

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

William J. Froehlich, Chairman
Dr. Michael F. Kennedy
Dr. William E. Kastenber

In the Matter of
EXELON GENERATION COMPANY, LLC
(Limerick Generating Station, Units 1 and 2)

Docket Nos. 50-352-LR, 50-353-LR
ASLBP No. 12-916-04-LR-BD01
September 4, 2012

REVISED SCHEDULING ORDER

On August 3, 2012, the Nuclear Regulatory Commission amended its regulations related to adjudicatory proceedings under 10 C.F.R. Part 2.¹ These regulations take effect today.² On August 22, 2012, we issued a notice advising the parties of these amendments and requesting that they inform us if they believed that the amendments required any changes to the Initial Scheduling Order (ISO).³ On August 29, 2012, the NRC Staff submitted an unopposed response to this notice requesting that we make a number of changes to the ISO.⁴ We adopt the changes proposed by the NRC Staff and incorporate them in this Revised Scheduling Order.

In the above-captioned proceeding, the Board granted a hearing request⁵ filed by the Natural Resources Defense Council (NRDC or Intervenor) challenging the application which

¹ Amendments to Adjudicatory Process Rules and Related Requirements; Final Rule, 77 Fed.Reg. 46,561 (Aug. 3, 2012).

² Id. at 46,562.

³ See Licensing Board Notice (Advising Parties of Amendments to 10 C.F.R. Part 2) (Aug. 22, 2012) (unpublished).

⁴ See NRC Staff's Unopposed Response to the Board's Notice (Aug. 29, 2012).

⁵ LBP-12-08, 75 NRC ___ (Apr. 4, 2012).

Exelon Generation Company LLC (Exelon or Applicant) filed to extend its operating licenses for the Limerick Generating Station, Units 1 and 2 (Limerick) for an additional twenty years (i.e., until October 26, 2044 for Unit 1, and June 22, 2049 for Unit 2).⁶ On April 16, 2012, the Board issued a notice and order enumerating a number of issues to be discussed at an initial scheduling teleconference and requesting that the parties consult and attempt to reach agreement on those issues prior to the call.⁷ Exelon submitted a letter noting the areas in which the parties were able to reach agreement on April 25, 2012.⁸ In accordance with 10 C.F.R. § 2.332, the Board held the initial scheduling conference call on April 26, 2012.⁹ During the telephone conference the parties discussed with the Board the issues enumerated in the April 16 notice and order along with an unopposed motion to delay mandatory disclosures filed by Exelon on April 19, 2012.¹⁰

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."¹¹ The Board has considered the positions of the parties and has taken them into account to the

⁶ See License Renewal Application; Limerick Generating Station (June 2011) (ADAMS Accession No. ML11179A101).

⁷ Board Notice and Order (Setting Telephonic Initial Scheduling Conference) (Apr. 16, 2012) (unpublished) ("Notice Setting Conference").

⁸ Letter from Alex S. Polonsky to Judge William J. Froehlich (Apr. 25, 2012) ("Polonsky Letter").

⁹ Transcript of Telephone Conference (Apr. 26, 2012) at 270-317.

¹⁰ Exelon's Unopposed Motion to Defer Initial Disclosures (Apr. 19, 2012) ("Motion to Defer Disclosures").

¹¹ 10 C.F.R. § 2.332(a).

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.”¹² 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 for the issuance of its final supplemental environmental impact statement (FSEIS).¹³

1. Timeframes Governing Mandatory Disclosures and Hearing File Updates

A. Initial Disclosures

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.¹⁴ 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,¹⁵ and must “file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file.”¹⁶ Because the Board issued LBP-12-08 on April 4, 2012, these initial disclosures would have been due on May 4, 2012 at the latest. However, in our initial scheduling conference, the Board suspended initial disclosures until we ruled on Exelon’s unopposed motion to defer initial disclosures,¹⁷ to which we now turn.

Exelon’s motion requests that the initial disclosures and hearing file updates be deferred until the earlier of November 1, 2012, or thirty days after the Commission rules on

¹² Id. § 2.332(c)(2).

