LBP-09-22

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of	Docket No. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	August 27, 2009

INITIAL SCHEDULING ORDER

This proceeding concerns an application by Progress Energy Florida, Inc. (PEF) for licenses to construct and operate two nuclear power reactors in Levy County, Florida. Under the NRC regulations, this Board has the "duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order." 10 C.F.R. § 2.319. This initial scheduling order is designed to ensure proper case management of this proceeding, including "expediting the disposition of the proceeding, establishing early and continuing control so that the proceeding will not be protracted because of lack of management, discouraging wasteful prehearing activities, improving the quality of the hearing . . . . and facilitating settlement," 10 C.F.R. § 2.332(c)(1)-(5). The initial scheduling order must be issued "as soon as practicable" after the request for hearing is granted. 10 C.F.R. § 2.332(a).[1]

[1] See also. 10 C.F.R. Part 2, Appendix B, II, Model Milestones for Hearing Conducted Under 10 C.F.R. Part 2, Subpart L (Initial scheduling order to be issued within 55 days of Board decision granting intervention and admitting contentions).

I. Background

On July 28, 2008, PEF submitted an application to the NRC for licenses to construct and operate the proposed Levy Nuclear Plant Units 1 and 2, in Levy County, Florida. On December 8, 2008, the NRC published a "Notice of Hearing and Opportunity to Petition for Leave to Intervene" in the PEF proceeding in the Federal Register. 73 Fed. Reg. 74,532 (Dec. 8, 2008). On February 6, 2009, three entities – the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (jointly, Intervenors) – filed a joint petition requesting intervention herein. On July 8, 2009, the Board ruled, inter alia, that Intervenors had standing to challenge PEF's combined license application and had presented at least one contention that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1).[2] The Board granted Intervenors' hearing request and admitted portions of three of their contentions.[3] The Board also ruled, based on the information available at that time, that the 10 C.F.R. Part 2, Subpart L hearing procedures were appropriate for each of the three contentions. Id. at __ (slip op. at 105).

On July 10, 2009, the Board scheduled an initial conference, pursuant to 10 C.F.R. §§ 2.329 and 2.332, for the purpose of developing a scheduling order to govern the conduct of this proceeding.[4] The Order stated that the scheduling conference would cover, inter alia, nineteen enumerated items related to the schedule and management of the case and directed the parties to confer concerning these items. In addition, the Order instructed the NRC Staff to submit a written estimate of its projected schedule for completion of its safety and environmental evaluation reports. In response, on July 28, 2009, the NRC Staff filed its estimate that the Staff would issue its Final Environmental Impact Statement (FEIS) on the proposed license

[2] Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC __ (slip op.) (July 8, 2009).

[3] PEF has appealed the Board's ruling. Progress Energy Florida, Inc.'s Brief in Support of Appeal from LBP-09-10 (July 20, 2009).

[4] Licensing Board Order (Scheduling Initial Scheduling Conference) (July 10, 2009) (unpublished) (Order).

application on September 22, 2010, and its Final Safety Evaluation Report (FSER) on May 5, 2011.[5] On August 14, 2009, the parties filed a joint motion regarding the nineteen enumerated items, together with proposed language addressing these items, and other matters, to be considered for inclusion in the initial scheduling order.[6]

On August 18, 2009, the Board conducted the initial scheduling conference. The parties, including the NRC Staff, stated their views regarding the nineteen items listed in the Order, as well as their views on certain other matters that arose.[7] Based on the Joint Motion, the parties' statements at the conference, the NRC Staff's projected schedule, the regulatory requirements, and the nature and circumstances of this case, the Board now issues this initial scheduling order.

II. Schedule

In addition to the general deadlines and time frames applicable to Subpart L proceedings pursuant to 10 C.F.R. Part 2, the Board establishes the following initial schedule for this matter.

