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NUCLEAR REGULATORY COMMISSION

Title: Limerick Generating Station

Docket Number: 50-352-LR and 50-353-LR

ASLBP Number: 12-916-04-LR-BD01

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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TELEPHONIC INITIAL SCHEDULING CONFERENCE

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In the Matter of: : Docket No.
EXELON GENERATION COMPANY, : 50-352-LR,
LLC : 50-353-LR
(Limerick Generating : ASLBP No.
Station, Units 1 and 2 : 12-916-04-LR-BD01

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Thursday, April 26, 2012

The above-entitled matter was convened telephonically, pursuant to notice, at 1:30 p.m.

BEFORE:

WILLIAM J. FROEHLICH, Chairman
MICHAEL F. KENNEDY, Administrative Judge
WILLIAM E. KASTENBERG, Administrative Judge

1 APPEARANCES:

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P R O C E E D I N G S

1:32 p.m.

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2
3 JUDGE FROEHLICH: Good afternoon, all.
4 This is Judge Froehlich. I take it that we have our
5 Court Reporter and all the parties to the proceeding
6 on the line, is that correct?

7 COURT REPORTER: This is the reporter. I'm
8 here.

9 JUDGE FROEHLICH: The most important is on
10 line. Thank you, sir.

11 And staff, the Applicant and Intervenor
12 are all on the line?

13 MR. ROISMAN: The Intervenor's here.

14 JUDGE FROEHLICH: Thank you.

15 MS. JONES: The Applicant is here.

16 JUDGE FROEHLICH: Okay. And the NRC
17 staff?

18 MR. SMITH: The NRC staff is here as well,
19 Judge.

20 JUDGE FROEHLICH: Thank you.

21 This is the first telephone conference in
22 this proceedings involving the license renewal
23 application for the Limerick Generating Station, Units
24 1 and 2, NRC Docket Nos. 50-352-License Renewal and
25 50-353-License Renewal.

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1 The ASLBP No. is 12-916-04-LR-BD01.

2 This is Judge William Froehlich. With me
3 in Washington is Judge Kennedy and our Law Clerk
4 Matthew Flyntz.

5 Judge Kastenber, are you with us on line?

6 JUDGE KASTENBERG: I am, indeed.

7 JUDGE FROEHLICH: Okay. At this point I'd
8 like to take the introductions from the parties.
9 Please state your name, who you represent and any
10 other persons who might be with you who will be
11 participating in today's conference.

12 We can begin with the Applicant.

13 MR. SMITH: This is Anna Jones with the
14 law firm of Morgan, Lewis. I'm representing the
15 Applicant Exelon Generation Company, LLC.

16 And also on the phone is Alex Polonsky and
17 I believe Kathryn Sutton.

18 JUDGE FROEHLICH: Thank you, Ms. Jones.

19 And for the Intervenor, the NRDC?

20 MR. ROISMAN: This is Anthony Roisman, and
21 I'm presenting Natural Resources Defense Council,

22 JUDGE FROEHLICH: Thanks.

23 And for the NRC staff?

24 MR. SMITH: This is Max Smith representing
25 the NRC staff. And I'm joined today by Catherine

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1 Kanatas.

2 JUDGE FROEHLICH: Thank you, Mr. Smith.

3 The purpose of today's conference is to
4 discuss the issues related to the schedule for and the
5 management of this proceeding. This is governed by
6 the NRC regulations at 10 CFR 2.332 which requires
7 this Board to develop a scheduling govern to schedule
8 this proceeding.

9 As a little bit of a background, the NRDC
10 submitted a petition to interview in this proceeding
11 in November of 2011. This Board admitted two portions
12 of one of the contention, Contention 1-E in our
13 decision LBP12-08 on April 4th of this year.

14 Exelon and the NRC staff both filed
15 appeals of our decision with the Commission on April
16 16th.

17 Also on that date, we issued a notice of
18 this telephone conference and requested that the
19 parties discuss a number of the issues and try to
20 reach agreements prior to today's call. They did so;
21 this Board is grateful for that. And Exelon filed a
22 letter with the Board on April 25th explaining the
23 areas where the parties agreed and those areas where
24 there's still some disagreements.

25 Throughout this call we'll refer to the

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1 letter that was submitted to the Board on April 25th
2 which parallels and is numbered as our notice of this
3 call.

4 And unless there are any preliminary
5 matters that any one of the parties or Judge
6 Kastenbergs wants to raise, we'll go through that, I
7 would purpose, seriatim. Are there any issues that
8 anyone wishes to raise prior to us going through that?

9 I do note that there is pending before the
10 Board an unopposed motion to defer initial disclosures
11 and we'll take that up as part of our private session
12 as we get into the enumerated items in detail. I know
13 a number a number of the members of the Board have a
14 series of questions related to that pleading, the
15 pleading of April 19th. Okay.

16 That said, let's move first to the time
17 frame for updating mandatory disclosures under 10 CFR
18 2.336(d), and the updating of the required hearing
19 file under 10 CFR 2.1203(c).

20 I note that the parties to agree to the
21 general timing of this. I want the parties to be
22 aware that even though the initial disclosures would
23 be due under our Regs. I think on the 3rd of May,
24 until there's an order issued, your excused from the
25 mandatory disclosures.

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1 Okay. The first question that I guess
2 that I had is that in the unopposed motion to defer
3 the initial disclosures and where it discusses, I
4 guess, on the bottom of the second page and the top of
5 the third page, I was a little bit confused about the
6 30 days -- let me rephrase it.

7 The example given on page 3 "If the
8 Commission denies the appeal on August 1st," that's
9 just a hypothetical date, "resulting in an initial
10 mandatory disclosures being exchanged on September
11 1st, i.e. 30 days, constituting a four month deferral
12 period, then NRDC may file a motion to extend the time
13 for actions to be taken after the trigger date by four
14 months."

15 I wonder if Mr. Mr. Roisman or a spokesman
16 for the unopposed motion can sort of explain that to
17 me? I'm not quite sure I understand the important of
18 what's in that paragraph.

