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 PROGRESS ENERGY FLORIDA, INC. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2)	Docket No. 52-029-COL, 52-030-COL ASLBP No. 09-879-04-COL-BD01 August 9, 2010

MEMORANDUM AND ORDER
(Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A)

This proceeding involves the application of Progress Energy Florida, Inc. (PEF or Applicant) for a combined license (COL) to construct and operate two nuclear power reactors in Levy County, Florida. On May 14, 2010, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Joint Intervenors), filed a motion to admit a new contention.[1] The proposed new contention alleges that PEF's recent amendments to its COL application (COLA), relating to PEF's plan for onsite management and storage of low-level radioactive waste (LLRW), fail to provide sufficient information to satisfy 10 C.F.R. § 52.79, one of NRC's safety regulations. Motion at 1. For the reasons stated below, we admit this new contention (hereinafter C-8A or Contention 8A).

[1] See Motion by Joint Intervenors to Amend Contention 8 on So-Called "Low-Level" Radioactive Waste and Safety Issues Associated with Extended On-Site Storage (May 14, 2010) (Motion).

I. BACKGROUND

This proceeding arises out of PEF's COLA submitted on July 28, 2008. The NRC Staff issued a notice of hearing and opportunity to petition for leave to intervene on December 8, 2008, and Joint Intervenors filed their petition to intervene on February 6, 2009. See LBP-09-10, 70 NRC 51, 67-68 (2009). This Board granted Joint Intervenors' petition, finding that they possessed standing and that their petition presented at least one admissible contention. Id. at 147. One of the originally admitted contentions, Contention 8 or C-8, alleged that the COLA failed to address the issue of LLRW storage and disposal after the first two years of operation. Contention 8, as originally admitted, reads as follows:

> (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.

Id. at 123. The Commission affirmed the admission of C-8, but narrowed it to exclude the storage and disposal of Greater than Class C (GTCC) LLRW. CLI-10-02, 71 NRC __, __ (slip op. at 25-27) (Jan. 7, 2010).

On December 4, 2009, PEF submitted a revision to the LLRW storage provisions of its COLA, amending Sections 11.4-1 and 11.4-2 of its Final Safety Analysis Report (FSAR).[2] The revision was submitted in response to an NRC request for additional information (RAI) and was apparently intended, inter alia, to address the omission alleged in C-8.[3]

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[2] Levy Nuclear Plant Units 1 and 2, Response to NRC Request for Additional Information Letter No. 073 Related to SRP Section 11.4 for the Combined License Application, dated November 4, 2009 (Dec. 4, 2009) at 2-5 (Response to RAI-11.04).

[3] See Request for Additional Information, Levy County, Units 1 and 2, Progress Energy Florida, Inc., Docket No. 52-029 and 52-030, SRP Section: 11.04 - Solid Waste Management System, Application Section: 11.4 (Nov. 4, 2009) (RAI-11.04).

On April 14, 2010, Joint Intervenors and PEF signed a settlement agreement for the dismissal of C-8 and jointly moved to dismiss this contention.[4] As part of the agreement, PEF stipulated that it would "not raise an argument as to the timeliness of any contention submitted by Joint Intervenors within thirty (30) days of the date of th[e] Joint Motion that challenges the adequacy of the RAI responses." Id. On April 21, 2010, the Board found that the settlement agreement was in the public interest under 10 C.F.R. § 2.338(i) and dismissed Contention 8.[5] Pursuant to the settlement agreement, the Board granted Joint Intervenors thirty (30) days "to file contentions that challenge the adequacy of the information [PEF] provided to cure the omission discussed in Contention 8." Id. at 2.

On May 14, 2010, Joint Intervenors filed their motion for the admission of Contention 8A. Motion at 1. The NRC Staff and PEF each filed an answer on June 8, 2010.[6] Joint Intervenors filed their reply on June 15, 2010.[7]

II. LEGAL FRAMEWORK FOR ADMISSION OF NEW OR AMENDED CONTENTIONS

Three regulations address the admissibility of additional contentions once an adjudicatory proceeding has been initiated. These are: 10 C.F.R. § 2.309(f)(2), which deals with the admission of new and timely contentions; 10 C.F.R. § 2.309(c), which deals with the admission of new but nontimely contentions; and 10 C.F.R. § 2.309(f)(1), which establishes the basic criteria that all contentions must meet in order to be admissible.

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[4] Joint Motion for Approval of Settlement and Dismissal of Contention 8 (Apr. 14, 2010) at 2.

[5] Licensing Board Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) at 1 (unpublished).

[6] NRC Staff Answer to Motion by Joint Intervenors to Amend Contention 8 (June 8, 2010) at 1 (Staff Answer); Progress Answer Opposing Joint Intervenors' Motion to Amend Contention 8 (June 8, 2010) at 1 (PEF Answer).

[7] Reply Brief of Interveners [sic]: LLRW Adequacy of Storage Safety Contention (June 15, 2010) at 1 (Reply).

The first step in assessing the admissibility of a new contention is to determine if it is timely under 10 C.F.R. § 2.309(f)(2)(iii).[8] If so, a new (non-NEPA[9]) contention is evaluated under the three-factor test of 10 C.F.R. § 2.309(f)(2). This regulation provides that new contentions may be filed after the initial docketing, with leave of the presiding officer, upon a showing that:

> (i) The information upon which the amended or new contention is based was not previously available;
> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[10]

In sum, if the petitioner is able to show that new and materially different information has become available during the processing of the application, and the petitioner promptly files a new contention based on this new information, then the new contention is admissible (assuming it also satisfies the six general contention admissibility standards contained in 10 C.F.R. § 2.309(f)(1)).[11]

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[8] See, e.g., Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (2006); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-16, 63 NRC 737, 744-45 (2006).

