

NUCLEAR REGULATORY COMMISSION

Title: Progress Energy Florida
Levy County Nuclear Power Plant
Pre-Hearing Conference

Docket Number: 52-029-COL and 52-030-COL

DOCKETED
USNRC

January 20, 2012 (9:00 am)

ASLBP Number: 09-879-04-COL-BD01

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3 ATOMIC SAFETY AND LICENSING BOARD
4 PRE-HEARING CONFERENCE
5

6 | Docket No.
7 In the Matter of: | 52-029-COL
8 PROGRESS ENERGY FLORIDA, INC. | 52-030-COL
9 | ASLBP No.
10 (Levy County Nuclear Power | 09-879-04-COL-BD01
11 Plant, Units 1 and 2) |
12 |

13 Thursday, January 12, 2012

14 4:20 P.M.

15
16 The Plantation Golf Resort and Spa
17 9301 West Fort Trail
18 Conference Hall
19 Crystal River, Florida
20

21 BEFORE ADMINISTRATIVE JUDGES:

22 Alex S. Karlin, Chairman

23 Dr. Anthony Baratta

24 Dr. Randall J. Charbeneau
25

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P R O C E E D I N G S

4:19 P.M.

JUDGE KARLIN: This is in the matter of Progress Energy of Florida pre-hearing conference in their challenge to their application for a combined operating license for the Progress Levy County Nuclear Power Plants. This is Docket No. 52-029 and 52-030-COL, and it's ASLBP No. 09-879-04-COL.

This pre-hearing conference is being held pursuant to a notice we issued on December 28th, 2011, and today's date is January 12th, 2012. The place for this pre-hearing conference, which is taking place in person, is the Plantation Inn in Crystal River, Florida.

We'll do quick introductions for the record of the Board and then ask the parties to introduce themselves and their representatives and who are with us.

For the Board, I'm Alex Karlin. To my left is Dr. Baratta, Anthony Baratta, and to my right is Dr. Randy Charbeneau. We are the three judges on this case. Josh Kirstein and Mat Flyntz are here, they're our lawyers and law clerks, and Sara Culler is in the back of the room in case we need some assistance on something.

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1 At this point let's ask the parties to
2 introduce themselves. Start with the Petitioners.
3 Mary Olson. Ms. Olson, could you introduce yourself?

4 Yes. I'm sorry. As a logistical matter
5 -- I'm sorry -- if you could get up and use the mics
6 because I think it helps with the court reporter to
7 capture all the info.

8 MS. OLSON: My name is Mary Olson, I work
9 for Nuclear Information and Resource Service, and I
10 also represent the Ecology Party of Florida and the
11 Green Party of Florida together known as the
12 Intervenors in this case.

13 JUDGE KARLIN: Right. And are any of your
14 members or other people here that you just want to
15 acknowledge?

16 MS. OLSON: I definitely want to
17 acknowledge a representative of the Green Party,
18 Michael Canney of Gainesville of Alachua County is
19 present. And --

20 JUDGE KARLIN: Welcome, Mr. Canney.

21 MS. OLSON: And many of the people who
22 were in the room earlier today were not representing
23 the intervening organizations in any way, but they're
24 associated either through friendship or membership.

25 MR. LYNN: All right. Thank you. Thank

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1 you, Ms. Olson.

2 Progress Energy. Mr. O'Neill, do you want
3 to introduce your team for the record, please.

4 MR. O'NEILL: My name is John O'Neill with
5 the law firm of Pillsbury, counsel to Progress Energy.
6 With me is the head of licensing of the nuclear plants
7 for Progress Energy, Robert Kitchen. And also with me
8 are co-counsel Robert "Bud" Haemer, and Kim Harshaw.

9 JUDGE KARLIN: All right. Thank you.

10 Now, the NRC staff. Mr. Martin.

11 MR. MARTIN: Good afternoon. My name is
12 Jody Martin from the NRC's Office of General Counsel
13 representing the NRC staff. With me is my co-counsel
14 Kevin Roach. We also have with us our Safety Project
15 Manager, Brian Anderson, our Environmental Project
16 Manager, Doug Bruner --

17 JUDGE KARLIN: Ah, Mr. Bruner. The
18 infamous Mr. Bruner.

19 MR. MARTIN: I'll just mention not from
20 the NRC staff, but sitting behind them is Don Hamberg
21 from the U.S. Army Corps of Engineers and he's the
22 Project Manager for the U.S. Army Corps of Engineers
23 review of this project.

24 JUDGE KARLIN: All right, thank you.

25 And, Mr. Bruner, I think there's a fellow

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1 looking for you out there. I'm not sure.

2 MR. BRUNER: I know. I've already talked
3 to him.

4 JUDGE KARLIN: I'm speaking truthfully
5 when -- we've never met. You were lurking in the
6 audience.

7 At the outset, for members of the public
8 who are here watching, and we welcome them, I'm not
9 going to go through the whole thing about where the
10 bathrooms are or cell phones, but let's just watch --
11 be careful on that and try to observe the protocol.

12 We just finished, as everyone in the room
13 knows, a Limited Appearance Statement session that
14 went from 1 to 4 p.m. For the record, now it's about
15 4:15, 4:20 in the afternoon. And at the Limited
16 Appearance Statement session of course members of the
17 public were entitled and requested to speak, and this
18 is a different deal, and this is just where the
19 lawyers and the representatives, Ms. Olson of the
20 parties speak. And the purpose of this pre-hearing
21 conference is for planning, sort of housekeeping and
22 planning for the hearing, for the trial later this
23 year. An evidentiary hearing we call it. And so
24 that's it.

25 Housekeeping, all the same, public

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1 meeting, welcome media, cell phones. Transcript will
2 be available in a week or two from the NRC website.

3 A little bit of background and then I'll
4 talk about the purpose in our proposed agenda, and
5 again I'll elicit if anyone has any other burning
6 topic that they would like to be asked to be added to
7 the agenda.

8 But the background: The application was
9 in 2008; the petition was filed in 2009; and in August
10 27th -- well, we admitted a contention, several
11 contentions in July, and then in August 27th of 2009
12 we issued an initial scheduling order that lays out in
13 some detail how this proceeding would proceed, what
14 events would occur and the idea of that is -- our
15 responsibility is to manage this case in a fair and
16 efficient way, to have the Intervenor's contentions
17 evaluated and then hearings held as promptly as
18 possible and as fairly as possible.