19 MR. ROISMAN: Okay. Thank you, Mr.
20 Chairman. This is Mr. Roisman.

21 If we didn't do the deferral and barring
22 a stay of the Licensing Board order, as you pointed
23 out the beginning of the mandatory disclosures would
24 be starting next week. We will in this hypothetical,
25 four months during which we would not have the benefit

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1 of those disclosures will have past, but there are a
2 variety of things most significantly the staff
3 continues to work on as the draft impact statement and
4 its SER. And those items will become milestones in
5 the case management order, as you'll see from the
6 proposed letter and was as routinely done in those
7 proceedings. We don't want to be put at a
8 disadvantage having lost four months during which we
9 would reviewing a fairly large volume of material,
10 that initial disclosure is usually quite large, by
11 having agreed to the deferral of when that would
12 start. So what we're suggesting here, and the parties
13 have agreed is, that we would be able to file a
14 request to have that four months tacked onto any
15 deadlines that were built into a case management order
16 and that the Applicant and the staff would not oppose
17 the request.

18 We're not suggesting in this that the
19 Board has agreed to that and even that we would ask
20 for it. But that we would have the right to do that
21 and to the extent that our request was based upon the
22 four month deferral of the mandatory disclosures,
23 there would be no opposition.

24 JUDGE FROEHLICH: I see. And Mr. Roisman,
25 for example, if the FEIS were to issue and the Board

1 were, I guess, in the normal course to set a date and
2 I believe as the parties proposed here, a 30 day
3 deadline for new contentions is the tenor of this
4 paragraph saying that you want 30 day plus in the
5 example four months to come up with a new contention?

6 MR. ROISMAN: That we would have the right
7 seek that and that the other parties wouldn't oppose
8 that. In the hypothetical that you give, it may quite
9 well be that there would no reason for us to ask for
10 that and we would still have to convince the Board,
11 you would still have to believe that something about
12 this new contention that we wanted to file or about
13 something that was in the FSEIS would relate back to
14 the four month deferral time period, and that all
15 those prior documents would in some way or another
16 have some bearing on this. And realistically I think,
17 probably the date that's more likely to come into play
18 would be the DSEIS and that's now anticipated by the
19 staff, I think they said in the recent filing in
20 either January or February of next year.

21 JUDGE FROEHLICH: All right. Now, Mr.
22 Roisman, like me ask you if this provision, the
23 deferral period or the request for it, if the Board
24 were to reject that concept, that idea and set, let's
25 just say for example as was proposed, a 30 day

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1 deadline for the filing of any new contentions after
2 the DEIS was a trigger or the FEIS as a trigger, would
3 you still be in support of the motion to defer the
4 initial disclosures?

5 MR. ROISMAN: No, we would not. See, the
6 deferral is a prejudice to us. The staff and the
7 Applicant have had literally years to get ready for
8 this application that we submitted. We had a very
9 short period of time to prepare and file contentions.
10 Documents that are going to be produced in the first
11 instance in the initial disclosure are usually
12 voluminous and full of very useful information.
13 Digesting those, if that disclosure starts to come at
14 the time of something else critical happening when we
15 have other pressures in the case, would to us be a
16 real disadvantage.

17 So, no, we would not be supportive of a
18 deferral and we would say that the Applicant and the
19 staff should have to file a motion for a stay, which
20 we would oppose.

21 JUDGE FROEHLICH: All right.

22 MR. POLONSKY: Your Honor?

23 JUDGE FROEHLICH: Yes, please

24 MR. POLONSKY: This is Alex Polonsky if I
25 could seek some clarification of my own.

1 JUDGE FROEHLICH: Sure.

2 MR. POLONSKY: Tony, would you be amenable
3 if the Board were to accept the last paragraph or last
4 condition and the actions after the trigger date that
5 would be extended or that you would be requesting an
6 extension of time for would be limited to things like
7 testimony and other filings with the exception of a
8 motion to amend or submit a new contention with
9 respect to the FSEIS?

10 MR. SMITH: Well, this is Max Smith with
11 the NRC staff. We were disconnected for about five to
12 ten minutes there.

13 JUDGE FROEHLICH: Oh, boy.

14 MR. SMITH: Sorry for the inconvenience.
15 The phone came unplugged and we were headed in the
16 same situation Anna was in, sort of in the
17 indeterminate holding pattern.

18 JUDGE FROEHLICH: Oh? If I may, to recap
19 for you, I was questioning Mr. Roisman and now Mr.
20 Polonsky is responding to the effect of the last
21 paragraph in the unopposed motion to defer initial
22 disclosure. And as I understood where it stands, and
23 Mr. Roisman correct me if I'm wrong, that the
24 intervenors would not be supportive of what was filed
25 as an unopposed motion if the Board were to disallow

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1 the deferral period tack on to a firm deadline for
2 filing, let's say, new contentions.

3 And Mr. Roisman, do you want to elaborate
4 or clarify for Mr. Smith our discussion? And then
5 we'll hear from Mr. Polonsky.

6 MR. ROISMAN: Oh no. I think what Alex is
7 raising will probably bring Max up to speed fairly
8 quick.

9 JUDGE FROEHLICH: Okay. Mr. Polonsky, up
10 to you.

11 MR. POLONSKY: Okay. Thank you. So, this
12 is Mr. Polonsky for the Court Reporter's sake.

13 Tell me, the question I have is would NRDC
14 be amenable to if the Board were to say that for
15 amended contentions related to -- or all new or
16 amended contentions including those related to the
17 FSEIS or FSER and whichever would be the trigger date,
18 that those would need to be filed within 30 days or
19 whatever about of time the Board specifies for filing
20 amended or new contentions? But that this provision
21 here, the last provision, would apply for all other
22 triggers, all other actions that would need to be
23 taken after the trigger date like filing testimonies?

24 MR. ROISMAN: I would have to think about
25 that, Alex. I mean, I see the distinction that you're

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1 making and I understand that in the usual case it's
2 something in the DSEIS or the FSEIS which triggers the
3 right to file a new or an amended contention, and that
4 in theory all these other documents are irrelevant to
5 that. But, I mean at least hypothetically I can
6 imagine situations in which something that the staff
7 is saying in the DSEIS relates to documents that were
8 part of the initial disclosure, the very contention
9 that we're talking about. The staff has in other
10 cases resorted to consultations with Sandia on issues
11 related to Severe Accident Mitigation Alternatives and
12 their impacts. As a result of that, I have no way of
13 knowing until the initial disclosures are made whether
14 or not there's a history of the staff already dealing
15 with Sandia or some other consultant or, in house,
16 with that issue. So what we see in the DSEIS might
17 conceivably be something significantly different from
18 what the Applicant has in the SER on this issue, which
19 is the admitted issue at this point, namely the
20 updating of Severe Accident Mitigation Alternatives
21 Analysis.

