UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Nicholas G. Trikouros
Dr. William E. Kastenberg

In the Matter of: FirstEnergy NUCLEAR OPERATING COMPANY (Davis-Besse Nuclear Power Station, Unit 1)	Docket No. 50-346-LR ASLBP No. 11-907-01-LR-BD01 June 15, 2011

INITIAL SCHEDULING ORDER

On April 26, 2011, this Board issued a Memorandum and Order[1] that granted the Joint Intervenors' hearing request[2] that challenged the application by FirstEnergy Nuclear Operating Company (FirstEnergy) to extend its operating license for the Davis-Besse Nuclear Power Station, Unit 1 (Davis-Besse) for an additional twenty years from the current expiration date of April 22, 2017 to April 22, 2037.[3] On May 19, 2011, this Board held a prehearing conference call to discuss

[1] LBP-11-13, 73 NRC __ (April 26, 2011).

[2] Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Green Party of Ohio Request for Public Hearing and Petition for Leave to Intervene (Dec. 27, 2010). Joint Intervenors consist of Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario (CEA), Don't Waste Michigan, and the Green Party of Ohio. Id. at 3.

[3] License Renewal Application; Davis-Besse Nuclear Power Station 1.0-1, 1.1-1 (Aug. 2010) (ADAMS Accession Nos. ML102450567, ML102450563). FirstEnergy's application also seeks renewal of the associated source material, special nuclear material, and by-product material licenses under 10 C.F.R. Parts 30, 40, and 70. Id. at 1.0-1.

case management and scheduling.[4] Among the subjects discussed at the teleconference was FirstEnergy's unopposed motion to defer initial disclosures.[5] At the close of the teleconference, the Board directed the parties[6] to submit a proposed schedule and their agreement regarding mandatory disclosures.[7] As requested, FirstEnergy submitted a letter on June 6, 2011 reflecting the parties' proposal regarding scheduling and mandatory disclosures.[8]

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Commission's regulations require that the presiding officer (in this case, the Licensing Board), "as soon as practical after consulting with the parties by a scheduling conference, telephone, mail or other available means, enter a scheduling order that establishes limits for the time to file motions, conclude discovery, commence the oral phase of the hearing and take other actions in the proceeding."[9] The Board has considered the positions of the parties and has taken them into account to the extent they are consistent with our responsibility to establish proper case management, including establishment of "early and continuing control so that the proceeding will not be protracted because of lack of management."[10] In this regard, as mandated by 10 C.F.R. § 2.332(d), many of the dates herein are driven by the NRC Staff's current projection

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[4] Tr. at 240-74.

[5] FirstEnergy's Unopposed Motion to Defer Initial Disclosures (May 6, 2011); see Notice and Order (Setting Telephonic Initial Scheduling Conference) (May 10, 2011) (unpublished) at 2; Tr. at 246-48.

[6] Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on all admitted contentions. NRC Staff's Notice of Intent to Participate as a Party (May 11, 2011). Thus, unless otherwise expressly indicated, the term "parties" in this order includes the NRC Staff.

[7] Tr. at 268.

[8] Letter from Alex S. Polonsky, Counsel for FirstEnergy, to Licensing Board (June 6, 2011) [hereinafter Parties' Mandatory Disclosure Agreement and Proposed Schedule].

[9] 10 C.F.R. § 2.332(a).

[10] Id. § 2.332(c)(2).

for the issuance of its final supplemental environmental impact statement (FSEIS) and final safety evaluation report (FSER).[11] Attachment A hereto presents relevant time limits in table form.

A. Mandatory Disclosures[12] and Production of Hearing File

1. Initial Mandatory Disclosures and Production of Hearing File. NRC regulations specify that unless otherwise ordered by the Board, the parties must make, without further order or request from any party, certain mandatory disclosures within thirty (30) days of the Board's ruling admitting contentions.[13] Likewise, the regulations provide that within those same thirty (30) days, the NRC Staff must, without further order or request from any party, make certain mandatory disclosures,[14] and must "file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file."[15] Since LBP-11-13 issued on April 26, 2011, these items would ordinarily have been due May 26, 2011. After FirstEnergy made an unopposed motion to defer initial disclosures,[16] the Board temporarily suspended these deadlines pending the scheduling teleconference.[17]

The parties' June 16, 2011 agreement proposes at paragraph 13:

> The parties agree that the initial mandatory discovery disclosures, and the NRC Staff's hearing file index, shall be filed no later than 30 calendar days after the Commission rules on the May 6, 2011 appeal of LBP-11-13, or four and one-half

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[11] NRC: Davis-Besse Nuclear Power Station, Unit 1 – License Renewal Application, http://www.nrc.gov/reactors/operating/licensing/renewal/applications/davis-besse.html (last visited June 9, 2011).