A. Mandatory Disclosures and Production of Hearing File.[8] The regulations specify that, within thirty (30) days of the Board's ruling admitting contentions, the parties must automatically make certain mandatory disclosures. 10 C.F.R. § 2.336(a). Likewise, the NRC Staff must make certain mandatory disclosures. 10 C.F.R. § 2.336(b). In addition, Subpart L proceedings require the NRC Staff to produce a hearing file and make it available to all parties. 10 C.F.R. § 2.1203(a). In this case, the Board denied a motion to suspend such disclosures (ruling that

[5] Letter from Sara Kirkwood, Counsel for NRC Staff (July 28, 2009).

[6] Joint Motion Regarding Enumerated Matters in Initial Scheduling Conference Order (Aug. 14, 2009) (Joint Motion).

[7] Pursuant to 10 C.F.R. § 2.1202(b)(2), the NRC Staff notified the Board that it will participate as a party on all admitted contentions. Letter from Sara Kirkwood, Counsel for NRC Staff (July 23, 2009).

[8] Except where otherwise specified herein, the term "mandatory disclosures" includes the witness lists and privilege logs required under 10 C.F.R. § 2.336 (a) and (b).

the pendency of an appeal should not suspend this proceeding),[9] but granted a short extension to accommodate certain logistical difficulties of one of the representatives of the parties.[10] Thus, the deadline for the first mandatory disclosures and the production of the hearing file is September 1, 2009.

1. Updating of Disclosures. The regulations specify that the parties and the NRC Staff have a "continuing" duty to update their mandatory disclosures, 10 C.F.R. § 2.336(d), and that the NRC Staff has a "continuing" duty to update the hearing file. 10 C.F.R. § 2.1203(c). But the regulations are not clear as to the frequency of such updates. Based on the Joint Motion and discussions during the August 18, 2009 conference, the Board directs that the parties and the NRC Staff shall update their disclosures and the hearing file monthly, on the second Thursday in October and November of 2009, and thereafter on the third Thursday of every month beginning in January 2010.[11] Each update shall cover all documents or other material or information required to be disclosed that is in the possession, custody, or control of each party or the NRC Staff (or their agents) as of the last day of the preceding month.[12]

2. Privilege Logs. The regulations require that the parties and the NRC Staff provide a "list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents." 10 C.F.R. § 2.336(a)(3). See also 10 C.F.R. § 2.336(b)(5). These are referred to as "privilege logs."[13] The parties have waived the

[9] Order (Denying Motion to Suspend Discovery) (July 23, 2009) (unpublished).

[10] Order (Suspending Certain Mandatory Disclosures Until September 1, 2009) (July 31, 2009) (unpublished).

[11] The Parties need not update their disclosures or the hearing file in December of 2009.

[12] The Board recognizes that the September 1, 2009 disclosures cannot be completely current as of September 1, and will entail some reasonable lag time.

[13] 10 C.F.R. § 2.336(a)(3) and (b)(5) cover documents claimed to be privileged and documents claimed to be protected. In both cases, the party or the NRC Staff must identify and list the document "together with sufficient information for assessing the claim of privilege or protected status . . . ." Id.

requirement to provide privilege logs for documents claimed to be covered by the attorney-client privilege and the attorney work product privilege. However, the parties and NRC Staff agreed that they must still produce, as part of their mandatory disclosures, privilege logs covering documents claimed to qualify for protected status as security-related information or as proprietary documents. See, e.g., 10 C.F.R. § 2.390(a)(1), (3), and (4).

3. Scope of Disclosures and Hearing File.

i. If a party or the NRC Staff generates the document in question, then it may limit mandatory disclosures to its final document and need not include its internal drafts, including comments on drafts, resolution of comments, draft transmittals, or other similar documents. However, if a party or the NRC Staff has legal possession, custody, or control of a document developed by someone else, and which is otherwise subject to mandatory disclosure (e.g., relevant to a contention), then the party or the NRC Staff must produce that document (even if it is labeled "draft") unless that party or the NRC Staff knows that the other person has already disclosed that document herein.[14]

ii. A party and the NRC Staff need not identify or produce a document that has been served on the other parties to this proceeding.

iii. If a document exists in both hard copy and electronic formats, then the party or the NRC Staff need only produce the electronic copy.

