LBP-09-30

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)	December 29, 2009

ORDER
(Denying Motion to Compel Disclosure of Bases for Expert Opinion)

On November 30, 2009, Progress Energy Florida, Inc. (Progress) filed a motion to compel the Nuclear Information and Resource Service, The Ecology Party of Florida, and The Green Party of Florida (collectively, Intervenors) to "supplement their initial disclosure with the [expert] analyses or other authority that provide bases for allegations in their Petition with regard to Contention 4 as admitted."[1] The Intervenors and the NRC Staff oppose the motion.[2] They argue, inter alia, that 10 C.F.R. § 2.336(a)(1) does not require that Intervenors' expert create a written analysis, but only mandates the disclosure of the written analysis or other documentary authority, if any, that exists and is reasonably available at the time of the disclosure. Intervenors' Answer at 1-2, Staff Answer at 2-4. We agree.

[1] [Progress'] Motion to Compel Disclosure of Bases for Expert Opinion with Regard to Contention 4 (Nov. 30, 2009) at 1 (citation omitted) (Motion).

[2] Intervenor's [sic] Response to Applicant's Motion to Compel Disclosure of Bases for Expert Opinion With Regard to Contention 4 (Dec. 7, 2009) (Intervenors' Answer); NRC Staff Response to the Applicant's Motion to Compel Disclosure of Bases with Regard to Contention 4 (Dec. 10, 2009) (Staff Answer).

Progress also contends that the duty to make mandatory disclosures under 10 C.F.R. § 2.336(a)(1) applies to parties who have "claims and contentions," and, therefore, it (1) applies only to intervenors, and (2) does not apply to applicants, such as Progress, because applicants supposedly have no "claims or contentions." Motion at 5-6 & n.9. We reject this claim as inconsistent with both the letter and spirit of the regulations. It would create an unintended and invidious asymmetry in mandatory disclosures, which are the only form of discovery available in Subpart L proceedings. See 10 C.F.R. §§ 2.336(g), 2.1203(d).

I. Background

On July 28, 2008, Progress submitted an application to the NRC for permission to construct and operate proposed Levy Nuclear Plant Units 1 and 2 at a site in Levy County, Florida. On February 6, 2009, Intervenors filed their petition to intervene, supported by a 23 page declaration by their expert, Dr. Sidney T. Bacchus.[3] On July 8, 2009, the Board granted the petition, ruling that Intervenors had shown standing and had presented three contentions that met the admissibility criteria of 10 C.F.R. § 2.309(f)(1).[4] The Board also ruled that the 10 C.F.R. Part 2, Subpart L procedures are appropriate for each of the three contentions. Id. at __ (slip op. at 106).

Subsequently, the Board issued an initial scheduling order specifying that initial mandatory disclosures pursuant to 10 C.F.R. § 2.336 were due on September 1, 2009. Initial Scheduling Order (ISO), LBP-09-22, 70 NRC __, __ (slip op. at 4) (Aug. 27, 2009). On that date the Intervenors made their mandatory disclosures.[5] Intervenors' Disclosure referenced the declaration by Dr. Bacchus and provided other authorities in support of Contention 4. In

[3] Petition to Intervene and Request for Hearing by The Green Party of Florida, The Ecology Party of Florida, and Nuclear Information and Resource Service (Feb. 6, 2009).

[4] 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).

[5] Co-Intervenors [sic] Mandatory Disclosure of Documents September 1, 2009, Levy County Units 1 & 2 (Intervenors' Disclosure) (Sept. 1, 2009).

addition, Intervenors' Disclosure included an affidavit by their pro se representative that "this disclosure (including attachments A – F) is current as of August 31, 2009, that it is the result of an honest and good-faith effort . . . to catalogue and report the relevant documents and experts with whom we are working as of August 31, 2009." Intervenors' Disclosure at 1-2. Meanwhile, Progress stated that it is exempt from making initial disclosures under 10 C.F.R. § 2.336(a)(1). See Motion at 5 n.9, 6 n.14.

On November 30, 2009, Progress filed the instant motion challenging the adequacy of Intervenors' Disclosure.[6] The Intervenors and the NRC Staff filed their answers on December 7, 2009, and December 10, 2009, respectively.

