

NUCLEAR REGULATORY COMMISSION

Title: Progress Energy Florida, Inc.

Docket Number: 52-029-COL; 52-030-COI
ASLBP Number: 0987904-COL

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USNRC

August 24, 2009 (11:50am)

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1 UNITED STATES OF AMERICA
 2 NUCLEAR REGULATORY COMMISSION
 3 ATOMIC SAFETY AND LICENSING BOARD PANEL
 4 PRE-HEARING CONFERENCE
 5
 6

7 In the Matter of :
 8 PROGRESS ENERGY FLORIDA, : Docket No.
 9 INC. : 52-029-COL and
 10 (Levy County and Nuclear : 52-030-COL
 11 Power Plant Units 1 and 2): ASLBP No.
 12 (Combined License) : 0987904-COL

13 -----
 14 Tuesday, August 18, 2009
 15

16 The pre-hearing conference came to order
 17 at 2:00 p.m. via telephone. Alex S. Karlin, Chair,
 18 presiding.

19 BEFORE:

20 ALEX S. KARLIN Chair
 21 ANTHONY J. BARATTA Administrative Judge
 22 WILLIAM M. MURPHY Administrative Judge
 23
 24
 25

1 APPEARANCES:

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9 ALSO PRESENT:

10 MEGAN WRIGHT, LAW CLERK

11 CARA CAMPBELL, Ecology Party of Florida

12 GARY HECKER, Ecology Party of Florida

13 MICHAEL CANNEY, Alachua County Green Party,

14 Green Party of Florida
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P R O C E E D I N G S

(2:07:19 p.m.)

1
2
3 JUDGE KARLIN: Good afternoon. This is
4 Alex Karlin, Judge with the Atomic Safety and
5 Licensing Board. We are now convening on the record
6 the Progress Energy Florida application for the Levy
7 County Combined License for two power reactors in Levy
8 County, Florida. So, Mr. Court Reporter, we are on
9 the record.

10 For the record, I will reflect this is
11 Docket number 52029 COL, and 52030 COL, and it's ASLBP
12 number 0987904-COL. We are conducting this pre-
13 hearing conference call pursuant to an order that this
14 Board issued on September, I'm sorry, on July 10th.
15 Today's date is August 18th, 2009. This is being
16 conducted telephonically.

17 We have really two separate types of
18 telephone lines here, one is for the representatives
19 of the parties, those lawyers and representatives who
20 have filed a Notice of Appearance, and only those
21 people are allowed to speak. Then we have lines for
22 the public, who are not allowed to speak. So, at this
23 point, I would like to proceed and ask -- well, first
24 I'll introduce the Board, and then I'll ask the
25 parties to introduce themselves.

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1 Here in Rockville at the ASLBP offices we
2 have Dr. Anthony Baratta is here, Judge Baratta; Dr.
3 William Murphy is participating by phone from
4 California. Judge Murphy, you're there?

5 JUDGE MURPHY: Yes, I'm here.

6 JUDGE KARLIN: Great. And we have Megan
7 Wright. She's an attorney with the Atomic Safety
8 Licensing Board, and is our law clerk on this
9 proceeding. And then myself, Alex Karlin. I'm the
10 Chairman of this particular Board.

11 With that, I'd like to ask the parties to
12 introduce themselves. Let's start with Progress
13 Energy. Mr. O'Neill, could you introduce yourself,
14 your colleagues, and any of your clients who may be on
15 the line?

16 MR. O'NEILL: Thank you, Judge Karlin.
17 This is John O'Neill, counsel for Progress Energy
18 Florida, Inc. in this proceeding. On a separate line
19 is my colleague, Robert Haemer. Also on a separate
20 line from North Carolina is Associate General Counsel
21 and particularly focused on nuclear issues for
22 Progress Energy, David Conley.

23 JUDGE KARLIN: Thank you. Anyone else
24 from Progress on the line listening or otherwise?

25 MR. O'NEILL: No, that's just David Conley.

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1 JUDGE KARLIN: Okay. Great. For the
2 Petitioners, Ms. Olson, could you introduce yourself
3 and your colleagues?

4 MS. OLSON: Yes. I'm Mary Olson. I'm the
5 Southeast Regional Coordinator for Nuclear Information
6 and Resource Service, and we're representing our
7 members who live in the Levy County area. Our co-
8 Intervenors are the Ecology Party of Florida, and the
9 Green Party of Florida, both, again, representing
10 their members in the immediate area of the reactor.

11 JUDGE KARLIN: All right. Is there
12 someone on the line from those two entities?

13 MS. OLSON: Cara Campbell, and Gary Hecker
14 are in Florida, Fort Lauderdale, on the line. And
15 Michael Canney - I'm sorry. They are with Ecology
16 Party, and Michael Canney is also on the line in
17 Florida with the Green Party.

18 JUDGE KARLIN: Okay. Thank you. And for
19 the Staff, have the Staff shown up yet?

20 PARTICIPANT: Yes, we arrived, Your Honor.
21 We had an old password, I believe. But for NRC Staff,
22 this is Jody Martin from Office of General Counsel.
23 With me here we have Sara Kirkwood, also from OGC, and
24 then we have Brian Anderson, who is our Safety Project
25 Manager, and Doug Bruner, who is our Environmental

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1 Project Manager, and Michelle Moser, who also assists
2 with the Environmental Project managing.

3 JUDGE KARLIN: Okay. So, your name is
4 Jody Martin?

5 MR. MARTIN: Correct.

6 JUDGE KARLIN: And have you filed an
7 appearance in this case?

8 MR. MARTIN: Yes.

9 JUDGE KARLIN: Okay. Great. I didn't
10 have your name down. Thank you.

11 Is there anyone -- I think that covers
12 everyone on the line, but I'll just ask, is there
13 anyone else on the line? Okay. Fine. Thank you for
14 introducing yourselves, and we can move ahead. We've
15 got a goodly amount to cover, I think.

16 The purpose of this conference call, this
17 pre-hearing conference and this Board is really laid
18 out by the regs, 2.332A requires that Boards, as soon
19 as practicable, after deciding upon the admission of
20 contentions or granting an admission of contentions,
21 need to hold a scheduling conference, and issue a
22 scheduling order that lays out how the case will
23 proceed.

24 The regulations talk about the objectives
25 of these kind of orders and conferences to expedite

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1 the disposition of the proceeding, to establish early
2 and continuous control, to discourage wasteful pre-
3 hearing activities, improve the quality, et cetera.
4 So, we're hoping we can achieve some of those
5 objectives here today, and in the order we issue
6 later. We have under the model milestones 55 days from
7 July 8th to issue this order, and we're going to try
8 to meet that time frame. That would be September 1st,
9 so we'll proceed with that.

10 The overview, I'd like to give an overview
11 of what I think we want to try to cover here today,
12 and then we'll go right into the substance. First,
13 we're going to -- I think the best thing to do is
14 review the 19 questions that we posed in our July 10th
15 order, and we'll review the answers that have been
16 proffered by the joint motion covering the enumerated
17 items that the parties filed on August 14th. So, I
18 intend, and I think we intend to basically have the
19 questions on one side of my desk, and the answers on
20 the other side, and walk through those 19 questions.

21 Second sort of major order of business
22 would be to talk about, to review other items from our
23 -- from the Vermont Yankee initial scheduling order.
24 As you will remember from our July 10th order at page
25 5, we referenced the Vermont Yankee scheduling order,

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1 and said that would sort of be somewhat of a model.
2 There are a few things in that scheduling order that
3 we won't talk about today. We didn't ask questions
4 about them, because we didn't really think they
5 warranted questions, such as, asking the Staff
6 probably to give us a monthly status report. So,
7 that's the kind of thing that would be covered; other
8 items from the Vermont Yankee initial scheduling
9 order.

10 The third major topic would be additional
11 items that we thought of since that time, or think
12 need to be covered since we issued the July 10th
13 order. These may include subjects such as
14 consultation reciprocity, I'll call it. There's a
15 duty to consult, and we want to talk about the idea of
16 imposing that duty as a reciprocal matter, so that's
17 the kind of thing. So, those are the three main
18 topics, the 19 questions, other items from the Vermont
19 Yankee initial scheduling order, and then additional
20 items that we've thought of since that time.

21 With that, I'd like to ask the parties if
22 there's any significant issues that you think need to
23 be raised, or feel something, that a motion needs to
24 be filed here today. I'll start with Mr. O'Neill. Is
25 there anything new, additional that you know of that

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1 you want to cover?

2 MR. O'NEILL: No, sir. I believe that your
3 three board areas will cover everything that we think
4 needs to be covered.

5 JUDGE KARLIN: Okay. Let's hope so. If
6 not, let us know. Ms. Olson, anything from you and
7 your joint Petitioners?

8 MS. OLSON: Well, there is one very small
9 matter of instruction that I was going to bring up, if
10 you could point me to something in the regs that
11 really tells me about the first mandatory disclosure
12 in greater detail, or if you could spare me a moment
13 on that.

14 JUDGE KARLIN: Okay. Fair enough. We
15 will talk about the mandatory disclosures. And I
16 think if we don't answer that question, then you can
17 pose it at the time. Okay?

18 MS. OLSON: Okay. That's all I have.

19 JUDGE KARLIN: Okay. And, Mr. Martin?

20 MR. MARTIN: I think we brought up when we
21 were talking about our consultation later, but we do
22 have one issue about whether we have to consult with
23 all three of the Interveners, or rather Ms. Olson is
24 going to be representing all three of the Interveners,
25 and we just want to clarify if they represent any of

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1 the other joint Interveners.

2 JUDGE KARLIN: Good. Okay. That's a good
3 point. I think let's try to remember to address that
4 when we talk about consultation. And if we don't,
5 please remind us. Okay? If I don't remember that.
6 Okay?

7 MR. MARTIN: That's it from us.

8 JUDGE KARLIN: Okay. Good point. With
9 that, we will go into the first main topic, which is
10 to look at the July 10 order, and the joint motion
11 regarding enumerated matters, and to walk through the
12 feedback and the answers that you've given.

13 First, I think all members of the Board
14 think it's excellent that you all have consulted,
15 talked about this, and have come up with proposals.
16 I think this will be a good foundation for discussion,
17 and for our schedule. The Board may not, necessarily,
18 agree with the handling or treatment of all of the
19 items. We have some questions and concerns,
20 clarifications, also, but this is great that you've
21 been able to do that.

22 Before we start, and what I would propose
23 to do is just go down the questions one, two, three,
24 some of them may not require much discussion at all,
25 some may. Have you all designated lead spokespersons

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1 for this exercise? I mean, maybe on certain items
2 you have one lead spokesperson, on others you have
3 others.. Any lead designations here?

4 MR. MARTIN: Judge Karlin, this is Jody
5 Martin from NRC Staff. I think I've been tasked with
6 being the lead spokesperson on the area that we've
7 agreed, so on pretty much all of them I think they've
8 asked me to go ahead and go first.

9 JUDGE KARLIN: Oh, you get the hot seat.

10 MR. MARTIN: Right.

11 JUDGE KARLIN: All right. Well,
12 congratulations.

13 MR. MARTIN: Thank you.

14 JUDGE KARLIN: Okay. The first question
15 was whether the hearings on Safety Contention Eight
16 should be commenced before publication of the Staff's
17 SER. It is permissible under the regulation, and so
18 you all have, apparently, proposed that it does start
19 before the final SER be issued. And you want it to
20 start at the advanced final safety evaluation. Could
21 you explain the difference between the advanced and
22 the final SER?

23 MR. MARTIN: The advanced SER is the
24 version that we send to the ACRS Committee, so from
25 NRC Staff's point of view, we feel that it -- our

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1 review has essentially been completed, and we're
2 sending it to the ACRS for their review. So, the
3 distinction is that the final SER will then include a
4 letter from ACRS, or any changes that the ACRS may
5 instruct us to make. But the advanced -- by the time
6 you put out the advanced final SER, you have the
7 Staff's position on the issues.

8 JUDGE KARLIN: Okay. And, as I see the
9 schedule that you posted, again, I should have -- I'm
10 remiss. I should have thanked you for submitting the
11 estimated schedule. You have the advanced FSER
12 September 30th, 2010, and the FSER May 5th, 2011. Is
13 that correct?

