UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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

CLI-11-10

MEMORANDUM AND ORDER

The NRC Staff has appealed the Atomic Safety and Licensing Board's order denying a motion for summary disposition filed by the applicant, Progress Energy Florida, Inc. (Progress), in this combined license (COL) proceeding.[1] As discussed below, we deny review because the order is not ripe for review under our rules of practice.

I. BACKGROUND

The proceeding involves Progress's application to construct and operate a 2000-megawatt facility in Levy County, Florida, consisting of two units of the Westinghouse AP1000 design. Three organizations, the Green Party of Florida, the Nuclear Information and Resource Service (NIRS), and the Ecology Party of Florida (collectively, Joint Intervenors), filed a timely petition to intervene in the proceeding, and were admitted as parties.

[1] *See* LBP-10-20, 72 NRC __ (Nov. 28, 2010) (slip op.); Memorandum and Order (Denying Motion for Reconsideration of LBP-10-20) (Dec. 22, 2010) (Order on Reconsideration) (unpublished).

There are currently two contentions pending before the Board. The contention at issue here, Contention 8A, concerns the adequacy of Progress's plans for handling and long-term storage of low-level radioactive waste (LLRW). Joint Intervenors' concerns arise from the closure of the Barnwell, South Carolina, LLRW disposal facility to waste generated outside the Atlantic Compact, and the apparent unavailability of LLRW disposal for waste generated at the proposed Florida facility.[2]

Initially, the Board admitted two contentions on LLRW: Contention 7, which concerned the environmental impacts of LLRW storage, and Contention 8, which challenged the safety aspects of the same processes.[3] In response to a Staff Request for Additional Information (RAI), Progress proposed to amend the relevant sections of its application, stating that it would add more storage, if necessary, consistent with relevant NRC guidance.[4]

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[2] *See generally* NRC Regulatory Issue Summary 2008-32: Interim Low Level Radioactive Waste Storage at Reactor Sites (Dec. 30, 2008) (ADAMS accession no. ML082190768) (discussing the Barnwell closure, and consolidating relevant information on interim long-term storage of LLRW); NRC Regulatory Issue Summary 2011-09: Available Resources Associated with Extended Storage of Low-Level Radioactive Waste (Aug. 16, 2011) (ML111520042) (informing addressees, among other things, of a consolidated list of available resources that will assist with the extended storage of LLRW). The other pending contention, concerning environmental impacts to ground and surface water, is not before us today.

[3] *See* LBP-09-10, 70 NRC 51 (2009). Progress appealed this decision. We affirmed the admission of the LLRW contentions, although further narrowed. *See* CLI-10-2, 71 NRC 27, 47-48 (2010) (excluding challenges to storage of Greater-than-Class-C waste). After the Staff issued its Draft Environmental Impact Statement (DEIS), the Board dismissed Contention 7 as moot, and subsequently rejected a proposed new contention on the DEIS. *See* Memorandum and Order (Granting Motion for Summary Disposition of Contention 7 as Moot) (Sept. 8, 2010) (unpublished), Memorandum and Order (Denying Contention 7A) (Mar. 16, 2011) (unpublished).

[4] 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 (amending Sections 11.4-1 and 11.4-2 of its Final Safety Analysis Report (FSAR)) (RAI Response) (ML093440353). *See generally* NUREG-0800, Standard Review Plan for the Review of Safety Analysis Reports, ch. 11.4, Solid Waste Management System (Rev. 3, 2007) and NUREG-1793, Final Safety Evaluation Report Related to Certification of the AP1000 Standard Design, ch. 11, Radioactive Waste Management (2004). Progress also stated that it would implement a waste minimization plan that would consider various strategies for reducing waste. RAI Response at 2.