19 And so obviously we've been waiting under
20 10 CFR Section 2.332(d). We have to wait until the
21 Final Environmental Impact Statement is issued before
22 we can proceed with the various cascade of events that
23 will bring us to the evidentiary hearing. And the
24 staff has estimated -- it gives us a monthly estimate
25 -- that they look to be filing -- finishing the

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1 Environmental Impact Statement and issuing it in April
2 of 2012, in a couple three months here. And when that
3 happens, as our initial scheduling order lays out, a
4 bunch of things have to be filed; initial testimony
5 and exhibits and then rebuttal testimony and exhibit,
6 and then motions and a number of things, and then we
7 can finally get to the evidentiary hearing.

8 The last real status conference we had in
9 this thing, where we talked about schedule
10 essentially, was in May, May 4th, 2011, so it's been
11 7, 8 months or something and it's timely to do this
12 now.

13 So here's some agenda items we've got for
14 today. I think I've got seven of them and then if
15 you've got something to add, I'm going to ask that.

16 First, we'll review the timetable and
17 schedule with the staff to see if April 2012 still
18 holds. Second, we'll identify or try to identify if
19 anybody knows of any other scheduling issues that are
20 going to change or to alter the schedule to have the
21 evidentiary hearing in October of 2012. Third, we're
22 going to talk a little bit about the duties and
23 expectations, our expectations and your duties as to
24 what you need to file in preparation for the
25 evidentiary hearing. Those filings are going to come

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1 due 45 days after the FEIS is issued. And that's a
2 pretty short time and you've got some work to do, and
3 we're going to talk about that.

4 Fourth, stipulations of fact.
5 Stipulations. This was raised by Mr. Haemer, in a
6 call we had a couple weeks ago, as to talk about, and
7 we said we'd try to cover that briefly in this pre-
8 hearing conference today.

9 Fifth, filings based on the FEIS. And in
10 that category, dispositive motions are sort of one
11 half of that equation and new contentions are the
12 other half of that equation. We'll talk a little bit
13 about how we want to manage that and maybe hear from
14 you a little bit on that.

15 But, sixth is request for extension or
16 delay. We're going to talk a little bit about how --
17 you're going to have to be pretty convincing to get us
18 to change the schedule. It's been laying out there
19 for almost two years now in terms of filings.

20 And seventh is, blackout dates. We asked
21 you ahead of time -- I think our Matt Flyntz -- to
22 tell us times that you're not available in the
23 September/October/November time frame so we can start
24 getting down to brass tacks with specific dates, hold
25 the date type of thing, all contingent on the FEIS

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1 coming out.

2 So is there anything else from my
3 colleagues at this point? Yeah. Tom?

4 JUDGE BARATTA: I wanted to express an
5 apology. We were supposed to have a meeting, I think
6 was it in November?

7 JUDGE KARLIN: Yes.

8 JUDGE BARATTA: And I was not able to
9 participate. I relied on technology and the
10 technology failed me. So I apologize for any
11 inconvenience that may have caused the parties here.

12 JUDGE KARLIN: One of the things we
13 learned is that from now on we will try to make sure
14 when we have a conference call that all the Judges are
15 coming in on land lines rather than cell phones,
16 because you can be out of service in an area in a cell
17 phone, and I think that's what happened last time, so.

18 Dr. Charbeneau, anything? Okay.

19 All right. Anything from the parties that
20 want to be added to the agenda or a suggestion?

21 (No response.)

22 JUDGE KARLIN: Hearing none, I first want
23 to turn to the staff. Mr. Martin, perhaps you can let
24 us know. You filed a status report on January 5th of
25 202, your monthly report; that's good. And you

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1 indicated that your best estimate at that time was the
2 FEIS would be issued in April of 2012.

3 Is that still pretty good?

4 MR. MARTIN: That's still our best
5 estimate. And to be a little more specific, we are
6 thinking it will be closer to the end of April than
7 the beginning, probably around the last week of April.

8 JUDGE KARLIN: Okay.

9 MR. MARTIN: The last full week of April.

10 JUDGE KARLIN: Good. Good. And I suppose
11 the FSER is okay too? Is the schedule on the FSER
12 still --

13 MR. MARTIN: Yes.

14 JUDGE KARLIN: The Final Safety Evaluation
15 Report, for the audience.

16 MR. MARTIN: Correct. Yeah, no change in
17 that schedule.

18 JUDGE KARLIN: That's also supposed to
19 come out in April 2012.

20 MR. MARTIN: Correct.

21 JUDGE KARLIN: Okay, thank you. That's
22 under our initial scheduling -- you can sit down --
23 under our initial scheduling order. That's what we
24 call the trigger event which triggers the rest of the
25 filings, and so it's important to watch for the Final

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1 Environmental Impact Statement date when it comes out,
2 and 45 days after that the initial filings are due.
3 If that all works out the probable hearing is October
4 of 2012.

5 The second item on the agenda. Does
6 anyone -- does any of the parties, and maybe I'll
7 start with Mr. O'Neill.

8 Do you have any -- do you or your client
9 have any filings, changes, amendments to the
10 application that you think are coming in or would
11 change that schedule in any way?

12 MR. O'NEILL: We do not.

13 JUDGE KARLIN: Thank you. Ms. Olson, do
14 you know of anything that could be affecting that
15 schedule?

16 MS. OLSON: I heard some things today that
17 I heard for the first time, but I can't make any
18 comment on a change of schedule and I doubt it.

19 JUDGE KARLIN: All right. That's fine.
20 Staff, anything else you know of coming
21 in?

22 MR. MARTIN: No, not that I know of.

23 JUDGE KARLIN: All right, thank you.

24 Item three on our agenda. Moving right
25 along, which is the protocol, we'll call it, for

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1 presenting evidence at the evidentiary hearing. For
2 those of you who have done this before, and their
3 experiences may be well known.

4 But what happens at the evidentiary
5 hearing is we decide the merits of the contention. We
6 have to make a decision based upon evidence that it
7 put into the record by the parties. The regs require
8 us and limit us to what's in the record, 10 CFR
9 12.10(c). So take a look at that.

