

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

ATOMIC SAFETY AND LICENSING BOARDS
Before Administrative Judges:

April 18, 2006 (2:00pm)

Michael C. Farrar, Chairman
E. Roy Hawkens
Nicholas G. Trikouros

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED April 18, 2006

In the Matter of
DALE L. MILLER

Docket No. IA-05-053
ASLBP No. 06-846-02-EA
April 18, 2006

In the Matter of
STEVEN P. MOFFITT

Docket No. IA-05-054
ASLBP No. 06-847-03-EA
April 18, 2006

INITIAL SCHEDULING ORDER

Three weeks ago, on March 27, the identically-constituted Licensing Boards in these companion cases granted the hearing requests of Dale Miller and Steven Moffitt, former employees of the Davis-Besse Nuclear Power Plant in northwestern Ohio who sought to challenge the January 4, 2006 Enforcement Orders of the NRC Staff suspending them for a period of five years, effectively immediately, from work in the regulated nuclear industry.¹ The Boards' grant of the hearing requests triggered established procedural norms in the regulations that govern such proceedings, including certain "milestones" for future phases, including a 25-day target (i.e., April 21) for issuing an initial scheduling order. In the orders granting the hearing requests, the Boards indicated they would hold an April 13 conference call with the parties to address those scheduling matters (March 25 Memorandum and Order at 7).

¹ In contrast to the situation in certain other pending NRC enforcement proceedings, the government has not also brought criminal indictments against Messrs. Miller and Moffitt.

Last week, the parties in each proceeding filed joint motions indicating their agreement as to the proposed scheduling of the first prehearing phase -- involving discovery -- and duly participated in the scheduled teleconference. This "Initial Scheduling Order" reflects the results of that teleconference in terms of acting upon the pending motions and addressing other relevant matters.

1. Length of Discovery Phase. The regulatory "milestones" put in place by the Commission call for the discovery phase to be completed within 145 days of a Board order granting a hearing. 10 C.F.R. Part 2, Appendix B, § I. And, as we earlier observed (March 27 Order at 3), the Commission has instructed (10 C.F.R. § 2.202(c)(1)) that hearings on immediately-effective orders are to be conducted "expeditiously," so we were prepared to shorten the discovery-completion milestone time accordingly. The schedule proposed by the parties would, however, lengthen that time by almost a month, ending on September 15.

Consequently, we inquired during the teleconference as to the justification for the lengthened schedule. The responses were more than satisfactory, centering on the enormous amount of documentary material with which counsel for Messrs. Miller and Moffitt, who has not been involved in the matter as long as the government, has to familiarize herself before moving forward (April 13 Tr. at 5-8). Because the "expedition" mandate is essentially for the benefit of the subjects of the orders (March 27 Order at 4) and by its own terms is to be applied "giving due consideration to the rights of the parties," and because the preamble to the milestones recognizes that they can be adjusted to take account of any relevant factors about the proceeding including its complexity, we indicated during the teleconference that the proposed schedule is a reasonable one in the circumstances (April 13 Tr. at 7).

2. Approval of Protective Order. Some of the documentation that the NRC Staff is preparing to turn over contains proprietary materials that are to be protected from public disclosure. To that end, the parties in each proceeding have drafted a suggested Protective Order for recipients of such materials to sign, promising to guard against their disclosure. Given the parties' agreement on the form of such order, and finding that form suitable for the assigned purpose, we hereby APPROVE the proposed order (and the attached sample form of "Non-Disclosure Declaration") in each proceeding and append a copy of each, signed by the Boards' Chairman and dated this date, to this Order.