14 MR. MARTIN: That's correct.

15 JUDGE KARLIN: Well, I think that we are -
16 - personally, I guess I'll speak for myself, I'm
17 somewhat concerned that the ACRS, Advisory Committee
18 on Reactor Safety, their review is often quite, well,
19 valuable and important in identifying or reviewing
20 issues, discussing issues, and has, in the past, in my
21 experience been something that the Boards have found
22 to be relevant and helpful in thinking through our
23 contention. There may be a contention on this
24 particular issue, and ACRS has some interesting
25 insights that the parties end up citing to us in their

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1 testimony, and we end up asking questions about in the
2 hearing. So, I think we are hesitant to -- I think
3 this might not really expedite the process if we wait
4 that -- if we jump and have it right after the AFSER.
5 But it's certainly worth a thought. Any additional
6 points, Judge Baratta or Murphy?

7 JUDGE MURPHY: No.

8 JUDGE BARATTA: And some of the parties
9 have also found those reports useful, too. So, the
10 question is whether or not it would be a good idea to
11 proceed prior at least until the ACRS publishes their
12 letter and report.

13 JUDGE KARLIN: Yes. I mean, it's been
14 common that the parties -- we didn't raise this sua
15 sponte. The parties would raise something from the
16 ACRS that became useful and relevant in our review, so
17 we'll take that under advisement. But I think we are
18 not -- I am not enthused about doing it at that stage.

19 MR. O'NEILL: Judge Karlin?

20 JUDGE KARLIN: Yes?

21 MR. O'NEILL: This is John O'Neill.

22 JUDGE KARLIN: Yes, Mr. O'Neill.

23 MR. O'NEILL: We certainly understand the
24 point, in general. I would suggest here that if you
25 look at what is, indeed, fairly characterizes the

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1 safety issue, I would suggest that the probability
2 that the ACRS is going to comment on it is
3 extraordinarily remote. I mean, this is not an issue
4 that is subject to anything novel with this design.
5 This is a question of storing low-level radioactive
6 waste, and managing the exposure to ALARA. So, I
7 think that -- it was our discussion, certainly when we
8 discussed it with the Staff, who has a general
9 practice of not wanting to take a position on safety
10 issues until after the final SER, I think at the end
11 agreed with us that it was highly unlikely that there
12 would be anything new after the AFSER. We have no
13 desire to duplicate, but we also have a desire to move
14 through the process expeditiously. These contentions
15 are significantly related, and it would seem to be
16 inefficient not to try them together.

17 JUDGE KARLIN: Well, we certainly think
18 that trying them together may be the appropriate
19 measure. We're not suggesting that they be tried
20 separately. We were suggesting that they be tried
21 simultaneously, but after the final SER be issued.
22 There's another aspect to that, which as these
23 proceedings -- these cases proceed, you know that
24 first there are often the issues become whittled down
25 in that motions for summary disposition are filed, and

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1 certain contentions might be eliminated or narrowed,
2 properly so. And then there are other times where new
3 contentions are filed, because something transpires
4 either down the line that raises a new issue, and it's
5 filed either as a timely or non-timely new contention.
6 But we'll take that into consideration. That's
7 valuable to understand your logic on that.

8 We'll move now to Question 2. Question 2,
9 suggestions for modifying the time limits set for
10 motions for summary disposition to prevent them from
11 conflicting with the preparations by the parties,
12 staff, and the Board for the evidentiary hearing. The
13 answer is, you set a date 30 days after the FEIS or
14 AFSEER. And jumping ahead, you all have proposed a
15 schedule that would trigger, and particularly
16 Paragraph 10, that the issuance of the AFSEER and the
17 FEIS are those events that trigger the cascade of
18 filings that immediately precede the evidentiary
19 hearing. So, by scheduling summary dispositions at
20 the same time, you are not solving the problem that we
21 perceive, which is the train wreck at the end of the
22 process, when once the FSEER is issued, and the EIS is
23 issued, whichever is later, there's a whole lot of
24 filings that have to be made by the parties, and
25 there's a lot of reading that has to be done by the

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1 Board. And that is probably the worst time for there
2 to be motions for summary disposition presented from
3 our perspective, so I don't know whether you -- you
4 don't seem to have addressed that issue, Mr. Martin.

5 MR. MARTIN: I thought that that would be
6 the latest date that someone could file summary
7 disposition motions, but I guess you are correct that
8 the schedule is tight, that we probably -- definitely
9 will not solve your problem. You're correct.

10 JUDGE KARLIN: Yes.

11 MR. MARTIN: We were thinking of what the
12 latest could be, and we kind of built it off looking
13 at what documents someone would file summary
14 disposition on, and we're a little bit constrained
15 here in that the Staff isn't putting out SER open
16 items. So, the only Staff documents that will have
17 anything to do with the safety review will be the
18 final SER and the advanced final SER. So, I think
19 that's kind of why we ended up there, as far as the
20 end of the time period for summary disposition,
21 because that's really the only time for a safety
22 summary disposition motion to be filed.

23 JUDGE KARLIN: Yes. I mean, let me ask
24 this question. How do you know you're not going to
25 have an FSER with open items? I mean, that's common.

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1 I've seen it before, anyway. You're sure that you're
2 not going to have that sort of situation here?

3 MR. MARTIN: The current -- yes, that's
4 the new -- the current NRO office policy is that after
5 the reference plants go through for the first of each
6 design, that all the subsequent COL applications will
7 no longer have SERs with open items. So, that's how
8 the current scheduling is moving forward.

9 JUDGE KARLIN: Yes. Yes. Okay. Well,
10 good luck. I think that's a good goal to have. But we
11 just are trying to move -- let me back up. We're
12 going to talk about motions for summary disposition a
13 little bit here, but there is an interesting article
14 in the spring 2009 "Journal of the Section of
15 Litigation" of the American Bar Association that I was
16 reading the other day, and on page 36, they talk about
17 motions for summary judgment. And the title of the
18 article is, "The Trial On Paper." Motions for summary
19 disposition are basically trials on paper. You put
20 all the paper together. Well, that's what a Subpart
21 L proceeding is, a trial on paper. The only
22 difference is -- well, a couple of differences.

23 One, the Board, if we have any questions,
24 get a chance to ask questions of the experts. And the
25 other is, the Board gets to weigh differing testimony

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1 by the experts. And it's far easier for the Board to
2 rule on that kind of thing, than to rule on a motion
3 for summary disposition where we have to first find
4 that there is no genuine issue of material fact in
5 dispute. Thus, at the late stage in an L proceeding,
6 motions for summary disposition aren't very helpful or
7 useful, is my impression. So, I don't know that your
8 answer to number 2 solves our problem, so we may
9 address that in some different way, more like what we
10 did before, perhaps some other solutions we'll come up
11 with. Did any other parties want to address this?

12 MR. O'NEILL: Judge Karlin, John O'Neill.

13 JUDGE KARLIN: Yes, Mr. O'Neill. I
14 thought you might want to say something.

15 MR. O'NEILL: Well, I would say a couple
16 of things. One, actually, we picked the date that's
17 in the model scheduling order. And, secondly, there's
18 a problem doing it earlier, because the Staff is
19 uncomfortable often taking positions on either
20 environmental issues before the final EIS comes out,
21 or, obviously, on safety issues until they've at least
22 gone through the -- in this new round, the AFSER. So,
23 as Mr. Martin says, this is the latest, but it also
24 may be close to the point at which the Staff is in a
25 position to take a position on a motion for summary

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1 judgment.

2 JUDGE KARLIN: Well, let me just mention.
3 That is not the date that is in the order. The model
4 from Vermont Yankee had a date, a firm date of June
5 15th, 2007, which is based upon the Staff's estimate.
6 It's two months before the Staff's FSER.

7 MR. O'NEILL: The model milestones that
8 are in Appendix B to Subpart L.

9 JUDGE KARLIN: Oh, I understand. I
10 understand that, the model milestones. If we go by
11 the regulations, they would allow motions for summary
12 disposition to be filed at such a late date, that this
13 Board would have to rule on it in a narrow window of
14 10 days between 25 days, and 15 days before the
15 evidentiary hearing begins. And that's exactly what
16 we don't want to have to do.

17 MR. O'NEILL: But the model milestones are
18 different than the regulations, which give you up to
19 45 days before the hearing, where they say within 30
20 days of issuance of SER and any necessary NEPA
21 document, they would allow motions for summary
22 disposition on previously admitted contentions due.

23 JUDGE KARLIN: Right.

24 MR. O'NEILL: So, we just picked the --
25 instead of the SER, which comes later in the process,

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1 the AFSER, to deal without pushing it to the very end,
2 and we thought that that was addressing the very issue
3 you raised.

4 With respect to summary judgment, however,
5 I guess I have a different view of it. Having
6 litigated the first round 30 years ago, summary
7 judgment, we found to be a very helpful tool, even if
8 the contention was not dismissed on summary judgment,
9 and having, as you pointed out a little bit earlier,
10 narrowed. If you have a very broad contention, it is
11 one of the ways to focus what the experts are going to
12 testify to, or your expert testimony will be on, if
13 you have the Board go through the process, and the
14 parties go through the process of stating their
15 positions, so that you can get to a point where you
16 are not all over the place in what is being filed
17 before the Board, but you are focused on the issue
18 that the Board has found is still open, and was not a
19 matter that was not subject to dispute. So, I think
20 that our experience has been summary disposition is a
21 powerful way to manage the litigation, and can narrow
22 things. So, we wanted to come up with a schedule that
23 would meet all of these competing considerations.

24 JUDGE KARLIN: Well, it may be if -- this
25 may be one way, one part of fixing this problem is, if

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1 we set the evidentiary hearing to begin after the
2 final -- the cascade of events that are a prelude to
3 the evidentiary hearing start or triggered by the
4 FSER. But we state the deadline for motions for
5 summary disposition associated with the AFSER, we
6 have, thus, separated it by, and preceded it by six
7 months. And that might solve part of that problem.

8 MR. O'NEILL: Yes, but that part of it, we
9 would feel is not a -- the triggering the events off
10 of the SER pushes the hearing pretty far back to where
11 you're running into the mandatory hearing, and you
12 could possibly delay the COL, which is why you want to
13 have the hearing, certainly on the environmental
14 issues, as quickly as possibly. And if there are any
15 safety issues, if you can have them before the SER,
16 that makes a lot of sense, as well.

17 JUDGE KARLIN: Well, we certainly are
18 interested in moving the case along, and managing it
19 carefully. But we're -- if you have the trigger
20 mechanism for the deadline for motions for summary
21 disposition triggered -- with the same trigger as the
22 trigger for filing all the filings for the evidentiary
23 hearing, then you are doubling, if not more, the
24 burden on the parties, i.e., in the Intervener, for
25 example, if they don't file a motion for summary

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1 disposition. And you are doubling, or if not more,
2 the burden on the Board at the exact moment when we're
3 proceeding with a Subpart L proceeding.

4 In the old days, they weren't Subpart L
5 proceedings; and, therefore, your G proceedings that
6 went very long. This hearings, the proceedings to the
7 extent they go at all, they're one day. It's a one-
8 day evidentiary hearing, so much of the value of
9 eliminating a 15-day evidentiary hearing is mooted
10 out. But I think we understand that. Does the
11 Intervener have anything they want to say, Ms. Olson?

12 MS. OLSON: Your Honor, you articulated
13 what was occurring to me as a way to address the
14 situation in your last statement about triggering the
15 cascade with the final document, which, quite frankly,
16 I have felt all along that it would be nice to have
17 the ACRS' input, but was accommodating a group process
18 that had accommodated me in several places. So,
19 anyway, I agree with you and what you've just
20 formulated.