10 The burden is on the parties to "make the
11 record," to put the documents and the evidence into
12 the record. This Board does not put evidence into the
13 record. We rely upon you and you're the ones who have
14 to put information into the record, the evidentiary
15 record.

16 Right now there is nothing in the
17 evidentiary record, there's no evidence in the record.
18 The Intervenor has filed attachments and affidavits
19 by Dr. Bacchus; the Applicant has filed documents
20 associated with Mr. Carter -- or I believe it was
21 Griffin -- I'm sorry. Those are attachments to
22 pleadings but they are not evidence in this
23 proceeding. They haven't been proffered into
24 evidence, they haven't been admitted into evidence.

25 So the main point is the record. The

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1 evidentiary record at this point is empty, zero. If
2 you have something you want to get into the record you
3 need to introduce it 45-days after the FEIS, and your
4 initial testimony and exhibits.

5 Ms. Olson, do you have a question?

6 MS. OLSON: Well, I'm just a little
7 confused because I understand what you said and that's
8 what I thought. But the EIE docket in the NRC website
9 has a big fat file of evidence and it's got all these
10 different pleadings that we thought we'd just put in
11 as pleadings -- in there as evidence. So at somewhere
12 -- a point in all of this it would be good to clarify.

13 JUDGE KARLIN: Okay. That's what I'm
14 trying to do.

15 MS. OLSON: Okay.

16 JUDGE KARLIN: That is not evidence. You
17 filed your initial contentions. Attached to your
18 initial contentions you had some affidavits and some
19 documents and some pieces of paper and different
20 things. Those were -- that's a pleading. That's a
21 petition for hearing, a request for hearing. That's
22 not evidence. Because if it was evidence the other
23 side would say, "Oh, I object, that's not admissible,
24 that person really isn't an expert," this, that, and
25 the other. It's not evidence.

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1 If you've got something you need to
2 present you need to put it together in a good, clean,
3 new package on -- that's your initial statements of
4 position, initial testimony and initial exhibits, 45
5 days after the FEIS is issued. Same thing with the
6 other parties.

7 Now, when we have the evidentiary hearing,
8 in October of whenever it is, what's going to happen
9 is we're going to read all those documents. We're
10 going to read everything you've submitted and we're
11 going to ask questions. And that's kind of all that's
12 going to happen at the evidentiary hearing unless
13 someone asks for a motion to do cross-examination, and
14 ask for it and is granted, all that's going to happen
15 is you're going to present written evidence and we're
16 going to read it and we're going to ask questions.

17 So if you have an expert who needs to say
18 something or wants to say something, or you think it
19 needs to get into the record, don't wait until October
20 and think that Dr. Bacchus or anybody else is going to
21 sit up there and give us a tutorial on something. If
22 you want to get it in you've got to get it in in that
23 written stuff. And the only thing that happens at the
24 evidentiary is we ask questions.

25 It's a strange process. It's the subpart

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1 (1) process, it's not your normal trial process. But
2 I think, Ms. Olson, you've been in a few of these
3 things and so you probably have a handle on that too.

4 The contention admissibility. Contentions
5 get admitted based on allegations of fact; we've
6 alleged this. And we say, well -- it's all it takes,
7 really, to get it admitted is a contention. But now
8 when it goes to the hearing you've got to prove it,
9 you've got to put up and present evidence and not just
10 ask questions. You have to establish the validity of
11 your position, not just enough to get a contention
12 admitted, so.

13 And the other thing is, don't just put a
14 grab bag of old affidavits together and put them in a
15 pile and say, "here it is." We want one clean
16 affidavit from each of the experts who's going to come
17 in here, and don't give us a collection of old ones.
18 Because if you got three affidavits from the same
19 person I don't want to have a redline to try to figure
20 out the differences between these different things.
21 So it's got to be clean, new, package. It takes work.
22 It's going to take work upon all the parties and their
23 experts and other people.

24 Anything else on the protocol? Did I miss
25 anything?

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1 JUDGE BARATTA: I want to emphasize that
2 the evidence that you put in really needs to be
3 specific to this case and it cannot be some generality
4 with regards to particular phenomenon.

5 The other point I want to emphasize too
6 is, that in the past I've seen whole documents put in
7 as evidence whereas in fact it's one or two pages that
8 are really the evidence that supports your position.
9 You can put the whole document in, it's up to you,
10 but, you know, you better point us to where it is,
11 that the information is that you want us to be
12 cognizant of. And I've seen that on both sides,
13 Intervenor and Applicant and Staff side. So it better
14 be specific if you want us to really look at it.

15 JUDGE KARLIN: Yes, good points. Exactly.
16 And if it's an exhibit that you want us to read, then
17 I suggest you attach it and provide it to us. Don't
18 tell us to go down to the library and find it
19 ourselves, unless it's the FEIS which is right there.
20 It has to be put into the record. The Staff is
21 obliged to put that in the record, the regs call for
22 that. If it's something else, you better attach it.
23 And you better cite to the page you want us to look
24 at, because we're not going to read a hundred page
25 document to find the nugget in there that you think

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1 supports your position.

2 JUDGE CHARBENEAU: I was just going to say
3 that if it is an exhibit, that we're only looking at
4 part of it, I would still like to see the entire
5 exhibit available in order to get a context for those
6 few pages I'm looking at. But it helps an awful lot
7 if we can be pointed to the issues you want us to
8 focus on.

9 JUDGE BARATTA: I didn't preclude putting
10 in the whole document.

11 JUDGE CHARBENEAU: I would greatly prefer
12 to see the whole document.

13 JUDGE BARATTA: Where we're supposed to
14 pay attention.

15 JUDGE KARLIN: How many hundred pages?

16 JUDGE CHARBENEAU: Well, it's electrons.
17 That's all.

18 JUDGE BARATTA: The other point to the
19 Staff. When they put the EIS and a SER in, I would
20 like to get a CD with all of the links active in there
21 so that we can go from one chapter to the other as
22 appropriate.

23 JUDGE KARLIN: Now, can you do that, Mr.
24 Martin?

25 MR. MARTIN: Yeah, we will work on doing

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1 that. The difficulty we always have to do filing is
2 getting the EIS and the SER into the record is that -
3 - we'll probably talk about the DDMS later, the
4 digital data management system or the e-filing system
5 -- is that they have restrictions on how large a
6 document you can file. And so we are always sort of
7 in the mode of we are chopping up these documents out
8 of their original format in order to put them in a
9 format that we can e-file it.

