

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

PROGRESS ANSWER OPPOSING CONTENTION 7A

I. Introduction

Progress Energy Florida, Inc. (“Progress”) hereby opposes the Motion for Leave to File a New, Timely Contention, and Contention 7A: Inadequacy of the Levy DEIS with Respect to the Environmental Impacts of Low-Level Radioactive Waste (“JI Motion”) submitted by Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, “Joint Intervenors”) on October 4, 2010. Joint Intervenors request that the Board admit as timely Contention 7A, which challenges the sufficiency of the NRC Staff’s analysis of the environmental impacts associated with the storage of low level radioactive waste (“LLRW”) at Levy County Nuclear Plant (“Levy”). See JI Motion at 1. The Joint Intervenors’ Motion should be summarily denied because it is untimely and Joint Intervenors do not address the factors applicable to a late-filed contention. Even if the Joint Intervenors’ Motion were considered timely, no aspect of the proposed Contention 7A is admissible because each aspect either: (1) lacks basis; (2) is beyond the scope of this proceeding; or (3) fails to support a genuine dispute with a material issue of law or fact.

II. Background

This proceeding involves the Levy Combined Constriction Permit and Operating License Application (“COLA”), submitted by Progress on July 28, 2008. Joint Intervenors filed their Petition to Intervene and Request for Hearing on February 6, 2009, alleging several contentions. With respect to

Contention 7, on July 8, 2009, the Atomic Safety and Licensing Board (the “Board”) found admissible only the narrow issue that the COLA’s Environmental Report (“ER”) fails to address the environmental impacts of on-site storage and management of LLRW for a potentially extended period of time.¹ Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 121-25 (2009) (“LBP-09-10”). The Board found Contention 7 “inadmissible insofar as [it] raise[s] issues under 10 C.F.R. Part 61, or insofar as [it] constitute[s] a challenge to Table S-3 of 10 C.F.R. § 51.51.” Id. at 121.

Progress appealed the Board’s decision in LBP-09-10. With regard to Contention 7, the Commission affirmed in part and reversed in part, stating:

With respect to the Staff’s environmental review, the EIS must discuss the reasonably foreseeable environmental impacts of the proposed project. Absent a licensed LLRW disposal facility that will accept waste from the Levy County facility, it is reasonably foreseeable that LLRW generated by normal operations will be stored at the site for a longer term than is currently envisioned in Progress’ COL application.

Progress Energy Florida, Inc. (Combined License Application, Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC __ (slip op. at 24) (Jan. 7, 2010) (citations omitted) (“CLI-10-02”). The Commission explicitly found that “the [greater than class C] GTCC waste is outside the scope of the adjudicatory proceeding.” Id. at 27. Thus, the Commission further narrowed Contention 7 to omission of environmental impacts of storage of Class B and C LLRW, and excluded the impacts of GTCC LLRW. Id.

On August 5, 2010, the NRC Staff provided the omitted environmental analysis in the Levy Draft Environmental Impact Statement, NUREG-1941 (Aug. 2010) (“DEIS”). The NRC Staff’s analysis reflects the responses to Request for Additional Information (“RAI”) Nos. 11.04-1 and 11.04-2 that

¹ As restated and admitted by the Board, Contention 7 states: “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.” LBP-09-10, 70 NRC at 123.

Progress submitted on December 4, 2009.² These responses provide analysis of compliance with 10 C.F.R. Part 20 in the event that Progress will have to manage Class B and C LLRW at Levy for more than two years. The DEIS concludes that such management at Levy would be very similar to the types and amounts of LLRW stored on-site for operating plants that was assessed in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437 (1996), and that radiation doses from interim LLRW storage would be insignificant. DEIS at 6-13 to 6-14. The DEIS concludes that long-term on-site LLRW management would, for the various reasons stated in the analysis, result in a small environmental impact. *Id.* at 6-15. Similarly, the DEIS concludes the cumulative environmental impact would be small. *Id.* at 7-49.

On August 12, 2010, Progress demonstrated that the alleged omissions with regard to Contention 7 had been cured by Progress's RAI responses describing the contingency plan for potential long-term on-site storage of Class B and C LLRW. Progress Motion for Summary Disposition of Contention 7 as Moot (Aug. 12, 2010). Additionally, Progress showed that the NRC Staff had analyzed the environmental impacts of Progress's plan for managing LLRW for more than two years at the Levy site and found those impacts to be small. Progress Motion for Summary Disposition of Contention 7 as Moot, Attachment B (Aug. 12, 2010) ("Contention 7 Material Facts"). Joint Intervenors did not contest the Contention 7 Material Facts and agreed that the analysis was not omitted. Response of Intervenors to Progress Energy August 12, 2010 Motion for Summary Disposition on Contention Seven as Moot (Aug. 31, 2010). On September 8, 2010, this Board dismissed Contention 7. Licensing Board Order (Granting Motion for Summary Disposition of Contention 7 as Moot) (Sept. 8, 2010) (unpublished).