[9] New contentions arising under the National Environmental Policy Act (NEPA) are subject to a different standard. See 10 C.F.R. § 2.309(f)(2). Otherwise, the three-factor test of 10 C.F.R. § 2.309(f)(2)(i)-(iii) applies.

[10] 10 C.F.R. § 2.309(f)(2) (emphasis added). The regulations do not set a specific number of days for determining whether a new contention motion is "timely" as required by 10 C.F.R. § 2.309(f)(2)(iii). It is subject to a reasonableness standard. However, many boards, including this one, have established a general 30-day rule for the filing of such motions. LBP-09-22, 70 NRC __, __ (slip op. at 9) (Aug. 27, 2009).

[11] NRC typically initiates its adjudicatory proceedings at a very early stage in the administrative process – when the application is docketed. Normally a great deal of new and material information becomes available to the public after the docketing, as for example when the applicant amends its license application or submits additional information or when the NRC Staff issues its safety evaluation report and final environmental documents. Section 2.309(f)(2) accommodates this fact by allowing a petitioner to assert new contentions, if they are filed in a

If a proposed new contention is not timely under 10 C.F.R. § 2.309(f)(2)(iii), then its admissibility is governed by 10 C.F.R. § 2.309(c), which deals with "nontimely filings." While timely new contentions are subject to a three-factor test, the admissibility of nontimely new contentions is evaluated by a more stringent standard – the eight-factor balancing test specified in 10 C.F.R. § 2.309(c).

The third step in determining the admissibility of any new contention is the requirement that it satisfy the six standards specified in 10 C.F.R. § 2.309(f)(1). We reviewed this six-factor test earlier in this proceeding, and need not repeat that discussion here. See LBP-09-10, 70 NRC at 71-73.

III. CONTENTION 8A

Joint Intervenors' proposed Contention 8A reads as follows:

> Progress Energy Florida's (PEF's) COL application is inadequate to satisfy 10 C.F.R. 52.79 because it assumes that class B and C radioactive waste generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite, while currently there is an absence of access to a licensed disposal facility or capability to isolate the radioactive waste from the environment. The proposed amendment to the Levy County COL also fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing Class B and C radioactive waste on the Levy site if offsite disposal capacity is not available within two years. PEF's plan to postpone most of its decisions regarding how and where to store the waste (including "minimizing" the volume of the waste) until sometime after issuance of the license for Levy violates Section 52.79 and also the Atomic Energy Act's requirement that safety findings must be made before the license is issued.

Motion at 3.

IV. POSITIONS OF THE PARTIES

Joint Intervenors provide two rationales for the timeliness of Contention 8A under 10 C.F.R. § 2.309(f)(2). First, they assert that since settlement of Contention 8 "was based on a [December 2009] supplement to PEF's [COLA], which now provides some information about PEF's plans for the onsite storage of LLRW at the Levy site," PEF's LLRW plan revisions satisfy

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timely fashion, based on such new information. This satisfies Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239a. Cf. LBP-09-10, 70 NRC at 139 n.79.

the "previously unavailable information" and "materially different" factors of 10 C.F.R. § 2.309(f)(2)(i) and (ii). See Motion at 1-3. Second, they point out that Contention 8A was filed on May 14, 2010, which is within thirty days of the April 14, 2010, settlement agreement in which PEF agreed not to "challenge the timeliness of an amended contention . . . if it were offered within 30 days of the date of the settlement agreement." Id. Thus, Joint Intervenors assert that Contention 8A was timely filed under 10 C.F.R. § 2.309(f)(2)(iii). See id.

In addition, Joint Intervenors assert that Contention 8A satisfies the general contention admissibility factors of 10 C.F.R. § 2.309(f)(1)(i)-(vi). Relying on their attached Declaration of Diane D'Arrigo, Joint Intervenors charge that "PEF lacks a credible basis for its assertion that it will definitely be able to ship so-called 'low-level' radioactive waste generated at the proposed Levy County 1 & 2 sites off the site within two years. No such disposal option exists today and two years is not a credible time span to generate a new off-site option." Id. at 3-4 (references omitted). Joint Intervenors assert that the plan that is provided in PEF's FSAR is "so lacking in detail as to be completely useless for showing compliance with NRC's safety regulation 10 C.F.R. 52.79." Id. at 4. Joint Intervenors say that PEF's amendments to the COLA "do not offer any details whatsoever about waste management and storage beyond two years" but instead simply say that

> if [PEF] has to use long-term onsite storage, it will change its plans and make an analysis under 10 CFR 50.59; and that in the event that analysis shows that the extended waste storage would cause Levy to be out of compliance . . . PEF will seek a license amendment.

Id. This, Joint Intervenors argue, does not comply with the law: "a promise to seek license amendment after the license has been issued is not adequate to satisfy the NRC's licensing standards, which require that safety of operation must be demonstrated at the time of licensing, not afterwards." Id. In support, they quote 10 C.F.R. § 52.79(a), which states that "[t]he final safety analysis report shall include the following information at a level of information sufficient to enable the Commission to reach a final conclusion on all safety matters that must be resolved

by the Commission before issuance of the license." Id. (quoting 10 C.F.R. § 52.79). In short, Joint Intervenors conclude that "it is not sufficient to invoke a future license amendment as the 'plan' for this waste." Id. at 5.

In response, PEF concedes that it "has agreed that it will not challenge the timeliness of new contentions that challenge the adequacy of the Levy LLRW Plan under 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c)." PEF Answer at 5.

