UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

APPLICANT'S NOTICE OF APPEAL FROM LBP-09-10

Pursuant to 10 C.F.R. § 2.311(a), Progress Energy Florida, Inc. ("Progress") files, together with the attached Brief, this Notice of Appeal of the Atomic Safety and Licensing Board's July 8, 2009 Memorandum and Order which admitted for litigation in the above-captioned proceeding three contentions relating to Progress's Application for a combined license to construct and operate the Levy County Nuclear Plant in Levy County, Florida.

Respectfully submitted,
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July 20, 2009

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PROGRESS ENERGY FLORIDA, INC.'S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-10

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PROGRESS ENERGY FLORIDA, INC.'S BRIEF IN SUPPORT OF APPEAL FROM LBP-09-10

I. INTRODUCTION

Pursuant to 10 C.F.R. 2.311(a) Progress Energy Florida, Inc. ("Progress" or "Applicant") hereby appeals the Atomic Safety and Licensing Board's ("Board") July 8, 2009 Memorandum and Order ("LBP-09-10") in the above-captioned proceeding. In LBP-09-10, the Board granted intervention to the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively the "Petitioners"), and found that the Petitioners had submitted three admissible contentions, as restated by the Board. For the reasons set forth below, Progress respectfully requests that the Commission reverse the Board's admission of contentions and wholly deny Petitioners' request for hearing.

II. BACKGROUND

This proceeding involves Progress's application (the "Application" or "COLA"), dated July 28, 2008, for a combined license ("COL") to construct and operate the proposed Levy County Nuclear Plant ("Levy") in Levy County, Florida. On December 8, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene in this proceeding. 73 Fed. Reg. 74,532 (Dec. 8, 2008). On February 6, 2009, Petitioners filed a

petition to intervene and request for hearing ("Petition").[1] The Petition requested that Petitioners be admitted as parties to this proceeding, and contained twenty-seven proposed contentions.[2]

On March 3, 2009, Progress submitted its Answer opposing Petitioners' request for hearing, arguing that the Petition should be denied because it did not propose an admissible contention.[3] In its Answer of March 3, 2009, the Staff likewise opposed Petitioners' hearing request, arguing that no admissible contention had been proposed.[4] Petitioners filed a Response to Progress's and Staff Answers on March 17, 2009 that, among other things, contained new bases for proposed Contentions 7 and 8.[5] On April 6, 2009, Progress filed an Answer opposing those new bases.[6] The Board held oral argument in this proceeding on April 20 and 21, 2009.

On July 8, 2009, the Board issued LBP-09-10. That Order admitted Contentions 4, 7 and 8, "as restated and narrowed [by the Board] in Attachment A" to LBP-09-10.[7] The Board denied all of Petitioners' other contentions. Id. For the reasons set forth below, Progress respectfully requests that the Commission reverse the Board's decision admitting Petitioners' contentions and deny Petitioners' request for hearing.

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[1] Petition to Intervene and Request for Hearing By the Green Party of Florida, the Ecology Party of Florida and Nuclear Information and Resource Service (Feb. 6, 2009).

[2] These included Petitioners' Contentions 1 through 11; Petitioners' Contentions 4.A through 4.O as well as two Contentions denominated as 4.N; Petitioners' Contention 6 included Contentions 6.A and 6.B. Petitioners later submitted a twenty-eighth proposed contention, Contention 12, which the Board found inadmissible for failure to meet the requirements for filing new or untimely contentions.

[3] Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service (Mar. 3, 2009) ("Progress Answer").

[4] NRC Staff Answer to "Petition to Intervene and Request for Hearing by the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service" (Mar. 3, 2009) ("Staff Answer").

[5] Response of the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service to Answers to Our Petition to Intervene from NRC Staff Attorneys and Progress Energy Florida Attorneys (Mar. 17, 2009) ("Petitioners' Response").

[6] Progress Energy's Answer Opposing the Green Party of Florida, the Ecology Party of Florida, and Nuclear Information and Resource Service Filing of New Bases for Proposed Contentions 7 and 8 (Apr. 6, 2009) ("Progress Answer Opposing New Bases").

[7] LBP-09-10, slip op. at 107.

III. STANDARD OF REVIEW

The Commission will reverse licensing board rulings where there is clear error or abuse of discretion. U.S. Department of Energy (High Level Waste Repository), CLI-09-14, 69 N.R.C. ___ (Jun 30, 2009) (slip op. at 4); Crow Butte Resources, Inc. (North Trend Expansion Area), CLI-09-12, 69 N.R.C. ___ (Jun. 25, 2009) (slip op. at 8-9); Progress Energy Carolinas, Inc., (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-08, 69 N.R.C. ___ (May 18, 2009) (slip op. at 7). The Commission's review of such rulings "is appropriately informed by the unique circumstances and issues presented" by the particular matter before it. U.S. Department of Energy, CLI-09-14, slip op. at 4.

Moreover, the Commission has reversed licensing board decisions admitting reformulated contentions where a board "add[s] material not raised by a petitioner in order to render a contention admissible." Crow Butte, CLI-09-12, slip op. at 22 (footnote omitted). The Commission has reversed decisions admitting contentions where a board fails to "explicitly state[] which bases were admitted, including the reasons for their admissibility, and to which contention each basis applie[s]." Id. at 23. Likewise, board decisions, admitting reformulated contentions, that fail to adequately define the scope of the admitted contention also have been reversed. Id.

IV. SUMMARY OF ARGUMENT

The Commission should reverse the Board's admission of Contentions 4, 7, and 8 in LBP-09-10 because the Board committed clear error and abuse of discretion with respect to the admission of those Contentions.

The Board in LBP-09-10 reformulated sixteen inadmissible contentions (Contentions 4.A through 4.O, including two labeled Contention 4.N) into a single one. In so doing, the Board committed clear error and abused its discretion. Specifically, the Board reformulated and admitted "Contention 4" without identifying an adequate basis for it. As the Commission recently reiterated in Crow Butte, admitted contentions, including those reformulated by a Board, must have adequate, explicitly stated bases to ensure that the issues to be litigated are well-defined. Crow Butte, CLI-09-12, slip op. at 22-23.

The Board also "read together" the sixteen separately-pled Contentions, rather than evaluating whether each Contention individually met the Commission's six criteria for admissibility. It also converted sixteen contentions of omission, which specifically alleged that Progress's Environmental Report ("ER") did not include certain information regarding impacts, into one contention alleging the ER did not "adequately address" those impacts. Accordingly, the Board committed errors of law by adding material to an otherwise inadmissible contention and by reformulating a new contention before finding the underlying contentions admissible as submitted. See Crow Butte, CLI-09-12, slip op. at 22; Andrew Siemaszko, CLI-06-16, 63 N.R.C. 708, 720-21 (2006).

