

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. Randall J. Charbeneau

In the Matter of

PROGRESS ENERGY FLORIDA, INC.

(Levy County Nuclear Power Plant, Units 1 and 2)

Docket Nos. 52-029-COL, 52-030-COL

ASLBP No. 09-879-04-COL-BD01

May 23, 2012

MEMORANDUM AND ORDER

(Ruling on Motions for Extension of Time and Motion to
Change the Trigger Date for the Evidentiary Hearing)

On March 19, 2012, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida¹ (collectively, Intervenors) moved for a 30-day extension of time for the filing of their initial testimony, exhibits, and statement of position (Initial Filings).² Progress Energy Florida, Inc. (PEF) filed an opposition to the motion.³ NRC Staff did not file a

¹ We note that as of the time this Memorandum and Order was issued, the Green Party of Florida has withdrawn as an Intervenor in this proceeding. See Notice of Withdrawal (May 17, 2012).

² Intervenors' Motion for Extension of Time (Mar. 19, 2012) at 1 ("Motion"). We note that although the motion was filed as an extension of time, the extension would modify the hearing for the schedule for proceeding and thus we treat it as a motion under 10 C.F.R. § 2.334(b).

³ Progress Energy's Answer Opposing Joint Intervenors' Motion for Extension of Time (Mar. 21, 2012) ("PEF Answer").

response to the Joint Intervenors' motion. On April 10, 2012, the Intervenors filed a supplemental motion requesting either that the Board change the Trigger Date⁴ for the Initial Filings, or in the alternative, grant a 60-day extension for such filings.⁵ PEF and the NRC Staff opposed this motion.⁶ On April 27, 2012, the Board issued a two-page order denying Intervenors' motions.⁷ Upon further consideration, the majority of this Board has concluded that the preliminary ruling of April 27, 2012 should be revised. For the reasons set forth below, we revise our April 27, 2012 Order and grant the Intervenors' request for a 30-day extension, although we grant that relief in the form of one 15-day extension for submission of Initial Filings and one 15-day extension for submission of Rebuttal Filings.⁸ Our ruling denying the Supplemental Motion remains unchanged by this Order.

⁴ The Trigger Date is the date for initiation of evidentiary hearing filings and is specified as the date when the NRC Staff makes the FEIS publicly available or the date when the Advisory Committee on Reactor Safety makes its final report on the PEF application publically available, whichever is last to occur. LBP-09-22, 70 NRC at 654.

⁵ Supplemental Motion for Extension of Time and Request for Staff Analysis of RAI Seismic Study as Hearing Trigger (Apr. 10, 2012) ("Supplemental Motion").

⁶ Progress Energy Florida, Inc.'s Answer Opposing Joint Intervenors' Supplemental Motion for Extension of Time (Apr. 17, 2012) ("PEF Supplemental Answer"); NRC Staff Answer to Joint Intervenors' Request for an Extension of Time (Apr. 17, 2012) ("NRC Staff Supplemental Answer").

⁷ Board Order (Denying Motions for Extension of Time and Motion to Change the Trigger Date for the Evidentiary Hearing) (Apr. 27, 2012) (unpublished).

⁸ For the purposes of this Memorandum, Rebuttal Filings refer to those filings discussed in Section J.2 of our Initial Scheduling Order. LBP-09-22, 70 NRC 640, 655 (2009).

I. Procedural Background

On August 27, 2009, we issued our initial scheduling order (ISO) governing the conduct of this proceeding. LBP-09-22, 70 NRC 640 (2009). The ISO mandated that the Initial Filings be filed 45 days after the Trigger Date. Id. at 654.

On January 12, 2012, the Board conducted a prehearing conference wherein we informed the parties that in addition to the requirements of the ISO, we would require that any motion to delay the adjudication for more than seven days based on medical or disability issues be “accompanied by signed documentation from a medical provider that explains (a) what’s the problem and when did it arise, and (b) justifying the amount of time being asked for.” Tr. at 862. We also reminded the parties that any such motion must be filed promptly, within 10 days after the party learns of the problem. Id.; see 10 C.F.R. § 2.323(a).