22 Those documents are going to be very
23 relevant to that and it's not just enough to know from
24 the DSEIS oh, that's changed. But it also then will
25 be incumbent upon us to have integrated in any

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1 documents that would produce that need disclosures,
2 the mandatory disclosures prior to that time. If
3 there's a lot of them, if the deadline for when the
4 DSEIS is published and the date on which the deferred
5 disclosures are made is relatively close together, we
6 will be squeezed. And, frankly, I see no reason for us
7 -- I mean, I think it's a disadvantage to Interveners
8 that staff and Applicant have all this time to put
9 their case together and we have very short time to do
10 our work. I don't want to make that problem worse.

11 So my first reaction would be no, I
12 wouldn't agree to that. But I think that the Applicant
13 and the staff wrote into this, and I understood what
14 they were writing into it, if you will, an escape
15 clause. And that is at the end we will still have to
16 convince the Board that there's a good reason why we
17 should get in this hypothetical four months, or it
18 might be that we'll say we just need two of those four
19 months, whatever, in order to make our case. We did
20 not insist that there be an automatic deferral of
21 those dates and that the Board wouldn't have the
22 responsibility to decide if what we asked for is
23 reasonable.

24 So, I'm more inclined to trust the Board
25 to make a decision and, frankly, I hope that everyone

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1 will trust us to not try to abuse this just because we
2 say we have that right.

3 JUDGE FROEHLICH: Staff, do you wish to be
4 heard on this particular issue?

5 MR. SMITH: The staff has nothing to add,
6 Judge Froehlich.

7 JUDGE FROEHLICH: Okay. Then I will ask
8 that the Proponents of the motion, the six month
9 deferral, why six months? Was that triggered to,
10 like, the Commission's record on dealing with appeals
11 or on dates currently projected by the staff for the
12 DEIS and the FSEIS, the final statement?

13 MR. POLONSKY: This is Mr. Polonsky.

14 JUDGE FROEHLICH: Okay.

15 MR. POLONSKY: It is based on a number of
16 factors. The first is that the date of the FSEIS as
17 currently published by the staff is in February 2013,
18 and we thought six months would give plenty of time
19 for the parties to review their respective documents
20 before that document was issued, especially since we
21 have only an admitted NEPA contention and we assumed,
22 although we don't know, but assumed that the Board
23 would use the FSEIS as the trigger date.

24 The other is the Commission in ruling on,
25 legal questions like this typically have taken a

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1 shorter period of time. Clearly after Fukushima for
2 the Seabrook and Davis-Besse appeals, the Commission
3 took about a year but those contentions had very
4 factual components to them and we view the appeal here
5 as being a legal-based appeal, and as I mentioned, the
6 Commission's history there is somewhere in the four to
7 six month time frame. So, there were a couple of
8 considerations.

9 JUDGE FROEHLICH: Yes. Okay. Thank you.
10 I appreciate that clarification.

11 The next issue related to this is the
12 termination of the obligation for disclosure. And I
13 noticed that this was one of the elements that the
14 parties were not able to agree on.

15 My initial reaction was why shouldn't
16 initial disclosure continue up until the date of the
17 hearing. Could I hear the arguments in favor of
18 cutting it off earlier and then a response from NRDC?

19 MS. JONES: Your Honor, this is Anne
20 Jones.

21 JUDGE FROEHLICH: Okay.

22 MS. JONES: Our experience has been that
23 terminating the mandatory disclosures at a date
24 certain in advance of the testimony allows us to focus
25 our resources on comparing complete and comprehensive

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1 testimony. And felt that then our experience that
2 there's little to be disclosed during that time frame
3 that would not be excluded under a privileged
4 information or under other exclusions that we've
5 proposed here, such as drafts and so on. Therefore,
6 that the substantive matters to be disclosed are very
7 few and don't outweigh the costs of spending time and
8 resources on that effort.

9 JUDGE FROEHLICH: All right. So, Ms.
10 Jones, from your perspective there probably isn't a
11 large volume of material in that period between the
12 testimony and the hearing, but that it would detract
13 from the preparation for a hearing, is that what I
14 understood?

15 MS. JONES: That's accurate. And the
16 volume that was generate would be on the order of
17 draft privileged materials.

18 JUDGE FROEHLICH: Okay. Mr. Roisman,
19 hearing that what is the necessity or the need, do you
20 anticipate that there are documents that will would be
21 disclosed on the eve of trial that would prejudice you
22 if you didn't have them or what are the arguments
23 going towards taking this up to, let's say the close
24 of the evidentiary hearing as I understand your
25 position?

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1 MR. ROISMAN: Okay. Well, first,
2 obviously I come from having markedly different
3 experience in both the Vermont Yankee license renewal
4 proceeding and ongoing Indian Point licensing renewal
5 proceeding. Applicant and staff have been engaged in
6 an interactive process in which documents are being
7 produced continuously. We already filed -- profiled
8 direct testimony at Indian Point and major documents
9 are coming out from the Applicant and the staff after
10 we profiled that relate to issues that we profiled on.

11 JUDGE FROEHLICH: Yes.

12 MR. ROISMAN: And so while there's nothing
13 that we're proposing here that would force them to
14 produce the document earlier if it didn't come into
15 existence earlier, the idea that those documents we
16 wouldn't see them --

17 JUDGE FROEHLICH: Yes.

18 MR. ROISMAN: -- and they wouldn't be part
19 of the mandatory disclosure seems to me to be
20 completely wrong. That's number one.

21 Number two: And my experience in more
22 general litigation is that the disclosure obligations,
23 the continuing disclosure obligations which are
24 contained in the Federal Rules of Civil Procedure
25 normally have no such cut-off. They continue

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1 continuously, even during the course of trial if
2 there's a relevant document.

