UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ronald M. Spritzer, Chairman
Nicholas G. Trikouros
Dr. Sekazi K. Mtingwa

In the Matter of	Docket No. 50-443-LA-2
NEXTERA ENERGY SEABROOK, LLC	ASLBP No. 17-953-02-LA-BD01
(Seabrook Station, Unit 1)	November 25, 2019

ORDER

(Granting C-10's Motion to Compel Mineralogical Data and Request to Submit Supplemental Written Testimony concerning the data; Denying C-10's Motion to Submit Additional Exhibits)

I. BACKGROUND

This proceeding arises from a License Amendment Request (LAR) filed by NextEra Energy Seabrook, LLC (NextEra),[1] concerning the operating license for Seabrook Station, Unit 1 (Seabrook), located in Seabrook, New Hampshire. The LAR sought to revise the Unit 1 Updated Final Safety Analysis Report (UFSAR) to include methods for analyzing the impact of concrete degradation caused by the alkali-silica reaction (ASR) affecting Seismic Category I reinforced concrete structures.[2] The monitoring, inspection criteria, and inspection intervals in the LAR were derived in large part from the testing conducted in the Large Scale Test Program (LSTP) at Ferguson Engineering Laboratory. The admitted contention of the C-10 Research

[1] Ex. INT010, License Amendment Request 16-03, Revise Current Licensing Basis to Adopt a Methodology for the Analysis of Seismic Category I Structures with Concrete Affected by Alkali-Silica Reaction (Aug. 1, 2016) (Non-Proprietary Version) [hereinafter LAR].

[2] LAR Enclosure 1, NextEra Energy Seabrook's Evaluation of the Proposed Change.

and Education Foundation (C-10) alleges that the LSTP test data fail to adequately represent the progression of ASR at Seabrook, and therefore the data fail to provide an adequate basis for the LAR's proposed monitoring, inspection criteria, and inspection intervals.[3]

On September 24–27, 2019, the Board held the evidentiary hearing for this proceeding in Newburyport, Massachusetts. On September 27, C-10's expert witness, Dr. Saouma, testified that documents supplied by NextEra are inadequate to permit a comparison of the mineralogical properties of the aggregate of the Seabrook concrete and the aggregate of the LSTP test specimens, particularly with regard to their chemical origin and chemical composition.[4] A NextEra witness stated that a revised NextEra exhibit (NER022-R, Appendix K) included petrographic reports on the LSTP test specimens.[5] Another NextEra witness acknowledged the existence of a petrographic report on the Seabrook aggregate, but he stated that report was not supplied to C-10 because "[i]t was not requested as part of the contention[.]"[6] At that point, NextEra objected to producing the petrographic report on the Seabrook aggregate, whereupon the Board stated that C-10 should file a motion if it wants to obtain the report.[7]

On September 29, 2019, C-10 filed a motion to compel NextEra to provide "a document or documents containing data regarding the tested mineralogical components of aggregate in Seabrook concrete."[8] C-10 maintains that the production of the mineralogical data on the

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[3] NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-17-7, 86 NRC 59, 127 (2017).

[4] See Official Transcript of Proceedings, NextEra Energy Seabrook, LLC Seabrook Station, Unit 1 at 1073–76 [hereinafter Tr.].

[5] Tr. at 1078–79 (Symons).

[6] Tr. at 1076–77, 1079–80 (Sherman). It is not clear from the transcript whether the witness was referring to one report or multiple reports. References hereafter to a petrographic report on the Seabrook aggregate should be understood as referring to all such reports.

[7] Tr. at 1080–81.

[8] C-10 Research and Education Foundation's Motion to Compel Production of Mineralogy Data and Request for Opportunity to Submit Supplemental Written Testimony Regarding the Data at 1 (Sept. 30, 2019) [hereinafter Motion to Compel].

Seabrook aggregate is necessary to make a complete record for the resolution of the dispute regarding the representativeness of the LSTP test data.[9] In addition, C-10 requests "a reasonable opportunity for Dr. Saouma to give a written expert opinion on the comparability of the Seabrook aggregate with the LSTP test specimen aggregate."[10]

NextEra opposes the Motion to Compel.[11] The NRC Staff (Staff) did not file a response. In its opposition, NextEra argued, among other things, that it had in fact produced documents containing mineralogical data as part of its initial disclosures in January 2018.[12] The Board therefore requested clarification from C-10 whether the documents that NextEra described as containing "relevant mineralogical and petrographic information"[13] in fact contain the mineralogical data C-10 seeks in its Motion to Compel.[14]

C-10 reviewed the documents identified by the Board and concluded they do not contain all the data Dr. Saouma seeks.[15] In its response to the Request for Clarification, C-10 also raised a new issue. During his review of the documents identified by the Board, Dr. Saouma also reviewed a petrographic study prepared by Wiss, Janney, Elstner (the WJE Report), which documents the observation of more severe ASR in the interior of a core sample than indicated

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[9] Id.

[10] Id. at 4.

[11] NextEra's Answer Opposing C-10's Motions to Compel Production of Mineralogical Data and to Submit Additional Post-Hearing Testimony (Oct. 9, 2019) [hereinafter NextEra's Answer to Motion to Compel].

[12] Id. Most of the documents to which NextEra referred were not offered into evidence during the hearing.