10 JUDGE KARLIN: Okay.

11 MR. MARTIN: But we will work on that,
12 yes.

13 JUDGE KARLIN: Go ahead.

14 JUDGE BARATTA: I mean we'll accept a
15 separate CD with that on it. We understand the
16 limitation, the EIE and DDMS, et cetera.

17 JUDGE KARLIN: Mr. O'Neill, did you have
18 something?

19 MR. O'NEILL: Just to follow up on that.
20 It might be more practical, rather than filing, in our
21 case, the Environmental Report again electronically,
22 that we can provide a CD to the Board. Obviously the
23 Intervenors and the Staff already have and have looked
24 at the ER, the parties all have the FEIS. And it
25 would seem more practical not to have to file them,

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1 even sponsor them. The witness will have to sponsor
2 testimony that cites some part of the ER, the FEIS.
3 But we can simply provide CDs to the Board and not
4 have to file them or sponsor them in evidence, would
5 move this process along and deal with some of these
6 issues. So I suggest you take that under
7 consideration.

8 JUDGE KARLIN: I think that's a good one.
9 The Staff has an obligation under the subpart (l) regs
10 to put certain things automatically into the record,
11 into the evidentiary record. I was just going to try
12 to find that reg. But, yeah, I don't know that we
13 have to have it in the EIE, but we do need to get
14 copies if we can of the documents. We can arrange
15 that.

16 MR. MARTIN: I'd just like to make -- what
17 Mr. O'Neill's talking about is for the summer
18 mandatory hearing, which we just did. We took that
19 approach. Instead of trying to file the SER, because
20 it was so huge, we provided a CD copy of it that we
21 had marked with the proper exhibit number, and we
22 actually provided a copy of that CD to all the parties
23 and then we provided a copy to the Board so that your
24 law clerk -- or so that anyone could upload it
25 directly into the DDMS system.

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1 JUDGE KARLIN: Okay.

2 MR. MARTIN: Just to be considered.

3 JUDGE KARLIN: We can work something
4 practical out, I think, on that. I personally would
5 like a hard copy bound of the FEIS. You know, I
6 actually will read that. I will read the relevant
7 sections relevant to this contention. I may not read
8 the whole thing. Okay.

9 And also with regard to witnesses, just a
10 reminder, and it's in our initial scheduling order and
11 I encourage -- I think everyone's reread it for
12 preparation today. But every party has a right to
13 submit declarations or testimony from witnesses. If
14 you do that, though, you've got to be prepared to have
15 that witness show up at the evidentiary hearing at
16 your cost to be prepared to answer questions from us,
17 so they need to be there. You need to provide them
18 and make sure they're there, if you would. That's
19 important to the way this process works.

20 Okay. And we're going to move to the next
21 topic which is stipulations of fact. Mr. Haemer
22 raised this in our conference call a couple weeks ago,
23 or maybe it was even last week. It was on a different
24 topic, the site visit actually.

25 But the regulations encourage parties to,

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1 you know, reach settlements and to stipulate to facts.
2 If there are certain facts that they all agree on that
3 are relevant to this contention but they all agree on,
4 then, great. If you can stipulate to those that would
5 be excellent. The Board would welcome that.

6 We're trying to think of a time frame and
7 maybe I could -- it seems that the stipulations of
8 fact would appropriate come sometime after the FEIS is
9 issued but before the hearing. Now, when is that?

10 The FEIS gets issued, 45 days later you
11 file your initial statements of fact and initial
12 testimony. It would be nice if you have some
13 stipulations, that you reach them before that
14 juncture, before the 45th day so that you can relieve
15 both sides, all sides of haggling about it. So I
16 would encourage you to have such a discussion and I
17 would say -- of course you're going to have to read
18 the FEIS, and that will take a little bit of time, and
19 then you're going to have to prepare your written
20 testimony and that sort of thing. So maybe by at
21 least 30 days after the issuance of the FEIS.

22 Could I ask the Applicant to take the lead
23 in organizing a conference call amongst the parties to
24 see if there are any stipulations of fact that you
25 think that you can enter. In fact, if someone wants

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1 to float such a proposed stipulations of fact to the
2 other parties in advance of that conference call, or
3 whatever discussion, within 30 days, great.

4 Don't send it to us. We're not going to
5 see any of this stuff unless you agree on it. And if
6 you agree on it then file it. But if you're just
7 negotiating about which part, we don't want to see the
8 drafts that are exchanged back and forth.

9 Mr. O'Neill, did you have something on
10 this?

11 MR. O'NEILL: We're happy to undertake
12 that, indeed. Ms. Olson has agreed to meet actually
13 this evening --

14 JUDGE KARLIN: Oh, good.

15 MR. O'NEILL: -- to start a dialogue which
16 will include that, so.

17 JUDGE KARLIN: Okay. Good. I mean try to
18 work it out. Now, it may be that you can't achieve
19 such a result, and we're not going to prohibit you
20 from stipulating -- to reaching stipulations after the
21 initial testimony is submitted. Each side may submit
22 its initial testimony and you may finally realize,
23 yes, we've got enough in common here, we can stipulate
24 to 20 different things and fight about 30 other
25 things. So that would be great.

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1 But the one thing I really -- well, two
2 things I want to say about that is, one -- especially
3 to the Intervenor who has a limited -- more limited
4 resources. Keep in mind that your primary function at
5 this point was to get your initial testimony in on the
6 45th day. So don't divert all of your resources to
7 working on stipulations of fact and then say, "Oh, we
8 need more time because we've been doing all this time
9 on the stipulations of fact."

10 And the other thing is, I just would urge
11 the lawyers here -- we've talked about this a little
12 bit before. All of you have been through these kind
13 of proceedings before, but this a pro se Intervenor.
14 So we're going to look at the stipulations of fact and
15 make sure we scrutinize them and we might not just
16 accept them. If we think something's being stipulated
17 to that may not be fair or something we are concerned
18 about, we may reject that. The lawyers have a duty to
19 treat pro se representatives with some care because
20 the lawyers have a higher ethical duty. So be careful
21 and don't try to get over-reaching with regard to the
22 stipulations of fact.