However, PEF opposes admission of Contention 8A, claiming that it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1). Id. at 2. PEF's first argument is that the Levy LLRW plan, submitted in December 2009, satisfies 10 C.F.R. § 52.79(a)(3) because it "addresses the procedures that will be followed if long-term temporary storage is needed," asserting that "NRC regulations do not require a COLA to do more." Id. at 6. PEF insists that "[s]pecifying the procedures to be followed is one of the three methods identified by the Commission for demonstrating compliance with the regulations governing LLRW management." Id. (citing CLI-10-02, 71 NRC at __ (slip op. at 24)). PEF characterizes its "procedures" as specifying that "if appropriate and needed, actions will be taken to minimize waste generation" and "[i]n the event . . . storage is needed, on-site temporary storage will be provided in accordance with the relevant NRC guidance" and in compliance with Part 20. Id. (citations omitted).

PEF notes that 10 C.F.R. § 52.79(a)(3) requires an applicant to describe "'the kinds and quantities of radioactive materials expected to be produced'" in the facility and the "'means for controlling and limiting radioactive effluents' to comply with Part 20 limits." Id. at 7 (citations omitted). PEF says that its LLRW plan satisfies these requirements because the COLA incorporates the AP1000 Design Control Documents (DCD) (both the certified design through Revision 15 and the proposed amendments to the DCD), which describe the kinds and quantities of LLRW expected to be generated. Id. at 7. PEF says that such information "coupled with the Levy LLRW Plan procedures for complying with 10 C.F.R. Part 20" satisfy 10 C.F.R. § 52.79(a). Id. at 7-8 (citations omitted). PEF notes that "the Vogtle Board, in

addressing a contention similar to Contention 8A, found that 10 C.F.R. § 52.79(a)(3) may be satisfied by a description of procedural controls similar to that provided in the Levy LLRW Plan."[12]

Next, PEF argues that proposed C-8A is improper because it seeks to "challenge issues resolved by settlement." Id. at 8. PEF notes that C-8A is not a new contention because it "repeats almost verbatim" the assertions in C-8. Id. PEF asserts that therefore, under the Settlement Agreement, C-8A is improper. Id. PEF says that the Joint Intervenors "mischaracterize the Levy LLRW plan as a [mere] plan to submit a future license amendment." Id. at 9. PEF reiterates that this is not the case and that its LLRW plan is compliant because it "states the procedural controls over the process of implementing temporary storage."[13] Thus, PEF regards Contention 8A as inadmissible for failing to raise any issue of law or fact to be controverted under 10 C.F.R. § 2.309(f)(1)(i). Id.

PEF also considers the Declaration of Diane D'Arrigo as not taking issue with any specific aspect of the Levy Nuclear Plant (LNP) LLRW disposal plan since the Declaration refers to specific off-site facilities that the LNP LLRW Plan does not mention. Instead, PEF portrays Ms. D'Arrigo's statements as merely an opinion (without any basis in law) which advocates that "procedural controls" for LLRW storage are not a "substitute for detailed plans." Id. at 11-12 (citations omitted). PEF asserts that "the Board in the Vogtle COL proceeding recently held [that] the level of detail that the Joint Intervenors seek is not required by the NRC's regulations." Id. at 12-13 (citing Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 12-14)). Moreover, PEF depicts Ms. D'Arrigo as claiming there is an omission in PEF's LLRW storage plan, rather than disputing the adequacy of PEF's LLRW storage plan. Id. (citations omitted). Therefore, PEF reasons that

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[12] Id. at 8 n.9 (citing Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __, __ (slip op. at 13-14) (May 19, 2010) (Vogtle)).

[13] Id. at 10 (citing CLI-10-02, 71 NRC at __ (slip op. at 22) and Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 12-14)).

Ms. D'Arrigo's Declaration is an insufficient "basis" for a contention under 10 C.F.R. § 2.309(f)(1)(ii). Id. at 13.

Next, PEF asserts that Contention 8A is "outside of the scope of this proceeding, in violation of 10 C.F.R. § 2.309(f)(1)(iii)" because "[t]he core of Contention 8A is a challenge to the plain language of 10 C.F.R. § 52.79(a)(3)." Id. at 13. PEF argues that, under 10 C.F.R. § 52.79(a) "[w]hether the NRC Staff has adequate information . . . is a decision that the Staff makes at its discretion and is outside the scope of an adjudicatory proceeding," and thus is deficient under 10 C.F.R. § 2.309(f)(2)(iii). Id. at 15 (citations omitted).

PEF characterizes its LLRW plan as follows: "[t]he Levy LLRW Plan states that long-term temporary storage is 'only provided until routine offsite shipping can be performed.' . . . The Levy LLRW Plan is the contingency plan submitted by Progress showing its intentions if more storage capacity . . . is needed." Id. at 16. PEF emphasizes that the Vogtle Board found that the regulations do not require more. Id. at 16-17.

Finally, PEF says that because it has provided the requisite detail and Contention 8A does not specifically address what is deficient in the Levy LLRW Plan, Contention 8A is inadmissible because it does not demonstrate a genuine issue over a material fact under 10 C.F.R. § 2.309(f)(2)(iv), (v), and (vi). Id. at 15-17.