[13] Id. at 3.

[14] Licensing Board Memorandum (Request for Clarification) (Oct. 16, 2019) (unpublished) [hereinafter Request for Clarification].

[15] C-10 Research and Education Foundation's Response to ASLB Memorandum and Motion to Submit Additional Exhibits Regarding Petrographic Observations and Analyses of ASR at Seabrook (Oct. 28, 2019) [hereinafter Motion to Submit Additional Exhibits].

on the surface.[16] According to C-10, that observation contradicts testimony from NextEra and the Staff that ASR has always been found to be more severe at the surface of core samples.[17] Accordingly, in addition to pursuing its Motion to Compel, C-10 seeks to submit two additional exhibits: (1) INT049-R - Supplemental Testimony Of Victor E. Saouma, Ph.D Regarding Petrographic Documents; and (2) INT050 - the WJE Report.[18] NextEra opposes the Motion to Submit Additional Exhibits,[19] as does the Staff.[20]

For the reasons explained below, the Board grants the Motion to Compel, but denies the Motion to Submit Additional Exhibits.

II. ANALYSIS

A. Motion to Compel

1. Parties' Positions

C-10 alleges the production of mineralogical data is necessary to make a complete record for the resolution of the dispute regarding the representativeness of the LSTP test data.[21] Specifically, C-10 argues it "demonstrated that the mineralogy of the aggregate in the Seabrook and test specimen concrete falls within the scope of the admitted contention because it affects the length of time ASR has propagated."[22] Dr. Saouma alleges the information about

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[16] Id. at 2.

[17] Id. at 4–7.

[18] Id. at 2.

[19] NextEra's Answer Opposing C-10'S Third Motion for Leave to File Supplemental Testimony at 1–2 (Nov. 6, 2019) [hereinafter NextEra's Answer].

[20] NRC Staff's Answer Opposing C-10's Motion to Admit Additional Exhibit and Testimony at 1 (Nov. 6, 2019) [hereinafter NRC Staff's Answer].

[21] Motion to Compel at 1.

[22] Id. at 2 (quotations omitted).

mineralogy provided in NextEra's hearing exhibits is insufficiently detailed or quantitative to formulate a valid scientific comparison.[23]

NextEra opposes the Motion to Compel,[24] arguing that (1) the motion is procedurally improper because such motions are permissible only in formal adjudications;[25] (2) the motion is moot because NextEra already produced documents related to mineralogy prior to the evidentiary hearing; (3) the motion is untimely; and (4) the requested information is irrelevant to the admitted contention.[26] Additionally, NextEra argues the motion to submit additional testimony is premature and lacks good cause.[27]

2. Legal Standard

In a Subpart L proceeding such as this, the parties' obligation to produce documents is governed by 10 C.F.R. § 2.336. Under that provision, the standard for mandatory document disclosure is relevance to the admitted contention.[28] Once a contention has been admitted, the obligation to disclose documents relevant to the contention applies without the need for a further order from the board or a request from a party.[29] Moreover, parties have a continuing duty to disclose relevant documents that does not end until the board issues its decision resolving the contention (unless the board or the Commission orders otherwise).[30] "Disclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure

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[23] Id. at 3.

[24] NextEra's Answer to Motion to Compel.

[25] See 10 C.F.R. § 2.705(h).

[26] NextEra's Answer to Motion to Compel at 2.

[27] Id.

[28] 10 C.F.R. § 2.336(a)(2)(i).

[29] Id. § 2.336(a).

[30] Id. § 2.336(d).

update."[31] Under this Board's Initial Scheduling Order, "monthly updates are due on the last working day of each month[.]"[32] The parties did not request permission to alter that schedule, and neither the Board nor the Commission has modified the continuing obligation of the parties to disclose relevant documents until the Board issues its decision.

3. Mootness

C-10's Motion to Compel is not moot. As previously explained, C-10 has answered the Board's Request for Clarification whether NextEra has already produced the information sought in the Motion to Compel. C-10 states that the documents cited by NextEra are not sufficient to support the mineralogical comparison Dr. Saouma contends is necessary.[33]

We therefore consider whether the information C-10 seeks to compel is relevant to the admitted contention, and, if so, whether C-10 correctly filed the motion under 10 C.F.R. § 2.323 and complied with the timeliness requirements of that regulation.

4. Relevance

In Levy County, the licensing board borrowed the definition of relevance from the Federal Rules of Evidence, stating that the "Federal Rules of Evidence (FRE) provide some useful guidance."[34] Under the FRE, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'"[35] Further, "although the FRE are not mandated for NRC adjudicatory proceedings, the Commission has endorsed the use of

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[31] Id.

[32] Licensing Board Order (Initial Scheduling Order) at 2 (Nov. 29, 2017) (unpublished).

[33] Motion to Submit Additional Exhibits at 3–4 (emphasis omitted).

[34] Progress Energy Fla., Inc. (Levy Cty. Nuclear Power Plant, Units 1 & 2), LBP-10-23, 72 NRC 692, 705 (2010).

