

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

December 22, 2010

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration of LBP-10-20)

Before the Board is a motion¹ by Progress Energy Florida, Inc. (PEF) for reconsideration of our decision in LBP-10-20. See LBP-10-20, 72 NRC __ (slip op.) (Nov. 18, 2010). In that decision, we denied PEF's motion for summary disposition of Contention 8A (C-8A) regarding the adequacy of PEF's plan for the onsite storage of low-level radioactive waste for the period extending beyond the initial two-year time frame contemplated in PEF's original combined license application (COLA). For the reasons set forth below, the motion is denied.

I. BACKGROUND

The procedural background of this proceeding as it relates to C-8A was discussed in LBP-10-20 and we need not restate it here. See LBP-10-20, 72 NRC at __ (slip op. at 2-6). We note only that PEF filed this motion for reconsideration on November 29, 2010, and that neither the Intervenors (collectively, the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida) nor the NRC Staff filed an answer or response.

¹ Progress Energy Florida, Inc.'s Motion for Reconsideration of LBP-10-20 (Nov. 29, 2010) (Motion).

II. ANALYSIS

Under 10 C.F.R. § 2.323(e), the Board may grant a motion for reconsideration only “upon leave of the [Board] . . . upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated that renders the decision invalid.” 10 C.F.R. § 2.323(e). When promulgating its 2004 revisions to the NRC hearing procedures, the Commission explained its rationale for imposing rigorous criteria for evaluating motions for reconsideration:

[The] standard [for motions for reconsideration], which is a higher standard than the existing case law, is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration, and the claim could not have been raised earlier. In the Commission’s view, reconsideration should be an extraordinary action and should not be used as an opportunity to reargue facts and rationales which were (or should have been) discussed earlier.

Nuclear Regulatory Commission; Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,207 (Jan. 14, 2004). Thus, to be successful, a motion for reconsideration “cannot simply ‘republish’ prior arguments, but must give the Commission a good ‘reason to change its mind.’”²

We conclude that PEF has not satisfied the standard for reconsideration. PEF’s motion fails to identify any compelling circumstance why LBP-10-20 was incorrectly decided and fails to show that the decision was based on some new issue or information that PEF was unable to anticipate. Instead, PEF does little more than restate points that Judge Baratta explained in his dissent in LBP-10-20. The fact that these issues were raised in the dissent demonstrates, almost per se, that the members of the Board were aware of these issues and analyzed and debated them. PEF’s motion raises nothing new. As the Commission stated in Louisiana Energy Services, a reconsideration motion cannot merely repeat prior arguments, but must provide a good reason for the adjudicator to change its mind. See id. Because PEF merely reiterates points of disagreement between the dissent and the majority in LBP-10-20, we find

² Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 n.13 (2004) (citing Ahmed v. Ashcroft, 388 F.3d 247, 249 (7th Cir. 2004)).

that PEF's fails in its motion to demonstrate a clear error in LBP-10-20 constituting a compelling circumstance to justify reconsideration under 10 C.F.R. § 2.323(e). We briefly consider each of PEF's three arguments.

First, we reject PEF's argument that the Board majority made a clear error in LBP-10-20 by finding insufficient content in PEF's plan for managing onsite storage of LLRW for the time period beyond the initial two year period. See Motion at 3-5. PEF repeats the dissent's assertion that "[t]he majority's analysis artificially and incorrectly divides PEF's LLRW management plan into two phases: the 'Initial LLRW Plan' . . . and the 'Extended' LLRW Plan." Motion at 3 (citing LBP-10-20, 72 NRC at ___ (slip op. at 16, dissent at 5 n.10)). PEF then argues that because the LLRW plan for the extended time period incorporates the LLRW plan for the initial two-year time period, it in fact contains sufficient information to satisfy 10 C.F.R. § 52.79(a). Motion at 4.

The Board rejected that rationale in LBP-10-20 and sees no need to reconsider it now. The majority was (and is) fully aware of the fact that, when PEF amended its final safety analysis report (FSAR) to respond to NRC's request for additional information, PEF's responses were incorporated into, and became part of, PEF's overall LLRW management plan. We stated that PEF's response "sets forth the specific words by which PEF is amending the FSAR." Id. at 23 (emphasis in original). We noted that PEF's amendments to the FSAR were less than one page in length. Id. at 31. This conclusion was confirmed by PEF's instant motion, which shows that PEF's original LLRW management plan (without extended LLRW storage) and its amended LLRW management plan (with extended LLRW storage) are essentially the same length. They are both 35 pages long.³

Likewise, the majority in LBP-10-20 was well aware that the LLRW plan is a single document and rejects the proposition that this fact somehow enlarges or changes what PEF has

³ Compare Motion, Attachment A (PEF's revised LLWR plan (35 pages)) with Motion for Summary Disposition of Contention 8A (Aug. 27, 2010), Attachment D (PEF's original LLRW plan (35 pages)).

committed to do with regard to onsite storage of LLRW during the period beyond the two years covered by the AP1000 Design Control Document (DCD). In LBP-10-20 we analyzed PEFs commitments carefully, and found them wanting. We reject the proposition that we “artificially” created two separate plans. The fact that our analysis focused on, and distinguished between, PEF’s commitments with regard to the initial two-year period, and its commitments with regard to the extended time period, served as a valuable way to assess what, if anything, PEF was actually committing to do during the latter period and whether it was sufficient. This approach is consistent with our recognition that they are both part of the same document and plan.