23 I know Ms. Olson has done this before.
24 She's good at it. She's very good for a non-lawyer
25 but, she is not a lawyer and, you know, whatever. So,

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1 that's important. Primary task is get the initial
2 filings done.

3 The fifth item -- I think we're covered
4 with the stipulation.

5 Fifth item we sort of call filings, based
6 on the Final Environmental Impact Statement, FEIS. As
7 you know typically what often happens is, the FEIS
8 comes -- let's go back to the past.

9 The initial contentions were filed on the
10 Environmental Report submitted by the Applicant. The
11 Intervenor group said, oh, the Environmental Report is
12 inadequate in various ways. And we admitted a couple
13 of those contentions.

14 And then, a year or so later, the Staff
15 issued its Draft Environmental Impact Statement and
16 the parties moved to dismiss the complaint about the
17 ER and they moved to add new contentions based on the
18 Draft Environmental Impact Statement, and we ended up
19 with contention 4A, which is very close to the
20 original contention, 4.

21 The original contention 4 complained about
22 or alleged that the ER was inadequate. The contention
23 4A alleged that the DEIS was inadequate in essentially
24 the same ways. And we had a number of filings and
25 things that had to go on.

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1 We'd prefer, as a case management order,
2 to minimize that because it's going to slow the
3 schedule down. So with regard to dispositive motions
4 -- and by dispositive motions -- our order addresses
5 this. The initial scheduling order addressed this, it
6 was subject in Section ii.h. We issued a
7 clarification about dispositive motions on April 7th,
8 2010, and we issued a further clarification about
9 dispositive motions denying an extension for the
10 deadline of dispositive motions. And that order was
11 St. Patrick's day, March 17th, 2011. And right now no
12 further dispositive motions may be filed.

13 And a dispositive motion means, as Judge
14 Baratta will make sure I remember to tell you, both
15 motions for summary disposition and motions to
16 dismiss, and any other kind of motion, whatever name
17 you want to put on it which disposes of the
18 contention, or a significant part of the contention,
19 or any part of the contention. And so no more
20 dispositive motions are allowed in this proceeding.

21 Now, there is an exception which says, if
22 the Applicant or the Staff -- because they're the only
23 ones that are going to file dispositive motions at this
24 point, I think -- if they really thing that there's
25 something that disposes of a major portion of this

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1 case then they can file a motion for leave to file a
2 dispositive motion, and we've laid out what happens at
3 that point.

4 And at that point the Intervenor will have
5 to answer the motion for leave, but it does not have
6 to answer the dispositive motion itself. So this is
7 getting short and sweet, and then we're going to rule
8 on whether we grant leave to file a dispositive
9 motion. So at this point we're discouraging
10 dispositive motions.

11 And why are we discouraging them?
12 Because, essentially, they substantially duplicate the
13 filings that you're going to have to do on the 45th
14 day anyway, in our eyes. A lot of the same paper will
15 be right in there, and so why duplicate the effort.
16 Let's get this hearing going and get it done. The
17 hearing will take probably a day or less, maybe a day-
18 and-a-half. Hearings usually take one day. And so --
19 anyway.

20 So, we've got the orders issued that deal
21 with dispositive motion. And only if a motion for
22 leave is granted will we deal with any further
23 dispositive motion. And we will set a time table in
24 that granting, that order, that will say when the
25 answer is due by the Intervenor.

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1 Okay. That's one half of the coin. FEIS
2 comes out and often times the Staff of the Applicant
3 will say, "Well, that ends the case, we're all done."
4 And the other side of the coin is that the Intervenor
5 says, "Oh, the FEIS just came out. It's got some new
6 problems in it, we're going to file new contentions."
7 So it can go the other way.

8 So here's sort of -- the FEIS comes out
9 and as we see it there's sort of three things that can
10 happen from the Intervenor's prospective. One, the
11 Intervenor says "The FEIS has the same defects as the
12 DEIS. They didn't cure anything, it's just the same
13 problem."

14 If that's what you believe then you don't
15 have to file a new contention. We are under the
16 migration tenant. We are going to operate on the
17 proposition that the contention C 4A that challenges
18 the DEIS also challenges the same provisions of the
19 FEIS. Now, when you file your initial testimony you
20 better focus on the FEIS and tell us how and why it
21 doesn't. But you don't have to file a new contention.
22 And the reason why you don't want to file a new -- you
23 file a new contention, then they file an answer 25
24 days later, then you file a reply 7 days later, then
25 we issue a decision of whether it's -- and all this

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1 stuff is consuming time. We just think it's not
2 appropriate. So if you think -- option one, FEIS has
3 the same defects as the DEIS in your mind. If that's
4 true, you don't have to file anything. We are going
5 to assume that your complaint against DEIS transfers
6 to the FEIS.

7 Option two: The FEIS cures some or all of
8 the alleged defects in the DEIS. Now, this is in the
9 Intervenor's mind. Obviously the Applicant and the
10 Staff think there wasn't any defects in the first
11 place and if there were any it was cured. But if the
12 Intervenor's think that the FEIS indeed does cure some
13 of the problems, I would encourage you to come forward
14 and talk with the Applicant and the Staff -- the Staff
15 is doing the FEIS, not the Applicant -- and see if you
16 can work that into the stipulations and/or, you know,
17 settle some portion of the contention. So that's an
18 option. But that's not a motion for summary
19 disposition, that's a stipulation type/ agreement-type
20 thing.

21 Option three is, the Intervenor say, "Oh,
22 the FEIS, not only does it repeat all the errors that
23 were in there before but there's some new ones now.
24 Oh, we've got some new complaints. We have to file a
25 new contention because there's some additional defect

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1 in the FEIS."

2 If that's the case then you are entitled
3 to file a new contention. You might keep in mind if
4 it's a new contention it's supposed to be based on new
5 information; material, new information. And if it's
6 just kind of a little tweak it isn't very -- you know,
7 it's got to be new information and then we go through
8 the same process. Did it meet 309(f)(2), new
9 information, material, timely filed; did it meet
10 309(c), good cause. So we'll go through that whole --
11 and of course, does it meet the basic requirements for
12 a contention anyway. So you can file that.