21 JUDGE KARLIN: Okay. Anything from my
22 colleagues on the Board?

23 JUDGE BARATTA: No.

24 JUDGE MURPHY: No.

25 JUDGE KARLIN: Okay. Let's move to Item

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1 3, suggested time limits for filing timely motions,
2 for leave to file, and for non-timely filings under
3 309(f)2, and 309(c). I think we've got your answer on
4 that. We understand it. Your answer on number 3 did
5 not address the time for non-timely motions under
6 2.309(c). But you just addressed 309(f), but I guess
7 the -- let's go to number 4, because they go together,
8 specification of pleading, rules for motions for leave
9 to file new or amended contentions that reconcile the
10 problem. You've got a problem, is that on the one
11 hand it says you need to file a motion for leave to
12 file a new contention. Then someone files an answer
13 to the motion for leave to file a new contention. And
14 then the Board has to rule on the motion for leave to
15 file a new contention. And then the new contention
16 gets filed, and then 25 days later the answer to the
17 new contention is filed, and 7 days later the reply to
18 the answer to the new contention is filed. That's a
19 prolonged process that doesn't make a lot of sense,
20 has caused confusion in the past. And I think what we
21 want to do is address that, in the same way we
22 addressed this issue in our earlier order, which is to
23 say we're going to collapse those two into one
24 process. And we've studied your answer, and I think
25 you're close, but we'll address that. Anything you

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1 need to say on this, Mr. Martin?

2 MR. MARTIN: Not unless you have any
3 questions about our answer.

4 JUDGE KARLIN: Okay. Okay. Moving right
5 along, Number 5. I think you rightfully point out
6 that there's nobody here to do an adoption, because
7 the joint Petitioners are proceeding jointly, so that
8 provision, Number 5 question may not be relevant here.

9 Number 6, regularized time frames for the
10 continuous updating of mandatory disclosures under
11 2.336(d). And the updating of the -- continuous
12 updating of the hearing file. Here's where -- and I
13 see your answer, and I think it's a useful one.
14 Pursuant to the Board's July 31, 2009 order, Applicant
15 and Intervener shall make their initial disclosures
16 under 336(a), and the Staff shall make its initial
17 production of hearing file under 2.1203 on September
18 1, et cetera, et cetera.

19 You omitted, however, what the Staff is
20 going to do, because the Staff has a duty to make
21 mandatory disclosures under 2.336(b), and this
22 provision is silent on that. Mr. Martin, do you want
23 to tell me why you omitted that?

24 MR. MARTIN: We just realized -- that was
25 a complete oversight. We know that we have to

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1 disclose 2.336. That was faulty drafting, and we
2 apologize for that.

3 JUDGE KARLIN: Well, you need to be
4 careful about your drafting, because -- okay.
5 Because, obviously, you have a duty to make your
6 mandatory disclosures under (a) and (b). And the
7 Staff has, in the past, and even in this proceeding,
8 referenced concerns and complaints about that.

9 MR. MARTIN: We're aware that we have to
10 make our initial disclosures under both 2.336 and
11 2.1203.

12 JUDGE KARLIN: Good, 2.336(b). And here,
13 Ms. Olson, is what you need to do, if you haven't done
14 it already, is read those regs. 2.336, and I'm going
15 to get it out in front of me right now, you need to
16 get a copy of the regs, and you need to -

17 MS. OLSON: It's in front of me.

18 JUDGE KARLIN: -- read the regs. And it
19 lays out, 2.336(a), "All parties, other than the NRC
20 Staff, shall in 30 days", blah, blah, blah, "without
21 further order request from any party, disclose, and
22 provide." And those disclosures, and Mr. O'Neill well
23 knows, are not just disclosures of documents.
24 2.336(a)(1) says, "The name, and if known, the
25 address, telephone number of any expert upon whom you

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1 may rely as a witness, and a copy of their analysis.
2 (2) "Copy of all documents relevant to the
3 contentions", et cetera. (3) "A list of documents
4 that would be privileged."

5 Now, the Staff's obligations are
6 different, as the Staff well knows. The Staff's
7 obligations under 336(b), it says, "Except for
8 proceedings under et cetera, the NRC Staff shall
9 within 30 days without further order", blah, blah,
10 blah, and they have to produce, among other things,
11 all documents, including documents that provide
12 support for, or opposition to the application of
13 proposed action supporting the NRC Staff's review.
14 So, their standard of documentary production is
15 different than your's, but it's parallel in many ways.
16 And then the Staff also has to do the hearing file.
17 That's under the Subpart L proceedings regs, 2.3, or
18 2.102 to I guess it's, what is it, 5, 2.1205, I think
19 it is; no, 1203.

20 So, those are your obligations. There was
21 a very strange, motions to suspend the discovery were
22 filed by the Staff. I have to say, I read that with
23 some concern, because on July 30th, Mr. Martin,
24 perhaps you can explain this to me. On page 2 of your
25 motion -- on your joint motion to suspend document

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1 obligations until September 18, 2009, at the top of
2 page 2, the statement is, "Joint Interveners also
3 expressed interest in limiting the parties'
4 disclosures to documents that are relevant to the
5 contentions admitted."

6 Wouldn't you agree, Mr. Martin, that the
7 Interveners' obligations are limited to the documents
8 that are relevant to the contentions admitted?

9 MR. MARTIN: Yes, we agree.

10 JUDGE KARLIN: Well, why should the joint
11 Interveners be concerned about that, because that's
12 exactly all they have to do? You're the one who's
13 concerned with something more than that.

14 MR. MARTIN: Right. I think what we were
15 going for is, we were talking about whether we should
16 just limit our specific contention, and whether she
17 agreed with that, so that we didn't provide her with -
18 - I mean, our initial disclosure will probably be
19 several thousand documents, because it's not limited.
20 And whether she wants just the documents related to
21 the contention, or see our initial disclosures which
22 covers everything.

23 JUDGE KARLIN: Right. Well, I see your
24 Footnote 1, and you allude to you don't want the
25 disclosure to inundate the parties with irrelevant

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1 material. Well, you know, I didn't write these regs,
2 and maybe you didn't write these regs, but the regs
3 say that they're supposed to provide the mandatory
4 disclosure there. And I hope you're not -- I mean,
5 some people use a tactic of just dump=trucking
6 everything on the other party so as to obscure
7 anything that's valuable. And, hopefully, you're not
8 inferring that you're going to inundate the other
9 party with a bunch of irrelevant material, just
10 because you have to comply with the regs.

11 MR. MARTIN: No. I mean, only just those
12 that we feel is relevant. It's a large review, so it
13 ends up being a significant amount of documents just
14 on the nature of the review.

15 JUDGE KARLIN: Okay. Okay.

16 MR. MARTIN: And, just by the way, Ms.
17 Olson and I have discussed this further, and we
18 haven't agreed to -- or she hasn't agreed to so limit
19 the disclosures right now. She's signed up to be on
20 our mailing list, so she'll get the updates of any
21 documents that she wants to make sure that she has.
22 Let's see how informed that keeps her, but, currently,
23 we're not saying that we are moving to limit our
24 disclosures in any way. So, we are currently planning
25 on disclosing everything that's called for under

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1 2.336.

2 JUDGE KARLIN: Well, good, because we're
3 currently planning to issue an order requiring you to
4 disclose everything, so it may not be voluntary at
5 that point.

6 MR. MARTIN: Okay.

7 JUDGE KARLIN: Certainly, that's what the
8 regs call for. All we're saying is you do what the
9 regs say, no more, no less.

10 Okay. We go to Question 7.

11 MS. OLSON: Judge Karlin, this is Mary
12 Olson. I have one more question about the mandatory
13 disclosure. May I ask it?

14 JUDGE KARLIN: Yes.

15 MS. OLSON: I'm just a little confused
16 about timeliness of disclosure information. I mean,
17 I can understand from the regs what broadly we're to
18 produce, but if down the road an issue comes up, and
19 there's an expert who's going to rely on documents
20 that we do have in our possession now, but we didn't
21 see them as relevant, are they still -- I mean, I get
22 confused about contention requirements, and disclosure
23 requirements, and the existence of things, and when
24 you have to have said you have them. And I just am
25 not quite clear about whether we have to list every

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1 possible thing in our universe that we might ever use,
2 and then add anything that is newly published, or if
3 we can, in fact, disclose things later that are not
4 new, but we didn't view them as relevant until later.
5 Help me.

6 JUDGE KARLIN: Well, I'm not here to be
7 your lawyer.

8 MS. OLSON: Okay.

9 JUDGE KARLIN: But you need to read the
10 regs, and you need to disclose all the documents that
11 -- let me just read it. "A copy or description by
12 category and location -- a copy, or a description by
13 category and location of all documents and data
14 compilations in your possession, custody, or control.
15 And that would include the custody or control of your
16 expert. Let's say Dr. Bacchus has some document in
17 her control, then she's your expert. You've hired
18 her, as it were, so, presumably that -- "all documents
19 in your possession, custody, or control of that party
20 that are relevant to the contentions. Provided that
21 if only a description is provided of a document or
22 data compilation, the parties shall the right to
23 request copies of that document." So, you just have
24 to read that carefully, and follow it. And you just
25 in good faith provide the documents, or a list of the

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1 -- a description of the documents to the other side,
2 and don't -- mostly, it's disclosure of everything
3 that's relevant to your contentions at this point in
4 time. I mean, people can make mistakes, and there can
5 be minor omissions on the side, but don't hide things
6 off to the side and hope nobody gets it. Make the
7 disclosures, and the other parties do that, too. And
8 it could be a lot of stuff, and this includes lots of
9 things. It includes emails. It doesn't just -- nice,
10 pretty, formal documents. So, we'll get into the
11 issue of drafts later, because you all raised that,
12 and it's a good thing to think about. But it's all
13 documents. Documents is a broadly defined word, I
14 mean, electronic documents, emails, paper documents,
15 that sort of thing.

16 MS. OLSON: Thank you.

17 JUDGE KARLIN: Okay.

18 MR. O'NEILL: Judge Karlin, before we
19 leave 6?

20 JUDGE KARLIN: Yes, Mr. O'Neill?

21 MR. O'NEILL: When we drafted this, we,
22 obviously, had your order, which said that the initial
23 disclosure would be September 1, 2009. As you can see
24 from the logic, in order to provide documents as of
25 the last day of the month, we picked the second

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1 Thursday so that we weren't going to pick a date that
2 could be the 10th, and could be a weekend, or
3 whatever. And that has become, I think, maybe even
4 standard over -- as people started thinking how to do
5 this.

6 As it turns out, if we are going to keep
7 the date of September 1, at least our disclosure will
8 be as of August 20th, we actually think that it would
9 make more sense in your order, and maybe you could
10 tell us whether you're going to accept this today,
11 because we have to make a decision by the end of the
12 week, to have September's disclosure also be the
13 second Thursday in September, which will be September
14 10th. And that would be through August 31st. And that
15 we would be on that schedule, if you like our
16 approach, which we've all agreed to. But we,
17 obviously, weren't going to put that in this response
18 given the order that you had issued, but we believe it
19 all makes sense to try to have a cutoff at the end of
20 the month, and then the second Thursday is the date on
21 which we make the disclosure, and we do that every
22 month. And if you buy into that arrangement, we
23 would, at least, suggest that the first disclosure be
24 September 10th, or the second Thursday of September.
25 And we would be through August 31st. And if you don't

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1 agree with that, and we keep September 1, then for
2 full disclosure, our cutoff date will be August 20th,
3 in order to process the documents.

4 JUDGE KARLIN: Right. No, that's a good
5 point. I think it is good. First, your basic --
6 first, I think we want to keep September 1st.
7 Second, I think your time frames, otherwise, are
8 reasonable. The second Thursday, October and
9 November, the third Thursday January, et cetera, skip
10 December. I don't see any big problems with any of
11 those things. I also think it's good that you address
12 the lag time issue. Ms. Olson, this is a useful
13 point. There is, inevitably, some lag time between
14 the -- you don't have every document the same day you
15 file it, so a lag time. And I would just suggest --
16 we'll address that in the order, but probably a good
17 -- just in your initial disclosure on September 1st,
18 you then tell the other parties what cutoff date you
19 used. And as long as it's reasonable and fair, I
20 don't think anybody is going to object.

21 I might add that you don't send this stuff
22 to us. We don't get copies of these documents. You
23 send them to each other. Your disclosures are to each
24 other, not to the Board. Okay?

25 Seven and eight deal with the

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1 electronically stored information issue. Seven is not
2 particularly helpful. Mr. Martin, it just says,
3 "reasonable search".