3 And third: As if Ms. Jones has suggested,
4 there aren't very many that are going to come up, then
5 I don't see that it's much of a burden. My experience
6 is that the good stuff tends to come up at the end.
7 And the idea that we would have it stopped 30 days
8 before the first submittal of direct testimony seems
9 to me to be a huge problem. And I'm not sure that it
10 could be done given the staff's obligation with regard
11 to the staff itself.

12 JUDGE FROEHLICH: Okay. Mr. Smith, I note
13 in the file saying you took no position on this
14 matter. Have you after hearing the arguments, the
15 perspectives from each side, care to comment on this
16 issue?

17 MR. SMITH: Judge, as the document
18 indicates, the staff's only concern is that there be
19 a clearly demarcated date where the hearing file
20 obligation ends. Beyond that, the staff doesn't have
21 a view one way or another.

22 JUDGE FROEHLICH: Okay. So you would
23 continue to submit and update the hearing file up
24 until the date where it's ordered that it stop. And
25 it's really even to you whether that's 30 days before

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1 they submit direct testimony or at the end of the
2 hearing, is that correct?

3 MR. SMITH: The staff is fine with either
4 approach.

5 JUDGE FROEHLICH: Okay. All right.

6 Do any of the parties want to be heard
7 further on this issue or can we move to the second
8 item in the enumerated list? Okay.

9 Okay. The second item deals with
10 electronically stored information. And I commend the
11 parties and appreciate the fact that there were
12 discussions and that there is agreement among the
13 parties.

14 The Board has one question, I guess, and
15 that deals with things like external drives. Are they
16 contemplated to be included amongst the computer
17 shared and network drives, removable drives, and I
18 note you said such as thumb drives. Would that
19 include also external drives?

20 MS. JONES: Your Honor, this is Anne
21 Jones.

22 Yes, the Applicant understood that removal
23 drives would encompass external drives.

24 JUDGE FROEHLICH: Okay. Thank you.

25 MR. ROISMAN: And so did NRDC.

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1 JUDGE FROEHLICH: All right. Thank you.
2 I think that the Board will certainly accept the
3 proposal as it was written and perhaps add in such as
4 thumb drives and external drives just to be clear.

5 And I note on the third item parties have
6 agreement. And, let's see -- okay. The parties seem
7 to agree on everything.

8 Is there anything that there's
9 disagreement on the third item? Hearing none -- yes?

10 MS. JONES: No. No, Your Honor.

11 JUDGE FROEHLICH: There's no -- all right.
12 Okay.

13 That brings us to the fourth item having
14 to do with privileged and protected information. And
15 here again we have a difference of opinion among the
16 parties, as I understand it.

17 From the Applicant's perspective the party
18 gets a protected document and if they're going to
19 challenge the designation that it is protected, they
20 have to do so within ten days, is that correct?

21 MS. JONES: That's correct.

22 JUDGE FROEHLICH: Okay. And the NRDC, as
23 understand it, will get this document that has been
24 marked protected and they would have, if they prevail
25 in this argument, they would have until 14 days prior

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1 to using it as part of their testimony or a pleading
2 to raise the issue. Is that your position, Mr.
3 Roisman?

4 MR. ROISMAN: Yes. Yes, it is, Your Honor.

5 JUDGE FROEHLICH: Okay. And based on, I
6 guess on your experience, how does this work in your
7 life? I mean, how big an issue is this and please, I
8 guess, just elaborate on your positions with the
9 reasons for either the short amount of time to
10 identify or why from Mr. Roisman's perspective having
11 it and then only if he's going to use it, raise the
12 objection.

13 Perhaps, Ms. Jones, you could start.

14 MS. JONES: No problem.

15 It's the Applicant's position that setting
16 the structure so that any challenges are raised within
17 ten days of receiving the documents builds in some
18 certainty to the process and allows the parties to
19 move ahead. It doesn't involve the possible confusion
20 that could result from the NRDC's proposal, namely
21 were such a challenge not to be resolved by the time
22 of the submittal, there could be some confusion about
23 the deadlines or with the form of the disclosure.

24 The Applicant also offers that the
25 protective order that we intend to circulate and agree

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1 on and propose to the Board would build into it
2 provisions for including protected information and
3 filing via the electronic information exchange. And so
4 the logistical aspects of including that information
5 would be covered procedurally by the protective order.

6 JUDGE FROEHLICH: I can imagine the
7 problems that a intervenor would have not knowing, you
8 know ten days after receipt of the document how that
9 might be used months down the road when testimony is
10 being prepared, perhaps. I mean, the significance of
11 it may not be apparent until further disclosures have
12 been made, you know as the months leading up to
13 hearing. Could you address that?

14 MS. JONES: Yes, Your Honor.

15 You know, I would anticipate that this is
16 not a frequent dilemma, certainly not speaking for
17 NRDC but I would not expect that that they would see
18 a whole lot of protected documents that they thought
19 a challenge was appropriate. So, I see this being a
20 rare circumstance and one that would be more clearly
21 evident at the time of receipt of the document.

22 JUDGE FROEHLICH: Okay. Mr. Roisman,
23 would you speak to this issue?

24 MR. ROISMAN: Yes. Thank you.

25 First of all, if we knew that the document

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1 was going to be relevant, we'd have no incentive to
2 not want to raise that as soon as we become aware of
3 it. So this 14 days prior to inclusion is not the
4 earliest date on which we could do it: It's the
5 latest date on which we could do it. And because of
6 all the things that Ms. Jones said, which is that if
7 you don't have it resolved and you're getting ready to
8 file the document, you're forced into using whatever
9 the procedure is for dealing with a proprietary
10 document and a filing. We would have every incentive
11 once we know that the document is going to have some
12 bearing to say "Hey, we don't think that's entitled to
13 proprietary status." So, that's the first point.

14 The second point is that just what the
15 question from the Board raised, which is: How could
16 we know in advance, particularly when we're talking
17 about a fairly large volume of documents being
18 produced that you would get at least in the initial
19 disclosures, but sometimes you get them even on the
20 monthly disclosures? To go through all of those, to
21 decide which ones in the proprietary group that have
22 been produced to you are going to be important to your
23 case and to have consulted and then filed the motion
24 all within that ten day period, it just seems to me to
25 be totally unrealistic.

