According to Combined Petitioners, 10 C.F.R. Part 2 Subpart L is not adequate to litigate such contentions or to allow the Board to make an informed decision. Motion at 2. This is because— Combined Petitioners claim—discovery in Subpart L proceedings is limited to "notice of irrelevant, as well as potentially relevant, additions to the NRC's ADAMS data base." Motion at 2-3. Moreover, Combined Petitioners claim that under Subpart L, "[i]ntervenors' attorneys are forbidden from conducting the examination and cross-examination of witnesses at the adjudication of contentions, which greatly hinders the search for truth." Motion at 3.

According to Combined Petitioners, "the complex and technical nature of the numerous contentions in this case" and the fact that the CISF is a "nuclear waste storage facility" are sufficient to justify the use of Subpart G procedures. *See* Motion at 3. Combined Petitioners claim that Subpart L is inadequate because:

> The 2004 amendment to Subpart L, 69 Fed Reg. 2182, 2213, explains that Subpart L was amended to accommodate NRC hearings that do not involve factual disputes that require full discovery procedures or cross-examination. Proceedings such as reactor license renewals, transfer of a license, or licensing an ISFSI at a reactor site that would accept only waste from that reactor fit the description of proceedings that may not require full discovery or cross-examination.[2]

Motion at 5.

[2] Contrary to Combined Petitioners' claim, the 2004 rulemaking that developed Subpart L "applie[d] the hearing procedures of the new Subpart L to all other proceedings not specifically named, i.e., proceedings involving hearings on the grant, renewal, licensee-initiated amendment or termination of licenses and permits subject to 10 CFR parts 30, 32 through 35, 36… 39, 40, 50, 52, 54, 55, 61, 70 *and 72*." *Changes to Adjudicatory Process*, 69 Fed Reg. 2182, 2205 (emphasis added).

Apart from Combined Petitioners' inaccurate description of Subpart L, the Board should reject Combined Petitioners' Motion because the criteria for applying Subpart G procedures are not met in this case. Additionally, the procedures set forth in Subpart L are sufficient and appropriate for this proceeding. The Commission has determined that the Subpart L procedures for discovery and cross-examination are robust and preferable to the Subpart G procedures, absent the factors—not found here—which the Commission specified as requiring the application of Subpart G.

A. The criteria for applying Subpart G procedures are not met in this case.

Combined Petitioners have not addressed nor met any of the criteria for applying the Subpart G procedures to this case. The NRC rule regarding the selection of hearing procedures does not direct the use of Subpart G in proceedings for the grant of a license under 10 C.F.R. Part 72. *See generally* 10 C.F.R. 2.310 (listing the limited uses of Subpart G). Rather, the procedures direct the use of Subpart L for Part 72 licenses, unless an exception applies allowing for the "the extraordinary step of a Subpart G proceeding." *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 N.R.C. 535, 573 (2009); 10 C.F.R. 2.310(a) (noting that Part 72 licensing proceedings may take place under Subpart L, except in accordance with paragraphs (b) through (h)).

Combined Petitioners claim that Subpart L procedures are used "to accommodate NRC hearings that do not involve factual disputes that may not require full discovery or cross-examination, ... such as reactor license renewals, transfer of a license, or licensing an ISFSI at a reactor site that would accept only waste from that reactor." Motion at 5. This characterization is both unsubstantiated and incorrect. Since its promulgation, Subpart L procedures have been used in almost all modern licensing cases (save Yucca Mountain which was specifically exempt), including the most complex and technical cases—those for combined operating licenses for new

nuclear power plants. *See, e.g.*, *Florida Power & Light Co*. (Turkey Point Units 6 and 7), LBP-17-5, 86 N.R.C. 1, 15 (2017); *Progress Energy Florida, Inc.* (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 N.R.C. 51 (2009). These cases include extensive document disclosure under 10 C.F.R. 2.336 and full cross-examination by the Board, "enhancing the role of the presiding officer as a technical fact finder by giving him or her the primary responsibility for controlling the development of the hearing record." 69 Fed. Reg. 2182. Expedited proceedings, such as those for a license transfer, occur under Subpart M procedures.

Subpart G has only a limited scope. It is applied to: proceedings on enforcement matters; proceedings on the licensing of the construction and operation of uranium enrichment facilities; the application for a geologic repository under 10 C.F.R. §§ 2.101(f) or 2.105(a)(5)[3]; or reactor licensing proceedings where "the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of 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 material to the resolution of the contested matter." 10 C.F.R. 2.310. Combined Petitioners have not shown that any of these apply to the Holtec CISF proceeding, potentially requiring the use of Subpart G procedures. Nor could they make such a showing.

