

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

Before Administrative Judges:

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Clinch River Nuclear Site Early Site Permit
Application)

Docket No. 52-047-ESP

ASLBP No. 17-954-01-ESP-BD01

November 28, 2017

ORDER
(Circulating Draft Initial Scheduling Order)

The attached draft Initial Scheduling Order sets forth case management procedures and deadlines that the Board proposes to govern this proceeding. The Board has considered suggestions made during the November 8, 2017 conference call and subsequent correspondence. However, the parties may, if they wish, submit—preferably jointly, but otherwise individually—any further comments or suggestions concerning the scheduling order no later than December 6, 2017.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 28, 2017

UNITED STATES OF AMERICA
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ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of

TENNESSEE VALLEY AUTHORITY

(Clinch River Nuclear Site Early Site Permit
Application)

Docket No. 52-047-ESP

ASLBP No. 17-954-01-ESP-BD01

December ##, 2017

INITIAL SCHEDULING ORDER

This proceeding concerns an early site permit application by the Tennessee Valley Authority (TVA) for two or more small modular reactors at the Clinch River Nuclear site near Oak Ridge, Tennessee. The 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 scheduling order is intended to further those objectives.²

I. Background

The principal history of this proceeding is set forth in the Board’s October 10, 2017 Memorandum and Order, in which we admitted the Southern Alliance for Clean Energy (SACE) and the Tennessee Environmental Council (TEC) (collectively, Intervenors) as intervenors to

¹ 10 C.F.R. § 2.319.

² See id. § 2.332(c)(1)–(5).

this proceeding.³ Thereafter, on November 3, 2017, TVA filed, on behalf of all parties, a joint motion for extension of the time to provide initial disclosures.⁴ On November 6, 2017, the NRC Staff provided its best estimate of the projected schedule for completion of the staff's safety and environmental evaluations.⁵ On November 8, 2017, the NRC Staff noticed its intention to participate as a party with respect to all admitted contentions.⁶

The Board convened an initial scheduling conference with the parties by telephone on November 8, 2017, pursuant to 10 C.F.R. § 2.332. Subsequently, TVA filed a letter on behalf of TVA, Intervenors, and NRC Staff outlining an agreement among the parties regarding mandatory disclosures.⁷ The parties' November 8, 2017 Agreement Regarding Mandatory Disclosures is attached hereto as Attachment A and incorporated by reference and made a part of this Order, as though fully set forth herein.

On November ##, 2017, the Board circulated a draft of this order for comment.⁸ On December ##, 2017, ### commented on the draft.

In preparing this initial scheduling order, therefore, the Board has considered the positions of the parties and has taken them into account consistent with our responsibility to

³ Tenn. Valley Auth. (Clinch River Nuclear Site Early Site Permit Application), LBP-17-08, 85 NRC __, __-__ (slip op. at 2-4) (Oct. 10, 2017).

⁴ Joint Motion for Extension of Time to Provide Initial Disclosures (Nov. 3, 2017).

⁵ NRC Staff's Current Review Schedule for Clinch River Early Site Permit Application (Nov. 6, 2017).

⁶ NRC Staff's Notice of Intent to Participate as a Party (Nov. 8, 2017).

⁷ Letter from Blake J. Nelson, Counsel for TVA, to Licensing Board, Re: Agreement of the Parties Regarding Mandatory Discovery Disclosures (Nov. 8, 2017) [hereinafter Agreement Regarding Mandatory Disclosures].

⁸ Licensing Board Order (Circulating Draft Initial Scheduling Order) (Nov. ##, 2017) (unpublished).

establish “early and continuing control so that the proceeding will not be protracted because of lack of management.”⁹

II. Schedule

Given that the issuances of the staff review documents are not expected until mid-2019, the Board anticipates conducting further scheduling conferences to modify or update this scheduling order as needed. In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R., Part 2, the following case management procedures and schedule shall govern this adjudicatory proceeding in accordance with 10 C.F.R. § 2.332.

A. Mandatory Disclosures and Production of Hearing File

1. Initial Mandatory Disclosures and Production of Hearing File. Unless otherwise ordered by the Board, the parties must make certain mandatory disclosures within 30 days of the Board’s ruling admitting contentions.¹⁰ Likewise, within those 30 days, the NRC Staff must make certain mandatory disclosures,¹¹ and must produce a hearing file and make it available to all parties.¹² These deadlines were modified by the Board in response to a joint motion by the parties.¹³ The parties must make their initial mandatory disclosures no later than Friday, December 15, 2017. In addition, the NRC Staff must produce a hearing file by Friday, December 15, 2017.

⁹ 10 C.F.R. § 2.332(c)(2).

¹⁰ Id. § 2.336(a).

¹¹ Id. § 2.336(b).

¹² Id. § 2.1203(a).

¹³ See Licensing Board Order (Granting Joint Motion for Extension of Time to Provide Initial Disclosures) at 1 (Nov. 8, 2017).