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1 And finally, I think that it's in the
2 interest of the Board and the Commission has certainly
3 indicated that openness is the key, one of the key
4 principles on which the Commission operates to have an
5 open hearing in which the minimum number of sealed
6 documents and closed hearings take place. We don't
7 want to unnecessarily have to have the Board delve
8 into hundreds of documents whose proprietary status we
9 think is questionable if it turns out there are only
10 five. But we do want to make sure that if there are
11 five, we can focus on those, the Board can focus on
12 those. And if the proprietary designation was
13 inappropriate, the document could be released and we
14 can use it publicly.

15 JUDGE FROEHLICH: All right. And one last
16 question, I guess for Ms. Jones. The protective order
17 how would that effect either of those proposed
18 deadlines or would it have no effect other than to
19 acknowledge the adopted deadline?

20 MS. JONES: I'm not certain that my answer
21 is going to be responsive to your question. But I
22 anticipate that the protective order will provide a
23 means for NRDC to gain access to protected
24 information, first and foremost. And secondly, to
25 provide a mechanism for their use of that information

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1 in the proceeding. I had not previously anticipated
2 including information about deadlines for challenging
3 in that protective order, but we could do that.

4 JUDGE FROEHLICH: Okay. So the protective
5 order is focused, perhaps, as you view it right now on
6 the access to the information. And then once the
7 Intervenor had access to it, then whatever trigger --
8 whatever deadline is proposed, whichever one is
9 ordered by the Board, would come into play, right?
10 It's sort of two stages, two separate stages?

11 MS. JONES: That's correct.

12 JUDGE FROEHLICH: Okay. And I cut you
13 off, I believe. What were you going to add?

14 MS. JONES: The only thing I would add is
15 that, you know in the interest of facilitating a
16 proceeding it's the Applicant's perspective that
17 challenging the protection of a document shortly
18 before filing of a pleading or a testimony diverts
19 resources on a rather ancillary issue away from the
20 more substantive effort of developing the issues for
21 hearing.

22 And we'd also add that the timeline we've
23 proposed is consistent with CFR 2.323 in that it
24 allows ten days for a challenge.

25 JUDGE FROEHLICH: Okay. All right. Is

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1 there anything further that any party wishes to raise
2 on point four?

3 MR. ROISMAN: Mr. Chairman, this is
4 Roisman.

5 JUDGE FROEHLICH: Yes.

6 MR. ROISMAN: Should the Board find and
7 think the ten days is unreasonable but think the 14
8 days is also unreasonable, NRDC could certainly live
9 with the 30 days before if that would help facilitate
10 the resolution of the issue before the actual filing
11 in which the document was to be used or attached, as
12 the case may be, were to occur. Most of the time,
13 although not the only time, it's the profiled
14 testimony that talks about proprietary material or
15 wants to include or attach or include proprietary
16 documents. And that work is done, you know with 30
17 days in advance and it's probably liveable. When it's
18 just a motion during the course of the proceeding, for
19 instance a response to a summary disposition motion,
20 it's more complicated. But if they compromise -- if
21 the Board feels like it needs to compromise between
22 the two positions, we would be willing to change the
23 14 days to 30 days.

24 JUDGE FROEHLICH: But I take it, Mr.
25 Roisman, that you probably wouldn't be as willing to

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1 change the ten days to 30 days, am I correct?

2 MR. ROISMAN: That is correct.

3 JUDGE FROEHLICH: Thank you.

4 All right. Item five on our list is the
5 time limits for designation of a timely filing and the
6 finding nontimely as listed in 10 CFR 2.309(c).

7 Thirty days is the agreed to amount of
8 time from all parties. And I think that will be
9 workable. The fact that the movement is uncertain
10 would solve pursuant to both sections is also
11 appropriate.

12 Okay. Is there anything that needs to be
13 added or discussed concerning item five?

14 Then moving to six, there is some
15 disagreement among the parties on this element and
16 we're trying to reconcile a number of different
17 Commission regulations having to do with contentions.
18 Give me a moment.

19 And this has to do solely with the reply.
20 And I would ask Mr. Roisman why the Commission
21 standard seven day response period in 2.309(h)(2)
22 would not be appropriate in this proceeding?

23 MR. ROISMAN: Only from my personal
24 experience that that's an unrealistically short time
25 period often to respond to as much as 50 pages of

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1 opposition; half from the Applicant, half from the
2 staff.

3 JUDGE FROEHLICH: Okay.

4 MR. ROISMAN: To digest all of that, to
5 file and answer and to get it done in seven days when
6 the Commission makes no allowances for holidays, no
7 allowances for weekends it just seems to me that it is
8 unreasonably short.

9 And I agree that ultimately what should
10 happen, and if I didn't have to do hearings I might do
11 this, is to file with the Commission a motion to amend
12 that rule. But given that the Board has at least
13 invited us to consider alternatives to just following
14 the rule, I felt that 14 days was at least a minimum
15 more reasonable time frame given that when Intervenors
16 file these motions, they're almost always opposed by
17 both parties and two separate briefs are filed.

18 JUDGE FROEHLICH: Thank you.

19 Anyone else wish to be heard on item six?
20 Okay.

21 Parties have agreed on element seven
22 having to do with a settlement judge. And also, I
23 believe on item eight having to do with the filing of
24 potentially witnesses.

25 And I note also that relating to item nine

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1 parties don't believe that a site visit would be
2 helpful and agree at this stage given the nature of
3 the contention that has been admitted. Okay.

4 Takes us to item ten, and this deals with
5 summary disposition motion and their effect on the
6 time lines set forward in the Commission's
7 regulations.

8 Before we discuss this, could I just
9 inquire of the staff whether the dates that are
10 currently on the web for the publication of the SER --
11 well, I guess mostly we're more concerned with the
12 Draft FEIS and the Final FEIS are still accurate,
13 thereby the draft Environmental Impact Statement --

14 MR. SMITH: Judge, this is Max Smith from
15 the NRC staff.

16 We've spoken with our Project Managers and
17 they confirmed for us that the dates that are on the
18 website for the Final EIS and the Draft EIS as well as
19 the SER schedule are all accurate.

