

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

February 22, 2012

ORDER

(Providing Instructions on Pre-Filed Evidentiary Material)

This Order provides instructions concerning the proffer of written testimony and other proposed documentary exhibits that, if admitted, will serve as the evidentiary record for the Board's decision in this proceeding. The regulations state that the Board's decision on the merits of the admitted contention(s) "must be based solely upon the information in the record or facts officially noticed." 10 C.F.R. § 2.1210(c). The "information in the record" is the evidentiary record. It consists of the evidence that the parties proffer, and the Board admits, in the evidentiary hearing.¹ More specifically, the written evidentiary record will consist of the admitted portions of (a) the initial and rebuttal pre-filed written testimony and proposed documentary exhibits that the parties file pursuant to 10 C.F.R. § 2.1207 and our Initial Scheduling Order (ISO)² and (b) the documents that the NRC Staff offers into evidence pursuant to 10 C.F.R.

¹ The Board may also take official notice of certain facts, see 10 C.F.R. § 2.337(f), and may also introduce its own exhibits in certain limited circumstances (e.g., several maps that were distributed to the Board and all parties during a site visit), provided that all parties are given reasonable prior notice and an opportunity to comment thereon.

² LBP-09-22, 70 NRC 640, 654-56 (2009) (ISO).

§ 2.337(g). As specified in the ISO, the first set of pre-filed written testimony and proposed exhibits will be due forty-five (45) days after the Trigger Date.

The parties should be aware of the following points:

1. The evidentiary record is currently empty. The Board will base its decision on evidence (written testimony and exhibits) that is proffered and admitted. Affidavits, declarations, and/or attachments that have been submitted previously (e.g., in support of contention admissibility or in support of motions for summary disposition) have not been proffered or accepted into evidence and are not in the evidentiary record. Similarly, the hundreds of documents in the NRC Agencywide Documents Access and Management System (ADAMS) related to the instant application might be in the administrative record of the NRC, but are not in the evidentiary record of this adjudication. Likewise, the documents that the parties have disclosed and exchanged inter se pursuant to 10 C.F.R. § 2.336, and the documents filed by NRC Staff in accordance with 10 C.F.R. § 2.1203(b), are not in the evidentiary record. The evidentiary record of this adjudication consists of the evidence proffered and admitted herein together with any facts officially noticed pursuant to 10 C.F.R. § 2.337(f). If a party or NRC Staff wants the Board to base its decision on a particular witness's testimony or a document, then it must submit such written testimony or document as proffered evidence when it proffers its filings pursuant to ISO sections II.J.1 – 2.

2. Incorporation by reference is not sufficient. Declarations, affidavits, and proposed exhibits must be submitted pursuant to ISO sections II.J.1 – 2 if they are being proffered as evidence. Incorporation by reference is not acceptable.

3. Written testimony should be submitted into evidence in exhibit form. See 10 C.F.R. § 2.1207(b)(2). This means that the written testimony must include a statement that it is sworn or affirmed under penalties of perjury. For each witness, a single new and consolidated affidavit or declaration containing the witness's testimony is greatly preferable to the re-submission of a

pile of previously submitted, overlapping, and potentially confusing declarations (e.g., re-submission of Declarations 1 through 5 from witness X).

4. Group testimony is disfavored. Pre-filed written testimony must clearly identify the individual who is swearing or affirming to each specific statement therein. Ideally, a separate declaration or affidavit will be filed by each witness.

5. Provide basis for fact testimony. If pre-filed written testimony concerns factual matters or events (e.g., the “Applicant performed a groundwater analysis”), then it should specify the basis for that witness’s testimony as to that fact (e.g., did that individual witness perform the analysis, did she see someone else perform the analysis, or did she read a report [cite the report] indicating that the analysis was performed by someone else?). This applies to all testimony regarding factual matters, including testimony by witnesses who might also be providing expert opinion testimony.

6. Completeness of testimony. Pre-filed written testimony must cover all points that a party and/or a given witness needs to make. If a point is unclear, or contested, the Board may ask the witness questions about it during the oral portion of the Subpart L evidentiary hearing. But a witness has no right to give additional oral tutorials, or to supplement her written testimony with additional explanations or testimony, at the evidentiary hearing. If a point is necessary or important, then the witness should state it in her pre-filed testimony.

7. Statements of position and evidence should explain, and define important terms. Parties and/or their witnesses need to define any terms (e.g., “transient,” “scram,” “sinkhole”) that are important to their position. Likewise, the statements of position and evidence submitted by a party should explain any fundamental concept that is necessary or important to understanding the party’s position. Definitions and explanations should be in clear, non-technical English. If a term is defined in a regulation, cite it. Otherwise, where possible, provide

some other authoritative citation to support its definition or explanation. This will help the Board decide the issue and write its decision.

