

June 16, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247-LR/ 50-286-LR
)
(Indian Point Nuclear Generating)
Units 2 and 3)

NRC STAFF'S COMMENTS ON THE BOARD'S
DRAFT SCHEDULING ORDER OF JUNE 2, 2010

INTRODUCTION

In its "Draft Scheduling Order" of June 2, 2010 ("Draft Order"), the Atomic Safety and Licensing Board ("Board") offered the parties an opportunity to comment on the proposed schedule set forth therein (Draft Order at 2). The NRC Staff ("Staff") hereby provides its comments on the proposed schedule. In brief, the Staff believes that the proposed schedule provides a comprehensive and efficient timetable for the litigation of contested issues in this proceeding. The Staff supports the Board's adoption of the proposed schedule with certain modifications proposed herein, to avert filing conflicts and to assure that sufficient time is afforded for the completion of various litigation tasks. The Staff's comments are set forth in numbered paragraphs below, corresponding to the numbered paragraphs in the Draft Order.

SPECIFIC COMMENTS

A. Final Environmental Impact Statement (FEIS) and Final Safety Evaluation Report.

The Staff continues to anticipate publication of the FEIS on or before August 31, 2010.

B. Mandatory Disclosures and Production of Hearing File.

The Staff will continue to comply with its mandatory disclosure obligations in accordance

with NRC regulations and the Board's directives. The Staff notes that the Board's proposed schedule would require, once the hearing commences, that an update be provided "immediately upon the discovery of any new, relevant information (Draft Order at 4, emphasis added). While the Staff recognizes that important information could arise at any time, under the Board's proposed approach, immediate updates would be required regardless of the materiality of the information to be disclosed; such a requirement, however, would present inordinate demands on the parties' time and resources. For example, immediate disclosures and privilege log updates would be required to record every routine transmission of E-mail communications among a party's employees or members regardless of the importance of the information. In particular, this requirement would severely impact the Staff, inasmuch as the Staff's disclosure obligations relate not just to the contentions, but to the application in general. Accordingly, the Staff proposes that this requirement be modified to state: "However, once the hearing has commenced, updates are not to be made in monthly reports but must be made immediately upon the discovery of, and limited to, any new, relevant information that is material to an admitted contention."

C. Protective Order and Non-Disclosure Agreement.

No comment.

D. Disclosure Disputes and Motions to Compel.

No comment.

E. Monthly Status Report.

No comment.

F. Additional Contentions.

No comment.

G. Pleadings and Motions - Generally.

1. Pleadings – Page Limitation. The Draft Order would allow a twenty-five (25)

page limit for motions and answers, “absent preapproval of the Board.” The Staff does not oppose this proposed limit, except insofar as the Draft Order requires that motions to exceed this page limit be filed “no less than four (4) business days prior to the time the motion or answer is due to be filed.” Draft Order at 6. This proposed deadline is inconsistent with the provisions of 10 C.F.R. § 2.323(c), which requires that answers to motions, in general, are to be filed within “10 days” after service of the incoming motion – *i.e.*, under § 2.323(c), answers are due just six to eight business days after the incoming motion was filed. The proposed requirement that a motion for extension be filed four business days before the answer is due would allow insufficient time to request an extension of the page limit, particularly if the incoming motion was filed on a Friday (for which responses would be due six business days later). Accordingly, the Staff suggests that this requirement be modified to state: “A motion for preapproval to exceed this page limitation shall be submitted in writing no less than three (3) business days prior to the time the motion or answer is due to be filed.” Further, in order to assure that the views of any parties opposing the motion are presented in a timely manner, the Staff proposes modifying clause (i) of this provision to require the movant to “(i) indicate whether the request is opposed or supported by the other participants in the proceeding, and if opposed, to succinctly describe the grounds stated for such opposition.”

2. Response to New Facts or Arguments in Answer Supporting a Motion.

No comment.

3. Motion for Leave to File Reply.

Here, the Draft Order requires that motions for leave to reply must be filed “four business days prior to the time the reply would be required to be filed” (Draft Order at 7). In the Staff’s view, this requirement does not afford an adequate time for filing such requests – particularly since the Board “presume[s] that for a reply to be timely it would have to be filed within seven (7) days of the date of service of the response it is intended to address” (Draft Order at 7 n.22).

