

November 16, 2004

MEMORANDUM TO: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

FROM: G. Paul Bollwerk, III /RA/  
Chief Administrative Judge

SUBJECT: ATOMIC SAFETY AND LICENSING BOARD PANEL  
COMMENTS ON SECY-04-0177, "MODEL  
MILESTONES/SCHEDULES FOR PRINCIPAL LICENSING  
TRACKS"

Acting in accord with the Commission's November 13, 2003 staff requirements memorandum (SRM) regarding the adoption of the new 10 C.F.R. Part 2 rules of practice for adjudicatory hearings, in SECY-04-0177 the Office of the General Counsel (OGC) has provided the Commission with options for the adoption of milestones for the adjudicatory hearing process. For the reasons set forth below, we believe the current requirements in the new Part 2 are adequate to address any concerns regarding hearing process scheduling. Nonetheless, if additional milestone/scheduling measures are to be implemented, we believe the milestones proposed by OGC are sufficient and should be adopted by a policy statement rather than by incorporation into Part 2 as an appendix or otherwise.<sup>1</sup>

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<sup>1</sup> For reasons that are not apparent, in this instance OGC did not consult with the Atomic Safety and Licensing Board Panel (ASLBP or the Panel) prior to presenting to the Commission what clearly is a proposed substantive change to the existing Part 2 rules of practice. This seemingly runs contrary to the policy embodied in 10 C.F.R. § 1.15 that specifies the Chief Administrative Judge "develops and applies procedures governing the activities of Boards, Administrative Judges, and Administrative Law Judges and makes appropriate recommendations to the Commission concerning the rules governing the conduct of hearings" (emphasis added). Moreover, as a practical matter, as the entity charged under agency rules with managing and conducting agency adjudicatory proceedings, the Panel is the body most affected by the imposition of milestones or schedules, making it logical that its views should be sought during the formative process rather than after a proposal has been formally created and recommended to the Commission.

Based on discussions with the Chairman's office, it is our understanding there was no intent on the part of the Commission in connection with the development of the milestones/schedules proposal to change the longstanding practice by which there is consultation between OGC and the Panel before Part 2 changes are proposed to the Commission. As a consequence, we view what transpired as an unfortunate misunderstanding that will not reoccur.

I. Office of the General Counsel Recommendations

In April 2001, the Commission published for public comment a proposed rule that would, if adopted, substantially revise NRC adjudicatory procedures. See 66 Fed. Reg. 19,610 (Apr. 16, 2001). Proposed rule sections 2.332 and 2.334 charged the presiding officer in a hearing with the task of establishing and maintaining a hearing schedule, and notifying the Commission of any departure from the schedule greater than sixty days. See id. at 19,620. In the proposed rule's "Summary and General Questions" section, the Commission stated that it "welcome[d] comments on whether firm schedules or milestones should be established in the NRC's rules of practice in 10 CFR part 2." See id. (answer to Question 6, "Time Limitations").

In adopting the final rule, in its "Significant Comments and Issues, and Their Resolution in Final Rule" section the Commission noted:

[T]he final rule does not contain any generally-applicable hearing schedule or set of milestones for the conduct of proceedings. The rule does, however, require the presiding officer to establish a schedule for the proceeding, to manage the case against that schedule, and to notify the Commission when it appears that there will be slippage in the overall schedule of sixty (60) days or more. The Commission will continue to exercise its oversight in proceedings and may revisit this issue in the future if circumstances warrant. In particular, the Commission will consider whether general sets of milestones for the principal adjudicatory tracks can be developed and added to the rules as an appendix or provided as guidance by other means.

69 Fed. Reg. 2182 (Jan. 14, 2004). Along this line, in its November 13, 2003 SRM relative to the final rule, the Commission directed OGC to continue to consider the use of a generic set of milestones for the principal licensing tracks. See Memorandum for Karen D. Cyr, General Counsel, and John F. Cordes, Director, Office of Commission Appellate Adjudication, from Annette L. Vietti-Cook, Secretary (Nov. 13, 2003) at 1 (MO3113). In response, OGC has prepared a set of model milestones and an alternate set of model schedules for several different licensing tracks, which it has presented in SECY-04-0177, "Model Milestones/Schedules for Principal Licensing Tracks" (Sept. 30, 2004) [hereinafter SECY-04-0177].