13 If you do file a new contention at that
14 point then we go through the process. The Applicant
15 and Staff will file answers 25 days later. So the
16 DEIS comes out -- I'm sorry -- the FEIS comes out; 30
17 days later, just when you're doing your initial
18 testimony, I might say, you have to file your new
19 contention; 25 days after that the Applicant and Staff
20 file their answers; 7 days after that you file a
21 reply; within 45 days after that we are supposed to
22 issue a decision whether the new contention gets
23 admitted.

24 All this time the clock is running and
25 October is coming up. The odds are pretty good that

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1 we're going to bifurcate. If we end up admitting that
2 new contention our initial thought is, unless they are
3 inextricably intertwined we are going to bifurcate and
4 have a separate track for that new contention. If we
5 admit it we may have an evidentiary hearing in
6 November or December.

7 Because what happens, the contention gets
8 admitted and then what happens? 30 days later the
9 parties are supposed to do their mandatory
10 disclosures. That takes up more time. You got a
11 whole 'nother track.

12 So it's rare that the FEIS kicks in a new
13 defect that wasn't previously contemplated, but if you
14 really think it does you have a right to file a new
15 contention at that point.

16 So, again, no new dispositive motions and
17 no need to file a new contention if it's just the same
18 problem repeated. And if it's cured something, try to
19 work it out. If it's really something new, a new
20 problem, you can file a new contention if you have to,
21 if that makes sense.

22 Anybody; comments, questions on that?
23 Mr. O'Neill? Ms. Olson? Mr. Martin? Okay.

24 Item six: Request for extensions or
25 delay. We issued the initial scheduling order in 2009

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1 -- I guess it was August 27th, 2009. And it lays out,
2 you know, this cascade of events that are going to
3 occur as soon as the FEIS hits. And what it specifies
4 is, if you want an extension of time of any deadline -
5 - we're going to move out crisply and quickly now to
6 this evidentiary hearing. It doesn't seem like that
7 to most normal people, but to lawyers this is pretty
8 crisp. Okay.

9 So once that FEIS comes out there's
10 filings that are due. And if you want to an extension
11 of time it's got to be in writing; it's got to
12 indicate whether it's opposed or supported by the
13 other parties; it's got to be filed at least three
14 days prior to the due date for the filing; and it
15 must, "demonstrate appropriate cause that supports the
16 extension." That's what we said in our initial
17 scheduling order.

18 Now, let's focus on that a moment. It
19 must be filed at least three days prior to the due
20 date for filing. So the due date -- okay, if the FEIS
21 comes out on April 30th the due date for the initial
22 testimony is May 15th and the due date would be May
23 12th -- I'm sorry, June 15th, June 15th.

24 So if you think you need an extension of
25 time don't wait until the third day and just throw it

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1 in at that point. You file that as early as you know
2 you think you need -- or you want to ask for an
3 extension of time. And keep in mind there is the reg
4 out there, 2.323(a) applies. And that's a -- and this
5 is a motion for extension of time, and all motions
6 have to be filed within 10 days of the occurrence or
7 circumstance which they rely on. So if somebody gets
8 sick or somebody has a problem, and you know about
9 that today and you think it's going to affect the
10 deadline of filing, you've got to file something now,
11 or within 10 days of now.

12 And demonstrate appropriate cause, is the
13 other part of that. And that kind of comes from some
14 regs, 2.334(b). It says that our boards are not
15 allowed to modify the hearing schedule unless there's
16 a showing, "showing of good cause."

17 So that's what's you got to show, you got
18 to show good cause. And that reg also says -- 2.334
19 says that if we modify the hearing schedule so that
20 the evidentiary hearing is delayed -- well, if any
21 major activity is delayed by 45 days or the hearing is
22 delayed by 60 days we have to notify the Commissioners
23 right away. So they kind of are -- they're on top of
24 the boards to keep things moving and the parties, so
25 we all have to keep this going. It's not easy to

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1 change the schedule at this point.

2 So if you -- and we're going to add and
3 I'm going to say right now, additional requirement.
4 If there's a request to delay the evidentiary filings
5 for greater than 7 days -- like it's a 2 day extension
6 that's one thing. But if you're asking for a 60 day
7 or a 120-day extension you've got to be accompanied by
8 written documentation showing good cause justifying
9 the delay and the length of time of a delay.

10 Thus, for example, if there's a request
11 for a greater than 7 day delay based upon medical or
12 disability issues, they must be filed as soon as
13 possible within 10 days of the knowing of medical or
14 a disability problem, and they must be accompanied by
15 signed documentation from a medical provider that
16 explains (a) what's the problem and when did it arise,
17 and (b) justifying the amount of time being asked for.
18 So, you know, if it's a long delay we want to know,
19 well, why is this amount of time really necessary, and
20 at the end of that time frame will the problem be
21 solved.

22 So, please help us out. If you've got a
23 situation like that let us know as soon as possible
24 and provide the documentation. We know that sometimes
25 you can't do this. There was one case where we had,

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1 on the eve of the hearing, one of the witnesses, one
2 of the doctor's was taken ill and not able to attend
3 the evidentiary hearing. Mr. O'Neill and Mr. Haemer's
4 firm was involved in that -- that was in the Vermont
5 Yankee case. And it's kind of difficult. It was a
6 Staff person at that case and, you know, we wanted to
7 ask that Staff member some questions. We proceeded
8 with the hearing in any event because we thought we
9 could and we did, and I think we ended up okay. But,
10 anyway, things can happen, but just let us know as
11 soon as possible. And again, document any extension
12 for more than seven days.

13 And with that the last item is the
14 blackout dates. The days -- can we just go, Mr.
15 O'Neill, perhaps you can start there.

16 Are you prepared to tell us right now when
17 your team is not available during the weeks of
18 September/October/November, or maybe you've already
19 submitted that to Mr. Flyntz.

20 MR. O'NEILL: No, we didn't.

21 JUDGE KARLIN: Okay.

22 MR. O'NEILL: We didn't submit it. And
23 we're prepared to go forward, certainly. All of
24 October we would prefer strongly. For personal
25 reasons, having to do with my son's wedding, not to do

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1 it actually two weeks; one, Labor Day week, and
2 secondly, the week of Thanksgiving.