On October 4, 2010, Joint Intervenors filed new Contention 7A, alleging that NRC Staff's analysis of the environmental impacts associated with the storage of LLRW at Levy was insufficient.

² See Progress Motion for Summary Disposition of Contention 7 as Moot, Attachment A (Aug. 12, 2010) ("LLRW RAI Responses").

III. Standards For Contentions

A. Timeliness

Under the NRC Rules of Practice, contentions must be based on documents or other information available at the time the petition is filed, which occurs at the outset of a proceeding. 10 C.F.R. §§ 2.309(b), 2.309(f)(2). The regulation states that, “on issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant’s environmental report.” 10 C.F.R. § 2.309(f)(2). The Commission has held that “contention pleading rule[s] require a petitioner to file NEPA contentions on the applicant’s ER so that environmental issues are raised as soon as possible.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004). Furthermore, the Commission has stated that it “is essential to efficient case management that intervenors file contentions on the basis of the applicant’s environmental report and not delay their contentions until after the Staff issues its environmental analysis.” Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 45 (2004) (footnote omitted). “The petitioner may amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant’s documents.” 10 C.F.R. § 2.309(f)(2). This Board has ordered that an amended or new environmental contention is “timely” if it is filed promptly after “the new and material information on which it is based first becomes available.” Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-22, 70 NRC __ (slip op. at 9) (Aug. 27, 2009) (“ISO”). Therefore, the Board Order requires a two-step inquiry. (1) What is the new and material information that is the basis of the new or amended contention? (2) When did that information become available?

It is not sufficient that the information is in the DEIS because simply issuing the DEIS does not occasion the raising of additional arguments that could have been raised previously. Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC

373, 385-86 & n.61 (2002) (citing Union of Concerned Scientists v. NRC, 920 F.2d 50, 55 (D.C. Cir. 1990) (“[W]e think it unreasonable to suggest that the NRC must disregard its procedural timetable every time a party realizes based on NRC environmental studies that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.”)). The filing of new contentions is permitted where information was not available early enough to provide the basis for the timely filing of that contention. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). “[T]he unavailability of these documents does not constitute a showing of good cause for admitting a late-filed contention when the factual predicate for that contention is available from other sources in a timely manner.” Id. at 1043. Further, the requirement that there be data or conclusions that “differ significantly” from those in the ER is analogous to the requirement that the information be “materially different” from information previously available. Exelon Generation Co. (Early Site Permit for Clinton ESP Site), LBP-05-19, 62 NRC 134, 163 (2005).

This Board ordered that a request to admit a new or amended contention must be consolidated with a motion to address either the regulatory factors applicable to (a) timely contentions, (b) non-timely contentions, or (c) both:

If a party seeks to file a motion or request for leave to file a new or amended contention (timely or untimely), then it shall file such motion and the substance of the proposed contention simultaneously. The pleading shall include a motion for leave to file a timely new or amended contention under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c) (or both), and the support for the proposed new or amended contention showing that it satisfies 10 C.F.R. § 2.309(f)(1).

ISO at 9 (emphasis in original).³ Implicitly, if a contention is concluded to be untimely, but the motion does not address the 10 C.F.R. § 2.309(c) factors, consideration of admission as an untimely contention

³ The ISO explicitly requires a motion for admitting a timely contention “should cover the three criteria of 10 C.F.R. § 2.309(f)(2).” ISO at 9. Therefore, even if there was an alternate test that did not require addressing the three criteria, such a test would not apply in this case. Furthermore, an argument that there is an alternate test that does not apply the three criteria is suspect as a proper regulatory interpretation should be backed by appropriate and relevant case law. Progress Energy Florida, Inc.

has been waived. Joint Motion Regarding Matters Enumerated in Initial Scheduling Conference Order at 2 (Aug. 14, 2009).

B. Admissibility

Even if a proponent of a new contention satisfies the requirements of 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c), it must also demonstrate that its new contention satisfies the standard for admissibility in 10 C.F.R. § 2.309(f)(1)(i)-(vii). Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993). 10 C.F.R. § 2.309(f)(1) requires that a petition:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in connection is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by [Joint Intervenors] (Mar. 3, 2009) provides a further discussion of these standards, which will not be repeated here.