[35] Id. The FRE definition of relevance has been characterized as "expansive." United States v. Pollard, 790 F.2d 1309, 1312 (7th Cir. 1986), overruled on other grounds, United States v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987).

the FRE as guidance for the Boards, with the express proviso that Boards must apply the Part 2 rules with greater flexibility than the FRE."[36] The Levy County board also observed:

> 10 C.F.R. § 2.336 is a discovery regulation, and the rules are clear that the scope of discovery is broader than the scope of admissible evidence. See 10 C.F.R. § 2.705(b)(1) ("It is not a ground for objection [to discovery] that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."). See also Fed. R. Civ. P. 26(b)(1).[37]

And, as the board noted, "the Commission has stated that the mandatory disclosures in Subpart L proceedings encompass a 'wide range of information.'"[38]

Applying the broad definition of relevance under 10 C.F.R. § 2.336,[39] we conclude for the reasons set forth below that C-10 has provided sufficient support through the testimony of its expert Dr. Saouma to show that the requested mineralogical data is relevant to the determination framed by the admitted contention: whether the LSTP test specimens were sufficiently representative of Seabrook concrete.

ASR is a chemical reaction that produces an alkali-silicate gel that expands as it absorbs moisture. The expansion exerts stress on the surrounding concrete and results in cracking.[40] According to Dr. Saouma, "[d]ifferent kinds of reactive aggregates or sand will cause different types of gel. The calcium content of the gel . . . is known to be critical in characterizing the ASR

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[36] Levy Cty., LBP-10-23, 72 NRC at 705–06 (emphasis omitted); see Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2187 (Jan. 14, 2004) [hereinafter Adjudicatory Process Changes].

[37] Levy Cty., LBP-10-23, 72 NRC at 705–06.

[38] Id. (citing Adjudicatory Process Changes, 69 Fed. Reg. at 2194).

[39] Pollard, 790 F.2d at 1312.

[40] LAR Enclosure 1, NextEra Energy Seabrook's Evaluation of the Proposed Change, at p. 2 of 34 (unnumbered) (Non-proprietary version).

expansion."[41] Therefore, Dr. Saouma maintains, it is necessary to have a comparison of the mineralogy of the aggregate at Seabrook and the mineralogy of the aggregate used in the LSTP "because mineralogy plays an important role in the formation of ASR, in the formation of the gel, in the type of gel, in the nature of the expansion, in the type of cracks that we expect."[42] In C-10's proposed Exhibit 049-R, submitted in response to the Board's request for clarification, Dr. Saouma stated that although "the data provided in NextEra's reports are sufficient to support a comparison of the physical characteristics of the aggregates in the Seabrook concrete and the LSTP specimens, i.e., shape, hardness, strength, and size distribution of aggregate components[,]"[43] they are not adequate to support a mineralogical comparison "because they lack information about the gel type that will be produced, and consequentially the crack widths and patterns, that are needed to ensure adequate alkali silica reaction (ASR) representativeness."[44]

NextEra argues that the mineralogical data C-10 requests is irrelevant. It understands Dr. Saouma's request for mineralogical data on the Seabrook aggregate to concern its chemical composition. NextEra contends such data is irrelevant because "the chemical composition of the aggregate was intentionally *excluded* as a design parameter (i.e. was not a representativeness goal) of the LSTP, and . . . the LSTP intentionally and conservatively used aggregate that is *more* reactive than Seabrook."[45] During the evidentiary hearing, various expert witnesses debated the significance to the admitted contention of comparing the chemical

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[41] Ex. INT031, Saouma, Review of Selected Documents Pertaining to the Structural Evaluation of Seabrook Nuclear Power Plant at 3 (Feb. 12, 2019) (Non-Proprietary Version).

[42] Tr. at 1082–83 (Saouma).

[43] Ex. INT049-R, Supplemental Testimony Of Victor E. Saouma, Ph.D Regarding Petrographic Documents at 2 (Oct. 31, 2019) (emphasis omitted).

[44] Id.

[45] NextEra's Answer to Motion to Compel at 5–6 (citing Tr. at 290, 1082) (emphasis in original).

composition of the Seabrook aggregate and the LSTP aggregate.[46] NextEra's witnesses maintained that it is sufficient if the physical properties of the aggregates are comparable,[47] but Dr. Saouma argued, for the reasons explained above, that it is important to also know "their chemical origin, their chemical composition."[48]

The admitted contention alleges that the LSTP test data fail to adequately represent the progression of ASR at Seabrook. On its face, the contention is not limited to any specific aspect of representativeness. Moreover, any ambiguity about its scope is resolved by Dr. Saouma's explanation of why data on the chemical origin and composition of the Seabrook aggregate is relevant to the representativeness issue. His theory is vigorously disputed by NextEra, but this is a technical dispute that concerns the weight to be given to disputed evidence, not its relevance in the context of determining whether it is discoverable material.

We therefore need not resolve the battle of the experts to decide the Motion to Compel.[49] Judges should not weigh the evidence when determining its relevance,[50] particularly in resolving a dispute over whether the material is discoverable in the first instance. When the standard of relevance is met, the possibility that evidence may be explained away is not a reason to deny its admission,[51] much less its status as discoverable material. We therefore

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[46] Tr. at 981–96, 1081–83.

[47] Tr. at 982–84, 1081–82.

[48] Tr. at 1076 (Saouma). See also Tr. at 981–82, 984–85, 1082–83.