4 MR. MARTIN: Our discussions were that we
5 would all do a reasonable search of all of our -- when
6 we have the obligation of 2.336 to provide all
7 documents that are in our control, and so we all
8 agreed that we would do a reasonable search of our
9 databases to get all the documents that are in each
10 party's control. We didn't really get into too many
11 more specifics about individual databases, or anything
12 like that, because we thought that our fundamental
13 requirement was to do a reasonable search, and produce
14 all documents that are in our control under 2.336.

15 JUDGE KARLIN: Okay. We'll think about
16 that. I suggest you look at the Federal Rules that we
17 cited in Footnote 2 of our order. The purpose of this
18 is to make sure that parties are defining reasonable
19 in some reasonably consistent way. We'll take that
20 under advisement.

21 MR. O'NEILL: Judge Karlin, this is John
22 O'Neill, if I might just make a comment on the Federal
23 Rules. They do not apply, in our view, to the new
24 document disclosure. The Federal Rules go off in lots
25 of different areas that are very different than what

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1 this is. This is not Federal Rule discovery, so I'm
2 not sure that the Federal Rules are the right place,
3 necessarily, to look as to what is a reasonable
4 search. And, in our case, certainly, each contention
5 will have a different databases, and different set,
6 and any new contentions we have to figure out how we
7 meet this obligation, and how the person who's signing
8 it, the senior person who's signing it is going to be
9 able to make the -- attest to the reasonableness, and
10 the completeness of the search. But it would be -- I
11 think it's fair to say that nobody in our practice
12 believes that the Federal Rules apply here,
13 specifically, because it's a very different discovery
14 regime. More like Subpart G, perhaps, but not under
15 L.

16 JUDGE KARLIN: Well, certainly, we under
17 the Federal Rules do not strictly speaking apply, but
18 they are used in NRC proceedings as guidance. This is
19 a knotty, difficult, new issue that has arisen about
20 electronically stored information. The Federal Rule
21 says, "A party need not provide discovery of
22 electronically stored information from sources that
23 the party identifies as not reasonably accessible
24 because of undue burden or cost." It seems like a
25 pretty good rule of hand. Just tell us what you're

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1 not going to search, and tell us what you are going to
2 search. But this is just by guidance, and I think
3 that there's a huge amount of electronically stored
4 information these days. And what constitutes a
5 reasonable search has been the subject of great
6 difficulty in many courts and administrative
7 proceedings, and we're just trying to ask you all to
8 address it, and think it through, and reach an
9 agreement. And the word "reasonable" leaves a lot of
10 vagueness there, and doesn't really help. Maybe we'll
11 just let everyone litigate it some day, and see how it
12 goes.

13 MR. O'NEILL: I think at least for this
14 group, we won't be litigating it, because we have
15 developed a pretty good relationship to do this
16 cooperatively on procedural issues. We may not agree
17 in substance, but we've done a pretty good job of
18 agreeing on procedural issues.

19 JUDGE KARLIN: Good. Okay. Well, maybe
20 we're buying an issue that really is not an issue at
21 this point. It's just something I think everyone
22 needs to think about as we go forward.

23 Let's jump to Question 9, final list of
24 potential witnesses. "The parties shall file" -- we
25 had the question, "Suggest a time for filing the final

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1 list of potential witnesses for each contention,
2 pursuant to such and such." And, "Suggest time limits
3 for any motion for Subpart G hearing procedures to
4 change, or to file a new contention." Your answers 9
5 and 10 certainly are starkly different than what we
6 had in the initial scheduling order we gave you as an
7 example, and misconstrue the rationale of those
8 requirements. So, I'm not sure whether you want to
9 say anything about that, Mr. Martin. But did you
10 intentionally decide not to follow the approach we put
11 forth in the initial scheduling order, or did you even
12 think about it?

13 MR. MARTIN: No, we definitely looked at
14 your scheduling order. I mean, for number 9, I think
15 there is some concerns brought up that no one would
16 know that the final list of potential witnesses, that
17 because we weren't doing Subpart G, since we're doing
18 Subpart L, there's not going to be any discovery
19 against individual witnesses, no depositions or
20 anything, so none of the parties felt that it was
21 overly important to know the potential witnesses
22 before we actually filed our testimony. That's why
23 none of us felt strongly that we had to have the final
24 list of witnesses from the other parties before the
25 testimony was actually filed.

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1 JUDGE KARLIN: Well, I think, probably,
2 the Interveners being unrepresented here, they're not
3 lawyers, there may not -- maybe there's a
4 misunderstanding by everyone, but here's the point we
5 would make. We have made an initial selection of
6 hearing procedure Subpart L, sort of as almost a
7 default, but we made that call. But the decision of
8 whether a Subpart G proceeding should be used is made
9 in significant part by 2.310(d). And 2.310(d) says
10 you can use Subpart G, it can be mandated, if the
11 credibility of a witness is a key part of the problem.
12 Well, the problem is, nobody knows who the witnesses
13 are yet, so how in the world could the Intervener ask
14 for a G proceeding under 2.310(d), before it even
15 knows the identify of the witnesses? How do they know
16 whether the credibility of a witness is a problem,
17 until they know the identify of a witness. So, there
18 seems to be some logical connection between (a)
19 identifying the witnesses, and then (b), filing a
20 motion for a G proceeding. And that is the
21 contemplation that we laid out here, is that there has
22 to be some point where you lay out who your witnesses
23 are, so each of the other parties can then say ahh,
24 that person has got a credibility problem. We move
25 for a G. And the proceeding that is now an L, can be

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1 converted to a G for the contention. There's nothing
2 immutable about it being an L at the moment. It could
3 go to an N, it could go to a G, and so this is the
4 purpose of identifying witnesses. And, certainly,
5 under 2.336(a), the parties have to identify their
6 witnesses on September 1st, and then amend their
7 lists. So, that's the concept here.

8 MR. O'NEILL: Judge Karlin?

9 JUDGE KARLIN: Yes, is this Mr. O'Neill?

10 MR. O'NEILL: It is.

11 JUDGE KARLIN: Yes, Mr. O'Neill.

12 MR. O'NEILL: I think that analysis is
13 fine, except for with respect to contentions 4, 7, and
14 8, you never get to that issue, because none of them
15 deal with resolution of issues of material fact
16 relating to the occurrence of a past activity. So,
17 you never get to whether or not an eye witness would
18 be material to this past activity, because none of
19 these contentions relate to a past activity. There
20 may be a future contention that could relate to a past
21 activity, I guess, and that's why we allowed in our
22 proposal under 10, that the party filing the new
23 contention, or the NRC Staff, or the Applicant
24 responding could request Subpart G for future
25 contentions, but at least the way I read the

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1 regulations, there's no past activity with respect to
2 4, 7, and 8, because all that's going to happen in the
3 future.

4 JUDGE KARLIN: Well, that's an interesting
5 point. I don't know whether that's true or not. I
6 certainly contemplate that, for example, an expert, or
7 an individual expert or not, goes out and conducts a
8 survey of sink holes, or of wetlands, or of fish, or
9 of endangered species, and they conduct a survey, and
10 they come back and say we've analyzed this issue, and
11 everything is fine. Well, that's a past activity, and
12 it's a factual activity, not an expert opinion. So,
13 I don't know whether we can just flat out say there's
14 no possibility that a past activity could be an issue
15 here.

16 MR. O'NEILL: At least the way we read the
17 contention, and read the regulations, we didn't see
18 that this applies to 4, 7, or 8, because it goes to --
19 necessitates resolution of issues of material fact
20 relating to the occurrence of a past activity, just
21 doesn't, at least to our understanding of these
22 contentions, doesn't seem to fall into that category.
23 That's the logic behind our response.

24 JUDGE KARLIN: Okay. Okay. Shall we move
25 to Question 11? This was the one about Subpart N, and

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1 you all said you weren't interested in Subpart N, so
2 no consenting to Subpart N.

3 We note that -- we're going to leave that
4 open, though. It's still possible that we could
5 convert to an N. The Board can do it unilaterally, if
6 we conclude that the hearing on the contention will
7 take no greater than two days. And I might note that
8 I don't think any hearing on a Subpart L contention in
9 the last five years has taken more than two days, so
10 they all take one day, or maybe two, one and a half.
11 I've had a couple that go one and a half.

12 Twelve, thirteen, fourteen, fifteen,
13 sixteen, opportunities for clarification, et cetera.
14 You all agree it's premature. It's important for you
15 all to think about that, though, because these are
16 provisions that are specifically listed by the reg,
17 2.329(c). They list, these are the things we're
18 supposed to think about and talk about. And maybe
19 there's nothing we can do at this moment, but I would
20 focus -- I want us all to focus on the opportunities
21 for stipulations, or admissions of fact in accordance
22 with 2.329(c)(3). In lieu of, perhaps, filing a
23 motion for summary disposition to narrow some issues,
24 I think there are opportunities for joint admissions
25 of fact, or joint stipulations that could narrow a

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1 goodly amount of what we need to do. And I would like
2 to think there are ways or opportunities that I could
3 either, at your behest, or we could -- at your behest,
4 or on our own, or on your own develop some sort of
5 stipulations or admissions of fact that sort of clear
6 away a lot of the brush before we get to the
7 evidentiary hearing, assuming we get there.

8 JUDGE BARATTA: This is Judge Baratta.
9 I've seen that actually occur fairly early on, even
10 within a few months after a contention is admitted.
11 So, I agree with Judge Karlin there, that you may
12 really want to think about that, and talk amongst
13 yourselves as to whether or not there is any
14 information that you can stipulate to at this point.

15 JUDGE KARLIN: Yes. In some way, we could
16 even build it into our schedule, if you have a
17 proposal. Like after the FSER is issued, but before
18 the initial testimony is due from the parties, is
19 there a chance? I don't want to do anything that
20 delays the evidentiary hearing, necessarily, but it
21 seems to me that at some point before we get into all
22 the cascade of filings, there might be stipulations
23 that would work, or admissions of fact that would be -
24 - I mean, it seems to me that it's permissible here in
25 a Subpart L proceeding, to file with the other party

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1 a request for admissions of fact. Do you have any
2 thoughts on that, Mr. O'Neill?

3 MR. O'NEILL: I don't disagree that that
4 may be appropriate at some point. I think we're, to
5 be honest, looking to see what happens to these
6 contentions, if there's any narrowing of them before
7 the Commission, before we then settle in and figure
8 out how we're going to litigate every aspect of it.

9 JUDGE KARLIN: Right. Right. But -

10 MR. O'NEILL: But I don't disagree that
11 there are opportunities for stipulated, indeed. There
12 is opportunities for settling contentions. I've
13 certainly done a lot of that, too.

14 JUDGE KARLIN: Yes. Yes. We'd like to
15 see, obviously, the settlement is encouraged, and
16 there are -- so, let's keep those in mind. And we're
17 going to have follow-up as this case proceeds. We'll
18 have follow-up conferences, and we'll keep asking
19 these questions, and posing these questions.

20 Sixteen is the privilege, protected
21 status, protective order, I guess, question. You have
22 a series of answers regarding mandatory disclosures.
23 The parties agree that, and I think we understand most
24 of those. But I have to ask a couple of questions
25 about your first paragraph, 16-A. I guess, Mr.

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1 Martin?

2 MR. MARTIN: Yes.

3 JUDGE KARLIN: Okay. "The parties waive
4 the requirement to do a privilege log. However, the
5 parties will still produce, as part of their
6 disclosure, a list of any documents withheld as
7 proprietary." Could you please discuss, clarify the
8 difference between a privilege log and a list?

9 MR. MARTIN: I think that's mainly going
10 for we'll -- it probably should have said a log
11 containing proprietary documents. Essentially, if
12 we're not going to be doing privilege log, I think --
13 there's agreement then to resolve or deliver the
14 process documents, or attorney/client documents, and
15 we still produce -- we'd still describe all of the
16 proprietary documents that have the title of the
17 document, who it was from, what's the date of it, and
18 then a short description of why we feel it's
19 proprietary.

