

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

Before Administrative Judges:

Paul S. Ryerson, Chairman  
E. Roy Hawkens  
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Enforcement Action)

Docket Nos. EA-20-006 and EA-20-007

ASLBP No. 21-969-01-EA-BD01

July 29, 2021

ORDER

(Providing Case Management Instructions)

On July 21, 2021, the Board conducted a prehearing conference by telephone to consider the parties' views on administrative requirements for the evidentiary hearing presently scheduled to begin on October 18, 2021.<sup>1</sup> This Order sets forth the Board's directives.

Hearing Location and Format. Although both TVA and the NRC Staff favor an in-person hearing in Chattanooga, Tennessee,<sup>2</sup> that appears problematic at this time. The situation regarding COVID-19 remains unclear. Although many witnesses may reside in Tennessee, the members of the Board, the Board's staff, perhaps some witnesses, and all or almost all the lawyers for the parties reside in or near Rockville, Maryland. The availability of a suitable venue in Tennessee—especially if the parties correctly project the length of the hearing<sup>3</sup>—is also

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<sup>1</sup> Licensing Board Order (Scheduling Prehearing Conference) (July 1, 2021) (unpublished); see Tr. at 107–41.

<sup>2</sup> Tr. at 112 (Walsh).

<sup>3</sup> Tr. at 117–18 (Kirkwood), 119 (Walsh).

unclear. At least one important witness, who currently resides outside the United States, is expected to testify remotely regardless of where the hearing is held.<sup>4</sup>

Nor would an entirely in-person hearing at NRC headquarters in Rockville, Maryland appear preferable at this time. Because of COVID-19, the rules concerning use of the NRC's facility remain subject to change. And, as stated, many potential witnesses reside in Tennessee.<sup>5</sup>

Accordingly, the Board presently intends to conduct the evidentiary hearing from its hearing room in Rockville, Maryland, with the expectation that a number of witnesses will testify remotely. Insofar as practicable, and consistent with safety concerns, the Board encourages the parties to present witnesses to testify in person. However, no party will be penalized—nor the testimony of any witness less valued—if a witness testifies remotely rather than in person.

The Board will subsequently provide guidance on the technical aspects of remote participation.

Pre-filed Materials. In their recent joint motion to extend the hearing schedule, the parties proposed to file “[w]ritten testimony and pre-trial briefs” no later than September 8, 2021.<sup>6</sup> The Board granted the motion.<sup>7</sup> At the prehearing conference, however, for the first time the parties stated that—at least for the most part—neither party now wishes to submit pre-filed written testimony.<sup>8</sup>

Under 10 C.F.R. § 2.711, the Board may direct the submission of pre-filed written testimony, even in proceedings concerning the imposition of a civil penalty. Because section

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<sup>4</sup> Tr. at 114–16.

<sup>5</sup> Tr. at 113–14 (Walsh).

<sup>6</sup> Joint Motion for Schedule Extension, attach., Proposed Revised Procedural Schedule (Apr. 1, 2021).

<sup>7</sup> Licensing Board Order (Granting Joint Motion for Schedule Extension) (Apr. 2, 2021) (unpublished).

<sup>8</sup> Tr. at 122–24.

2.711 contemplates that pre-filed testimony may less often be appropriate in such cases, however, the Board will defer to the parties' wishes and not require it.

The Board nonetheless encourages the parties to file written testimony (including deposition testimony that a party may wish to proffer as evidence) and document exhibits by September 8, 2021 insofar as practicable. Such filings should use the agency's E-Filing system and comply with the requirements set forth in the Appendix to this Order.

The Board especially encourages the NRC Staff—which has the burden of proving the violations it charges by a preponderance of the evidence—to submit supporting evidence before the oral phase of this evidentiary hearing. The Staff has charged serious violations and made serious allegations. Among other things, in a related proceeding arising from the same facts, the NRC Staff characterized the investigation of the relevant employment actions by TVA's Office of General Counsel (OGC) and their consideration by TVA's Executive Review Board (ERB) as mere "window dressing" to conceal TVA's real (and allegedly improper) reasons for disciplining the affected employees.<sup>9</sup>

In affirming the licensing board decision in that proceeding, the Commission agreed with that board's finding "that the Staff presented no evidence that either the TVA OGC or ERB reviews were conducted in bad faith."<sup>10</sup> If, after document discovery and depositions in this proceeding, the NRC Staff now has evidence to support such claims, we are surprised at the Staff's reluctance to disclose it.