In SECY-04-0177, OGC discusses the advantages and disadvantages of milestones and schedules, and the implementation of milestones through various mechanisms.<sup>2</sup> OGC discounts the utility of extensive model schedules as being too rigid and requiring too much Commission oversight over the hearing process. See SECY-04-0177, at 6. Focusing instead on model milestones, OGC describes three possible roles such milestones could play in the

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<sup>2</sup> As described in SECY-04-0177, milestones set forth times within which certain adjudicatory activities must occur following certain key events in the licensing/enforcement or related adjudicatory process, while schedules establish deadlines for certain events starting with the beginning of the proceeding (i.e., day 0).

hearing process: (1) as a guide, with no legally binding effect; (2) legally binding in the sense that the presiding officer in a proceeding is required to use the milestones as a starting point for developing a hearing schedule; or (3) as a mandatory item that must be complied with unless certain criteria are met. See id. at 6-9. OGC also discusses methods for Commission adoption of the model milestones, focusing on three main options: (1) a non-binding policy statement; (2) application by order in each individual proceeding; or (3) various forms of rulemaking, including publication as a direct final rule, as a final administrative rule, or using notice and comment rulemaking. See id. at 9-11. Relative to the role of milestones and the method of adoption, OGC recommends the Commission “[a]pprove the Model Milestones, their inclusion in a new 10 CFR Part 2, Appendix B, and revisions to §§ 2.332 and 2.334 to refer to the Model Milestones as the starting point for establishing schedules” and that it undertake “the issuance of the new Appendix B and the revisions to §§ 2.332 and 2.334 via a final administrative rule.” Id. at 12. The latter recommendation is based on the OGC view that the delay involved in notice and comment rulemaking would “likely not result in significant new information or ideas” given that “[t]he Commission already sought and received comments on model schedule concepts in the proposed rulemaking on Part 2.” Id.

## II. Need for Additional Milestones/Schedules to Manage the Adjudicatory Process

As OGC notes in SECY-04-0177, the recent revisions to Part 2 include a number of scheduling requirements. See id. at 2. Besides a general provision directing that presiding officers establish a scheduling order early in the proceeding, there are specific deadlines when, among other activities, (1) intervention petitions/contention pleadings must be filed and a presiding officer determination on standing and contentions must be made; (2) discovery must start and mandatory disclosures must be made; (3) summary disposition motions must be filed and decided; (4) prefiled testimony must be submitted; and (5) proposed findings and conclusions must be filed. See 10 C.F.R. §§ 2.309 (a)-(b), (h)-(l), 2.332, 2.336(a)-(b), 2.704(a)-(c), 2.710(a), (e), 2.711(b), 2.712(a)-(b), 2.1205(a)-(c), 2.1209. Additionally, there is the Commission’s existing policy directive that, absent some specific deadline, a presiding officer is to make a decision within sixty days after the final pleadings are received. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998). Moreover, the new Part 2 rules contain a provision requiring that once a schedule is established, if that schedule slips by more than sixty days, the presiding officer must inform the Commission and provide an explanation. See 10 C.F.R. § 2.334(b).

Under the circumstances, the adoption of additional scheduling requirements seems unnecessary. This is particularly so given that a primary cause of significant delay in recent high-profile Panel licensing proceedings -- changes to the application -- will not be addressed in any meaningful way by milestone or scheduling provisions such as those proposed by OGC.<sup>3</sup>

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<sup>3</sup> In addition to delays relating to changes in the license application, recent experience suggests that security-related issues can cause considerable delays in a proceeding as well. Security-related delays stem from many causes, including lengthy need-to-know determinations, security procedures for holding hearings, procedures for writing and issuing decisions, and document redaction, withholding, and viewing procedures.

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In this regard, we believe it is important to recognize that the “conventional wisdom” about the adjudicatory process as a source of delay in licensing cases is overstated. As an appendix to this memorandum, we provide descriptions of the circumstances that surround the high-profile Private Fuel Storage and Savannah River MOX Fabrication Facility cases, both of which have been pending for at least three years, as well as the recently-initiated Vermont Yankee Power Uprate proceeding. Although the application-related delays in the first two proceedings is more extensive than in most cases while the latter case is still in the formative stage, taken as a whole they are not atypical given the fluid nature of the licensing process under which the applicant essentially has carte blanche to revise its application to address NRC staff concerns identified as part of the ongoing staff review/requests for additional information (RAI) process or problems/deficiencies identified during the adjudicatory process itself. As the Commission seeks to address managing delay in the hearing process, the degree to which this factor outside a presiding officer’s control impacts the process is worthy of its consideration as well. If the Commission nonetheless concludes additional management guidelines for presiding officers are necessary, the Panel considers milestones far preferable to schedules.<sup>4</sup> The Panel

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<sup>3</sup>(...continued)

The Duke Energy Corporation case is an example of a proceeding plagued by numerous security-related delays. There, the Duke Energy Corporation (Duke) seeks to amend its operating license to allow use of mixed oxide (MOX) lead test assemblies at its Catawba Nuclear Station. Discovery in the case, as well as the eventual hearing and the initial decision, have been delayed significantly because of need-to-know disputes regarding security-related contentions.