The NRC Staff opposes admission of Contention 8A, arguing that it does not raise an issue that is material, as is required by 10 C.F.R. § 2.309(f)(1)(iv) and that it fails to provide sufficient information to show the existence of a genuine dispute of material law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi). Staff Answer at 3-4. The Staff argues that "[N]either the Board nor the Commission has concluded in this proceeding, or other proceedings with similar contentions, that NRC regulations require a contingency plan to contain the detailed design

information suggested by Joint Intervenors." Id. at 4 (citations omitted). In support, the Staff cites the Commission decisions in Levy (CLI-10-02) and Vogtle (CLI-09-16).[14]

The Staff describes PEF's LLRW plan as follows:

> (1) consistent with the DCD, only temporary storage facilities would be provided . . . ; (2) if needed in the future, additional storage can be provided through the § 50.59 change process or a license amendment. . . ; (3) current and future disposal and storage options are expected to accommodate Levy low level radioactive waste ("LLRW"); and (4) temporary storage capacity can be extended for greater than two years . . . through the use of waste minimization strategies.

Id. at 4-5 (emphasis added, citations omitted).

The Staff says that Joint Intervenors "do not demonstrate that greater detail is material to a finding that the NRC Staff must make, and also fail to raise a genuine dispute with Progress on a material issue." Id. at 6 (references omitted). The Staff, like PEF, cites to the recent Board decision in Vogtle: "In a ruling on a motion for summary disposition regarding a similar contention, in the Vogtle proceeding, the Board agreed that detailed, construction level information is not required under 52.79(a)(3)." Id. (references omitted). The Staff complains that the Joint Intervenors have not explained why the level of information provided by PEF's plan is not sufficient under 10 C.F.R. § 52.79. Id. at 7.

Joint Intervenors' Reply characterizes the question regarding the adequacy of PEF's LLRW plan as follows: "[C]an (and will) compliance with relevant NRC regulations governing health and safety be assessed . . . or will that function be delegated either solely to the putative licensee, or to the future, or both?" Reply at 1. Joint Intervenors state that "[i]t is our reading that [10 C.F.R. § 52.79] actually requires an assessment of whether the limits of Part 20 (which references ALARA as well) will be met." Id. at 2. Joint Intervenors argue that "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." Id. at 3. They characterize PEF's "procedural"

[14] Id. at 4 n.4 (citations omitted). We note that in both cases, the Commission affirmed the admission of LLRW safety contentions. CLI-10-02, 71 NRC at __ (slip op. at 21-25); Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37-38 (2009).

plan as "'smoke and mirrors' procedural maneuvers" that fail to provide sufficient information for NRC to make the determination of compliance now, before the license is issued. Id. at 3-4. Joint Intervenors say that PEF "gingerly ignores" the key part of CLI-10-02, which states that "'the Board reasonably interpreted [the regulations] to find that Progress must address, in its COL application, how it intends to handle an accumulation of LLRW.'" Id. at 4 (citing CLI-10-02, 71 NRC at __ (slip op. at 25)). Joint Intervenors add that the regulations require "not only a plan, [but] a plan that can demonstrably meet the exposure limits. Specificity is required; kicking the can down the block to a license amendment is not" sufficient. Id.

Finally, Joint Intervenors claim that Contention 8A does not address the same issue as Contention 8 because Contention 8A is based on the inadequacy of the LLRW disposal plan provided by PEF, while Contention 8 said there was no plan and the Settlement Agreement only pertained to the contention of omission alleged in Contention 8. Id. at 4-5. Therefore, Joint Intervenors claim that Contention 8A does not violate the Settlement Agreement. Id.

V. ANALYSIS AND RULING

A. Timeliness Under 10 C.F.R. § 2.309(f)(2)

As an initial matter, the Board has no problem concluding that the motion for admission of Contention 8A satisfies the requirements of 10 C.F.R. § 2.309(f)(2)(iii) and the Settlement Agreement. First, the proposed new contention is based on information that was "not previously available" and thus satisfies 10 C.F.R. § 2.309(f)(2)(i). Specifically, C-8A is based on PEF's new LLRW procedural plan that was submitted in response to NRC's RAI. Contention 8A challenges the adequacy of PEF's "procedural" plan. Second, PEF's new LLRW procedural plan is "materially different" than the previously available information and satisfies 10 C.F.R. § 2.309(f)(2)(ii). Third, given that the April 14, 2010, Settlement Agreement specifies that a new contention would be timely if submitted within thirty days, we conclude that proposed C-8A, filed on May 14, 2010, is timely filed, as required by 10 C.F.R. § 2.309(f)(2)(iii).

B. Contention Admissibility Under 10 C.F.R. § 2.309(f)(1)

Turning to the six substantive criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) that must be met in order for any contention to be deemed admissible, the Board concludes that C-8A satisfies all of these criteria as well. First, C-8A "provide[s] a specific statement of the issue of law or fact to be raised or controverted" as required by 10 C.F.R. § 2.309(f)(1)(i). C-8A states that PEF's COLA:

> [I]s inadequate to satisfy 10 C.F.R. 52.79 because . . . . [it] fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing Class B and C radioactive waste on the Levy site if offsite disposal capacity is not available within two years. PEF's plan to postpone most of its decisions regarding how and where to store the waste (including "minimizing" the volume of the waste) until sometime after issuance of the license for Levy violates Section 52.79 and also the Atomic Energy Act's requirements that safety findings must be made before the license is issued.

Motion at 3. This is a clear and specific statement of the issue of law and fact to be litigated.

Similarly, C-8A satisfies 10 C.F.R. § 2.309(f)(1)(ii). It includes a "brief explanation of the basis for the contention." C-8A identifies the relevant regulation (10 C.F.R. § 52.79) and gives the three brief explanations of the reasons (or "bases") for believing that the regulation is not satisfied: i.e., because (1) the PEF LLRW procedural plan allegedly "fails to offer sufficient information to demonstrate the adequacy" of the plan, (2) "postpone[s] most of its decisions regarding how and where to store the waste," and (3) "violates . . . the . . . requirement[s] that safety findings be made before the license is issued."