iv. All documents that are required to be disclosed pursuant to 10 C.F.R. § 2.336(b) and that are available via the NRC's website or the NRC's Agencywide Documents Access and Management System (ADAMS) shall be specifically identified by the NRC Staff as required

[14] The reason for this rule is simple. If the person who developed a document considered it sufficiently final to share it with an external third party (e.g., a party or the NRC Staff) who is a litigant herein, then we do not deem that document, even if it is still labeled "draft," exempt from the mandatory disclosure requirements.

under 10 C.F.R. §§ 2.336(b) and 2.1203. Documents so disclosed and so identified do not need to be identified or produced by any other party.[15]

4. Electronically Stored Information.

i. Reasonable Search. Mandatory disclosures and the production of the hearing file shall include electronically stored information and documents (ESI). In implementing their responsibilities, the parties and the NRC Staff shall conduct a reasonable good faith search for all documents or information, including ESI, subject to the mandatory disclosure and hearing file requirements. Each production or disclosure shall include a signed affidavit attesting that the party or the NRC Staff has conducted such a search, and that the disclosure or production excludes only (a) documents or information exempted from disclosure pursuant to the law, including NRC regulations or this order, and (b) information that is not reasonably accessible because of undue burden or cost.[16]

ii. Format of Production. The parties and the NRC Staff shall disclose each document in the same form as the original document in the party's or the Staff's possession, custody, or control. ESI shall be disclosed or produced in searchable electronic form to the same extent that the original ESI in that person's possession, custody, or control was searchable.

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

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

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

B. Protective Order and Non-Disclosure Agreement.[17]

1. Confer. On or before October 1, 2009, the parties and the NRC Staff shall confer with one another for the purpose of discussing and developing a joint proposed protective order and nondisclosure agreement dealing with the handling (and redaction) of documents that are claimed to contain privileged, proprietary, or otherwise protected information.[18]

2. Submission. On or before October 15, 2009, the parties and the NRC Staff shall submit to the Board either (i) a unanimously agreed upon proposed protective order and nondisclosure agreement; or (ii) individually or jointly proposed protective orders and nondisclosure agreements. In either event, the proposals may be accompanied by a short brief, not to exceed five (5) pages, explaining the proposal and submission.

3. Response Brief. If, but only if, the parties and the NRC Staff are unable to submit a unanimously agreed upon proposed protective order and nondisclosure agreement, then, on or before October 22, 2009, the parties and the NRC Staff may each file a brief (not to exceed five (5) pages) responding to any points previously raised by the other parties.

C. Disclosure Disputes and Motions to Compel. On or before October 29, 2009, the parties and the NRC Staff shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file, redactions, or the validity of any claim that a document is privileged or protected, concerning any disclosures occurring prior to that date. Thereafter, any such motion or challenge shall be filed within ten (10) days after the occurrence or circumstance

[17] Documents covered by a protective order are nevertheless required to be included in a privilege log. Indeed, the only way that an opposing party can learn of the existence of such a document, and thus to request access to that document, is for it to be included in the privilege log.

[18] See Licensing Board Order (Protective Order Governing Non-Disclosure of Certain Documents Claimed to be Proprietary) (Jan. 12, 2007) (unpublished) (ML0701203270) in Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03LR, for a good example of a protective order and non-disclosure agreement in a Subpart L proceeding.

from which the motion arises, in accordance with 10 C.F.R. § 2.323(a).[19] For example, an objection to the claim that a document qualifies for protection as a "proprietary" document must ordinarily be filed within ten (10) days of the service of the privilege log where that document was first added.

D. Monthly Status Report. Commencing on October 1, 2009, the NRC Staff shall submit a short report specifying its best estimate of the dates it expects to issue the draft and final version of the Environmental Impact Statement (DEIS and FEIS), the Advanced Final Safety Evaluation Report (AFSER) and the Final Safety Evaluation Report (FSER), and the dates when it understands that the Advisory Committee on Reactor Safety (ACRS) and its relevant subcommittees plan to issue any reports concerning PEF's proposed combined license. Thereafter, the Staff shall update this status report on the first Thursday of each month.