Reformulated Contention 4 itself is impermissibly vague. It does not identify what resource is implicated by the allegedly "LARGE" impacts to be litigated, finding instead that identification of the resource is a matter for further briefing. Accordingly, the reformulated Contention 4 does not "achieve 'the goal of clarity, succinctness, and a more efficient proceeding,'" (Crow Butte, CLI-09-12, slip op. at 22, quoting Siemaszko, 63 N.R.C. at 720), nor does it "define adequately the scope of the admitted contentions." Crow Butte, CLI-09-12, slip op. at 23. The Board also erred by failing to analyze whether the Contentions that it calls

"consequential" met the six criteria of contention admissibility. Instead, the Board abused its discretion by relying upon failed "logic" to admit the subjects discussed in the consequential Contentions.

Finally, the Board committed an error of law by relying solely on the expert opinion of Dr. Sydney Bacchus to find that the admitted Contention raised a genuine issue of material dispute with the Application. The Board failed to address controlling Commission precedent (cited by Progress and the Staff) holding that an expert opinion which – like Dr. Bacchus's – merely makes conclusory statements "without providing a reasoned basis or explanation for that conclusion," is inadequate to support admission of a contention "because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 472 (2006) ("USEC").

The Board also committed clear error in admitting Contentions 7 and 8. First, the Board committed an error of law when it admitted those Contentions, which (as the Petitioners acknowledged) are substantively the same as two contentions that the Commission *sua sponte* held were inadmissible in Tennessee Valley Authority (Bellefonte Nuclear Power Plant, Units 3 and 4), CLI-09-03, 69 N.R.C. ___ (Feb. 17, 2009) ("Bellefonte"). Second, the Board committed clear error by not ruling on Progress's opposition to Petitioners' late-filed attempt to amend the bases for Contentions 7 and 8 through their Response. The Board further erred in relying on those new bases, when Petitioners did not even attempt to demonstrate that the new bases met the Commission's regulations for late-filed contentions.

Third, the Board committed clear error in adding new regulatory bases, not raised by Petitioners in their Petition or Response, in support of Contentions 7 and 8 as reformulated by

the Board (see Crow Butte, CLI-09-12, slip op. at 22), and by not providing Progress with an opportunity to provide argument concerning how those regulatory bases were satisfied. Fourth, the Board committed clear error in admitting Contentions 7 and 8 because, even as reformulated by the Board, the Contentions are inadmissible. As reformulated, Contentions 7 and 8: (a) improperly impose requirements on a COL applicant that do not exist in the Commission's regulations, and (b) allege that the Application omits information that it does, in fact, contain.

Finally, the Board erred in allowing Greater Than Class C Waste issues to be litigated as part of Contentions 7 and 8, which are based entirely on the inability of Progress to ship low-level radioactive waste to the Barnwell facility. The closure of that facility has no effect on Greater Than Class C Waste because the disposal of Greater Than Class C Waste is the responsibility of the Federal government and would not be shipped to Barnwell or any other low-level radioactive waste disposal facility. 42 U.S.C. § 2021c(b)(1)(D).

V. ARGUMENT

A. The Board Erred In Admitting Contention 4

As pled by Petitioners, "Contention 4" consisted of sixteen separate contentions – Contentions 4.A - 4.O, including two Contention 4.Ns – each of which Progress and the Staff challenged as inadmissible for failing to satisfy the Commission's six criteria for admitting contentions. Progress Answer at 56-155; Staff Answer at 29-54. In LBP-09-10, the Board admitted one reformulated Contention 4 as set forth in Attachment A to its Order. When it admitted that reformulated Contention, the Board committed various legal errors and abused its discretion.

1. The Board Failed To Identify The Bases For Admitting Contention 4

When it reformulated and admitted Contention 4, the Board failed to identify the bases upon which it was admitting that Contention, as required by the Commission in Crow Butte. CLI -09-12, slip op. at 22-23. In LBP-09-10, the sole basis the Board identified for admitting Contention 4 was that:

> 10 C.F.R. § 51.45 requires that the ER cover all significant environmental impacts associated with the proposed project, and (allegedly) the PEF ER fails to meet this legal requirement because it does not adequately address the indirect and cumulative environmental impacts associated with certain specified aspects of the LNP project.

LBP-09-10, slip op. at 47. However, nowhere in the Petition's forty-page discussion of Contentions 4.A through 4.O, or in their Response, do Petitioners argue that Progress's ER failed to satisfy the requirements of 10 C.F.R. § 51.45. Petitioners allege that the ER failed to comply with NEPA, and do not even cite 10 C.F.R. § 51.45. Accordingly, the Board erred by admitting Contention 4 based on a rationale not raised by the Petitioners. Crow Butte, CLI-09-12, slip op. at 22; Siemaszko, CLI-06-16, 63 N.R.C. at 720-21.[8]

Moreover, in its discussion admitting the "allegations" in Contentions 4.D, 4.E, 4.F, 4.G and 4.I, the Board merely paraphrases each of those Contentions. LBP-09-10, slip op. at 50. Without stating more, the Board claims that the Petitioners and their expert "have met the criteria of 10 C.F.R. § 2.309(f)(1) to admit these allegations as part of C4." LBP-09-10, slip op. at 50.

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[8] In addition, even if Petitioners had alleged that the ER failed to comply with 10 C.F.R. § 51.45, it was an error of law for the Board to rely on Part 51 as the basis for a Contention. The Staff, not the Board, is tasked with determining whether a COLA is complete in accordance with that Part. 10 C.F.R. § 2.101(a)(3). That discretionary decision of the Staff is not subject to adjudication. See Letter from A. Bates, Acting Secretary of the Commission, to D. Curran and J. Blackburn, Jr., Re: Exelon Nuclear Texas Holdings, LLC (Victoria Country Station, Units 1 and 2), Docket Nos. 52-031-COL and 52-032-COL (Dec. 30, 2008), available at ADAMS Accession No. ML083650299 (citing U.S. Department of Energy (High-Level Waste Repository), CLI-08-20, 68 N.R.C. 272 (2008)). The Board erred as a matter of law by reformulating Contention 4 to adjudicate whether the ER complies with Part 51.

The Board cites to nothing in the Petition's discussion of Contentions 4.A through 4.O that sets out the bases for admitting Contention 4. Nor does the Board's reformulation of the Contention in Attachment A describe the bases to be litigated. The Board's decision is inconsistent with Crow Butte, which required the licensing Board in that proceeding to "explicitly state[] which bases were admitted … and to which contention each basis applied." Crow Butte, CLI-09-12, slip op. at 23.