II. Arguments of the Parties

The main thrust of Progress' argument is that the Intervenors' Disclosure failed to comply with 10 C.F.R. § 2.336(a)(1) "because no analysis or authority is provided with regard to certain specific conclusory opinions of their expert" concerning Contention 4. Motion at 1 (citation omitted). Progress states:

> Unless analysis or other authority adequate to provide an evidentiary basis for the intervenors' expert opinion is provided [in the initial mandatory disclosure], the applicant cannot prepare a challenge to the reliability of an expert; [sic] and hence the expert's credibility. An expert's conclusory opinions as the sole disclosure is [sic] contrary to the Commission's expectations . . . .

Id. at 8-9. Progress argues that the disclosure of the 23 page declaration from Dr. Bacchus is insufficient and violates 10 C.F.R. § 2.336(a)(1) because it is missing "the analysis or other authority that provides evidentiary bases for Dr. Bacchus' opinion adequate to show the opinion is sufficiently reliable to meet the . . . Intervenors' burden of going forward." Id. at 12 (citation omitted). Progress cites several cases for the proposition that it is "entitled to discovery against

[6] The deadline for motions challenging the adequacy of the initial disclosures was November 30, 2009. Licensing Board Order (Granting Motion for Extension of Time) (Oct. 27, 2009) (unpublished).

intervenors in order to obtain the information necessary for the applicant to meet its burden of proof." Id. at 9.

Given that this is a case of first impression and that the Intervenors are pro se, the answer by the NRC Staff herein was most helpful. The Staff urged that the motion be "denied because there is no requirement that the Joint Intervenors disclose in the initial disclosures the bases for their expert opinion if [such a written report] does not yet exist." Staff Answer at 1. The NRC Staff asserts that 10 C.F.R. § 2.336(a)(1), which states that the mandatory disclosures must include "a copy of the analysis or other authority upon which [the expert witness] bases his or her opinion" must be read in conjunction with 10 C.F.R. § 2.336(c), which states that each party shall make its initial disclosures "based on the information and documentation then reasonably available to it." Id. at 5 (emphasis in original). The Staff notes that when the Commission promulgated 10 C.F.R. § 2.336(a)(1), it stated that parties are required to disclose only "existing reports of their [expert's] opinions." Id. (emphasis in original) (citing Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2189 (Jan. 14, 2004)). The Staff also contrasts the mandatory disclosure requirement of 10 C.F.R. § 2.336(a)(1), which, it says, requires the disclosure of extant reports, with the mandatory disclosure provision of 10 C.F.R. § 2.704(b)(2) (for Subpart G proceedings), which affirmatively requires that each expert witness create, sign, and submit a written expert report. Id. at 7.

The NRC Staff rejects Progress' claim that the Intervenors have an evidentiary burden of going forward when they make their mandatory disclosures. Id. at 10. The Staff points out that while the Intervenors have the duty of going forward with affirmative evidence "at the hearing" and in the evidentiary filings "leading up to the hearing," there is no such requirement at the discovery stage, when the parties are merely exchanging information and documents inter se. Id. Similarly, the Staff rejects Progress' complaint that Dr. Bacchus' declaration must be excluded from the "record" as not "reliable" because, the Staff asserts, such concepts only apply "when a party submits evidence in this proceeding" and do not apply at the discovery stage. Id.

The Staff says that if Progress believes that Dr. Bacchus' testimony or evidence is not reliable, then Progress "may move to exclude that testimony [or evidence] under Section 2.319 when it is presented." Id. at 11. The Staff concludes:

> The Joint Intervenors, however, are not required to provide all of the background information they will eventually use at this point and they still have time before the hearing to discover further information to support any future testimony or exhibits. If any party attempts to include exhibits that were not disclosed in the mandatory disclosures, thus making it impossible for the other parties to examine the reliability of that information, then the Board may prohibit the admission of this new evidence into the record. 10 C.F.R. § 2.336(e)(2). This provision protects the parties from being surprised with new information at the eleventh hour.

Id.