In addition to delays caused by disputes involving security-related issues, many proceedings are plagued by delays simply because of the types of information at issue in the hearing. Because of more onerous procedures for storing, handling, and communicating safeguards materials, the involvement of these materials in any proceeding can potentially add significant delays. For instance, in the Private Fuel Storage proceeding, delays were injected because certain PFS expert witness reports were classified as containing safeguards information. This created difficulties for counsel attempting to communicate with experts in other locations. Further, security procedures for simply holding a hearing involving safeguards issues can introduce complications that cause delay.

There is no indication that security-related delays will decrease in the future and, in fact, given the delays in recent cases such as Duke and Private Fuel Storage attributable to security issues, it is almost certain that these delays will increase in future proceedings.

<sup>4</sup> From the Panel’s perspective, one example relative to the most prominent adjudicatory proceeding “schedule” currently in place -- Appendix D to Part 2 that governs the hearing process regarding the Department of Energy’s anticipated construction authorization application for the Yucca Mountain high-level waste repository -- suffices to show the problem generally with using such an approach to case management. If, as seems likely, there are hundreds of contentions filed by multiple petitioners, whether it will be possible to hold to the fourth item on that schedule -- allocating twenty-five days between day 30 and day 55 following the start of the proceeding for answers to intervention and interested governmental participant petitions --

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also believes that if the Commission is unwilling simply to make the milestones non-binding guidelines, as the first OGC option describes, then, as compared to the third option of mandatory application, the "middle option" requiring presiding officers to use milestones as a starting point for developing the detailed schedules required by 10 CFR §§ 2.332 and 2.334, is the more logical and effective method for employing such scheduling guideposts.

### III. Implementation Process

Finally, in connection with the choice of an implementation procedure, the Panel does not endorse the OGC recommendation that the milestones be included as an appendix to 10 C.F.R. Part 2. The concerns that arose in connection with having the agency's enforcement guidelines in Part 2, Appendix C, suggest that locking Commission guidance of this sort into a Part 2 appendix should be avoided. If the Commission nonetheless wishes to adopt an Appendix B, then we believe it should do so after notice and comment rulemaking. As was noted in section I above, OGC asserts that providing such an opportunity, even briefly, is unlikely to generate anything useful. This approach, however, apparently is premised in large measure on its view that comments on this matter already were elicited as part of the Part 2 revision proposed rule.

The brief discussion of potential scheduling processes in the April 2001 proposed rule's statement of considerations addressed only the possibility of utilizing scheduling provisions, without providing any real information about what such a "schedule" would look like. In this regard, it should be recognized there are two "substantive" aspects to agency implementation of a milestones/schedules scheme: the form it takes (i.e., milestones or a schedule) and the particular time frames or dates that are included in the method adopted. The latter clearly are important to participants as well. See 69 Fed. Reg. at 2197, 2203 (discussing changes to proposed rule in response to comments on the time for filing intervention petitions and petitioner replies to petition answers). Moreover, to the degree the OGC-proposed milestones would key off the staff safety evaluation report (SER) or National Environmental Policy Act (NEPA) documents rather than, for example, the beginning of the evidentiary hearing, interested persons have not seen or been provided with an opportunity to comment on the practicality or reasonableness of those guidelines. Compare SECY-04-0177, App. A, Subpart L Milestones (summary disposition motion filing keyed to SER and NEPA documents) with 10 C.F.R. § 2.1205(a) (summary disposition motion filing keyed to beginning of evidentiary hearing). Thus, we recommend that if the Commission decides to go forward with Appendix B, it provide at least a brief notice and comment opportunity.<sup>5</sup>

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<sup>4</sup>(...continued)

seems highly problematic (assuming the respondents are to provide the presiding officer with anything other than the most superficial filings). If that is the case, then almost from its inception, the day-specific Appendix D schedule will be glaringly "off."

<sup>5</sup> We would add that whether the Commission decides to go forward with notice and comment rulemaking or utilize a direct final rule, it should give serious consideration to revising one of the current "scheduling" provisions in the new Part 2, the 45-day period afforded presiding officers under section 2.309(l) to make a standing/contentions determination following the final participant filing on these subjects. Experience over the past six months has shown

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The Panel appreciates the time afforded by the Commission to provide these comments on SECY-04-0177. We have no objection to these comments being made publicly available as part of any rulemaking package.

Attachment: As stated

cc: K. Cyr, OGC  
J. Cordes, OCAA  
A. Vietti-Cook, SECY

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<sup>5</sup>(...continued)

that this deadline, which was not included in the April 2001 proposed rule, is not workable in many instances because it does not provide sufficient time for presiding officers to schedule and conduct an initial prehearing conference in appropriate circumstances.