2. Updating of Disclosures. Updates to mandatory disclosures and to the NRC Staff's hearing file shall be filed on the second Tuesday of every calendar month, and shall include documents identified by the 15th of the prior month.¹⁴

3. Monthly Status Report. Should the NRC Staff's best estimate of the projected schedule for completion of either its safety or environmental evaluations materially change, the NRC Staff shall so advise as soon as practicable, and in no event later than in the next monthly update of disclosures.

4. List of Potential Witnesses. Parties shall file a final list of potential witnesses pursuant to 10 C.F.R. § 2.336(a)(1) no later than 30 days after the Trigger Date, as defined in section II.G.1 infra.¹⁵

B. Protective Order and Nondisclosure Agreement

If a party anticipates the need for a protective order and nondisclosure agreement, it shall submit either an agreed upon proposed protective order and nondisclosure agreement or individually or jointly proposed versions of such documents.

C. Additional Contentions

1. Timeliness. A new or amended contention shall be deemed timely if it is filed within 30 days of the date when the new and material information on which it is based first becomes available to the moving party through service, publication, or any other means. A proffered new or amended contention must also show good cause pursuant to 10 C.F.R. § 2.309(c)(i)–(iii).

2. Consolidated Briefing. A party seeking to file a motion or request for leave to file a new or amended contention shall file such motion and proffer the proposed contention

¹⁴ See Agreement Regarding Mandatory Disclosures (Attachment A hereto) at 1; see also 10 C.F.R. § 2.336(d).

¹⁵ See Tr. at 159–60.

simultaneously. The pleading shall include a motion for leave to file a new or amended contention under 10 C.F.R § 2.309(c), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within 25 days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention.¹⁶ Within 7 days of service of the answer, the movant may file a reply.¹⁷

D. Dispositive Motions

1. Generally. Dispositive motions, such as motions for summary disposition under 10 C.F.R. § 2.1205 and motions to dismiss a contention as moot, may often be less efficient than proceeding directly to a Subpart L hearing, in which the Board decides contentions on the merits, but primarily on the basis of written testimony and exhibits. The parties are reminded that the Board “need not consider a motion for summary disposition unless its resolution will serve to expedite the proceeding.”¹⁸ While the Board will not prohibit dispositive motions, it expects the parties to consider carefully whether they can assert in good faith that no genuine issue exists as to any material fact relating to each such motion and that the motion has the potential to terminate the proceeding. As appropriate, the Board may order that no answer to a dispositive motion need be filed.

2. Timing. Except by agreement among the parties, no dispositive motion shall be filed any earlier than 30 days after the parties’ initial disclosures. In no event shall any dispositive motion be filed later than 30 days after the Trigger Date, as defined in section II.G.1 infra.¹⁹ In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion

¹⁶ 10 C.F.R. § 2.309(i)(1).

¹⁷ Id. § 2.309(i)(2).

¹⁸ Id. § 2.710(d)(1).

¹⁹ See Tr. at 154–57.

for summary disposition or other dispositive motion shall be filed within 20 days after service of the motion, unless the Board orders otherwise. Motions for summary disposition concerning new or amended contentions shall be filed no later than 60 days after a decision admitting those contentions, unless the Board orders otherwise.²⁰

E. Site Visit

The Board currently does not intend to conduct a site visit.

F. Limited Appearances

Prior to the evidentiary hearing, any person may request permission to submit a written limited appearance statement pursuant to 10 C.F.R. § 2.315(a). The Board does not contemplate oral limited appearance statements. As provided by NRC regulations, no limited appearance statement shall be considered as evidence.²¹

G. Evidentiary Hearing and Related Filings

1. Trigger Date. The Board currently contemplates a single evidentiary hearing addressing the admitted contentions, which are both environmental contentions. Pursuant to 10 C.F.R. § 2.1207, certain documents must be filed prior to the hearing. The trigger date (“Trigger Date”) for the initiation of such filings shall be the date on which the NRC Staff issues the final environmental impact statement (FEIS). If new or amended contentions are admitted, the Board may, as appropriate, either revise the Trigger Date, bifurcate the evidentiary hearing, or both.

2. Prehearing Evidentiary Submissions. Prehearing evidentiary submissions by the parties shall contain, on a contention-by-contention basis, an initial written statement of position, written testimony, and exhibits. The initial written statement shall be in the nature of a trial brief that summarizes the party’s case, setting out applicable legal standards, identifying witnesses

²⁰ See id.

²¹ 10 C.F.R. § 2.315(a).

and evidence, and specifying with as much particularity as practicable how each witness, exhibit, or category of evidence supports a factual or legal position. The written testimony shall be submitted under oath in the form of an affidavit or sworn declaration suitable for being received directly into evidence pursuant to 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are specifically relying upon for their statements or position.

3. Schedule. The parties shall file their prehearing evidentiary submissions in accordance with the following number of days after the Trigger Date:

40 Days: All written direct testimony, statements of position, and exhibits

70 Days: All written rebuttal testimony, statements of position, and exhibits

4. Motions in Limine or to Strike. Motions in limine or motions to strike regarding prehearing evidentiary submissions shall be filed no later than 30 days after service of the submission in issue. Answers shall be filed no later than 10 days after service of such motions.