The Intervenors raise similar themes in their answer. They argue that the motion should be denied because they (1) have provided Progress "with the analysis and authority as provided to this point by our expert," (2) have the "legal right to continue our investigation and develop the scientific basis of our position during the pendency of this matter," and (3) that they "understand our continuing legal obligations to supplement our response to discovery as we receive reports and additional scientific authority. . . ." Intervenors' Answer at 1-2. Intervenors assert that the mandatory discovery stage is not the proper forum for a challenge to the legal sufficiency of Intervenors' evidence, and that such issues are to be decided when Intervenors proffer their evidence at the hearing stage. Id. at 2. They state "[w]e find nowhere in 10 C.F.R. [§] 2.336(a)(1) a provision that compels specific information in initial mandatory disclosures as a 'burden for moving forward.'" Id.

Finally, given the sanctions associated with any failure to disclose the identity of a witness and his or her analysis or other authority, it is appropriate to address Progress' assertion that it is exempt from this aspect of mandatory disclosure. Specifically, Progress says that the mandatory duty to identify witnesses and to disclose their reports under 10 C.F.R. § 2.336(a)(1) is unilateral, applicable to intervenors but not to applicants. Motion at 5-6.

Progress' exemption argument proceeds as follows: First, Progress points out that 10 C.F.R. § 2.336(a)(1) requires the disclosure of witnesses and related information only by parties with "claims or contentions." Id. at 5. Second, it says that "[g]enerally, the parties with claims or contentions will be intervenors, not applicants." Id. at 5 n.9. Third, "[w]here only one party has claims and contentions, the naming of expert witness [sic] and providing of their reports would be unilateral." Id. at 6 n.14.

The unstated premise in the foregoing syllogism is that the phrase "claims and contentions" is limited to formal contentions that are admitted under 10 C.F.R. § 2.309(f)(1). Progress also argues that exempting applicants from the duty to disclose their experts (but requiring intervenors to do so) is fair - "[r]equiring that intervenors have more disclosure obligations is appropriate given the information provided by the applicant in a docketed application." Id. at 6. Progress supports this claim with several cases that state that applicants are entitled to discovery concerning the foundation of the intervenors' contentions. Id. at 6 n.13.

Neither the NRC Staff nor the Intervenors respond directly to Progress' argument that because the application is publicly available, the applicant is exempt from the duty to disclose the identity of its witnesses under 10 C.F.R. § 2.336(a)(1). But both the Staff and the Intervenors reject the proposition that the pre-2004 case law (indicating that all parties are "entitled" to discovery in formal adjudications) is controlling in a post-2004 Subpart L proceeding and thus "entitles" the applicant to conduct discovery in an informal adjudication. Staff Answer at 8, Intervenors' Answer at 2-3. The Staff notes that "fundamental changes" have occurred in the hearing process since the cases cited by Progress were decided and concludes that these cases are no longer good law. Staff Answer at 8. Intervenors agree, stating that NRC's 2004 amendments to its adjudicatory hearing regulations "renders the cases cited obsolete. . . ." Intervenors' Answer at 3.

III. Analysis

Our analysis begins with the words of the regulation, which states, in pertinent part:

> [A]ll parties . . . shall, within 30 days of the issuance of the order granting a request for hearing . . . disclose and provide: (1) The name and, if known, the address and telephone number 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). The regulation goes on to state that "[e]ach party and the NRC staff shall make its initial disclosures under paragraphs (a) and (b) of this section, based on the information and documentation then reasonably available to it." 10 C.F.R. § 2.336(c). The regulation adds that the duty of disclosure is "continuing" and requires that "any information or documents that are subsequently developed or obtained" be promptly disclosed. 10 C.F.R. § 2.336(d).

The plain language of the regulation makes it clear that 10 C.F.R. § 2.336(a)(1):

1. Applies to "all parties."

2. Requires the disclosure of all witnesses, not just expert witnesses, "upon whose opinion the party bases its claims and contentions and may rely upon as a witness."

3. Does not require the disclosure of a non-witness (e.g., an expert that the party consulted, but does not intend to use as a witness).

4. Does not require that each witness generate an "analysis," but rather calls for the disclosure of the "analysis or other authority" upon which the witness bases his or her opinion.

5. Does not set any substantive standard that the "analysis or other authority" must meet.

6. Does not require the disclosure of the name and telephone number of the witness, if this information is not known to the party.

7. Does not require the disclosure of "information and documentation" about the witness or his or her analysis or other authority if it is not then "reasonably available."

8. Requires that initial disclosures be made "within 30 days of the order granting a request for hearing," which is typically at least 18-24 months before the evidentiary hearing begins.