E. Requests For Subpart G Proceeding Based on Disclosures of Eyewitness.[20] A request that a contention or other contested matter be handled pursuant to Subpart G procedures based on 10 C.F.R. § 2.310(d) (which focuses, inter alia, on issues "where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness . . .") shall be filed as follows:

1. For witnesses identified in the September 1, 2009, mandatory disclosures, on or before September 22, 2009; and

2. For additional witnesses identified by an opposing party in subsequent mandatory disclosures, within twenty (20) days of said event.

[19] If they believe that it will facilitate the amicable resolution of privilege claim disputes without the intervention of the Board, the parties and/or the NRC Staff may propose to the Board a modification to the ten-day rule and/or other dispute resolution mechanisms.

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

F. Additional Contentions.

1. Consolidated Briefing. If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1). Within twenty-five (25) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention. Within seven (7) days of service of the answer, the movant may file a reply.[21]

2. Timeliness. A motion and proposed new contention specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available. If filed thereafter, the motion and proposed contention shall be deemed nontimely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c) (as well as the six criteria of 10 C.F.R. § 2.309(f)(1)).

3. Selection of Hearing Procedures. A motion and proposed new contention specified in paragraph II.F.1 above may address the selection of the appropriate hearing procedure for the proposed new contention. See 10 C.F.R. §§ 2.309(g) and 2.310(d).

G. Pleadings and Motions – Generally.

1. Pleadings – Page Limitation. Motions and answers to motions shall not exceed fifteen (15) pages in length (including signature page but excluding attachments, see II.K.5,

[21] This procedure resolves difficulties that have arisen in several proceedings concerning the interplay of the sequence and timing for motions under 10 C.F.R. §§ 2.309(f)(2) and 2.323 (motion, answer), and the sequence and timing for contentions under 10 C.F.R. § 2.309(h) (contention, answer, reply). Further, this procedure expedites the process by collapsing the two-step process established by the regulations into a single step.

infra) absent preapproval of the Board. A motion for preapproval to exceed this page limitation shall be submitted in writing no less than three (3) business days prior to the time the motion or answer is due to be filed. A motion to exceed this page limitation must (i) indicate whether the request is opposed or supported by the other participants to the proceeding; (ii) provide a good faith estimate of the number of additional pages that will be filed; and (iii) demonstrate good cause for being permitted to exceed the page limitation.

2. Response to New Facts or Arguments in Answer Supporting a Motion. Except for a motion to file a new or amended contention as set forth in paragraph II.F. supra or where there are compelling circumstances, the moving party has no right to reply to an answer or response to a motion. See 10 C.F.R. § 2.323(c). However, if the NRC Staff or any party files an answer that supports a motion, then a party opposing the motion may, within ten (10) days after service of that answer, file a response to any new facts or arguments presented in that answer. Except as otherwise specified herein, no further supporting statements or responses thereto will be entertained.[22]

3. Motion for Leave to File Reply. If a party or the NRC Staff seeks to file a reply, it must first obtain leave of the Board. A motion for leave to file a reply shall be submitted no less than three (3) business days prior to the time the reply would need to be filed.[23] In addition to all other requirements, a motion to file a reply must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate good cause for permitting the reply to be filed.

4. Motion for Extension of Time. A motion for extension of time shall be submitted in writing at least three (3) business days before the due date for the pleading or other

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

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

submission for which an extension is sought. In addition to all other requirements, a motion for extension of time must (i) indicate whether the request is opposed or supported by the other participants to the particular proceeding; and (ii) demonstrate appropriate cause that supports permitting the extension.

5. Answer Opposing a Motion to Exceed the Page Limitation, to File a Reply, or to Extend the Time for Filing a Pleading. An answer to a motion to exceed the page limit, to file a reply, or to extend the time for filing a pleading shall be filed and served on the next business day after the filing of the request.

