LBP-11-31

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	Docket Nos. 52-029-COL, 52-030-COL
PROGRESS ENERGY FLORIDA, INC.	ASLBP No. 09-879-04-COL-BD01
(Levy County Nuclear Power Plant, Units 1 and 2)	November 4, 2011

MEMORANDUM AND ORDER
(Granting Motion for Summary Disposition of Contention 8A)

Before the Board is a motion by Progress Energy Florida, Inc. (PEF) for summary disposition of Contention 8A (C-8A), which challenges the adequacy of PEF's plan for long-term on-site management of low-level radioactive waste (LLRW).[1] For the reasons stated below, we conclude that there is no genuine issue as to any material fact relating to C-8A, and that PEF is entitled to a favorable decision as a matter of law. The motion for summary disposition is granted.

I. BACKGROUND

On July 28, 2008, PEF filed a combined license application (COLA) pursuant to 10 C.F.R. Part 52, to construct and operate two nuclear power reactors in Levy County, Florida.[2]

[1] Motion for Summary Disposition of Contention 8A in Light of Revised Extended LLRW Plan (August 27, 2011) (Second MSD C-8A).

[2] Progress Energy Florida, Inc.; Application for the Levy County Nuclear Power Plant Units 1 and 2; Notice of Order, Hearing, and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 74,532, 74,532 (Dec. 8, 2008).

On July 8, 2009, we granted the petition to intervene of the Nuclear Information and Resource Service, the Ecology Party of Florida, and the Green Party of Florida (collectively, Intervenors) finding that they had standing and had proffered three admissible contentions.[3]

The evolution of the current C-8A can be summarized as follows: At the outset of this adjudication, the Intervenors filed Contention 8 (C-8), which alleged that the COLA was inadequate because it omitted any plan for the management of LLRW beyond the initial two years of operation of the proposed nuclear reactors. Id. at 67. We admitted C-8, id. at 78, and PEF appealed.[4] The Commission affirmed our decision in pertinent part. CLI-10-02, 71 NRC 27, 46 (2010).

Meanwhile, on December 4, 2009, PEF submitted an extended LLRW management plan (Extended LLRW Plan) that addressed the management of LLRW for the period beyond the initial two years of operation.[5] The parties filed a joint motion to dismiss C-8 because the alleged omission had been cured. Joint Motion for Approval of Settlement and Dismissal of Contention 8 (Apr. 14, 2010). The Board agreed, granted the motion, and dismissed C-8.[6]

The controversy then turned to the adequacy of the Extended LLRW Plan. On May 14, 2010, the Intervenors moved for the admission of C-8A, challenging the adequacy of the

[3] Progress Energy Florida, Inc. (Levy County, Units 1 and 2), LBP-09-10, 70 NRC 51, 67 (July 8, 2009).

[4] Applicant's Notice of Appeal from LBP-09-10 (July 20, 2009) and Progress Energy Florida, Inc.'s Brief in Support of Appeal from LBP-09-10 (July 20, 2009).

[5] PEF's Responses to NRC Staff's Requests for Additional Information Nos. 11.04-1 and 11.04-2.

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

Extended LLRW Plan.[7] C-8A reads as follows:

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

Id. at 3.

On August 9, 2010, we ruled that C-8A was admissible.[8] PEF promptly moved for summary disposition of C-8A. Motion for Summary Disposition of Contention 8A (Aug. 27, 2010) (First MSD C-8A). PEF asserted that there was no genuine factual dispute concerning the contents of the Extended LLRW Plan, that the plan satisfied the relevant regulation, 10 C.F.R. § 52.79(a), and that PEF was entitled to a favorable decision as a matter of law. Id. at 1.