On March 19, 2012, Intervenors filed a motion seeking an extension of “up to 30 days” for submitting their Initial Filings due to the medical issues of their expert witness, Dr. Sydney Bacchus. Motion at 1. On March 22, 2012, the Board issued a memorandum stating that the Motion did not provide adequate documentation and requesting that the Intervenors submit the required documentation within 10 days.⁹ We stated that the motion would be discussed at a (previously scheduled) March 29, 2012 prehearing conference call. Id. at 3.

During the March 29, 2012 prehearing conference call, the Board heard oral argument from the parties on the Motion and took testimony from Dr. Bacchus regarding her medical

⁹ Board Memorandum (Request for Information) (Mar. 22, 2012) at 2-3 (unpublished) (“Board RFI”).

conditions. See Tr. at 952-1026.¹⁰ At the conclusion of the call, the Board stated that the Intervenor would have until April 10, 2012 to supplement their motion with the proper medical documentation. Tr. at 1021-22. We gave NRC Staff and PEF until April 17, 2012, to respond to any such supplementary filing. Tr. at 1022.

On April 10, 2012, Intervenor filed a new request that the Board either change the Trigger Date for the Initial Filings or grant them a 60-day, rather than a 30-day, extension to submit those filings. Supplemental Motion at 1. On April 17, 2012, PEF and NRC Staff filed answers opposing the Supplemental Motion. See PEF Supplemental Answer and NRC Staff Supplemental Answer.

On April 27, 2012, the Board issued a two-page order denying the Intervenor's motions, and stating that a complete memorandum articulating our reasoning in this matter would follow.¹¹

II. Analysis and Ruling on Request to Change the Trigger Date

The Intervenor is requesting that the Trigger Date for the evidentiary filings and hearing on Contention 4A (C4A) be changed from the date of issuance of the FEIS to the date of publication of the NRC's analysis of PEF's response to a Request for Information (RAI 108) issued by the NRC Staff on March 25, 2012 (which requested certain information regarding seismic issues at the proposed Levy site). Intervenor contends:

¹⁰ We note that part of the transcript of this teleconference has been redacted because it contains private medical information.

¹¹ Board Order (Denying Motions for Extension of Time and Motion to Change the Trigger Date for the Evidentiary Hearing) (Apr. 27, 2012) (unpublished) ("April 27 Order").

[T]he seismic study . . . may yield information necessitating yet other changes in the construction of [Levy Units 1 and 2]. . . . [A]ny changes in construction size, methods and equipment could have bearing on issues that are within the scope of Contention 4A. Additionally, the study may reveal data relevant to the karst features connecting springs, rivers and other water-bodies and, therefore those data would be relevant to our Contention.

Supplemental Motion at 3-4.

After reviewing the pleadings, we decline to change the Trigger Date. We note that C4A, the only remaining admitted contention in this proceeding, is an environmental contention, whereas RAI 108 is focused on safety issues. The Staff has stated that RAI 108 and PEF's responses thereto will not result in any change or supplement to the FEIS. Tr. at 941. Having no reason to doubt this statement, we see no reason to postpone the Trigger Date for C4A and therefore deny the request to change the trigger date.¹²

III. Analysis and Ruling on the Motions to Extend Time for the Initial Filings

The Motion requests a 30-day extension due to past and possible future medical issues of Dr. Bacchus, "based on medical necessity as good cause." Motion at 3. The Motion attached signed medical documentation that described (as required by the Board) "what's the problem and when did it arise"¹³ and "justifying the amount of time being asked for."¹⁴ An

¹² We note, however, that Intervenor will have an opportunity to file new contentions based on RAI 108 or any NRC response to that RAI under 10 C.F.R. § 2.309(f)(2), as they would with any new and material information.

¹³ See Motion at Attach. 2 ("3/13 Bell Letter") (stating inter alia Dr. Bacchus underwent two oral bone graft surgeries and at least one other related surgical procedure, which can be "extremely painful" and "recovery from the procedure . . . and subsequent procedures are lengthy, some requiring six months to a year." Her most recent surgery was in February 2012, and a third may be required. In March 2012 [the time of the Motion], Dr. Bacchus was reporting "extensive pain.").