[12] Except where otherwise specified herein, the term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336(a) and (b).

[13] 10 C.F.R. § 2.336(a).

[14] Id. § 2.336(b).

[15] Id. § 2.1203(a).

[16] FirstEnergy's Unopposed Motion to Defer Initial Disclosures.

[17] Notice and Order (Setting Telephonic Initial Scheduling Conference) (May 10, 2011) at 2.

> (4.5) months after the Board issues its initial scheduling order, whichever is earliest. A party may voluntarily file its initial mandatory disclosures earlier.[18]

The Commission has held "[i]nterlocutory appeals or petitions to the Commission are not devices for delaying or halting licensing board proceedings."[19] Further, this Board believes that the Commission's regulations and sound hearing practice require full and early disclosure to allow the parties and the Board efficiently to adjudicate the dispute. However, the parties have agreed to a limited deferral, which the Board believes will not unduly interfere with their preparation for this adjudicatory proceeding. The Board therefore reluctantly adopts the parties' proposal to modify the deadlines. All mandatory disclosures and the NRC Staff's hearing file shall be filed within thirty (30) days of the Commission's disposition of the pending appeal of the Board's April 26, 2011 Memorandum and Order,[20] but in no event later than November 1, 2011. The Board will not look favorably on future actions by the parties that will further delay mandatory disclosures or the prompt adjudication of the issues set for hearing in this case.

2. Updating of Disclosures. The regulations specify that the parties have a "continuing" duty to update their mandatory disclosures within fourteen (14) days of when information or documents are subsequently developed or obtained.[21] The NRC Staff has a "continuing" duty to update the hearing file.[22]

The parties proposed to modify the duty to update mandatory disclosures as follows:

> Until the NRC Staff issues the final safety evaluation report (SER) or final environmental impact statement (EIS), the continuing obligation of the parties under 10 C.F.R. § 2.336(d) to update their respective disclosures is modified so that any information or documents subsequently developed or obtained must be disclosed in

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[18] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 13.

[19] Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994).

[20] FirstEnergy's Notice of Appeal of LBP-11-13 (May 6, 2011).

[21] 10 C.F.R. § 2.336(d).

[22] Id. § 2.1203(c).

> a periodic update transmitted on the 15th day of every other month (subject to 10 C.F.R. § 2.306(a)). A party may voluntarily update more frequently.[23]

The parties proposed also that the duty to update mandatory disclosures and the hearing file terminate thirty (30) days before the Joint Intervenors submit direct testimony.[24]

In the interest of "[i]mproving the quality of the hearing through more thorough preparation," which is a proper objective of scheduling orders,[25] the Board believes that more frequent updates are advisable. Accordingly, the Board directs that updates to mandatory disclosures and to the NRC Staff's hearing file shall be filed no later than the 15th of every month, commencing the calendar month after initial disclosures, and shall cover all documents or other material or information required to be disclosed that are in the possession, custody, or control of each party (or its agents) as of the last day of the preceding month. A party may voluntarily update more frequently.

As proposed by the parties, the Board directs that if a contention is dismissed, the duty to update mandatory disclosures shall terminate with respect to that contention upon issuance of the order dismissing that contention.[26] Otherwise, the duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing.

3. Privilege Logs. The regulations require that the parties provide a "list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents."[27] These are referred to as "privilege logs."

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[23] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 13.

[24] Id. ¶ 14.

[25] 10 C.F.R. § 2.332(c)(4).

[26] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 14.

[27] 10 C.F.R. § 2.336(a)(3); accord id. § 2.336(b)(5).