The third admissibility criterion, 10 C.F.R. § 2.309(f)(1)(iii), requires that the proposed contention be "within the scope" of the proceeding. PEF asserts that C-8A is outside of the scope of this proceeding because it is "a challenge to the plain language of 10 C.F.R. § 52.79(a)(3)." PEF Answer at 13. We disagree. 10 C.F.R. § 52.79(a)(3) specifies that the COLA must provide information concerning the LLRW expected to be generated by the Levy nuclear power plants, and the "means for controlling and limiting . . . exposures within the limits set forth in part 20." Meanwhile, the introductory clause to 10 C.F.R. § 52.79(a) specifies that this information must be provided "at a level of information sufficient to enable the Commission

to reach a final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." (Emphasis added). Here, the Joint Intervenors contend that PEF's procedural plan postpones the necessary decisions and does not comply with these regulations. The words of 10 C.F.R. § 52.79(a)(3), especially when read in conjunction with the introductory clause of 10 C.F.R. § 52.79(a), do not "plainly" resolve this issue.

We recognize that the Vogtle COL Licensing Board recently grappled with a very similar issue and ruled:

> We therefore find no requirement in section 52.79(a)(3) for [the applicant]'s FSAR to include, as contention SAFETY-1 maintains, details regarding 'building materials and high-density containers,' exact location, or health impacts on employees for the Vogtle Units 3 and 4 contingent onsite long-term LLRW storage facility. Thus, we conclude that, as a matter of law, [the applicant]'s FSAR need not include the details listed in SAFETY-1.

Vogtle, LBP-10-18, 71 NRC at __ (slip op. at 14).

That decision is not dispositive here. First, Vogtle was a decision on the legal merits rendered after the contention had been admitted and the parties had fully briefed the legal issues associated with the proper interpretation of 10 C.F.R. § 52.79(a)(3). Here, we are still at the contention admissibility stage and no such merits briefing has occurred.

Second, and perhaps most important, in Vogtle, the Board admitted contention SAFETY-1.[15] The Board held that the contention met all of the criteria of 10 C.F.R. § 2.309(f)(1)(i). See id. at 8-9. Thus, our ruling to admit C-8A is consistent with Vogtle.

Third, we note that the legal analysis in Vogtle, LBP-10-08, focused primarily on the distinction between 10 C.F.R. § 52.79(a)(3) and (a)(4), whereas here, the Joint Intervenors have focused more on the introductory clause to 52.79(a). The proper interpretation of these regulations, in this context, is not clear to us at this time.[16]

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[15] See Vogtle COL Licensing Board Memorandum and Order (Ruling on Motion to Amend Contention) (Jan. 8, 2010) at 9 (unpublished).

[16] The introductory clause to 10 C.F.R. § 52.79(a) states that the FSER shall include the prescribed information "at a level of information sufficient to enable the Commission to reach a

Fourth, Vogtle dealt with a motion for summary disposition where there was "no genuine issue as to any material fact," 10 C.F.R. § 2.710(d)(2), whereas this Board is still at the contention admissibility stage and we do not know whether there are any factual issues or disputes entailed in resolving C-8A.

Fifth, Vogtle is a Board decision and thus is not binding. The law remains unclear as to whether a contingent LLRW plan, that primarily consists of options and procedures, rather than committing to specific and concrete waste management actions that will be taken in the event that two years worth of LLRW storage is insufficient, satisfies 10 C.F.R. § 52.79(a). Vogtle seems to say yes. But the regulations are not clear and there is no Commission decision that is directly on point. If, after briefing on the merits, we find the Vogtle decision persuasive and to be factually on point, we will follow it. But that is for the merits.[17]

Finally, we reject PEF's argument that "[w]hether the NRC Staff has adequate information . . . is a decision that the Staff makes at its discretion and is outside the scope of an adjudicatory proceeding." PEF Answer at 15. Certainly, the NRC Staff may make an initial assessment as to whether or not the Applicant has provided sufficient information to satisfy 10 C.F.R. § 52.79(a). If the Staff thinks that the COLA is insufficient, then the Staff might decline to docket the application, request additional information, and even deny the application. But, while the Staff's role in initially assessing the sufficiency of the application is important, it does not

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final conclusion on all safety matters that must be resolved by the Commission before issuance of a combined license." Vogtle did not explicitly grapple with that provision. This is another reason why, unlike the Dissent, we are not persuaded that Vogtle necessarily resolves the law concerning the proper interpretation of this regulation.

[17] The Dissent would rule that C-8A does not raise a material issue under 10 C.F.R. § 2.309(f)(1)(iv) because the Dissent is persuaded by the Vogtle Board's interpretation of 10 C.F.R. § 52.79 (i.e., that the regulation does not require the COLA to contain the level of detail demanded by the intervenors in the Vogtle case). We believe that the Dissent has jumped to the merits. Further, C-8A is different from the contention in Vogtle, because the actual wording of C-8A does not prescribe a specific level of detail that is required. More importantly, C-8A raises a conceptual challenge (or basis) that is different from the challenge in Vogtle, i.e., that PEF's LLRW procedural plan is deficient not merely because its level of information is insufficient, but because it "postpone[s] most of its decisions" regarding how LLRW will be managed on-site after the initial two year period.

foreclose the possibility of adjudication. To the contrary, Intervenors may always challenge the sufficiency of the COLA and the fact that the Staff (which is simply another party to the litigation) is of the opinion that the COLA is sufficient, is merely a fact to be considered by the Board. If contentions are to be denied automatically every time the Staff agrees with the Applicant, then virtually no contentions would ever be admitted.