On November 18, 2010, the Board (with Judge Baratta dissenting) denied PEF's First MSD C-8A.[9] While we unanimously agreed with PEF that there was no genuine dispute concerning the contents of the Extended LLRW Plan, id. at __ (slip op. at 20), the majority ruled that the Extended LLRW Plan did not satisfy 10 C.F.R. § 52.79(a). Specifically, the majority concluded that the Extended LLRW Plan was inadequate "because it [did] not provide 'a level of information sufficient to enable the Commission to reach a final conclusion . . . before the

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

[8] Licensing Board Memorandum and Order (Ruling on Joint Intervenors' Motion to File and Admit New Contention 8A) (Aug. 9, 2010) at 17 (unpublished) (Order Admitting C-8A).

[9] Progress Energy Florida, Inc. (Levy County, Units 1 and 2), LBP-10-20, 71 NRC __, __ (slip op. at 1) (Nov. 18, 2010).

issuance of' the COL, to resolve whether PEF's 'means for controlling and limiting radioactive effluents and radiation exposures' during the extended period will be 'within the limits' set forth in 10 C.F.R. Part 20." Id. at __ (slip op. at 30). The majority stressed that 10 C.F.R. § 52.79(a) requires that the necessary safety determinations be made before the COL can be issued, and that PEF had not provided enough information regarding its LLRW plan to allow these determinations to be made now. Id. at __ (slip op. at 30-36). The majority found that the Extended LLRW Plan was "far too general and vague to make a final safety determination, now." Id. at __ (slip op. at 30). The majority ruled that the "plan" consisted essentially of a list of facts, a few statements of law, and some vague options that PEF could pursue, id. at __ (slip op. at 20-29), but that it failed to provide any enforceable commitments to take concrete action after the initial two years of on-site storage capacity were exhausted. Id. at __ (slip op. at 25-29). Thus, it did not provide sufficient information to allow the NRC to make the necessary safety determinations before the COL would be issued. Accordingly, the Board, with Judge Baratta in dissent, denied the First MSD C-8A. Id. at __ (slip op. at 40-41). We added that PEF might wish to revise and resubmit its application, taking into account our ruling. Id. at __ (slip op. at 41).

Once again, our decision was appealed, this time by the NRC Staff.[10] On October 5, 2011, the Commission rejected the appeal. CLI-11-10, 72 NRC __, __ (slip op. at 1) (2011).

Meanwhile, PEF undertook to cure the deficiencies in its Extended LLRW Plan. On April 14, 2011, PEF voluntarily submitted supplemental responses to NRC Staff requests for information (RAIs) Nos. 11.04-1 and 11.04-2, providing new and expanded information about how it plans to handle LLRW in the period beyond the initial two years of operation of the

[10] 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).

nuclear reactors.[11] We will refer to this as PEF's "Revised Extended LLRW Plan."[12] PEF then filed the instant (second) motion for summary disposition of C-8A (Second MSD C-8A) on August 27, 2011.[13] Intervenors filed an answer on September 16, 2011.[14]

II. APPLICABLE LEGAL STANDARD

The standard for deciding motions for summary disposition in Subpart L proceedings is found in 10 C.F.R. § 2.710, see 10 C.F.R. § 2.1205(c), and closely parallels the standard used by the federal courts in deciding motions for summary judgment.[15] A motion for summary disposition will be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a decision as a matter of law." 10 C.F.R. § 2.710(d)(2). "Thus, there are two criteria. First, the movant must show that there is no genuine issue as to any material fact. Second, the movant must establish that its legal position is correct." LBP 10-20, 71 NRC at __ (slip op. at 6).

With regard to the first criterion, "[t]he correct inquiry is whether there are material factual issues that 'properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'"[16] All facts are to be construed in the light most favorable to the non-moving party, Anderson, 477 U.S. at 255, and thus any doubt as to the existence of a

[11] PEF Motion, Attachment A, Supplemental 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.

[12] The Revised Extended LLRW Plan is more fully identified infra at page 6.

[13] Motion for Summary Disposition of Contention 8A in Light of Revised Extended LLRW Plan (Aug. 27, 2011).

[14] Answer to Progress Energy Florida's Motion for Summary Disposition of Contention 8A in Light of Revised Extended LLRW Plan (Sept. 16, 2011) (Intervenors' Answer).