Indeed, the Board rejected the need to show an adequate basis for a contention. According to the Board, "[c]hallenges to the admissibility of a contention pursuant to § 2.309(f)(1)(ii) on the ground that it does not include an 'adequate basis' because it does not include sufficient facts, evidence or supporting factual information are … misguided. If the petitioner provides a brief explanation of the rationale underlying the contention, it is sufficient to satisfy 10 C.F.R. § 2.309 (f)(1)(ii)." LBP-09-10, slip op. at 45. To the contrary, it is long-standing Commission precedent that a contention must be supported by an adequate basis. Nuclear Management Co. (Monticello Nuclear Generating Plant), LBP-05-31, 62 N.R.C. 735, 760 (2005); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant), ALAB-877, 26 N.R.C. 287, 292-94 (1987). "For our licensing boards to entertain contentions grounded on little more than guesswork would waste the scarce adjudicatory resources of all involved." Crow Butte, CLI-09-12, slip op. at 21. As such, a contention must allege sufficient facts or other information to ensure that only well-defined issues are admitted for hearing. Id.

Sufficient facts or other information were not identified by the Board here. And, because no adequate bases were set forth for admitting the "subparts" to Contention 4 described above, the Board's so-called "consequential" Contentions 4.L, 4.M and 4.N – which were admitted

solely because the other "subparts" were admitted (see LBP-09-10, slip op. at 51) – also are not admissible.

2. The Board Erred When It Reformulated Inadmissible Contentions To Attempt To Create An Admissible One

The Board erred as a matter of law by reformulating inadmissible Contentions to attempt to create an admissible one. As the Commission recently reiterated in Crow Butte, the Board's authority with respect to reformulating contentions is limited to narrowing a contention that it finds admissible, not rehabilitating a contention to make it admissible. Crow Butte, CLI-09-12, slip op. at 22. "When conducting its analysis, the Board should determine whether the contention is admissible as *submitted*. The Board may reframe contentions following a determination of their admissibility …." Siemaszko, 63 N.R.C. at 720 (emphasis in original).

Although Contentions 4.A through 4.O each begin with the number "4", Petitioners pled them as sixteen separate Contentions. The Petition and Petitioners' Response both introduce them as "Contentions 4.A to 4.O" and refer to them throughout as Contention 4.A, Contention 4.B, Contention 4.C, and so on. Progress and the Staff replied to those Contentions as pled, addressing each individually. Indeed, the possibility of reading "Contention 4" as an integrated Contention was not even discussed until oral argument and only with Petitioners. Tr. at 45.[9]

[9] LBP-09-10 states that the integrated Contention 4 is discussed at Tr. 41-44. In fact, Tr. at 41-43 discusses the need to re-file some of the Petitioners' documents related to their experts. Petitioners' new argument that Contentions 4.A to 4.O is to be read "whole cloth" starts at Tr. 40 and continues at Tr. 44-46. And, while Petitioners initially urge that Contentions 4.A to 4.O be considered "whole cloth" (Tr. at 44), Petitioners readily agree with the Board Chairman's suggestion that Contention 4.O be considered with Contentions 9 to 11. Tr. at 46.

The Board did not find that the individual Contentions 4.A through 4.O were admissible on their own. For example, while the Board agreed with Progress that Contentions 4[10] and 4.A do not provide separate, coherent, stand-alone contentions, the Board decided to "read them as the introductory overview of a single contention," and, "[a]s such" found "they are a proper part of an admissible contention." LBP-09-10, slip op. at 49 (emphasis in original). Rather than applying the contention admissibility criteria to each of Contentions 4.A through 4.O as it was required to do, the Board concluded that Contentions 4.A through 4.O present "several issues that, when read together, are sufficiently pled to satisfy the criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) and to thus constitute an admissible contention." LBP-09-10, slip op. at 21-22. By finding it necessary to read Contentions 4.A though 4.O "together" in order to satisfy the contention admissibility criteria, the Board implicitly finds that individually those Contentions were inadmissible, as argued by Progress and the Staff.

The Board did not even attempt to evaluate Petitioners' Contentions 4.A through 4.O individually. Instead, the Board expressly "decline[d] to approach C4 as sixteen separate contentions, with each subpart separately being required to satisfy each of the six criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi)." LBP-09-10, slip op. at 28. Despite finding "C4 and C4A" incoherent and implicitly finding that Contentions 4.A to 4.O were not admissible as pled, the Board reformulates the sixteen contentions into one, stating cryptically that treating each separately "inappropriately 'atomizes' the contention into sixteen subparts." Id. at 28. But, Petitioners chose to submit sixteen disparate Contentions in their filing, and the Board was

[10] LBP-09-10 defines Contention 4 as pled as an "introductory assertion" in conjunction with Contention 4.A. LBP-09-10, slip op. at 22. Progress notes that the Petition several times included an introductory sentence prior to the Contention's headnote. In all cases, Progress considered such introductory material part of the Contention that followed the headnote. See e.g., Progress Answer at 108 n.55; 126 n.68; 130 n.70. LBP-09-10 provides no explanation of why the material above the headnote for Contention 4.A should be treated as an introduction to all of Contentions 4.A through 4.O.

obligated to address them as such.[11] Instead, the Board improperly turned its authority on its head: rather than finding the Contentions admissible and then reformulating them to narrow their scope, the Board reformulated the Contentions in order to find them admissible. Reformulating contentions prior to ruling on their admissibility is an error of law. Crow Butte, CLI-09-12, slip op. at 22; Siemaszko, CLI-06-16, 63 N.R.C. at 720-21.

3. Petitioners Pled A Contention Of Omission, Not A Contention Of Inadequacy As Reformulated By The Board

Furthermore, in order to find Contention 4 admissible, the Board ignored the plain language of Contentions 4.A through 4.O. As Progress argued in its Answer, each of those Contentions were Contentions of omission, since they each alleged that the ER "failed to address" some specific issue. Petition at 32-72. In each case, Progress's Answer explained how the ER or other parts of the Application did, in fact, include the allegedly omitted information. The Board, however, dismissed that argument: "We reject the suggestion that, because C4 uses the phrase 'failed to address,'[12] C4 can only be seen as a contention of omission, and any reference to the relevant topic in the ER automatically results in the denial of C4. It is obvious that Petitioners know that the ER addressed, in some sense, some of the C4 topics." LBP-09-10, slip op. at 47 n.37.

The Board found that Contentions 4.A through 4.O were actually alleging that the ER's discussion of certain topics was "inadequate." Accordingly, reformulated Contention 4 states that the ER fails to "adequately" address certain impacts, even though the term "adequately" is used by Petitioners with regard to Contentions 4.A to 4.O only in summarizing their concerns of

[11] In each instance in setting forth Contentions 4A – 4O, Petitioners stated a Contention and followed the statement with the proposed "Explanation of basis."

[12] In fact, every one of Contentions 4.A through 4.O uses this phrase.

the consequence of the failure to "assess aquatic and other environmental impacts." Petition at 2. "Adequate" or "adequately" never appears in Contentions 4.A through 4.O as pled by Petitioners.