Moreover, the Commission has also already rejected the argument that Subpart G procedures are required in cases with "numerous/complex issues." As the draft rule was originally proposed by the Commission, Section 2.310 included a subsection that would call for the use of Subpart G hearing procedures in reactor licensing proceedings involving a large

[3] Neither 10 C.F.R. 2.101(f) nor 10 C.F.R. 2.105(a)(5) apply to licenses under 10 C.F.R. Part 72, but instead apply to licenses under 10 C.F.R. Parts 60, 61, and 63.

number of complex issues. *See* 69 Fed. Reg. 2182, 2205. In issuing the final rule, the Commission determined that "the proposed 'numerous/complex issues' criterion may not be well-suited for determining whether the procedures of Subpart G should be used in a given proceeding." *Id.* Instead, the Commission found that Subpart G and "oral hearings with right of cross-examination are best used to resolve issues where 'motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event.'" *Id.* (quoting *Union Pac. Fuels v. FERC*, 129 F.3d 157, 164 (DC Cir. 1997), citing *La. Ass'n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (DC Cir.1992)). Thus, the "numerous/complex issues" criterion advocated by Combined Petitioners was explicitly rejected in favor of the "motive, intent or credibility" or "dispute over the occurrence of a past event" criteria in 10 C.F.R. 2.309(d).[4]

Furthermore, the Combined Petitioners' request is untimely. If the Combined Petitioners wanted to use the factual witness criteria in 10 C.F.R. 2.310(d) as a justification to apply the Subpart G procedures, they needed to provide an individual justification *for each contention in the Petition to Intervene* showing "that resolution of the contention necessitates resolution of material issues of fact" "best determined through the use of [Subpart G]." 10 C.F.R. 2.309(g).[5] The Combined Petitioners failed to make this showing. As the Commission has stated, "a requestor/petitioner who fails to address the hearing procedure issue [in the request for

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[4] "In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of 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 material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part." 10 C.F.R. 2.310(d).

[5] Because 10 C.F.R. 2.310(d) only applies to reactor licensing proceedings, the Combined Petitioners would also need to justify application of the rule beyond its clearly stated scope.

hearing/petition to intervene] would not later be heard to complain in any appeal of the hearing procedure selection ruling." 68 Fed. Reg. 2182, 2202-03 (2004).

B. The Subpart L procedures are sufficient for this proceeding.

Combined Petitioners are also incorrect in arguing that the Subpart L procedures for discovery and cross-examination are insufficient for this proceeding.

Combined Petitioners' claim that discovery in Subpart L proceedings is limited to "notice of irrelevant, as well as potentially relevant, additions to the NRC's ADAMS data base," Motion at 2-3, is completely inaccurate. In Subpart L proceedings, *all parties* to the proceeding (except the NRC Staff) have to disclose "any expert, upon whose opinion the party bases its claims" and "all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions" within 30 days of the Board order granting a request for hearing or petition to intervene. 10 C.F.R. 2.336(a). The NRC Staff must also automatically disclose NRC correspondence, application documents, and other documents supporting the NRC Staff review that are relevant to the contentions that are admitted. 10 C.F.R. 2.336(b).

In adopting the rule, the Commission determined that this automatic discovery is preferable to more traditional discovery, explaining that "[t]his approach should reduce the burden on public participants because petitioners would be given access to pertinent information without the need to file formal discovery requests, and would not be burdened with responding to formal discovery requests." 69 Fed. Reg. 2182, 2188. The Commission also determined that the mandatory party disclosures and the NRC Staff's requirement to maintain a hearing file "go well beyond the discovery provisions for full, on-the-record adjudicatory hearings under the APA." 69 Fed. Reg. 2182, 2189 (quotation omitted). In light of the existing disclosure rules and the Commission's explicit determination of the adequacy of these procedures, Combined Petitioners

have failed to demonstrate that traditional, interrogatory-based discovery is necessary in this case or at all superior to the existing discovery procedures under Subpart L.

Combined Petitioners' claim that "[i]ntervenors' attorneys are forbidden from conducting the examination and cross-examination of witnesses at the adjudication of contentions" under Subpart L is also incorrect. Motion at 3. Combined Petitioners again mischaracterize Subpart L. Under Subpart L, "a party may file a motion with the presiding officer to permit cross-examination by the parties on particular admitted contentions or issues." 10 C.F.R. 2.1204(b). As the Commission explained in promulgating the rule,

> The presiding officer is ultimately responsible for the preparation of an initial decision on the contention/contested matter; it would follow that the presiding officer is best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer's (future) decision. If there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize cross-examination by the parties.

69 Fed. Reg. 2182, 2196. While cross-examination is not a matter of right in a Subpart L proceeding, an intervenor may still request the right to cross-examination on specific contentions or issues by motion.[6] At this stage, however, such a request is too early as the parameters of the eventual hearing and anticipated witnesses are still unknown.

Regardless, as noted above, the Commission has determined that traditional cross-examination is only *necessary* in cases where "motive, intent, or credibility are at issue, or if there is a dispute over the occurrence of a past event." 69 Fed. Reg. 2182, 2205. Combined Petitioners have not shown that these criteria apply to any of the proposed contentions in this proceeding, nor did any of the other petitioners argue this in their petitions to intervene. As a

[6] Combined Petitioners' current motion does not fulfill the requirements of 10 C.F.R. 2.1204(b), and such a request would not be appropriate until closer to the hearing when the specific witnesses have been identified, and a cross-examination plan and the objective of the cross-examination plan have been presented to the Board.

result, Combined Petitioners have failed to justify how the use of traditional cross-examination requires the adoption of Subpart G procedures in this case.

II. Conclusion

For the foregoing reasons, the Board should reject Combined Petitioners' request to adopt the Subpart G procedures in this case.

Respectfully submitted,

/Signed electronically by Anne R. Leidich/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Holtec International's Answer Opposing Don't Waste Michigan, et al., and Sierra Club's Joint Motion to Adopt Hearing Procedures has been served through the E-Filing system on the participants in the above-captioned proceeding this 14th day of January, 2019.

/signed electronically by Anne R. Leidich/
Anne R. Leidich