The parties propose "to waive the requirement in 10 C.F.R. §§ 2.336(a)(3) and 2.336(b)(5) to produce privilege logs," except that they will still produce disclosure lists of any documents "withheld as containing sensitive unclassified non-safeguards information (SUNSI), including, but not limited to, proprietary, confidential commercial, and security-related information."[28]

Neither the NRC regulations nor the parties define the term "sensitive unclassified non-safeguards information (SUNSI)." The term is defined in the guidance document "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information" as information of which "the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals" and is categorized as allegation information; investigation information; security-related information; proprietary information; Privacy Act information; federal-, state-, foreign government-, and international agency-controlled information; and sensitive internal information.[29] Although guidance documents are not binding on this Board, we will use it interpret and define the terms of the parties' proposal.

The Board directs the parties to produce privilege logs covering any documents claimed to qualify for protected status as containing:

i. Information compiled by the NRC or any government agency for law enforcement purposes, including investigation or allegation information, provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(7);

ii. "Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or

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[28] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 4.

[29] NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (ADAMS Accession No. ML052990146), attached to Letter from Luis A. Reyes, Executive Director for Operations, Re: Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-safeguards Information (SUNSI), COMSECY-05-0054 (Oct. 26, 2005) (ADAMS Accession No. ML052520181).

material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(d)(1);

iii. "Trade secrets and commercial or financial information" that is "privileged or confidential," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(4) and meets the criteria of 10 C.F.R. § 2.390(b)(4)(i)-(v);

iv. Information specifically exempted from disclosure by the Privacy Act, 5 U.S.C. § 552a, provided that it qualifies for the exemption at 10 C.F.R. § 2.390(a)(3);

v. Information submitted in confidence to the NRC by a foreign source, 10 C.F.R. § 2.390(d)(2); and

vi. Internal NRC information that qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(2).[30]

The Board further directs that all privilege logs shall identify the statute or regulation that provides the legal basis for the claimed privilege, and shall provide, for each document listed, sufficient information for the other parties, and the Board, to assess the validity of the claim of privilege or protected status.

4. Scope of Disclosure and Hearing File. The parties propose several restrictions on the scope of disclosure and of the hearing file.[31] With some modifications, the Board adopts most of the parties' proposals as follows:

i. As proposed by the parties, if a party (or its agents) generates the document in question, then it may limit mandatory disclosure to its final document and "need not include drafts (including comments on drafts, transmittals of drafts, resolution of comments on drafts, and

[30] See Milner v. Dep't of Navy, 131 S. Ct. 1259, 1262, 1271 (2011) (holding that 5 U.S.C. § 552(b)(2), the statutory basis for 10 C.F.R. § 2.390(a)(2), "encompasses only records relating to issues of employee relations and human resources" in its protection from disclosure of materials that are "related solely to the internal personnel rules and practices of an agency.")

[31] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶¶ 1-12.

similar documents)."[32] However, the Board directs that if a party has legal possession, custody, or control of a "draft" document developed by another party and otherwise subject to mandatory disclosure, then the party possessing the "draft" must produce it.[33]

ii. "Handwritten notes on a final document constitute a separate document, and must be produced as well as the original document."[34]

iii. "If the same relevant e-mail exists in multiple locations, each party may produce only one copy of that e-mail. If the e-mail exists in both sender and recipient email folders, the party may produce the sender's copy of the e-mail. If a chain or string of e-mails exists, the party need only produce the last e-mail in the chain or string, provided that it includes all of the previous e-mails and recipients of the chain or string."[35]

iv. "To the extent reasonably practicable, each party will provide electronic copies of documents in word-searchable, PDF formats."[36]

v. "A party need not identify or produce any document that already has been served on the other parties to this proceeding."[37]

vi. The parties "need not produce publicly-available documents."[38] Further, as the parties propose, each party "will produce as part of its disclosures a log identifying publicly-

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[32] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 1.

[33] Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2) (Sept. 15, 2010) at 6 n.12 (unpublished) ("If the person who developed a document considered it sufficiently final to share it with an external third party . . . who is a litigant herein, then we do not deem that document, even if it is still labeled 'draft,' exempt from the mandatory disclosure requirements.").

[34] Parties' Mandatory Disclosure Agreement and Proposed Schedule ¶ 1.