Affidavit by Dr. Bacchus herself raised further questions and led to the Board RFI and discussion at the March 29, 2012 Teleconference.¹⁵ At the Teleconference, the NRC Staff stated they “did not at first take a position on the request because we did not have sufficient facts to determine whether good cause existed. And that remains that [sic] case.”¹⁶ PEF opposed the motion primarily due to concerns about impacts to the schedule.¹⁷

Notwithstanding the Board’s April 27 Order, based on a more comprehensive, post-April 27 review of the record associated with Intervenors’ extension request, we have concluded that the Intervenors’ Motion requesting a 30-day extension should be granted for good cause shown under 10 C.F.R. § 2.334(b). Section 2.334(b) states “[a] hearing schedule may not be modified except upon a finding of good cause,” and states the Board should take into account, inter alia, the following factors in making a good cause determination:

- (1) Whether the requesting party has exercised due diligence to adhere to the schedule;
- (2) Whether the requested change is the result of unavoidable circumstances; and
- (3) Whether the other parties have agreed to the change and the overall effect of the change on the schedule of the case.¹⁸

¹⁴ See 3/13 Bell Letter (indicating the healing process is lengthy and Dr. Bacchus has experienced substantial pain).

¹⁵ Board RFI at 2. The Affidavit itself was an unnecessary component to the Motion, but its addition brought up an undocumented vision disability, a claim of Americans with Disabilities Act protection, and discussion about the release date of Staff documents. Motion Attach. 1 at 2.

¹⁶ Tr. at 966

¹⁷ Tr. at 961-64.

¹⁸ 10 C.F.R. § 2.334(b). The Intervenors filed their Motion under 10 C.F.R. § 2.307(a), which also references extensions and good cause, but is not the applicable provision here.

The Board previously stated that extensions would be granted for good cause shown, declaring “if there’s a request for a greater than 7 day delay based upon medical or disability issues . . . [the request] must be accompanied by signed documentation from a medical provider that explains (a) what’s the problem and when did it arise, and (b) justifying the amount of time being asked for.” Tr. at 861-62. At that time, the Board also warned that all requests for medical/disability-related extensions must be made within 10 days of knowledge of a potential delay.¹⁹

In granting Intervenors’ Motion, we provide a somewhat altered version of the relief requested in that motion. That is, rather than granting Intervenors one 30-day extension to file their Initial Filings, we grant them one 15-day extension for submission of their Initial Filings, and one 15-day extension for submission of their Rebuttal Filings.²⁰ Our grant of the first 15-day extension is supported by the extensive medical documentation before us that outlines a history of medical problems, particularly those associated with the multiple dental surgeries and infections that have caused Dr. Bacchus hardship in performing her duties as an expert witness for the Intervenors. While this hardship was ongoing, the Intervenors exercised due diligence in seeking to adhere to the established hearing schedule as required by 10 C.F.R. § 2.334(b)(1). For example, when Dr. Bacchus was experiencing reading difficulties, Dr. Bacchus utilized

¹⁹ Tr. at 861 (citing 10 C.F.R. § 2.323(a)). We note that this requirement relating to medical or disability issues supplements our ISO, which states “[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 submission for which an extension is sought.” LBP-09-22, 70 NRC 640, 649 (2009). However, no objection or question was raised about this additional requirement, and, in any event, we find the Motion timely under either standard.

²⁰ We will grant the same extension to the Staff and PEF and modify the schedule set out in LBP-09-22 to reflect all necessary changes that would follow.

“Read Aloud” software and was read to aloud in person, a process we believe she correctly characterized as “very slow.” Tr. at 1006. Second, the Intervenor’s request was unavoidable pursuant to 10 C.F.R. § 2.334(b)(2). The 3/13 Bell Letter not only discusses a surgery performed a month prior to the date of that letter, but notes that the recovery process from such a surgery is “lengthy, sometimes requiring 6 months to a year.” 3/13 Bell Letter. This in itself is “good cause” under 10 C.F.R. § 2.334(b) to grant Dr. Bacchus some additional time to make up for lost time as a result of her February surgery and account for any continuing challenges as she continues her responsibilities.²¹ Repeated oral surgeries and the accompanying painful recovery are “unavoidable circumstances.”