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

> "I certify that I have made a sincere effort to contact the other parties in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful." [24]

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

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

following certification by the contacted attorney or representative (or his or her alternate) of the answering party:

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

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

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

9. Consolidation of Intervenors for Purposes of Consultation. Pursuant to 10 C.F.R. § 2.314(b), each of the three Intervenors has designated one or more of its own members to serve as its pro se representative, and each of them has filed a notice of appearance.[25] During the initial scheduling conference, the NRC Staff asked whether 10 C.F.R. § 2.323(b) required consultation with all three representatives. Tr. at 450. In response, the Intervenors filed a statement indicating that they had jointly designated Mary Olson as the lead point of contact, and Michael Mariotte as the alternate point of contact, for all three of the Intervenors.[26] Accordingly, and pursuant to our authority under 10 C.F.R. §§ 2.316 and 2.319(c), the Board determines that the NRC Staff or a party may consult with Ms. Olson or Mr. Mariotte and, for purposes of 10 C.F.R. § 2.323 and consultation hereunder, these individuals shall be deemed to

[25] Notice of Appearance of Mary Olson on Behalf of Nuclear Information and Resource Service (Feb. 6, 2009); Notice of Appearance of Cara Campbell [on Behalf of the Ecology Party of Florida] (Apr. 6, 2009); Notice of Appearance of Gary Hecker [on Behalf of the Ecology Party of Florida] (Apr. 6, 2009); Notice of Appearance of Michael Canney [on Behalf of the Green Party of Florida] (Apr. 6, 2009).

[26] Notice of Appearance [of Mary Olson] (Aug. 20, 2009); Notice of Appearance [of Michael Mariotte] (Aug. 20, 2009).

speak for, and have the authority of, all three Intervenor organizations. These individuals shall be responsible for internal coordination, communication, and authorization among the three Intervenor organizations.

H. Dispositive Motions. Given that dispositive motions, such as motions for summary disposition under 10 C.F.R. § 2.1205 and Subpart L evidentiary hearings under 10 C.F.R. § 2.1207, are both conducted on the basis of written pleadings, testimony, and exhibits, the Board finds that such motions for summary disposition, especially if filed late in the proceeding when the parties are heavily engaged in other important tasks (e.g., preparing and submitting their pleadings, testimony, and exhibits immediately prior to the commencement of the evidentiary hearing), may impede and burden the litigants and the Board, rather than serving to narrow or expedite the resolution of the adjudicatory proceeding. Indeed, the Subpart L proceeding has two key advantages over motions for summary disposition. First, in a Subpart L evidentiary hearing the Board may ask the witnesses to appear in person and answer questions, the answers to which might significantly assist in resolving the matter.[27] This is not possible when ruling on a motion for summary disposition. Second, in an evidentiary hearing the Board may weigh competing evidence and expert opinion and may resolve/decide factual disputes, whereas this is not possible when ruling on motions for summary disposition, which are restricted to situations where "there is no genuine issue as to any material fact." 10 C.F.R. § 2.710(d)(2). See also id. § 2.1205. Further, a motion for summary disposition requires significant and often duplicative time and effort from all parties (and the Board), whereas Subpart L evidentiary hearings have proven to be short, usually requiring a day or less to hear a

[27] 10 C.F.R. § 2.1207(b)(6). The Board may also allow parties to conduct cross-examination in Subpart L proceedings pursuant to 10 C.F.R. § 2.1204(b)(3). To date, no party has ever been granted the opportunity to conduct cross-examination in a Subpart L proceeding.

contention. In these circumstances, motions for summary disposition and other dispositive motions, while permissible, will be managed in this proceeding as follows:[28]

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

> "I certify that this motion is not interposed for delay, prohibited discovery, or any other improper purpose, that I believe in good faith that there is no genuine issue as to any material fact relating to this motion, and that the moving party is entitled to a decision as a matter of law, as required by 10 C.F.R. §§ 2.1205 and 2.710(d)."[29]

2. Additional Time for Dispositive Motions. In light of the gravity and importance of dispositive motions, and in order to accommodate careful consultation as specified above, dispositive motions may be filed twenty (20) days after the occurrence or circumstance from which the motion arises (rather than the ten (10) day time frame established by 10 C.F.R. § 2.323(a)), provided that the moving party commences sincere efforts to contact and consult all