To be sure, a prehearing conference is not needed for every intervention petition. On the other hand, long-time Panel experience counsels that there are a number of instances when holding such a conference provides substantial value for the participants and the presiding officer by providing clarity/understanding regarding the participants' positions on the important initial matters of standing and issues. Additionally, these conferences are often an important opportunity for members of the public to observe and become educated about the agency's licensing and adjudicatory processes. With the current 45-day decision deadline, however, presiding officers are, as a practical matter, hard-pressed to hold such a conference and still meet this decisional deadline. This is particularly so given the agency's policy that such conferences be held to the extent practicable in the vicinity of the nuclear facility or materials at issue, which often requires finding appropriate meeting space on short notice in remote locations.

Under section 2.309(i), an extension can be provided if this deadline cannot be met. It makes little sense, however, to have a deadline that creates a substantial likelihood this provision will need to be invoked more than occasionally. As a consequence, we suggest that this particular provision be changed to provide that, in instances when the presiding officer conducts an initial prehearing conference on the issues of standing and contentions admissibility, the 45-day decisional deadline will begin to run from the conclusion of that conference or 75 days from the filing of answers and replies under section 2.309(h), whichever occurs first.

## APPENDIX

The Commission has shown great interest in expediting the hearing process. The new 10 C.F.R. Part 2 expressly and repeatedly identifies efficiency as a primary goal. Recent Commission issuances in the Louisiana Energy Services, L.P.<sup>1</sup> and Duke Energy<sup>2</sup> proceedings similarly reflect Commission concern with avoiding delay in the progress of cases. This appendix reviews a cause of significant delay experienced in several pending high profile adjudications that are not amenable to case management solutions such as those being proposed by OGC and, in fact, are generally unavoidable given the structure of the agency's current licensing and adjudicatory processes.

To be sure, particular cases can be identified in which there was an overly long hearing or presiding officer decisional period. Nonetheless, it seems apparent that a significant cause of delay in adjudicatory proceedings -- if not the most significant cause -- is associated with the fact that the adjudicatory process begins before most license applications are finished products. This is not a criticism of any particular applicant or its application; rather, it is a recognition of the reality of the licensing process as it now exists. Regardless of the quality or completeness of an application as filed, very likely it will be modified and amended a number of times before, and even after, the issuance of the staff's final safety evaluation report (FSER) and final environmental impact statement (FEIS). Simply put, the current agency licensing process is an iterative exchange of technical information between the staff and the applicant that results in countless changes, modifications, and amendments to the application in all but the simplest proceedings.

This process undoubtedly improves the quality of the application, increases safety, and enhances protection of the environment. But to the extent applications are constantly evolving as a function of the process of staff safety-related requests for additional information (RAIs), applicant RAI responses, and staff NEPA document issuance, the adjudicatory process ends up chasing a moving target as new safety and environmental "late-filed" contentions and concomitant discovery and motions are generated that make the adjudicatory process subject to unavoidable delays.

It is possible adjudications could be both (1) shorter in length from start to finish; and (2) far less likely to experience lengthy stays and continuances during adjudication if the notice of opportunity for hearing was not issued until the staff's FSER and FEIS are complete. That being said, it is not the purpose of this appendix to propose changes to current rules. Rather, as previously stated, it is intended to show the extent to which significant delays in current, high-profile Licensing Board adjudications result from causes that are not within the presiding officer's control.

1. Duke Cogema Stone & Webster (DCS) Savannah River Mixed Oxide (MOX) Fuel Fabrication Facility

DCS is a prime example of how the evolutionary nature of the licensing process generates unavoidable delays leading to a fitful, stop-start adjudication that frustrates the efficient conduct

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<sup>1</sup> CLI-04-03, 59 NRC 10 (2004).

<sup>2</sup> CLI-03-11, 58 NRC 130 (2003).

of the hearing process seemingly without regard to the implementation of milestones, schedules, or case management tools intended to expedite the case.

On February 28, 2001, applicant DCS submitted its application for construction of a MOX fuel fabrication facility to be located at the Department of Energy's (DOE) Savannah River site in South Carolina. In a June 14, 2001 order,<sup>3</sup> the Commission directed the Licensing Board to establish as its goal "the issuance of an initial decision on the [construction authorization request (CAR)] within approximately two years from the date that the NRC received the request," and presented suggested milestones designed to help achieve this goal.<sup>4</sup> The Commission also suggested that the Licensing Board use certain procedures to meet the two-year deadline, including requiring filings by electronic mail, granting no extensions absent unavoidable and extreme circumstances, and requiring simultaneous filings where appropriate.<sup>5</sup>