We grant the second 15-day extension for preparation of Intervenor’s Rebuttal Filings because we want to avoid any further instance in which the Board’s and the parties’ preparation for the upcoming hearing is sidetracked by responding to any additional extension motions for medical reasons.²²

We note also that the Motion can be granted without prejudice to PEF, which is the only party that objected to the 30-day extension motion. The current scheduling order contemplates a window of possible hearing dates that would not be impacted by the 30-day extension we are providing, LBP-09-22, 70 NRC at 656, and the final hearing date, which ultimately was chosen

²¹ Dr. Bacchus indicated during the Teleconference that she had bouts of excruciating pain and had multiple infections, but on the day of the call her “jaw issue [was] not a problem.” Tr. at 979-88. At the Teleconference, Dr. Bacchus also discussed under oath her vision difficulties. Tr. at 988-97. While we consider the vision issue as more consequential to the Supplemental Motion, we note that Dr. Bacchus also declared that reading takes her “longer.” Tr. at 994.

²² Dr. Bacchus has a scheduled appointment with her medical provider on June 5, 2012 concerning her surgery and that could result in an additional medical procedure similar to the one that occurred previously. See Supplemental Motion at Attach. 1, Bell letter, 3/27/12.

based on venue availability, would also not be impacted by this extension. With the appropriate adjustments to its filing dates, granting the Motion will not prejudice PEF's preparation for the hearing and does not impact our final hearing date – the final consideration of concern suggested by §2.334(b). Therefore, the Motion meets the requirements of 10 C.F.R. § 2.334(b). Thus, the part of the April 27 Order that denied the Motion is hereby revised in that we grant a 15-day extension to the Intervenors and the other parties for the submission of both their Initial Filings and their Rebuttal Filings.

The Intervenors' Supplemental Motion and the filings of the Staff and PEF also raise several other issues that we must address, in brief, here. Dr. Bacchus has asserted she has certain rights relative to the Americans with Disabilities Act (ADA).²³ Notwithstanding the Intervenors misplaced citation to the ADA,²⁴ it is apparent that the NRC has regulations implementing a similar congressional enactment, the Rehabilitation Act, in 10 C.F.R. §§ 4.500 through 4.999, which governs the treatment federal agencies are to afford a person with a disability.²⁵ Assuming that as an expert witness in this proceeding, Dr. Bacchus is covered by

²³ Motion at Attach. 1; Supplemental Motion at 10-13; Supplemental Motion at Attach. 1, Kamleiter letter, 4/10/12.

²⁴ The ADA is not applicable to federal agencies. See, e.g., Dyrek v. Garvey, 334 F.3d 590, 597 n.3 (7th Cir. 2003) ("The ADA does not apply to federal agencies.").

²⁵ The regulations in 10 C.F.R. Part 4 implement:

(b) The provisions of section 504 of the Rehabilitation Act of 1973, as amended, Pub. L. 93-112 (87 Stat. 355; 29 U.S.C. 701 note), Pub. L. 95-602 (92 Stat. 2955; 29 U.S.C. 701 note), which relates to nondiscrimination with respect to the handicapped in any program or activity receiving Federal financial assistance;

10 C.F.R. § 4.1(b).

the Rehabilitation Act under our regulations,²⁶ these regulations would place the burden on the Intervenor to prove not only that Dr. Bacchus is a “handicapped person” pursuant to 10 C.F.R. § 4.503, but that she is a “qualified handicapped person” as defined in to 10 C.F.R. § 4.503(2).²⁷ Furthermore, after these hurdles are surmounted, the Board would then be tasked with deciding what (if any) extension request is a reasonable accommodation – balancing Dr. Bacchus’s medical uncertainties, Dr. Bacchus’s ability to complete tasks with other accommodation, and our obligation to conduct an efficient, fair hearing.²⁸

The regulations define “handicapped person” as “a person who has a physical or mental impairment that substantially limits one or more major life activities.” 10 C.F.R. § 4.503 (emphasis added). But the record before us regarding Dr. Bacchus’s condition does not provide a prima facie showing on this preliminary requirement.