[49] Cf. Rosenfeld v. Oceania Cruises, Inc., 654 F.3d 1190 (11th Cir. 2011) ("Indeed, in most cases, objections to the inadequacies of a study are more appropriately considered an objection going to the weight of the evidence rather than its admissibility." (quotation omitted)).

[50] Adams v. Indiana Bell Tel. Co., 2 F. Supp. 2d 1077, 1088 (S.D. Ind. 1998), rev'd on other grounds sub nom. Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000). See also United States v. Porter, 881 F.2d 878, 887 (10th Cir. 1989) ("'An item of evidence, being but a single link in the chain of proof, need not prove conclusively the proposition for which it is offered . . . It is enough if the item could reasonably show that a fact is slightly more probable than it would appear without that evidence . . . A brick is not a wall.'" (quoting McCormick on Evidence, § 185, at 542–43 (E. Cleary 3d ed. 1984)) (footnotes omitted)).

[51] United States v. Snow, 517 F.2d 441, 444 (9th Cir. 1975).

conclude that the mineralogical data is relevant under 10 C.F.R. § 2.336(a)(2)(i) and should be disclosed to C-10 consistent with that provision's requirements.

5. Procedural Issues

We disagree with NextEra's argument that C-10's Motion to Compel is procedurally improper because such a motion is available only in formal adjudications under 10 C.F.R. Subpart G. It is true that traditional discovery tools, such as interrogatories, depositions, and document requests are not generally available in proceedings under 10 C.F.R. Subpart L.[52] But section 2.336(e)(1) authorizes a variety of sanctions for an offending party's "continuing unexcused failure to make the disclosures required by this section."[53] Among other things, the aggrieved party may make use "of the discovery procedures in subpart G of this part against the offending party[.]" Id. Thus, the discovery procedures of subpart G are available in a subpart L proceeding such as this when the moving party demonstrates an "unexcused failure to make the disclosures required by" section 2.336.[54] That is what C-10 alleges. And one of the discovery procedures available under subpart G is a motion to compel discovery.[55]

Given that C-10 may file a motion to compel discovery, we also conclude that it appropriately filed the Motion to Compel pursuant to 10 C.F.R. §§ 2.323 and 2.1204. Except for motions under 10 C.F.R. § 2.309 for new or amended contentions, motion practice for all types of hearings, formal or informal, is governed by 10 C.F.R. § 2.323. Section 2.323(h) indirectly authorizes motions to compel since it provides that "[p]arties may file answers to motions to compel discovery in accordance with paragraph (c) of this section."[56] And section 2.1204

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[52] 10 C.F.R. § 2.336(g).

[53] Id. 2.336(e)(1).

[54] Id.

[55] 10 C.F.R. § 2.705(h).

[56] Id. § 2.323(h).

confirms that in subpart L proceedings the requirements for motions and requests are those specified in section 2.323.

Regarding the issue of timeliness, section 2.323(a)(2) states that "[a]ll motions must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises."[57] C-10's motion was filed on September 29, 2019. Dr. Saouma explained his interest in additional mineralogical data during the evidentiary hearing on September 27, 2019,[58] and was told that a petrography report containing mineralogical data exists but had not been produced because "[i]t was not requested as part of the contention."[59] Putting aside the fact that the obligation to disclose documents relevant to an admitted contention applies without the need for a request from a party as part of the contention, 10 C.F.R. § 2.336(a), the Motion to Compel was filed on September 29, well within ten days of the date on which NextEra first acknowledged the existence of the disputed report and that it had not been produced based on NextEra's equally mistaken belief that the document did not fall within the scope of the admitted contention.

NextEra argues, however, that the circumstance from which the Motion to Compel arises was the initial production on July 24, 2019 of MPR-4262, and in particular section 4.3.2 of that document.[60] MPR-4262 was subsequently admitted into evidence as Exhibit NER022-R. Section 4.3.2 describes the physical characteristics of the aggregate used in "Mixture 10," the concrete mixture that was selected to prepare the LSTP specimens, as well as certain "ASR Accelerants" included in Mixture 10.[61] NextEra appears to argue that because Dr. Saouma

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[57] Id. § 2.323(a)(2).

[58] Tr. at 1073–76.

[59] Tr. at 1076–77, 1079–80 (Sherman).

[60] NextEra's Answer to Motion to Compel at 4–5.

[61] Ex. NER022-R, MPR-4262, "Shear and Reinforcement Anchorage Testing of Concrete Affected by Alkali-Silica Reaction," Vol. I, Rev. 1 (July 2016) & Vol. II, Rev. 0 (Jan. 2016) (FP100994), at 4-10 to 4-11 (Sept. 22, 2019) (Proprietary Version).

testified that section 4.3.2 includes some but not all of the petrographic information he wanted to review, C-10 was obligated to file a motion to compel additional petrographic information within ten days of its receipt of MPR-4262.[62]

We disagree. In Levy County,[63] the board found untimely a motion to compel production of computer programs because the programs were clearly described in reports disclosed months before the motion was filed. By contrast, section 4.3.2 of MPR-4262 does not identify a report that includes the additional mineralogical data Dr. Saouma seeks, nor did it put C-10 on notice that NextEra would refuse to produce such a report if it existed. Until the evidentiary hearing, C-10 had nothing more than the hypothetical possibility that NextEra might have additional reports containing mineralogical data of interest to Dr. Saouma. And because traditional discovery tools such as interrogatories, depositions, and document requests are not generally available in proceedings under subpart L,[64] C-10 had no means to inquire into or learn about the existence of additional documents not in the public record until the evidentiary hearing. Thus, the only option for C-10 was to ask during the hearing whether additional mineralogical data is available.

