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

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Gary S. Arnold
Dr. Randall J. Charbeneau

In the Matter of NUCLEAR INNOVATION NORTH AMERICA LLC (South Texas Project Units 3 and 4)	Docket Nos. 52-12-COL and 52-13-COL ASLBP No. 09-885-08-COL-BD01 October 3, 2012

REVISED SCHEDULING ORDER

This proceeding concerns an application by Nuclear Innovation North America, LLC (NINA or Applicant) for combined operating licenses (COLs) that would permit the construction and operation of two nuclear reactors (STP Units 3 and 4) near Bay City, Texas. Under the NRC regulations, this Board has the "duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order."[1] This revised scheduling order is designed to ensure proper case management of this proceeding, including "[e]xpediting the disposition of the proceeding; [e]stablishing early and continuing control so that the proceeding will not be protracted because of lack of management; [d]iscouraging wasteful prehearing activities; [i]mproving the quality of the hearing . . . ; and [f]acilitating . . . settlement."[2]

[1] 10 C.F.R. § 2.319.

[2] 10 C.F.R. § 2.332(c)(1)-(5).

I. RECENT BACKGROUND

On October 20, 2009, we issued the initial scheduling order for this proceeding.[3] On August 3, 2012, the NRC published amendments to its regulations governing adjudicatory hearings.[4] On August 17, 2012, the Board notified the parties of these regulatory changes and solicited their suggestions as to whether the ISO might need to be modified in light of the regulatory changes.[5] On September 4, 2012, on behalf of itself and the other parties, Applicant filed a joint response.[6]

Based on the foregoing, we are now issuing this Revised Scheduling Order (RSO). It incorporates changes suggested by the parties as well as several other adjustments that the Board deems warranted under the revised regulations or due to changes since the ISO was issued.

All citations herein are to the regulations as amended on August 3, 2012.

II. SCHEDULE

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Board establishes the following case management procedures and schedule for this matter. Consistent with 10 C.F.R. § 2.306(a), if any deadline prescribed by this scheduling order would fall on a Saturday, Sunday, Federal legal holiday, or a day on which NRC headquarters does not open for business due to an emergency closure of the Federal Government in Washington, D.C., then the deadline will be considered to fall on the next day that is not a Saturday, Sunday, Federal legal holiday, or emergency closure.

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[3] Initial Scheduling Order (ISO) (Oct. 20, 2009) (unpublished).

[4] Amendments to Adjudicatory Process Rules and Related Requirements, Final Rule, 77 Fed. Reg. 46,562 (Aug. 3, 2012). These amendments became effective September 4, 2012.

[5] Notice and Order (Notifying Parties of Amendments to 10 C.F.R. Part 2) (Aug. 17, 2012) (unpublished).

[6] Joint Response to Board Order Notifying the Parties of Amendments to 10 C.F.R. Part 2 (Sept. 4, 2012).

A. Mandatory Disclosures and Production of Hearing File.[7]

The regulations specify that, within thirty (30) days of the Board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures. 10 C.F.R. § 2.336(a). Likewise, the NRC Staff must make certain mandatory disclosures. 10 C.F.R. § 2.336(b). In addition, Subpart L proceedings require the NRC Staff to produce a hearing file and make it available to all parties. 10 C.F.R. § 2.1203(a). Pursuant to their Joint Proposal for Hearing Schedule, and the Joint Agreement of the parties on document disclosures, the parties commenced initial mandatory discovery disclosure on October 1, 2009.[8]

1. Updating of Disclosures. The regulations specify that the parties have a "continuing" duty to update their mandatory disclosures,[9] and that the NRC Staff has a "continuing" duty to update the hearing file.[10] Based on discussions during the October 6, 2009 conference, the Board directs the parties to update their disclosures and the hearing file monthly, on the first day of the month. Each update shall cover all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party (or their agents) as of the fifteenth day of the preceding month.

2. Privilege Logs. The regulations require that the parties provide privilege logs, i.e., 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

[7] 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).

[8] Letter from Alvin H. Gutterman, Counsel for STP Nuclear Operating Company (Sept. 10, 2009) (Joint Proposal for Hearing Schedule Attached) (hereinafter Joint Proposal); Letter from Alvin H. Gutterman, Counsel for STP Nuclear Operating Company (Sept. 10, 2009) (Agreement of the Parties Regarding Mandatory Discovery Disclosures) (hereinafter Joint Agreement).