Three days after the Commission issued its order, on July 17, 2001, the Licensing Board issued a scheduling order for the conduct of the first phase of the proceeding.<sup>6</sup> On December 6, 2001, the Licensing Board issued its ruling on standing and contentions.<sup>7</sup> Thereafter, the Licensing Board received a January 24, 2002 letter from DCS stating that it had received new information from DOE regarding the facility that would require it to amend its CAR and its environmental report (ER).<sup>8</sup> The letter stated that "[d]epending on the extent of the changes, some modification in the overall hearing schedule on the remaining contentions that are related to the anticipated MOX Facility design changes may be warranted."<sup>9</sup>

On February 12, 2002, the Licensing Board issued a memorandum and order setting the schedule for Phase II of the proceeding.<sup>10</sup> In this issuance, the Licensing Board relied on the staff's projection that its FEIS and FSER would be issued on September 30, 2002.<sup>11</sup> On February 14, 2002, the Licensing Board received a letter from the staff regarding the changes

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<sup>3</sup> CLI-01-13, 53 NRC 478 (2001).

<sup>4</sup> Id. at 484-86.

<sup>5</sup> See id. at 486.

<sup>6</sup> Licensing Board Memorandum and Order (July 17, 2001) (unpublished).

<sup>7</sup> LBP-01-35, 54 NRC 403 (2001).

<sup>8</sup> Letter from Steven P. Frantz, DCS Counsel, to Judge Thomas S. Moore, Chairman, (Jan. 24, 2002).

<sup>9</sup> Id.

<sup>10</sup> Licensing Board Memorandum and Order (Feb. 12, 2002) (unpublished).

<sup>11</sup> Id. at 3-4.

by DOE to the MOX facility.<sup>12</sup> The letter stated that as a consequence of the above-described developments, a delay in the issuance of its draft environmental impact statement (DEIS) for the proposed MOX facility would result.<sup>13</sup>

In a March 7, 2002 order, the Licensing Board then canceled the discovery schedule set out in its February 12 order and stated that it planned to revise the discovery schedule based upon the staff's "latest review estimates."<sup>14</sup> The Licensing Board issued its revised discovery schedule in an April 30, 2002 order stating that the new schedule superseded the February 12 order.<sup>15</sup> The Board set out a new schedule based on the staff's projected dates of August 29, 2003 for issuance of the FEIS and September 20, 2003, for the FSER.<sup>16</sup> Thereafter, in an August 25, 2003 letter to the Licensing Board, the staff projected additional delays in its issuance of both the FEIS and FSER, stating that it planned to issue the FEIS on November 28, 2003, and the FSER on December 5, 2003.<sup>17</sup>

On November 5, 2003, the Licensing Board received a letter from DCS announcing that DOE had directed DCS to make certain changes to the boundary for the MOX facility. On November 17, 2003, the Licensing Board received a letter from the staff stating that, as a result of these changes, DCS would be required to file amendments to its ER and CAR, thereby causing "additional delays in issuing the final environmental impact statement, and the final safety evaluation report."<sup>18</sup>

On February 10, 2004, the Licensing Board received a letter from DCS stating that DOE had notified DCS of a delay of approximately one year in the schedule for start of construction of the MOX facility.<sup>19</sup> The Licensing Board received another letter and attachments from DCS on March 23, 2004, stating that DOE had directed DCS to submit amendments for the ER and

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<sup>12</sup> Letter from John T. Hull, NRC Staff Counsel, to Administrative Judges (Feb. 14, 2002).

<sup>13</sup> Id.

<sup>14</sup> Licensing Board Memorandum and Order (Mar. 7, 2002) at 2 (unpublished).

<sup>15</sup> Licensing Board Memorandum and Order (Apr. 30, 2002) at 1 (unpublished).

<sup>16</sup> Id. at 4-5.

<sup>17</sup> Letter from John T. Hull, NRC Staff Counsel, to Administrative Judges (Aug. 25, 2003).

<sup>18</sup> Letter from John T. Hull, NRC Staff Counsel, to Administrative Judges (Nov. 17, 2003).

<sup>19</sup> Letter from Alex S. Polonsky, DCS Counsel, to Judge Thomas S. Moore, Chairman, (Feb. 10, 2004).

CAR to DOE by May 2004.<sup>20</sup> The March 2004 letter was the final communication from any party regarding the timing of amendments to the ER and CAR. The final EIS and SER still have not been issued.

In sum, the two-year delay to date is essentially attributable to the activities of applicant DCS, as the staff is merely in a position to react to the DCS filings and cannot complete its necessary tasks until the applicant submits its required documents.