IV. Joint Intervenors Contention 7A Is Untimely And Should Be Summarily Dismissed

Contention 7A is inadmissible because it is untimely and the Joint Intervenors fail to address the requirements for untimely contentions. Commission regulations permit new environmental contentions based on the DEIS only if there are data or conclusions in the DEIS that differ significantly from the data or conclusions in the applicant's documents. 10 C.F.R. § 2.309(f)(2). As admitted in the Joint Intervenors' Motion, Contention 7A challenges the adequacy of Progress's plan for storage of LLRW. See, e.g., JI Motion at 2, 3, 5, and 7 (stating that the basis is lack of adequate provision for storage, lack of planning details, undefined activities, and insufficient information from the Applicant). Joint Intervenors do not challenge any new information or analysis in the DEIS, but instead question information found in Progress's plan for extended storage of LLRW. Joint Intervenors concede that information has been available since December 4, 2009.⁴ For this reason, Contention 7A is untimely pursuant to 10 C.F.R. § 2.309(f)(2).

A. Contention 7A Is Untimely Because It Is Based On Previously Available Information

Contention 7A alleges that there are credible issues associated with handling and storing LLRW that the NRC Staff failed to address in the DEIS. JI Motion at 4. Joint Intervenors further argue that there is no credible basis for assuming that LLRW generated by reactors operating in Levy County, Florida will definitely be shipped off-site within two years because no such disposal option exists today and two years is not a credible time span to generate a new off-site option. Id. Joint Intervenors then acknowledge that the DEIS sets forth the possibility of extended storage of LLRW on the Levy site. Joint Intervenors assert that any evaluation of potential environmental impacts associated with this extended storage plan must be dismissed as incredible because it is "lacking any detail from the applicant about the way in which such extended storage and possible handling would be conducted." Id. at 5. The essence of Contention 7A is a challenge to Progress's plan of extended on-site storage and management without any

⁴ Licensing Board Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) (unpublished), Attachment A.

showing that the discussion in the DEIS differs significantly from that presented in the LLRW RAI Responses.⁵ For this reason, Contention 7A is based on information previously available and does not satisfy the requirement of 10 C.F.R. § 2.309(f)(2)(i).

When Progress cured the omission identified in Contention 7, Joint Intervenors were obliged at that time to challenge the adequacy of Progress's plan for extended storage of LLRW. The public has an obligation to structure participation in the agency's NEPA review process to be meaningful. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 539 (1977). It is inconsistent with this obligation to wait until the DEIS is issued to challenge publicly available information that would form the basis of the agency analysis.⁶ As required by the ISO, the Joint Intervenors must raise adequacy questions promptly when the information becomes available – in this case, that was eleven months ago in the LLRW RAI Responses - certainly not after the DEIS is issued.

B. The Joint Intervenors Do Not Identify How The DEIS Materially Differs From Previously Available Information

Joint Intervenors have failed to meet their affirmative burden to identify any data or conclusions in the DEIS that differ significantly from information that was previously available. Joint Intervenors have not even made an attempt to do so. The sole citation to the DEIS in the Joint Intervenors' Motion relates to the potential to increase the volume of Class A LLRW in order to minimize the volume of Class B and C LLRW. JI Motion at 5 (citing DEIS at 6-14). This information does not differ from the

⁵ The NRC Staff's analysis in the DEIS reflects the LLRW RAI Responses, which provide a contingency plan in the event that Progress will have to manage Class B and C LLRW at Levy for more than two years.

⁶ Joint Intervenors assert the unjustified legal conclusion that “[i]t is incumbent upon the NRC Staff to demand from the applicant sufficient information to demonstrate compliance with all applicable regulations for the radioactive waste generated by Levy County Units 1 and 2 in order to use such information for a complete and accurate environmental analysis and DEIS.” JI Motion at 7. In fact, other Boards have held that is not incumbent upon the NRC Staff to consider public input in its environmental review unless the public meets the obligation to structure participation in the NEPA process to be meaningful. See, e.g., Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), LBP-77-21, 5 NRC 684, 687 (1977) (faulting the County of Suffolk for failing to file specific comments during the environmental review when requested by the NRC).

information in Progress's Plan for extended storage of Class B and C LLRW. LLRW RAI Responses at 5. Joint Intervenors simply assert the tautology that increasing volume is a parameter with potential for impact without explaining how a plan to increase the volume shipped and reduce the volume stored is material to on-site storage, let alone introduces a difference between the DEIS and the LLRW RAI Responses. The DEIS compiles and analyzes the information provided in Progress's extended storage plan. See, e.g., DEIS at 6-13 to 6-15, 6-45. Joint Intervenors do not explain how any of the information in the DEIS differs from the extended storage plan in the LLRW RAI Responses. Where, as here, the data or conclusions on which a proffered contention is based were available before the NRC Staff's DEIS, that is the point in time at which the contention must have been filed for it to be considered timely. Catawba, CLI-83-19, 17 NRC at 1049; 10 C.F.R. § 2.309(f)(2)(ii).