[28] The Commission has stated that "[t]here may be times in the proceeding where motions for summary disposition should not be entertained because consideration of the motion would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues or distracting other parties and the presiding officer from their preparation for a scheduled hearing. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The presiding officer . . . is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide presiding officers the flexibility to make that determination in most proceedings." Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2186 (Jan. 14, 2004). More recently, the Commission issued a notice in an expedited case prohibiting summary disposition motions from proceeding absent an affirmative finding by the Board that it would expedite the proceeding. ("[T]he Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Licensing Board finds that such motions, if granted, are likely to expedite the proceeding."). Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation; In the Matter of Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), 74 Fed. Reg. 38,052, 38,057 (July 30, 2009).

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

other parties within ten (10) days of the occurrence or circumstance, and the accompanying certification so states.

3. Answers. In accordance with 10 C.F.R. § 2.1205(b), an answer supporting or opposing a motion for summary disposition or other dispositive motion shall be filed within twenty (20) days after service of the motion. See also II.G.4 supra.

4. Continuance. If it appears from the affidavits of a party opposing a motion for summary disposition or other dispositive motion that the opposing party "cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition," the Board may refuse the application for summary disposition or may order a continuance as may be necessary or just. See 10 C.F.R. § 2.710(c); cf. Fed. R. Civ. P. 56(f).

5. Deadline. With regard to any contention based on 10 C.F.R. Part 51 or the National Environmental Policy Act, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the FEIS.[30] With regard to any other contention or issue, no motion for summary disposition or other dispositive motion may be filed more than twenty (20) days after the NRC Staff publishes the Advanced FSER (AFSER).

I. Clarification, Simplification, and Amendment of the Pleadings. In the August 14, 2009, Joint Motion and during the initial scheduling conference, the parties and the NRC Staff stated that it was their consensus that it is premature to address the following issues:

1. The clarification, simplification, or specification of the issues;

2. The necessity or desirability of amending the pleadings;

[30] Consistent with the Commission's scheduling instructions in a recent case, see 74 Fed. Reg. 38,057 (July 30, 2009)), if all contentions, other than Part 51 and NEPA contentions, have been dismissed when the FEIS is published, then no answer to a motion for summary disposition or other dispositive motion filed after the FEIS is published is required, nor appropriate, unless and until ten (10) days after the Board issues an affirmative determination that the motion will not interfere with preparations and filings related to the evidentiary hearing and that its resolution will serve to expedite the proceeding. The Board will endeavor to make such determination within ten (10) days.

3. Opportunities to develop stipulations or admissions of fact; and

4. Opportunities for the settlement of issues or contentions.

Nevertheless, the Board encourages the parties and NRC Staff to continue to consider and pursue such measures, as specified in 10 C.F.R. §§ 2.329(c)(1)-(3) and 2.338. We will revisit these issues throughout this proceeding. For example, if it appears that stipulations or admissions of fact can narrow or eliminate factual or legal disputes, the parties and the NRC Staff are encouraged to consult with each other and/or file motions to pursue same.

J. Evidentiary Hearing Filings. The Board currently contemplates a single evidentiary hearing herein, which will cover both the two environmental contentions and the single safety contention. Pursuant to 10 C.F.R. § 2.1207, a number of documents must be filed immediately prior to the evidentiary hearing. The Board has determined that the earliest practicable trigger date for the initiation of such filings is the date when the NRC Staff makes the FEIS publicly available or the date when the ACRS makes its final report on the PEF application publicly available, whichever is last to occur.[31] This shall be deemed the "Trigger Date."[32]

1. Initial Statements of Position, Testimony, Affidavits, and Exhibits. Forty-Five (45) days after the Trigger Date, all parties and the NRC Staff shall file their initial written statement of position, written testimony with supporting affidavits, and exhibits, on a contention-by-contention basis, pursuant to 10 C.F.R. § 2.1207(a)(1). The initial written statement should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (i.e., stating with particularity how the

[31] 10 C.F.R. § 2.332(d) prohibits the commencement of evidentiary hearings on environmental issues until after the FEIS. It also prohibits commencement of evidentiary hearings on safety issues until after the FSER, unless the Board affirmatively finds that the safety hearing can be held earlier and still expedite the ultimate resolution of the case.