20 JUDGE KARLIN: Okay. Is that your
21 understanding, Mr. O'Neill?

22 MR. O'NEILL: Yes. I mean, the privilege
23 log is clearly the section 336(a)(3). The next thing
24 is we have a proprietary document. It's got company
25 financial information, the sort of information that is

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1 withheld from the public in the application initially,
2 or we have a proprietary document because it contains
3 trade secrets, but it's relevant. So, we will list
4 those, and then if one of the Interveners desires to
5 see a copy of it, we propose that we have 30 days
6 within which to negotiate a non-disclosure agreement,
7 to come up with a form of a protective order, and to
8 submit that to you. And then once we get the
9 protective order, we would then turn over, subject to
10 the -

11 JUDGE KARLIN: Okay. You're going beyond
12 that. I'll get to that in a moment. Okay. So, as I
13 understand it, you're going to produce a privilege log
14 for proprietary documents.

15 MR. O'NEILL: That's not a privilege log.
16 That's completely different. We're producing a list
17 of proprietary documents that we certainly want to
18 make sure that the parties understand, if they wish to
19 see them - I mean -

20 JUDGE KARLIN: Okay.

21 MR. O'NEILL: They may not wish to see
22 them, and a lot of times we've been in proceedings
23 where Intervener parties refuse to look at information
24 that they can't make public.

25 JUDGE KARLIN: I understand. So, you're

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1 not -- so, it sounds a little different from Mr.
2 Martin, which is, you're saying, no, you're not going
3 to produce a privilege log on proprietary.

4 MR. O'NEILL: Correct.

5 JUDGE KARLIN: You're going to just
6 produce a list.

7 MR. O'NEILL: Correct.

8 JUDGE KARLIN: And there is a difference.

9 MR. O'NEILL: I agree. That's what it
10 says, "produce as part of their disclosures a list."

11 JUDGE KARLIN: Okay. And the difference
12 is, and, Ms. Olson, you may want to listen to this, if
13 you look at the regs, 2.336, let's just say 336(a)(3),
14 this (a)(3) is what I refer to as a privilege log.
15 And it says, "A list of documents otherwise required
16 to be disclosed, for which a claim of privilege" -
17 doesn't mean it actually is privileged - "or
18 protective status is being made, together with
19 sufficient information for assessing the claim of the
20 privilege or protective status of the document."

21 Now, from what I hear you say, that's a
22 privilege log, which is you've got to identify the
23 document, and you've got to provide sufficient
24 information about the document so that the other side
25 can evaluate, have at least some inkling of whether it

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1 really qualifies for the privilege. That's a
2 privilege log.

3 A list, as I understand what Mr. O'Neill
4 and Mr. Martin is talking about, is, they just give
5 you a list of documents. They don't have to
6 substantiate, or provide sufficient information on why
7 it's privileged, or whether it really is privileged.
8 You just say here's the document, and we say it's
9 privileged.

10 MR. O'NEILL: No, that's not privileged,
11 Judge Karlin. You misspoke.

12 JUDGE KARLIN: Okay.

13 MR. O'NEILL: We are not producing a
14 privilege log. We've agreed to waive it. In fact, that
15 has become what most parties agreed to. I've been in
16 proceedings where, when the Intervener party has
17 decided no, we want your privilege log halfway through
18 it, they said what a mistake that was, because it's a
19 huge pain in the neck for both parties. And what
20 we're talking about is attorney/client communications,
21 which is a vast number, which you just put on a log,
22 and nobody ever is going to look at. So, we've made
23 it very clear, we don't want any misunderstanding of
24 what we're talking about. Maybe it would be clearer
25 if we then said (b), "The parties will produce a list

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1 of documents that are withheld as proprietary", not
2 privileged, but proprietary. We don't have a right to
3 withhold those, but we do have a right to only turn
4 them over with a protective order, and non-disclosure
5 agreement. And that was just to simply say on the one
6 hand we have privilege, no log, no nothing, with
7 respect to proprietary information, we have to deal
8 with that in the way that we're required to under,
9 perhaps, our agreement with somebody who produced the
10 trade secret, or within our company to maintain as
11 confidential, information that may be financial
12 information, that may be subject to FERC requirements,
13 not to disclose to competitors, whatever.

14 JUDGE KARLIN: Okay. Well, let's look at
15 the reg. The reg talks about a list of documents,
16 sufficient information for assessing the claim of
17 privilege -

18 MR. O'NEILL: And that's what we're
19 waiving.

20 JUDGE KARLIN: -- or protected status of
21 the documents. So, the latter, I mean, I -- the
22 latter would cover your proprietary claim; that is,
23 it's proprietary. We don't have to disclose is under
24 FOIA, Exemption Four, 2.390(a)(4). But it's still --
25 I consider that a privilege document, we call it

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1 protective status document. But, I guess, I
2 understand what you're saying. You don't want to
3 provide any privilege log for attorney/client, or
4 attorney work product.

5 MR. O'NEILL: Correct.

6 JUDGE KARLIN: But you are going to
7 provide a list, not a log, of proprietary documents
8 that you're not -- you're withholding.

9 JUDGE BARATTA: That are relevant.

10 JUDGE KARLIN: Yes, that are relevant.
11 Right. So, you provide a list of those. And that
12 list, the reg would require for those documents to be
13 -- you have to provide sufficient information for
14 assessing the claim of the protected -- for your claim
15 that that's protected. Are you going to provide
16 sufficient information so that either the Board, or
17 the Interveners could assess whether it really is
18 proprietary, or are you just going to identify them?

19 MR. O'NEILL: Sure. We'll provide
20 information that says why this information is
21 proprietary. That's fair.

22 JUDGE KARLIN: Okay.

23 MR. O'NEILL: In fact, to be honest with
24 you, we had that in mind, because, otherwise, we'd
25 just say annual report withheld section doesn't

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1 provide very much information.

2 JUDGE KARLIN: Okay. Okay. Good. That
3 helps clarify. Now, let me ask the next part of that
4 sentence, is a list of any documents withheld as
5 proprietary, including those containing security-
6 related information. Well, providing information and
7 security-related information are totally distinct
8 universes. One does not include the other. One is
9 SGI or classified. What's going on there?

10 MR. O'NEILL: That is -- I doubt that
11 there's going to be anything, to be honest with you,
12 of security. These contentions, this covers any
13 contention, and that is to say, those that are
14 restricted would be a better term, as opposed to
15 proprietary, and I think that the way this was added
16 on, we were talking about proprietary. One of the
17 parties raised security. We said yes, we'll include
18 that, and that's where that phrase came in. But the
19 point is, is that, again, if they have access to, and
20 are able to get access to security-related
21 information, if there's a SGI document that's relevant
22 to a contention, we will list that. And if they want
23 to go through the process to attempt to access it,
24 then they can go through that process.

25 JUDGE KARLIN: Okay. So, proprietary and

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1 security-related.

2 MR. O'NEILL: That would be a more correct
3 statement. You are correct.

4 JUDGE KARLIN: And you agree with that,
5 Mr. Martin?

6 MR. MARTIN: Yes, I agree with it. The
7 "and" probably would have been more clearer. Again,
8 that was put in there just -- one of the parties
9 wanted to make clear that any security-related
10 documents related to a contention were identified.

11 JUDGE KARLIN: So, let me guess which
12 party that would be. Was it the Intervener? No, I
13 don't think so. Okay. Well, unless you raise
14 something, Ms. Olson, I'm going to presume you're okay
15 with that interpretation.

16 MS. OLSON: I'm okay with it. However,
17 your reading is slightly different than the
18 conversation we had, and so I just want to affirm
19 whether the other parties are waiving the right to
20 privileged documents.

21 JUDGE KARLIN: No, no, no, they're not.
22 No.

23 MS. OLSON: Right. So, they're not.

24 JUDGE KARLIN: They're waiving the need --
25 they don't have to provide the privilege log for

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1 attorney/client, attorney work product. They don't
2 have to identify those documents to you. Presumably,
3 they have attorneys, they have attorney/client
4 communications. They have attorneys, they have
5 attorney work product. If you don't have attorneys,
6 you don't have attorney work product, you don't have
7 attorney/client communications, so the application of
8 this is significantly asymmetrical, I would say. They
9 don't have to provide information to you that you
10 would otherwise be entitled to.

11 MR. O'NEILL: Well, that's not necessarily
12 true. NIRS clearly has attorneys.

13 JUDGE KARLIN: Well, this is true. This
14 is true.

15 MR. O'NEILL: I wouldn't say -- and I
16 don't know about the other parties, but I certainly
17 have been involved in proceedings with NIRS, and they
18 clearly have attorneys, so it's not correct to say it
19 is not just one way. And, indeed, I would think that
20 it certainly would be probably a hassle for Ms. Olson,
21 if she has communications with any of the NIRS
22 attorneys to have to go through, identify those
23 documents, and then give us a log. So, I'm not sure
24 it's a one-way street.

25 JUDGE KARLIN: Yes. It's not one-way, but

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1 it may be -

2 MR. O'NEILL: But there's probably a heck
3 of a lot more of them that we would have to identify,
4 and go through the painful effort of coming up with a
5 log of which nothing would ever come of it. And
6 that's the reason that all -- and, increasingly, I've
7 just looked at two other orders, everybody is waiving
8 it, because it's really a wasted effort.

9 JUDGE KARLIN: Yes. So, I've seen it go -
10 - apply both ways. All right.

11 We'll move to the next one. The parties
12 shall have 30 days from the date the first proprietary
13 document is requested to negotiate a protective order,
14 and non-disclosure agreement. We'll take that under
15 advisement. I really don't think that's -- I think our
16 approach, and the approach in the -- might be better,
17 is to come up with a protective order before there's
18 ever any dispute about it. Outside of the context of
19 a specific dispute, it's easier, sometimes, to agree
20 to a relatively formalistic protective order, than it
21 is to do it when you're in the context of a specific
22 dispute.

23 JUDGE BARATTA: This is Judge Baratta. I
24 agree with that very strongly, because it -- you not
25 only have to get the order agreed to, but, typically,

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1 send it in to the Board, et cetera. And it could
2 result in a delay if we don't do it now. I would very
3 strongly recommend you take a look at the model
4 protective orders that are used, some of the other
5 proceedings, and just do it. I think you'd be better
6 off.

7 JUDGE KARLIN: A lot of times this comes
8 up even at the evidentiary hearing stage, where you
9 end up with experts who need to read material, or be
10 in the courtroom and the hearing room, and you have to
11 have a protective order, so it's really pretty
12 straightforward to come up with one, especially if
13 it's not in the context of a fight, of a problem.

14 JUDGE BARATTA: Yes. The issue I think
15 that Progress is going to face is dealing with
16 Westinghouse proprietary information. You may very
17 well have to go back to them for clarification, and
18 such. I think it's best to just do it now.

19 JUDGE KARLIN: That could happen,
20 depending upon the contention.

21 Okay. On C, you all have come up with,
22 "The parties may limit mandatory discovery disclosures
23 to final documents." And you don't need to include
24 drafts, including comments on drafts, et cetera.
25 That's useful that you thought of that issue, and it's

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1 okay. I mean, we just -- there's danger in that
2 people start playing games with calling everything a
3 draft, or doing a draft, and then never generating the
4 "final" document. So, long as -- how do you interpret
5 that, Mr. O'Neill?

6 MR. O'NEILL: Well, first of all, the
7 company has very specific procedures about what
8 document can support, a licensing document, or any
9 document that is used not only in this proceeding, in
10 the SEA proceeding, which has already been litigated
11 in Florida relating to the Levy plant. So, there's no
12 question what is a final document, and it goes to what
13 position the company is actually taking with respect
14 to this plant.

15 JUDGE KARLIN: Are you saying that a final
16 document is only a document that represents some
17 corporate -- the company's corporate position on
18 something? If some manager or expert at Levy writes
19 a report, or an analysis on something, it's
20 automatically draft until the president of the company
21 says it's the company's position?

22 MR. O'NEILL: Absolutely not. If you have
23 -- and let's pick that. If you have an expert who is
24 providing a report, or whatever.

25 JUDGE KARLIN: Let's do a manager. Let's

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1 do a manager in Progress Levy who generates a memo on
2 some issue that he thinks is relevant to this. And he
3 sends it around internally.

4 MR. O'NEILL: And you have peer review,
5 and the process is to resolve issues raised by peer
6 review, and to come up with a final draft of any
7 document that's going to be used for anything.