Second, we reject the argument that the Board made a clear error in finding in LBP-10-20 that PEF failed to make sufficient commitments regarding long-term storage of Class B and C LLRW. See Motion at 5-6. We examined PEF’s FSAR revisions carefully, and concluded that PEF’s LLRW onsite management plan for the period beyond the initial two years, was a purely procedural plan (e.g., we will comply with the law and do the right thing) that merely states a series of possible efforts, making enforceable commitments to execute none of them. See LBP-10-20, 72 NRC at ___ (slip op. at 25-26).

Third, we reject PEF’s suggestion that the Board majority assumed that PEF will violate its license by generating LLRW without a place to ship or store it. See Motion at 7-8. The majority of this Board expressly stated in LBP-10-20 that it does not assume that PEF will violate the terms and commitments in its license. See id. at ___ (slip op. at 25 & n.27-28). Instead, we held that PEF’s commitments (such as they are) with regard to extended onsite storage of waste, even if PEF complies with them, do not provide sufficient information to satisfy the requirements of 10 C.F.R. § 52.79(a). Id. at 30. The majority never suggested that PEF would not comply with the law. We merely noted that, assuming arguendo that the majority’s ruling is incorrect and that PEF’s extended LLRW plan meets the “sufficient information” criterion of 10 C.F.R. § 52.79(a), then Contention 8A would present a genuine issue of material

fact – whether PEF’s plan is workable within the two-year time frame available – the resolution of which would require an evidentiary hearing. Id. at 40.

In sum, PEF has failed to demonstrate clear error in LBP-10-20, and its motion is therefore denied.⁴

Before closing, we turn to PEF’s motion for clarification of LBP-10-20. We reiterate - our decision was entitled as a denial of a motion for summary disposition, and that is what it was. It is not an initial decision, partial or otherwise. Such a label should not serve as a device to delay this proceeding, hold it in abeyance, or otherwise terminate jurisdiction over the other pending motions and admitted contentions (and thereby force the Intervenors to refile and undergo the additional hurdles needed to reopen a proceeding under 10 C.F.R. § 2.326).⁵ This Board will proceed with the other work before it.

In the meantime, we note that the NRC Staff has filed a petition for review of LBP-10-20 and we agree that (although the Intervenors here have no legal counsel to assist with the briefing and have failed to file an answer to the Staff’s petition) this may be an opportunity for the Commission to study and to resolve an issue that has arisen in several adjudicatory proceedings.⁶

⁴ Given the deficiencies in the motion for reconsideration, there is no need to hear oral argument on it.

⁵ See Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-21, 72 NRC __, __ (slip op. at 4, 16-17, 20, 27, 30, 31-32) (Nov. 30, 2010); see also Licensing Board Memorandum (Referring Request to Admit New Contention to the Commission (Aug. 17, 2010) (unpublished); Commission Order (Aug. 25, 2010) (unpublished); Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-10-19, 72 NRC __, __ (slip op. Attachment A) (Oct. 28, 2010).

⁶ NRC Staff Petition for Review of the Licensing Board’s Decision in LBP-10-20 Denying the Applicant’s Motion for Summary Disposition (Dec. 10, 2010); see also Progress Energy Florida, Inc.’s Brief in Support of NRC Staff’s Petition for Review of LBP-10-20 (Dec. 20, 2010).

III. CONCLUSION

For the reasons set forth above, the motion of Progress Energy Florida, Inc. for reconsideration of LBP-10-20 is denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2010

Additional Comments of Judge Anthony J. Baratta

While I agree with my colleagues that PEF's motion for reconsideration does not meet the standards for reconsideration, I maintain that the majority's original ruling on the contention was in error. I also believe the majority's ruling is ripe for Commission review, because the ruling terminates a major portion of the case and is, in essence, a partial initial decision.

Although the majority did not characterize its original ruling as a partial initial decision, the ruling is clearly in the nature of a partial initial decision. The ruling decided the contention on the merits, holding as a matter of law that the Levy COLA does not contain sufficient information to satisfy 10 C.F.R. § 52.79(a); hence, the COLA cannot be granted unless it is amended. Because the contention is the only safety contention in the proceeding, the ruling effectively terminates the safety aspect of the proceeding. It is thus a partial initial decision deciding all safety related matters before the Board, thereby disposing of a major segment of the case.

Not only is the ruling the functional equivalent of a partial initial decision, it satisfies, for three alternative reasons, the criteria set out in 10 C.F.R. § 2.341(b)(4) for Commission review. Namely, (1) the ruling contains a necessary legal conclusion that is without governing precedent or departs from prior law (10 C.F.R. § 2.341(b)(4)(ii)); (2) the ruling raises a substantial and important question of law, policy, or discretion (10 C.F.R. § 2.341(b)(4)(iii)); and (3) Commission review of the legal issue is in the public interest (10 C.F.R. § 2.341(b)(4)(v)), insofar as it would promote efficiency in this case while providing clear guidance for future resolution of this issue (which is pending before several other licensing boards), thus conserving litigation and adjudication resources.

When a Board ruling is the functional equivalent of a partial initial decision and satisfies the 10 C.F.R. § 2.341(b)(4) criteria for Commission review, a Board's failure to characterize properly the ruling should not preclude such review. I would thus respectfully encourage the Commission to undertake review of the majority ruling.

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 (DENYING MOTION FOR RECONSIDERATION OF LBP-10-20) 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
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