[35] Id. ¶ 2.

[36] Id. ¶ 3.

[37] Id. ¶ 5.

[38] Id. ¶ 6.

available documents upon which the party may rely at hearing and indicating the general location of such documents."[39]

vii. The parties "need not identify or produce press clippings, including web clippings, unless they plan to rely on them at hearing."[40]

viii. "The following documents need not be produced because they are not 'relevant' to admitted contentions: documents that contain only administrative information related to a contention, such as notices of upcoming meetings or telephone calls, records of time and expenses, billing statements, and similar documents; and documents older than five years before the date of FirstEnergy's submittal of the License Renewal Application to the NRC, which was August 27, 2010."[41]

ix. The following will be treated as "locations of reasonably accessible electronically stored information: computers, shared/networked drives, modeling software input and output codes, removable drives (such as thumb drives), and e-mails."[42] The Board directs further that computer models, including the underlying data used in a computer analysis or simulation, the programs and programming methods, and the software that embodies the computer program also be treated as locations of reasonably accessible electronically stored information.

x. In connection with its submittal of the hearing file, the NRC Staff "will identify all relevant documents available via the NRC's website or ADAMS, as required by 10 C.F.R.

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[39] Id.

[40] Id. ¶ 7.

[41] Id. ¶ 8.

[42] Id. ¶ 9.

§§ 2.336(b) and 2.1203."[43] The parties shall not otherwise be required to identify or produce documents so disclosed and so identified.[44]

5. Protective Order and Nondisclosure Agreement.[45] During the teleconference, FirstEnergy indicated that the parties have conferred regarding a potential protective order and non-disclosure agreement.[46] The Board intends that any protective order and non-disclosure agreement be in place before the parties make their initial disclosures. Therefore, the parties shall continue to confer for the purpose of developing a proposed protective order and non-disclosure agreement concerning the handling (and possible redaction) of documents that are alleged to be proprietary or otherwise sensitive. No later than ten (10) days after the Commission's disposition of the pending appeal of the Board's April 26, 2011 Memorandum and Order, but in no event later than October 3, 2011, the parties shall submit to the Board either (i) a unanimously agreed upon proposed protective order and nondisclosure agreement; or (ii) individually or jointly proposed protective orders and nondisclosure agreements. In either event, a proposed protective order and nondisclosure agreement may be accompanied by a short brief, not to exceed five (5) pages, explaining the proposal and submission. The proposed protective order and nondisclosure agreement should, at a minimum, cover documents claimed to be privileged pursuant to 10 C.F.R. § 2.390(a)(4). If the parties are unable to submit a unanimously agreed upon proposed protective order and nondisclosure agreement, then, within seven (7) days of service of the individual or joint proposals, each party may file a brief (not to exceed five (5) pages) responding to any points previously raised by the other parties.

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[43] Id. ¶ 10.

[44] Id.

[45] Documents covered by a protective order are nevertheless required to be included in a privilege log. Indeed, the only way that an opposing party can learn of the existence of such a document, and thus can request access to that document, is for it to be included in the privilege log.

[46] Tr. at 268.

6. Disclosure Disputes and Motions to Compel. The regulations require that, unless otherwise specified by the Board, a motion, such as a motion to compel, shall be filed within ten (10) days after the occurrence or circumstance from which the motion arises[47] and that the movant certify his or her sincere effort to contact the other parties and resolve the issues raised in the motion.[48] Experience indicates that because some of the mandatory disclosures, especially the initial one and the initial production of the hearing file, can be quite large, compliance with the consultation and ten (10) day requirements can be extremely difficult. Accordingly, the following rules shall apply to disputes regarding the timing, nature, scope, and completeness of mandatory disclosures, production of hearing files, and privilege logs, including but not limited to disputes regarding whether a document qualifies for a claimed privilege or protection, disputes whether a document should be produced notwithstanding that it qualifies for a privilege, disputes regarding redaction, disputes regarding the adequacy of a privilege log, and disputes regarding the scope and application of any protective order or non-disclosure agreement (hereinafter "disclosure disputes"):