8 JUDGE KARLIN: Well, what if it isn't a
9 peer review? He just sends a memo to his colleagues
10 saying I think this issue in this litigation is a
11 problem because of blah, blah, blah, blah, and he
12 writes a memo on that subject.

13 MR. O'NEILL: Then that's a final
14 document, that's not a draft. He wrote a memo.

15 JUDGE KARLIN: Right. That's a final
16 document.

17 MR. O'NEILL: The real issue is here,
18 let's pick something that is normal. The NRC issues
19 an RAI. There's a very clear process for how we
20 respond to RAIs. We get lots of them.

21 JUDGE KARLIN: Right.

22 MR. O'NEILL: The process is, is that the
23 subject matter expert will do a first draft. There is
24 a peer review process. There are questions and
25 comments. Those questions and comments are resolved.

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1 There's a final response that then is submitted to the
2 NRC in response to that RAI. As a matter of fact, the
3 process requires that all of these draft comments and
4 everything just simply be destroyed. Right now, we
5 have a litigation not to destroy them, but to be
6 destroyed because you don't want in your files a bunch
7 of, if you will, thoughts, comments that have now been
8 finally resolved.

9 What we're saying is that what you -- what
10 we believe is most responsive, and by the way, will
11 cut the volume by probably a factor of a couple of
12 hundred percent, is just to get whatever document it
13 is that we will rely on with respect to any issue,
14 whatever the -- it could be a one-time memo that
15 someone drafts that's not subject to review. It could
16 be an email from one person to another person that's
17 not subject to any comments, or whatever. That's the
18 final document.

19 JUDGE KARLIN: Right. Okay.

20 MR. O'NEILL: The first cut we went
21 through this, I think only one-third of the documents
22 weren't duplicates, or subsequent drafts of a
23 document. And it would be - I forget how many
24 megabytes it was, how many thousands of documents.
25 And laying this out, it is a waste of time for all --

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1 because I don't think the other parties would ever
2 want to look at all this stuff. And we're effectively
3 providing only the information that anybody would rely
4 on.

5 JUDGE KARLIN: Right.

6 MR. O'NEILL: And I've seen this exact
7 language in at least -- I think Calvert Cliffs,
8 Vogtle, and Bellefonte.

9 JUDGE KARLIN: Yes. The Vogtle Board, in
10 fact, issued an order yesterday that had similar
11 language in it. And I talked with Paul Bollwerk about
12 that language, actually. Okay. Moving -

13 MR. O'NEILL: And we raised this issue
14 with NIRS, because NIRS is also in the Calvert Cliffs
15 proceeding, and NIRS had agreed to that. And in
16 advance of our meeting, we said we'd like to start
17 with this form of agreement, that at least your
18 colleagues have agreed to, and suggested that Mary
19 talk to her colleagues and be comfortable with it
20 before we even discussed it. So, we're not trying to
21 pull anything on anyone. We just think that there are
22 ways to do this that are easier than others.

23 JUDGE KARLIN: Yes. No, I see the point.
24 I mean, there is also the point that sometimes drafts
25 have some issues in them that are cleaned up by the

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1 time it gets to be final that could be valuable, but
2 that's a less frequent occurrence. But it's a
3 significant additional burden, both on the provider,
4 and on the reader, or the receiver of those documents
5 to ferret through all that. And it's a choice that
6 you all can make, I think, permissibly.

7 MS. OLSON: Your Honor, this is Mary
8 Olson. We do things in interminable numbers of
9 drafts, and so if we were required to produce all of
10 them, it would be a huge burden.

11 JUDGE KARLIN: Yes. This is reciprocal on
12 both sides, significantly. Okay.

13 Finally, if I can ask, what is the meaning
14 of 16-F, your answer to 16-F, Mr. Martin? I mean,
15 let's posit for the moment that we are going -- that
16 the Staff is required to provide all documents under
17 2.336(b), which this provision, the only one seems to
18 deal with. I'm not sure I understand, or like what I
19 see here. Please explain it.

20 MR. MARTIN: We are just saying that any
21 relevant documents that's within NRC's internal
22 documents, in the ADAMS system, that the NRC Staff
23 will identify and disclose, and that none of the other
24 parties have to also put it on their -- in their
25 mandatory disclosures, if we've already done it. So,

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1 basically saying, the NRC Staff has the responsibility
2 to disclose any document that's on ADAMS, and that --
3 so we don't have duplicates, so that we don't have
4 all three parties all referencing the same document in
5 ADAMS, but it's the NRC's responsibility to disclose
6 those documents. The other parties don't also have to
7 do it.

8 JUDGE KARLIN: Okay. I think that helps.
9 Yes, I see that now. I see that. That helps.

10 Seventeen, whether a site visit would be
11 appropriate. You basically said look, tell us what
12 you're -- I mean, I thought -- I'm not -- are you
13 amenable to a site visit, if you think it would be
14 helpful, Mr. O'Neill? I know it's a burden on the
15 company just to have a bunch of people traipsing
16 around on the property, but it might be useful to us.

17 MR. O'NEILL: One of the reason that -- in
18 the pre-hearing conference we had in Florida, I
19 provided some pictures of the site, was to give you an
20 orientation and appreciation of what the site looks
21 like. To be honest, I think that we could probably
22 take you any number of places, and you wouldn't have
23 any different experience, because it's an old logging
24 site, and nothing much has happened there. And we
25 doubt that it would be terribly beneficial. But,

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1 certainly, we're not going to tell the Board, if it
2 wants to have a visit, they can't have a visit.

3 JUDGE KARLIN: I appreciate that. But a
4 significant portion of the site is accessible by road,
5 I guess is what I understand. You drive in there on
6 a -

7 MR. O'NEILL: You can see it, from the
8 pictures we gave you, you can see that there is a road
9 through there.

10 JUDGE KARLIN: Yes.

11 MR. O'NEILL: And then there's, certainly,
12 a lot of places you can walk, and hope that you're not
13 shot by hunters in the other property.

14 JUDGE KARLIN: Okay. We'll wear
15 fluorescent orange or something. Well, we don't
16 really see the need at this point. But I think,
17 ultimately, we probably would. It's premature to try
18 to schedule a site visit at this time, but I think
19 what we -- my approach is once you sort of figure out
20 what the contentions are going to be, the new and
21 amended contentions, the eliminated contentions, the
22 motions for summary disposition contentions, once we
23 get a feel for whatever is going to actually be heard
24 in an evidentiary hearing, then that's probably a
25 reasonable time to try to, if you're going to schedule

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1 a site visit, to have it somewhere in six months
2 preceding that. So, it's premature at this point.
3 We've talked about it, but thank you.

4 MS. OLSON: Your Honor, this is Mary
5 Olson.

6 JUDGE KARLIN: Yes?

7 MS. OLSON: The motion doesn't reflect
8 that the Interveners were enthusiastic about the idea,
9 so if there is a scheduled visit, we'd like to
10 participate.

11 JUDGE KARLIN: Well, certainly. If we
12 have a site visit, all parties will participate. It
13 would be limited. It's not a public event, but the
14 representatives of the parties would be there. I'd
15 also say that I don't know that there's any
16 prohibition on NIRS having a side-bar conversation
17 with the Applicant and asking to have a site visit of
18 your own. They don't have to grant it to you, but
19 it's something that could happen, if you want to try.

20 MS. OLSON: Thank you.

21 JUDGE KARLIN: Okay. Eighteen,
22 simultaneously versus sequentially, whether you want
23 to file your initial -- you agree to -- so, your
24 answer to 18 is you agree to abide by the schedule set
25 forth in 10-A and 10-F. And Staff's second notice

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1 will be defined as the issuance later of the FSER.
2 Okay. This is helpful.

3 Let me just explain one thing, and maybe
4 we could just -- the reason I used in the past this
5 concept of a Staff second notice, I've had situations
6 arise where the -- I used to say well, the trigger
7 mechanism is the issuance of the SER, final SER.
8 Well, that got into a litigated fight, because the
9 Staff issued the SER, and sent a private copy to the
10 company, because it contained proprietary information
11 in it, and sent a redacted copy to the Intervener.
12 So, we had the fight about what was the real date of
13 the issuance of the SER. So, it's sort of an awkward
14 concept, but we figured well, once the Staff has sent
15 it to the Applicant, the Applicant has reviewed it for
16 proprietary information, the Applicant has then
17 returned it to the Staff, and then the Staff makes it
18 public to the other side, to the Intervener. Because
19 what happened is, the Applicant gets to see it three
20 weeks before the Intervener does, because they had a
21 preliminary review to deal with proprietary
22 information.

23 Let's just move on to 19, suggested time
24 limits for filing motions for cross-examination. You
25 all, I think, agreed to abide by the schedule, 10-G.

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1 So, I think that covers all 19 of the questions.
2 Let's see. And you have number 20 on your's. We've
3 already, I think, covered the idea of mandatory
4 disclosures by the Staff.

5 With that, I'm going to turn to the second
6 topic du jour, and that is, other items from the
7 November 17, '06 Vermont Yankee, the initial
8 scheduling order. And there are -- so, this I'm just
9 going to -- there are four. One is, in the initial
10 scheduling order on page 4, we had asked for monthly
11 status reports from the Staff. And we'd just like to
12 -- we're going to have -- our order is, likewise,
13 going to ask the Staff to have monthly status reports.
14 Those status reports really just give us an update of
15 when you expect to issue the SER, and EIS. It isn't
16 a compendium of a bunch of other stuff. It's just
17 updating your estimated schedule, good faith best
18 estimate, that sort of thing. And that's Section II.2
19 of the Vermont Yankee initial scheduling order.

20 JUDGE BARATTA: While we're on that, do
21 you have the current estimates for the advanced SER,
22 final SER, and EIS, and when you anticipate the ACRS
23 hearing?

24 MR. MARTIN: My Project Managers are here.
25 Let me just check with them really quick, one moment.

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1 JUDGE KARLIN: Mr. Martin, are you there?

2 MR. MARTIN: Yes, Judge Karlin.
3 Currently, there's still no change from the letter
4 that we sent to you as far as the schedule. The
5 environmental group hopes to update the schedule in
6 about a month, but, currently, there's still no change
7 from the letter that we sent.

8 JUDGE BARATTA: All right. Do you have --
9 this is Judge Baratta, again. In that letter, it
10 talked to the EIS, SER. I forget, did it talk to when
11 you anticipated the ACRS meeting? It's on a website,
12 but I found those not to be kept up to date.

13 MR. MARTIN: Right. One second. We do
14 have the schedule. It looks like it's scheduled
15 currently for February 10th, 2011. That's the date we
16 expect -

17 JUDGE BARATTA: That's the ACRS review.

18 MR. MARTIN: Right. Sometime in February
19 of 2011 is when we're looking for the ACRS review.

20 JUDGE KARLIN: Can you give us what time
21 of day it's going to be?

22 (Laughter.)

23 MR. MARTIN: That may be subject to
24 change.

25 JUDGE KARLIN: Oh, okay.

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1 MR. MARTIN: Judge Karlin, can I ask a
2 question about the monthly status reports?

3 JUDGE KARLIN: Yes.

4 MR. MARTIN: Would it be acceptable to
5 include those with our monthly hearing file updates,
6 or do you want a separate letter for the status
7 reports?

8 JUDGE KARLIN: A separate letter, a
9 separate letter. We don't expect to see a monthly
10 hearing file update.

11 MR. MARTIN: Okay. We usually file those
12 on HD, but I guess you don't have to look at those.

13 JUDGE KARLIN: We don't have to, and we
14 don't. I mean, unless it's filed with us, we'll get
15 into that a little bit later, but we want a monthly
16 status report from the Staff. Okay. We'll lay it out
17 in the order, and it's going to be pretty much what
18 you see in the Vermont Yankee order.

19 Number two from the Vermont Yankee order
20 is consultation prior to motions. We have this
21 provision in the Vermont Yankee, Section 2.8, and we
22 think we're going to -- we didn't ask any questions
23 about this, because we just pretty much know we're
24 going to require, or make some statements regarding
25 consultations prior to filing of motions. I think

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1 that's an important provision. People need to take it
2 seriously, and make a sincere effort. Okay. Yes,
3 this is perhaps where the issue was raised, someone
4 raised the issue of whether there's a duty to consult
5 with all of the parties when you are filing a motion.
6 Who raised that issue?