Progress and the Joint Intervenors subsequently sought dismissal of Contention 8, based on a settlement of the contention; the Board approved the settlement, and dismissed Contention 8.[5] Joint Intervenors then filed a new contention, Contention 8A, challenging the adequacy of Progress's revised plans for onsite LLRW management and storage.[6] The Board admitted Contention 8A,[7] and Progress filed a motion for summary disposition almost immediately.[8]

A majority of the Board (with Judge Baratta dissenting) denied Progress's motion for summary disposition of Contention 8A. At bottom, the majority agreed with Joint Intervenors that the information provided in Progress's RAI response did not set forth an adequate plan to satisfy the relevant NRC regulations. The Board majority concluded that, as a matter of law, Progress's revised plans to manage and store LLRW onsite did not satisfy 10 C.F.R. § 52.79(a)(3), because Progress did not provide "a level of information sufficient to enable the Commission to reach a final conclusion," prior to issuance of the combined license, to resolve whether the application would comply with applicable provisions of 10 C.F.R. Part 20.[9] The Board further opined that Progress "may wish to revise and resubmit" this portion of its COL application.[10] The same Board majority denied Progress's subsequent motion for

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[5] *See Joint Motion for Approval of Settlement and Dismissal of Contention 8* (Apr. 14, 2010) (stating that Progress provided information curing the omission in its application, and that Joint Intervenors agreed Contention 8 should be dismissed); Order (Approving Settlement and Dismissal of Contention 8) (Apr. 21, 2010) (unpublished).

[6] *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.

[7] Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) (unpublished).

[8] *Motion for Summary Disposition of Contention 8A* (Aug. 27, 2010).

[9] LBP-10-20, 72 NRC __ (slip op. at 41).

[10] *Id*.

reconsideration.[11]

The NRC Staff now seeks review of LBP-10-20, arguing that the Board's decision should be reversed, and that Contention 8A should be resolved in Progress's favor. As discussed below, we deny review of this interlocutory Board decision. In any event, now pending before the Board is a motion for summary disposition that has the potential to resolve the contention.

II. DISCUSSION

The Staff argues that the Board's order denying summary disposition is reviewable immediately, even though it was not styled a "partial initial decision" and is not otherwise a final decision under traditional Commission jurisprudence.[12] Progress joins the Staff in urging us to grant review.[13]

The Staff argues that the decision is ripe for appellate review because it is *a de facto* partial initial decision, in that the Board effectively has resolved the contention in the Joint Intervenors' favor.[14] The Staff points to the Board majority's finding that no material fact

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[11] *See* Order on Reconsideration. Judge Baratta dissented from the majority's ruling on both the summary disposition motion and the motion for reconsideration. He concluded that Progress had provided a sufficient level of information in its application relative to LLRW storage, and therefore was entitled to summary disposition. LBP-10-20, 72 NRC at __ (Dissent at 1-10). Judge Baratta considered the regulatory scheme as a whole, and determined that, given the simple statement in § 52.79(a)(3) that a COL applicant provide information necessary to provide "the *means* for controlling and limiting radioactive effluents . . .," logically requires less detail than is required under § 52.79(a)(4). In contrast, that section specifies more detailed design information that must be included with respect to the certain elements of the proposed facility. Although Judge Baratta agreed with the decision to deny reconsideration, he reiterated his argument that the Board's original ruling was in error, and added that, in his view, the ruling is ripe for our review. Order on Reconsideration at unnumbered page 7 (Additional Comments of Judge Anthony J. Baratta).

[12] *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), at 5-6 (Staff Petition).

[13] *Progress Energy Florida, Inc.'s Brief in Support of NRC Staff's Petition for Review of LBP-10-20* (Dec. 20, 2010) (Progress Brief). Joint Intervenors did not file an answer. *See Joint Intervenors Note to All* (Dec. 24, 2010).