9. Requires that if, after the initial disclosure, a party subsequently develops or obtains additional information or documents that meet the requirements of 10 C.F.R. § 2.336(a)(1), then that party must promptly file a supplemental mandatory disclosure.

Other key points derive from the nature of the mandatory disclosures, the structure of the NRC regulations, and the operation of discovery principles in general. First, mandatory disclosures, as required by 10 C.F.R. § 2.336, consist of an exchange of prescribed information and documents between the litigants, and do not need to be submitted to the Board. Second, mandatory disclosures, like all discovery exchanges, cover a vast array of information and documents that are not evidence and need not meet the requirements of admissible evidence. See e.g., 10 C.F.R. § 2.705(b)(1) ("It is not a ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). Third, documents and information exchanged in the mandatory disclosures enter the adjudicatory record only if and when a party proffers the document or information as evidence for the evidentiary hearing.[7] Fourth, unless and until a document or information is proffered into evidence, there is no basis for a party to object that the information it received in a mandatory disclosure was unreliable or otherwise not admissible as evidence.[8] Fifth, if and when testimony or a document is proffered as evidence, a party may object thereto, and the Board will rule on the objection. LBP-09-22, 70 NRC at __ (slip op. at 17) (ISO. II.J.3). Finally, we note that the mandatory disclosure requirements of 10 C.F.R.

[7] See 10 C.F.R. § 2.1207(a)(1) (submission of initial written testimony with supporting affidavits) and LBP-09-22, 70 NRC at __ (slip op. at 16) (ISO II.J.1).

[8] See 10 C.F.R. § 2.319(e) (Boards are authorized to "[r]estrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence" (emphasis added)).

§ 2.336 are not an opportunity to re-litigate the admissibility of a contention, e.g., to re-litigate whether the intervenor provided a "concise statement of the alleged facts or expert opinions" supporting the contention or whether the expert analysis provided in the mandatory disclosure is "conclusory." 10 C.F.R. § 2.309(f)(1).

In light of the foregoing basic principles, Progress' claim - that the initial disclosure by the Intervenors under 10 C.F.R. § 2.336(a)(1) must include an "analysis or other authority adequate to provide an evidentiary basis for the intervenors' expert opinions," sufficient to allow Progress to "prepare a challenge to the reliability of [the] expert," (Motion at 8-9), and "adequate to show the opinion is sufficiently reliable to meet the . . . Intervenors' burden of going forward," (id. at 12) - is plainly incorrect. The language and structure of 10 C.F.R. § 2.336 make clear that initial disclosures occur very early in the proceeding, may be missing significant data (e.g., the address and phone number of the witness), need include only such information and documentation that is reasonably available at that time, and must be supplemented if and when a party subsequently develops or obtains additional information. In short, 10 C.F.R. §2.336(a)(1) requires only the disclosure of any written "analysis or other authority" that is extant and reasonably available to the party when the initial disclosures are made. NRC stated this proposition when it issued this regulation: "Parties . . . are . . . required to exchange the identity of expert witnesses, as well as existing reports of their opinions." 69 Fed. Reg. at 2189 (citation omitted) (emphasis added).[9]

The stark contrast between the mandatory disclosure requirements of Subpart G and Subpart L confirms this conclusion. The "required disclosures" provision of Subpart G mandates the disclosure of the identity of expert witnesses and states:

> [T]his disclosure must be accompanied by a written report prepared and signed by the witness, containing: A complete statement of all opinions

[9] See U.S. Dept. of Energy (High-Level Waste Repository), CLI-08-12, 67 NRC 386, 392 (2008) (ruling that the initial mandatory disclosures in Subpart J only apply to extant documentary material).

> to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

10 C.F.R. § 2.704(b)(2) (emphasis added). (This regulation is identical to Rule 26(a)(2) of the Federal Rules of Civil Procedure). One thing is clear. The mandatory disclosure requirements of 10 C.F.R. § 2.336(a)(1) contain no such provision.