Therefore, without having access to more specific information than was provided in section 4.3.2 of MPR-4262, C-10 was not obligated to file its Motion to Compel prior to the hearing. If we accepted NextEra's argument, we would in effect be placing the burden on the party seeking disclosure to file motions to compel or discovery requests to obtain the relevant information to which it is entitled, based upon only the possibility that the opposing party may have additional relevant information. That would be flatly inconsistent with section 2.336, under which "each party must make the mandatory disclosures automatically without the need for a

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[62] NextEra's Answer to Motion to Compel at 4–5.

[63] Levy Cty., LBP-10-23, 72 NRC at 699–700, 714–15.

[64] 10 C.F.R. § 2.336(g).

party to file a discovery request."[65] Section 2.336(d) requires without limitation that "[d]isclosure updates shall include any documents subject to disclosure that were not included in any previous disclosure update."[66] That obligation continues until the board issues its initial decision and, like other disclosure requirements, is not contingent upon either a board order or a discovery request.

The Commission has affirmed that the "mandatory disclosures . . . which apply to Subpart L proceedings, are wide-reaching," and that parties other than the NRC Staff must provide "a copy or description of 'all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions.'"[67] The intent behind the mandatory disclosure requirements of section 2.336 was to replace the cumbersome and expensive process of discovery requests and motions practice with a system of mandatory disclosure. As the Commission explained:

> Mandatory disclosure of information relevant to the contested matter (together with the hearing file and/or electronic docket, discussed later) should reduce or avoid the need to draft often-complex discovery requests such as interrogatories, prepare for time-consuming and costly depositions, and engage in extended litigation over the responsiveness of a party to a discovery request. Reducing the burden of discovery may enhance the participation of ordinary citizens in the discovery process, since they often do not have the resources to engage in protracted litigation over discovery.[68]

NextEra's argument, however, would effectively require parties to file motions to compel whenever it is possible that the opposing party may have additional documents relevant to a particular issue. Thus, as a protective measure, parties in nearly every proceeding would be forced to engage in the burdensome motion practice the Commission sought to avoid to

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[65] Levy Cty., LBP-10-23, 72 NRC at 701 (emphasis added).

[66] 10 C.F.R. § 2.336(d).

[67] Crow Butte Resources, Inc. (North Trend Expansion Project) CLI-09-12, 69 NRC 535, 572–73 (2009).

[68] Adjudicatory Process Changes, 69 Fed. Reg. at 2194.

preserve their right to the disclosure of all relevant documents. This would frustrate the Commission's goal of reducing litigation related to disclosure of relevant information, as well as ignoring the automatic disclosure requirements of section 2.336. We decline to impose such a requirement.

We therefore grant C-10's Motion to Compel "a document or documents containing data regarding the tested mineralogical components of aggregate in Seabrook concrete."[69]

6. Request to Submit Additional Expert Testimony Based on NextEra's New Disclosures

We agree with C-10 that once NextEra produces a document or documents containing data regarding the tested mineralogical components of the aggregate in Seabrook concrete, Dr. Saouma should be permitted to submit additional written testimony explaining how the newly produced data affects his evaluation of the comparability of the Seabrook aggregate and the LSTP test specimen aggregate.[70]

We disagree with NextEra's claim that C-10 has not shown the requisite good cause for such limited supplementation of the record.[71] In general, licensing boards have the authority to schedule and regulate proceedings.[72] To be sure, the Commission permits licensing boards to

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[69] Motion to Compel at 1. In a footnote, C-10 states that it "understands that at least some data regarding the LSTP test specimen mineralogy can be found in Appendix K of Exhibit INT022-R," but it requests that "any additional data regarding the mineralogy of the LSTP test specimens be provided." Id. at 4 n.3. A request in a footnote at the end of a motion is insufficient to require either a response from NextEra or a ruling by the Board. In the interest of avoiding any further motion practice, however, the Board's ruling on relevance (section II.A.4, supra) should make it clear that any documents containing data regarding the mineralogy of the LSTP test specimens that are within NextEra's possession, custody, or control but have not been produced are subject to NextEra's ongoing duty of disclosure under 10 C.F.R. § 2.336(d).

[70] Motion to Compel at 4.

[71] NextEra's Answer to Motion to Compel at 7.