## 2. Private Fuel Storage, L.L.C. (PFS) Independent Spent Fuel Storage Installation (ISFSI)

As the Commission is aware from its recent PFS financial qualifications decision (CLI-04-27), a change in an applicant's basic approach to addressing a major licensing requirement can have a substantial impact on the proceeding in terms of additional adjudicatory disputes and, potentially, delay to the proceeding. Additionally, the evolving nature of a complex license application can continue long after completion of the FSER and FEIS, making it difficult to keep an adjudication on schedule. The 2003-2004 history of the PFS proceeding demonstrates how this can occur.

On May 28, 2003, the Commission denied immediate review of the Licensing Board's March 10, 2003 partial initial decision on aircraft crash "probability" (LBP-03-04) pending a decision on the "consequences" part of the hearing.<sup>21</sup> In doing so, the Commission established a target for the Board's completion of the consequences proceeding.<sup>22</sup> Citing its inherent supervisory power over licensing proceedings, the Commission informed the Licensing Board that it should make every effort to issue the consequences decision no later than December 2003.<sup>23</sup> The Commission stated that it was basing its schedule on the parties' time estimates for conducting pre-hearing discovery, presenting evidence at the hearing, and filing the post-hearing submissions of proposed findings.

In addition to setting scheduling targets, the Commission authorized the Licensing Board to use innovative procedural devices to reach its goal of deciding the "consequences" issue by the end of the year.<sup>24</sup> Such devices included ordering party disclosure in lieu of discovery, requiring simultaneous submissions, limiting the number of witnesses, forbidding summary disposition or other motions, conducting hearings at NRC Rockville headquarters rather than in Salt Lake

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<sup>20</sup> Letter from Alex S. Polonsky, DCS Counsel, to Judge Thomas S. Moore, Chairman, (Mar. 23, 2004).

<sup>21</sup> CLI-03-05, 57 NRC 279 (2003).

<sup>22</sup> See id. at 284-85.

<sup>23</sup> See id.

<sup>24</sup> See id.

City, limiting extensions of time, foregoing a formal staff evaluation, and any “other fair and workable procedural steps.”<sup>25</sup>

The day after the Commission issued its decision, the Licensing Board held a conference with the parties to establish a detailed schedule to meet the Commission’s deadline. The parties stayed on schedule for approximately two months, at which time PFS advised that it needed more time.<sup>26</sup>

Shortly thereafter, the staff issued a new round of RAIs. PFS immediately requested two weeks to determine a time estimate for completing the RAIs and resetting the schedule.<sup>27</sup> Two weeks later, the Licensing Board held another conference call during which PFS requested yet another week to estimate the time it needed to answer the staff’s RAIs, and the staff advised that it expected to issue another round of RAIs to PFS by August 15.<sup>28</sup>

On September 9, 2003, the Board issued a scheduling order that summarized the events of the preceding few months.<sup>29</sup> In that order, the Board noted the delays already encountered would bring decision completion to mid-April 2004. That schedule, the Board noted, was not only as aggressive as possible, but also (1) preserved the parties’ rights to prepare adequately their cases; and (2) would generate the sound record needed to resolve the complicated safety issues that had emerged since the PFS filings. On the other hand, the Board found the delay was due to a PFS inability to meet its own time estimates, filing more expert reports than expected, and a need to answer the staff RAIs. In addition, the large amount of safeguards material introduced into the proceeding was retarding the parties’ ability to communicate with their expert witnesses.

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<sup>25</sup> Id.

<sup>26</sup> See Licensing Board Scheduling Memorandum and Report (Sept. 9, 2003) (unpublished). Therein, the Licensing Board also noted: “Thus, not only had the schedule been set back by the three week delay thereby encountered, but that delay also foretold the possibility that, because of the complexity of the matter, the times previously allotted for other pre-hearing steps might prove too abbreviated.” Id. at 2.

<sup>27</sup> See id. at 2-3.

<sup>28</sup> Licensing Board Scheduling Memorandum and Report (Aug. 15, 2003) (unpublished). As the Licensing Board noted, “[t]he Applicant requested that the setting of the precise schedule be deferred approximately a week (from August 12 to August 20), at which time it expected to be able, in another conference call, to provide an accurate assessment of its projected RAI response time (Tr. at 14089-90; see also Tr. at 14139-40). . . . When the Licensing Board suggested that we proceed to set a tentative schedule even in the absence of precise RAI response time, the Applicant demurred (Tr. 14090).” Id. at 2.

<sup>29</sup> See Licensing Board Scheduling Order and Report (Sept. 9, 2003) (unpublished).