In addition, as the Staff points out, Progress' argument that the information and documents exchanged in the initial disclosures must meet some substantive criteria, e.g., must "provide an evidentiary basis" for a contention, must show that the expert's opinion is "reliable" evidence, and/or must satisfy the Intervenors' "burden of going forward" with the evidence, is completely misguided. First, the plain language of the regulation specifies no such requirements. Second, these concepts only apply to the presentation of evidence at the evidentiary hearing stage, and not to the exchange of discoverable information (which is not evidence) at the mandatory disclosure stage. Cases holding that a party is "entitled" to ask interrogatories or take depositions concerning the other party's claims and contentions, while valid in formal adjudications where discovery is permitted (i.e., Subpart G and other pre-2004 proceedings), are invalid in informal adjudications, where such discovery is expressly prohibited. See 10 C.F.R. § 2.336(g), 2.1203(d).

Mandatory disclosure is not an opportunity to re-litigate the admissibility of Contention 4. Progress challenged the sufficiency of Dr. Bacchus' declaration earlier, at the contention admissibility stage. We rejected that challenge, found that the contention was sufficiently supported, and admitted it. LBP-09-10, 70 NRC at __ (slip op. at 44, 48). Progress is appealing the result. Applicant's Notice of Appeal from LBP-09-10 (July 20, 2009). In addition, Progress will have the opportunity to challenge the sufficiency of Dr. Bacchus' opinion again later at the evidentiary hearing stage, when evidence is proffered and may be challenged. LBP-09-22, 70

NRC at __ (slip op. at 17) (ISO II.J.3). And Progress may even challenge Dr. Bacchus' opinion in the current stage, via a motion for summary disposition, if it can show that there is "no genuine issue as to any material fact and that [it] is entitled to a decision as a matter of law" as required by 10 C.F.R. § 2.710(d)(2). But, unless Progress is asserting that the Intervenors have failed to disclose all of the extant "analysis or other authority" that Dr. Bacchus is currently relying on and that is reasonably available to the Intervenors at this time,[10] then Progress' challenge to the sufficiency of the Intervenors' initial disclosures must be rejected.

We hold that the documents submitted by Intervenors as Dr. Bacchus' "analyses or other written authority," including her 23 page declaration, satisfy 10 C.F.R. §2.336(a)(1). We further hold that this regulation creates no substantive criteria for the quality of the "analysis or other authority" that must be disclosed. Further, we rule that 10 C.F.R. § 2.336(a) simply governs the mandatory exchange of certain discovery information and documents and imposes no evidentiary hurdle or "burden of going forward" with the evidence that must be met in the initial disclosures.

Finally, we turn to Progress' startling assertion that it is exempt from the duty to disclose the identity of its witnesses and the "analysis or other authority" upon which they base their opinions. We reject Progress' claim (a word we use advisedly) that the phrase "claims and

[10] The duty to disclose applies to the parties and the NRC Staff ("[e]ach party and the NRC staff shall make its initial disclosures . . . based on the information and documentation then reasonably available to it." 10 C.F.R. § 2.336(c) (emphasis added)). But, as we see it, this obligation flows down to an individual who is retained to serve as expert witnesses on behalf of a party. Thus, if the expert witness has "a copy of the analysis or other authority" upon which his or her opinion is based, see 10 C.F.R. § 2.336(a)(1), and it is extant and reasonably available to that witness and/or the party, then the mandatory disclosure should include that "analysis or other authority." We note that the phrase "other authority" does not require the production of an extensive library of articles or material only tangentially referenced by the expert, but only the authority substantially relied upon by the expert and likely to be proffered as a supporting exhibit at the hearing. Further, this duty is a continuing one and if an expert witness is subsequently selected, or any "analysis or other authority" is subsequently amended or newly developed, then this information must be promptly disclosed. 10 C.F.R. § 2.336(d). Finally, if the "other authority" that the expert is relying upon is already available to the opposing party and/or subject to copyright or other restrictions, then the parties may agree among themselves as to a reasonable method for disclosing it.

contentions" in 10 C.F.R. § 2.336(a)(1) must be read narrowly and applies only to intervenors and not to applicants. First, we conclude that the phrase "claims and contentions" should be read in its normal sense. A "claim" is "an assertion, statement, or implication." Webster's Third New International Dictionary (Unabridged) (1993). Likewise, a "contention" is simply "a point advanced or maintained in a debate or argument." Id. Notwithstanding the fact that the term "contention" is used as a term of art elsewhere in the NRC regulations, in the context of 10 C.F.R. § 2.336(a)(1), the term "contention" means simply a point or argument asserted or advanced by a party – any party.[11] Applying these terms in context, it is clear that both applicants and intervenors make numerous "claims" and "contentions" in the course of the typical ASLBP adjudicatory hearings. For example, our ruling on the admissibility of contentions (LBP-09-10) described Progress as "claiming" a certain point or "contending" a certain position no less than ten times. This is the natural sense of these terms and the common parlance of our adjudications.