¹³ See Letter from Maxwell C. Smith, Counsel for NRC Staff, to Licensing Board (Aug. 24, 2012).

¹⁴ 10 C.F.R. § 2.336(a).

¹⁵ Id. § 2.336(b).

¹⁶ Id. § 2.1203(a).

¹⁷ Tr. at 313.

the appeals of Exelon and the NRC Staff of LBP-12-08.¹⁸ While NRDC did not oppose this motion, it became clear during our initial scheduling conference that NRDC withheld its opposition only because Exelon and NRC Staff agreed not to oppose any later NRDC request for an extension of time “for actions to be taken (e.g., submittal of testimony)”¹⁹ that equals the length of the deferral received.²⁰ For example, if the Board granted Exelon’s motion and deferred initial disclosures six months, then NRDC would be able to request a six-month extension after the issuance of the FSEIS. The Board specifically asked, “If the Board were to reject that concept . . . would you still be in support of the motion to defer the initial disclosures?”²¹ Counsel for NRDC replied, “No, we would not.”²²

While the Board notes that NRDC may seek an extension of time as it wishes, NRC regulations establish a heavy burden for parties to modify a hearing schedule. Indeed, 10 C.F.R. § 2.334(b) provides, “A hearing schedule may not be modified except upon a finding of good cause.”²³ This Board would be disinclined to find that this arrangement that the parties have provided for alone constitutes such “good cause.” That is, the Board would likely reject such an extension request absent other circumstances demonstrating “good cause.” Because we reject this concept, we consider Exelon’s motion to defer disclosures to be opposed by NRDC.²⁴

¹⁸ Motion to Defer Disclosures at 1.

¹⁹ Id. at 2.

²⁰ Tr. at 277-79; see also Motion to Defer Disclosures at 3.

²¹ Tr. at 279.

²² Id.

²³ 10 C.F.R. § 2.334(b).

²⁴ See Tr. at 279.

The Board believes that a deferral of six months is excessive, and would be unfairly prejudicial to NRDC. Further, the NRC Staff projects the issuance of the Draft Supplemental Environmental Impact Statement (DSEIS) for August 2012.²⁵ NRDC is concerned about the possibility of being forced to review the other parties' initial disclosures while simultaneously reviewing the DSEIS.²⁶ So that this proceeding will move forward expeditiously and the Intervenor will have ample time to prepare in advance of the issuance of the DSEIS, we must shorten any disclosure deferral. Therefore, we grant a roughly two-month deferral, and rule that the parties' initial disclosures and the NRC Staff's initial hearing file update shall be filed on the earlier of July 1, 2012 or 30 days after the Commission rules on the appeals of Exelon and NRC Staff of LBP-12-08. Thereafter, mandatory disclosures and the hearing file shall be updated as the parties' have agreed:

[The parties shall] supplement their initial disclosures and the hearing file every 30 days, on the 1st of the month (or, if the 1st falls on a weekend or holiday, on the first working day that follows). Documents disclosed [shall] be those generated through the 1st day of the previous month, [allowing] the parties 30 days to gather, review and disclose the documents.²⁷

B. Final Disclosures

The parties disagree on the timeframe for the final update to mandatory disclosures and the hearing file. Exelon argues that updates should terminate 30 days before the parties submit direct testimony.²⁸ NRDC argues that updates should terminate at the conclusion of the evidentiary hearing.²⁹

²⁵ Tr. at 300.

²⁶ Tr. at 280, 283.

²⁷ Polonsky Letter at 2.

²⁸ Id.; Tr. at 286.

²⁹ Polonsky Letter at 2; Tr. at 287-88.

NRC regulations state, “The duty of disclosure . . . is continuing,”³⁰ and “the NRC staff has a continuing duty to keep the hearing file up to date.”³¹ Further, the Federal Rules of Civil Procedure provide that parties have a duty to supplement their disclosures “if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”³² We therefore rule that mandatory disclosures and hearing file updates shall continue through the end of the evidentiary hearing.