C. Joint Intervenors Contention 7A Is Not Submitted In A Timely Fashion

Joint Intervenors fail to demonstrate that Contention 7A meets the criteria under 10 C.F.R. § 2.309(f)(2)(i)-(iii). As discussed above, the information on which Contention 7A is based has long been available to Joint Intervenors. Therefore, they have failed to satisfy the requirement contained in 10 C.F.R. § 2.309(f)(2)(i). The NRC Staff's analysis in the DEIS reflects the LLRW RAI Responses that Progress submitted on December 4, 2009. Because the information in the DEIS on which Contention 7A is based is precisely the same information contained in these responses, Contention 7A also fails to satisfy the criterion in 10 C.F.R. § 2.309(f)(2)(ii) (information not materially different). In addition, Joint Intervenors do not even attempt to justify the unreasonable eleven-month delay (from December 4, 2009 to October 4, 2010) in filing Contention 7A. Therefore, Contention 7A fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii).

The sole statement by Joint Intervenors with regard to timing of Contention 7A misstates the relevant Board Order and is inconsistent with the governing regulations. Joint Intervenors state:

This filing is timely because as clarified September 3, 2009 in the Order Granting Motion for Clarification, the Board approved a 60 day period for the filing of new contentions

associated with the publication of the Draft Environmental Impact Statement for Levy County Units 1 & 2. The DEIS was released to Parties in this case on September 5, 2010 [sic].⁷

JI Motion at 1. Neither the Board Order nor the regulations at 10 C.F.R. § 2.309(f)(2) allow for filing new contentions merely because they are “associated” with the DEIS. Such a standard would render meaningless the NRC regulation requiring contentions to be filed based on documents available at the time. The issuance of the DEIS is not an occasion to file new contentions that could have been, but were not, filed earlier. Even if it were, to the extent the allegations in Contention 7A are associated with anything, they are not associated with the DEIS, but with the LLRW RAI Responses from eleven months earlier.

It is undisputed that the documents upon which Joint Intervenors rely to support their new contention have been available for some time. In their August 31, 2010 Response to Progress’s August 12, 2010 Motion for Summary Disposition of Contention 7 as Moot, Joint Intervenors did not contest the Contention 7 Material Facts. Therefore, those facts are deemed admitted.⁸ 10 C.F.R. § 2.710(a). Consequently, Joint Intervenors have admitted that the LLRW RAI Responses were available on December 4, 2009. Joint Intervenors have an “ironclad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention.” Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (footnote omitted). Indeed, in a recent decision directly on point, the Commission held that allowing an intervenor to delay filing a contention until a

⁷ The DEIS was released to the Parties on August 5, 2010. NRC Letter from Scott C. Flanders, Director Division of Site and Environmental Reviews, NRR, to John Elnitsky, Progress Energy Vice President, Nuclear Plant Development (Aug. 5, 2010). This letter was forwarded to the Parties by the NRC Staff (J. Martin) on that same date. NRC Staff Filing (NRC Eleventh Status Report) (Aug. 5, 2010).

⁸ “The opposing party must controvert any material fact properly set out in the statement of material facts that accompanies a summary disposition motion or that fact will be deemed admitted.” Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993) (footnote omitted); see also Consumer Power Company (Big Rock Point Plant) LBP-82-19B, 15 NRC 627, 631-32 (1982) (finding that a summary disposition decision that an allegation presents no genuine issue of fact may preclude admission of a subsequent, late-filed contention based on the same allegation).

document becomes available that collects, summarizes and places into context the facts supporting a contention would turn on its head the regulatory requirement that new contentions be based on “information . . . not previously available.” See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC ____ (slip op. at 17-18) (September 30, 2010) (emphasis in original).