Generally, motions raising disclosure disputes shall be filed within twenty (20) days of the occurrence or circumstance from which the motion arises. For example, such motions should generally be filed within twenty (20) days of the monthly update of the mandatory disclosures. For disclosure disputes arising from the initial disclosures and initial production of hearing file (including the associated privilege logs), motions shall be filed within sixty (60) days. For disclosure disputes filed after the issuance of the FSEIS and FSER, motions shall be filed within ten (10) days of the occurrence of circumstance from which the motion arises. Absent prior approval by the Board, negotiations between the parties concerning a discovery dispute do not extend the twenty (20) day deadline. Absent good cause shown, motions raising discovery disputes will not be considered after the twenty (20) day deadline. Finally, the Board directs under 10 C.F.R. § 2.325 that,

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[47] 10 C.F.R. § 2.323(a).

[48] Id. § 2.323(b).

regardless of whether the disclosure dispute arises in the context of a motion to compel or a motion for a protective order, the party asserting the privilege or protection bears the burden of proving that the document is entitled to protection from disclosure.

B. Additional Contentions

1. Timeliness. At the teleconference, Joint Intervenors proposed that new or amended contentions be considered timely if filed within ninety (90) days of the availability of new information.[49] They explained that a 90-day limit would allow them to do a better job of making comprehensive new contentions because they are currently involved in multiple NRC proceedings and because information on severe accidents and renewable energy alternatives is constantly developing.[50] FirstEnergy and the NRC Staff proposed a thirty (30) day time limit instead.[51]

The Board directs that a motion and proposed new contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when the material information on which it is based first becomes available to the moving party through service, publication, or any other means. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both sections.

2. Consolidated Briefing. A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2) or a motion for leave to file a nontimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). We adopt the parties' agreement that

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[49] Tr. at 250-52.

[50] Id.

[51] Id. at 250, 252.

(1) FirstEnergy and the NRC Staff may file an answer within twenty-five (25) days after service of the motion and proposed contention and (2) the Joint Petitioners may file a reply within seven (7) days of service of the answer.[52]

C. Dispositive Motions

Recognizing that the Board "need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding,"[53] the parties propose that there is no need to modify the time limits barring parties from moving for summary disposition later than forty-five (45) days before a hearing.[54] However, adjudicating a motion for summary disposition, motion to dismiss a contention as moot, or other dispositive motion shortly before a Subpart L hearing can often be less efficient than proceeding directly to the hearing, in which the Board decides contentions on the merits, but primarily on the basis of written testimony and exhibits. Accordingly, the Board directs that no dispositive motion shall be filed later than thirty (30) days after the Trigger Date, as defined in section F.1. infra. The Board expects the parties to consider carefully whether they can assert in good faith that no genuine issue exists as to any material fact relating to any such motion. In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within twenty (20) days after service of the motion, unless the Board orders otherwise. As appropriate, the Board may order that no answer to a dispositive motion need be filed.

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[52] See id. at 252-53.

[53] 10 C.F.R. § 2.710(d)(1); see Tr. at 262-63 (Counsel for FirstEnergy) (stating the parties are fully aware of the Board's discretion not to entertain summary disposition motions if they are filed up to 45 days before hearing).

[54] Tr. at 262.

D. Site Visit

Certain of the parties request the Board to schedule a site visit.[55] The Board will, at this time, defer decision on whether or not to conduct a site visit.

E. Limited Appearance Statements

The Board intends, prior to the evidentiary hearing, to accept written and to hear oral limited appearance statements[56] from members of the public at a date, time and place to be determined.[57] Notice of any oral limited appearance sessions will be published in the Federal Register and/or made available to the public at the NRC Public Document Room and on the NRC website, www.nrc.gov.

F. Evidentiary Hearing and Related Filings

1. Trigger Date. Pursuant to 10 C.F.R. § 2.1207, certain documents must be filed prior to the hearing. The parties recommend that the trigger date (Trigger Date) for the initiation of such filings be the date on which the NRC Staff issues the FSEIS because "the contentions admitted by LBP-11-13 . . . are NEPA-related."[58] The NRC Staff reports that, by its current best estimate, it will issue the FSEIS in May 2012 and the FSER in July 2012.[59] Because the issuance dates for the FSEIS and FSER are close together and a safety-related contention might yet be pled and possibly admitted, the Board rules that the Trigger Date shall be the later of the issuance date of the FSEIS or issuance date of the FSER.[60] Accordingly, the current estimate for the Trigger Date is July 2012. If additional contentions are admitted after the Trigger Date, the Board may, as appropriate,

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[55] Tr. at 261-62.