Petitioners have the burden to plead an admissible contention, free from internal inconsistencies. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 363 (2001). Accordingly, the Board erred as a matter of law in ignoring the plain language of Contentions 4.A to 4.O and reformulating otherwise inadmissible contentions of "omission" to allegedly admissible contentions of "inadequacy." The Board's authority to reformulate contentions for clarity, succinctness, and efficiency applies only after the Board finds the contention admissible. As the Commission states:

> When conducting its analysis, the Board should determine whether the contention is admissible as *submitted*. The Board may reframe contentions, following a determination of their admissibility, for purposes of clarity, succinctness, and a more efficient proceeding. But the Board must not redraft an inadmissible contention to cure deficiencies and thereby render it admissible. Such an action would be tantamount to raising a new issue *sua sponte* without the required prior permission from the Commission.

Siemaszko, CLI-06-16, 63 N.R.C. at 720-21 (emphasis in the original, citations and internal quotations omitted).

Moreover, in reformulating Contention 4 to make it a contention of inadequacy, the Board adds material not provided by the Petitioners. "Reading C4 as a whole, it is clear that Petitioners are asserting that Part 51 requires ERs to analyze and consider all significant indirect and cumulative environmental impacts resulting from a proposed project. When a subpart of C4 asserts that certain information is omitted or inadequate, the reason why Petitioners believe that this information is necessary is clear – Petitioners believe that it is required under Part 51."

LBP-09-10, slip op. at 47-48 n.38.[13] The Order impermissibly adds material to the Petitioners' contention in an effort to make it admissible. Crow Butte, CLI-09-12, slip op. at 22 & n.81, citing Siemaszko, CLI-06-16, 63 N.R.C. at 720-21 and Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991).

4. Contention 4 As Reformulated Is Impermissibly Vague

Contention 4 as submitted and as admitted is impermissibly vague because it fails to indentify what resource is implicated by the alleged "LARGE" impacts to be litigated. As described in Progress's Answer, characterizing whether an impact is large or small depends on whether the impact is sufficient to destabilize important aspects of a resource. See e.g., Progress Answer at 90, 130, 137. The allegation must identify the resource impacted because, as Progress explained at oral argument, defining the resource is an *ad hoc* decision based on what makes sense in context. Tr. at 379.

As admitted, the Contention states that the ER "fails to adequately address, and inappropriately characterizes as SMALL, certain direct, indirect, and cumulative impacts." LBP-09-10, Attachment A. It is unclear how the parties would litigate the characterization of impacts. Indeed, the Board agreed that the impacted resource must be defined in order to characterize the impact. LBP-09-10, slip op. at 46, citing 10 C.F.R. Part 51, App. B, Table B-1 n.3. Unable to define the resource as less than the "globe," the Board deferred this issue for later legal briefing. Id. The Board found: "It may be we will obtain better legal briefing on this issue with regard to some of the admitted portions of C4." Id. A contention, however, is not admissible "with details to be filled in later." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11,

[13] As noted earlier, nowhere in the Petition is compliance with Part 51 alleged as an issue. Compliance with Part 51 is part of the docketing decision by the Staff that is not subject to adjudication.

49 N.R.C. 328, 338 (1999). The Board errs as a matter of law in deferring until later briefing a key detail of the Contention, namely defining the impacted resource so that the impact can be characterized.

As Progress's Answer explains, since Petitioners allege that the ER improperly characterized certain impacts as small, it is incumbent on the Petitioners alleging large impacts to identify the resources so impacted. Progress Answer at 90. The Board dismissed this argument as a merits argument regarding whether the impacts described in the ER are properly characterized. LBP-09-10, slip op. at 37-40. The Board, however, abused its discretion in ignoring the relevant non-merits argument advanced by Progress; the resource must be defined by Petitioners in order to support their allegation that impacts are large.

The Petition provides no helpful clarification on defining the relevant resource(s) impacted. The Petition sets forth a listing of construction impacts from the ER. Petition at 34-35. It makes conclusory allegations that such impacts are all "LARGE." Petition at 43, 46, 59, 60, 61. The Petitioners, however, do not support their alleged characterization by identifying what resource is impacted.[14] The Board recognizes this shortcoming, but fails to attribute it to Petitioners. The Board surveys NRC requirements and the Application for a definition of resources and, citing oral argument by the Applicant, concludes that "there appears to be no" such definition. LBP-09-10, slip op. at 46, citing Tr. at 378-79. But Petitioners, as the proponents of the hearing request, have the burden to support their contentions. 10 C.F.R. § 2.325. The Board errs as a matter of law by not requiring Petitioners to have met this burden.

[14] While Contention 4.F vaguely alleges impacts from dewatering on the Withlacoochee and Waccasassa Rivers and associated wetlands and uplands (designated Outstanding Florida Waters ("OFW")) will be LARGE, it never alleges with specificity what resources of these OFWs would be impacted, much less how they could be LARGE. Progress Answer at 98-99.

LBP-09-10, slip op. at 46. It is not for the applicant or Staff to rebut a Contention; Petitioners must support it. Harris, CLI-09-08, slip op. at 9.

5. Consequential Allegations Of Contentions 4.L, 4.M, And 4.N Are Improperly Admitted Without Rigorous Application Of The Six Contention Admissibility Factors

The Board groups Contentions 4.B to 4.N into "specific" and "consequential" allegations. LBP-09-10, slip op. at 23-24.[15] It claims that the consequential allegations are Contentions 4.L, 4.M, and 4.N. The Board, however, did not rigorously evaluate whether those Contentions met the six contention admissibility factors. Id. at 28.[16] The Board finds "the gist of these three subparts is that, given the underestimation of the impacts 'described above' in C4B-C4K, the ER inadequately covered those topics. This is a fair and logical assertion." Id. at 51. The Board erred as a matter of law in admitting Contentions 4.L, 4.M, and 4.N, broadly as part of the reformulated Contention 4, based on "fairness and logic" rather than rigorously applying the six criteria of 10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

It was an abuse of discretion as well for the Board to find that fairness and logic justify admitting those Contentions. An ER, which allegedly underestimates dewatering impacts, does not necessarily contain an inadequate description of the affected environment. Even if some impacts are large, it does not logically follow that those impacts must extend beyond the 50 mile radius of the affected environment analyzed in ER Chapter 2. Progress Answer at 128. It is an

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[15] LBP-09-10 also separately treats three others. Contention 4.A is treated as an "introductory assertion." LBP-09-10, slip op. at 22. Contention 4.O is treated with Contentions 9 to 11. LBP-09-10 at 22 & n.25. The second Contention 4.N (called 4.P) is dismissed as a stand alone Contention. LBP-09-10, slip op. at 52. Petitioners did not group Contentions 4.A to 4.O this way and the rationale for the disparate treatment, especially if Contention 4 is evaluated "whole cloth," is not explicitly stated.