3 JUDGE KARLIN: Okay.

4 MR. O'NEILL: But I doubt that that is
5 going to be a very popular date for anyone, so I don't
6 think it's a problem.

7 JUDGE KARLIN: Right. Okay.

8 MR. O'NEILL: But I want to put it on the
9 record now.

10 JUDGE KARLIN: Okay. So we've got that.
11 Those are the only blackout dates for you and your
12 team and your witnesses.

13 MR. O'NEILL: Yes, sir.

14 JUDGE KARLIN: Ms. Olson?

15 JUDGE BARATTA: Just one clarification to
16 make sure we understand.

17 JUDGE KARLIN: I knew Judge Baratta would
18 be concerned about Thanksgiving.

19 JUDGE BARATTA: You're talking the week of
20 September 3rd is Labor Day? That's what you said, I
21 think.

22 MR. O'NEILL: Yes. To be more specific it
23 would be -- include the weekend before.

24 JUDGE BARATTA: Okay. So the weekend
25 starting the 1st through --

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1 MR. O'NEILL: Yes.

2 JUDGE BARATTA: I don't know when
3 Thanksgiving is. I won't worry about that now.

4 JUDGE KARLIN: Yes, Ms. Olson.

5 MS. OLSON: At present we have one expert.
6 I don't know if that will change. But her schedule
7 has a few blackout weeks of the time we're looking at.
8 She is unavailable the week of September 3rd. I don't
9 know if that's a Sunday or Monday, but that entire
10 week.

11 JUDGE BARATTA: Monday.

12 MS. OLSON: October 1st and November 19th.
13 And I am unavailable, due to a previous -- long time
14 ago previously scheduled work commitment, September
15 24th through 29th.

16 JUDGE KARLIN: Okay.

17 MS. OLSON: And the Ecology Party will do
18 their utmost to schedule once they know what our
19 schedule is because they can't make -- I mean they
20 don't have blackout dates.

21 JUDGE KARLIN: Okay. Well, we're going to
22 take that as no blackout dates from them.

23 MS. OLSON: Right.

24 JUDGE KARLIN: And we'll try to
25 accommodate everyone's schedule.

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1 Mr. Martin, from the Staff, I know you
2 have a number of witnesses.

3 I mean the point of this is not just -- as
4 you've just done Ms. Olson, is to have the whole team.

5 So, Mr. Martin, what have you got?

6 MR. MARTIN: Yes. We've checked with
7 everybody. The only dates that we would like to avoid
8 are some Jewish Holidays at the end of September.
9 Rosh Hashanah and Yom Kippur, which these are
10 September 16th to 18th and September 25th, 26th.

11 JUDGE KARLIN: Okay. Good. Well, that
12 looks like -- October looks relatively clean except
13 for the first week.

14 Did you say the first week in October,
15 October 1st, that week? Okay.

16 Well, we're not going to set anything
17 specific now, but I think what we will do is to issue
18 something which is to hold the date, you know, October
19 15th through the 20th or whatever, some time frame, a
20 week or maybe two weeks, and once we -- and of course
21 this is all contingent on the FEIS coming out. If
22 it's delayed a month which, you know, can happen, then
23 we're all pushing everything back probably another
24 month or two. But I appreciate you all checking that
25 out.

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1 I think we're pretty much done. Is there
2 anything else you have?

3 JUDGE CHARBENEAU: Columbus Day and stuff
4 like that.

5 JUDGE KARLIN: Okay. The week of October
6 8th is Columbus Day, so that could be -- you know,
7 it's a Federal holiday. We wouldn't have it that day
8 probably, but we could still do it that week possibly,
9 or the following week which includes my daughter's
10 birthday, so that's a good week, you know.

11 Okay. This is as good as we can do at
12 this point.

13 Anything else? Yes. Mr. O'Neill.

14 MR. O'NEILL: With the Court's permission
15 I'd like to address something that's not in your
16 initial scheduling order which goes to this process,
17 and that is findings of fact and conclusions of law,
18 which of course are set by the regulations I think at
19 2.1208.

20 Years ago, after the findings of fact and
21 conclusions of law, we had a useful process where
22 there would be, within so many days, say 15 days or
23 so, an opportunity for all of the parties to have
24 rebuttaled anything that they found was untoward or
25 not supported or whatever.

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1 The alternative of that is a motions
2 practice that could occur where you object, move to
3 strike. We would suggest you might consider going
4 back to the -- all parties have an opportunity to file
5 a rebuttal if they want, and there's no motions
6 practice so that we don't end up with motions to
7 strike and responses and that sort of thing, which is
8 what you would do absent having this procedure.

9 So I know I'm catching you cold on it, but
10 you might consider, as you reflect on how we get from
11 here to the end. Obviously, proposed findings of fact
12 and conclusions of law are of great aid to the Board
13 in doing their own job and their own proposed findings
14 of fact and conclusions of law, and we think it is in
15 the Board's interest, if you determine that either
16 party, the Staff -- the party in our case -- had a
17 glaring error, to point that out. So that you would
18 expect it had been pointed out before through all
19 these pleadings but, hey, so there's this last shot.

20 JUDGE KARLIN: You mean once the -- we
21 have the evidentiary hearing --

22 MR. O'NEILL: Yep.

23 JUDGE KARLIN: -- the record is closed.

24 MR. O'NEILL: It's closed.

25 JUDGE KARLIN: Now what happens, we have

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1 the evidentiary hearing and then we have an
2 opportunity to corrections of the transcript.

3 MR. O'NEILL: Correct.

4 JUDGE KARLIN: So the record doesn't close
5 for a little bit because the transcript has to be
6 corrected. And I've seen it that there's actually
7 been a fight about what the record said and that sort
8 of thing, so it took a little bit of time. And then
9 the record is closed, the transcript is corrected as
10 need be, you know, and then the parties are obliged to
11 file proposed findings of fact and, you know --

12 MR. O'NEILL: And conclusions of law.

13 JUDGE KARLIN: Are you suggesting after
14 that point we then have a --

15 MR. O'NEILL: Within 15 days there's an
16 opportunity for all parties, if they have any
17 rebuttal, to just file that as a last chance filing
18 and no motions.