3. Setting of Initial Schedule. In light of the foregoing, the schedule for discovery agreed upon by the parties is ACCEPTED, with the underlined modification as follows: (1) the parties will make their initial document disclosure on Wednesday, April 26 or as near thereto as may be, and at that time will inform the Boards as to the approximate number of documents each is providing, as well as provide us a rough estimate of the number of total pages those documents contain, and will provide the Boards a copy of any index to, or other summary of, the documents that they may have prepared; (2) all written discovery requests will be served by Thursday, June 1, and replies to such requests will be served within two weeks thereafter, by Thursday, June 15; and (3) all discovery will be completed by Friday, September 15. During the teleconference, the parties informed us that they contemplated depositions being taken in July, August, and early September, but that the precise timing had been left indeterminate to abide developments (April 13 Tr. at 8-10).

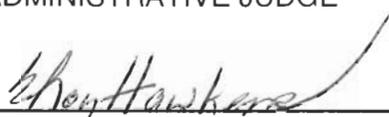
4. Convening of Next Teleconference. In order to track the pace of progress, the next teleconference is SET for Tuesday, June 20, beginning at 10:00 AM, subject to change depending on any conflicts that may arise before then (see April 13 Tr. at 10-12). If any matters develop before that time that threaten the orderly progress of the proceedings, the parties are encouraged to bring them promptly to the Boards' attention for early resolution (id. at 10-11, 20).

It is SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD



Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE



E. Roy Hawkens
ADMINISTRATIVE JUDGE



Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 18, 2006

Appended: Executed Protective Orders, each with attached form Non-Disclosure Declaration.

Copies of this Initial Scheduling Order were sent this date by e-mail transmission to counsel for Messrs. Miller and Moffitt and to counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Michael Farrar
E. Roy Hawkens
Nicholas G. Trikouros

DOCKETED
USNRC

April 18, 2006 (2:00pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

DALE L. MILLER

Docket No. IA-05-053

ASLBP No. 06-846-02-EA

PROPOSED MEMORANDUM AND ORDER
(Protective Order Governing Disclosure of Proprietary Materials)

Upon consideration of the joint motion of the Staff of the Nuclear Regulatory Commission (Staff) and counsel for Mr. Dale L. Miller for approval of a proposed Protective Order to govern the use and dissemination of proprietary materials in this proceeding, we grant the motion and adopt a Protective Order, the terms of which are as follows:

A. This Protective Order shall govern the use of all proprietary materials produced by the Staff. Notwithstanding any order to terminate this proceeding, this Protective Order shall remain in effect until specifically modified by the Atomic Licensing and Safety Board or the Commission.

B. Definitions—For purposes of this Protective Order:

1. The term “party” shall mean Mr. Miller, his counsel, and other individuals assisting Mr. Miller in the challenge to the NRC enforcement order applicable to Mr. Miller. The term does not include the Staff. The terms of this Protective Order, unless expressly stated, do not apply to NRC employees, contractors, or consultants. Disclosure of proprietary material by the Staff, including staff counsel, is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, 9.25.

2. The term “materials” means any audio tape or video tape recording or

written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

3. The term "proprietary materials" means:

- a. documents submitted to the Staff pursuant to subpoena or otherwise, and for which proprietary treatment has been sought pursuant to 10 C.F.R. § 2.390;
- b. any information contained in or obtained from such designated proprietary materials;
- c. any other materials that are made subject to this Protective Order by the Licensing Board, by the Commission, by any court or any other body having appropriate authority, or by agreement of the parties;
- d. notes of proprietary materials;
- e. copies of proprietary materials.

4. The term "proprietary material" does not include:

- a. any information or documents contained in the files of the Commission, or any other federal or state agency, or any federal or state court, unless the information or document has been determined proprietary by such agency or court; or
- b. information that is public knowledge, or which becomes public knowledge other than through disclosure in violation of this Protective Order.

5. The term "notes of proprietary materials" means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses

proprietary materials described in paragraph B.3 above. Notes of proprietary materials are subject to the same restrictions provided in this Protective Order for proprietary materials except as specifically provided in this Protective Order.

6. The term "Non-Disclosure Declaration" shall mean the Declaration, as attached to this Protective Order, by which any person who has been granted access to proprietary materials shall certify his or her understanding that such access to proprietary materials is provided pursuant to the terms and restrictions of this Protective Order, and that such person has read the Protective Order and agrees to be bound by it. All Non-Disclosure Declarations shall be served on counsel for the Staff, as provided on the official service list for this proceeding.

