UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Dr. William M. Murphy

In the Matter of	Docket No. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	June 15, 2010

REPLY BRIEF of INTERVENERS: LLRW ADEQUACY OF STORAGE SAFETY CONTENTION

At bottom the question is: can (and will) compliance with relevant NRC regulations governing health and safety be assessed based on information about so-called "low-level" waste storage provided by the applicant as part of the current licensing activity (COL); – or will that function be delegated either solely to the putative licensee, or to the future, or to both?

Counsel for NRC Staff clearly argue that intervener's assessment of adequacy exceeds what it deems necessary (page 4):

> In their Motion, Joint Intervenors appear to be arguing that Progress' RAI response must contain design-level detail. Motion at 4-5. However, Joint Intervenors fail to demonstrate that such detailed information is required.

At the moment the NRC NMSS division is engaging in a "gap analysis" of its regulatory regime for radioactive waste. Clearly counsel for NRC staff is both identifying a gap and also defending the same lack of regulation *as if it were a regulation*. Interveners are not attacking the regulation or the lack thereof, but instead addressing the need for the level of detail needed in

the proposed plan such that it provides sufficient information for NRC staff to discern whether existing NRC health and safety regulations have been met.

Indeed, much of the rest of the argument from both NRC staff and the applicant pend upon the reading of 10CFR52.79(a)(3):

> 52.79(a)(3): …the 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;

It is our reading that this regulation actually requires an assessment of whether the limits of Part 20 (which references ALARA as well) will be met by "the means." It is our contention that the plan proffered by the applicant lacks sufficient detail for NRC Staff to accomplish that assessment, which is part of its obligation under this regulation, in the licensing action. Our members are protected by Part 20, such as it is, and 10CFR52.79(a)(3) states that whatever the radioactive material, however it is handled, it is expected to meet Part 20 – and so it matters what the materials are and exactly how they will be managed in order to discern whether the requirements of Part 20 will be met.

Both NRC Counsel and PEF Counsel argue that 52.79(a)(3) does not require any sort of specificity, however it remains a mystery how an assessment that shows that "radiation exposures are within the limits set forth in part 20 of this chapter," (per the reg) can be met without specificity. PEF itself acknowledges (see footnote 5 on page 6) that there will be cost / exposure trade-offs associated with various options for so-called "low-level" waste management and storage. We want to know what the plan is now, before the aspiration by PEF of producing a veritably unlimited, unending stream of this hazardous and challenging waste is approved by NRC staff.

It is perhaps amusing to Counsel to argue in the alternatives, but clearly the prospective amendments to the COL state that the applicant intends to ship so-called "low-level" waste off-

site as quickly as possible (See Attachment A of PEF answer). The declaration of Diane D'Arrigo is offered (and relevant to) the question of whether this is a viable aspiration, or perhaps merely fantasy.

Another point of disconnect in the argument by Counsel for PEF is on page 17:

> Providing such a laundry list of hundreds of pages of regulations with no further explanation is not sufficiently specific to support a genuine dispute on a material issue and fails to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv), (v), or (vi). Furthermore, none of those regulations provide the requirements for an on-site LLRW storage plan.

First, the list of regulations comes from PEFs RAI. Second, the point is not that these regulations "provide requirements" for storage – but rather that whatever plan PEF has must be shown to comply with the requirements of the regulations. For instance, Part 20 gives exposure limits for workers. PEF needs to provide enough detail that it is possible for NRC staff to determine whether these limits will be met, with the addition of ALARA, cited in Part 20.

NRC has a history of neither assessing nor enforcing compliance with radiation standards (for instance all the soil and groundwater contamination issues at most existing reactors). If NRC accepts these "smoke and mirrors" procedural maneuvers from PEF as the basis for allowing the production of and then the extended storage of highly radioactive waste (Class B and C both contain long-lived radionuclides such as plutonium and also highly radioactive inventories of cesium and iodine, creating the potential for substantial health impacts to workers and to the public in the event of fire or weather events, such as hurricanes) at reactors. Indeed, if current NRC plans for irradiated fuel are applied to so-called "low-level" waste, this could entail centuries of storage. A decision that the safety issues at Levy have been resolved by the dismissal of contention 8 would be a confirmation for health and safety advocates that linguistic detoxification is all they can expect from the federal agency mandated by law to protect the public.

Many of the additional issues raised by Counsel to NRC staff focus on meeting the contention requirements – and mirror arguments that were made in regards to the original

contention 8. The Commission addressed most of these in CLI-10-02 which upheld the Board's admission of Contentions 7 & 8 in part, striking only the Greater Than Class C portions.

PEF also invokes portions of CLI-10-02 but gingerly ignores the key paragraph (page 25):

> Progress further argues that in reformulating Contention 8, the Board effectively created a new regulatory requirement that the applicant perform safety calculations for a source term greater than a two year period of accumulation.102 But as the Board explained in its decision, the safety regulations at 10 C.F.R. § 52.79(a)(3) require the COL application to describe the kinds and quantities of radioactive materials that will be produced in operating the plant and todescribe the "means for controlling and limiting the radioactive effluents and radiation exposures within the limits set forth" in 10 C.F.R. Part 20.103 In our view, the Board reasonably interpreted that existing provision to find that Progress must address, in its COL application, how it intends to handle an accumulation of LLRW.

