

January 8, 2021

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
)
)

Tennessee Valley Authority)
Chattanooga, Tennessee)
)

) Docket Nos. EA-20-006, EA-20-007

Tennessee Valley Authority's Proposed Hearing Schedule

On December 17, 2020, the Board convened a pre-hearing teleconference, during which the Board requested that the Tennessee Valley Authority ("TVA") and the NRC Staff submit, by January 8, 2021, a proposed schedule or competing proposed schedules for consideration by the Board.¹ As discussed further below, TVA and the NRC Staff have, to date, been unable to agree on a proposed schedule.

The inability to agree is due in part to the fact that, during TVA's consideration of the appropriate schedule and efforts to develop a schedule consistent with the Board's request to expedite the hearing, TVA recognized that there is a potential issue related to estoppel or issue preclusion that affected schedule considerations. Specifically, TVA Violation 4 concerns essentially the same circumstances (the personnel action involving Beth Wetzel) that are before the parallel proceeding in Docket No. IA-20-008-EA involving TVA Vice President Joe Shea.

¹ Transcript of December 17, 2020 Teleconference Proceeding at 29 (Dec. 17, 2020) (ADAMS Accession No. ML20356A221).

Indeed, Mr. Shea is charged with engaging in deliberate misconduct in that matter, and TVA Violation 4 was escalated based on that alleged deliberate misconduct.

Recognizing that there was an issue in this regard that would be of concern to the Board as well as the parties, TVA endeavored to propose a schedule to the Staff that would address this issue and TVA's concerns regarding the scope of discovery, as well as meet the Board's scheduling concerns. TVA proposed to the NRC Staff a compromise schedule in which a hearing would be held the last week of October 2021, if the parties also reached agreement on (1) defining the scope of TVA's required disclosure obligations in a reasonable manner; and (2) requesting consolidation of TVA Violation 4 with the ongoing (and further along) proceeding on the Shea Order before the Shea Board under 10 C.F.R. § 2.317. But we were unable to reach agreement.

TVA is in the process of preparing a motion with this Board for consolidating TVA Violation 4 with the Shea proceeding. The Board in the Shea proceeding is already underway in evaluating that case. The Shea Board has held a prehearing teleconference;² multiple rounds of pleadings have been filed;³ an oral argument was conducted;⁴ an order has been issued deciding certain issues;⁵ and a schedule with a November hearing date has been established. That hearing schedule is based largely (if not completely) on the schedule jointly proposed by Mr. Shea and

² Transcript of September 30, 2020 Pre-Hearing Conference on Enforcement Action ITMO Joseph Shea (Sept. 30, 2020) (ADAMS Accession No. ML20281A329).

³ *See, e.g.*, Joseph Shea's Motion to Set Aside the Immediate Effectiveness of an Order Banning Him from Engaging in NRC-Licensed Activities, Answer, and Request for Hearing (Sept. 22, 2020) (ADAMS Accession No. ML20266G394); NRC Staff Answer to Motion to Set Aside the Immediate Effectiveness of the Order and Answer to the Request for a Hearing (Sept. 28, 2020) (ADAMS Accession No. ML20272A298); Joseph Shea's Motion for Leave to Reply to Staff Answer and Reply to Staff Answer (Oct. 5, 2020) (ADAMS Accession No. ML20279A914); NRC Staff Reply to Mr. Shea's Motion for Leave to Respond and Mr. Shea's Response to NRC Staff Answer (Oct. 13, 2020) (ADAMS Accession No. ML20287A488).

⁴ 16 October 2020 Oral Arguments Transcript (Oct. 19, 2020) (ADAMS Accession No. ML20293A172).

⁵ *Joseph Shea*, LBP-20-11, 90 NRC ___ (Nov. 3, 2020) (slip op. at 9) (ADAMS Accession No. ML20308A739).

the NRC Staff, and on one that is consistent with the Subpart G Model Milestones.⁶ TVA intends to file its consolidation motion with this Board (and notify the Shea Board of such motion) on or before next Friday, January 15, 2021.

If TVA's motion for consolidation is granted, TVA would agree to a schedule for a hearing on the non-consolidated portions (i.e., TVA Violations 1-3) in late October 2021 prior to the Shea hearing, which is scheduled for November 2021. While holding a hearing by October on even three violations would be burdensome, it would be possible in part because at least one of the violations would be heard later in the consolidated hearing.