7. The term "reviewing individuals" shall mean a person who has signed a Non-Disclosure Declaration and who is:

- a. Mr. Miller;
- b. counsel for Mr. Miller;
- c. assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller;
- c. a person designated as a reviewing representative by order of the Licensing Board or the Commission; or
- e. a court reporter engaged for depositions or record proceedings.

C. Proprietary materials shall be made available under the terms of this Protective Order only to Mr. Miller, counsel for Mr. Miller, and individuals assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller. The Staff shall produce proprietary information separately from non-proprietary information and shall mark proprietary materials with a cover letter.

D. Proprietary materials shall remain available to Mr. Miller, his counsel, and

individuals assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding related to the proprietary material is concluded and no longer subject to judicial review. Mr. Miller, his counsel, and individuals assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller shall, within fifteen (15) days of the later date described above, return the produced materials to the NRC staff, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain proprietary materials, and notes of proprietary materials may be retained, if they are maintained in accordance with paragraph F below. Within such time period, Mr. Miller, his counsel, and individuals assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller shall submit to the Staff an affidavit stating that, to the best of their knowledge, all proprietary materials and all notes of proprietary materials have been returned or have been destroyed or will be maintained in accordance with paragraph F below. To the extent proprietary materials are not destroyed, they shall remain subject to this Protective Order.

E. Mr. Miller, his counsel, and individuals assisting Mr. Miller in the challenge of the NRC enforcement order applicable to Mr. Miller shall maintain all proprietary materials in a secure place. Access to those materials shall be limited to those reviewing representatives specifically authorized pursuant to paragraphs G-J below.

F. Proprietary materials shall be treated as confidential in accordance with the Non-Disclosure Declaration executed pursuant to paragraph I below. Proprietary materials shall not be used except as necessary for the conduct of this proceeding, nor shall they be disclosed in any manner to any person except a reviewing representative who is engaged in the conduct of this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing representatives may make copies of proprietary

materials, but such copies become proprietary materials. Reviewing representatives may make notes of proprietary materials, which shall be treated as notes of proprietary materials if they disclose the contents of proprietary materials.

G. Reviewing representatives may not use information contained in proprietary material to obtain a commercial advantage.

H. If Mr. Miller or his counsel wish to designate as a reviewing representative a person not described in paragraph B.7 above, they shall seek the agreement of the Staff. If an agreement is reached, that person shall be a reviewing representative pursuant to paragraph B.7 above with respect to those materials. If no agreement is reached, the dispute shall be submitted to the Licensing Board for resolution.

I. A reviewing representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to proprietary materials pursuant to this Protective Order unless that reviewing representative has first executed a Non-Disclosure Declaration. A copy of each executed Non-Disclosure Declaration shall be provided to the Staff prior to disclosure of any proprietary material to that reviewing representative.

J. Attorneys qualified as reviewing representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order.

K. Any reviewing representative may disclose proprietary materials to any other reviewing representative as long as the disclosing reviewing representative and the receiving representative have both executed the Non-Disclosure Declaration. If any reviewing representative to whom the proprietary materials are disclosed ceases to be engaged in these proceedings, or employed or retained for a position whose occupant is not qualified to be a reviewing representative under paragraph B.7 above, access to proprietary materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Declaration shall continue to be bound by the provisions of this

Protective Order and the Declaration.

L. Subject to paragraph S below, the Licensing Board shall resolve any disputes arising under this Protective Order. Prior to presenting any dispute under this Protective Order to the Licensing Board, counsel for the Staff and counsel for Mr. Miller shall use their best efforts to resolve the dispute.