[16] Indeed, "[i]f any one of the requirements [now in 10 C.F.R. § 2.309(f)(1)] is not met, a contention must be rejected." Palo Verde, CLI-91-12, 34 N.R.C. at 155 (citation omitted).

abuse of discretion to admit Contention 4.L without the Petitioners having alleged a deficiency in ER Chapter 2, Affected Environment.

In addition, an ER, which allegedly underestimates dewatering impacts, does not necessarily inadequately describe the habitat of federally protected species. Regardless of the proper characterization of impacts on federally listed species, it does not logically follow that the ER's description of their habitats is improper. Progress Answer at 138-42. It is an abuse of discretion to admit Contention 4.M without Petitioners having alleged an error in the ER's description of the federally protected species' habitat.[17]

Finally, the Petition does not cite, let alone dispute with specificity, the mitigation plans provided in the Application. Progress Answer at 145. Even if the ER mischaracterizes impacts, it does not logically follow that the impacts cannot be mitigated as set forth in the ER.[18] For example, even if more wetlands were impacted by dewatering than are discussed in the ER, that does not necessarily mean that the mitigation plan to provide alternate wetlands to replace the impacted wetlands is inadequate. It is an abuse of discretion to admit Contention 4.N without Petitioners having alleged a deficiency in the mitigation plans in the ER.

For these reasons, it was an abuse of discretion for the Board to apply fairness and logic, rather than the six admissibility criteria, when determining whether to admit Contentions 4.L, 4.M and 4.N.

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[17] Furthermore, it is not clear why Contention 4.M is a consequential allegation rather than a specific allegation. Petitioners baldly allege that impacts on federally protected species is large. Petition at 61. As such, Contention 4.M has more in common with Contentions 4.J (tree death leads to global warming) and 4.K (large impacts on air resources) that the Board found to allege highly speculative, remote, and attenuated impacts. LBP-09-10, slip op. at 51.

[18] Contention 4.N does not allege that a mitigation alternative should be considered. Instead, Petitioners make a conclusory allegation that mitigation is not possible, and that therefore, the impacts are irreversible or irretrievable. Petition at 63-64.

6. The Board Erred As A Matter Of Law In Relying Upon The Conclusory Assertions Of Dr. Bacchus To Support Admission Of Contention 4

The Commission's criteria regarding the admissibility of Contentions require that contentions provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(vi). In order to satisfy this criterion, the Board relies entirely on "Dr. Bacchus's expert opinion and statements." LBP-09-10, slip op. at 48. Because Dr. Bacchus's opinion is only conclusory and contains no reasoned basis or explanation, relying on her Declaration to satisfy the requirement that Petitioners raise a genuine issue of material dispute with the Application was clear error.

As Progress argued throughout its Answer, Dr. Bacchus's expert opinion contains nothing more than bald, unsubstantiated assertions. See e.g., Progress Answer at 63, 74, 94, 103, 104, 123, 126-27, and 146. Petitioners rely exclusively on her opinion to claim that the impacts from the Levy plant will be large and widespread due to dewatering and salt drift. See e.g., Tr. at 63-70; 145. But her Declaration never provides an explanation for her conclusory statements.[19]

As Progress's Answer points out, under Commission precedent an expert opinion which – like that of Dr. Bacchus – merely makes statements "without providing a reasoned basis or explanation for that conclusion" is inadequate to support admission of a contention "because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion." USEC, CLI-06-10, 63 N.R.C. at 472. The Staff's Answer makes the same argument. See, e.g., Staff Answer at 32, 44. Similarly, a contention that does not meet the specificity requirement for

[19] Indeed, Contentions 4A – 4O are "cut and pasted" directly from the "Expert Declaration of Dr. Sydney T. Bacchus." Contention 4 and the expert opinion in support are one and the same.

admissibility cannot be cured by an expert affidavit that also fails to meet that requirement. See Millstone, CLI-01-24, 54 N.R.C. at 363, citing Oconee, CLI-99-11, 49 N.R.C. at 338.

The Board failed to address Progress's claims that Dr. Bacchus's Declaration was insufficient. In fact, the Board never even mentions the USEC decision, even though it was raised by both by Progress and the Staff. Compare LBP-09-10 with Progress Answer at 82, 103 and Staff Answer at 32, 44; see also Tr. at 87-88 and 123-125. Rather than addressing the salient issue – whether Dr. Bacchus's opinions have some reasoned basis or explanation – based on controlling Commission precedent, the Board instead discusses her qualifications as an expert. LBP-09-10, slip op. at 48. The Board erred by relying on a premature merits finding that Dr. Bacchus is an expert, instead of meeting its obligation to determine whether her opinions were in the form that supports admission of a contention. Private Fuel Storage, LLC (Independent Spent Fuel Storage Facility), LBP-98-7, 47 N.R.C. 142, 181 (1998).

B. The Board Erred In Admitting Contentions 7 And 8

1. The Board Erred In Failing To Follow The Commission's Bellefonte Decision

Petitioners sought to admit Contention 7 on the basis that:

> Progress Energy Florida's (PEF) application to build and operate Levy County Nuclear Station Units 1 & 2 violates the National Environmental Policy Act by failing to address the environmental impacts of the waste that it will generate in the absence of licensed disposal facilities or capability to isolate the radioactive waste from the environment. PEF's environmental report does not address the environmental, environmental justice, health, safety, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.

Petition at 87 (footnote omitted). Contention 7 is premised upon Contention 8, which states:

> A substantial omission in Progress Energy Florida's (PEF) COL application to build and operate Levy County Nuclear Station

> Units 1 & 2 is the failure to address the absence of access to a licensed disposal facilities [sic] or capability to isolate the radioactive waste from the environment. PEF's FSAR does not address an alternative plan or the safety, radiological and health, security or economic consequences that will result from lack of permanent disposal for the radioactive wastes generated.

Petition at 93-94. During oral argument, Petitioners' representative agreed that Contentions 7 and 8 were substantially the same or similar to the contentions that she wrote for the Bellefonte petition to intervene:

> CHAIRMAN KARLIN: [I]n the Bellefonte Commission decision, they ruled that the Bellefonte Board had erroneously admitted these two contentions, which seemed to be very similar. Do you agree that the contentions in that case are similar or same as the contentions here?
>
> MS. OLSON: I wrote all of them.
>
> CHAIRMAN KARLIN: Okay. But do you agree that they're the same or similar?
>
> MS. OLSON: Yes.
>
> CHAIRMAN KARLIN: Yes. Okay. The fact that you wrote them doesn't mean they're necessarily the same.
>
> MS. OLSON: Well, yes. They're all in the same ballpark. They're small changes.

Tr. 310-11.