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

witness, exhibit, or evidence supports a factual or legal position). The written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, use, or are relying upon for their statements or position.

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

3. Motions In Limine or to Strike. No later than ten (10) days after service of the materials submitted under paragraph J.2, the parties and the NRC Staff shall file their motions in limine or motions to strike regarding the materials submitted under paragraphs J.1 and J.2. Answers shall be filed no later than seven (7) days after service of such motions.

4. Proposed Questions for Board to Ask.[33] No later than thirty (30) days after service of the materials submitted under paragraph J.2, all parties and the NRC Staff shall file

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

proposed questions for the Board to consider propounding to the direct or rebuttal witnesses, pursuant to 10 C.F.R. § 2.1207(a)(3)(i) and (ii). The direct or rebuttal examination plans should contain a brief description of the issue or issues which the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed direct examination questions and plans should be filed in camera and not served on the NRC Staff or any other party.

5. Motions for Cross-Examination.[34] No later than thirty (30) days after service of the materials submitted under paragraph J.2, all parties shall file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s), pursuant to 10 C.F.R. § 2.1204(b). The motion for cross-examination shall be filed with all parties, but the cross-examination plan itself should be filed in camera and not be served on the NRC Staff or any other party.

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

7. Witness with Written Testimony Must be Available in Person. Unless the Board expressly provides otherwise, each party (including the NRC Staff) must, at its own expense and effort, assure that each person for whom it submitted written direct or rebuttal testimony

[34] "The standard for allowing the parties to conduct cross-examination is the same under Subparts G and L, to wit – the Administrative Procedure Act (APA) standard for cross-examination in formal administrative proceedings as set forth in 5 U.S.C. § 556(d) ("A party is entitled . . . to conduct such cross examination as may be required for a full and true disclosure of the facts."). See Citizens Awareness Network, Inc. v. NRC, 391 F.3d 338, 351 (1st Cir. 2004); see also 69 Fed. Reg. at 2,195-96." Levy County, LBP-09-10, 70 NRC at __ (slip op. at 104-05).

attends the evidentiary hearing in person and is available to testify and to respond orally to questions.[35]

K. Attachments to Filings.

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

2. Exception. If the following documents are publicly available on the NRC ADAMS system, then they do not need to be attached to a motion or pleading: PEF's Application and Environmental Report, the DEIS, the FEIS, the AFSER and the FSER. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant. All other documents (or the relevant portions thereof), even if they can be found in ADAMS, should be attached to the pleading.[36]

3. Attached Documents are "Attachments." All documents referred to in the pleadings (pursuant to the two preceding paragraphs) shall be labeled and referred to as "Attachments," not exhibits.[37]

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

[36] The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See http://www.nrc.gov/site-help/e-submittals.html (under Submittal Instructions, access link for Guidance for Electronic Submissions to the NRC, Revision 4).

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

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

5. Page Limits/Method of Electronic Submission. Attachments are not subject to the page limitation set forth in section G.1 above. All Attachments associated with a pleading shall be submitted together via the E-Filing system as a single electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments. If, however, the submission exceeds fifteen megabytes in size, then the pleading should be separated into two submissions, each less than fifteen megabytes.[38]

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[39]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA by Edward R. Hawkens for/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by Edward R. Hawkens for/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 27, 2009

[38] This accords with NRC's E-Filing guidance (at page 14). See http://www.nrc.gov/site-help/e-submittals.html (under Submittal Instructions, access link for Guidance for Electronic Submissions to the NRC, Revision 4).

[39] Copies of this memorandum and order were sent this date by the agency's E-Filing system to the counsel/representatives for (1) Progress Energy Florida, Inc. (2) Nuclear Information and Resource Service, The Green Party of Florida and The Ecology Party of Florida; and (3) NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029-COL
	)	and 52-030-COL
(Levy County Nuclear Power Plant Units 1 and 2)	)	
	)	
(Combined License)	)	

CERTIFICATE OF SERVICE

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

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
This 27th day of August 2009