In effect, the requirement that such motions be filed within four business days before the reply is filed would allow just one day for a party to review the incoming response and request leave to reply. Accordingly, the Staff suggests that this requirement be modified to state: "A motion for leave to file a reply shall be submitted not less than three (3) business days prior to the time the reply would be required to be filed." Further, the Staff suggests that this provision be modified to require, like motions for an extension of time or for an expansion of the page limit in Paragraphs G.1 and G.4, that motions for leave to reply must "(i) indicate whether the request is opposed or supported by the other participants in the proceeding and, if opposed, to succinctly describe the grounds stated for such opposition, and (ii) demonstrate good cause for being permitted to file a reply."

4. Motion for Extension of Time.

The proposed requirement that motions for an extension of time must be filed "at least four (4) business days before the due date" of the pleading (Draft Order at 7), does not afford an adequate time for filing such requests, especially where the pleading is intended to respond to a pleading filed on a Friday (which allows only six business days to file a response). In effect, this requirement would allow just one business day for a party to review the incoming pleading and to file an adequate explanation of why an extension of time is required to respond. As in the case of motions for an expansion of the page limit (see Paragraph G.1 above), the proposed requirement that a motion for extension of time be filed four business days before the answer is due would allow insufficient time for the answering party to recognize that an extension is needed and to file a motion seeking such relief. Accordingly, the Staff suggests that this requirement be modified to state: "A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other submission for which an extension is sought." Finally, as in Paragraphs G.1 and G.3 above, in order to assure that the views of any parties opposing the motion are presented in a timely manner, the Staff

proposes modifying clause (i) of this provision to require the movant to: "(i) indicate whether the request is opposed or supported by the other participants in the proceeding, and if opposed, to succinctly describe the grounds stated for such opposition,"

5. Answer Opposing a Motion to Exceed the Page Limitation, to File a Reply, or to Extend the Time for Filing a Pleading.

In this paragraph of the Draft Order, the Board proposes affording "two (2) business days" for parties to respond to motions to exceed the page limit, to file a reply, or to extend the time for filing (Draft Order at 7). This proposal would afford the Board two business days to rule on the relief request after receiving the answer thereto. While this appears reasonable, the Staff believes that the merits of most motions of this nature should be fairly apparent in the movant's filing, and only rarely would a ruling on the motion be affected by the respondent's answer thereto – particularly since Paragraphs G.1 and G.4 of the Draft Order (and Paragraph G.3, as modified herein) would require these motions to "indicate whether the request is opposed or supported by the other participants in the proceeding, and if opposed, to succinctly describe the grounds stated for such opposition," Accordingly, the Staff suggests that this requirement be modified to state: "An answer to a motion to exceed the page limit, to file a reply, or to extend the time for filing a pleading, if any, shall be filed and served within one (1) business day after the filing of the motion."

6. Motion Certification.

No comment.

7. Answer Certification.

No comment.

8. Supplemental Information.

No comment.

H. Dispositive Motions.

The Staff shares the Board's view that motions for summary disposition should be filed far enough in advance of the hearing so as not to interfere with hearing preparations. See Draft Order at 9. Nonetheless, the Staff has found that summary disposition motions (like summary judgment motions filed under Rule 56 in federal court litigation)¹ constitute an important litigation tool that can help avert the unnecessary expenditure of considerable time and resources, by disposing of issues as to which there is no genuine dispute of material fact. Further, such motions can be particularly important in Subpart L proceedings -- where interrogatories and requests for admission are not utilized -- as a means for clarifying and narrowing the issues that must be addressed at hearing, thus helping to streamline the issues to be resolved.

Finally, with respect to timing, it is important to recognize that a party's position on a contention may not be fully crystallized until it has had an opportunity to review the information obtained in discovery and to work with its witnesses in evaluating the contention's merits. In this regard, the Staff notes that in a Subpart L proceeding, the Commission's Rules of Practice allow summary disposition motions to be filed "no later than forty-five (45) days before the commencement of hearing." 10 C.F.R. § 2.1205(a). For these reasons, the Staff submits that Paragraphs H.2 and H.4 of the Draft Order should be modified as follows:

¹ In federal court litigation, Rule 56(c), Fed. R. Civ. P., requires summary judgment motions to be served "at least 10 days before the date set for hearing," and allows other parties to serve opposing affidavits "before the hearing day." Recent amendments to the rule, effective December 1, 2010, curtail the period for filing and provide that "a party may move for summary judgment at any time until 30 days after the close of all discovery."