Apparently, the NRC Staff hopes to prove its case at the hearing by examining current and former TVA employees, many of whom it expects may be hostile witnesses.<sup>11</sup> In

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<sup>9</sup> Joseph Shea (Order Prohibiting Involvement in NRC-Licensed Activities Immediately Effective), CLI-21-03, 93 NRC \_\_, \_\_ (slip op. at 10) (Jan. 15, 2021) (footnote omitted).

<sup>10</sup> Id. at \_\_ (slip op. at 11).

<sup>11</sup> Tr. at 126–27.

accordance with our responsibility to control the hearing and avoid delay,<sup>12</sup> the Board will allow the Staff a reasonable, but not unlimited, opportunity to do so. The Staff should not assume it will necessarily be permitted to take “a couple of weeks” to try to prove its case, as it claims might be necessary.<sup>13</sup>

Pre-trial Briefs. The Board continues to expect the parties to file pre-trial briefs (or statements of position) no later than September 8, 2021.<sup>14</sup> Such filings should be based on (a) the parties’ pre-filed written testimony and exhibits (if any); (b) their stipulations; and (c) such additional facts as the parties expect to establish through testimony at the hearing. In addition to explaining the legal bases for the parties’ positions, these submissions should set forth each party’s understanding of the relevant facts, preferably including a chronology of significant events.

Stipulations. The Board appreciates that the parties are attempting to stipulate to uncontested facts,<sup>15</sup> thereby potentially eliminating the need for testimony from certain witnesses and shortening the testimony of others. Preferably, such stipulations should be made final before September 8, 2021, to permit the parties to cite to them in their pre-trial briefs or statements of position.

Summary Disposition Motion. TVA expects to submit a motion for summary disposition shortly.<sup>16</sup> As stated in our Revised Scheduling Order, the Board will allow any such motion to be submitted until September 8, 2021, but will call for a response only if necessary.<sup>17</sup> If we

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<sup>12</sup> See 10 C.F.R. § 2.319.

<sup>13</sup> Tr. at 117–18 (Kirkwood).

<sup>14</sup> Licensing Board Order (Granting Joint Motion for Schedule Extension) at app. A (Apr. 2, 2021) (unpublished).

<sup>15</sup> Tr. at 124–25 (Walsh).

<sup>16</sup> Tr. at 129–30 (Walsh).

<sup>17</sup> Licensing Board Order (Granting Joint Motion for Schedule Extension) at app. A (April 2, 2021) (unpublished).

request a response to TVA's motion, we will adjust the schedule for the evidentiary hearing as necessary.

Motion in Limine. The parties do not presently expect to file motions in limine, but they reserve their right to do so.<sup>18</sup>

Federal Rule of Evidence 615. In accordance with the request of both parties,<sup>19</sup> the Board will apply Rule 615 to prevent witnesses from hearing the oral testimony of prior witnesses.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
July 29, 2021

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<sup>18</sup> Tr. at 132 (Kirkwood, Walsh).

<sup>19</sup> Tr. at 134 (Kirkwood).

APPENDIX  
Prefiled Exhibits and Testimony

A. Ordering and Numbering

Each party shall number its prefiled exhibits with a three-character party designation, followed by a three-character zero-filled number: NRC Staff – NRC; Tennessee Valley Authority – TVA. The Board intends to mark and enter prefiled testimony and exhibits into the record electronically. Pursuant to 10 C.F.R. § 2.304(g), each item of prefiled testimony and each exhibit that is submitted via the agency’s E-Filing system must be submitted as an individual electronic file. The Board recommends that each party’s first numbered exhibit should consist of its witness testimony, if filed, to be followed by that party’s document exhibits.