19 JUDGE KARLIN: Rebuttal to the other
20 side's proposed findings of fact --

21 MR. O'NEILL: Correct.

22 JUDGE KARLIN: -- or a rebuttal of new
23 evidence?

24 MR. O'NEILL: No, no new evidence.

25 JUDGE KARLIN: Okay.

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1 MR. O'NEILL: Purely what is in the
2 record. Generally those --

3 JUDGE KARLIN: Right.

4 MR. O'NEILL: -- will go to -- a party
5 will say, this is the finding of fact, and cite to 15
6 different things. It is useful for the Board, I
7 think, for the parties to say, "What are you talking
8 about? That doesn't support that and here's why."
9 And that just provides as some additional assistance
10 in getting those right.

11 So that's the way we did it years ago, and
12 I think that's better than a motions practice, to move
13 to strike, you know, within 10 days and then have
14 replies to that.

15 JUDGE KARLIN: Okay.

16 MR. O'NEILL: That's my suggestion.

17 JUDGE KARLIN: Let us -- we will take that
18 under consideration. We'll think about that. I mean
19 rest assured our findings -- when we issue our
20 findings of fact -- in the old days I think there were
21 boards that just simply cut and paste a bunch of stuff
22 from the parties, though. You're not going to see
23 that pretty much from some of the stuff we write. So
24 if somebody writes something we generally double check
25 whether it really stands for what they said it does.

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1 And so it seems a little strange to have a rebuttal
2 and it's a little longer time. But we'll take it
3 under consideration, and, you know.

4 And I think that's a useful comment. I
5 know there are other colleagues who've been around
6 longer than me and can understand how other boards
7 have done it. I'll try to research that.

8 MR. MARTIN: Judge Karlin, I have one.

9 JUDGE KARLIN: Yes, Mr. Martin.

10 MR. MARTIN: One more request. Just to
11 something we talked about prior. We talked about
12 outside of submitting the FEIS into evidence that you
13 said you wanted a hard copy and Judge Baratta wants a
14 CD that works.

15 If you all could at some point -- I'm sure
16 the Clerks will want copies too -- just let us know
17 how many hard copies and how many CDs you want, so
18 that I can --

19 JUDGE KARLIN: Yes, okay. We'll have Mr.
20 Flyntz or someone send you an e-mail and ask you to
21 help us with that.

22 MR. MARTIN: Okay. Thanks.

23 JUDGE KARLIN: I appreciate that.

24 Ms. Olson, yes.

25 MS. OLSON: I's just like to say that we

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1 don't oppose the Applicant's idea about doing
2 rebuttals at the end.

3 JUDGE KARLIN: Okay.

4 MS. OLSON: And I'd also like to thank you
5 for this trip. We really appreciate the time that
6 we've all had and it's been good.

7 And, finally, I want to put in a pitch for
8 both, I want a hard copy and CD.

9 JUDGE KARLIN: Yeah, okay. Thank you.

10 Now where we go from here. We're waiting
11 for the FEIS to be issued. When that happens you're
12 off to the races with your filings and your work. We
13 will then be reading them as they come in.

14 We will probably hold at least one other
15 pre-hearing conference -- I mean maybe more. But
16 sometimes it's our practice, depending on what gets
17 filed, to have a short pre-hearing conference after
18 all the filings have come in but before the
19 evidentiary hearing, like two or three weeks before,
20 just to make sure we're all there and the final
21 lectures we give and that sort of thing. So I think
22 that's probably the next thing we could definitely
23 plan on.

24 JUDGE BARATTA: Witness lists and
25 questions.

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1 JUDGE KARLIN: Oh, yeah. Well, there are
2 other filings. There's the initial testimony, the
3 rebuttal testimony, and then you have proposed
4 questions that we would ask for the other side which
5 you file in camera, which mean you don't let the other
6 side see these proposed questions. Motions for cross-
7 examination. If somebody wants to move or ask for
8 cross-examination, those are due. Motions to strike
9 somebody else's testimony; "Oh, that person really
10 isn't an expert, or, no, that's outside of the record,
11 or it's irrelevant," or something. You know, all
12 these motions get filed.

13 So there's a whole bunch of things that
14 are to be filed. You've got to review the -- the
15 initial scheduling lays out the things.

16 JUDGE BARATTA: There's a special way for
17 filing the questions that they have to file.

18 JUDGE KARLIN: Well, yes. I say it's in
19 camera and it's instructed, meaning just send it to
20 the Board. You don't -- well, the EIS -- we'll give
21 you some instruction on that. But it has to be filed
22 in a way that the other parties -- it inadvertently
23 happened one time that the party filed some questions
24 and the other side got to see it. It was like, oh,
25 you know, what are we going to do now. You know, it

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1 was kind of a problem.

2 But I think if you are all alert and talk
3 with Mr. Flyntz you'll understand how to do that
4 filing.

5 Okay. That's a good point.

6 MR. MARTIN: Can I -- sorry.

7 JUDGE KARLIN: Mr. Martin.

8 MR. MARTIN: One more time to bug you. Do
9 you plan on also issuing an order at some point with
10 the specifics or how you'd like the exhibit markings,
11 like the 6-digit number and the format you'd like the
12 witness list in and all those things?

13 JUDGE KARLIN: Good point, good point.
14 Yes. I think we'll follow the lead of others so that
15 there can be a protocol for marking exhibits.

16 Judge Bollwerk and some of the others have
17 these exhibit numbers that are about 14-digits long,
18 and I don't think we're going to follow that. We
19 might clean it up a little bit. But that's a good
20 point. We'll try to get some instructions so there's
21 sort of a common format for marking your exhibits.

22 And we also, once we get to the hearing,
23 we'll encourage people to not duplicate file. If you
24 both are -- if you both got the same exhibit, you
25 know, when we get to the hearing we don't have to have

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1 the identical document be the Intervenor's Exhibit No.
2 13 and the Applicant's No. 7 or something, we can
3 consolidate that. Okay?

4 Good point, Mr. Martin. Thank you.

5 All right. We're going to be adjourned,
6 it's 5:15, and that's the end of the pre-hearing
7 conference. And as you know, later, in a separate
8 proceeding, have the limited appearances. So we stand
9 adjourned. Thank you all for coming.

10 (Proceedings adjourned, 5:15 p.m.)
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Proceeding: Progress Energy, Levy County Plant
Pre-Hearing Conference

Docket Number: 52-029-COL and 52-030-COL

ASLBP Number: 09-879-04-COL-BD01

Location: Crystal River, Florida

were held as herein appears, and that this is the
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