[15] See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio, 44041), CLI-93-22, 38 NRC 98, 102 (1993).

[16] Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 297 (2010) (citing Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986)).

genuine issue of material fact is to be resolved against the movant. LBP 10-20, 71 NRC at __ (slip op. at 6).

III. ANALYSIS AND RULING

For the reasons set forth below, the Board grants the motion for summary disposition because (a) there is no genuine issue or dispute as to any material fact relating to C-8A and (b) PEF's Revised Extended LLRW Plan satisfies the requirements of 10 C.F.R. § 52.79(a).

A. No Genuine Issue as to Any Material Fact.

Contention C-8A alleges, in essence, that PEF's application with regard to LLRW management is inadequate because it "fails to offer sufficient information" to satisfy 10 C.F.R. § 52.79. The portion of the application that addresses this issue is PEF's Revised Extended LLRW Plan.

There is no factual dispute as to the contents of the Revised Extended LLRW Plan. It is specified, in black and white, in PEF's April 14, 2011 voluntary supplemental response to NRC's RAIs, Second MSD C-8A, Attachment A; in the "advance" copy of Chapter 11 of PEF's Final Safety Analysis Report (FSAR), Second MSD C-8A, Attachment D; and in the copy of Chapter 11 of the FSAR that PEF actually submitted to the NRC on October 4, 2011.[17] The contents of PEF's plan are not in doubt. The only question raised here is a legal one: Does the plan satisfy the regulatory requirements?

B. Adequacy of PEF's Revised Extended LLRW Plan as a Matter of Law.

As we did in LBP-10-20, we now turn to the second criterion for a successful motion for summary disposition – a showing that the movant is "entitled to a decision as a matter of law."

[17] On October 24, 2011, this Board posed a number of questions to PEF to determine what, exactly, constitutes the Revised Extended LLRW Plan and whether the "advance copy" of the plan provided to this Board as an attachment to PEF's Second MSD C-8A had actually been filed with the NRC Staff in October 2011. Licensing Board Order (Request for Clarification from Progress Energy Florida, Inc.) (Oct. 24, 2011). PEF filed answers to these questions on November 2, 2011. Progress Energy Florida's Clarifications Regarding Motion for Summary Disposition of Contention 8A (Nov. 2, 2011). Upon reviewing these answers, the Board has determined that the Revised Extended LLRW Plan filed with NRC Staff on October 4 is substantially similar in all pertinent respects to the "advance copy" PEF filed with this Board.

10 C.F.R. §§ 2.1205(c), 2.710(d)(2). In this context, the "matter of law" is whether PEF's LLRW plan satisfies 10 C.F.R. § 52.79. Specifically, C-8A asserts that PEF's LLRW plan "fails to offer sufficient information to demonstrate the adequacy of PEF's plans" and that its "plan to postpone most of its decisions . . . until sometime after issuance of the license for Levy violates Section 52.79 and the Atomic Entergy Act." Order Admitting C-8A at 5. PEF denies that its plan suffers from any such deficiencies and contends that it meets the requirements of this regulation.

We start with the words of 10 C.F.R. § 52.79. As relevant here, the regulation specifies that the FSAR must include "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). This information must be "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).

Next, we turn to the promises and commitments in PEF's Revised Extended LLRW Plan to see if they satisfy the foregoing regulatory criteria. Our examination reveals that PEF's Revised Extended LLRW Plan contrasts starkly with its Extended LLRW Plan and that the "Revised" plan contains sufficient information (e.g., concrete and enforceable commitments) that was lacking in the earlier plan. See LBP-10-20, 72 NRC at __ (slip op. at 25-29).

The Revised Extended LLRW Plan can be summarized as follows: PEF acknowledges that the "LLRW disposal facility in Barnwell, South Carolina is no longer accepting Class B and C" LLRW. FSAR § 11.4.2.4.3. PEF states that "should there be no disposal facilities that will accept the Class B and C wastes after the [proposed Levy Nuclear Plant] begins operation, there are several options available for the storage of such wastes." Id. These options are (1) mixing of the spent resin tanks to temporarily limit the volume of Class B and C wet waste; (2) "vendor services" to process and store the LLRW off-site pending the availability of a licensed disposal site; and (3) "[i]f additional storage capacity were eventually needed, the plant

could construct or expand storage facilities onsite, or gain access to a storage facility at another licensed nuclear plant."[18] Id.