[9] 10 C.F.R. § 2.336(d).

[10] 10 C.F.R. § 2.1203(c).

protected status of the documents."[11] The parties have agreed to waive the requirement in 10 C.F.R. §§ 2.336(a)(3) and 2.336(b)(5) to produce a privilege log. The parties will produce as part of their disclosures a list of all documents withheld as proprietary, security-related, or safeguards information.[12]

3. Scope of Disclosures and Hearing File. The Board accepts and adopts the Joint Agreement of the parties related to mandatory discovery disclosures. In particular:

a. Where a party has generated a particular document that would otherwise be required to be disclosed, it may limit its mandatory disclosures to its final version of such document and need not include its internal drafts, including comments on drafts, resolution of comments, draft transmittals, or other similar documents. However, if a party has legal possession, custody, or control of a document that it or its contractors did not generate, and which is otherwise subject to mandatory disclosure (e.g., relevant to a contention), then the party must produce that document (even if it is labeled "draft").

b. A party need not identify or produce a document that has previously been served on the other parties to this proceeding.

c. If a document exists in both hard copy and electronic formats, then the party need only produce the electronic copy in PDF format, and that party will use its best efforts to produce the document in a Word searchable format. If a relevant e-mail communication exists in multiple locations, the producing party need produce only one copy of that e-mail communication. If the e-mail communication exists in both sender and recipient e-mail folders, the producing party need only produce the sender's copy of the e-mail.

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[11] 10 C.F.R. § 2.336(a)(3); see also 10 C.F.R. § 2.336(b)(5). 10 C.F.R. § 2.336(a)(3) and (b)(5) cover documents claimed to be privileged and documents claimed to be protected. In both cases, the party must identify and list the document "together with sufficient information for assessing the claim of privilege or protected status." Id.

[12] Joint Agreement at 2; see, e.g., 10 C.F.R. §§ 2.390(a)(1), (3), (4).

d. All documents that are required to be disclosed pursuant to 10 C.F.R. § 2.336(b) and that are available via the NRC's website or the NRC's Agency wide Documents Access and Management System (ADAMS) shall be specifically identified by the NRC Staff, as required under 10 C.F.R. §§ 2.336(b) and 2.1203. Documents so disclosed and so identified need not be identified or produced by any other party.[13]

e. A party need not identify or produce press clippings.

4. Electronically Stored Information.

a. Reasonable Search. Mandatory disclosures and the production of the hearing file shall include electronically stored information and documents (ESI), except that the parties have agreed not to produce metadata. To satisfy this disclosure obligation, each party shall conduct a reasonable good faith search for all documents or information, including ESI, subject to the mandatory disclosure and hearing file requirements. Each production or disclosure shall include a signed affidavit attesting that the party has conducted such a search, and that the disclosure or production excludes only (a) documents or information exempted from disclosure pursuant to the law, including NRC regulations or this order, and (b) information that is not reasonably accessible because of undue burden or cost.[14]

b. Format of Production. The parties have agreed that all ESI that is disclosed pursuant to the preceding paragraph shall be produced in pdf searchable electronic form.

5. Termination. The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing.

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[13] At the evidentiary hearing stage, however, the Board may require the NRC Staff or the parties to produce separate electronic or paper copies of certain important documents such as the FEIS, FSER, and COLA.

[14] Cf. Fed. R. Civ. P. 16(b)(5) (scheduling order to include "provisions for disclosure of electronically stored information"); 26(b)(2)(B) ("A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.").