Once again, it is not only a plan, it is a plan that can demonstrably meet the exposure limits. Specificity is required; kicking the can down the block to a license amendment is not.

Invocation of the Duke Energy case (CLI-02-14, 55 N.R.C. 278, 297 (2002)) by Counsel for PEF while complimentary to the current Intervener (who prosecuted that case) is completely out of place. The decision by the Commission that the details of MOX fuel use was not appropriate in a license renewal case had some basis since license renewal did not pend on irradiation of plutonium from dismanteled warheads (true, MOX irradiation did pend on license extension, so it was a Duke savvy decision). In the Duke case the two issues could be severed; however here, the production of so-called "low-level" waste as a determined outcome of the license and the fact that there is no off-site location for its long-term disposition is <u>not</u> severable.

PEF complains (answer brief page 8) that the Interveners have erred in calling our most recent filing "amended contention 8." Interveners admit the error of using title "amended contention 8" and would be happy to change the title of the filing. If in fact, the health, safety and security of the residents of Levy and Citrus Counties turns upon the use of the words Amended Contention vs New Contention, we are willing to so inform our members.

Additionally, PEF claims (page 2) that Interveners are violating the terms of the settlement agreement – when the settlement agreement itself states (from that document):

3. Progress will not raise an argument as to the timeliness of any contention submitted by Joint Intervenors within thirty (30) days of the date of the Joint Motion that challenges the adequacy of the RAI Responses.

Interveners did challenge the adequacy - the substance - of the RAI responses. Contention 8 was a "contention of omission" - did the utility have a plan for LLRW in light of no waste dump, or not? We agree to dismiss the contention of omission because there are words on paper that superficially address the problem of no licensed LLRW dump. But we expressly reserved the right to challenge the adequacy of what PEF proposed. We did not agree to the adequacy – we expressly did not agree to that - why would we reserve the right to challenge the adequacy in the agreement? The word "adequacy" has special meaning as a term of art in NRC practice. Since the settlement was fully agreed to, it must be presumed that the utility as well as Intervenors meant for the word "adequacy" to be used as it was in the agreement. The settlement agreement is a contract. Contracts must be read as a whole. It is impermissible for PEF to elevate or distort the meaning of one term by removing it from the context of the entire agreement. [1]

For these reasons, and more that simply will not fit in a 5 page response, the contention on adequacy of storage of any so-called “Low-Level” was that may be generated at the Levy County 1 & 2 sites should be admitted for further litigation and resolution.

Respectfully Submitted

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Mary Olson
Southeast Regional Coordinator,
on behalf of the Co-Interveners

Asheville, North Carolina
June 15, 2010

[1] "It is well settled that contracts must be read as a whole, and they must be interpreted in such a manner as to give effect to every provision." *Mead Corporation v. ABB Power Generation, Inc.,* 2003 FED App. 0047P (6th Cir.)

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Certificate of Service

I hereby certify that copies of these REPLY BRIEF of INTERVENERS: LLRW ADEQUACY OF STORAGE SAFETY CONTENTION have been served on the following persons by Electronic Information Exchange on this 15th day of June, 2010:

Administrative Judge Alex S. Karlin, Chair Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: Alex.Karlin@nrc.gov	Office of Commission Appellate Adjudication Mail Stop O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: OCAAmail@nrc.gov
Administrative Judge Anthony J. Baratta Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: Anthony.Baratta@nrc.gov	Office of the Secretary ATTN: Docketing and Service Mail Stop: O-16C1 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: HEARINGDOCKET@nrc.gov
Administrative Judge William M. Murphy Atomic Safety and Licensing Board Panel Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: William.Murphy@nrc.gov	Megan Wright Law Clerk Mail Stop: T-3F23 U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 E-mail: megan.wright@nrc.gov

Mary Olson NIRS Southeast PO Box 7586 Asheville, NC 28802 E-mail: maryo@nirs.org	Michael Mariotte Nuclear Information and Resource Service 6930 Carroll Ave Suite 340 Takoma Park, MD 20912 E-mail: nirsnet@nirs.org
Michael Canney The Green Party of Florida Alachua County Office PO Box 12416 Gainesville, FL 32604 E-mail: alachuagreen@windstream.net	Cara Campbell The Ecology Party of Florida 641 SW 6th Ave Ft. Lauderdale, FL 33315 E-Mail: levynuke@ecologyparty.org
John H. O'Neill, Esq. Michael G. Lepre, Esq. Blake J. Nelson, Esq. Robert B. Haemer, Esq. Jason P. Parker, Esq. Counsel for Progress Energy Florida, Inc. Pillsbury, Winthrop, Shaw, Pittman, LLP 2300 N. Street, NW Washington, DC 20037-1122 E-mail: john.O'Neill@pillsburylaw.com michael.lepre@pillsburylaw.com blake.nelson@pillsburylaw.com robert.haemer@pillsburylaw.com jason.parker@pillsburylaw.com	U.S. Nuclear Regulatory Commission Office of the General Counsel Kathryn L. Winsberg, Esq. Sara Brock Kirkland, Esq. Jody Martin, Esq. Kevin Roach Joseph Gilman, Paralegal Washington, DC 20555-0001 E-mail: Kathryn.winsberg@nrc.gov; seb2@nrc.gov; jcm5@nrc.gov; jsg1@nrc.gov ; Kevin.Roach@nrc.gov

/Signed (electronically) by/

Mary Olson
NIRS Southeast Office
maryo@nirs.org