Second, even if the term "contention," as used in 10 C.F.R. § 2.336(a)(1) must be read as pertaining only to formal contentions admitted under 10 C.F.R. § 2.309(f)(1), the other term in 10 C.F.R.§ 2.336(a)(1), the term "claim," is not so constrained, and can only be read in its normal sense. Thus, for example, Progress "claims" that its application is sufficient and complete. Progress "claims" that its environmental report is adequate. Progress "claims" that

[11] It is a well-founded principle of statutory construction that the meaning of a word can vary, depending on the context in which it is used. The same word can have different meanings when it is used in different contexts in different parts of the same statute or regulation. "Since most words admit of different shades of meaning, susceptible of being expanded or abridged to conform to the sense in which they are used, the presumption [that identical words in a statute always have identical meaning] readily yields to the controlling force of the circumstance that the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent." Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 87 (1934). See also Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation) CLI-02-29, 56 NRC 390, 400 (2002) (rules of statutory construction must be employed to give "each word Congress used a separate and distinct significance which is consistent with its ordinary meaning"); Greenbaum v. EPA, 370 F.3d 527, 535-36 (6th Cir. 2004); United States v. Alghazouli, 517 F.3d 1179, 1187 (9th Cir. 2008); United States v. Tobeler, 311 F.3d 1201, 1206 (9th Cir. 2002).

the ER has adequately discussed the problem of dewatering. Progress "claims" that the impact of salt drift is small. If it expects to proffer witnesses to support such claims, it must disclose their names, and their "analysis or other authority" pursuant to 10 C.F.R. § 2.336(a)(1), just as the Intervenors must.

This Board holds that the phrase "claims and contentions" as used in 10 C.F.R. § 2.336(a)(1), includes any assertion, statement, or argument, positive or negative, in support of an intervenor's position or an applicant's position, that is advanced by any party. It is not limited to the formal "contentions" that meet the strict criteria of, and are admitted under, 10 C.F.R. § 2.309(f)(1). Our interpretation is consistent with the language of 10 C.F.R. § 2.336(a), which states it applies to "all parties." It is consistent with the Commission's statements when the regulation was promulgated (e.g., specifying that the "parties" must "exchange" the identity of expert witnesses. 69 Fed. Reg. at 2189 (emphasis added)). Certainly, this interpretation is consistent with the overarching goal of providing equitable treatment to all parties in our adjudications, by preventing one party from subjecting another to unfair surprise by withholding the identity of its witnesses, and the witnesses' analyses or other supporting authority, until the evidentiary hearing begins.[12]

As Progress has pointed out, this Board may impose sanctions "including dismissal of the specific contentions, dismissal of the adjudication, [or] dismissal of the application" for any continuing unexcused failure to make the required mandatory disclosures. 10 C.F.R. § 2.336(e)(1). These sanctions are available against any "party that fails to provide any document or witness name." 10 C.F.R. § 2.336(e)(2). We encourage both parties to comply with the mandatory disclosure responsibilities set forth above.

[12] It is worth noting that while section 2.336(a)(1) uses language that is somewhat different from Federal Rule of Civil Procedure 26(a)(1)(A), which is the apparent model for this NRC provision, thereby reflecting the distinctive procedural posture of NRC proceedings (i.e., "claims and contentions" in section 2.336(a)(1) verses "claims and defenses" in Fed. R. Civ. P. 26(a)(1)(A)), our interpretation of the NRC provision is fully consistent with the evenhanded approach to party disclosures taken in Rule 26(a)(1)(A).

For the foregoing reasons, Progress' Motion to Compel Disclosure of Bases for Expert Opinion with Regard to Contention 4 is denied.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[13]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA, by E. Roy Hawkens for/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA, by E. Roy Hawkens for/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 29, 2009

[13] 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	)	
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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 LB ORDER (DENYING MOTION TO COMPEL DISCLOSURE OF BASES FOR EXPERT OPINION) (LBP-09-30) have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

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