2. Electronic Information Subject to Disclosure

The Board asked the parties to reach “an agreement concerning which electronically stored information will be considered reasonably accessible and thus subject to mandatory disclosure under 10 C.F.R. § 2.336 or production under 10 C.F.R. § 2.1203.”³³ We adopt, with one small addition, the parties’ proposal that the following locations are reasonably accessible: “computers, shared/networked drives, removable drive (such as thumb drives [and other external drives]), and e-mails.”³⁴ We also adopt their proposal that “relevant modeling software input and output files will be disclosed.”³⁵

3. Form of Disclosures

We adopt the parties’ agreement that “to the extent practicable, NRDC and Exelon will provide electronic copies of documents in word-searchable, PDF format. The NRC

³⁰ 10 C.F.R. § 2.336(d) (emphasis added).

³¹ Id. § 2.1203(c) (emphasis added).

³² Fed. R. Civ. P. 26(e).

³³ Notice Setting Conference at 3.

³⁴ Polonsky Letter at 2.

³⁵ Id.

Staff's disclosures will provide the ADAMS Accession numbers for each document but the Staff does not plan to circulate a CD-ROM with its disclosed documents."³⁶

4. Privileges

The parties have stated that they anticipate asserting certain privileges or protected status for certain documents. They have agreed upon, and we adopt, the following terms to govern the preparation of privilege logs:

(a) Parties need not include on a privilege log communications for which a party claims an attorney-client privilege that originated from counsel to the client and/or the client's retained consultants, or from the client and/or its retained consultants to counsel, when no other person outside the client control group is included among the recipients;

(b) Parties need not include on a privilege log documents to which the attorney work-product privilege is claimed when the documents are authored by counsel and distributed among counsel; and

(c) . . . [D]rafts of any kind [shall] not be included on a privilege log.³⁷

The parties do not agree, however, on the timeframe for challenging another party's assertion of a privilege. We withhold judgment on this issue until such time as the parties submit to the Board a proposed protective order to govern the disclosure of proprietary information.

5. Timeliness of New and Amended Contentions

NRC regulations state that new or amended contentions may be filed after new information becomes available provided that, among other requirements, the contentions are "submitted in a timely fashion based on the availability of the subsequent information."³⁸ The regulations do not define the phrase "timely fashion."

³⁶ Id.

³⁷ Id. at 3.

³⁸ 10 C.F.R. § 2.309(f)(2)(iii).

For purposes of this proceeding, as the parties have proposed, any contention filed within 30 days of the availability of the information upon which it is based shall be deemed “timely” under 10 C.F.R. § 2.309(c)(1)(iii). Any contention filed later than that will be deemed “nontimely.”

6. Procedures Governing New and Amended Contentions

The parties disagree on the length of time that NRDC shall be provided to reply to Exelon’s and NRC Staff’s answers to contentions filed after the initial deadline. Exelon proposes a seven-day deadline, in accordance with 10 C.F.R. § 2.309(i)(2). NRDC proposed a 14-day deadline, because intervenors are often faced with the task of replying to lengthy answers filed by both applicants and the NRC Staff, and that the standard seven-day deadline does not account for weekends or holidays.³⁹ In short, NRDC contends that a seven-day deadline is “unreasonably short.”⁴⁰ In the interest of ensuring adequate time to respond to potentially two separate answers, we agree. NRDC shall have 14 days to file a reply to any answers to a motion to admit new or amended contentions.

7. Settlement of Contentions

The Board notes that the parties’ have agreed on the following:

The parties may become interested in pursuing settlement discussions, especially to the extent that Contention 1-E is a contention of omission. The parties reserve the right to request appointment of a settlement judge under [10 C.F.R. §] 2.338.⁴¹

8. Time Limit for Submitting Witness Lists

We adopt the agreement of the parties as follows:

[The parties shall] identify potential witnesses within the mandatory disclosure filings, as soon as those witnesses become known, but no later than 10 days after the issuance of the Final SEIS. Depending on the written testimony

³⁹ Tr. at 297-98.