[72] 10 C.F.R. § 2.718; see Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-95-25, 48 NRC 325, 342 n.2 (1998) ("The Board's application of the 'unavoidable and extreme circumstances' test to petitioner was consistent with not only the Commission's own directive . . . but also with the Board's own extensive authority under 10 C.F.R. § 2.718 to schedule and regulate proceedings.").

extend adjudicatory deadlines "only when warranted by unavoidable and extreme circumstances."[73] In this regard, the Commission's 1998 Statement of Policy on Conduct of Adjudicatory Proceedings explained that it wanted:

> to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.[74]

C-10 in substance requests a limited extension of the Board's deadline for the submission of direct testimony. Although the Commission's standard is a demanding one, licensing boards have allowed limited extensions of time when adequately justified.[75] For example, an "unavoidable and extreme circumstance[]" occurs when documents formerly publicly available on the Agency's website are no longer available due to national security concerns.[76] The unexpected withdrawal of counsel on the day a filing is due also presents an "unavoidable and extreme circumstance[]."[77]

This case presents a particularly compelling instance of "unavoidable and extreme circumstances" because it arises from NextEra's own failure to comply with its disclosure

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[73] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 21 (1998); see Calvert Cliffs, CLI-95-25, 48 NRC at 342 ("[The Commission's] construction of 'good cause' [requiring] a showing of 'unavoidable and extreme circumstances' constitutes a reasonable means of avoiding undue delay in … proceeding[s], and for assuring that the proceeding[s are] adjudicated promptly, consistent with the goals set forth in the Policy Statement and the [Administrative Procedure Act].").

[74] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 19.

[75] Licensing Board Order (Granting in Part Motion for Extension of Time), Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), No. 01-790-01-ML (July 3, 2001) (discussing cases) (unpublished).

[76] See Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), LBP-01-31, 54 NRC 242, 245 (2001).

[77] See Memorandum and Order (Ruling on Request to Admit New Contention), S. Nuclear Operating Co. (Vogtle Elec. Generating Plant, Units 3 & 4), Nos. 52-025-COL and 52-026-COL at 13–14 (Nov. 30, 2010) (unpublished).

obligations under section 2.336. Obviously, Dr. Saouma could not submit testimony before the evidentiary hearing based on mineralogical data that will not be available to him until after the hearing. If the Board were to preclude the filing of additional testimony in this situation, we would in effect be encouraging parties to avoid compliance with their disclosure obligations, knowing that the aggrieved party may lack an effective remedy even if the licensing board eventually compels production of the previously undisclosed information. We do not believe the Commission intended to prohibit licensing boards from providing an effective remedy for violations of disclosure obligations. In fact, the Commission has emphasized the availability of sanctions for the failure to make mandatory disclosures, "including dismissal of the contention or of the application itself."[78] Given that the Commission has authorized such draconian sanctions in appropriate cases, we may allow C-10 the far more limited remedy of submitting additional expert testimony based on the newly available data.

Furthermore, granting C-10's request is consistent with "provid[ing] a fair hearing process," and "produc[ing] an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment."[79] It is true that allowing additional written testimony will delay the closing of the evidentiary record and may affect the completion of the Board's Initial Decision. The parties have already filed their proposed findings of fact and conclusions of law, however, and the Board is working on its decision. Any effect on the completion of that decision will be limited and is justified by the need to provide an effective remedy for the violation of disclosure requirements.

We emphasize, however, that any new testimony from Dr. Saouma should be limited to explaining how the newly produced data affects his evaluation of the comparability of the

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[78] North Trend Expansion Project, CLI-09-12, 69 NRC at 573.

[79] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 19.

Seabrook aggregate and the LSTP test specimen aggregate.[80] It should not be the occasion for new testimony related to other issues.

The following schedule shall apply to the filing of additional testimony and supplements to proposed findings of fact and conclusions of law:

1. On or before December 5, 2019, NextEra shall deliver to C-10 all documents within its possession, custody, or control not previously produced containing data regarding the tested mineralogical components of aggregate in Seabrook concrete.
2. On or before December 20, 2019, C-10 shall file Dr. Saouma's written testimony explaining how the newly produced data affects his evaluation of the comparability of the Seabrook aggregate and the LSTP test specimen aggregate.
3. On or before January 10, 2020, NextEra and the NRC Staff may file written rebuttal testimony in response to Dr. Saouma's new written testimony.
4. If the Board does not advise the parties by January 20, 2020 that it has questions regarding the parties' additional testimony, on or before January 31, 2020, the parties may file supplemental proposed findings of fact and conclusions of law, limited to the specific issues raised in Dr. Saouma's new written testimony and any rebuttal testimony filed by NextEra and the NRC Staff.

B. Motion to Submit Additional Exhibits

1. Parties' Positions

C-10 asks the Board to admit into the evidentiary record two new exhibits: (1) INT049-R, the supplemental testimony of its expert, Dr. Victor E. Saouma, in which, in addition to responding to the Board's request for clarification, he explains the significance of proposed

[80] Motion to Compel at 4.

exhibit INT050; and (2) INT050, the WJE Report.[81] This request presents the opposite situation from the Motion to Compel. Instead of seeking access to a document or documents that have not previously been produced and to submit written testimony concerning the new information, C-10 admits it received the WJE Report in early 2018, yet did not include it as an exhibit for the evidentiary hearing because Dr. Saouma "did not have sufficient time to review all . . . documents disclosed by NextEra[.]"[82]

Nevertheless, C-10 argues that good cause exists for the Board to admit the proposed exhibits. C-10 notes the WJE Report concludes that ASR cracking was the same throughout, or "significantly less" at the surface than at deeper portions.[83] C-10 suggests this exhibit contradicts NextEra's testimony[84] "that it has consistently found ASR at the surface of Seabrook core samples to be more severe than at depth within the cores."[85] According to C-10, the WJE Report supports Dr. Saouma's opinion "that surface ASR conditions are not reliable indicators of

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[81] We have already considered INT049-R in connection with the Motion to Compel. For that purpose, it was not necessary to admit the document into the record of the evidentiary hearing. The Motion to Submit Additional Exhibits, however, requests that we admit INT049-R as part of the evidentiary record for the hearing.