The fourth admissibility criterion requires that the contention raise issues that are "material to the findings the NRC must make to support the action that is involved in the proceeding." 10 C.F.R. § 2.309(f)(1)(iv). As we stated in admitting the original C-8, we believe that the Joint Intervenors have sufficiently alleged "the plausible looming scenario whereby the LL[R]W 2-year storage capacity [of PEF's Levy facility] will be reached and exceeded." LBP-09-10, 70 NRC at 124.

> Given the closure of Barnwell, the current absence of any alternative disposal facility for the LNP LL[R]W, and the large length of time often required for licensing of new LL[R]W facilities, we conclude that Petitioners have raised a legitimate and material safety issue, as required by 10 C.F.R. § 2.309(f)(1)(iv).

Id. The Commission affirmed this decision. See CLI-10-02, 71 NRC at __ (slip op. at 25). We likewise conclude that C-8A, which challenges the adequacy of PEF's procedural LLRW plan to satisfy 10 C.F.R. § 52.79(a), raises issues that are material to the issuance, or not, of the COL.

Likewise, we conclude that C-8A satisfies the fifth admissibility criterion under 10 C.F.R. § 2.309(f)(1)(v). Joint Intervenors, both in their Motion and in the D'Arrigo Declaration, have "alleged facts . . . which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely." 10 C.F.R. § 2.309(f)(1)(v).[18] Joint Intervenors have alleged, inter

[18] 10 C.F.R. § 2.309(f)(1)(v) requires "alleged facts or expert opinions." Thus, we need not decide whether Ms. D'Arrigo is an "expert" in all of the areas she addresses, or whether her declaration qualifies as an "expert opinion." The D'Arrigo Declaration consists primarily of the recital of a number of "alleged facts" and the assessment of the validity of any of her opinions expressed therein, expert or not, is not necessary for today's ruling.

alia, that "[c]urrently, there is no LLRW disposal facility that can accept Class B and C radioactive waste from Levy."[19] Joint Intervenors allege:

> Currently, there are only two operating commercial facilities that dispose of Classes A, B, and C LLRW: US Ecology at Hanford, near Richland, Washington; and EnergySolutions in Barnwell, South Carolina. EnergySolutions in Clive, Utah, is licensed to dispose of Class A waste and cannot take Class B or C. The Richland and Barnwell facilities can take LLRW only from the Northwest, Rocky Mountain, and Atlantic compacts. Waste Control Specialists (WCS) has a license to store a limited amount of waste . . . but can dispose of waste only from the Texas-Vermont Compact when its license is approved and it overcomes other outstanding hurdles. . . .

D'Arrigo Decl. ¶ 3.

As described by the NRC Staff, PEF's newly submitted LLRW procedural plan reiterates that PEF does "not expect" to need to manage or store LLRW onsite for more than two years and then specifies "if needed in the future, additional storage can be provided through the § 50.59 change process or a license amendment," that "current and future disposal options are expected to accommodate Levy low-level radioactive waste ('LLRW')," and that "temporary storage capacity can be extended" through the use of waste minimization strategies. Staff Answer at 4-5 (emphasis added). Joint Intervenors cite the Levy COLA Section 11.4.6 as stating, "[i]f additional storage capacity for Class B and C waste is required, further temporary storage would be developed in accordance with NUREG 0800." Motion at 2 (quoting Response to RAI-11.04). Joint Intervenors allege that these kinds of procedural promises are not concrete enough to demonstrate compliance with the Part 20 standards as is required by 10 C.F.R. § 52.79. We do not decide whether the merits of these allegations are true or correct.[20] We

[19] See Declaration of Diane D'Arrigo in Support of Interveners' [sic] Amended Contention 8 on So-Called "Low-Level" Radioactive Waste Safety Issues (May 14, 2010) ¶ 15 (D'Arrigo Decl.).

[20] In affirming the admission of the original C-8 herein, the Commission stated "the LLRW storage information required by 10 C.F.R. § 52.79(a)(3) is tied to the COL applicant's particular plans for compliance through design, operational organization, and procedures." CLI-10-02, 71 NRC __ (slip op. at 24) (emphasis added). PEF asserts that this statement means that the Commission has authorized three alternate methods for demonstrating compliance (design, operational organization, or procedures). PEF Answer at 6. We are not so sure. It remains to

merely conclude that these allegations are sufficient to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v).[21]

Finally, the Board rules that proposed C-8A provides sufficient information to show "that a genuine dispute exists . . . on a material issue of law or fact" as required by 10 C.F.R. § 2.309(f)(1)(vi). The proposed contention refers to specific provisions of the COLA (Section 11.4.6) as supposedly deficient. C-8A raises material issues and is supported by sufficient information. We find it satisfies 10 C.F.R. § 2.309(f)(1)(v).

In conclusion, the Board rules that proposed C-8A satisfies the six contention admissibility criteria of 10 C.F.R. § 2.309(f)(1)(i)-(vi) and hereby admits the contention.[22] Many

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be seen whether a contingent and primarily procedural plan such as PEF's satisfies the regulations.