[56] 10 C.F.R. § 2.315(a).

[57] Tr. at 271-73.

[58] Parties' Mandatory Disclosure Agreement and Proposed Schedule at 5.

[59] Letter from Brian G. Harris, Counsel for NRC Staff, to Licensing Board (May 11, 2012) at 2.

[60] See 10 C.F.R. Part 2, app. B(II) (setting model milestone deadlines in relation to "issuance of SER and any necessary NEPA document").

revise the Trigger Date, bifurcate the evidentiary hearing, or both. Likewise, should the FSER's issuance date significantly lag behind the FSEIS's, the Board will expedite the hearing by treating the FSEIS issuance date as the Trigger Date for NEPA-related contentions.

2. Monthly Status Report. To keep the Board, the parties, and the public abreast of any changes in the schedule, we hereby direct the NRC Staff to submit a monthly status report specifying its best estimate of the dates when it expects to issue the draft and final versions of the SER and SEIS. The Board directs the NRC Staff to submit this report on the 15th of every month, commencing with the NRC Staff's initial mandatory disclosure and ending when both the FSER and FSEIS have been issued.

3. Prehearing Evidentiary Submissions. Prehearing evidentiary submissions by the parties shall contain, on a contention-by-contention basis, a written statement of position, written testimony, and exhibits. The written statement shall be in the nature of a trial brief that summarizes the party's case, setting out applicable legal standards, identifying witnesses and evidence, and specifying with as much particularity as practicable how each witness, exhibit, or category of evidence supports a factual or legal position. The written testimony shall be submitted under oath in the form of an affidavit or sworn declaration suitable for being received directly into evidence pursuant to 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are specifically relying upon for their statements or position.

4. Schedule. Under the model milestones for a Subpart L proceeding, the evidentiary hearing begins within 175 days of the Trigger Date.[61] The parties propose a schedule under which the Joint Intervenors make their evidentiary submission sixty-one (61) days after the Trigger Date, FirstEnergy and the NRC Staff make their evidentiary submission sixty (60) days after the Joint Intervenors', and the evidentiary hearing starts 183 days after the Trigger Date.[62] To better meet

[61] 10 C.F.R. Part 2, app. B(II).

[62] Parties' Mandatory Disclosure Agreement and Proposed Schedule at 5-6.

the model milestones, we have compressed the parties' proposed schedule. The parties shall file their prehearing evidentiary submissions in accordance with the following number of days after the Trigger Date:

45 Days:	Joint Intervenors Initial Submission
90 Days:	FirstEnergy and NRC Staff Submission
110 Days:	Joint Intervenors Rebuttal Submission (if any)

5. Final List of Potential Witnesses. The parties propose to exchange final witness lists one (1) day after the Trigger Date.[63] Because the Trigger Date might arrive without advance warning, the Board orders that final witness lists be exchanged ten (10) days after the Trigger Date.

The parties also propose to be allowed seven (7) days after receiving written testimony to identify witnesses not previously identified in their mandatory disclosures to rebut that written testimony.[64] The Board will allow FirstEnergy and the NRC Staff seven (7) days after receiving the Joint Intervenors Initial Submission to identify witnesses not previously identified to rebut that testimony. The Board will also allow the Joint Intervenors seven (7) days after receiving FirstEnergy and the NRC Staff's Submission to identify witnesses not previously identified to rebut that testimony.

6. Motions in Limine or to Strike. The parties have proposed that motions in limine or to strike regarding prehearing evidentiary submissions shall be filed no later than thirty (30) days after service of the submission in issue.[65] The Board directs that motions in limine or to strike regarding prehearing evidentiary submissions shall be filed no later than twenty (20) days after

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[63] Id. at 5.

[64] Id. ¶ 12.