B. Protective Order and Non-Disclosure Agreement.[15]

In July 2009, the parties entered into an agreed protective order and non-disclosure agreement, governing the disclosure of "Protected Information," defined therein.[16] On April 26, 2012, the Board issued a new protective order and non-disclosure agreement that, in addition to the prior orders, governs the use of Protected Information about Contention FC-1, regarding foreign ownership, control, or domination issues.[17]

C. Disclosure Disputes and Motions to Compel.

The parties shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure, hearing file, redactions, or the validity of any claim that a document is privileged or protected, concerning any disclosures within ten (10) days after the occurrence or circumstance from which the motion arises, in accordance with 10 C.F.R. § 2.323(a)(1).[18]

D. Monthly Status Report.

Commencing on November 1, 2009, the NRC Staff shall submit a short report specifying its best estimate of the dates it expects to issue the Advanced Final Safety Evaluation Report (AFSER) and the Final Safety Evaluation Report (FSER), and the dates when it understands that the Advisory Committee on Reactor Safety (ACRS) and its relevant subcommittees plan to issue any reports concerning NINA's proposed combined licenses. Thereafter, the Staff shall

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[15] 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 to request access to that document, is for it to be included in the privilege log.

[16] Licensing Board Memorandum and Order (Protective Order Governing the Disclosure of Protected Information) (July 1, 2009) (unpublished); Licensing Board Order (Amending Protective Order) (July 14, 2009) (unpublished).

[17] Licensing Board Memorandum and Order (Protective Order Governing Disclosure of Protected Information for Contention FC-1) (Apr. 26, 2012) (unpublished).

[18] For example, an objection to the claim that a document qualifies for protection as a "proprietary" document must ordinarily be filed within ten (10) days of the service of the privilege log where that document was first added.

update this status report on the first day of each month. Additionally, commencing August 2012 the Staff shall provide the projected decision date for its review of FOCD issues.[19]

E. Requests for Subpart G Proceeding Based on Disclosures of Eyewitness.[20]

A request that a contention or other contested matter be handled pursuant to Subpart G procedures based on 10 C.F.R. § 2.310(d) (which focuses, inter alia, on issues "where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness . . .") shall, for witnesses identified by an opposing party in mandatory disclosures, be within twenty (20) days of said event.

F. New or Amended Contentions.

1. Consolidated Filing. If a party seeks to file a motion for leave to file a new or amended contention, then such motion shall be accompanied by the proposed contention. This consolidated filing shall specify how the motion satisfies the "good cause" criteria of 10 C.F.R. § 2.309(c)(1)(i)-(iii) and how the proposed contention satisfies the admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Within twenty-five (25) days thereafter, any other party may file an answer responding to the motion.[21] The answer shall also address the admissibility of the proffered contention. Within seven (7) days thereafter, the movant may file a reply.[22]

2. Timeliness Deadline. The consolidated filing referred to in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(c)(1)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first became available.

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[19] See Licensing Board Order (Monthly Status Updates Regarding FOCD Review) (July 18, 2012) (unpublished).

[20] Mandatory disclosures by the parties include the disclosure of "the name . . . of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion." 10 C.F.R. § 2.336(a)(1).

[21] See 10 C.F.R.§ 2.309(i)(1).

[22] See 10 C.F.R. § 2.309(i)(2).

3. Extensions of Time. A party may move for an extension to the foregoing timeliness deadline for good cause or by stipulation approved by the Board.[23] A motion for extension may be filed before or after the deadline. The "good cause" concept and criterion specified in 10 C.F.R. § 2.307(a) may include such causes as health issues, weather issues (snowstorms) and NRC electronic hearing docket issues.[24] It is broader than the three factor test for "good cause" specified in 10 C.F.R. § 2.309(c)(1)(i)-(iii).

4. Selection of Hearing Procedures. A motion and proposed new contention specified in paragraph II.F.1 above may address the selection of the appropriate hearing procedure for the proposed new contention.[25]

G. New Hearing Requests and Petitions to Intervene.

New hearing requests and petitions to intervene may be filed by persons not currently a party hereto provided that they satisfy the "good cause" criteria of 10 C.F.R. § 2.309(c)(1)(i)-(iii), the contention admissibility criteria of 10 C.F.R. §2.309(f)(1)(i)-(vi), and the standing criteria of 10 C.F.R. § 2.309(d).[26] Because such filings are subject to additional requirements, the determination as to whether such requests or petitions are filed in a "timely manner" as required by 10 C.F.R. § 2.309(c)(1)(iii) shall be subject to a reasonableness standard and is not subject to the thirty (30) day deadline specified in II.F.2 above.

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[23] See 10 C.F.R. § 2.307(a).