First, the record before us has several internal contradictions that prevent us from developing a clear and documented showing of a disability. For example, Dr. Bacchus’s

²⁶ While various provisions of Part 4 are relevant to agency activities, 10 C.F.R. § 4.530 speaks directly to the issue at hand stating: “No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise subjected to discrimination under any program or activity conducted by the agency.” 10 C.F.R. § 4.530(a). Section 4.530(b) states that “[t]he agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap” 10 C.F.R. § 4.530(b)(6).

²⁷ The United States Courts of Appeals have universally held in various contexts that it is the prima facie burden of the party making a Rehabilitation Act claim to show the existence of a handicap under the Act and to demonstrate that the requesting individual is a “qualified handicapped person.” See Halpern v. Wake Forest Univ. Health Scis., 669 F.3d 454, 461 (4th Cir. 2012); Donahue v. Consol. Rail Corp., 224 F.3d 226, 229 (3d Cir. 2000); Hamm v. Runyon, 51 F.3d 721, 724 (7th Cir 1995); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993); Taub v. Frank, 957 F.2d 8, 10 (1st Cir. 1992).

²⁸ Since we have granted the request, albeit in a different manner, this consideration is moot here.

ophthalmologist states that “her vision measures 20/20 [sic] each eye with minimal distance correction” and assesses “her eyes are very healthy.” However, he also acknowledges “several significant floaters in the left eye as well as some floaters in the right eye.” Supplemental Motion, at Attach. 1, Dong Letter, 3/29/12. He states that this has been the likely source of Dr. Bacchus’s reading difficulties, but that there is “no treatment” and “typically patients adjust . . . over time.” Id.

Dr. Bacchus’s testimony is similarly unsettled. While experiencing “extreme difficulty” with a “blurry bubble,” Dr. Bacchus did not follow up with her doctor for thirteen months – and does not have another appointment for two years. Id.; Tr. at 991-92. This record is insufficient to find the Intervenors have made a prima facie showing that Dr. Bacchus is a “handicapped person” pursuant to 10 C.F.R. § 4.503 with regard to her vision difficulties.

Dr. Bacchus’s dental documentation sits on even shakier legal ground. Federal courts have held that the Rehabilitation Act applies only to impairments that are “permanent or long term.”²⁹ While Dr. Bacchus’s evidence regarding her dental condition indicates some uncertainty about the length of recovery, nowhere did Dr. Bell indicate that Dr. Bacchus’s condition was of a “permanent or long term” nature. The documentation also fails to show that Dr. Bacchus suffers from a substantial limitation to a major life activity. While immediately post-surgery Dr. Bacchus struggled to eat, Dr. Bacchus herself testified that her dental issues are not currently causing her problems. Tr. at 988. For those reasons, the Intervenors have also failed

²⁹ McGeshick v. Principi, 357 F.3d 1146, 1150 (10th Cir. 2004) (citing Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002)). See also Rolland v. Potter, 492 F.3d 45, 47-48 (1st Cir. 2007) (citing same and explaining why the Supreme Court’s ADA decision in Toyota is directly relevant to Rehabilitation Act cases).

to make a prima facie showing that Dr. Bacchus's dental problems qualify Dr. Bacchus as a "handicapped person" pursuant to 10 C.F.R. § 4.503.

Moreover, to the extent that the Supplemental Motion's 60-day extension request also warrants a good cause determination, we find there are no grounds for such an extension. An extension of such length, to which both PEF and the NRC Staff objected, will cause prejudice to both parties. Further, while Dr. Bacchus and the Intervenors are entitled to some extension for good cause shown, 60 days is not a reasonable request. The ISO, issued in 2009, set the deadline for the Initial Filings as 45 days after the Trigger Date. To extend it by an additional 60 days, after the Intervenors stated in the first Motion that only "up to a 30 day extension" would be necessary, Motion at 3, lacks sufficient justification and was not "unavoidable."

Finally, we advise the parties that we would be hard pressed to grant any further future extensions to the Intervenors regarding their pre-hearing filings absent extraordinary circumstances.

IV. Conclusion

For the foregoing reasons,

- 1) The April 27, 2012 Order is revised inasmuch as we GRANT Intervenors' initial extension motion and structure the relief to provide all parties a 15-day extension to submit their Initial Filings, and a 15-day extension to submit their Rebuttal Filings;
and
- 2) The Intervenors' Supplemental Motion is DENIED.