[65] Id. at 5-6.

service of the submission in issue. Opposition shall be filed no later than ten (10) days after service of such motions.[66]

7. Proposed Questions for Board to Ask. As the parties proposed, the Board directs that all parties may file proposed questions for the Board to consider propounding to the witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii), no later than seven (7) days after the deadline for the final prehearing evidentiary submission.[67] Accordingly, the proposed questions must be filed no later than 127 days after the Trigger Date. The examination plans should contain a brief description of the issue or issues that the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. Proposed examination questions and plans should be filed with the Board in camera and not be served on other parties.[68]

8. Motions for Cross-Examination. As the parties proposed, the Board directs that all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b), no later than seven (7) days after the deadline for the final prehearing evidentiary submission.[69] Accordingly, motions for cross-examination may be filed no later than 127 days after the Trigger Date. The motion for cross-examination shall be filed and served in the normal manner, but the cross-examination plan itself should be filed with the Board in camera and not be served on other parties.[70]

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[66] 10 C.F.R. § 2.323(c).

[67] Parties' Mandatory Disclosure Agreement and Proposed Schedule at 5.

[68] For specific instructions on non-public filings with limited distribution, see Guidance for Electronic Submissions to the NRC (Rev. 6 May 17, 2010) § 11.1.7, available at http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub-r6.pdf.

[69] Parties' Mandatory Disclosure Agreement and Proposed Schedule at 5.

[70] See Guidance for Electronic Submissions to the NRC, supra note 68, § 11.1.7.

9. Evidentiary Hearing. Although the specific time and date for the evidentiary hearing will be determined later, the Board currently contemplates that it will commence within 175 days of the Trigger Date.

10. Witness with Written Testimony Must Be Available in Person. Unless the Board orders otherwise, each party (including the NRC Staff) must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.

G. Additional Case Management

1. Motion Certification. To maximize the early resolution of issues without Board intervention, motions will be summarily rejected if they do not include the certification specified in 10 C.F.R. § 2.323(b) that a sincere attempt to resolve the issues has been made. Each party shall endeavor to make itself available for consultation and shall cooperate in attempting to resolve the issues. Without revealing the substance of any settlement discussions, the required certification shall state if the other party was not available or refused to discuss the matter.

2. Motions for Extension of Time. A motion for extension of time in these proceedings shall be submitted in writing at least three (3) business days before the due date for the filing for which an extension is sought. A motion for extension of time must (1) indicate whether the request is opposed or supported by the other parties; and (2) demonstrate appropriate cause that supports permitting the extension.[71] Any written opposition to a request for an extension of time shall be filed and served on the Board and the other parties on the next business day after the filing of the request.

3. Attachments and Enclosures to Filing and Evidentiary Exhibits. If additional documents are appended to a motion, they shall be referred to as attachments or enclosures (not exhibits) and a separate alpha or numeric designation shall be given to each appended document

[71] 10 C.F.R. § 2.334(b) ("A hearing schedule may not be modified except upon a finding of good cause . . . .").

(e.g. Attachment A, Enclosure 1), either on the first page of the appended document or on a cover or divider sheet in front of the appended document. The label "exhibit" shall be reserved for use as a designation for those items that are submitted, whether by prefiling or at the time of an evidentiary hearing, as potential materials a party will seek to have identified in the evidentiary record of the proceeding.

i. Documents Must Be Attached. If a motion 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 motion. The motion must cite to the specific page or section of the document that is relevant.

ii. Exception. If the following documents are publicly available on the NRC ADAMS system, then they do not need to be attached to motions: FirstEnergy's Application and Environmental Report, the draft environmental impact statement, the FEIS, the FSER with open items, and the FSER. With regard to such documents, it is sufficient if the motion clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant. All other documents (or the relevant portions thereof), even if they can be found in ADAMS, should be attached to the motion.[72]

H. Settlement

The Administrative Dispute Resolution Act of 1996[73] encourages the use of alternative dispute resolution by federal agencies. The parties are encouraged to explore voluntary processes, including settlement talks with or without a neutral, to resolve the issues in this case.[74]

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[72] The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See http://www.nrc.gov/site-help/e-submittals.html (under Additional Information, follow link to Reference Materials for Electronic Submissions and then access link for Guidance for Electronic Submissions to the NRC, Revision 6).

[73] 5 U.S.C. §§ 571-584.

