

September 16, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER IN SUPPORT OF PROGRESS ENERGY
FLORIDA'S MOTION FOR SUMMARY DISPOSITION OF CONTENTION 8A

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1205(b), and the Atomic Safety and Licensing Board's (Board) Initial Scheduling Order, *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC __ (slip op. at 8) (August 27, 2009), the NRC staff (Staff) hereby files its answer in support of Progress Energy Florida's ("Applicant" or "Progress") August 27, 2010, Motion for Summary Disposition of Contention 8A (Motion). Because there are no material facts in dispute, and because the Applicant demonstrated that it is entitled to a decision as a matter of law, the Motion should be granted.

BACKGROUND

On July 28, 2008, the Applicant filed an application for a combined construction permit and operating license (COL) for two new reactors in Levy County, Florida. On February 6, 2009, the Ecology Party of Florida, the Nuclear Information and Resource Service, and the Green Party of Florida ("Joint Intervenors") collectively filed a petition to intervene and several

contentions.¹ On July 8, 2009, the Board issued a Memorandum and Order, granting the hearing request and admitting, among others, Contention 8, which the Board originally admitted as a contention of omission. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121-25 (2009). After the Applicant appealed, the Commission affirmed the admission of Contention 8, but narrowed it, stating that the issue of greater than Class C waste is outside the scope of this proceeding. *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC ___ (slip op. at 27) (January 7, 2010).

On December 8, 2009, the Applicant filed a response to two Staff Requests for Additional Information (RAI) that provided the Applicant's plan for managing Class B and C low level radioactive waste (LLRW).² Because this response cured the omission alleged in Contention 8, the Applicant and Joint Intervenors entered into a settlement agreement, whereby they agreed to ask the Board to dismiss Contention 8 as moot, and provide the Joint Intervenors an opportunity to file an amended contention.³ The Board approved the parties' settlement agreement. Licensing Board Order (Approving Settlement of and Dismissal of Contention 8) (April 21, 2010) at 1 (unpublished). On May 14, 2010, the Joint Intervenors filed a motion to amend Contention 8, and on June 8, 2010, both the Staff and Applicant filed answers opposing

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 (February 6, 2009).

² The RAIs and responses are included as Attachment B to the Motion. The Staff RAIs were issued on November 4, 2009, and can be found in the NRC's Agencywide Document Access Management System (ADAMS) at accession number ML093080633. The Applicant's response was sent on December 4, 2009, and can be found at accession number ML093450353.

³ Joint Motion for Approval of Settlement and Dismissal of Contention 8 (April 14, 2010).

admission of Amended Contention 8 (“Contention 8A”).⁴ On August 9, 2010, the Board admitted Contention 8A 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.

Licensing Board Memorandum and Order (Ruling on Joint Intervenors’ Motion to File and Admit New Contention 8A) (August 9, 2010) (unpublished) (“Contention 8A Admissibility Order”). On August 27, 2010, the Applicant timely filed its Motion.

DISCUSSION

I. Legal Standards

A. *Summary Disposition Standards*

In subpart L proceedings, the Board must apply the standard for summary disposition found in Subpart G. 10 C.F.R. § 2.1206 (c). Section 2.710(d)(2) of Subpart G states that the presiding officer shall grant the summary disposition motion if the moving party “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.710(d)(2).

⁴ 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); NRC Staff Answer to Motion by Joint Intervenors to Amend Contention 8 (June 8, 2010); Progress Answer Opposing Joint Intervenors’ Motion to Amend Contention 8 (June 8, 2010).

The NRC's summary disposition standards are based on Rule 56 of the Federal Rules of Civil Procedure. *Entergy Nuclear Generating Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, 71 NRC __ (slip. op. at 11-12) (March 26, 2010). A party that opposes a motion for summary disposition "may not rest upon [] mere allegations or denials," but must state "specific facts showing that there is a genuine issue of fact" for hearing. *Id.* at 12 *citing* 10 C.F.R. § 2.710(b). There cannot merely be the existence of "some alleged factual dispute between the parties," for "the requirement is that there be no *genuine* issue of *material* fact." *Id. quoting Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original). "Only disputes over facts that might affect the outcome' of a proceeding would preclude summary disposition." *Id.*