8. Tables, graphs, drawings, and other visual aids should not be located inside pre-filed written testimony. Tables, graphs, drawings, and other visual aids that are referred to in pre-filed written testimony should be submitted as separate exhibits, rather than incorporated inside of the written testimony.

9. Final Environmental Impact Statement. Pursuant to 10 C.F.R. § 2.337(g)(2), the NRC Staff will offer its Final Environmental Impact Statement (FEIS) into evidence. We further request that the Staff provide the Board with five (5) hard copies and five (5) electronic disc copies of the FEIS immediately upon its availability.

10. Pagination and specific references. Proposed exhibits should be referenced in and tied to the party's statement of position or to a witness's pre-filed written testimony. All pleadings, testimony, and proposed exhibits should be paginated, with page numbers located at the bottom of the pages. When the pre-filed written testimony or the statement of position refers to a proposed exhibit, it should specify the page number that supports the point being made. Broad citations (e.g., "FEIS at pages 123-145") should be avoided.

11. Avoid duplication. The parties and NRC Staff should discuss and coordinate their evidentiary submissions to minimize or avoid duplication of exhibits.

12. Use of the DDMS. The Board intends to use the Digital Data Management System (DDMS) for the purpose of marking and entering pre-filed testimony and proposed exhibits into the record. Pre-filed testimony and proposed exhibits shall conform to the following DDMS formatting requirements.

a. Proposed exhibit number formatting. In accordance with 10 C.F.R. § 2.304(g), each item of pre-filed testimony and each proposed exhibit must be submitted via the agency's E-filing system as an individual electronic file. For example, pre-filed written testimony by Dr. X

shall be a numbered exhibit (e.g., Exhibit Y). If Dr. X's testimony is based on and refers to three additional documents, then each of those documents should not be included in Exhibit Y, but instead shall be a separate numbered exhibit. Each party shall number its pre-filed testimony and proposed exhibits in a format that consists of a three-character party designation (PEF for Applicant, NRC for NRC Staff, and INT for Joint Intervenors), followed by a three-character zero-filled number. For example, a typical numbering sequence for the NRC Staff's proposed exhibits would be as follows:

NRC001

NRC002

* * * * *

NRC999

To the extent practicable, the parties shall order and number their pre-filed testimony and proposed exhibits in the sequence in which they are discussed in the initial and rebuttal statements of position. The proposed exhibit number should be placed in the lower right-hand corner of the first page of the pre-filed testimony or proposed exhibit. A proposed exhibit should also be marked with its date of filing on the first page below the exhibit number.

b. Revised proposed exhibits prohibited absent good cause shown. Pre-filed statements, testimony, and proposed exhibits are due on specific dates and should be final and correct as of that date. Parties (and their witnesses) are not entitled to submit revised documents, except on motion for leave to file revisions for good cause shown. If a party seeks to revise a previously submitted pre-filed testimony or proposed exhibit, the document number should include the letter "R" directly following the proposed exhibit number (e.g., NRC001 would become NRC001R). Each revised proposed exhibit must clearly highlight every change in the exhibit (e.g., via a redline version).

c. Large file-size proposed exhibits. If a pre-filed testimony or proposed exhibit needs to be separated into multiple segments to ensure that it does not exceed the agency's guidance on recommended file sizes for electronic submissions,³ then each segment should be labeled by placing an alphabetical designation directly following the exhibit number in a way that will reflect the relationship of that part to the other parts of the exhibit. For example, if the NRC Staff proffers an exhibit (that would otherwise have the single exhibit number NRC005) which is too large for the NRC filing system, then the proposed exhibit should be submitted in multiple parts and each portion should be assigned a different exhibit number, e.g., NRC005A, NRC005B, and NRC005C.

d. Proposed exhibit list. At the time that the pre-filed testimony and proposed exhibits are filed, each party should submit an electronic copy of its pre-filed exhibit list in Microsoft Word format to the Board's law clerk, Matthew Flyntz (Matthew.Flyntz@nrc.gov), using the exhibit list template included in Attachment A of this Order.⁴ Upon request, the Board's law clerk will provide the parties with the template of the exhibit list.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 22, 2012

³ See Guidance for Electronic Submissions to the NRC, rev. 6.1 at 15-16 (May 27, 2011), available at <http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub.pdf>.

⁴ Parties might also wish to share exhibit lists amongst themselves to avoid duplicate exhibits.

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NUCLEAR REGULATORY COMMISSION

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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 ORDER (PROVIDING INSTRUCTIONS ON PRE-FILED EVIDENTIARY MATERIAL) have been served upon the following persons by Electronic Information Exchange.

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Docket Nos. 52-029-COL and 52-030-COL
ORDER (PROVIDING INSTRUCTIONS ON PRE-FILED EVIDENTIARY MATERIAL)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 22nd day of February 2012