[74] 10 C.F.R. § 2.338.

Upon request, a settlement judge from the Atomic Safety and Licensing Board Panel (ASLBP) could be appointed.[75]

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[76]

/RA/

_____
William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 15, 2011

[75] Id. § 2.338(b).

[76] Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) the Joint Intervenors; (2) FirstEnergy; and (3) the NRC Staff.

ATTACHMENT A

Davis-Besse Schedule

Filing or Event			Time Limit	Estimated date
Proposed Protective Order and Nondisclosure Agreement			Must be filed no later than ten (10) days after the Commission's disposition of pending appeal of LBP-11-13, but in no event later than October 3, 2011	NA
	Brief responding to individual or joint proposed protective order and nondisclosure agreement		May be filed within seven (7) days of service of individual or joint proposal	NA
Initial Mandatory Disclosures and Production of Hearing File			Must be filed within thirty (30) days of the Commission's disposition of pending appeal of LBP-11-13, but in no event later than November 1, 2011	NA
	Updating of Disclosures and Hearing File		Must be filed no later than the 15th of every month. Duty to update commences the calendar month after initial disclosures and ends at close of evidentiary hearing (or, with respect to dismissed contention, upon issuance of order dismissing that contention)	NA
	Monthly Status Report		Must be filed no later than the 15th of every month, commencing with the NRC Staff's initial mandatory disclosure and ending when both the FSER and FEIS have been issued	NA
Additional Contentions			Deemed timely if filed within sixty (60) days of when the material information first becomes available to moving party	NA
	Answer to additional contentions		May be filed within twenty-five (25) days after service of the motion and proposed contention	NA
	Reply to answer to additional contentions		May be filed within seven (7) days of service of answer	NA
Trigger Date			The issuance of the FSEIS or the FSER, whichever is later	July 2012[1]
	Final List of Potential Witnesses		Must be filed no later than ten (10) days after Trigger Date	Aug. 2012
	Dispositive motions		May be filed no later than thirty (30) days after Trigger Date	NA
		Answer to dispositive motion	May be filed no later than twenty (20) days after service of dispositive motion	NA
	Joint Intervenors Initial Evidentiary Submission		Must be filed no later than forty-five (45) days after Trigger Date	Sept. 2012
		FirstEnergy and NRC Staff's Identification of Witnesses to Rebut Intervenors' submission	May be identified no later than seven (7) days after service of evidentiary submission	Sept. 2012

[1] Based on NRC Staff's current best estimate of July 2012 issuance of FSER.

	Motion in Limine or to Strike Intervenors' submission	May be filed no later than twenty (20) days after evidentiary submission. Opposition may be filed no later than ten (10) days after service of such motion	Oct. 2012
FirstEnergy and NRC Staff Evidentiary Submission		Must be filed no later than ninety (90) days after Trigger Date	Oct. 2012
	Intervenors' Identification of Witnesses to Rebut FirstEnergy or NRC Staff's submission	May be identified no later than seven (7) days after service of evidentiary submission	Nov. 2012
	Motions in Limine or to Strike FirstEnergy or NRC Staff's submission	May be filed no later than twenty (20) days after evidentiary submission. Oppositions may be filed no later than ten (10) days after service of such motion	Nov. 2012
Intervenors Rebuttal Submission (if any)		May be filed no later than 110 days after Trigger Date	Nov. 2012
	Motions in Limine or to Strike Rebuttal submission	May be filed no later than twenty (20) days after rebuttal submission. Oppositions may be filed no later than ten (10) days after service of such motion	Dec. 2012
Proposed Questions for Board to Ask		May be filed no later than 127 days after Trigger Date	Dec. 2012
Motions for Cross Examination		May be filed no later than 127 days after Trigger Date	Dec. 2012
Hearing		Commencing no later than 175 days after Trigger Date	Jan. 2013
Board Order		Initial decision to be issued within 90 days after closing of record	April 2013

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
FIRST ENERGY NUCLEAR OPERATING COMPANY	)	
	)	
(Davis-Besse Nuclear Power Station, Unit 1)	)	Docket No. 50-346-LR
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the INITIAL SCHEDULING ORDER has been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 15th day of June 2011