[82] Motion to Submit Additional Exhibits at 2–3.

[83] Id. at 4; see proposed Ex. INT050, WJE Report No. 2014-3453.2 at 17 (May 26, 2016) ("Within each core, the extent of ASR was also different depending on the locations of the cores. Of the eight cores with ASR, Core 2 was the only one that exhibited the most severe ASR in the top portion of the core. All other cores either exhibited significantly less ASR in the top portions than the deeper portions or a similar extent of ASR between the top portions and deeper portions. This observation suggests that ASR in the concrete was likely initiated and controlled by a factor from deep inside the concrete, rather than from the top surface of the concrete.").

[84] See Tr. at 397 ("[NextEra has] never found a spot at the plant, and we've done cores, you know, tested different depths. It is never worse at depth within the core concrete than what is indicated at the surface.") (Sherman)]; see Tr. at 456 (stating NextEra "found no substantial difference between near surface and what would be below the level of the reinforcing steel within the core of the structure") (Sherman).

[85] Motion to Submit Additional Exhibits at 5.

the severity of ASR within Seabrook structures, because the surface is drier than the interior of the concrete."[86]

C-10 argues the WJE Report undermines the NRC Staff's assumption that as long as ASR is not observed on the surface, it is not causing damage that can challenge the licensing basis.[87] C-10 also asserts that proposed exhibit INT050 provides a response to an inquiry from the Board seeking evidence of an "asymmetric effect . . . , where the effects [of ASR are] much more severe internally than would be indicated by surface cracking."[88] C-10 states the WJE Report provides evidence of greater internal cracking due to ASR than observed on the surface. C-10 argues INT049-R should be admitted into the evidentiary record because it contains an explanation by Dr. Saouma of the significance of INT050.[89]

NextEra opposes the motion, asserting C-10 failed to demonstrate "unavoidable and extreme circumstances" required to establish good cause.[90] NextEra argues the excuse of a large volume of discovery materials and competing priorities are not legally sufficient to satisfy the good cause standard.[91] In addition, NextEra states its testimony and the Staff's is neither contradicted nor undermined by the WJE Report, and that in fact it "is entirely consistent with—and in fact bolsters—NextEra's and the NRC Staff's testimony."[92] Further, NextEra complains

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[86] Id. at 6.

[87] Id.; see Tr. at 693 ("[The NRC Staff's] position in this review is if [ASR is] … not able to be identified at the surface, it's not causing damage that is going to challenge the licensing basis of the structures.") (Buford).

[88] Tr. at 450 (Trikouros); see also Tr. at 452 (requesting examples of more severe internal cracking) (Mtingwa).

[89] Motion to Submit Additional Exhibits at 7.

[90] NextEra's Answer Opposing C-10'S Third Motion for Leave to File Supplemental Testimony at 1–2 (Nov. 6, 2019) [hereinafter NextEra's Answer to Supplemental Testimony].

[91] Id. at 5–6.

[92] Id. at 2, 7–12.

that C-10 provided an evidentiary response to a request for a pleading clarification.[93] Thus, NextEra argues INT049-R "is procedurally improper and does not constitute probative evidence."[94]

Similarly, the Staff opposes the motion, stating that admitting the additional exhibits "would cause unnecessary delay and would not add to the already voluminous record in this proceeding."[95] Further, the Staff claims admitting the additional exhibits "would be patently unfair to the Staff and NextEra."[96] The Staff argues that C-10 fails to establish good cause to submit both exhibits, noting the WJE Report was disclosed in January 2018, yet C-10 failed to meet the Board's deadlines of August 23, 2019 (deadline for filing testimony) and September 24, 2019 (deadline for filing exhibits).[97] In addition, the Staff notes that C-10 already presented extensive arguments on the same issue presented in the proposed new exhibits.[98] The Staff asserts the relief sought by C-10 "would only serve to delay the closure of the record and the completion of this adjudication."[99]

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[93] Id. at 12–14.

[94] Id.

[95] NRC Staff's Answer Opposing C-10's Motion to Admit Additional Exhibit and Testimony at 1 (Nov. 6, 2019) [hereinafter NRC Staff's Answer to Supplemental Testimony].

[96] Id.

[97] Id. at 3; see Licensing Board Memorandum and Order (Revised Scheduling Order) at 3 (Feb. 15, 2018) (unpublished) (providing C-10 the opportunity to file written rebuttal testimony by August 23, 2019); see Licensing Board Memorandum (Regarding Submission of Non-Disclosure Agreements, Unredacted Version of a Certain Exhibit, Review of the Hearing Transcript, and Revised Hearing Room Layout) at 1–2 (Sept. 11, 2019) (unpublished).

[98] NRC Staff's Answer to Supplemental Testimony at 3–4 ("And, in fact, C-10 did present extensive evidence on this very issue—surface versus interior cracking—in its filings and at the evidentiary hearing. C-10's belated discovery of the report it now seeks to admit does not excuse an eleventh-hour attempt to supplement the already extensive record—after the completion of a four-day evidentiary hearing—with supplemental testimony based on a report disclosed nearly two years ago.").