[24] See 77 Fed. Reg. at 46,571-72, 46,582, 46,591 (Aug, 3, 2012).

[25] See 10 C.F.R. §§ 2.309(g) and 2.310(d).

[26] See 10 C.F.R. § 2.309(c)(3).

H. Pleadings and Motions – Generally.

1. Ten Days. Except for motions under 10 C.F.R. § 2.309(c) or as otherwise specified herein, all motions must be filed within ten (10) days after the occurrence or circumstance from which the motion arises.[27]

2. Pleadings – Page Limitation. Motions and answers to motions shall not exceed fifteen (15) pages in length (excluding attachments) absent preapproval of the Board. A motion for leave to exceed this page limitation must be filed no less than three (3) business days prior to the time the motion or answer is due to be filed. A motion to exceed this page limitation must (i) indicate whether the request is opposed or supported by the other participants to the proceeding; (ii) provide a good faith estimate of the number of additional pages that will be filed; and (iii) demonstrate good cause for being permitted to exceed the page limitation.

3. Response to New Facts or Arguments in Answer Supporting a Motion. Except for a motion to file a new or amended contention as set forth in paragraph II.F. above or where there are compelling circumstances, the moving party has no right to reply to an answer or response to a motion.[28] However, if any party files an answer that supports a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a response to any new facts or arguments presented in that answer. Except as otherwise specified herein, no further supporting statements or responses thereto will be entertained.[29]

4. Motion for Leave to File Reply. A party seeking to file a reply to any answer must first obtain leave of the Board, except with respect to motions to file new or amended contentions under 10 C.F.R. § 2.309. A motion for leave to file a reply shall be submitted no less than three

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[27] See 77 Fed. Reg. at 46,567, 46,593.

[28] See 10 C.F.R. § 2.323(c).

[29] This provision avoids unnecessary confusion and litigation that has arisen on this point and is modeled on 10 C.F.R. § 2.710(a).

(3) business days prior to the time the reply would need to be filed.[30] In addition to all other requirements, a motion to file a reply must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate good cause for permitting the reply to be filed.

5. Motion for Extension of Time. A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other submission for which an extension is sought. In addition to all other requirements, a motion for extension of time must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate appropriate cause that supports permitting the extension.

6. Answer to Motion to Exceed the Page Limitation, to File a Reply, or to Extend Time. If a motion to exceed the page limit, to file a reply, or to extend the time for filing a pleading is filed less than five days before the relevant deadline, then the answers thereto shall be filed on the next business day after the filing of the motion. Otherwise, answers are due within (7) seven days thereof.

7. Motion Certification.[31] In accordance with 10 C.F.R. § 2.323(b), a motion will be rejected if it does not include the following certification by the attorney or representative of the moving party:

> I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion,

[30] Although the agency's rules of practice regarding motions do not provide for reply pleadings, the Board will presume that for a reply to be timely it would have to be filed within seven (7) days of the date of service of the response it is intended to address. See 10 C.F.R. § 2.309(i)(2).

[31] The consultation and certification requirements in paragraphs II.H.7 and II.H.8 do not apply to motions to file new or amended contentions. See 10 C.F.R. § 2.323(a)(1).

> and to resolve those issues, and I certify that my efforts have been unsuccessful.[32]

8. Answer Certification. If the attorney or representative of a party is contacted pursuant to the consultation requirement of 10 C.F.R. § 2.323(b), counsel for the non-moving party must make a sincere effort to make himself or herself available to listen and to respond to the moving party's explanation, and to resolve the factual and legal issues raised in the motion. If counsel for the non-moving party is unaware of any attempt by the moving party to contact him or her, the answer to the motion shall so certify. Otherwise, an answer to a motion will be rejected if it does not include the following certification by the counsel for the non-moving party (or his or her alternate):

> I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

It is inconsistent with the dispute avoidance/resolution purposes of 10 C.F.R. § 2.323(b), and thus insufficient, for counsel for the non-moving party to fail or refuse to consider the substance of the consultation attempt, or for the non-moving party to respond that it takes no position on the motion (or issues) but reserves the right to file a response to the motion when it is filed.

9. Supplemental Information. The certifications specified in the foregoing two subsections may be supplemented with any additional information that the representative or attorney deems necessary to ensure the accuracy of the certification or to explain the situation.