[14] LBP-10-20, 72 NRC __ (slip op. at 15) ("[W]e rule that there is no genuine issue of material fact in dispute and that, as a matter of law, PEF's LLRW plan does not satisfy 10 C.F.R. (continued . . .)

remains in dispute.[15] Alternatively, the Staff argues that because there are no remaining safety contentions, the Board majority's ruling qualifies for immediate appellate review because it resolves a "major segment of the case."[16] The Staff cites a longstanding practice initiated by our (now defunct) Appeal Board to allow petitions for review of Board rulings that dispose of a "major segment of the case."[17]

The Board did indeed indicate that any remaining factual disputes were not "material" to its finding that the COL application does not satisfy 10 C.F.R. § 52.79(a).[18] In denying Progress's reconsideration motion, however, the Board majority expressly stated that it intended its decision to be a denial of summary disposition, not an "initial decision." The majority's stated concern was that "[s]uch a label [could] serve as a device to delay [the] proceeding, hold it in abeyance, or otherwise terminate jurisdiction" over other matters pending in the adjudication.[19]

Our rules of practice allow petitions for review after a full or partial initial decision, both of which are considered "final" decisions.[20] We held in the *Pilgrim* license renewal case that a

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§ 52.79.").

[15] Staff Petition at 4 (citing LBP-10-20, 72 NRC __ (slip op. at 15-20)).

[16] *Id.* at 6.

[17] *See, e.g.*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983) (quoting *Toledo Edison Co.* (Davis-Besse Nuclear Power Station) ALAB-300, 2 NRC 752, 758 (1975)).

[18] LBP-10-20, 72 NRC at __ (slip op. at 20). *See also id*. at __ (slip op. at 40) (finding that, even if Progress is correct, as a legal matter, that it need not include any more specifics in its long-term plan for LLRW, then the question whether Progress could implement its long-term plan before running out of storage space becomes a material issue, also precluding summary disposition in Progress's favor).

[19] Order on Reconsideration at 5.

[20] *See generally* 10 C.F.R. § 2.341(b)(1). *See also* Final Rule, Procedures for Direct Commission Review of Decisions of Presiding Officers, 56 Fed. Reg. 29,403 (July 27, 1991). This rule codified our practice of considering a Board order appealable where it "disposes of . . . a major segment of the case or terminates a party's right to participate." *Seabrook*, ALAB-731, 17 NRC at 1074-75 (internal quotation omitted).

partial initial decision is one "rendered following an evidentiary hearing on one or more contentions, but that does not dispose of the entire matter."[21] On that basis, we declined in *Pilgrim* to review a grant of summary disposition of a safety contention (in a proceeding with other safety contentions pending), finding that the Board's decision in that case did not fall within the exception for partial initial decisions.

Consistent with our ruling in *Pilgrim*, regardless of how it is titled, the Board's decision here does not qualify as a "partial initial decision." A denial of summary disposition generally demonstrates that there remains an unresolved controversy—here, the controversy surrounds the extent, and type, of information required in a COL application regarding the question of long-term, onsite LLRW storage sufficient to permit the agency to make the requisite findings under 10 C.F.R. § 52.97, based on the information provided in the application pursuant to 10 C.F.R. § 52.79(a)(3).

It is also for this reason that the Board's decision does not resolve a "major segment of the case." The Board found in Joint Intervenors' favor as to Contention 8A, but the clear implication of the Board decision is that the matter is not settled. The Board did not terminate the contested proceeding, as might be expected if the ruling were dispositive of the case; indeed, as noted above, the Board itself suggested that Progress submit a further revision to its application.[22] Such a revision would be subject to challenge in this proceeding, and to further consideration by the Board. We thus conclude that the Board's decision is interlocutory.

The Staff does not argue that interlocutory appellate review is merited under our usual standards for such review; we find, in any event, that the denial of summary disposition in this case does not satisfy our interlocutory review standards. Appellate review of interlocutory

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[21] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-08-2, 67 NRC 31, 34 (2008).

[22] LBP-10-20, 72 NRC at __ (slip op. at 41).