Throughout this period, the Licensing Board employed several of the Commission's suggested procedural devices.<sup>30</sup> Summary disposition motions were not employed, the hearing was scheduled for NRC headquarters, and the Board set all filings after the prefiled testimony to be due simultaneously. On the other hand, the Licensing Board found that it was too soon to attempt to limit the number of witnesses and most likely not necessary.<sup>31</sup> The Board also found that none of the parties wished to limit discovery.<sup>32</sup>

After receiving another round of RAIs, PFS requested that the schedule established at the September 9, 2003 conference call be suspended.<sup>33</sup> PFS initially said it was unable even to estimate the time it would need to complete its responses.<sup>34</sup> When pressed for a rough estimate by the Board, PFS stated that it would take one or two months. This would cause the scheduled hearing date to be postponed from December 2003 to no earlier than February 2004, leading to a Licensing Board decision in June 2004.<sup>35</sup> As it turned out, this RAI-induced hiatus in the hearing schedule lasted not one or two months, but four.<sup>36</sup> PFS did eventually submit its RAI responses and, in recognition of new concerns, concurrently amended its license

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<sup>30</sup> See id. at 8-11.

<sup>31</sup> See id. at 9-10.

<sup>32</sup> In its September 9, 2003 scheduling memorandum and report, the Licensing Board noted that "we have - - based on our individual and collective familiarity and expertise with this and other complex litigation, and taking into account from the outset the timeliness and fairness guidance offered by the Commission regarding this proceeding - - adopted a realistic schedule which preserves the parties' right to fairness and promotes a comprehensive record, all to the end of yielding a comprehensible and supportable decision." Id. at 14.

<sup>33</sup> See Licensing Board Order Suspending Schedule (Oct. 10, 2003) (unpublished). The Licensing Board noted that "[u]p to the point of the Staff's September 25 announcement that a second round of RAIs would need to be forthcoming, the parties had been meeting the schedule's deadlines." Id. at 1 n.1.

<sup>34</sup> See id. at 1-2. The Licensing Board noted that "the Applicant indicated it was not yet in a position to project the length of time it would need to respond to the latest RAIs, given that it had substantial work ahead to revise certain computer models in order to perform the additional analyses requested (Tr. at 14216-17, 14263)." See id.

<sup>35</sup> See id. at 2. In its order suspending schedule, the Licensing Board noted that "[a]ll involved in the proceeding agreed on the difficulty of establishing realistic schedules on complex technical issues before the extent of the issues' complexity, and the depth of the analyses required to address those issues, are fully known (Tr. At 14256-60). See also Sept. 9 Scheduling Order, pp. 2-3." Id. at 2 n.3.

<sup>36</sup> During this break in the hearing schedule, the parties and the Licensing Board continued to address other matters in the case. For instance, the Licensing Board issued LBP-03-30, 58 NRC 454 (2003), its partial initial decision regarding "rail-line alternatives."

application to address those concerns. Not surprisingly, the State responded by filing a new contention.<sup>37</sup>

In February 2004, the Licensing Board held a series of conference calls with the parties.<sup>38</sup> The staff projected an “unexpectedly long period” of time to review PFS’s RAI responses, i.e., until April 20, 2004.<sup>39</sup> Based on the staff’s representations, the Licensing Board set the hearing for a July-August time frame.<sup>40</sup> During the conference calls, the parties discussed several measures to shorten the length of the hearings<sup>41</sup> and ways to make use of the time delay, including moving some phases of discovery forward.<sup>42</sup> Everyone also agreed to file prefiled testimony to save time, and the Licensing Board suggested that the parties should also consider using prefiled rebuttal.<sup>43</sup>

The Licensing Board held two more conference calls during March and April. During an April 8 conference call, the staff informed the Board that it would now need three more weeks to finish its review of the RAI responses. This delay pushed the hearing into the August-September time frame. On May 11, 2004, the staff finally issued its analysis of those RAI responses. Having finally regained control of the hearing schedule, from that date forward the Licensing Board kept the proceeding on track.<sup>44</sup>

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<sup>37</sup> See Licensing Board Order Convening Conference Call (Regarding Contention Utah TT and Hearing Schedule) (Feb. 5, 2004) at 1 (unpublished).

<sup>38</sup> See generally id.; Licensing Board Order Summarizing Prehearing Conference Call (Regarding Contention Utah TT, Hearing Schedule, and Related Matters) (Feb. 19, 2004) (unpublished); Order Summarizing Prehearing Conference Rulings (Regarding Contention Utah TT and Hearing Schedule) (Feb. 27, 2004) (unpublished).

<sup>39</sup> See Licensing Board Order Summarizing Prehearing Conference Rulings (Regarding Contention Utah TT and Hearing Schedule) (Feb. 27, 2004) at 2 (unpublished).

<sup>40</sup> See id. at 4.

<sup>41</sup> See id. at 2-4 (explaining in detail ways to make the hearing run more efficiently).