The Commission *sua sponte* reversed the two contentions that the Board in Bellefonte admitted regarding low-level waste. In Bellefonte, the Commission reversed a proposed "contention of omission" regarding an applicant's alleged failure to offer a viable plan for how to dispose of low-level radioactive waste generated in the course of operations, closure and post-closure of Bellefonte 3 and 4. CLI-09-03, slip op. at 2. The Commission reversed the admission of both Contention FSAR-D (which corresponds to Contention 8 in this proceeding) and Contention NEPA-G (which corresponds to Contention 7 in this proceeding). The Board in this

proceeding erred by failing to reject the admission of Contentions 7 and 8 as required by Bellefonte.

a. The Only Regulatory Basis For Contention 7, As Originally Pled, Is A Collateral Attack On Table S-3

Petitioners left no doubt that Contention 7, in its entirety, was a collateral attack on Table S-3:

> Joint Petitioners recognize that this contention raises a challenge to the generic assumptions and conclusions in Table S-3. In NIRS et al comments on the radioactive waste confidence decision . . . submitted today February 6, 2009 to the NRC, we have asked the US NRC to prepare a comprehensive Environmental Impact Statement on the environmental impacts of the uranium/nuclear power fuel chain waste streams including revising table S-3. . . . .
>
> . . . [W]e seek admission of this contention in order to protect our right to ensure that any generic resolution of our concerns is made in a timely way and "plugged in" to the licensing decision in this particular case.

Petition at 87 n.30. The Commission found that the same admission – that the Contention is a collateral attack on Table S-3 – was a fatal flaw in the admission of NEPA-G in Bellefonte and distinguished NEPA-G from the contention admitted in North Anna[20] on that basis. Bellefonte, CLI-09-03, slip op. at 9. As in Bellefonte, Contention 7 is an admitted collateral attack on Table S-3, and Petitioners sought no waiver of Table S-3 with respect to this proceeding.[21] Accordingly, Bellefonte requires the Commission to reverse the Board's admission of Contention 7.

[20] Virginia Electric & Power Co. (Combined License Application for North Anna, Unit 3), LBP-08-15, 68 N.R.C. 294 (2008).

[21] The Staff also noted to the Board that Contention 7 was a collateral attack on Table S-3. See Staff Answer at 60-66.

b. The Only Regulatory Basis For Contention 8, As Originally Pled, Is 10 C.F.R Part 61

Contention 8 as originally pled, like FSAR-D in Bellefonte, rested entirely on a single regulatory basis: 10 C.F.R. Part 61 (discussed in the Petition with respect to Contention 7 and incorporated into the discussion of Contention 8).[22] Petition at 91. The Commission in Bellefonte reversed the admission of FSAR-D because 10 C.F.R. Part 61 is inapplicable to a COLA proceeding. Bellefonte, CLI-09-03, slip op. at 5-6. Accordingly, consistent with the Commission's decision in Bellefonte, the Commission must reverse the Board's admission of Contention 8.

c. Petitioners Did Not Plead A Design- Or Site-Specific Contention With Respect To The Storage Of Low-Level Radioactive Waste

Although the Commission left open in Bellefonte the possibility of an admissible design- or site-specific basis for a contention regarding low-level waste, the Commission held that the substantively identical contentions to those at issue in Bellefonte did not qualify as such contentions.[23] In this proceeding, Petitioners have not asserted any bases in addition to those that were rejected by the Commission in Bellefonte. Petitioners have not provided any specific allegations regarding low-level waste with respect to the reactor design or the site. Nor could they with respect to the reactor design in this proceeding because it is identical to the reactor design in the Bellefonte proceeding. The AP1000 DCD, Revision 16, which is incorporated by reference into the Application's FSAR, addresses in detail the size and space capacities for

[22] The Staff also noted that Petitioners' reliance on 10 C.F.R. Part 61 was directly contrary to Bellefonte. Staff Answer at 62-63.

[23] Bellefonte, LBP-09-03, slip op. at 11 n.42.

storage in the proposed auxiliary and radwaste buildings and the estimated expected and maximum annual quantities of waste effluents.[24]

2. The Board Erred In Reformulating Contentions 7 And 8

Despite the fact that Contentions 7 and 8 are substantively identical to contentions FSAR-D and NEPA-G in Bellefonte, requiring them to be rejected, the Board further erred in rewriting Contentions 7 and 8. As explained below, rather than simplifying or clarifying Petitioners' Contentions 7 and 8 (as permitted under Crow Butte), the Board effectively created two new contentions, erring in two respects: (1) incorporating new bases for Contentions 7 and 8 that were set forth in Petitioners' Response (and additionally failing to rule on Progress's Answer opposing those new bases); and (2) *sua sponte* raising regulatory bases not alleged by Petitioners.

As admitted, the Board rewrote Contentions 7 and 8 as follows:

> CONTENTION 7: Progress Energy Florida's (PEF's) application is inadequate because the Environmental Report assumes that the class B, C, and greater than C low-level radioactive waste (LLW) generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite and fails to address the environmental impacts in the event that PEF will need to manage such LLW on the Levy site for a more extended period of time.
>
> CONTENTION 8: Progress Energy Florida's (PEF's) application is inadequate because the Safety Analysis Report assumes that the class B, C, and greater than C low-level radioactive waste (LLW) generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite and fails to address compliance with Part 20 and Part 50 Appendix I (ALARA) in the event that PEF will need to manage such LLW on the Levy site for a more extended period of time.

[24] DCD Rev. 16 at 11.4-4 to 11.4-6. The AP1000 DCD, Rev. 15, has been certified by the Commission. 10 C.F.R. Part 52, Appendix D. Because there have been no substantive changes to these descriptions from Rev. 15 to Rev. 16, these provisions for storage, as well as the determination that the solid waste management system is designed to maintain personnel exposures "well below the limits of 10 CFR 20" (id. at 11.4-3), are beyond the scope of this proceeding and cannot be collaterally attacked.

LBP-09-10, slip op. at 75.

a. The Board Erred In Allowing Petitioners To Amend Their Petition Without Satisfying The Commission's Regulations Concerning Late-Filing

Petitioners' Response included new bases for proposed Contentions 7 and 8 that were not previously asserted in the Petition and which related to claims about unspecified dose calculations.[25] Petitioners admitted during oral argument that the Commission's clear holdings in Bellefonte effectively prompted Petitioners to move away from 10 C.F.R Part 61 (and Table S-3) as their regulatory bases for Contentions 7 and 8. Tr. at 281-82. Petitioners' representative stated that she interpreted the Commission's decision in Bellefonte as "encourag[ing] that there be litigation on site specific aspects of this rather new situation that we're in, since Barnwell only closed June 30th of last year . . . ." Tr. at 317. As a result, Petitioners' conceded that in Petitioners' Response they tried to move away from Table S-3 and 10 C.F.R. Part 61 as the regulatory bases for Contentions 7 and 8:

> But one piece of our reply that I do want to bring up, since we've been talking about Table S-3, is our point that Table S-3 really only pertains to the Part 61 part of the issue because it really is about disposal. Table S-3, it really does not rivet [sic] to storage. So if we're going to say that we're looking at the storage issues that are raised, and I don't know what you're going to say, but I said let's lay aside Part 61 issues, which are disposal, and talk about whether or not the application reflects a long term storage plan. To that, Table S-3 is not relevant.