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[32] Although in general the movant has only ten (10) days within which to file its motion under 10 C.F.R. § 2.323(a), the spirit of the rules is that such motions should be timely, i.e., not initiated at the last minute, but instead should be commenced sufficiently in advance to provide enough time for the possible resolution of the matter or issues in question. See Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-5, 63 NRC 116, 128 (2006). If the initial consultation is initiated at a reasonable time and the parties believe that all or part of the matter may be resolved amicably if additional time for filing the motion were provided, the parties are encouraged to file a joint motion requesting an extension of time.

I. Dispositive Motions. Motions for summary disposition and other dispositive motions, while permissible,[33] will be managed in this proceeding in accordance with the following requirements.

1. Certification. A dispositive motion (e.g., motion for summary disposition or a motion to dismiss) will be rejected unless, in addition to the signature requirements of 10 C.F.R. § 2.304(d) and the certifications required by 10 C.F.R. § 2.323(b) and this order, the motion includes the following certification by the attorney or representative of the moving party:

> I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d).[34]

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[33] The Commission has stated that:

> [t]here may be times in the proceeding these where motions [for summary disposition] should not be entertained because consideration of the motions would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer . . . is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings.

Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,186 (Jan. 14, 2004). More recently, the Commission issued a notice in an expedited case prohibiting summary disposition motions from proceeding absent an affirmative finding by the Board that it would expedite the proceeding. ("[T]he Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions, if granted, are likely to expedite the proceeding."). Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation; In the Matter of Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), 74 Fed. Reg. 38,052, 38,057 (July 30, 2009).

[34] See 10 C.F.R. § 2.304(d) (Representations of a Signatory to a Pleading); cf. Fed. R. Civ. P. 11(b).

2. Additional Time for Dispositive Motions. In order to accommodate careful consultation as specified above, dispositive motions are to be filed within twenty (20) days after the occurrence or circumstance giving rise to the motion (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a)), provided that the moving party commences sincere efforts to contact and consult all other parties within ten (10) days of such occurrence or circumstance, and the accompanying certification so states.

3. Answers. 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.[35]

4. Continuance. If it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party "cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition," the Board may refuse the application for summary disposition or may order a continuance as may be necessary or just.[36]

5. Deadline. With regard to any contention based on 10 C.F.R. Part 51 or the National Environmental Policy Act, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the FEIS. With regard to any other contention or issue, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the AFSER.

J. Clarification, Simplification, and Amendment of the Pleadings. In the October 6, 2009 initial scheduling conference, the parties stated that it was their consensus that it is premature to address opportunities for the settlement of issues or contentions. Nevertheless, the Board encourages the parties to continue to consider and pursue such measures, as specified in 10 C.F.R. §§ 2.329(c)(1)-(3) and 2.338, including the potential: 1.) clarification, simplification, or

[35] See also supra sec. II.H.5.

[36] See 10 C.F.R. § 2.710(c); cf. Fed. R. Civ. P. 56(f).

specification of the issues; 2.) necessity or desirability of amending the pleadings; 3.) opportunities to develop stipulations or admissions of fact; and 4.) opportunities for the settlement of issues or contentions.

The Board will revisit these issues throughout this proceeding. For example, if it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties are encouraged to consult with each other and/or file motions to pursue same.

K. Evidentiary Hearing Filings. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the earliest practicable trigger date for the initiation of such filings is the date when the ACRS makes its final report on the NINA application publicly available.[37] This shall be deemed the "Trigger Date."[38]

1. Initial Statements of Position, Testimony, Affidavits, and Exhibits. Sixty (60) days after the Trigger Date, each party shall file, on a contention-by-contention basis, its initial written statement of position, exhibits, and written testimony with supporting affidavits, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that sets out affirmative arguments and applicable legal standards, identifies witnesses and evidence, and specifies the purpose of witnesses and evidence (i.e., stating with particularity how the witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence

[37] 10 C.F.R. § 2.332(d) prohibits the commencement of evidentiary hearings on environmental issues until after the FEIS. It also prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and will expedite the ultimate resolution of the case. Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 394 (2007); see also Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC 211, 214 (2001).