5. Proposed Questions for Board to Ask. No later than 30 days after service of the last prehearing evidentiary submission, all parties may file proposed questions for the Board to consider propounding to the witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The examination plans should contain a brief description of the issue or issues that the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. Proposed examination questions and plans should be filed in camera, using the NRC's E-Filing system, and not be served on other parties.

6. Motions for Cross-Examination. No later than 30 days after service of the last prehearing evidentiary submission, all parties shall file any motions or requests to permit that party or interested state to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). The motion for cross-examination shall be filed and serviced in the normal manner, but the cross-

examination plan itself should be filed in camera, using the NRC's E-Filing system, and not be served on other parties.

7. 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 50 and 65 days after service of the last prehearing evidentiary submission.

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

H. Additional Case Management

The Board assumes that all parties will act responsibly. While the Board expects that most legal briefs rarely should exceed 15 pages, we prefer not to impose, beyond the requirements of 10 C.F.R. Part 2, unnecessarily prescriptive rules concerning the length or format of future filings and other administrative matters. As experiences warrants, however, the Board may establish additional case-specific requirements, either on its own initiation or at the suggestion of a party.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Dr. Sue H. Abreu
ADMINISTRATIVE JUDGE

Rockville, Maryland
December ##, 2017

DRAFT

ATTACHMENT A



Tennessee Valley Authority, 400 W. Summit Hill Dr., Knoxville, Tennessee 37902

November 8, 2017

Paul S. Ryerson, Chairman
Dr. Gary S. Arnold
Dr. Sue H. Abreu
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Docket: *Tennessee Valley Authority (Clinch River Nuclear Site Early Site Permit Application), Docket No. 52-047-ESP*

RE: **Agreement of the Parties Regarding Mandatory Discovery Disclosures**

Dear Administrative Judges:

The purpose of this letter is to inform you that the parties to this proceeding have reached the following agreement concerning mandatory disclosures under 10 C.F.R. § 2.336. As used in this agreement, the term “parties” includes Tennessee Valley Authority (“TVA”) (applicant in this matter), the U.S. Nuclear Regulatory Commission (“NRC”) Staff, Southern Alliance for Clean Energy (“SACE”), and the Tennessee Environmental Council (“TEC”) (the admitted intervenors).

The parties have agreed to the following protocol:

1. All parties will make their initial mandatory disclosures no later than December 15, 2017. Disclosure updates will be due on the 2nd Tuesday of every calendar month, subject to the other rules governing the continuing disclosure requirements in 10 C.F.R. § 2.336(d).
2. The parties may limit the mandatory discovery disclosures to final documents that they develop, and need not disclose drafts (including comments on drafts, transmittals of drafts, resolution of comments on drafts, and similar documents).
3. Documents will be produced in electronic format. If the same document exists in both hard copy and electronic format, a party may produce the electronic copy only. Handwritten notes on a final document, however, constitute a separate document, and must be produced as well as the original document.
4. To the extent reasonably practicable, each party will provide electronic copies of requested documents. If the requested documents cannot be provided electronically, other arrangements will be made, including, if appropriate, in-person inspection. In the event that electronic delivery or in-person inspection is not possible, the party

requesting the documents from another party will pay expenses related to the copying and delivery of hard copies of such documents.

5. 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 for documents asserted to be protected from disclosure under the attorney work product and/or attorney-client privilege and the deliberative process privilege. The parties, however, will produce as part of their disclosures lists of any documents withheld as proprietary. The party claiming the right to withhold listed documents as proprietary must describe the basis for the claim; *e.g.*, whether it is based upon an agreement with a third party, and the person or entity to whom the proprietary document belongs or whose privilege is being asserted.
6. A party need not identify or produce any document that has been served on the other parties to this proceeding.
7. The parties need not produce publicly available documents. Each party, however, will produce as part of its disclosures a log identifying publicly available documents upon which the party may rely and indicating the general location of such documents.
8. The parties need not identify or produce press clippings.
9. If the same relevant e-mail exists in multiple locations, each party may produce only one copy of that e-mail. If the e-mail exists in both sender and recipient email folders, the party will produce the sender's copy of the e-mail.
10. All parties may, at their option, update their disclosures under 10 C.F.R. § 2.336(d) through the use of e-mail alone. The Staff, however, will make the Hearing File available via the Electronic Hearing Docket.
11. The duty to update mandatory disclosures and the hearing file shall terminate at the close of the evidentiary hearing. If a contention has been dismissed, the duty to update mandatory disclosures shall terminate with respect to that contention upon issuance of the Board order dismissing that contention. Pending appellate review of a Board decision disposing of a contention, all parties should preserve and maintain disclosures relating to that contention, despite termination of the duty to update the disclosures for that contention.

Counsel of record for each of the other parties identified above has authorized counsel for TVA to submit this agreement on behalf of the parties.

Respectfully submitted,

/signed (electronically) by Blake J. Nelson/

Dated: November 8, 2017

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
TENNESSEE VALLEY AUTHORITY) Docket No. 52-047-ESP
)
(Early Site Permit Application)
for Clinch River Nuclear Site))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Circulating Draft Initial Scheduling Order)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland
this 28th day of November, 2017

[Original signed by Herald M. Speiser ____]
Office of the Secretary of the Commission