[25] Petitioners state:

> The assumption is made that all dose limits in 10 CFR 20 and 50 will be met for public releases and worker exposures, but there is no indication that those dose calculations were done including the full inventory of Class B, C and Greater-than-C radioactive waste that we contend could be present onsite. The applicant's underlying assumption appears to be that all but about a year's worth or one refueling cycle's worth of waste will have been removed from the site. It is not clear that the calculations account for accumulated Class B, C and GTCC for all the years the reactors operate. This is an omission. Petitioners' Response at 36. Moreover, this is the first time that Petitioners sought to abandon Table S-3 as the sole basis for Contention 7. Petitioners' Response at 34.

Tr. at 346. In short, in light of the Commission's decision in Bellefonte, Petitioners admittedly tried in their Response to raise new bases to avoid the Commission's rulings that would require the Board to reject Contentions 7 and 8 as originally pled.

In order for new bases to be considered by a Licensing Board, those new bases must comply with the late-filing requirements of both 10 C.F.R. §§ 2.309(c) and 2.309(f)(2).[26] Petitioners, however, did not attempt to demonstrate that they met any of the Commission's late-filing criteria.[27] Therefore, under controlling Commission case law, the Board could not consider the new bases,[28] and erred in doing so.

b. The Board Also Erred In Providing New Regulatory Bases When It Reformulated Contentions 7 And 8

Licensing Boards are proscribed by 10 C.F.R. § 2.340(a) regarding the circumstances under which issues may be raised *sua sponte*.[29] Where a licensing board seeks to raise an issue *sua sponte* or apply a different legal theory than that raised by any of the parties, as the

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[26] Nuclear Management Co. (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006). The Commission has recently reaffirmed this holding in Crow Butte, CLI-09-12, slip op. 44 (". . . a reply cannot expand the scope of the arguments set forth in the original hearing request.")

[27] Nor could they demonstrate good cause for the late-filing for the reasons set forth in Progress's Answer Opposing New Bases and incorporated herein by reference, including: (1) failing to satisfy the criteria set forth in 10 C.F.R. § 2.309(f)(2)(i)-(iii); (2) failing to satisfy the late-filed contention requirements of 10 C.F.R. § 2.309(c); (3) failing to satisfy the requirements of 10 C.F.R. § 2.309(f)(1) by failing to specify: (a) what calculations they assert are "not clear;" or (b) the basis for their assertion that (i) the calculation does not account for "accumulated Class B, C and GTCC," waste or (ii) that the calculation is required to account for it; and (4) being an impermissible challenge to the dose limits of 10 C.F.R. Part 20.

[28] Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 40, 58 (2004) (holding that the petitioners' "'reply' filings essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), cannot be considered in determining the admissibility of their contentions." (emphasis added)); see also Crow Butte, CLI-09-12, slip op. at 46.

[29] 10 C.F.R. § 2.340(a) provides, in pertinent part:

> In any initial decision in a contested proceeding on an application for an operating license (including an amendment to or renewal of an operating license) for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on . . . any matter not put into controversy by the parties, but only to the extent that the presiding officer determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the presiding officer.

Commission recently noted in Bellefonte, it is required to provide parties a fair opportunity to present argument.[30] Here the Board erred in raising additional regulatory bases without complying with 10 C.F.R. § 2.340(a) or allowing Progress to present argument concerning the new regulatory bases. As discussed below, even as reformulated by the Board, Contentions 7 and 8 are not admissible.

With respect to Contention 7, the Board cites 10 C.F.R. §§ 51.45(b)(1), (2), (5) as a regulatory basis for the reformulated contention. LBP-09-10, slip op. at 76. Petitioners, however, never raised nor cited to 10 C.F.R. §§ 51.45(b)(1), (2), (5). With respect to Contention 8, the Board also raises bases that were never alleged by Petitioners: 10 C.F.R. §§ 52.79(a)(3); 10 C.F.R. §§ 50.34a(a) and 50.34a(b)(3); and Part 50 Appendix I. Id. Of those regulations, only Part 50 Appendix I appears in Petitioners' pleadings, but only in a quote from the Application. Petition at 89.

3. Contentions 7 And 8 As Reformulated By The Board Are Inadmissible

The Board's reformulated Contentions 7 and 8 are inadmissible because: (1) they create new regulatory requirements that do not exist in the Commission's regulations; and (2) where they allege omissions, the Application addresses those alleged omissions. As such, they fail to meet the pleading requirements of 10 C.F.R. § 2.309(f)(1).

In rewriting Contention 7, the Board states that an ER must "confront the plausible problem of longer term management of LLW onsite (i.e., longer than 2 years)." LBP-09-10, slip

[30] Bellefonte, LBP-09-03, slip op. at 7 n.24.

op. at 75. However, there is no such regulatory requirement.[31] 10 C.F.R. §§ 51.45(b)(1), (2), (5), cited by the Board (but not raised by the Petitioners), does not provide any such regulatory requirement.[32] Progress's ER provides the information required by each of those provisions. The Application incorporates the AP1000 DCD, Rev. 16, which provides the source terms for the various radioactive waste management systems (id. Chapter 11), other radiation sources (id. § 12.2), and dose assessment (id. § 12.4), including dose assessments with respect to waste processing (id. Table 12.4-10). Neither the Petitioners nor the Board provided any basis for challenging the accuracy of these source terms or dose assessments. These calculations are not dependent on the duration of time that the source is present. Rather, these calculations, generally, are annual dose calculations. See, e.g., ER, Section 3.5.3 at 3-50. The environmental impact of these dose assessments are analyzed in the ER. Specifically, ER Section 3.5 analyzes the environmental impacts of the radioactive waste management system using the source terms provided in Chapter 11 of the AP1000 DCD, Rev. 16. ER Section 5.4 assesses the radiological impacts of normal operation including radiation doses to members of the public (ER § 5.4.2); impacts on members of the public (ER §5.4.3); and occupational exposures (ER § 5.4.5). The accuracy of these assessments in the ER has not been challenged either by the Petitioners or the Board.

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[31] The fact that there is no regulatory requirement for a COL application to specify any particular amount of storage (and hence there is no need for an environmental assessment beyond the source expected to be onsite) is demonstrated by the fact that Section 11.4 of NUREG-0800, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, Rev. 3, at 11.4-26 (Mar. 2007) provides that a facility need not be initially designed to store waste for its entire operational life. The Staff also noted to the Board that no such regulatory requirement exists. See Staff Answer at 64.