<sup>42</sup> See Licensing Board Order Summarizing Prehearing Conference Call (Regarding Contention Utah TT, Hearing Schedule, and Related Matters) (Feb. 19, 2004) at 4 (unpublished).

<sup>43</sup> See id.

<sup>44</sup> The hearing began August 9, 2004, and concluded, as projected, on September 15. The Licensing Board used several procedural tools to save time including pre-filed testimony, rebuttal, and exhibits. The Licensing Board also had the exhibits premarked to minimize time that could be devoted to hearing substantive evidence from being consumed by the administrative tasks associated with the introduction of some 225 exhibits during the hearing. The Licensing Board also scheduled the hearing from 9:00 a.m. to 5:30 p.m., but to make

(continued...)

In summary, during just this last phase of the PFS adjudication, the total delay attributable entirely to the post-FSER evolution of the PFS application exceeded one year, effectively doubling the length of the schedule. Yet, absent the filing of a perfected application, delays of this nature likely cannot be avoided, but rather must be endured as part of the price of an effective licensing regime. Certainly, no amount of tinkering with the adjudicatory process, including rigid scheduling orders or milestones, will eliminate delay resulting from this cause.

3. Entergy Nuclear Vermont Yankee L.L.C. (Vermont Yankee) Extended Power Uprate

Finally, if the preceding discussion concerning the DCS and PFS proceedings demonstrates the acuity of hindsight, evolving circumstances regarding the recently initiated adjudication regarding the Vermont Yankee extended power uprate license amendment present an opportunity to prognosticate about delays yet to be experienced.

Vermont Yankee filed its application on September 10, 2003.<sup>45</sup> According to recently filed pleadings in connection with a motion to dismiss the proceeding,<sup>46</sup> the application has been modified or amended at least twenty times, including thirteen times since publication of the notice of opportunity for hearing on July 1, 2004.<sup>47</sup> As the Commission is aware, this is a high-profile case that has attracted significant public attention in the Vermont, New Hampshire, and Massachusetts areas. Indeed, at the request of the State of Vermont, the Commission directed the staff to prepare a special engineering report concerning the Vermont Yankee facility in addition to the staff's normal SER.<sup>48</sup> The State of Vermont has sought to intervene with a petition that contains over 500 pages of material in support of five contentions.<sup>49</sup>

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<sup>44</sup>(...continued)

sufficient progress began early or stayed late (often by several hours) for 13 out of the 16 days of hearing. The Licensing Board also allowed the parties to come into the hearing room on a Sunday to set up their offsite offices before the hearing began and, during the last week of the hearing, even held a Sunday hearing to finish the hearing as scheduled.

<sup>45</sup> See Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate (ADAMS Accession No. ML032580089).

<sup>46</sup> See New England Coalition's Motion to Dismiss Proceeding Due to Failure to Provide Proper Notice and New England Coalition's Memorandum of Fact and Law Supporting its Motion to Dismiss the Proceeding Due to Failure to Provide Proper Notice (Oct. 20, 2004).

<sup>47</sup> Id.

<sup>48</sup> See Letter from Nils J. Diaz, Chairman, Nuclear Regulatory Commission, to Michael H. Dworkin, Chairman, Vermont Public Service Board (May 4, 2004) (ADAMS Accession No. ML041170438).

<sup>49</sup> See Vermont Department of Public Service Notice of Intention to Participate and Petition to Intervene (Aug. 30, 2004).

Notwithstanding that the staff had ten months to review the Vermont Yankee application before it was docketed, it has already announced that it will require several additional months beyond the previously announced schedule to complete the SER.<sup>50</sup> The State of Vermont has already moved for leave to file a new contention.<sup>51</sup> And, as previously mentioned, petitioner New England Coalition has filed a motion to dismiss the entire proceeding on the grounds that the application has been amended so many times since July 1, 2004, that the original notice of opportunity for hearing no longer encompasses the application in its current state.<sup>52</sup> Regardless of the merits of the New England Coalition's motion, it serves to illustrate the practical problems that can arise when a Licensing Board is required to adjudicate an application that is subject to continuous revision and modification.

Based on these facts and circumstances, and assuming that an intervenor is found to have standing and one admissible contention, it would not be untoward to predict that the Vermont Yankee extended power uprate adjudication will be subject to additional application review/revision-related delays. And again, given the current licensing process, it is arguable there is no scheme of schedules, milestones, or case management procedures that will avoid this type of delay.

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<sup>50</sup> See Letter from L. B. Marsh, Director of Licensing Project Management, NRR, to Michael Kansler, President of Entergy Nuclear Operations at 2 (Oct. 15, 2004).

<sup>51</sup> See Vermont Department of Public Service Request for Leave to File a New Contention (Oct. 18, 2004).

<sup>52</sup> See supra note 46.