The ruling on a summary disposition motion, however, should not be a "trial on affidavits." *Id.* at 13. At the summary disposition stage, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for [hearing]." *Id. quoting Anderson*, 477 U.S. at 249. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* If "reasonable minds could differ as to the import of the evidence," summary disposition is inappropriate. *Id.*

B. Regulatory Requirements for the Contents of a COLA

The requirements applicable to the issuance of COLs are set forth in 10 C.F.R. Part 52, Subpart C. Combined license applications (COLAs) must contain the information specified in 10 C.F.R. § 52.79, including a final safety analysis report (FSAR). Section 52.79(a), requires an FSAR to contain the information listed in that section, "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." 10 C.F.R. § 52.79(a). Section 52.79(a)(3) requires that the FSAR 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.” 10 C.F.R. § 52.79(a)(3).

As shown below, the Staff agrees with the Applicant’s Motion with respect to the legal requirements of section 52.79. However, because the Staff review of the Applicant’s compliance with the relevant requirements is not complete, the Staff does not take a position at this time on whether the Application in fact satisfies these requirements. That notwithstanding, summary disposition of Contention 8A as a matter of law is appropriate.

II. Argument

Contention 8A states that the Applicant’s plans for disposal of LLRW are inadequate to meet section 52.79 because: (1) PEF assumes that class B and C waste will be promptly shipped offsite, while there is currently no licensed disposal facility to accept this waste; (2) the RAI responses provide insufficient information on storage of Class B and C waste should offsite storage remain unavailable; and (3) the Applicant’s plan to “postpone most of its decisions regarding how and where to store the waste” violates section 52.79 and the Atomic Energy Act. Contention 8A Admissibility Order at 5. In its Motion, the Applicant argues that summary disposition is appropriate because: (1) contention 8A requires a legal not a factual determination; (2) the Applicant’s plan meets section 52.79(a)(3); (3) NRC regulatory guidance supports summary disposition; and (4) there are no material facts in dispute. Motion at 4-14. As discussed below, because there are no material facts in dispute, and because the Applicant has demonstrated that it is entitled to a decision as a matter of law, the Motion should be granted.

1. There are No Material Facts in Dispute

To grant a Motion for Summary Disposition, there must be no material facts in dispute. 10 C.F.R. § 2.719(d)(2). In admitting contention 8A, the Board stated that it did “not know whether there are any factual issues or disputes entailed in resolving C-8A.” Contention 8A

Admissibility Order at 14. The Applicant argues, citing several other Board statements, that the questions raised by contention 8A are legal and not factual. Motion at 5. The Applicant also cites the Licensing Board in the Vogtle COL proceeding stating that a similar contention raised a legal and not a factual issue. *Id.* at 5, fn. 4; *citing* Licensing Board Memorandum and Order *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4) Ruling on Motion to Amend Contention*) at 8-9 (January 8, 2010) (unpublished).

The Staff agrees that contention 8A proposes a legal issue that is appropriate for summary disposition. As the Board noted, Joint Intervenors' argument is slightly different than that in the Vogtle case. Contention 8A Admissibility Order at 13. Here, the Joint Intervenors argue that the Applicant's plan is insufficient both because of its lack of detail and because "it postpones most of its decisions" regarding how LLW will be managed. This leads to two legal questions, (1) whether the Applicant must provide the level of detail sought by the Joint Intervenors to meet section 52.79, and (2) whether the Applicant can meet 52.79 by "postponing most of its decisions" regarding how LLW will be managed in the future. Both of these inquiries are legal questions regarding what information is required to meet 52.79; one goes to the amount of detail, and the other to whether a plan that specifies potential future acts is sufficient to meet the regulation. Joint Intervenors have not challenged any of the Applicant's factual statements in the RAI responses;⁵ instead, the Joint Intervenors have stated that the information

⁵ As the *Vogtle* Board noted regarding a similar contention, the lack of a factual dispute differentiates this contention from that admitted for hearing in the North Anna COL proceeding. In that proceeding, the Intervenors challenged a specific factual allegation in the Applicant's plan. *Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4)*, LBP-10-08, 71 NRC __ (slip. op. at 15-16, fn. 9). The North Anna LLRW contention has since been dismissed because the North Anna applicant subsequently sought an amendment to its COLA to reference a different design. See *Virginia Electric and Power Co. (Combined License Application for North Anna Unit 3)*, LBP-10-17, 72 NRC __ (slip. op. at 4-5) (September 2, 2010).

included is insufficient to satisfy 52.79. Therefore, this is a legal question regarding what is required to meet section 52.79, and there are no factual issues to resolve.