M. All copies of documents reflecting proprietary materials that are filed in this proceeding, including the protection of hearing testimony, the portion of exhibits, the portion of transcripts, the portion of pleadings, and the portion of documents that refer to proprietary materials shall be filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Protective Order. Such documents shall be marked "PROPRIETARY MATERIALS" and shall be served only on the Licensing Board, NRC's Office of the Secretary, and persons authorized to receive proprietary materials under this Protective Order.

N. If Mr. Miller or his counsel desires to include, utilize, or refer to proprietary information or information derived therefrom in a pleading, brief, testimony, exhibit, or other filing in this proceeding in such a manner that might require disclosure of such materials to persons other than the reviewing representatives, counsel for Mr. Miller shall notify the Staff and the Licensing Board of such a desire, identifying with particularity each of the proprietary materials. Thereafter, such proprietary materials will be governed by procedures determined by the Licensing Board.

O. Nothing in this Protective Order shall be construed as precluding objections to the use of proprietary materials on any legal grounds.

P. Nothing in this Protective Order shall preclude a request that the Licensing Board, the Commission, or any other body having proper authority, find that this Protective Order should not apply to any or all materials previously designated as proprietary materials

pursuant to this Protective Order. The Licensing Board may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

Q. The parties to this Protective Order may seek changes in it as appropriate from the Licensing Board or the Commission.

R. Nothing in this Protective Order prevents a request for public disclosure of information designated as proprietary materials, in accordance with NRC procedures.

S. If the Licensing Board finds at any time in the course of this proceeding that all or part of the proprietary materials need not be proprietary, those materials shall, nevertheless, be subject to the protection afforded by this Protective Order for ten (10) days from the date of issuance of the Licensing Board's decision, and if there is an interlocutory appeal or request that the issue be certified to the Commission, for an additional ten (10) days. The right to seek additional administrative or judicial remedies after the Licensing Board's decision respecting proprietary materials or reviewing representatives, or the Commission's denial of any appeal is not waived.

T. Nothing in this Protective Order shall be deemed to preclude a party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Protective Order.

U. The right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of proprietary materials is not waived by this Protective Order.

V. Proprietary materials or any other form of information that copies or discloses proprietary materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this proceeding. Any violation of this Protective Order and any Non-Disclosure Declaration executed hereunder shall constitute a violation of an order of the Commission. Any violation of this Protective Order may result in the

imposition of sanctions as the Licensing Board or the Commission may deem appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

April 18, 2006

Michael C. Jones

Chairman

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
DALE L. MILLER

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Docket No. IA-05-053
ASLBP No. 06-846-02-EA

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that (1) access to proprietary materials is provided to me pursuant to the terms and restrictions of the Atomic Licensing and Safety Board's April , 2006 Protective Order in this proceeding; (2) I have been given a copy of and have read the Protective Order; and (3) I agree to be bound by it. I understand that the contents of the proprietary materials, any notes or other memoranda, or any other form of information that copies or discloses proprietary materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this Declaration or the Protective Order, which incorporates the terms of this Declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate, including, but not limited to, referral of the violation to the appropriate bar associations and other disciplinary authorities.

WHEREFORE, I do solemnly agree to protect such proprietary information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this Declaration.

Name (printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DALE L. MILLER) Docket No. IA-05-053
)
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB INITIAL SCHEDULING ORDER AND ATTACHED PROTECTIVE ORDER GOVERNING DISCLOSURE OF PROPRIETARY MATERIAL (INCLUDING SAMPLE NON-DISCLOSURE DECLARATION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
E. Roy Hawkens
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

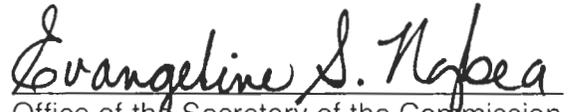
Administrative Judge
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Docket No. IA-05-053
LB INITIAL SCHEDULING ORDER AND
ATTACHED PROTECTIVE ORDER GOVERNING
DISCLOSURE OF PROPRIETARY MATERIAL
(INCLUDING SAMPLE NON-DISCLOSURE DECLARATION)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001


Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of April 2006