2. Additional Time for Dispositive Motions.

In light of the gravity and importance of dispositive motions, and in order to accommodate careful consultation as specified above, dispositive motions may be filed ~~up to thirty (30) days after the occurrence or circumstance from which the motion arises (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a))~~ no later than 60 days prior to the date any party's testimony is due to be filed on that contention, provided that the moving party commences sincere efforts to contact and consult all other parties within ~~fifteen (15) days of the occurrence or circumstance~~ ten (10) days prior to filing the motion, and the accompanying certification so states.

* * * *

4. Deadline.

With the exceptions noted below, all motions for summary disposition based on information that is now available, including motions based on the FSER, shall be filed on or before July 30, 2010. With regard to any motion for summary disposition filed after that date, the moving party shall identify and explain the new information or event that gave rise to the motion, and/or the reasons why the motion could not be filed by that date. If the Board determines that the motion was not filed in a timely manner or that its consideration would delay the hearing in this proceeding, the motion will be summarily denied. In addition, no motion for summary disposition or other dispositive motion relating to a previously admitted National Environmental Policy Act (NEPA) contention may be filed more than thirty (30) days after the NRC Staff publishes the FEIS.²

I. Clarification, Simplification, and Amendment of the Pleadings.

No comment.

J. Consolidation of the Safety and Environmental Issues for Hearing.

The schedule proposed by the Board contemplates a single track of litigation, in which all safety and environmental contentions proceed to hearing together (Draft Order at 12). At present, given the Staff's expectation that the FEIS will be issued by August 31 (*i.e.*, within 12 weeks), the Staff does not believe that bifurcation is necessary. Nonetheless, the Staff anticipates that the litigation of 13 or 15 contentions will require a considerable sustained effort

² The Staff has no comment on paragraphs H.1 and H.3.

by the Board and the parties involved in litigating those contentions, such that week-long or multi-week pauses may be necessary to permit some “re-grouping” to occur after the hearing has commenced. This is particularly true if more than one day is required for hearings on various contentions.³ Thus, it is reasonable to expect that hearings, once commenced, may not be held continuously until all contentions have been heard.

K. Evidentiary Hearings Filings.

The Draft Order requires that, “[u]nless modified by the Board due to the admission of new or amended contentions or for some other due cause, sixty (60) days after the trigger date” (*i.e.*, issuance of the FEIS), the Intervenors are to file their statements of position, testimony, affidavits and exhibits, to be followed 45 days later by the Applicant’s and Staff’s responsive filings (Draft Order at 14-15). In the Staff’s view, given the large number of contentions that have been admitted in this proceeding, the Board’s proposed approach provides the most reasonable and efficient means for the parties to identify the issues and specify the evidence that must be considered at hearing. Moreover, as previously stated by the Board, this approach would avert having “two ships passing in the night.” Tr. 813 (Apr. 19, 2010). Nonetheless, the Staff believes that certain aspects of the proposed schedule require modification, as set forth below, to avoid schedule conflicts and to afford sufficient time for the parties to complete their litigation tasks.

³ In its Draft Order, the Board observed that, “historically, Subpart L evidentiary proceedings have proven to be short, often requiring a day or less to hear any particular contention” (Draft Order at 10). In the Staff’s view, hearings in this proceeding may take considerably longer than one day per contention, given the number and complexity of the issues that have been raised in the contentions. Further, if permitted by the Board, the Staff anticipates that cross-examination on any contention (followed, as appropriate, by re-direct examination and Board questions) may well take more than one day.

1. Initial Statements of Position, Testimony, Affidavits, and Exhibits.

The Staff generally supports the provisions proposed in this paragraph, except insofar as the Board would require Intervenors to file their statements of position and direct case “sixty (60) days after the trigger date” (Draft Order at 14). The Staff believes that this requirement affords insufficient time for the Intervenors to file their case-in-chief following issuance of the FEIS, especially since they would be required to file any new or amended environmental contentions within 30 days after issuance of the FEIS, and to respond to any motions for summary disposition based on the FEIS within 50 days after publication thereof (see Draft Order at 6, 11, and 12). Accordingly, the Staff suggests that this requirement be modified to require the Intervenors to file their statements of position, testimony, affidavits and exhibits “ninety (90) days after the trigger date.” Further, interested governmental entities should be required to submit their statements of position, testimony, affidavits and exhibits at the same time as the Intervenors, in order to afford parties that oppose the governmental entities’ positions an opportunity to respond thereto.