[21] We believe that the Dissent inappropriately reduces C-8A to the last few paragraphs of the D'Arrigo Declaration. The Contention is clear enough. It alleges the issue to be litigated - whether PEF's LLRW plan fails to satisfy 10 C.F.R. § 52.79. It provides three reasons or "bases" why the Joint Intervenors believe that PEF's plan is defective (insufficient information, postpones most decisions, violates requirement that safety determinations be made before issuance of license). In contrast, the D'Arrigo Declaration serves to help satisfy 10 C.F.R. § 2.309(f)(1)(v) and (vi) by providing "alleged facts" and "sufficient information" in support of C-8A. The facts alleged by Ms. D'Arrigo include "[t]he Operational Status of Various LLRW Disposal Sites in the United States," "[t]he Limitations on the Disposal and Storage Capacity of Waste Control Specialists (WCS)," the "Storage Capacity of Studsvik," and the status and challenges facing WCS in its attempts to amend its license. These support the admission of C-8A. But when Ms. D'Arrigo, at the end of her Declaration, begins to assert legal conclusions such as "the applicant must provide greater detail about" X; or that "simply referring to generic guidance documents does not" suffice, or that "we need to know . . . what processing will be done [and] the kind of containers that would be used and how they are certified," these are not factual allegations. They are legal assertions or opinions, which Ms. D'Arrigo has no apparent expertise to make and which go to the ultimate legal questions in this case. We are not misguided by these effusive statements by an employee of a pro se intervenor. This Board will decide what the law is and what it requires. In sum. we believe that the scope of C-8A is best derived from the words of the contention itself. While the scope of the contention is informed by its "bases," in this case the three bases of C-8A have already been identified. The D'Arrigo Declaration represents "alleged facts" and is not the "basis." We believe that the Dissent has erred by overly concentrating on the most limiting statements of a putative witness of a pro se intervenor.

[22] In admitting Contention 8A, however, we agree with PEF that "[t]he COLA incorporates by reference the information in the AP1000 Design Control Documents," which "describe[ ] the kinds and quantities of radioactive materials expected to be generated with regard to solid waste containing radioactive materials." PEF Answer at 7. The challenge by the Joint

of the arguments raised by PEF and the NRC Staff go to the merits (legal and/or factual) and will be addressed at the time of our merits ruling.

VI. SELECTION OF HEARING PROCEDURES

As charged by 10 C.F.R. § 2.310(a), upon admission of a contention, the Board must identify the specific hearing procedures to be used. "The Board determines which hearing procedure to use on a contention-by-contention basis." LBP-09-10, 70 NRC at 145 (citations omitted). The regulation provides, "[e]xcept as determined through the application of paragraphs (b) through (h) of this section, proceedings . . . may be conducted under the procedures of subpart L of this part." 10 C.F.R. § 2.310(a) (emphasis added). Paragraphs (b) through (h) outline specific instances where certain hearing procedures are available or mandated. Unfortunately, none of the parties addressed the question of which hearing procedures should apply to the new Contention 8A.

Absent any mandatory hearing procedure under 10 C.F.R. § 2.310(b)-(h), the Board must exercise its discretion under 10 C.F.R. § 2.310(a) and select the hearing procedure most appropriate for Contention 8A. There is no mandatory or automatic "default" to Subpart L. A general discussion of this issue is found at LBP-09-10, 70 NRC at 145-46.

Our selection of the appropriate hearing procedure for newly admitted Contention 8A is influenced by the fact that the other two contentions admitted herein are currently subject to the Subpart L procedures. See id. at 145-47. While the original selection of hearing procedures for the other contentions is not immutable, there is no indication that any party will seek to change it. Under these circumstances, and lacking any suggestion that a different procedure would be appropriate for the newly admitted contention, we conclude that Contention 8A should be heard under the Part 2, Subpart L hearing procedures.

Intervenors' expert that the "[t]he applicant must provide greater detail about the amount of waste," D'Arrigo Decl. ¶ 20, is a challenge to the AP1000 DCD and is not admissible.

If any party objects to the selection of this hearing procedure for the newly admitted contention, then, within ten (10) days hereof, it may file a motion, not to exceed five (5) pages in length, supporting the selection of a different hearing procedure. Seven (7) days thereafter, any other party may file a response, not to exceed five (5) pages in length, supporting or opposing the motion.

V. CONCLUSION

For the foregoing reasons, the Board hereby admits Contention 8A.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA, by A. Baratta for/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 9, 2010

Dissenting Opinion of Judge Anthony J. Baratta

I disagree with my colleagues regarding the disposition of Contention 8A (Contention 8-A or C-8A). Their admission of the contention is based in part on a misinterpretation of the regulations, particularly 10 C.F.R. § 52.79(a)(3), which leads them to an erroneous conclusion. I conclude Contention 8A does not satisfy the materiality requirement of 10 C.F.R. § 2.309(f)(1)(iv) and is, therefore, inadmissible.

As submitted by the Joint Intervenors, Contention 8A reads:

> Progress Energy Florida's (PEF's) COL application is inadequate to satisfy 10 C.F.R. 52.79 because it assumes that class B and C radioactive waste generated by proposed Levy Units 1 and 2 will be promptly (e.g., within two years) shipped offsite, while currently there is an absence of access to a licensed disposal facility or capability to isolate the radioactive waste from the environment. The proposed amendment to the Levy County COL also fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing Class B and C radioactive waste on the Levy site if offsite disposal capacity is not available within two years. PEF's plan to postpone most of its decisions regarding how and where to store the waste (including "minimizing" the volume of the waste) until sometime after issuance of the license for Levy violates Section 52.79 and also the Atomic Energy Act's requirement that safety findings must be made before the license is issued.[1]

In support of the contention, Joint Intervenors rely principally on the Declaration of Diane D'Arrigo. Joint Intervenors assert that the plan that is provided in PEF's FSAR is "so lacking in detail as to be completely useless for showing compliance with NRC's safety regulation 10 C.F.R. 52.79." Id. at 4. In this regard, the D'Arrigo Declaration states,

> The applicant must provide greater detail about the amount of waste, its condition, the processes it will undergo, how it will be stored and where, considering the likelihood that extended onsite waste management will be necessary. Will storage be in buildings, and if so what will the structures be? If outside, exposed to the elements, how will safety and security be assured? Where will the storage area or building(s) be located? Will they be within the "protected" area? What treatment options will be carried out onsite and where?