2. Contention 8A Seeks More Information Than What is Required to Meet Section 52.79

The Applicant argued that its plan for disposing of LLRW meets section 52.79(a)(3) because it both sets forth the kinds and quantities of radioactive materials to be produced, and because it describes the “means” of disposing of such material as required by section 52.79(a)(3). Motion at 5-12. Because contention 8A seeks information that is not required by section 52.79(a), the Staff agrees with the Applicant that summary disposition should be granted in its favor.

Section 52.79(a)(3) states that an FSAR must include:

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.

10 C.F.R. § 52.79(a)(3). As the Applicant noted, the first portion of this regulation – that the FSAR include the kinds and quantities of radioactive materials expected to be produced – is met by incorporating the AP1000 design control document into the COLA. Motion at 5-6. At issue here is the requirement that the FSAR discuss the “means for controlling and limiting radioactive effluents and radiation exposures.” 10 C.F.R. § 52.79(a)(3).

The Joint Intervenors make two primary arguments for why the Applicant does not meet section 52.79. First, that the Applicant provided “insufficient detail” and second, that the Applicant’s plan is insufficient because “it postpone[s] most of its decisions regarding where and how to store the waste . . . until sometime after issuance of the license.” The Applicant argued that the level of detail it provided is sufficient to meet section 52.79(a)(3). Motion at 6-12. The Applicant also states that its plan is not “contingent” because it does not delay decisions regarding LLRW; instead, the plan “commit[s] to specific actions that will be taken to manage LLRW at Levy if the initial LLRW storage capacity is not sufficient.” Motion at 10. The Staff

agrees with the Applicant that section 52.79(a)(3) does not require more specific detailed information than what the Applicant provided, and that it is appropriate for the Applicant to provide a plan for LLRW that includes actions that will be taken in the future if more LLRW storage becomes necessary.

In affirming the admissibility of the original contention 8, the Commission stated that “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.” *Levy County*, CLI-10-02, 71 NRC ____ (slip op at 24); *see also*, *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-09-16, 70 NRC 33, 37 (2009) (“[T]he required information is tied to the COL applicant’s particular plans for compliance through design, operational organization and procedures.”). There is nothing in the Commission’s rulings, or in the regulation itself, that implies that the “means” for controlling LLRW in the FSAR must include construction level information or that it cannot include a plan that sets forth what actions will be taken should the existing LLRW storage prove insufficient. Here, the Applicant has described the “means” it intends to use to comply with section 52.79(a)(3). As the Motion shows, the COLA is not deferring compliance with section 52.79(a)(3); rather, it states how the Applicant’s plan meets section 52.79(a)(3) and commits to a known regulatory process should any future construction become necessary. Motion at 10-12. In short, the Staff agrees with Progress that nothing precludes an applicant from complying with section 52.79(a)(3) by providing a plan that includes specific actions to be taken in the future if the existing LLRW storage becomes insufficient.

The Board also noted that Contention 8A focused on the introductory text of section 52.79(a). Order at 13. The introductory clause of section 52.79(a) states, in relevant part, that the FSAR “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 a combined license.” 10 C.F.R. § 52.79(a). The argument above regarding what information is required to meet section 52.79(a)(3) is directly relevant to the introductory clause in section 52.79(a).⁶ The Applicant described the means by which it intends to control and limit radioactive effluents expected to be produced in the operation of proposed new Units 3 and 4 and how it intends to maintain radiation exposures within the limits set forth in 10 C.F.R. Part 20. The introductory clause to section 52.79(a) simply requires that the Applicant provide enough information to allow the Commission to make its safety findings. As stated above, section 52.79(a)(3) does not require the level of detail sought by the Joint Intervenors, nor is it improper for the Applicant to meet this regulation by using a plan that specifies what actions the Applicant will take should more LLRW storage become necessary. Thus, the Applicant has provided the type of information necessary to meet section 52.79(a)(3). Consequently, Progress has provided sufficient information to allow the Commission to determine whether 52.79(a)(3) is met.