7 MR. MARTIN: That was me, NRC Staff. And
8 our issue that we're kind of curious about is, in
9 discussions with joint Interveners, I know both Ms.
10 Olson, and Ms. Campbell want it discussed with them
11 any time we consult with other parties. Ms. Olson has
12 said that the Ecology Party has -- the Green Party, I
13 apologize, has given -- has pretty much allowed her to
14 speak for them, but we're a little bit worried that
15 under the rules, since she's a non-attorney, about
16 whether it's permissible for us just to consult with
17 her, versus having to always consult with all three of
18 the joint Interveners. We were, I guess, looking for
19 some sort of a direction on whether the Board finds it
20 acceptable to just consult with just Ms. Olson for
21 both of the parties, since they filed their
22 contentions jointly. If the Board has any feelings on
23 that.

24 JUDGE KARLIN: That's a good question.
25 Ms. Olson, do you all want to speak on that subject?

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1 MS. OLSON: The Green Party has certainly
2 been jointly involved. They put more effort into some
3 of the contentions that were rejected, and they are
4 not stepping back in terms of their participation, but
5 we'll have to put in a couple of more notices of
6 appearance for a few more people, because their
7 primary contact travels a lot. So, they are members
8 of Nuclear Information and Resource Service, and have
9 been happy to have me make these kinds of procedural
10 participation on their behalf, but I certainly don't
11 want to be cutting them out in any way. And,
12 certainly, am not requesting that they not be
13 consulted with in any way.

14 JUDGE KARLIN: Well, is it Mr. Michael
15 Canney on the line for the Green Party?

16 MR. CANNEY: Yes, I'm here.

17 JUDGE KARLIN: Are you the one who -- I
18 mean, she just referred to the Green Party. Do you
19 have a position on this, Mr. Canney? Have you filed
20 an appearance in this proceeding?

21 MR. CANNEY: I wanted to apologize that
22 for this call, I had to file a notice of appearance.
23 I don't think I did for this call, but I have it.

24 JUDGE KARLIN: Okay. Well, you need to
25 file a notice of appearance not just for this call,

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1 but for-

2 MS. OLSON: In the original filing, there
3 is a notice of appearance for Mr. Canney.

4 JUDGE KARLIN: Okay. Great. Anyway, Mr.
5 Cannery -- is it Cannery, is that correct?

6 MR. CANNEY: Without the R.

7 JUDGE KARLIN: Okay.

8 MR. CANNEY: Canney.

9 JUDGE KARLIN: Canney. I'm sorry. All
10 right. Do you have any thoughts on this, Mr. O'Neill?

11 MR. O'NEILL: The real question is whether
12 or not for these contentions, it wouldn't make sense
13 to have the Green Party and NIRS consolidated, which
14 would allow under the rules for us to consult with Ms.
15 Olson as the representative of the consolidated
16 parties. If she wanted to talk to Mr. Canney, or
17 somebody else, she could before she gave us an answer,
18 but it would avoid -- at least, the process has been,
19 is we've contacted Ms. Olson, and sometimes somebody
20 from the Ecology Party has participated, and rarely
21 has somebody from the Green Party. And if we have
22 this consultation responsibility, which we do, it
23 would make it a little bit cleaner if that is, in
24 reality, how this is going to move forward.

25 JUDGE KARLIN: Well, I think -- okay.

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1 Having heard everybody, I think subject to my
2 colleagues, I mean, we can do several things. First,
3 it seems to me that you need to designate a lead. The
4 Interveners, the joint Interveners have filed
5 everything jointly. They need to have a single lead
6 representative who is sufficient for contacting on
7 these consultation requirements. I mean, you could
8 have a backup, I guess, if you want to designate a
9 backup, if the lead is out, or not available. Just as
10 each of the Staff and the Applicant has several
11 attorneys, it seems to me that you need to designate
12 a lead person. And that would be sufficient, if they
13 contact and consult with that lead person.

14 Then your lead person, if that's you, Ms.
15 Olson, it's incumbent on you to either inform the
16 other entities, or to bring them on the phone if
17 there's a discussion going on.

18 JUDGE BARATTA: Ms. Olson, that doesn't
19 mean you can't, like he said, bring them on the phone
20 and have a discussion. Again, this is Judge Baratta.
21 It just facilitates matter, if it's just one person.

22 JUDGE KARLIN: Right.

23 MS. CAMPBELL: This is Cara Campbell from
24 the Ecology Party.

25 JUDGE KARLIN: Yes?

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1 MS. CAMPBELL: We had this conversation,
2 and the reason that Ms. Olson and I came to this was
3 that she has had significant problems with her
4 communications moving to where she is, and sometimes
5 I travel, so we thought we would essentially be
6 backups for each other, but that you would only have
7 to -- only one person would give the answer. But in
8 case somebody tried to get in touch with Ms. Olson and
9 there was a problem, they would then contact me, and
10 I would be need to consult with her, or she would
11 consult with me. It was just -- because we're not
12 sitting in an office all the time the way that
13 Progress Energy and the NRC are, so it was just a
14 matter of making sure that we had somebody at our
15 back.

16 JUDGE KARLIN: Well, okay. That's more of
17 an alternate approach, so I think why don't we say
18 this. We'll give you -- today is Tuesday, we'll give
19 you until Friday of this week to submit a notice to us
20 as to who is going to be the lead for the joint
21 petitioners. And if you want to designate an
22 alternate for the joint petitioners in the absence of
23 the lead, or if someone can't get in touch with the
24 lead, then you can designate an alternate. Both of
25 those people have to be authorized to speak for all

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1 three of the Interveners, so you need to coordinate
2 amongst yourselves to make sure that when you speak on
3 something, you have the authority internally to handle
4 that. Will that help, Ms. Caraway?

5 MS. CAMPBELL: Cara. Yes, that -- we will
6 do that.

7 JUDGE KARLIN: Okay. So, submit something
8 in writing to us on Friday of this week on that,
9 please. Does that help, Mr. Martin?

10 MR. MARTIN: Yes, that takes care of our
11 issue. Thank you.

12 JUDGE KARLIN: Okay.

13 MR. O'NEILL: The only thing, Judge
14 Karlin, is whether or not any one of the parties meet
15 the requirements of 2.314(b), to speak on behalf of
16 the others. And I just note that whatever the Board
17 orders is fine with us, but at least in our
18 discussions we have been concerned about a party may
19 be represented by an attorney, but also by a duly
20 authorized member or officer, or attorney-in-fact of
21 the association, or the corporation, or the
22 partnership that is the Intervener. So, you may want
23 to establish that whoever it is that's speaking for
24 everybody meets those requirements of 3.314(b).

25 JUDGE KARLIN: Good point. Good point.

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1 I mean, I think we have the authority to mandate the
2 consolidation of issues and the designation of a lead
3 for any given issue, other types of cases where there
4 are three different interveners, all represented by
5 different parties, who are filing different pleadings,
6 and we can say you all have the same issue. We order
7 you to consolidate your representation. But you raise
8 a good point, this is more the attorney versus non-
9 attorney representation problem.

10 MR. O'NEILL: That's why I suggested a few
11 minutes ago that I thought that it might make sense
12 just to make sure that we've done everything according
13 to the regulations, for the Board to order the
14 consolidation for these three contentions of the
15 parties, and that would take care of any uncertainty
16 with respect to the authority of Ms. Olson, or Ms.
17 Campbell to speak for all three.

18 JUDGE KARLIN: Yes. I think that's what
19 we were planning to do, anyway, which is, we'll get
20 something from you, Ms. Olson and Ms. Campbell, as to
21 what your approach is, who is the lead, who is the
22 alternate. And then we will duly incorporate that
23 into an order, which designates the lead, and the
24 alternate for purposes of consultation, and other
25 communications, I guess. That's a good point, Mr.

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1 O'Neill.

2 Back to the main subject, I think we're
3 done with the -- consultation prior to motions is
4 important. The whole point of the consultation
5 requirement is to avoid a motion, or to narrow it in
6 some significant way, so that we don't even have to
7 litigate it, to avoid litigation, i.e., by having you
8 all talk about it before it gets to us. And we think
9 that's a good idea. And what we've seen, we don't
10 want situations, for example, where someone says the
11 deadline for filing a motion for summary disposition
12 is, let's say, Tuesday. And on Tuesday at noon, the
13 person calls up his opponent and says I'm filing a
14 motion for summary disposition today. Do you want to
15 surrender?

16 (Laughter.)

17 JUDGE KARLIN: Missiles have been
18 launched, do you intend to surrender? Well, that's
19 not really a fair consultation, so we think you've got
20 to have enough time to do it. And we may end up
21 expanding some of the time, and we want you to
22 consult. So, there may be -- let me move on.

23 The third item from the ISO is ISO Section
24 2.9, motions for extension or modification of
25 schedule. We will have something in our order which

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1 puts a limit on -- we don't want people filing motions
2 for extensions at the last minute. And we certainly
3 don't want people filing motions for extension after
4 they've already missed the deadline. So, we'll have
5 something addressing that.

6 And then, of course, we'll also address
7 the evidentiary hearing filings that are in the ISO,
8 Section 2.10A-H. It will look very similar. I think
9 we're still talking about whether the initial
10 statements of the Intervener and the other -- and the
11 Applicant should be simultaneous, or should be
12 sequential.

13 MR. O'NEILL: We agreed for sequential in
14 our motion.

15 JUDGE KARLIN: Yes, I saw that, and that's
16 good. We had some problem with the sequential in the
17 past, because the Intervener complained because it
18 really gave the Applicant, supposedly, two shots at
19 rebuttal. So, we had to grapple with whether that was
20 fair. There are pros and cons to each way, and we're
21 still trying to figure out the best way to manage this
22 process, and make it work. And I appreciate that you
23 all thought about it, and agreed. We may leave it
24 that way. It might work fine.

25 Okay. Now, we move to the third kind of

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1 major category, which maybe will go somewhat faster,
2 because we've covered some of this; additional items
3 that the Board has thought about, that we've thought
4 about. First is reciprocal duty to consult. There is
5 a duty under the regs, 2.323(b), Ms. Olson, you need
6 to read these regs carefully, and it says before you
7 file a motion, you have to make a sincere effort to
8 contact the other side, and consult the other side
9 about it, to see if you can settle, or resolve it, or
10 not have to file it, or narrow it, all good things.
11 But what we've seen, sometimes, is the person who is
12 on the receiving end of that call, or email, as it may
13 be, just sort of comes back and says we take no
14 position. We'll see you in court. We reserve the
15 right to file an answer yes or no, which kind of
16 eviscerates the whole point of the consultation, if
17 the person with whom you were supposed to consult
18 refuses to discuss the matter, or in any meaningful
19 way. Just says no, we take no position. Go ahead and
20 file it, and we'll see you in court. And that happens
21 with the Staff, and that happens with the Applicant,
22 that happens with the Interveners. And we don't think
23 that works, so we're going to -- we're thinking of
24 imposing a duty for the receiving person to make a
25 sincere effort to listen, and to discuss and respond

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1 to the attempt to consult. So, you will probably see
2 something in the order which addresses that.

3 We will also probably have something that
4 requires both sides a certification. You have to file
5 a certification with a motion saying I certify that I
6 made a sincere effort to consult, and it didn't --
7 likewise, the person who files the answer will have
8 to certify that they made a sincere effort to consult,
9 as well.

10 So, second point, motions. There is a
11 dichotomy between -- this is a source of confusion in
12 Subpart L proceedings in the past, and we want to try
13 to avoid that confusion. File a motion, and you file
14 an answer. Under the Subpart L, there's no right to
15 file a reply, but with regard to motions for summary
16 disposition, there is a reg that we think has got some
17 wisdom to it, that is 2.710(a). And what it says is
18 if there's a motion for summary disposition, or a
19 dispositive motion, what often happens, and this could
20 be for example, the Applicant files a motion for
21 summary disposition. Twenty days later, the
22 Intervener files an answer to the motion for summary
23 disposition saying we oppose the motion for summary
24 disposition. On the same date, 20 days after the
25 motion, the Staff files an answer and says we support

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1 the motion for summary disposition. And not only
2 that, but the Staff adds some new reasons why the
3 motion for summary disposition should be granted.