[1] Motion by Joint Intervenors to Amend Contention 8 on So-Called "Low-Level" Radioactive Waste and Safety Issues Associated with Extended On-Site Storage (May 14, 2010) at 3 (Motion).

and, "PEF cannot show that it meets any of the standards without supplying details regarding how the waste will be managed and stored."[2]

Such level of detail is simply not required at this time and thus cannot form the basis for an admissible contention. Joint Intervenors cite 10 C.F.R. § 52.79(a)(3) as the basis for their amended contention. See Motion at 4. But the requirements of Section 52.79(a)(3) have been persuasively addressed by the licensing board in the Vogtle proceeding. In granting summary disposition on a contention alleging that the applicant's FSAR needed to include "details regarding 'building materials and high-integrity containers,' exact location, [and] health impacts on employees," the Vogtle Board stated, "[w]e find nothing in the rule or the cited Commission statements regarding LLRW that indicate section 52.79(a)(3) requires the detailed design, location, and health impacts information outlined in [the] amended contention."[3] Additionally, the Vogtle Board noted that

> [n]or does the Commission's language in CLI-09-16 indicate that "means" includes actual design, location, or health impacts information. Rather, the Commission seems merely to have been stating that the information required under section 52.79(a)(3) is tied to the applicant's "particular plans for compliance through," but not necessarily the details of, "design, operational organization, and procedures" associated with any contingent long-term LLRW facility.[4]

I agree with the Vogtle Board and find no requirement in Section 52.79(a)(3) for Progress' FSAR to include, as C-8A maintains, a level of detail regarding the exact storage, handling, and security procedures to be employed that Joint Intervenors' expert alleges to be

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[2] Declaration of Diane D'Arrigo in Support of Interveners' Amended Contention 8 on So-Called "Low-Level" Radioactive Waste Safety Issues (May 14, 2010) ¶¶ 20, 21.

[3] Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-08, 71 NRC __, __ (slip op. at 13, 14) (May 19, 2010) (Vogtle).

[4] Id. at __ (slip op. at 13-14) (citing Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009)).

necessary. Thus, I would find that C-8A does not raise a material issue as required under 10 C.F.R. § 2.309(f)(1)(iv).[5]

I would note also that Joint Intervenors have not raised the issue of the admissibility of C-8A under 10 C.F.R. § 52.79(a)(4). As pointed out by the Vogtle Board, Section 52.79(a)(4) "governs only those structures that are 'a component of the facility to be constructed under the COL.'" Vogtle, LBP-10-08, 72 NRC at __ (slip op. at 12). In connection with C-8A, Joint Intervenors have neither cited Section 52.79(a)(4) nor alleged that any on-site long-term LLRW facility will be a "component of the facility to be constructed under the COL." As the language of the proposed contention implies, Joint Intervenors acknowledge that any long-term on-site LLRW storage facility is contingent at this stage.[6]

I further note that Progress' plan is a contingency plan that would be enacted only when there is a clear need for additional storage, something that will not be determined for many years to come. As Progress points out, "LNP Units 1 & 2 are not scheduled to load fuel and begin operation for several years."[7] When combined with the stated storage capability of two years, the need for additional storage capacity is well into the future and beyond the facility to be licensed at this time. Progress has acknowledged this in stating that the future temporary storage "will be analyzed in accordance with 10 C.F.R. § 50.59," or, "[s]hould the temporary storage facility result in more than a minimal decrease in safety, a license amendment would be

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[5] Although the Vogtle Board was ruling on a summary disposition motion and not contention admissibility, it found, as a matter of law, that 10 C.F.R. § 52.79(a)(3) does not require design-level details of a contingent long-term LLRW storage facility to be included in a COL application. See Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 14). Thus, C-8A asserts that Progress' FSAR lacks information that, under the Vogtle Board's ruling, it is not legally required to contain. As a result, C-8A does not raise a material issue and is therefore inadmissible under 10 C.F.R. § 2.309(f)(1)(iv).

[6] See Motion at 3 (alleging that Progress' FSAR offers inadequate detail concerning LLRW storage "if offsite disposal capacity is not available within two years" (emphasis added)).

[7] Progress Answer Opposing Joint Intervenors' Motion to Amend Contention 8 (June 8, 2010) (PEF Answer), Attach. A, Progress Letter to NRC (Dec. 4, 2009) at 4.

required." PEF Answer at 6 & n.6. As Progress notes, "[t]he viability of such a plan was supported by the Vogtle Board, which noted . . . 'the longstanding agency recognition of the availability of the mechanisms under 10 C.F.R. §§ 50.59 or 50.90 for obtaining authorization to construct additional onsite LLRW storage facilities.'"[8]

For these reasons, I would reject Joint Intervenors' proposed Contention 8A as not raising a material issue as required under 10 C.F.R. § 2.309(f)(1)(iv).[9]

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

[8] Id. at 16 (quoting Vogtle, LBP-10-08, 71 NRC at __ (slip op. at 13)).

[9] Given the Majority's determination to admit this contention of inadequacy, it would seem appropriate that, as was the case in the Vogtle proceeding, this matter can be promptly set for briefing on summary disposition to provide an early opportunity for a merits disposition of the issues the contention presents.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PROGRESS ENERGY FLORIDA, INC.	)	Docket Nos. 52-029-COL
	)	and 52-030-COL
(Levy County Nuclear Power Plant Units 1 and 2)	)	
	)	
(Combined License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON JOINT INTERVENORS' MOTION TO FILE AND ADMIT NEW CONTENTION 8A) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]
_____
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 9th day of August 2010