

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before the Licensing Board:

G. Paul Bollwerk, III, Chairman
Dr. Anthony J. Baratta
Dr. William W. Sager

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Bellefonte Nuclear Power Plant Units 3 and 4)

Docket Nos. 52-014-COL and 52-015-COL

ASLBP No. 08-864-02-COL-BD01

November 10, 2008

MEMORANDUM AND ORDER

(Prehearing Conference and Status of General Schedule)

In accord with 10 C.F.R. § 2.332(a), the Licensing Board conducted a November 3, 2008 telephone prehearing conference with applicant Tennessee Valley Authority (TVA), the NRC staff, and Joint Intervenors.¹ See Tr. at 242-95. During this conference the Board discussed a number of different matters with the parties, including the status of the mandatory disclosure process under section 2.336 and future scheduling for this combined operating license (COL) proceeding. Relative to those discussions, as well as the staff's September 22 and November 7, 2008 submissions providing status information on staff issuance of its draft and final environmental impact statements (EISs) and its safety evaluation report (SER), the Board provides the scheduling directives and guidance that follow. In doing so, however, we note that, because of the existing uncertainty regarding the staff's estimated schedule for making its draft EIS publicly available, notwithstanding the milestone provisions of 10 C.F.R. Part 2, App. B.II,

¹ Joint Intervenors include the Blue Ridge Environmental Defense League and the Southern Alliance for Clean Energy.

the Board will postpone issuing an initial general schedule for this Subpart L proceeding pending further staff information on its draft EIS issuance schedule.

1. Discovery Mandatory Disclosure Process

Previously, the parties submitted and the Board approved a series of stipulations regarding the conduct of various aspects of the mandatory disclosure process, including waiving the production of privilege logs for information other than proprietary items. See Licensing Board Memorandum and Order (Ruling Regarding Mandatory Disclosures and Scheduling Prehearing Conference) (Oct. 14, 2008) at 2-3 (unpublished). During the prehearing conference, the parties indicated they had entered into this agreement limiting the scope of their privilege logs because they anticipated this would be adequate for this proceeding. See Tr. at 249-50. Additionally, Joint Intervenors indicated, see Tr. at 250-51, as they asserted before the Board during the July 30, 2008 initial prehearing conference, see LBP-08-16, 68 NRC __, __, __ (slip op. at 54, 69) (Sept. 12, 2008), that they consider it unnecessary to seek a protective order to view this propriety information since they believe all information relating to the TVA application should be public. While continuing to pursue this approach is, of course, Joint Intervenors prerogative, the Board would note that the provisions of 10 C.F.R. § 2.323(a) regarding the need to submit a motion “no later than ten (10) days after the occurrence or circumstance from which the motion arises” would, absent some other directive from the Board, apply to any particular request for disclosure of or access to any item publicly identified in a privilege log as propriety.

Additionally, in the course of the conference applicant TVA stated that during the period prior to the issuance of the staff’s final EIS when the parties have agreed their update disclosures are due every thirty days (rather than every fourteen days as is provided under section 2.336(d)), its mandatory disclosures would be on a “rolling” basis that would reflect

documents identified fifteen days prior to the actual update disclosure date. There was no objection expressed to this practice, see Tr. at 248, and so we consider it adopted as part of the mandatory disclosure protocols that apply prior to issuance of the staff's final EIS.²

2. Motions to Admit New or Amended Contentions

As was noted during the prehearing conference, to be considered timely any motion to admit a new contention or to amend an admitted contention must be filed within thirty days of the event that provides the triggering basis for submitting a new or amended contention. See Tr. at 254; see also Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Oct. 14, 2008) at 4-5 (unpublished). Further, absent some other Board directive, any response to such a motion will be due within fourteen days following the filing of the motion, and any reply to a response shall be filed within seven days of the response. See Tr. at 254. Additionally, the Board will require that, absent some other Board directive, any mandatory disclosure update relative to a new contention or an amended contention must be completed by all parties within fourteen days after the new contention is admitted or the requested contention amendment is approved. See Tr. at 255. Also, as was noted in the Board's initial prehearing order, see Licensing Board Memorandum and Order (Initial Prehearing Order) (June 18, 2008) at 5 n.2 (unpublished) [hereinafter Initial Prehearing Order], a motion for admission of a new or amended contention has a ten-page limit (not including any supporting material). See Tr. at 254-55. The Board further indicated that in situations in which Joint Intervenors contemplate filing more than one new or amended contention in connection with a triggering event, because the page limit applies to any motion requesting the admission of new or amended contentions

² With respect to the submission of mandatory disclosure materials, the Board also advised Joint Intervenors that they need not submit their disclosure statements via the agency's E-Filing system, but could if they wished simply exchange that information with applicant TVA and the staff by e-mail (or some other mutually acceptable method). See Tr. at 251-53.

regardless of the number of contentions involved, in lieu of filing multiple separate motions of ten pages each seeking the admission of each individual contention, it would be preferable to seek leave of the Board to exceed the page limit. If granted, this would permit the party to file one timely motion that deals with all the contentions being proffered relative to a particular triggering event. See Tr. at 255.