2. Entergy’s and the NRC Staff’s Statements of Position, Testimony, Affidavits, and Exhibits.

This paragraph of the Draft Order would require the Applicant and Staff to file their statements of position, testimony, affidavits and exhibits within 45 days after the Intervenors have filed their case-in-chief (Draft Order at 15). The Staff believes that this proposal would be acceptable in most proceedings, but it affords an insufficient time here, given the unusually large number of issues that must be addressed by the responding parties, and the fact that a portion of the allotted time may be unavailable due to the need to respond to new contentions, to prepare or respond to dispositive motions, and to prepare and file motions *in limine*. Accordingly, the Staff requests that this paragraph be revised to require the Staff and Applicant to file their statements of position, testimony, affidavits and exhibits “[n]to later than sixty (60)

days after service of the materials submitted under paragraph K.1.”

3. Optional Revised Statement of Position and Submissions by Interested Governmental Entities.

In this paragraph of the Draft Order, the Board proposes that Intervenors be required to notify other parties of their intention to file a revised statement of position and rebuttal testimony “no later than ten (10) days after the service of the materials submitted by Entergy and the NRC Staff under paragraph K.2,” and to “submit their revised statement of position and rebuttal testimony no later than sixty (60) days after the service under paragraph K.2” (Draft Order at 15-16). In addition, the Draft Order allows interested governmental entities to “submit a written statement of position, written testimony with supporting affidavits, and exhibits no later than sixty (60) days after the submission of materials by Entergy and/or the NRC Staff under paragraph K.2.” The Staff submits that certain modifications of this paragraph are required.

First, the provision of fully 60 days for the filing of revised positions and rebuttal testimony by the Intervenors appears to be excessive and unnecessary, and is inconsistent with the Board’s proposal that only 45 days be afforded for the Applicant and Staff to file their statements of position, testimony, affidavits and exhibits – comprised of both direct and rebuttal evidence. Further, given the staggered filing approach adopted in the Draft Order, whereby the Staff and Applicant will be filing responses to the Intervenors’ initial filings, the issues will have been identified and joined such that there may be no need for Intervenors to file extensive rebuttal testimony. Accordingly, the Staff proposes that Intervenors be required to file any revised statements of position and rebuttal testimony “no later than thirty (30) days after the service under paragraph.K.2.”

Second, the Draft Order fails to consider the possibility that an Intervenor’s “revised position” or “rebuttal testimony” may improperly include new material, which the Staff (and/or Applicant) has not had a fair opportunity to address. Accordingly, the Staff requests that the

Draft Order be revised to provide that “The Staff and Applicant shall have an opportunity to respond to any new material in the Intervenor’s filing under paragraph K.2, no later than twenty (20) days after service thereof.”

Finally, interested governmental entities should be afforded an opportunity to submit statements of position, testimony, affidavits, and exhibits, the Staff anticipates that such materials would not be treated as “limited appearance” materials under 10 C.F.R. § 2.315(a) but, rather, may be treated as evidentiary materials upon which a decision may rest. See 10 C.F.R. § 2.337. Accordingly, opposing parties should be afforded an opportunity to file statements of position, testimony, affidavits and exhibits in response to the governmental entities’ pleadings and evidentiary filings. The Staff therefore proposes that this paragraph be revised, and that all filing provisions applicable to interested governmental entities be moved to paragraph K.1 above.

4. Motions In Limine or to Strike.

In this paragraph, the Draft Order would require, *inter alia*, that motions *in limine* or motions to strike be filed “[n]o later than twenty-one (21) days after service” of the materials submitted under paragraphs K.1, K.2 or K.3 (Draft Order at 16). The Staff respectfully submits that, given the number of admitted contentions and the large volume of evidentiary materials that may be filed in this proceeding, this provision should be modified to require that motions *in limine* and motions to strike should be filed within “thirty (30) days” after service of the materials filed under paragraphs K.1, K.2 or K.3.

5. Proposed Questions for the Board to Ask.

No comment.