20 JUDGE FROEHLICH: And that would be the
21 Draft SEIS would be August 2012 and the Final SEIS in
22 February 2013?

23 MR. SMITH: That's correct, Your Honor.
24 That's on the website. If the schedule changes
25 significantly, we'll certainly inform the Board and

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1 the other parties in this proceeding.

2 JUDGE FROEHLICH: Okay. All right. The
3 parties agree that dispositive motions shall be filed
4 no later than 30 days after the staff publishes the
5 FSEIS, and then there's 20 days to file an answer.
6 And that's certainly acceptable. To the extent that
7 this talks about an ultimate deadline for filing
8 dispositive motions, the Board was interested in
9 hearing the perspectives on the triggering date. From
10 the filing here I note that there seems to be
11 agreement that ten days is probably the ten days
12 specified in 10 CFR 2.323(c) probably should not apply
13 to summary disposition motions. But I would like to
14 hear proposals from the parties as to a trigger date
15 for when these dispositive motions could be filed.

16 MR. POLONSKY: Your Honor, this is Mr.
17 Polonsky.

18 JUDGE FROEHLICH: Yes.

19 MR. POLONSKY: Our resolve was that there
20 would be no trigger date. We have never viewed the
21 rule as having a trigger date, that it is simply a
22 date after which the Board would not entertain such
23 motions because they encroached upon the consideration
24 of testimony, and that makes sense.

25 We're also not aware of a trigger date

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1 requirement in the Federal Rules of Civil Procedure
2 related to summary judgment motions, nor do we think
3 that a trigger date is needed.

4 So there would simply be a date no later
5 than which such motions could be filed. And, clearly,
6 it's to the advantage to the parties to file as soon
7 as they can anyway so that knowing that the Board will
8 take some time to rule and that there are a number of
9 days after the filing of that that answers are
10 allowed. So, there's no advantage to filing early
11 anyway. There's no incentive to wait.

12 JUDGE FROEHLICH: All right. Does the
13 staff or the Intervenor care to speak to this issue?

14 MR. ROISMAN: This is Mr. Roisman.

15 I have unsuccessfully argued to the
16 Licensing Board in Indian Point that the 2.323(c)
17 trigger date should apply to summary disposition
18 motions. And they ruled in that case, probably in an
19 unpublished order, that the confluence of 2.1205 and
20 2.710 and 2.323 suggests that there is no trigger date
21 for summary disposition motions.

22 With that said, I tend to agree with Alex
23 that a party doesn't really have much of an incentive
24 to hold back the summary disposition motion, at least
25 in the case where we're talking about one contention

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1 with two bases. In a case like Indian Point where
2 we've got close to 20 contentions with most the bases,
3 we were concerned that summary disposition motions
4 could be used strategically to interfere with party's
5 preparation time on other matters. I don't see the
6 opportunity for that, at least at this stage of the
7 proceeding. So, I personally didn't see any reason to
8 make an argument for a trigger date.

9 With that said, I think that if the
10 summary disposition motions were based upon documents,
11 all of which were in someone's hands in January and
12 they didn't file the summary disposition motion until
13 November, still within the time limits of this
14 proposal, that that would be at least objectionable
15 even if not legally attackable.

16 JUDGE FROEHLICH: Staff counsel, do you
17 care to be heard?

18 MR. SMITH: The staff has no position on
19 this issue.

20 JUDGE FROEHLICH: All right.

21 We'll take this under advisement.

22 Move to item eleven. Yes, any hearing
23 that would be held in this case we would endeavor to
24 have at a venue near the Limerick facility. All
25 right.

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1 It brings us to item twelve, item twelve
2 having to do with the order in which testimony is
3 filed and the timing of it. It appears that the
4 Applicant would have a 45 day/45 day/20 day response
5 with the Applicant going first. Whereas, the NRDC
6 proposes sequential filing of 60 day/60 days and 30
7 days.

8 I wonder if the Applicant could speak to
9 both the amount of time that has been proposed and
10 also the order in which the Applicant is filing in the
11 first instance?

12 MS. JONES: Yes, Your Honor.

13 We've had good experience in other
14 proceedings with this proposed order. We've found that
15 this approach allows us to provide a lot of
16 information at the outset and then narrow and mute
17 some issues along the way so that when the time for
18 hearing comes there's really a more focused target
19 area for everyone and for the Board's efforts as well.

20 As far as the time frame, we propose 45/45
21 and 20 because in light of the model milestones for
22 the proceeding we're just trying to assist in
23 resolution of the matter in a timely form. And adding
24 60/60 and 30 adds at least another month to month and
25 ten days on to the entire proceeding.

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1 JUDGE FROEHLICH: Does the order in which
2 the testimony is filed bear any relation to your
3 perception of burden of proof or anything like that

4 MS. JONES: No, Your Honor. This is just
5 an approach that has been useful in the past.

6 JUDGE FROEHLICH: Okay. Mr. Roisman,
7 would you please address both the Applicant's proposal
8 and speak to your proposal, both?

9 MR. ROISMAN: Okay. Let me take the easy
10 one first, just the time difference. Intervenors are
11 always operating for substantially less resources,
12 therefore anytime limits are short stresses us and
13 makes it more difficult for us to produce our best
14 product. So that's why we've proposed the 60/60 and 30
15 as opposed to the 45/45 and 20.

16 In my experiences the cases that I've been
17 in, which admittedly have had more contentions in
18 them, the time limits have been 90/90 and 60. So I
19 thought given the breadth of the contentions here that
20 60/60 and 30 was a reasonable number.

21 With regard to the order of things I think
22 my view is that because of the unusual nature of the
23 discovery process in front of the NRC in which there
24 are no depositions, there are no document production
25 requests, there are no interrogatories, there's no

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1 request for admission the two parties whose positions
2 are best understood are the Applicant's and the
3 staff's because they have obligations to produce
4 certain documents, like the application, the responses
5 to RAIs that come from the staff, of course the Draft
6 and Final Impact Statement, the SER, et cetera, et
7 cetera. So the party who is best equipped to lay out
8 their position in light of what the other parties have
9 to say is the Intervenor.

10 So, I would suggest that we start; that
11 way the Applicants and the staff know with precision
12 that they cannot get from just the mandatory
13 disclosures exactly where we're going and what we're
14 trying to do.