[32] 10 C.F.R. §§ 51.45(b)(1), (2), (5) provide that the Environmental Report shall discuss the following considerations:

(1) The impact of the proposed action on the environment. Impacts shall be discussed in proportion to their significance;

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented;

(5) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The Application provides radioactive sources and dose assessments, and assesses the radiological impact of normal operation with conservative, bounding analyses. The Levy plant will be licensed to operate within that licensing basis, which means that the hypothetical accumulation of low-level radioactive waste in excess of the dose assessments assumed as the bases for the Contention will not occur. To the extent that additional storage could be needed sometime in the future, the existing regulatory framework would allow a licensee to conduct written safety analyses under 10 C.F.R. § 50.59. If the additional storage does not satisfy 10 C.F.R. § 50.59, a license amendment would be required.[33] In either event, the environmental impacts of the additional storage would be fully evaluated – either through the present Application or through a license amendment proceeding.

In rewriting Contention 8, the Board states that "PEF has not done the safety calculations for a source term greater than a two year accumulation." LBP-09-10, slip op. at 77. There is no such regulatory requirement. As described above, the Application provides radioactive source terms and dose calculations, none of which have been challenged by either Petitioners or the Board. The Board cites to 10 C.F.R. § 52.79(a)(3), 10 C.F.R. §§ 50.34a(a) and 50.34a(b)(3) and Part 50, Appendix I, for applicable regulatory bases, but none of those regulatory provisions requires the calculation that the Board seeks to impose on COL applicants.

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[33] This process is described in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NUREG-1437 Vol. 1) (May 1996) at 6-57; see also NRC Generic Letter 81-38, Storage of Low-Level Radioactive Wastes at Power Reactor Sites (Nov. 10, 1981); NRC Regulatory Issue Summary 2008-12, Considerations for Extended Interim Storage of Low-Level Radioactive Waste by Fuel Cycle and Materials Licensees (May 9, 2008) (ADAMS Accession No. ML073330725); NRC Regulatory Issue Summary 2008-32, Interim Low Level Radioactive Waste Storage At Reactor Sites, (Dec. 30, 2008) (ADAMS Accession No. ML082190768). While not binding, these NRC guidance documents are entitled to considerable weight. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 N.R.C. 275, 290 (1988); Consumers Power Co. (Big Rock Point Nuclear Plant), ALAB-725, 17 N.R.C. 562, 568 (1983).

10 C.F.R. § 52.79(a)(3) does not address long-term storage of low-level radioactive waste, it merely requires that a COLA include "[t]he kinds and quantities of radioactive materials expected to be produced in the operation and the means for controlling and limiting radioactive effluents and radiation exposures within the limits set forth in part 20 of this chapter." This information is provided in the AP1000 DCD in Chapters 11 and 12 (and Tier 1, §§ 2.3.10, 2.3.11, 2.3.12) and incorporated by reference into the Application. Chapter 11 of the AP 1000 DCD, Rev. 16, provides source terms and Chapter 11 (and Tier 1, Sections 2.3.10, 2.3.11 and 2.3.12) provides descriptions of the equipment for the radioactive waste management systems that are incorporated by reference in FSAR, Chapter 11. Chapter 12 of the AP1000 DCD, Rev. 16 provides sections on radiation protection (id. § 12.1), radiation sources (id. § 12.2); radiation protection design features (id. § 12.3); dose assessment (id. § 12.4) and health physics facility design (id. § 12.5). All of the information required by 10 C.F.R. § 52.79(a)(3) has been provided in the Application and not challenged by either the Board or Petitioners.

The information required by 10 C.F.R. §§ 50.34a(a) and 50.34a(b)(3)[34] (and Part 50, Appendix I) is provided in Chapter 11 of the AP1000 DCD, Rev. 16 (and Tier 1, Sections 2.3.10, 2.3.11, 2.3.12), and incorporated by reference into Chapter 11 of the FSAR or otherwise provided in Chapter 11 of the FSAR. This information is not omitted from the Application and the information required by those regulatory provisions does not include "safety calculations for a source term greater than a two year accumulation." Nothing with respect to the design of the equipment to be installed to maintain control over gaseous and liquid effluents produced or the

[34] 10 C.F.R. 50.34a(a) requires, among other things, "a description of the preliminary design of equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences."

10 C.F.R. § 50.34a(b)(3) requires "[a] general description of the provisions for packaging, storage, and shipment offsite of solid waste containing radioactive materials resulting from treatment of gaseous and liquid effluents and from other sources."

general description for packaging, storage and shipment offsite of solid waste containing radioactive materials has been challenged by the Board or Petitioners. As discussed above, if at any point during the operation of the facility, as licensed, it is necessary to evaluate a change to the facility, the current regulatory process provides that a 10 C.F.R § 50.59 safety evaluation would have to be conducted to ensure that there is no unreviewed safety concern with such a change. If any such concern exists, a license amendment would be required and that safety concern would be reviewed. Thus, there will be no unreviewed safety issues.

Accordingly, even as reformulated by the Board, Contentions 7 and 8 are not admissible contentions.

4. The Board Erred In Allowing Greater Than Class C Waste Issues To Be Litigated In This Proceeding

Finally, the Board also separately erred with respect to allowing Greater Than Class C Waste issues to be litigated as part of Contentions 7 and 8. The factual basis for Contentions 7 and 8 is the closure of the Barnwell Facility. The closure of that facility has no effect on Greater Than Class C Waste because the disposal of Greater Than Class C Waste is the responsibility of the federal government and would not be shipped to Barnwell or any other low-level radioactive Waste disposal facility. 42 U.S.C. § 2021c(b)(1)(D). Thus, neither the Board nor the Petitioners have established the factual predicate that Progress will not be able to dispose of Greater Than Class C Waste. Accordingly, there was no basis for the Board to include Greater Than Class C Waste within the scope of reformulated Contentions 7 and 8.

Thus, Contentions 7 and 8 could not have been admitted as originally pled and should have been rejected by the Board. Instead, they were impermissibly reformulated by the Board and the Board's admission of Contentions 7 and 8 should be reversed on that basis alone.

Morevover, even as reformulated, Contentions 7 and 8 are inadmissible. The Commission should, therefore, reverse the admission of both Contentions 7 and 8.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission reverse LBP-09-10 and deny Petitioners' request for hearing.

Respectfully Submitted,

/Signed electronically by John H. O'Neill, Jr./

_____

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July 20, 2009

July 20, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	Docket Nos. 52-022-COL
Progress Energy Florida, Inc.	)	52-023-COL
	)	
(Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	)	ASLBP No. 09-879-04-COL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Progress Energy Florida, Inc.'s Brief in Support of Appeal from LBP-09-10," dated July 20, 2009, was provided to the Electronic Information Exchange for service upon the following individuals.

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