In the absence of consolidation, TVA is proposing a schedule that we believe is the most appropriate for this case, and consistent with the 10 C.F.R. Part 2 Subpart G Model Milestones. The NRC Staff has issued to TVA four Violations and an Order imposing a civil penalty. Meeting TVA's discovery obligations under the required disclosure rule (10 C.F.R. § 2.704) for all four Violations will be time intensive, thus TVA proposes nearly the full amount of time allotted under the Subpart G Model Milestones for discovery purposes. Once discovery is completed, it is reasonable for TVA to be given at least four months to prepare its case in chief, as the Model Milestones suggest and as TVA's proposed schedule provides. Indeed, we believe TVA may be prejudiced otherwise.

While the Staff may prefer a shorter discovery period or less time to prepare for hearing, the Staff already has been in possession of numerous of TVA's relevant documents for a considerable amount of time, through its investigations that concluded over a year ago, and through information voluntarily provided by TVA and its employees (including Ms. Henderson and Mr. Shea) at four pre-decisional enforcement conferences nearly seven months ago in June

⁶ Initial Scheduling Order (Dec. 9, 2020) (ADAMS Accession ML20344A398).

2020. Thus far, TVA has received from the NRC only two heavily redacted Office of Investigation reports (without exhibits) and very limited additional documentation regarding the Staff's case.⁷ In addition, TVA has not received all of the "Office of Enforcement documents, data compilations, or other tangible things regarding the order" to be provided by the Staff under 10 C.F.R. § 2.709. For these reasons, fundamental fairness dictates that the Board put in place a schedule consistent with the Model Milestones that allows TVA sufficient time to review new information provided by the Staff and prepare to defend the Violations (whereas the Staff has already had months to review TVA's information). Respectfully, TVA sees no basis for expediting this proceeding and sees no harm that will come from holding the hearing in December 2021, roughly six weeks after the end of October that the Board indicated was its preferred time frame, while, on the other hand, a shorter schedule may prejudice TVA.

In addition, as TVA expressed during the pre-hearing conference, TVA believes that some, if not all, of the Violations against it can be resolved on summary disposition.⁸ Thus the proposed schedule allows for summary disposition motions, while at the same time shortening by roughly 50% the time period called for in the Model Milestones for the Board to rule on summary disposition motions, consistent with the Board's statements at the pre-hearing teleconference.⁹ And even if the Board would need less time to rule on summary disposition, TVA will still need the time set forth in its proposed schedule to prepare for hearing.

⁷ This limited documentation was provided in response to filings by Ms. Henderson and Mr. Shea.

⁸ Transcript of December 17, 2020 Teleconference Proceeding at 14 (Dec. 17, 2020) (ADAMS Accession No. ML20356A221).

⁹ *Id.* at 21.

For these reasons, TVA respectfully submits the following proposed schedule for consideration by the Board, assuming adjudication before this Board of all four Violations. TVA understands that the Staff will be filing its own proposed schedule.

Proposed Hearing Schedule:

<u>Date</u>	<u>Action</u>
Monday, 02-08-21 ¹⁰	Initial scheduling order issued/in effect; discovery begins.
Thursday, 04-01, 2021	Initial disclosures due
Friday, 06-25-21	Discovery complete
Friday, 07-23-21	Motions for summary disposition due
Friday, 09-10-21	Presiding Officer decisions on motions for summary disposition
Thursday, 09-23-21	Prehearing conference (optional); presiding officer sets schedule for remainder of proceeding
Friday, 10-22-21	Written testimony and pre-trial briefs filed (subject to 2.711(d))
Monday, 11-22-21	Reply testimony and reply pre-trial briefs filed (subject to 2.711(d))
Monday – Friday, 12-13— 12-17-21	In-person evidentiary hearing
Tuesday, 01-18-22	Proposed findings of fact and conclusions of law
Thursday, 03-17-22	Presiding Officer issues initial decision

¹⁰ The TVA Order Imposing Civil Monetary Penalty was issued on October 29, 2020. The Subpart G Model Milestones contemplate that the presiding officer will issue an order on TVA’s hearing request within 100 days of the enforcement order, and set the initial proceeding schedule within 25 days thereafter. *See* 10 C.F.R. Part 2, Appendix B. For the present schedule proposal purposes, TVA has assumed that the order and initial schedule will be set on the same day, 102 days after issuance of the TVA Order (the 100th day falls on the immediately prior Saturday, February 6).

TVA appreciates the Board's careful consideration of these issues. As noted, TVA will file its motion on consolidation by the end of next week.

Respectfully submitted,

/Electronically signed by Timothy J. V. Walsh/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Tennessee Valley Authority's Proposed Hearing Schedule has been served through the E-Filing system in the above-captioned proceeding this 8th day of January, 2021.

/Electronically signed by Timothy J. V. Walsh/
Timothy J. V. Walsh