15 Now some applicants use the summary
16 disposition motion as discovery. I think that's an
17 abuse of that process, but I understand their
18 frustration and why they might use it. But even that
19 does not substitute for real discovery as you would
20 have in a federal case.

21 So, it make sense for us to go first.
22 That's the first time that anybody really gets the
23 full flavor of all the things that we're saying and
24 the bases of the supporting evidence for the bases of
25 our position.

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1 The second thing is that then Applicant
2 and staff files at the same time simultaneously so
3 that all of that information is available, and then we
4 file a reply to the extent that one is warranted. And
5 I'm supportive of the idea that our reply obviously
6 has to be a reply: It has to respond to things that
7 are said in the testimony of the Applicant and the
8 staff. Not new things that we wish we had said in our
9 original direct.

10 I think that just makes more sense given
11 the reality of how information is exchanged in the NRC
12 proceedings.

13 JUDGE FROEHLICH: And, Mr. Smith?

14 MR. SMITH: Yes, Judge. The NRC staff is
15 very troubled by the proposal submitted by the
16 Applicant. At the stage of the proceeding where you'd
17 having a hearing, the EIS would be published and that
18 would be the operative document at that point, and it
19 would be the staff's obligation to suspend it.

20 Under the Applicant's proposal, we
21 certainly hope that our EIS will address NRDC's
22 concerns and there won't be a need for a hearing at
23 that point. But if there is a hearing, it'll be the
24 case that NRDC is still challenging what's in the EIS.
25 And it's the Applicant's proposal, the NRC staff being

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1 in a position of filing blind at the same time as NRDC
2 is trying to get to any subsequent claims that they
3 might make, that any chance to reply to them, and at
4 the same time NRDC would be in the exact same
5 position. They would be challenging the EIS without
6 any real chance to respond to the staff's arguments in
7 support of the EIS.

8 So, I think that the Applicant's approach,
9 while it might have been successful in other cases,
10 will not be successful in this case with environmental
11 intentions.

12 JUDGE FROEHLICH: Okay. Anything further
13 on item twelve?

14 MS. JONES: Your Honor, I would add only
15 that the staff's -- or excuse me. It's the Applicant's
16 opinion that simultaneous filings often results in the
17 parties passing like ships in the night and often
18 makes it harder to distil the discreet issues for
19 hearing. So, it's our preference to do sequential
20 filings.

21 JUDGE FROEHLICH: Sequential filing?

22 Yes, but I guess there's an issue that
23 staff counsel just alluded to about the problem with
24 the simultaneous filing when they're filing at the
25 same time as the Intervenor. Isn't that your concern,

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1 Mr. Smith?

2 MR. SMITH: That's right, Your Honor. And
3 in a normal simultaneous filing instance we get a
4 chance to file cross simultaneous briefs. So both us
5 and NRDC would get a chance to respond to Applicant's
6 arguments. Under the Applicant's somewhat unique
7 proposal, we would have to file simultaneously but
8 never get a chance to reply to the other's testimony,
9 at least in writing. We'd have to wait for the
10 hearing, and an oral hearing can be an uncertain
11 process. So, the staff would really like to have a
12 chance to file written testimony in response to what
13 NRDC produces, and I'm sure NRDC would like to have
14 the same.

15 JUDGE FROELICH: Okay. Anything further
16 on this item? All right.

17 Motions for filing whether it's timeless
18 or motions for examination, and this is just a matter
19 that I guess, Mr. Roisman, that the seven days
20 provided in the Regs. is somewhat constraining for the
21 Intervenor or in this case you think you'll need more
22 time than is generally accorded?

23 MR. ROISMAN: Yes. Actually, this sort of
24 dovetails with something that I didn't -- I've been a
25 little busy responding to the appeal so I haven't

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1 focused as much on these documents in preparation for
2 this phone call today. But my recollection is that
3 there is two different deadlines that we're basically
4 proposing be combined into one.

5 There's a deadline for when the parties
6 submit to the Board questions that we believe the
7 Board should ask of the other witnesses. And then
8 there's a separate deadline for when the parties
9 should ask the Board for leave to conduct cross-
10 examination directly themselves.

11 What NRDC is proposing here is that those
12 two be combined at the 21 day number. And I think that
13 the 21 days I don't think there's a disagreement among
14 the parties that 21 days from the conclusion of the
15 filing of all of the profiled testimony for filing
16 parties' proposed examination plans is a good number.
17 I'm just suggesting that that be the same time that we
18 file, if we are filing, if any party is filing the
19 right to cross-examine witnesses themselves. And I
20 think in part that's because until you really have
21 written out what you think the issues are and how the
22 Board you believe should ask questions, it's hard to
23 make the argument to the Board as to why some subset
24 of those questions are more appropriate asked by the
25 Intervenor.

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1 Now, some of that probably prescinds from
2 a disagreement between NRDC and the other parties on
3 what the standard is that the Board would apply under
4 1204(b)(3). We believe it's the standard that's
5 written in the Regulation, which is, if necessary, to
6 fully develop the record. I believe that Applicant
7 and staff may believe this is the standard that's
8 applicable under 2.310 to when you get a subpart G
9 hearing, namely that the credibility of a witness is
10 involved. I think it's broader than that.

11 JUDGE FROEHLICH: Okay. Thank you.

12 Anyone else care to be heard on this item?
13 All right.

14 Moving to fourteen, the parties have
15 agreement and not necessary at this point.
16 Stipulations? Okay.

17 Nothing we need to do with fifteen at this
18 point?

19 I note that item sixteen the parties have
20 reached agreement on the bulleted items below and the
21 additional proposals that have been made by the
22 parties. And the Board will take these, under
23 advisement.

24 Does any party care to speak to any of the
25 bulleted points at this juncture? Hearing none, are

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1 there any other items that should be discussed or
2 raised at this time where we're altogether on the
3 phone and connected?

4 Judge Kastenberg, I'll start with you. Do
5 you have anything you'd like to ask or add at this
6 stage?

7 JUDGE KASTENBERG: No, not at this time.
8 Thank you.

9 JUDGE FROEHLICH: Thank you.

10 And Judge Kennedy?

11 JUDGE KENNEDY: No, have nothing to add.

12 JUDGE FROEHLICH: All right. Any of the
13 parties have anything they wish to add or say for the
14 record at this juncture?