As provided in the Revised Procedural Schedule, all prefiled testimony shall be submitted no later than September 8, 2021, shall identify the individual(s), and shall be submitted in exhibit form, under oath, so that it is suitable for receipt into evidence without the necessity of the appearance of the witness.<sup>1</sup> Unless otherwise advised by the Board, however, each party shall ensure that each person for whom it submits written testimony is available to testify and respond to questions at the evidentiary hearing.

B. Exhibit Cover Sheet

Each prefiled exhibit shall have a cover sheet.<sup>2</sup> The cover sheet is a PDF form with fillable fields for an exhibit number and exhibit title that should be appended to the front of the exhibit so that it is part of the PDF file for that exhibit when it is submitted via the E-Filing system. Exhibit titles must be 200 characters or less and must match the title on the exhibit list. There are four exhibit cover sheets, one for initial exhibits, revised exhibits, confidential exhibits,

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<sup>1</sup> See Licensing Board Order (Granting Joint Motion for Schedule Extension) at app. A (Apr. 2, 2021) (unpublished).

<sup>2</sup> Using a cover sheet on each exhibit avoids unnecessary duplications of exhibits/testimony in ADAMS. See Licensing Board Order (Providing Case Management Instructions), NextEra Energy Seabrook, LLC (Seabrook Station Unit 1), No. 17-953-LA-BD01 at 2 n.3 (May 23, 2019) (unpublished).

and revised confidential exhibits. The Board's law clerk will provide a template of each exhibit cover sheet.

C. Large Exhibits

In the unlikely event a party finds that it needs to break a large document into several documents to ensure it does not exceed the agency's guidance on recommended file sizes for submissions,<sup>3</sup> each of the documents should be labeled by placing an alpha designation next to the number of the exhibit. For example, if an NRC Staff exhibit that would otherwise have the number NRC001 were submitted in three parts because of the file size, each portion would have a different exhibit number, e.g., NRC001A, NRC001B, and NRC001C.

D. Revised Exhibits

If approved by the Board, a party may submit a revised version of a previously filed exhibit. The revised exhibit shall use the exhibit cover sheet for a revised exhibit. The exhibit should be refiled with the designation "-R" placed after the exhibit number, e.g. NRC001 would be designated NRC001-R. If a subsequent revision is approved, the exhibit should be refiled using the revised exhibit cover sheet with the revised exhibit number reflecting the additional revision, e.g., NRC001-R2.

E. Exhibit List

At the time each party submits its prefiled exhibits, each party shall also submit an exhibit list. The parties should utilize an exhibit list similar to the one attached to this Appendix. Each party shall file an updated exhibit list if new or revised exhibits are added to the docket.

For each exhibit listing, the parties shall provide (1) the exhibit number; (2) the exhibit title; and (3) the ADAMS accession number, to the extent an ADAMS accession number is available for the document (or portion of the document). For any exhibit with confidential

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<sup>3</sup> A single file can be no larger than 500 megabytes (MB) and the aggregate size of the attached files cannot exceed 500 MB.

information, that exhibit's row should be bolded. The exhibit list should not be numbered as a separate exhibit.

F. Exhibits Containing Confidential Information

The Protective Order in this proceeding, paragraph 7, directs that documents containing information protected under the Order be filed electronically using the NRC's E-Filing system.<sup>4</sup> To file a confidential document, each party shall use the "Non-Public Submission" option to prevent the document from being filed in the public docket. Any party filing an exhibit containing protected information should also ensure that it uses the appropriate confidential exhibit cover sheet.

G. Page Number References

When referring to/citing page numbers for exhibits, parties should reference the actual page number of the document and not the page number of the electronic document (i.e., not the PDF page number). If the document lacks pagination, the PDF page number can be referenced.

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<sup>4</sup> Licensing Board Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Confidential) at 3–4 (Feb. 8, 2021) (unpublished).



UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
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TENNESSEE VALLEY AUTHORITY ) Docket Nos. EA-20-006 and 20-007-EA  
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(Enforcement Action) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Providing Case Management Instructions)** have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission  
Office of Commission Appellate Adjudication  
Mail Stop: O-16B33  
Washington, DC 20555-0001  
E-mail: [ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

U.S. Nuclear Regulatory Commission  
Office of the Secretary of the Commission  
Mail Stop: O-16B33  
Washington, DC 20555-0001  
E-mail: [hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3F23  
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop - O-14A44  
Washington, DC 20555-0001

Paul S. Ryerson, Chairman  
Administrative Judge

Joe Gillespie, Esq.  
Sara Kirkwood, Esq.  
Mauri Lemoncelli, Esq.  
Joseph McManus, Esq.  
Patrick Moulding, Esq.  
Kevin Roach, Esq.

E. Roy Hawkens  
Chief Administrative Judge

Thomas Steinfeldt, Esq.  
Brian Newell, Paralegal  
Stacy Schumann, Paralegal

Dr. Sue H. Abreu  
Administrative Judge

E-mail: [joe.gillespie@nrc.gov](mailto:joe.gillespie@nrc.gov)  
[sara.kirkwood@nrc.gov](mailto:sara.kirkwood@nrc.gov)  
[mauri.lemoncelli@nrc.gov](mailto:mauri.lemoncelli@nrc.gov)  
[joseph.mcmanus@nrc.gov](mailto:joseph.mcmanus@nrc.gov)  
[patrick.moulding@nrc.gov](mailto:patrick.moulding@nrc.gov)  
[kevin.roach@nrc.gov](mailto:kevin.roach@nrc.gov)  
[thomas.steinfeldt@nrc.gov](mailto:thomas.steinfeldt@nrc.gov)  
[brian.newell@nrc.gov](mailto:brian.newell@nrc.gov)  
[stacy.schumann@nrc.gov](mailto:stacy.schumann@nrc.gov)

Ian Curry, Law Clerk

E-mail: [paul.ryerson@nrc.gov](mailto:paul.ryerson@nrc.gov)  
[roy.hawkens@nrc.gov](mailto:roy.hawkens@nrc.gov)  
[sue.abreu@nrc.gov](mailto:sue.abreu@nrc.gov)  
[ian.curry@nrc.gov](mailto:ian.curry@nrc.gov)

TENNESSEE VALLEY AUTHORITY  
Docket Nos. EA-20-006 and 20-007-EA  
**ORDER (Providing Case Management Instructions)**

On behalf of Erin Henderson and  
Tennessee Valley Authority

Pillsbury Winthrop Shaw Pittman LLP  
Meghan Hammond, Esq.  
Brendan Hennessey, Esq.  
Anne Leidich, Esq.  
Michael Lepre, Esq.  
Timothy Walsh, Esq.  
1200 Seventeenth Street, NW  
Washington, DC 20036-3006

Email: [meghan.hammond@pillsburylaw.com](mailto:meghan.hammond@pillsburylaw.com)  
[brendan.hennessey@pillsburylaw.com](mailto:brendan.hennessey@pillsburylaw.com)  
[anne.leidich@pillsburylaw.com](mailto:anne.leidich@pillsburylaw.com)  
[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)  
[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)

On behalf of Tennessee Valley Authority

O'Melveny & Myers LLP  
Mary Patrice Brown, Esq.  
Andrew Neal Taylor Churchill, Esq.  
Alexander Duran, Esq.  
Samuel R. Lehman, Esq.  
Laurel Loomis Rimon, Esq.  
Amanda Santella, Esq.  
1625 Eye Street, NW  
Washington, DC 20006

Email: [mpbrown@omm.com](mailto:mpbrown@omm.com)  
[achurchill@omm.com](mailto:achurchill@omm.com)  
[aduran@omm.com](mailto:aduran@omm.com)  
[slehman@omm.com](mailto:slehman@omm.com)  
[lrimon@omm.com](mailto:lrimon@omm.com)  
[asantella@omm.com](mailto:asantella@omm.com)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this day 29<sup>th</sup> of July 2021.