⁴⁰ Tr. at 298.

⁴¹ Polonsky Letter at 4.

eventually filed by the parties, the parties reserve the right to present rebuttal witnesses not previously identified in mandatory disclosures within seven (7) days after receiving each set of written testimony.⁴²

9 Site Visit

The parties agreed that a site visit would not be useful in this proceeding. The Board agrees, and will not plan on visiting the Limerick facility in the course of this proceeding.

10 Dispositive Motions

The parties agreed that they would “file all dispositive motions no later than 30 days after the Staff publishes the FSEIS,” and that answers would be due 20 days thereafter.⁴³ They also agreed that the ten-day deadline for filing all motions found in 10 C.F.R. § 2.323(a)(2) “should not apply to summary disposition motions in order that the parties have adequate time to prepare well pled motions and supporting affidavits.”⁴⁴ Last, the parties agree that if an answer supports the motion, a party opposing the motion may submit a supplemental answer within 10 days addressing the arguments in the answer that were not included in the motion.⁴⁵

The Board adopts all of these proposals, but we wish to stress a number of points. First, the terms of this section of this Order govern all dispositive motions. A dispositive motion is any motion that would dispose of all or part of any admitted contention, and includes Motions for Summary Disposition and Motions to Dismiss.

Second, we note that the 30-day deadline proposed above is an “ultimate deadline.” That is, no dispositive motions may be filed later than 30 days after publication of the FSEIS, even if information arises that would otherwise allow for such a motion to be filed.

⁴² Id. at 4-5.

⁴³ Id. at 5.

⁴⁴ Id.

⁴⁵ Id.

Third, we note that even though the parties have agreed that no “promptness deadline”⁴⁶ will govern the submission of dispositive motions, the Board expects that any dispositive motion shall be submitted within a reasonable time from the occurrence that gives rise to the motion. A reasonable time for the submission of a dispositive motion is 30 days from the date the information on which the motion is based becomes available. A 30-day deadline provides “adequate time to prepare well pled motions and supporting affidavits,”⁴⁷ and mirrors the time limit agreed upon by the parties for the filing of new and amended contentions. In addition, the Board will reject outright any dispositive motion that is filed in bad faith or for dilatory purposes.

Last, we note that this suspension of the 10-day deadline found in 10 C.F.R. § 2.323(a)(2) applies only to dispositive motions. All other motions, unless provided otherwise within this Order or NRC regulations, will continue to be held to a 10-day deadline.

11. Hearing Venue

The parties have suggested that we hold the evidentiary hearing at a venue near the Limerick site,⁴⁸ and we will plan to do so.

12. Initial Filings

10 C.F.R. § 2.1207(a)(1) provides that the parties shall submit initial written statements of position and testimony with supporting affidavits (“Initial Filings”), but does not specify when these Initial Filings should be submitted. The parties have not reached an agreement on the matter. Exelon suggests that it should submit its Initial Filings first, within 45 days of the publication of the FSEIS, NRDC and NRC Staff should file their Initial Filings

⁴⁶ A “promptness deadline” measures time from the occurrence that gives rise to the motion. For example, 10 C.F.R. § 2.323(a)(2) provides for a ten-day “promptness deadline” to file motions from the date that the information giving rise to the motion arose.

⁴⁷ Polonsky Letter at 5.

⁴⁸ Id.

and rebuttal testimony 45 days later, and Exelon should file its rebuttal testimony 20 days later.⁴⁹ NRDC suggests that it should submit its Initial Filings first, within 60 days of the publication of the FSEIS, Exelon and NRC Staff should file their Initial Filings and rebuttal testimony 60 days later, and NRDC should file its rebuttal testimony 30 days later.⁵⁰ The NRC Staff supports the order proposed by NRDC, but does not take a position on the timeframe.

