

September 1, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

JOINT MOTION FOR CLARIFICATION OF THE INITIAL SCHEDULING ORDER

The NRC Staff (Staff) and the Green Party of Florida (GPF), the Ecology Party of Florida (EPF), and Nuclear Information and Resource Service (NIRS) (collectively "Joint Intervenors") together move to clarify two provisions of the Atomic Safety and Licensing Board's ("Board") August 27, 2009, Initial Scheduling Order.

On July 8, 2009, the Licensing Board issued a Memorandum and Order (LBP-09-10) ruling on standing and contention admissibility. On July 10, 2009, the Licensing Board issued an Order scheduling a prehearing conference call for August 18, 2009, and setting forth nineteen enumerated items for the parties to discuss prior to the prehearing conference. On August 14, 2009, the parties filed a joint motion regarding the nineteen enumerated items and setting forth proposed language addressing these items ("August 14, 2009, Joint Motion"). After holding the prehearing conference on August 18, 2009, the Board issued an Initial Scheduling Order on August 27, 2009 ("Scheduling Order"). The Staff and Joint Intervenors ("Movants") move for clarification of two items in the Scheduling Order.

First, in their August 14, 2009, Joint Motion, the parties stated that "[t]he Parties waive the requirement in 10 C.F.R. §§ 2.336(a)(3) and 2.336(b)(5) to produce a privilege log. However, the Parties will still produce as part of their disclosures a list of any documents withheld as proprietary, including those containing security-related information." August 14,

2009, Joint Motion at 4. Item A.2 of the Scheduling Order states that “[t]he parties have waived the 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.” Scheduling Order at 4-5.

The Movants note that the Board was silent on the remaining privileges covered by the parties’ joint agreement. The privileges covered by sections 2.336(a)(3) and 2.336(b)(5) include more than just the attorney client and attorney work product privileges. For example, those sections could also include portions of documents that are being withheld because they contain personally identifiable information, documents that contain deliberative process information and documents that contain investigatory information. The Movants respectfully request clarification on whether the Board authorizes the parties to waive the requirement to produce privilege logs for all documents covered under sections 2.336(a)(3) and 2.336(b)(5) – with the exception of proprietary and security-related documents – or whether the Board intended to limit the parties’ agreement to only documents protected by the attorney client and attorney work product privileges.

Second, in their August 14, 2009, Joint Motion, the parties agreed that a motion for leave to file a new or amended contention “shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(ii) if it is filed within thirty (30) days of the date when the new information on which it is based first becomes available, unless such information first becomes available in the Draft Environmental Impact Statement (“DEIS”) or the Advanced Final Safety Evaluation Report (“AFSER”). If the motion for leave to file a new or amended contention and the proposed contention are based on information that first becomes available in the DEIS or the AFSER, such a motion and proposed contention shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within sixty (60) days of the date when such information first becomes available.” August 14, 2009, Joint Motion

at 2. Item F.2 of the Scheduling Order states that “[a] motion and proposed new contention . . . 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.”

Scheduling Order at 9. The Scheduling Order, however, is silent on the parties agreement that a new or amended contention based on information that first becomes available in the DEIS or AFSER will be deemed timely if it is filed within sixty (60) days of the date when such information first becomes available. The Movants respectfully request clarification on whether the Board agrees with the parties’ August 14, 2009, Joint Motion, that new or amended contentions based on information that first becomes available in the DEIS or AFSER will be timely if filed within sixty (60) days of the date when such information first becomes available.

Mary Olson, representative of NIRS has authorized the Staff to submit this motion on behalf of the Joint Intervenors. After consultation with counsel for the Applicant, Progress Energy Florida, counsel for the Applicant has indicated that Progress does not object to this motion.

CERTIFICATION

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. I certify that after this consultation, the Joint Intervenors agreed to file this motion jointly, and the Applicant does not object to this motion.

/Signed (electronically) by/
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Dated at Rockville, Maryland
This the 1st day of September, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of the JOINT MOTION FOR CLARIFICATION OF THE INITIAL SCHEDULING ORDER has been served on the following persons by Electronic Information Exchange on this 1st day of September, 2009:

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