3. Summary Disposition

The Board discussed with the parties the possible timing of any section 2.1205 summary disposition motions relative to the four admitted contentions in this proceeding. Applicant TVA indicated a possible interest in submitting such a dispositive motion prior to issuance of the staff's draft EIS in connection with contentions FSAR-D and NEPA-G, regarding low-level radioactive waste disposal, and NEPA-N, regarding inadequate costs estimates for the proposed Bellefonte units. TVA declared, however, that it wished to defer filing any motion regarding FSAR-D and NEPA-G until the Board's referral of its rulings on those contentions is addressed by the Commission or the staff issues its draft EIS, whichever comes first. See Tr. at 256-59. The Board indicated that, under the circumstances, a pre-draft EIS dispositive motion regarding contentions FSAR-D and NEPA-G should be filed within thirty days of a Commission decision regarding the Board's referred rulings or, if such a decision was not issued by the time the staff's draft EIS is available, in accord with the schedule the Board will establish for post-draft EIS dispositive motions. See Tr. at 259.

With regard to post-draft EIS dispositive motions, the Board indicated these would need to be filed relatively promptly following the availability of that document. See id. Although the Board had contemplated setting forth the applicable time frame as part of the general schedule for this proceeding based on date for issuance of the staff's draft EIS, for the reasons explained in section 7 below, issuance of that schedule is being deferred. Nonetheless, the parties should

be aware that under such a schedule, post-draft EIS dispositive motions will be due within seven days after either (1) the close of the period for seeking to amend any admitted environmental contention if no amendments regarding an admitted contention are filed; or (2) the parties complete their mandatory disclosures regarding any new or amended contention that is admitted following issuance of the draft EIS. A similar schedule would apply to dispositive motions following issuance of the final EIS and the draft, advanced, and final SER as well.

Regarding the times for responses to a dispositive motion, as the Board indicated, see Tr. at 260-61, because section 2.1205 applicable to Subpart L informal proceedings does not provide any time limits for responding to a response supporting a dispositive motion, the Board will look to section 2.710(a) applicable to Subpart G formal proceeding dispositive motions and the time limits specified there. In doing so, however, the Board has found that the time limits specified in section 2.710(a) can be structured somewhat more efficiently. Under section 2.710(a), any response to a summary disposition motion generally must be filed within twenty days of the motion. In this proceeding, however, if a party would like to file a response in support of another party's summary disposition motion, that response shall be filed within ten days of the motion. And if such a supporting response is filed,³ within fourteen days of the supporting response any response opposing the motion shall be filed, which should address both the motion and the supporting response.

Concerning page limits applicable to dispositive motions, after considering the parties' comments during the conference, see Tr. at 261-62, the Board will set a twenty-five page limit on such motions and responses. Given the possibility that dispositive motions regarding different contentions may be filed at different times, that page limit will apply on a per contention

³ If a supporting response is not filed, than any response opposing the summary disposition motion shall be filed within 20 days of the submission of the motion.

basis, with the Board's preference being, if summary disposition is sought, each admitted contention should be the subject of a separate dispositive motion and responses. Additionally, as the Board indicated, see Tr. at 262, the twenty-five page limit does not apply to attachments to the motion/responses or to the separate, short, concise statements of material facts as to which there is no genuine issue to be heard or material facts as to which there exists a genuine issue to be heard that must be filed with each motion/opposing response, see Tr. at 262-63; see also 10 C.F.R. § 2.710(a).

Finally, the Board notes that during its discussion with the parties, no schedule was set for the possible TVA pre-draft EIS submission of a dispositive motion regarding contention NEPA-N. During the conference, applicant TVA indicated that, in light of the October 30, 2008 ruling of the Licensing Board in the Shearon Harris COL proceeding on a similar issue, see Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC __, __-__ (slip op. at 23-27) (Oct. 30, 2008), it might file an additional motion concerning this Board's October 14, 2004 ruling denying its motion for clarification regarding contention NEPA-N, see Licensing Board Memorandum and Order (Ruling on Motion for Clarification) (Oct. 14, 2008) at 3-4 (unpublished). See Tr. at 289-93. Such a pleading was, in fact, filed by TVA this date. See Applicant's Motion for Leave to File and Motion for Reconsideration of the Board's Clarification Order Regarding Contention NEPA-N (Nov. 10, 2008). Given this development, the Board will defer setting a schedule for a TVA pre-draft EIS dispositive motion on this contention pending Board resolution of this TVA submission.