15 MR. POLONSKY: This is Mr. Polonsky.

16 MR. ROISMAN: Oh, I'm sorry. Go ahead,
17 Alex.

18 MR. POLONSKY: Oh, go ahead, Tony.

19 MR. ROISMAN: Actually, I was going to ask
20 you a question. I had written back a question about
21 that there had been something in here before about
22 what would trigger the ten day period under 2.323, in
23 other words when was a party aware of the document.
24 And I don't see now, and as I said a moment ago, I
25 have not had a chance to review the final version of

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1 this that went in. Did you take out of this any
2 discussion of that particular point and just leave it
3 for us to argue about when and if the issue arises?

4 MR. POLONSKY: My recollection is that you
5 had proposed a couple of words and that we had --

6 MR. ROISMAN: I proposed that you word it
7 "reasonable.

8 MR. POLONSKY: Yes. And we adopted that,
9 I believe and we inserted it. Yes, to the extent that
10 there's --

11 MR. ROISMAN: Can you just tell me where
12 that appears?

13 MS. JONES: It's on page 3 at the bottom
14 paragraph.

15 MR. ROISMAN: Thank you. I apologize for
16 my lack of preparation with just nobody to blame but
17 yourself. If you hadn't file the appeal, I would have
18 been better prepared.

19 In which paragraph, Ms. Jones?

20 MS. JONES: Paragraph 5 at the bottom of
21 page 3 of the letter.

22 MR. ROISMAN: Okay.

23 MR. POLONSKY: "Reasonably available."

24 MR. ROISMAN: Oh, yes, I see. Okay. Yes.
25 Okay. Thank you. I'm sorry. I missed that.

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1 Other than that, no, I didn't have
2 anything else.

3 JUDGE FROEHLICH: Okay. Mr. Polonsky,
4 did you have anything you wanted to raise at this
5 stage?

6 MR. POLONSKY: Just a question if the
7 Board would entertain it?

8 JUDGE FROEHLICH: Sure.

9 MR. POLONSKY: When the Board believes
10 that it will issue a schedule, particularly because
11 many of the bullet points at the end of the joint
12 proposal relate to what will be disclosed next week.
13 And, obviously, the unopposed motion to defer would
14 effect activities this week and next week. So if you
15 have a sense of when you might issue your order, we'd
16 be all ears.

17 JUDGE FROEHLICH: I'm glad to respond to
18 that question and it's perfectly appropriate.

19 At the present time the May 3rd, I guess,
20 date that it would be required under the rules for
21 both the staff to put forward their hearing file and
22 for initial disclosures to begin will be suspended
23 until the Board issues its order. And I would expect
24 that it would probably take us three weeks or so to
25 get a scheduling order out in this docket.

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1 Is that helpful to you for your planning
2 purposes.

3 MR. POLONSKY: Yes, thank you. So we do
4 not need to exchange or disclose documents? We'll
5 await an order?

6 JUDGE FROEHLICH: Right. You may await an
7 order and during the pendency of the time while we're
8 working on our order here there is no hearing file
9 requirement on the staff, nor is there the initial
10 disclosures for any of the parties. So we'll just
11 wait and address that in our order, and we'll take it
12 from that month, you know following the issuance of
13 the order.

14 MR. POLONSKY: Okay. Thank you very much.

15 MR. ROISMAN: This is Mr. Roisman. And I
16 guess I have a question for Alex and Max.

17 What is your position on whether or not
18 the immediate disclosure in the newly generated
19 documents is going to begin immediately even if the
20 Board has not signed the deferral on mandatory
21 disclosure order? I'm concerned that the staff is
22 still on schedule for an August DSEIS, that we really
23 are going to get in a bind if we're not even seeing
24 the current documents that are being exchanged, and
25 not being alerted to them. So, I'd like to know what

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1 your position is going to be and if it's anything
2 other than, yes, we're going to disclose them anyway,
3 then I would ask that the Board please rule on the
4 deferral motion much more quickly than three weeks.

5 MR. POLONSKY: Tony, I can make sure that
6 communications as provided in paragraph number one of
7 the unopposed motion to defer initial disclosures from
8 Exelon to the NRC staff will be made in the interim.

9 MR. ROISMAN: And, Max, what about from
10 the staff?

11 MR. SMITH: One minute, please.

12 I'll direct the NRC staff to, again,
13 making a way to provide the correspondence mentioned
14 in the deferral motion to NRDC. I might contact you,
15 Tony, and talk about what would be the easiest way for
16 us to do that.

17 MR. ROISMAN: Okay. That's great.

18 And, Alex, are you saying the same as Max
19 or were you suggesting a narrower disclosure; that is
20 are you going to go ahead and do item number one fully
21 or only the portion of it that involves the direct
22 communication from the Applicant itself to the staff?

23 MR. POLONSKY: Tony, if I in anyway
24 mischaracterized paragraph one, I should have simply
25 said whatever paragraph one says, that's what we will

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1 promise to do until the Board issues its order

2 MR. ROISMAN: Okay. Thank you, both. I
3 appreciate that courtesy.

4 JUDGE FROEHLICH: And, Mr. Roisman, with
5 both assurances you've received from staff and the
6 Applicant is our three week timetable acceptable to
7 you?

8 MR. ROISMAN: Absolutely. I assume that
9 you all are going to Los Vegas to hold your meeting to
10 decide these things, and I wouldn't want to rush that.

11 JUDGE FROEHLICH: Okay. Thank you.

12 Well, if there's nothing further at this
13 stage, and I assuming there is nothing further at this
14 stage, I will adjourn this session and the Board will
15 endeavor to have its initial scheduling order out
16 within three weeks. In the interim the parties are
17 relieved of their obligations that arise from the
18 regulations but subject to the agreements that they've
19 reached among themselves.

20 With that, we stand adjourned.

21 (Whereupon, at 2:37 p.m. the Scheduling
22 Conference was adjourned.)

23

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory
Commission

Proceeding: Limerick Generating Station
Scheduling Conference

Docket Number: 50-352-LR and 50-353-LR

ASLBP Number: 12-916-04-LR-BD01

Location: Teleconference

were held as herein appears, and that this is the
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