Licensing Board orders is disfavored, and will be undertaken as a discretionary matter only in extraordinary circumstances.[23] The denial of summary disposition of Contention 8A neither threatens the Staff with "immediate and serious irreparable impact which . . . could not be alleviated through a petition for review of the presiding officer's final decision," nor affects the basic structure of the proceeding in a "pervasive or unusual manner."[24]

It is clear that matters associated with Contention 8A are still in flux. In the time since the Staff filed its petition for review, Progress voluntarily supplemented its response to the Staff's RAI related to long-term storage of LLRW,[25] and now has filed a fresh motion for summary disposition of Contention 8A.[26] The Board's resolution of Progress's recent motion for

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[23] *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), CLI-09-6, 69 NRC 128, 133-37 (2009).

[24] *See* 10 C.F.R. § 2.341(f)(2)(i) – (ii). Ordinarily, the principal adverse effect suffered by the refusal of a Board to grant summary disposition is that the moving party may incur the labor and expense of pursuing litigation that it sought to curtail. We have long held that this type of burden does not constitute irreparable harm. *See Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001) (admission of contention); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 61-62 (1994) (denial of motion for summary disposition or dismissal). Similarly, the expansion of issues for litigation that results from such a Board action does not have a "pervasive and unusual" effect on the litigation. *See Haddam Neck*, 54 NRC at 374; *Sequoyah Fuels*, 40 NRC at 62-63.

[25] The supplemental response, which is to be incorporated in an amendment to the COL application, provides more detail about how Progress would add storage if no offsite disposal or storage options were available by the time the proposed facility begins operations. *See* Letter from J. Elnitsky, Progress Energy, to NRC Document Control Desk, "Levy Nuclear Plant Units 1 and 2, Voluntary Supplemental Response to Request for Additional Information Letter No. 073 Related to Solid Waste Management System" (Apr. 14, 2011) (ML11112A087) (Supplemental RAI Response). Progress's voluntary supplemental response was added to the hearing file and made available to the parties. *See* letter from Kevin C. Roach, counsel for the NRC Staff, to the Administrative Judges (May 19, 2011) (transmitting update 19 to the hearing file); *Notice to the Commission of Information Relevant to the NRC Staff Appeal of LBP-10-20* (Aug. 29, 2011) (notifying us of the supplemental response, and of the Staff's review of the changes to Progress's LLRW management plan in Chapter 11 of the Advanced Final Safety Evaluation Report).

[26] *See Progress Energy Florida, Inc.'s Motion for Summary Disposition of Contention 8A in Light of Revised Extended LLRW Plan* (Aug. 27, 2011).

summary disposition of this contention may resolve Contention 8A.[27]

III. CONCLUSION

For the foregoing reasons, we *deny* the Staff's Petition for review.[28]

IT IS SO ORDERED.

For the Commission

[NRC SEAL] **/RA/**

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of September, 2011.

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[27] *See generally Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-10-8, 71 NRC 433 (2010) (concluding, as a matter of law, that the LLRW plan outlined in the applicant's FSAR complied with 10 C.F.R.§ 52.97(a)(3)).

[28] During the pendency of the Staff's petition for review, NIRS filed in this proceeding a petition requesting, among other things, that we suspend "all decisions" regarding the issuance of COLs, pending completion of several actions associated with the recent nuclear events in Japan. This was one of a series of similar petitions filed in multiple dockets. *See generally Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident* (Apr. 14, 2011, corrected Apr. 18, 2011); *Declaration of Dr. Arjun Makhijani in Support of Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned From Fukushima Daiichi Nuclear Power Station Accident* (Apr. 19, 2011). We granted the requests for relief in part, and denied them in part. In particular, we declined to suspend this—or any other—adjudication, or any final licensing decisions, finding no imminent risk to public health and safety, or to common defense and security. *See generally Union Electric Co. d/b/a Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-5, 74 NRC __ (Sept. 9, 2011) (slip op.). The agency continues to evaluate the implications of the events in Japan for U.S. facilities, as well as to consider actions that may be taken as a result of lessons learned in light of those events. Particularly with respect to new reactor licenses, we observed that "we have the authority to ensure that certified designs and combined licenses include appropriate Commission-directed changes before operation." *Id.* at __ (slip op. at 24).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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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 COMMISSION MEMORANDUM AND ORDER (CLI-11-10) 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 27th day of September 2011