D. Contention 7A Should Be Summarily Dismissed Because The Joint Intervenors’ Motion Did Not Address Application Of The Factors For Admission Of Nontimely Contentions

Because the Joint Intervenors’ Motion fails to establish that Contention 7A is timely, Joint Intervenors should have (but did not) addressed the standards for nontimely contentions in 10 C.F.R. § 2.309(c)(1). The failure to address these factors by itself warrants denial of Contention 7A. Baltimore Gas & Electric Co., (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 (1998) (“the Commission has itself summarily dismissed petitioners who failed to address the five factors for a late-filed petition.”) (footnote omitted); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 465-66 (1985) (“[G]iven its failure even to address the . . . lateness factors, [a] [late] intervention petition [is] correctly denied because it [is] untimely”). “Late petitioners properly have a substantial burden in justifying their tardiness.” Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). “[T]he late petitioner must address each of [the] five factors and affirmatively demonstrate that, on balance, they favor permitting his tardy admission to the proceeding.” Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980) (citations omitted). Because Joint Intervenors have not addressed the factors for nontimely filing of contentions in the Joint Intervenors’ Motion, any request to admit Contention 7A as untimely is deemed waived. 10 C.F.R. § 2.309(c)(2).

V. Contention 7A Is Not An Admissible Contention

As discussed above, the Joint Intervenors’ Motion should be summarily denied because the motion is untimely and Joint Intervenors do not address the factors applicable to a late-filed contention.

Even if the Joint Intervenors' Motion were considered timely, no aspect of proposed Contention 7A is admissible because each aspect either: (1) lacks basis; (2) is beyond the scope of this proceeding; or (3) fails to support a genuine dispute with a material issue of law or fact.

A. Contention 7A Lacks An Identified Basis

Contention 7A is inadmissible because it fails to provide an explanation of its basis, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(ii). A contention is required to include a brief explanation of the basis for the contention. The stated bases for Contention 7A are that: (1) there is no disposal site available (JI Motion at 4); (2) the plan lacks the details required to demonstrate safety (JI Motion at 5); and (3) the waste minimization practices are unknown (JI Motion at 5). First, the issue amenable to this proceeding is not disposal, but on-site storage. CLI-10-02 at 21. Second, compliance with safety analysis requirements can only form the basis for a safety contention (in contrast, compare Contentions 8 and 8A in this proceeding), not an environmental contention. Third, there can be no relationship between a bounding analysis of the environmental impacts of on-site storage and a waste minimization strategy to reduce on-site storage of Class B and C LLRW by increasing the shipment of Class A LLRW. Regardless of the merits of the alleged facts in the Joint Intervenors' Motion, they do not explain the basis of proposed Contention 7A, an environmental contention about on-site LLRW storage.

The affidavits of the purported experts do not establish a basis for an environmental contention related to on-site storage of Class B and C LLRW. Joint Intervenors cite the declarations provided by Dr. Resnikoff and Ms. D'Arrigo⁹ for two propositions, neither one of which provides adequate basis for Contention 7A. First, the Joint Intervenors' Motion states:

⁹ Hereinafter referred to as Resnikoff Declaration of Sept. 15, Resnikoff Declaration of Oct. 4, and D'Arrigo Declarations, respectively. The D'Arrigo Declarations were executed before the DEIS was issued. Therefore, the ability of such opinions to form the basis for a challenge to the DEIS is suspect. Specifically, this Board has found that the second D'Arrigo Declaration, while providing alleged facts about the status of off-site LLRW processing facilities, otherwise makes unjustified legal conclusions. Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) at 17 n. 21 (Aug. 9, 2010) (unpublished).

As demonstrated in the Declarations of Dr. Resnikoff there are credible issues associated with handling and storing so-called ‘low-level’ radioactive waste that NRC Staff fail to treat in the DEIS. These declarations and previous filings of declarations by Diane D’Arrigo (supplied again as Attachment C) establish once again that there is no credible basis to assume that so-called LLRW generated by reactors operating in Levy County Florida will definitely [be] shipped off-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.

JI Motion at 4. Regardless of the merits of these declarations on disposal, the opinions about ultimate disposal are irrelevant to the environmental analysis of extended on-site storage. Second, the Joint Intervenors’ Motion states that, “[a]s enumerated in the Declarations from Dr. Resnikoff, the potential for significant impact exists, has been documented elsewhere at operating reactors, and should be included in the NRC Staff assessment of possible impacts from the operation of two AP1000 nuclear reactors in Levy County.” JI Motion at 6. In fact, the Resnikoff Declaration of Sept. 15 discusses only challenges to the AP1000 DCD,¹⁰ and the Resnikoff Declaration of Oct. 4 reiterates his concerns about the AP1000 DCD and challenges the validity of 10 C.F.R. Part 51, Table S-3. As discussed below, such challenges are outside the scope of this proceeding and are irrelevant to the basis of an admissible contention.