4. Pre-Evidentiary Hearing Events

Assuming that one or more admitted contentions ultimately are to be the subject of an evidentiary hearing, there are a number of scheduling items that come into play. One is a final list of potential witnesses, which should be provided, at the latest, in conjunction with the

mandatory disclosure update associated with any amended contention or admitted new contention. See Tr. at 273. Scheduling consideration also will be given to a deadline for any request to use alternative procedures for the hearing, including the use of Subpart G or Subpart N procedures or allowing cross-examination by counsel in lieu of the Board under section 2.1204(b).⁴ See Tr. at 273-75. In the case of the use of Subpart G or N procedures, such a request is likely to be due at the time summary disposition motions are filed, while permission to engage in the cross-examination likely will need to be sought when suggested Board direct testimony cross-examination questions are filed. Additionally, in line with the discussion during the prehearing conference, see Tr. at 275-78, the schedule when established also will call for simultaneous initial written statements of position and written direct testimony with supporting affidavits, followed by concurrent written responses with rebuttal testimony. The Board noted that the schedule will provide an opportunity for in limine motions and responses regarding both the direct and rebuttal pre-filed testimony, and for proposed cross-examination questions as to both types of testimony. See Tr. at 275, 278, 279. Further, the Board encouraged the parties to consider entering into factual stipulations and/or stipulations as to the authenticity and admissibility of proposed evidentiary materials. See Tr. at 278. Finally, given this proceeding has been conducted using the agency's E-Filing system, the Board also reminded the parties about the provisions of section 2.304(g) that require their prefiled testimony and exhibits be submitted as separate electronic files. See Tr. at 278-79.

⁴ During the prehearing conference, TVA counsel indicated the parties currently did not anticipate requesting the use of Subpart N's expedited oral hearing procedures. See Tr. at 274.

5. Evidentiary Hearing

Relative to a possible evidentiary hearing, the parties estimated that for the existing admitted contentions, any hearing is likely to last between three and five days. See Tr. at 280-81. The parties also indicated they foresaw the need for some process (and associated infrastructure) that would permit them to provide the Board with additional proposed cross-examination questions during the course of the hearing, see Tr. at 281-83, which will be the subject of further discussion. The Board also suggested that it would be looking at both Huntsville and Scottsboro, Alabama, as potential hearing sites. See Tr. at 283.

6. Miscellaneous Items

Although TVA and Joint Intervenors apparently have explored possible settlement regarding the admitted contentions, in response to a Board inquiry they indicated that at this juncture a settlement judge would not be helpful. See Tr. at 283-85. They also expressed the view that the Board's suggestion that there be a facility site visit, perhaps in conjunction with taking section 2.315(a) limited appearance statements, was worthy of further exploration. See Tr. at 285-87.

Finally, the Board and the parties discussed holding periodic status conferences by telephone. See Tr. at 287-88. Given the current uncertainty about when the staff draft EIS will be issued, which is discussed in section 7 below, the Board will defer setting any time frame for such further conferences now, but likely will provide additional information when it sets an initial general schedule for the proceeding. In the interim, any matters that require Board resolution should be brought to the Board's attention promptly.

7. Deferral of General Schedule and Request for Staff Status Report on Scheduling

Appendix B.II to Part 2 suggests that a general schedule for a Subpart L proceeding be established in the first instance within 55 days of issuance of the licensing board order granting

intervention and admitting contentions. In this instance, that date would have been November 6, 2008. As both the Appendix B guidance and section 2.332(d) indicate, in setting a general schedule, we must take into account the staff's schedule relative to its safety and environmental review of the application in question. In this instance, we initially were told by the staff in its September 22 submission that the draft EIS would be publicly available on March 6, 2009. See Letter from Jody C. Martin, NRC Staff Counsel, to Licensing Board 1 (Sept. 22, 2008). On the basis of that information and the input from the parties at the November 3 prehearing conference, we were prepared to issue an initial general schedule for this proceeding by November 6. During the prehearing conference, however, we were advised by the staff that it (1) now anticipated a delay in issuance of both the draft EIS and the SER relating to hydrology matters; and (2) would provide us with information on the length of the delay by November 7. See Tr. at 263-66. On November 7, staff counsel sent us a letter indicating that "the Draft and Final EIS will likely be delayed, [but the staff has] not yet formulated a revised schedule for issuance." Letter from Jody C. Martin, NRC Staff Counsel, to Licensing Board 1 (Nov. 7, 2008).

Because the date for issuance of the staff draft EIS is an essential jumping off point for the schedule for the rest of this proceeding, notwithstanding the guidelines for Subpart L cases in Appendix B.II, no purpose would be served at this point in issuing a general schedule that could not provide any specific deadlines for any activities by the parties or the Board. Accordingly, before promulgating an initial schedule, we will await receipt of an update from the staff regarding the dates for issuance of the draft EIS, as well as for the final EIS, the SER with open items, the advanced SER, and the final SER. In this regard, we request that on or before Monday, November 24, 2008, the staff provide the Board and the other parties with an update

on its schedule for issuing these documents or, if such a schedule for issuance has not been determined, the staff's best estimate as to when a new schedule for issuance will be available.

In accordance with 10 C.F.R. § 2.329(e), any objections to this memorandum and order shall be filed within five days after it is served.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD⁵

/RA/

G. Paul Bollwerk, III
CHAIRMAN

Rockville, Maryland

November 10, 2008

⁵ Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) applicant TVA; (2) Joint Intervenors; and (3) the staff.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (PREHEARING CONFERENCE AND STATUS OF GENERAL SCHEDULE), issued November 10, 2008, have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by Nancy Greathead]
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Dated at Rockville, Maryland
this 10th day of November 2008