[99] Id. at 6.

2. Legal Standard

As we explained in our ruling on the Motion to Compel, the Commission permits licensing boards to extend adjudicatory deadlines "only when warranted by unavoidable and extreme circumstances."[100] The Commission's "timeliness rules require a high level of discipline and preparation by petitioners, 'who must examine the [] available material and set forth their claims and the support for their claims"[101] within Board established deadlines. The Commission has also stated that "[r]egardless of a party's resources, '[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations.'"[102] Nor does "the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding . . . relieve that party of its hearing obligations."[103]

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[100] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 21; see Calvert Cliffs, CLI-95-25, 48 NRC at 342 ("[The Commission's] construction of 'good cause' [requiring] a showing of 'unavoidable and extreme circumstances' constitutes a reasonable means of avoiding undue delay in … proceeding[s], and for assuring that the proceeding[s are] adjudicated promptly, consistent with the goals set forth in the Policy Statement and the [Administrative Procedure Act].").

[101] AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 271–72 (2009); see also Phila. Elec. Co. (Limerick Generating Station, Units 1 & 2), ALAB-819, 22 NRC 681, 729–30 (1985) (upholding the licensing board's rejection of intervenors' testimony on the ground of lateness because the intervenors "had ample notice of the filing requirements for this particular direct testimony," had participated in the proceeding "for several years and had reason to be knowledgeable about the Commission's general requirements for prefiling testimony," and because such cases are "complex proceedings that demand an orderly process").

[102] DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-14-10, 80 NRC 157, 164 (2014) (quoting Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981)).

[103] Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC at 454.

3. Board Ruling

We must determine whether C-10 established good cause to submit the two additional exhibits.[104] This requires C-10 to show "unavoidable and extreme circumstances"[105] because C-10 is asking leave to file evidence after a Board-ordered deadline that could have been filed before the deadline. In this instance, unlike the Motion to Compel, C-10 proffered no justification which satisfies the good cause standard, and we accordingly deny the motion.

C-10 possessed the WJE Report since early 2018, almost two years ago. The fact that C-10 only just realized its significance is neither an "unavoidable [n]or extreme circumstance[.]"[106] Intervenors are under an "obligation to review the record closely and to raise their arguments promptly," so that "NRC adjudicatory proceedings [do not] prove endless."[107] Further, a discrepancy in resources between parties does not relieve a party of its obligation to thoroughly review pertinent documents.[108] Therefore any arguments revolving around C-10's expert's heavy workload is not a sufficient justification.[109]

Further, although the proposed exhibits appear to discuss the subject of an inquiry by the Board during the evidentiary hearing,[110] C-10 is incorrect in asserting the Board requested a search for additional evidence upon completion of the hearing. The fact that after the hearing

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[104] Request for Clarification at 3.

[105] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 21.

[106] Motion to Submit Additional Exhibits at 2–3.

[107] Hydro Res., Inc. (Rio Rancho, NM), CLI-04-33, 60 NRC 581, 591 (2004).

[108] See supra nn.101–102.

[109] See also Licensing Board Memorandum and Order, Fla. Power and Light Co. (Turkey Point, Units 3 & 4), No. 50-250/251-LR at 2 (Dec. 15, 2000) (holding that work and family commitments during the Christmas holiday season failed to rise to the level of unavoidable and extreme circumstances) (unpublished).

[110] See supra n.88 and accompanying text.

C-10 found a better answer to a Board inquiry does not entitle it to submit additional evidence after the deadlines for written testimony and exhibits.[111]

In addition, C-10 makes a substantive argument, stating the proposed exhibits contradict the testimony of NextEra and undermine the conclusions of the NRC Staff.[112] Commission precedent does not contemplate using the probative value of evidence filed after deadlines to satisfy the good cause standard. Instead, the Commission requires a showing of "unavoidable and extreme circumstances."[113]

III. CONCLUSION

For the reasons stated above, the Board grants C-10's Motion to Compel but denies C-10's Motion to Submit Additional Exhibits. Accordingly, INT049-R and INT050 will not be admitted into evidence. INT049-R has been considered by the Board only insofar as it responds to the Request for Clarification.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ronald M. Spritzer, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Sekazi K. Mtingwa
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 25, 2019

[111] See Hydro Res., Inc., CLI-04-33, 60 NRC at 591.

[112] Motion to Submit Additional Exhibits at 5–6.

[113] Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC at 21.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
NEXTERA ENERGY SEABROOK, LLC	)	Docket No. 50-443-LA-2
(Seabrook Station, Unit 1)	)	
	)	
(License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **ORDER (Granting C-10's Motion to Compel Mineralogical Data and Request to Submit Supplemental Written Testimony Concerning the Data; Denying C-10's Motion to Submit Additional Exhibits)** have been served upon the following persons by Electronic Information Exchange.

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NEXTERA ENERGY SEABROOK, LLC (Seabrook Station Unit 1) – Docket No. 50-443-LA-2
ORDER (Granting C-10's Motion to Compel Mineralogical Data and Request to Submit Supplemental Written Testimony Concerning the Data; Denying C-10's Motion to Submit Additional Exhibits)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 25th day of November 2019.