At its heart, Contention 7A is based on Joint Intervenors’ assertion that the NRC lacks the information needed to perform an analysis of environmental impacts and has not included such an analysis. The Joint Intervenors’ Motion states that “the assertion that environmental impacts from such undefined activities will be SMALL or that the NRC regulations will necessarily be met is not credible” and “the impacts from an extended storage and any other actions associated with keeping the waste in Levy County should be included at this stage of the licensing / NEPA analysis.” JI Motion at 5 and 7. As discussed above, the Contention 7 Material Facts are deemed admitted by the Joint Intervenors. These admitted facts state that the DEIS includes analysis of the impacts of extended LLRW storage.

Contention 7 Material Facts, ¶¶ 9-12. Having admitted that the NRC has provided an analysis, Joint

¹⁰ It is unclear by referring to the “DCD” whether Dr. Resnikoff means the issued certified design (10 C.F.R. Part 52, App. D, § III.A, “AP1000 DC Rule”) or the amendment requested by Westinghouse (Westinghouse Electric Co.; Acceptance for Docketing of A Design Certification Rule Amendment Request for the AP1000 Design, Docket 52-006, 73 Fed. Reg. 4,926 (Jan. 28, 2008)). This Answer will use “AP1000 DCD” to mean the relevant version applicable to LLRW storage that was provided as Attachment C to Progress Answer Opposing Motion to Amend Contention 8 (June 8, 2010).

Intervenors cannot base a contention on broad, generalized claims that the analysis is not credible or does not exist.¹¹ The purported bases for Contention 7A are either contrary to admitted facts or irrelevant to the environmental impacts of on-site storage of Class B and C LLRW. Joint Intervenors are required to provide at least a minimal factual or legal basis relevant to their contention. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359 (2001), petition for reconsideration denied, CLI-02-01, 55 NRC 1 (2002). Contention 7A lacks the brief explanation relevant to its purported basis required by 10 C.F.R. § 2.309(f)(1)(ii) and is not admissible.

B. Contention 7A Raises Issues Outside The Scope Of This Proceeding

Contention 7A is inadmissible because it is outside the scope of this adjudicatory proceeding, contrary to the requirement of 10 C.F.R. § 2.309(f)(1)(iii). Contention 7A challenges the plan for extended storage and disposal of LLRW provided by Progress, the environmental impacts of which are analyzed by the NRC Staff in the DEIS. That plan is explicitly based on information found in the AP1000 DCD and Table S-3 (10 C.F.R. § 51.51). For example, the plan makes clear that, before operation of Levy Units 1 and 2, Progress expects to have an agreement with an NRC-licensed facility to accept the LLRW from the plant. However, if Progress fails to enter into such an agreement, it will implement measures to reduce or eliminate the generation of such low-level radioactive waste, thereby extending the capacity of the on-site waste storage system described in the DCD to more than two years. See DEIS at 6-13. If more storage is needed, Progress could construct additional storage facilities on site, in accordance with the guidance provided by the NRC. Id.

The NRC Staff specifically addressed the environmental effects of each of these options in the DEIS. Id. The Staff found that Table S-3 fully addresses the environmental impacts of entering into an agreement with an NRC-licensed facility for the disposal of low-level radioactive waste. Id. In addition, the second option of using measures to reduce the generation of such waste could increase the volume of

¹¹ Specifically, Joint Intervenors are deemed to have admitted that the NRC has provided an environmental analysis of three scenarios, not just the plan in the LLRW RAI Responses. Contention 7 Material Facts, ¶ 9.

(but not the total curies of radioactive material in) the waste and the volume of waste would be bounded by the estimates described in Table S-3. Id. at 6-14. Joint Intervenors acknowledge this fact. See JI Motion at 5; Contention 7 Material Facts at ¶ 9.

Aspects of the design certification covered by the AP1000 DC Rule have already been approved by the Commission and cannot be challenged in this proceeding. 10 C.F.R. § 52.63(a). In general, challenging an NRC rule in a licensing proceeding is not permitted, absent a waiver from the Commission. 10 C.F.R. § 2.335. Furthermore, even if Contention 7A is considered to be raising an issue in the pending amendment proceeding (which it is not), rather than the AP1000 DC Rule, the Commission has stated that a contention that raises an issue on a matter addressed in a design certification amendment proceeding should be resolved in that rulemaking proceeding rather than the COLA proceeding. See Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-08, 69 NRC 317, 327 (2009); Statement of Policy on Conduct of Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). In addition, Table S-3 is not subject to attack in this proceeding. See LBP-09-10, 70 NRC at 115 (“the Commission has recently held that a Licensing Board may not admit a contention that directly or indirectly challenges Table S-3”); id. at 122 (“to the extent that C7 and C8 challenge 10 C.F.R. § 51.51 Table S-3, they are inadmissible under 10 C.F.R. § 2.335, which states ‘no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding’”). Because Contention 7A challenges the AP1000 DC Rule and Table S-3 with its attack on the plan in the LLRW RAI Responses, it is outside the scope of this proceeding.¹²