Any party aggrieved by this ruling may file a petition for interlocutory review by the Commission in accordance with the provisions of 10 C.F.R. § 2.341(f). Any such petition must be filed within fifteen (15) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD³⁰
/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Randall J. Charbeneau
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 23, 2012

³⁰ The separate opinion of Judge Karlin follows.

SEPARATE OPINION BY JUDGE KARLIN CONCURRING IN PART AND DISSENTING IN PART IN PART

I concur with my colleagues that the Intervenor's motion to change the Trigger Date should be denied. I dissent, however, from their reversal of our unanimous April 27, 2012 decision. Nothing has happened since that decision to change my mind. I see no reason to grant relief to the Intervenor that they did not request,¹ that will not satisfy them, that the other parties oppose, and that they do not deserve. In my opinion, the Majority's reversal is legally incorrect and will lead to additional delays in this proceeding. And despite the Majority's admonishment that no further extensions will be granted, I can see no principled basis upon which the Board can grant this extension request, and deny the (inevitable) next one(s).

I analyze the facts and the law as follows:

First, the Intervenor's two motions for extension are plainly untimely under this Board's prior scheduling order and 10 C.F.R § 2.323(a). We established the 45-day deadline for the Initial Filings on August 27, 2009. LBP-09-22, 70 NRC 640, 654 (2009). Meanwhile, the Intervenor and Dr. Bacchus acknowledge that they have been aware of Dr. Bacchus's chronic medical issues since at least 2010.² Yet the requests to change the 45-day deadline (to 105 days) were not filed until the spring of 2012, on the veritable eve of the Initial Filings. These motions should be denied as untimely.

¹ Intervenor requested an extension for their Initial Filings (first 30 and then 60 days) and indicated that they would not need an extension for their Rebuttal Filings. Tr. at 997 (March 29, 2012). Instead, the Majority grants the Intervenor a 15-day extension for their Initial Filings and a 15-day extension for their Rebuttal Filings.

² See Motion for Extension of Time to File Amended or New Contentions on Hydroecology (Sept. 27, 2010) at 2, Tr. at 994 (Dr. Bacchus: "I've known all along that it takes me longer to read documents."); Tr. at 1000.

Second, despite the Board's prior admonishments,³ and despite the fact that we gave the Intervenors four bites at this particular apple,⁴ the Intervenors have failed to show that they exercised due diligence to adhere to the schedule and thus avoid the need for an extension. Why does Dr. Bacchus need so much extra time, when the pleadings show that, even since her recent February 13, 2012 procedure, she has been busy writing and submitting filings in other proceedings?⁵ In addition, assuming arguendo that she needs extra time to do certain tasks, why did she not begin working on her testimony long ago? No adequate explanation is provided. Further, the Intervenors made no showing that they have made any diligent effort to hire an alternate expert witness in order to avoid delaying this proceeding. The Intervenors have failed to demonstrate the "due diligence" and "unavoidable circumstances" that is required for extensions under 10 C.F.R. § 2.334(b).

Third, I reject the Intervenors' claim that their hired expert witness, Dr. Bacchus, is entitled to delay this proceeding because of the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213. As the Majority agrees, the ADA does not apply to the NRC.⁶

³ See, e.g., Tr. at 860 (Jan. 12, 2012); Tr. at 948 (Mar. 29, 2012).

⁴ First bite: The original motion for extension of time was filed on March 19, 2012. Second bite: On March 22, 2012, this Board issued a memorandum stating that "rather than denying the motion" we granted the Intervenors ten extra days within which to submit additional documentation. Board Memorandum (Request for Information) (Mar. 22, 2012) at 3 (unpublished). Third bite: On March 29, 2012, the Board held a prehearing conference where we allowed Dr. Bacchus to testify in support of her claims. Fourth bite: During that prehearing conference we granted the Intervenors another opportunity to submit additional documentation by April 10, 2012. Tr. at 1021-22.

⁵ See Progress Energy Florida, Inc.'s Answer Opposing Joint Intervenors' Supplemental Motion for Extension of Time (Apr. 17, 2012) at 13-14.

