

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)		
	)	Docket Nos.	52-029-COL
Progress Energy Florida, Inc.	)		52-030-COL
	)		
Combined License Application for	)		
Levy County Nuclear Plant, Units 1 and 2	)	ASLBP No.	09-879-04-COL

**Progress Energy’s Answer Opposing Joint Intervenors’  
Motion for Extension of Time to File Amended or New Contentions on Hydroecology**

I. Introduction

On September 27, 2010, Joint Intervenors<sup>1</sup> filed a motion requesting an additional 90 days for the timely filing of new contentions on hydroecology and amendments to Contention 4.<sup>2</sup> Progress Energy Florida, Inc. (“Progress”) hereby opposes the JI Extension Motion for a 90-day extension (until January 3, 2011) because the request to modify the schedule established by the Board<sup>3</sup> lacks good cause.

II. Background

This proceeding involves the Combined Operating License Application (“COLA”), submitted by Progress on July 28, 2008, for the proposed Levy County Nuclear Plant (“Levy”) in Levy County, Florida. Joint Intervenors filed their “Petition to Intervene and Request for Hearing” on February 6, 2009, alleging several separate contentions. On July 8, 2009, the Board found portions of three contentions to be admissible, including portions of Contention 4 (Environmental Impacts of Dewatering and Salt Drift).<sup>4</sup>

On August 14, 2009, the NRC Staff filed a Joint Motion describing the agreement of the Parties on several scheduling issues, including agreement that contentions based on new information in the Draft

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<sup>1</sup> The Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service are referred to as “Joint Intervenors.”

<sup>2</sup> Joint Intervenors’ Motion (Motion For Extension of Time to File Amended or New Contentions on Hydroecology), Sept. 27, 2010 (“JI Extension Motion”).

<sup>3</sup> Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 N.R.C. \_\_ (slip op. at 14-15) (Aug. 27, 2009) (“ISO”).

<sup>4</sup> Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 147, 149 (2009).

Environmental Impact Statement (“DEIS”) would be deemed timely if filed within 60 days of when the information first becomes available. NRC Staff Motion (Joint Motion Regarding Enumerated Matters in Initial Scheduling Conference Order) (Aug. 14, 2009) at 2. After the Board held a scheduling conference in this proceeding on August 18, 2009, the Board issued its ISO. The ISO states that a “motion and proposed new contention specified . . . 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.” ISO at 9. At the request of the Joint Intervenors and NRC Staff, without objection from Progress, the Board clarified that for new information in the DEIS, the filing deadline was 60 (not 30) days. Licensing Board Order (Granting Motion for Clarification) (Sept. 3, 2009) (unpublished).

On August 5, 2010, the NRC issued its DEIS for Levy, NUREG-1941.<sup>5</sup> The public comment period on the DEIS runs until October 27, 2010. Availability of the Draft Environmental Impact Statement for the Combined Licenses for Levy Nuclear Plants Units 1 and 2, 75 Fed. Reg. 49,539, 49,450 (Aug. 13, 2010).

### III. The JI Extension Motion Lacks Good Cause

The JI Extension Motion lacks good cause for modifying the schedule established in the ISO for filing new or amended contentions. NRC regulations state that the “hearing schedule may not be modified except upon a finding of good cause by the” Board. 10 C.F.R. § 2.334(b). The JI Extension Motion does not establish good cause because: (a) there is an apparent lack of diligence in complying with the issued schedule; (b) it does not reflect Joint Intervenors’ obligation to structure their participation to be meaningful; (c) Joint Intervenors do not establish what hardship the extension alleviates; and (d) the JI Extension Motion does not have agreement of the Parties.

(a) Considering a party’s diligence in complying with the schedule is one factor the Board is expected to weigh in determining good cause for an extension. 10 C.F.R. § 2.334(b)(1). While the JI

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<sup>5</sup> See NRC Letter from Scott C. Flanders, Director Division of Site and Environmental Reviews, NRR, to John Elnitsky, Progress Energy Vice President, Nuclear Plant Development (Aug. 5, 2010). This letter was forwarded to the Parties by the NRC Staff (J. Martin) on that same date. NRC Staff Filing (NRC Eleventh Status Report) (Aug. 5, 2010).

Extension Motion describes why Dr. Bacchus is unable to participate, it does not discuss any actions by Joint Intervenors to diligently pursue compliance with the schedule. As Joint Intervenors concede, Dr. Bacchus inability to participate has been known for some time. JI Extension Motion at 2. The JI Extension Motion does not describe any effort to find alternate expertise. It is long-standing NRC policy that parties are expected to bring the resources necessary to participate in an NRC proceeding. Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 18-19 (1998) (citing Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)).

(b) In determining if there is good cause for an extension, the Board is expected to consider the circumstances. 10 C.F.R. § 2.334(b). The public comment period on the DEIS closes October 27, 2010. The public comment period is the principal means for the public to meaningfully impact the agency's environmental review. 42 U.S.C. § 4332(C); 40 C.F.R. § 1503.1(a)(4). There is an obligation to structure participation in the agency's NEPA review process to be meaningful. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977) (describing the general obligation to comment during the public comment period). The JI Extension Motion effectively requests an open-ended delay in participating.<sup>6</sup> The Board should weigh the fact that Joint Intervenors are requesting a delay beyond the public comment period for the DEIS and that such a delay is inconsistent with the proper exercise of the NEPA process.

(c) The Parties mutually agreed that 60 days would be adequate time to file new or amended contentions on new information in the DEIS. The ISO provides procedures regarding additional contentions filed outside such periods; specifically requiring the filing to address 10 C.F.R. § 2.309(c) instead of 10 C.F.R. § 2.309(f)(2). ISO at 9. The Joint Intervenors do not identify what hardship they would suffer from complying with the ISO. If the JI Extension Motion is not granted and if Joint

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<sup>6</sup> Progress regrets Dr. Bacchus's medical condition and wishes her a speedy recovery, but the Joint Intervenors were obliged to consider that the unavailability of Dr. Bacchus due to multiple surgeries may require retaining another expert.

Intervenors file a motion or request for leave to file a new or amended contention late, the Board can determine the admissibility of that contention using the criteria specified in the ISO.

(d) Considering the agreement of the other parties is one factor the Board is expected to weigh in determining good cause for an extension. 10 C.F.R. § 2.334(b)(3). The other parties do not agree to the JI Extension Motion. See JI Extension Motion at 2.

When the above factors are balanced against the long-standing medical condition of Dr. Bacchus, the weight is against finding good cause for the proposed change to the mutually agreed upon schedule. The procedures established by the ISO are adequate to allow consideration of any late-filed contentions the Joint Intervenors may file and there is not good cause for changes to the ISO.

IV. Conclusion

For the reasons set forth above, Progress requests that this Board deny the JI Extension Motion.

V. Certification

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.

Respectfully Submitted,

/Signed electronically by Robert B. Haemer./  
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Dated: September 28, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of the foregoing Progress Energy's Answer Opposing Joint Intervenor's Motion for Extension of Time to File Amended or New Contentions on Hydroecology, dated September 28, 2010, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 28<sup>th</sup> day of September 2010.

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