Contention 7A has 11 sub-elements. Six of these sub-elements are outside the scope of this proceeding as they either challenge the AP1000 DCD or Table S-3 of 10 C.F.R. Part 51, as reproduced in the DEIS, Table 6-1. Specifically, sub-elements 7A.A.1 and 7A.B.1 explicitly challenge the AP1000 DCD, which is outside the scope of this proceeding. Licensing Board Memorandum and Order (Ruling

¹² In addition to challenging the AP1000 DCD and Table S-3 by contesting the plan proposed by Progress and analyzed by the NRC Staff in the DEIS, as previously mentioned, Dr. Resnikoff also more directly attacks Table S-3. See Resnikoff Declaration of Oct. 4 at ¶¶ 2, 3, and 5. This direct attack underscores the fact that Contention 7A is outside the scope of this proceeding and should not be admitted.

on Joint Intervenors' Motion to File and Admit New Contention 8A) at 17-18 n. 22 (Aug. 9, 2010) (unpublished). Also, sub-elements 7A.C.1, 7A.C.2, 7A.C.3, and 7A.D challenge the NRC analysis of the environmental impacts of radioactive waste management practices, which are based on Table S-3. See DEIS at 6-14. By regulation, Table S-3 covers the environmental impacts of solid LLRW management. 10 C.F.R. § 51.51(a). Accordingly, these sub-elements of Contention 7A are outside the scope of an admissible contention in this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). Because the remaining specific sub-elements 7A.A.2 and 7A.B.2 and the consequential sub-elements 7A.E.1, 7A.E.2, and 7A.E.3 do not raise a genuine dispute on a material issue of fact or law as discussed below, Contention 7A is inadmissible and must be rejected.

C. Contention 7A Fails To Support A Genuine Dispute On A Material Issue Of Law Or Fact

Contention 7A is inadmissible because it fails to support a genuine dispute on a material issue of law or fact in contravention of 10 C.F.R. §§ 2.309(f)(1)(iv), (v), and (vi). Contention 7A has eleven sub-elements, eight specific and three consequential. As discussed above, six of the eight specific sub-elements are outside the scope of this proceeding, but even if they were considered, the Joint Intervenors' Motion does not demonstrate that there is a genuine issue on a material fact in any of the eight specific sub-elements. Logically, if none of the specific sub-elements are admissible, the three consequential elements are also not admissible. Contention 7A alleges that the DEIS "fails to adequately address, and inappropriately characterizes as SMALL, direct, indirect, and cumulative impacts, onsite and offsite, of generating and managing so-called Low-Level Radioactive Waste (so-called LLRW) from operating the proposed two AP1000 reactors." JI Motion at 3. The DEIS concludes that public and occupational exposures within the limits of 10 C.F.R. Part 20 have a SMALL environmental impact. DEIS at 5-130. Therefore, to be material, Contention 7A must support a genuine dispute as to whether exposures will comply with 10 C.F.R. Part 20. Instead, the Joint Intervenors' Motion only asks for additional details on compliance, providing little more than idle speculation about what such details might show. Licensing Boards do not sit to flyspeck the DEIS. See Exelon Generating Co. (Early Site Permit for Clinton ESP

Site), CLI-05-29, 62 NRC 801, 811 (2005) (“There may, of course be mistakes in the DEIS, but in an NRC adjudication, it is Intervenor’s burden to show their significance and materiality. ‘Our boards do not sit to ‘flyspeck’ environmental documents or to add details or nuances.’”). Even assuming for the sake of argument that the DEIS is based on inadequate detail, it does not follow that adding details would lead to a genuine dispute on a material issue of law or fact. Contentions must be based on a genuine material dispute, not the possibility that Joint Intervenor, if they perform their own analyses, may ultimately disagree. USEC, Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 480 (2006).