⁶ The ADA does not apply to the NRC because the ADA only applies to "public entities." 42 U.S.C. § 12132. The ADA defines a "public entity" as "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or

Fourth, as the Majority acknowledges, Dr. Bacchus is not entitled to an extension under the Rehabilitation Act of 1973 or NRC's regulations at 10 C.F.R. § 4.500 et seq. Applying the Rehabilitation Act criteria, the NRC Staff states that "the medical documentation provided by Dr. Bacchus' [two medical providers] does not contain the necessary level of specificity to make a determination whether she is an 'individual with a disability.'" NRC Staff Supplemental Answer at 10-12. Meanwhile, PEF notes that the letters from Dr. Bacchus's medical providers do not demonstrate that she needs significant extra time to complete her testimony. PEF Supplemental Answer at 13. I agree. It has not been shown that she qualifies as an "individual with a disability" or that she suffers from an "impairment that substantially limits one or more major life activities." See 10 C.F.R. § 4.503.

Fifth, I am concerned that the instant extension, combined with the inevitable next one(s), will increase the probability that the contested evidentiary hearing in this proceeding will conflict with the parallel mandatory hearing that the Commission will be conducting. This Board should manage this adjudication so as to avoid such a collision, if possible.

In sum, at this late date, PEF is plainly "entitled to a prompt resolution" of the issues raised in this adjudication.⁷ We admitted Contention 4 in July 2009, and readmitted it (as

local government; and (C) the National Railroad Passenger Corporation, and any commuter authority" 42 U.S.C. § 12321. The NRC does not fit that definition. See, e.g., Smith v. Pallman, 420 Fed. Appx. 208, 214 (3d Cir. 2011) ("The ADA does not apply to federal agencies."); U.S. v. Wishart, 146 Fed. Appx. 171, 173 (9th Cir. 2005) ("By definition, the ADA does not apply to the federal government."); Luna v. Roche, 89 Fed. Appx. 878, 881 n.4 (5th Cir. 2004) ("The ADA does not apply to the federal government."); Dyrek v. Garvey, 334 F.3d 590, 597 n.3 (7th Cir. 2003) ("The ADA does not apply to federal agencies."); Cellular Phone Taskforce v. F.C.C., 217 F.3d 72, 73 (2d Cir. 2000) ("The ADA is not applicable to the federal government.").

⁷ Policy Statement, Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998).

Contention 4A) in February 2011. With the issuance of the FEIS on April 27, 2012, our wait is over and this adjudicatory proceeding is now on the critical path of the licensing proceeding. The issuance of the FEIS allows the Board to proceed with the evidentiary hearing, see 10 C.F.R. § 2.332(d), and we should do so without further ado.

Many factors in the licensing process are beyond this Board's control. We cannot tell the Staff when it must issue the FEIS or order the Applicant to commence construction within X days. But some factors, such as the amount of time allowed for the submission of Initial Filings, are within our control. For such factors, it is our responsibility to actively manage the adjudicatory process and to resolve this dispute as promptly and fairly as possible. "A presiding officer 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.

In fairness, we admitted Intervenors' contention, and they are entitled to litigate it. In fairness, now that the necessary triggering event has occurred, Progress Energy is entitled to have it litigated promptly.⁸

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

⁸ See, e.g., Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2183 (Jan. 14, 2004) ("Case management by the presiding officers and Licensing Boards is an essential element of a fair, efficient hearing process.").

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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(Levy County Nuclear Power Plant)
Units 1 and 2))
)
(Combined License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON MOTIONS FOR EXTENSION OF TIME AND MOTION TO CHANGE THE TRIGGER DATE FOR THE EVIDENTIARY HEARING, DATED MAY 23, 2012) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-029-COL and 52-030-COL
 MEMORANDUM AND ORDER (RULING ON MOTIONS FOR EXTENSION OF TIME AND
 MOTION TO CHANGE THE TRIGGER DATE FOR THE EVIDENTIARY HEARING, DATED
 MAY 23, 2012)

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[Original signed by Evangeline S. Ngbea]

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Dated at Rockville, Maryland
 this 5th day of June 2012