We rule that the parties shall submit their Initial Filings as follows. First, NRDC shall submit its Initial Filings within 45 days of the publication of the FSEIS. Second, Exelon and NRC Staff shall submit their Initial Filings and rebuttal testimony within 45 days of service of NRDC's Initial Filings. Last, NRDC shall submit its rebuttal testimony within 20 days of service of Exelon's and NRC Staff's Initial Filings and rebuttal testimony, whichever is later.

13. Motions for Cross-Examination

The parties disagree on the timing for filing motions for cross-examination under 10 C.F.R. § 2.1204(b). Exelon and NRC Staff propose that such motions should "be made no later than seven (7) days after the deadline for the final prehearing evidentiary submission, while NRDC proposes twenty-one (21) days."

We rule that any party requesting cross-examination shall file a motion for cross-examination under 10 C.F.R. § 2.1204(b) no later than 10 days of the deadline for the final prehearing evidentiary submission. This 10-day deadline comports with the default deadline for motions provided by 10 C.F.R. § 2.323(a)(2).

⁴⁹ Id. at 5-6.

⁵⁰ Id. at 6.

14. Amendments to Pleadings

We note that the parties have stated that they “do not believe that such amendments are necessary at this stage of this proceeding.”⁵¹

15. Stipulations

We note that the parties have agreed on the following:

At present, the parties do not believe that such stipulations or admissions of fact are necessary to facilitate prompt resolution of the admitted contention. The parties could work through such stipulations as part of summary disposition motions, to identify material facts that are not in dispute.⁵²

16. Confidential Questions

We adopt the proposal of the parties that they shall “submit confidential questions to the Board 21 days after service of the final round of prefiled testimony.”⁵³

17. Timing of Evidentiary Hearing

The parties stated that “they will be ready for hearing 14 days after submitting confidential questions to the Board.”⁵⁴ As such, we will hold the evidentiary hearing in this proceeding no earlier than 14 days after the submission of confidential questions.

18. Proposed Findings of Fact and Conclusions of Law

We adopt the agreement of the parties as follows:

Proposed Findings of Fact and Conclusions of Law [shall] be simultaneously filed 30 days after the close of the evidentiary hearing. If there are multiple evidentiary hearings on discrete issues, then Proposed Findings of Fact would be due 30 days after each hearing as to those discrete issues.⁵⁵

⁵¹ Id. at 7.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

19. Served or Disclosed Documents

We adopt the agreement of the parties as follows: “The parties need not disclose any document served on the other parties in this proceeding, or previously disclosed by another party, or in the NRC Staff’s hearing file.”⁵⁶

20. Public Documents

We adopt the agreement of the parties as follows: “The parties need not disclose press clippings, unless they intend to rely on them in testimony or at the evidentiary hearing.”⁵⁷

21. Duplicates

We adopt the agreement of the parties as follows: “The parties need not produce the same document held by multiple custodians, or shorter email strings contained within longer email strings.”⁵⁸

22. Administrative Documents

We adopt the agreement of the parties as follows:

[D]ocuments that contain only administrative information (such as notices of upcoming meetings or telephone calls, records of time and expenses, billing statements, and similar documents), without any relevant substantive information, need not be produced. Meeting notices pertaining to meetings between Exelon and the NRC Staff, however, will be disclosed by the NRC Staff as part of the hearing file.⁵⁹

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id. at 8.

⁵⁹ Id.

23. Drafts

We adopt the agreement of the parties that disclosure obligations shall extend only to final documents, and not to “drafts, comments on drafts, transmittals of drafts, and discussion of drafts.”⁶⁰

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD

/RA/

William J. Froehlich, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 4, 2012

⁶⁰ Id.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Exelon Generation Company, LLC) Docket Nos. 50-352-LR and 50-353-LR
(Limerick Generating Station, Units 1 and 2))
) ASLBP No. 12-916-04-LR-BD01
(License Renewal))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **REVISED SCHEDULING ORDER** have been served upon the following persons by Electronic Information Exchange.

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Limerick Generating Station, Units 1 and 2, Docket Nos. 50-362-LR and 50-363-LR
REVISED SCHEDULING ORDER

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[Original signed by Herald Speiser]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of September, 2012