4 Question, does the Intervener get a right
5 to respond to the new facts and arguments that have
6 been raised in the answer? That's become a subject of
7 litigation, and hassling, and we've got a fight about
8 it, so we're just going to say yes, if the party
9 opposing a motion for summary disposition has the
10 right to file a response, if another answer proposes
11 new facts or arguments in an answer in support of the
12 motion. You follow me?

13 MS. OLSON: Yes.

14 JUDGE KARLIN: Follow me, Mr. O'Neill?

15 MR. O'NEILL: Certainly.

16 JUDGE KARLIN: Okay. So, we're going to
17 address that, and that's how we're going to address
18 that. I think that helps, because we just don't want
19 to litigate about it. Try to fight whether or not
20 they have a right to do that, or not.

21 And the third topic, dispositive motions.
22 Now we're talking about dispositive motion. By that
23 we kind of mean motions for summary dispositions,
24 motions to dismiss as moot, or whatever. Again, we
25 don't want to have a lot of motions for summary

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1 disposition at the end of the proceeding. Once the
2 filings begin on the evidentiary hearing, look, the
3 vastly diminished value for a motion for summary
4 dispositions occur, and we're really not interested in
5 encouraging that, we're discouraging that.

6 We also want to avoid battles of the
7 experts. If there is a battle, if the Applicant's
8 expert says X, and the Intervener's expert says Not X,
9 then there's probably no chance anybody is going to
10 get a motion for summary disposition granted. So, why
11 even file it?

12 We are going to probably have something
13 that manages the motions for summary disposition,
14 dispositive motions. We may impose a requirement that
15 any motion be accompanied by a certification, that
16 there's a genuine belief, good faith belief that
17 there's no genuine dispute of any of the material
18 facts raised. There is also an interesting example
19 raised in the AREVA enrichment uranium case that was
20 noticed in the Federal Register on July 30th of '09.
21 The citation is 74 Fed Reg 38057. That's the page
22 number. And what the Commission did in that notice
23 for AREVA said there will be no motions -- any time
24 you file a motion for summary disposition, the Board
25 will look at it before the other side has to answer.

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1 The Board will issue a ruling before the other side
2 answers. So, we're thinking about these things, and
3 we haven't decided, but we're going to deal with
4 dispositive motions.

5 Fourth, there's no discovery in Subpart L
6 proceedings, and that's what we've got at this point.
7 And, yet, there are things, such as request to admit,
8 joint stipulations, other ways to sort of manage
9 things and reduce the scope. And we encourage, and
10 we're going to try to figure out ways to encourage
11 that. There also are motions to compel mandatory
12 disclosures. If you don't think somebody has given
13 the mandatory disclosures they're supposed to be
14 giving, you can always file a motion to compel that,
15 or motions to compel production of documents that are
16 being withheld on some claim of privilege that you
17 don't think is legitimate. Certainly, those are still
18 out there.

19 Fifth, notifications to the Board. We've
20 gotten two instances in this case so far, and kind of
21 startling, where the Applicant and the Staff, I think,
22 have sort of filed these notifications to us,
23 informing us of events, like well -- and I think we
24 are surprised. I think we're not -- we sort of
25 disfavor filings that are simply for your information,

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1 here's a piece of paper that exists, or something
2 happened. We are not interested in FYI filings.
3 There are these things called mandatory disclosures
4 that the parties give to each other, and we think
5 that, plus the monthly reports that we get, serves
6 substantially in lieu of any of the notifications that
7 are required under the doctrine that developed 20
8 years ago.

9 I think, I'm not sure what parameters
10 remain, but if you've got something -- generally, we
11 don't want to see a filing from you unless it's got a
12 motion attached to it. You want us to do something,
13 not just FYI, here's a copy of a report, and expect us
14 to read it, because we're not going to read a 70, or
15 80, or 30-page report just because you sent an FYI
16 filing. And if you want us to move to dismiss
17 something, or move -- add a new contention, or
18 something, tell us what you want us to do with it.
19 But just don't send it to us, and expect us to read
20 it.

21 Also, in the same vein, no emails to the
22 Board. Obviously, if you've got some communication on
23 administrative matters, you need to have -- Megan
24 Wright, she can help with administrative stuff,
25 obviously, no ex parte, but any administrative stuff.

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1 Finally, the record in this case are the
2 pleadings that have been filed in this case in the
3 adjudicatory proceeding that have been filed to us.
4 This is not ADAMS. We do not read ADAMS. We don't
5 know what's in ADAMS, and do not expect us to be -- to
6 have ADAMS mastered. We read the pleadings that are
7 filed in front of us, and that's pretty much all we
8 read. That's our record.

9 Seven is attachments. When you file a
10 pleading, you may have an attachment to it. It is not
11 an exhibit, it is an attachment. Exhibits only occur
12 when there's an evidentiary hearing. Those are the
13 documents you submit as evidence in an evidentiary
14 hearing. You file a motion, a contention, or
15 whatever, and you want to attach some documents to
16 support your motion or contention, great. They should
17 be attached, and they should be called attachments.
18 And, further, if you've got some document you want us
19 to read as part of a motion, or part of a pleading,
20 then you need to attach it.

21 JUDGE BARATTA: And -

22 JUDGE KARLIN: Go ahead.

23 JUDGE BARATTA: This is Judge Baratta,
24 again. And if you are referring to a specific portion
25 of that document, you need to clearly identify the

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1 page number, paragraph number, or whatever.

2 JUDGE KARLIN: Right.

3 JUDGE BARATTA: Because we're not going to
4 wade through a 50-page report looking for that one
5 sentence that you're relying on to support your motion
6 for summary disposition.

7 JUDGE KARLIN: Right. Right. Exactly.
8 Don't give us a web page site, and say go see it. You
9 attach that document. Web pages change all the time,
10 and we're not going to go search something down, or
11 find something. If you've got a document you want us
12 to read, then make it an attachment, and attach it to
13 the document. The exceptions are the application,
14 itself, the environmental report, the draft EIS, the
15 final EIS, the SER, those documents you don't have to
16 attach the whole thing, obviously. But you dang well
17 ought to cite us to the clear citations of the page,
18 and the version. And we will at the end, when we go
19 to the evidentiary hearing stage, we're going to need
20 copies of those, hard copies of those, probably. I
21 like a hard copy. We're going to need the proper copy
22 of those.

23 JUDGE BARATTA: We'll let you know about
24 the proper copy.

25 JUDGE KARLIN: We'll let you know. We'll

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1 work that out.

2 Another point is corrected filings.
3 Corrected filings are highly discouraged. We don't
4 want to see a practice develop where you file an
5 answer on July 10th, and then you file a corrected
6 answer on July 11th, or July 12th. And, particularly
7 problematic, if we don't -- if we can't tell what the
8 difference is. So (a), you need to -- you can't use
9 a correction as a way to supplement, or change your
10 response, or get yourself a little extra time.

11 Second, if it really does need a
12 correction, I mean, there's some erroneous citation,
13 or errata, then if you have to file it, recognize it's
14 going to be maybe challenged, but give us a red line,
15 tell us clearly what the difference is, so we don't
16 have to go searching around to figure out what's
17 different about this corrected version.

18 And, finally, pleadings. We're going to
19 send out a -- Megan Wright is going to send out a
20 note, or a one or two-page document that just gives
21 you some guidance on how to cite cases. We always
22 want to see, whether it's a Licensing Board case, or
23 it's a Commission decision, those are LBPs versus
24 CLIs. That's important for us to understand, because
25 CLI cases, if they're on point and they're holdings,

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1 they're binding on us. LBP decisions, that is
2 decisions by other Licensing Boards, even if they're
3 directly on point, are not binding on us. So, when
4 you cite us a case, we want to know whether it's by a
5 Licensing Board, or the Commission, that kind of
6 thing. So, that's all we've got.

7 I don't know if there's anything else.
8 It's been a long call. It's two hours now. Judge
9 Baratta, anything more you want to talk about, or
10 Judge Murphy?

11 JUDGE MURPHY: I have nothing.

12 JUDGE KARLIN: Okay.

13 JUDGE BARATTA: I have nothing.

14 JUDGE KARLIN: Go ahead. Why don't you
15 start, Judge Murphy? Judge Murphy?

16 JUDGE MURPHY: Yes?

17 JUDGE KARLIN: Go ahead. Do you have
18 something?

19 JUDGE MURPHY: No, I have nothing.

20 JUDGE KARLIN: Oh, I'm sorry. I thought
21 you said you have something. Anything else from the
22 parties, questions, issues?

23 MS. OLSON: This is a stupid question, but
24 I'll ask it. Filing our disclosures to each other,
25 does that mean they do not go through the EIE hearing

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1 docket, or they do?

2 JUDGE KARLIN: I don't think they go in
3 the EIE.

4 MR. MARTIN: Judge Karlin, usually -- this
5 is Jody Martin of NRC Staff. Usually, we do file them
6 on the EIE. I don't know if it's required to, but
7 usually we do, just because it's the easiest way for
8 everybody to receive them.

9 JUDGE KARLIN: Yes. Then, I, quite
10 frankly, don't know. My main point is it doesn't go
11 to us.

12 MS. OLSON: Well, you would delete it.

13 JUDGE BARATTA: We'll get -

14 JUDGE KARLIN: No, no. In terms of
15 mandatory disclosures -

16 JUDGE BARATTA: If they file through EIE,
17 it'll show up.

18 MS. OLSON: You don't have to open it up.

19 JUDGE KARLIN: In litigation, Ms. Olson,
20 parties sue each other. Tobacco companies get sued.
21 The judges sit there and listen to the case. The
22 parties, the Plaintiffs and the tobacco companies
23 exchange hundreds of boxes of documents in discovery.
24 The judges don't read those documents. They don't get
25 those documents. They are not something we read, or

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1 pay any attention to, unless and until you file a
2 motion, and attach a document and say ahh, I
3 discovered in those 10,000 documents, here's one that
4 you've got to read, Your Honor, because this is very
5 important, and we win, or we file a motion. We don't
6 read that. We don't read that stuff, unless -- so, I
7 don't know. The EIE -

8 MS. OLSON: I take your point. I just
9 want to know whether I should send it to them on
10 email directly, or stick it in the hearing docket, but
11 someone could send me an email to tell me if it's -

12 JUDGE KARLIN: Yes, you all work that out,
13 but it's not something that we will see or read.

14 MS. OLSON: I understand, and I appreciate
15 that clarification.

16 JUDGE KARLIN: Okay. Anything else, Mr.
17 Martin?

18 MR. MARTIN: No, nothing else from the
19 Staff.

20 JUDGE KARLIN: Mr. O'Neill, anything?

21 MR. O'NEILL: Nothing else from Progress
22 Energy.

23 JUDGE KARLIN: Okay. We will be issuing
24 an order. Thank you. Thank all of you for
25 participating on this. We will be issuing an order in

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1 the next week or two, before September 1st, laying out
2 many of the things we've talked about. You all have
3 your mandatory disclosures that are due on the 1st of
4 September, so please proceed with that. There will be
5 no change in that particular item, I don't think. And
6 I think what we would plan to do is try to schedule
7 conferences with the parties every six months or so,
8 and it may be more frequent than that, if some motion
9 or oral argument, or something comes up. But, absent
10 that, probably just to keep a status report. Sometime
11 in about six months, if there's nothing else on the
12 horizon, we would probably convene again.

13 So, with that, I appreciate all your time
14 and effort, and we will call this -- this meeting will
15 be adjourned. Thank you.

16 (Whereupon, the proceedings went off the
17 record at 4:09:21 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission
in the matter of: Progress Energy Florida, Inc

Name of Proceeding: Pre-hearing Conference

Docket Number: 52-029-COL; 52-030-COL

ASLBP No. 0987904-COL

Location: (phone conference)

were held as herein appears, and that this is the
original transcript thereof for the file of the United
States Nuclear Regulatory Commission taken by me and,
thereafter reduced to typewriting by me or under the
direction of the court reporting company, and that the
transcript is a true and accurate record of the
foregoing proceedings.


Eric Hendrixson
Official Reporter
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