6. Motions for Cross-Examination.

No comment.

7. Witnesses with Written Testimony Must Be Available in Person.

No comment.

8. Evidentiary Hearing.

In this paragraph, the Board notes that it currently contemplates the commencement of hearings between 30 and 60 days after the service of proposed questions and motions for cross-examination, which it projects would result in the commencement of hearings some seven to eight months after the trigger date (publication of the FEIS), *i.e.*, “between April and May 2011” (Draft Order at 18). The Staff believes that this paragraph may require revision to reflect any revisions to the schedule. More specifically, given the Staff’s view that certain adjustments to the milestone dates are required, as set forth in paragraphs K.1 to K.4 above (resulting in a net addition of 44 days to the schedule), hearings should be expected to commence no sooner than June 2011.

L. Requests for Subpart G Proceeding Based on Disclosures of Eyewitnesses.

This provision appears to be redundant (and potentially confusing), in that paragraph K.6 of the Draft Order already provides an opportunity for parties to file a motion seeking to conduct cross-examination within 30 days after the last service of materials under paragraphs K.2 or K.3 (see Draft Order at 17). The opportunity to seek cross-examination, provided in paragraph K.6, should be sufficient for the cross-examination of eye-witness testimony, as well.

M. Attachments to Filings.

1. Documents Must Be Attached.

In this paragraph, the Draft Order requires that any time a document is referred to in any motion or pleading, the referenced document must be attached (Draft Order at 18-19). The Staff respectfully submits that this requirement is overly broad and unworkable, as it would require a party to file copies of a document even if the party does not intend to rely thereon, but only mentions it in passing or as background (for example, a list of articles a witness has

authored or a summary of material that a party reviewed. Further, the requirement addresses references that appear in pleadings or motions, but does not specify whether it is intended to apply as well to written testimony. Assuming that such a requirement is consistent the Board's intent, this requirement should be revised as follows.

If written testimony, an affidavit, or a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), then a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the testimony, affidavit, motion or pleading if the party seeks to have the Board rely on the contents or conclusions of that document. In that event, the testimony, affidavit, motion or pleading must also cite to the specific page or section of the document that is relevant.

See Draft Order at 18-19.

2. Exception.

Consistent with the suggestion set forth in paragraph M.1 above, the Staff suggests that the terms "motion or pleading" and "pleading" be replaced by the phrase "written testimony, affidavit, motion or pleading."

3. Attached Documents are "Attachments".

The term "pleadings" should be replaced as set forth in paragraph M.2 above.

4. Designation and Marking of Attachments.

No comment.

5. Page Limits/Method of Electronic Submission.

No comment.

N. Findings of Fact and Conclusions of Law.

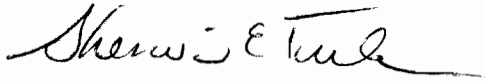
The Draft Order would require all parties to file proposed Findings of Fact and Conclusions of Law within forty-five days after the close of evidentiary hearings, and to file responses to the filings of other parties within thirty (30) days thereafter. Given the large number of contentions and the substantial volume of testimony and exhibits that are likely to be submitted in this proceeding, these periods appear to be inadequate. The Staff respectfully

submits that these requirements should be revised, to require the filing of proposed Findings of Fact and Conclusions of Law within sixty (60) days after the close of evidentiary hearings, and to file responsive filings within forty-five (45) days after service thereof.

CONCLUSION

The Draft Order proposed by the Board provides a comprehensive and efficient plan for managing the litigation of the numerous contested issues in this proceeding. The Staff supports the Board's adoption of the Draft Order, subject to the proposed modifications set forth above.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Sherwin E. Turk".

Sherwin E. Turk
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 16th day of June 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
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ENTERGY NUCLEAR OPERATIONS, INC.) Docket Nos. 50-247/286-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S COMMENTS ON THE BOARD'S DRAFT SCHEDULING ORDER OF JUNE 2, 2010," dated June 16, 2010, have been served upon the following through deposit in the NRC's internal mail system, with copies by electronic mail, or, as indicated by an asterisk, by deposit in the U.S. Postal Service, with copies by electronic mail this 16th day of June, 2010:

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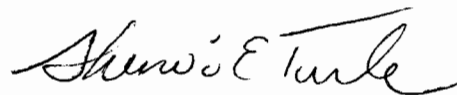
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