Joint Intervenor alleges that the NRC Staff’s analysis of the impacts of potential LLRW storage at the Levy site is insufficient because Progress has not provided enough details regarding its plan for such storage. JI Motion at 5-7. Joint Intervenor fails to provide any information showing that on-site storage of LLRW will have environmental impacts that are significant or that warrant mitigation. The DEIS explains that “doses to members of the public within the NRC and EPA regulations [i.e., 10 C.F.R. Part 20 and 40 C.F.R. Part 190] are a small impact.” DEIS at 6-14. Joint Intervenor only alleges that more detail is needed to assess whether to challenge the NRC Staff’s determination that the impacts of on-site storage of LLRW would be small. The only specific statement in the Joint Intervenor’s Motion with regard to compliance with dose limits is:

In addition to the matter of storage details, any and all future treatment and processing that could add to the routine and accidental radioactive and chemical releases and exposures from the operation of the reactors, management of high and so-called “low-level” radioactive waste and all of the accompanying activities, is necessary in order to assess the compliance with both 10 CFR 20 (for both workers and the public) as well as ALARA (10 CFR 50 Appendix I) which once completed, would also need to be included in the DEIS.

JI Motion at 7. Nowhere does Contention 7A allege that these details will show that exposures will exceed 10 C.F.R. Part 20 limits. The purported expert opinions attached to the Joint Intervenor’s Motion do not support any potential for violation of the public or occupational dose limits. None of the examples cited in the Resnikoff Declarations involve or could credibly lead to exposures in excess of the 10 C.F.R.

Part 20 limits.¹³ Any change that leads to exposures that are still within Part 20 limits is immaterial to the NRC Staff's analysis in the DEIS, because the impacts would still be SMALL. Contention 7A does not support a genuine dispute on a material issue contrary to 10 C.F.R. § 2.309(f)(1)(iv), (v), and (vi) and is not admissible.

VI. Conclusion

For all of these reasons, Contention 7A should not be admitted.

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, and that my efforts to resolve the issues have been unsuccessful.

Respectfully Submitted,

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

John H. O'Neill, Jr.

Robert B. Haemer

Stefanie N. George

Ambrea Watts

PILLSBURY WINTHROP SHAW PITTMAN LLP

2300 N Street, NW

Washington, DC 20037-1128

Tel. (202) 663-8148

Counsel for Progress Energy Florida, Inc.

Dated: October 29, 2010

¹³ It is unclear that the historic events cited by Dr. Resnikoff relate to on-site storage of LLRW. However, even assuming that they do, Dr. Resnikoff apparently concedes that these historic events involved doses in compliance with limits. Resnikoff Declaration of Oct. 4 at ¶ 4. Furthermore, he speculates that eventual soil removal may be necessary. Even if such action is assumed to be reasonably foreseeable, it would not materially change the environmental analysis of decommissioning the site in the DEIS. DEIS at 6-42 to 6-43.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Progress Answer Opposing Contention 7A, dated October 29, 2010, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding this 29th day of October 2010.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

Nuclear Information Resource Service
6390 Carroll Avenue, #340
Takoma Park, MD 20912
Michael Mariotte, Executive Director
E-mail: nirsnet@nirs.org

Nuclear Information & Resource Service
P.O. Box 7586
Asheville, NC 28802
Mary Olson,
NIRS Southeast Regional Coordinator
E-mail: nirs@main.nc.us

Alachua County Green Party, Green
Party of Florida
P.O. Box 190
Alachua, FL
Michael Canney, Co-Chair
E-mail: alachuagreen@windstream.net

Ecology Party of Florida
641 SW 6th Avenue
Ft. Lauderdale, FL 33315
Cara Campbell, Chair
Gary Hecker
E-mail: levynuke@ecologyparty.org

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001

Alex S. Karlin, Chair
Administrative Judge
E-mail: ask2@nrc.gov

Anthony J. Baratta
Administrative Judge
E-mail: ajb5@nrc.gov

William M. Murphy
Administrative Judge
E-mail: William.murphy@nrc.gov,
wmm1@nrc.gov

Megan Wright, Law Clerk
E-mail: megan.wright@nrc.gov

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburg, PA 15219
Counsel for Westinghouse Electric Co., LLC
Barton Z. Cowan, Esq.
E-mail: teribart61@aol.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001

Marian Zobler, Esq.
Sara Kirkwood, Esq.
Jody Martin, Esq.
Michael Spencer, Esq.
Joseph Gilman, Paralegal
E-mail:
mlz@nrc.gov
sara.kirkwood@nrc.gov
jcm5@nrc.gov
michael.spencer@nrc.gov
jsg1@nrc.gov

OGC Mail Center : OGCMailCenter@nrc.gov

//Signed electronically//
Robert B. Haemer