[38] By using the ACRS final report as the Trigger Date, we are accelerating the Subpart L evidentiary hearing by several months. Heretofore, most Boards have (explicitly or implicitly) used the FSER as the Trigger Date to commence the evidentiary hearing filings.

directly, in exhibit form, in accordance with 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 relying upon for its statements or position.

2. Rebuttal Statements of Position, Testimony, Affidavits, and Exhibits. No later than twenty (20) days after service of the materials submitted under paragraph K.1, each party shall file its written responses, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(2). The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 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 relying upon for its statements or position. Being in the nature of rebuttal, the response, rebuttal testimony and rebuttal exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

3. Motions In Limine or to Strike. No later than ten (10) days after service of the materials submitted under paragraph I.2, each party shall file its motions in limine or motions to strike regarding the materials submitted under paragraphs K.1 and K.2. Answers to such motions shall be filed no later than seven (7) days after service of the subject motion.

4. Proposed Questions for Board to Ask.[39] No later than thirty (30) days after service of the materials submitted under paragraph K.2, each party shall file its proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R.

[39] A party should cover all essential points in the direct and rebuttal testimony that it prefiles for each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the other parties.

§ 2.1207(a)(3)(i) and (ii). The direct or rebuttal 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. The proposed direct examination questions and plans should be filed in camera and not served on any other party.

5. Motions for Cross-Examination.[40] No later than thirty (30) days after service of the materials submitted under paragraph K.2, each party shall file its motions to conduct cross-examination of a specified witness or witnesses, if any, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). Such motion to conduct cross-examination shall be filed with all parties, but the cross-examination plan itself should be filed in camera and not be served on any other party.

6. Evidentiary Hearing. Although the specific time and date for the evidentiary hearing will be determined later, the Board currently contemplates that it will commence between thirty (30) and seventy-five (75) days after the service of the material specified in paragraphs K.4 and K.5.

7. Witness with Written Testimony Must be Available in Person. Unless the Board expressly provides otherwise, each party must, at its own expense and effort, assure that each

[40] As expressed by another Licensing Board:

> The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit – the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) ("A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts."). See Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2,195-96.

Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 343-44 (2010).

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.[41]

L. Attachments to Filings.

1. Documents Must be Attached. If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), then a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

2. Exception. If the following documents are publicly available on ADAMS, they need not be attached to a motion or pleading: the Application and Environmental Report, the DEIS, the FEIS, the AFSER and the FSER. With regard to such documents, it is sufficient if the pleading 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.[42] All other documents (or the relevant portions thereof) that cannot be found in ADAMS should be attached to the subject pleading.

3. Attached Documents are "Attachments." All documents referred to in the pleadings (pursuant to the two preceding paragraphs) shall be labeled and referred to as "Attachments," not exhibits.[43]

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[41] If, after reading the prefiled testimony, the Board concludes that it has no questions for a particular witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing. Likewise, if the Board concludes that it has no questions for any witness concerning a particular contention, it will so advise the parties and propose that the contention be resolved pursuant to 10 C.F.R. § 2.1208.

[42] 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).

[43] The term "exhibit" is reserved for use as a designation for those items that are submitted pursuant to paragraph II.K as proffered evidence for the evidentiary hearing.

4. Designation and Marking of Attachments. A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by paragraph L.1, the numeric designation shall be prominently marked either on the first page of the appended document or on a cover/divider sheet in front of the appended document.

5. Page Limits/Method of Electronic Submission. Attachments are not subject to the page limitation set forth in paragraph H.2 above. All Attachments associated with a pleading shall be submitted together via the E-Filing system as a single electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments. If, however, the submission exceeds fifteen megabytes in size, then the pleading should be separated into two or more submissions, each less than fifteen megabytes.[44]

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

_____
Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 3, 2012

[44] This accords with NRC's E-Filing guidance (at page 14-15). 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).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NUCLEAR INNOVATION NORTH AMERICA LLC	)	Docket Nos. 52-012-COL and 52-013-COL
	)	
	)	
(South Texas Project, Units 3 and 4)	)	
	)	

CERTIFICATE OF SERVICE

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

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Docket Nos. 52-012-COL and 52-013-COL
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[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of October 2012