Ruling on a similar contention, the Licensing Board in the *Vogtle* COL proceeding concluded that the detailed design information sought by the Intervenors in that case was not required to meet section 52.79(a)(3), and that there was no prohibition on an applicant using a plan for compliance that included contingent plans should future LLRW storage become necessary. *Vogtle*, LBP-10-08, 71 NRC ___ (slip op. at 13-14). While the *Vogtle* decision is not controlling on this Board, it is instructive in that it dealt with a similar legal question. The *Vogtle* Board found that the Commission did not intend the word “means” in section 52.79(a)(3) to require “actual design, location, or health impacts information.” *Id.* at 13. In fact, the *Vogtle*

⁶ In the Part 52 rulemaking in 2007, the Commission did not explicitly discuss the meaning of the introductory text; however, it stated that in revising section 52.79(a) the “NRC has attempted to capture all relevant requirements regarding contents of the FSAR for a combined license application.” Final Rule, *Licenses, Certifications, and Approvals for Nuclear Power Plants*, 72 Fed. Reg. 49,352, 385-86 (August 28, 2007).

Board found that “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.” *Id.* at 13-14 citing *Vogtle*, CLI-09-16, 70 NRC at 36-37. In remarking on the contingent nature of the *Vogtle* plan, and the fact that Southern Company was not proposing design level information in its COLA for any additional LLRW storage facilities, the Board found that its interpretation that such information is unnecessary “is consistent with 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.” *Id.* at 13. The Staff agrees with the *Vogtle* Board’s analysis. There is no evidence that the Commission intended that section 50.379(a)(3) require the level of specificity sought by the Joint Intervenors, or that a plan that provides a specific approach for adding more LLRW capacity, should it become needed, is insufficient to meet section 52.79(a)(3).

Because there is no requirement in section 52.79(a)(3) for the Applicant to provide the design level information sought by the Joint Intervenors, and because it is acceptable to meet this regulation with a plan that includes a process for adding LLRW capacity should it become necessary, the Staff agrees with the Motion and the Applicant is entitled to a decision as a matter of law. Thus, summary disposition of contention 8A should be granted in the Applicant’s favor.

3. Statement of Material Facts

Attached to its Motion, the Applicant provided a statement of nine material facts for which it believes no genuine dispute exists. The Staff agrees that there is no dispute regarding any of the material facts listed by the Applicant.

CONCLUSION

Because there are no material facts in dispute regarding contention 8A, it is appropriate to resolve this contention by summary disposition. The Staff agrees with the Applicant that the information the Joint Intervenors seek in contention 8A is not required; thus, the Applicant is entitled to a decision as a matter of law.

CERTIFICATION

I certify that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion. As discussed above, the Staff supports the Applicant's Motion, but the Staff's efforts to resolve the issues with the Joint Intervenors have been unsuccessful.

Respectfully submitted,

/Signed (electronically) by/

Jody C. Martin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1569
Jody.Martin@nrc.gov

Dated at Rockville, Maryland
This the 16th day of September, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC Staff's Answer in Support of the Applicant's Motion for Summary Disposition of Contention 8A" have been served on the following persons by Electronic Information Exchange on this 16th day of September, 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
Joshua Kirstein
Law Clerks
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: megan.wright@nrc.gov
josh.kirstein@nrc.gov

Cara Campbell
The Ecology Party of Florida
641 SW 6th Ave
Ft. Lauderdale, FL 33315
E-Mail: levynuke@ecologyparty.org

Michael Canney
The Green Party of Florida
Alachua County Office
PO Box 12416
Gainesville, FL 32604
E-mail: alachuagreen@windstream.net

Michael Mariotte
Executive Director
Nuclear Information & Resource Service
6930 Carroll Ave. Suite 340
Takoma Park, MD 20912
Email: nirsnet@nirs.org

Mary Olson
NIRS Southeast
PO Box 7586
Asheville, NC 28802
E-mail: maryo@nirs.org
John H. O'Neill, Esq.
Michael G. Lepre, Esq.
Blake J. Nelson, Esq.
Robert B. Haemer, Esq.
Jason P. Parker, Esq.
Stefanie N. George, 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
stefanie.george@pillsburylaw.com

/Signed (electronically) by/

Jody C. Martin
Counsel for NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-1569
Jody.Martin@nrc.gov