With regard to the third option – expanded on-site storage – the Revised Extended LLRW Plan states:

> 11.4.6.3 Long Term On-Site Storage Facility
>
> Storage space for six months' volume of packaged waste is provided in the radwaste building. Radioactive waste generated by LNP will normally be shipped to a licensed disposal or off-site storage facility. However, should disposal facilities or off-site storage facilities not be available, storage capacity will be expanded as described below to provide additional on-site storage for LNP.

Id. § 11.4.6.3 (emphasis added).

We assess the foregoing provisions of the Revised Extended LLRW Plan as follows. First, PEF expresses the hope that that its initial on-site storage capacity will be sufficient and that PEF will be able to ship its LLRW off-site promptly. We find nothing wrong with such an expression of hope. Thus, we reject the complaint reflected in the first sentence of C-8A (i.e., the COLA is inadequate because it "assumes" that LLRW "will be promptly . . . shipped offsite"). Motion to Admit C-8A at 3. While the Revised Extended LLRW Plan expresses the hope that off-site disposal will be available, it goes on to backstop that assumption with concrete contingency plans for on-site management of the waste if off-site options are not available.

Second, PEF acknowledges that if the initial on-site storage capacity proves to be insufficient, then it has three options.[19] As we stated in LBP-10-20, there is nothing inappropriate about having options, provided that each of the "options is described with a level of information sufficient for NRC to make the necessary safety determinations now." LBP-10-

[18] Intervenors point out that PEF occasionally uses the term "could" instead of "would" when discussing the three options. Intervenors' Answer at 7. For example, PEF states that "[i]f additional storage capacity were eventually needed, the plant could construct or expand waste storage facilities or gain access to a storage facility at another licensed nuclear plant." FSAR § 11.4.2.4.3 (emphasis added). In context, however, the term "could" is simply being used to reflect that PEF has identified several options. As discussed below, so long as each option is stated with sufficient information, the LLRW plan can still satisfy 10 C.F.R. § 52.79(a)(3).

[19] The first two options are waste volume reduction and off-site storage.

20, 72 NRC at __ (slip op. at 39). Thus, we reject the complaint reflected in the third sentence of C-8A (i.e., that "PEF's plan to postpone most of its decisions" violates 10 C.F.R. § 52.79). Motion to Admit C-8A at 3. As we stated before, "postponing the decision between [concretely stated options] would not violate 10 C.F.R. § 52.79(a)." LBP-10-20, 72 NRC at __ (slip op. at 39).

Third, and most importantly, PEF's current plan makes affirmative, enforceable commitments as to what it will do if off-site disposal and/or storage facilities are not available. PEF states that on-site "storage will be expanded as described below." FSAR § 11.4.6.3 (emphasis added). PEF's description of what it will do to expand the on-site LLRW storage is, again, stated affirmatively and concretely, as follows:

> Additional on-site [LLRW] storage capabilities are available if Class B and C waste cannot be disposed at a licensed disposal facility. An outside storage pad will be utilized to provide this capability. The LNP LLRW storage facility would be located outside the Protected Area (PA) in the Owner Controlled Area (OCA). The storage facility would be enclosed by an eight-foot high fence with locked gates and would be provided with area lighting. The storage of LLRW would be in high integrity containers (HICs) or other suitable containers that will not decay over time, which would be stored within shielded containers. The design of the storage facility will comply with the guidance of documents as identified in this section which is consistent with NUREG-0800, Appendix 11.4A. The design storage capacity is based on the expected generation in Table 11.4-1, industry experience indicates approximately 100% of the Class B and C waste is expected to be in the form of wet waste, and volume minimization/reduction programs. The site waste management plan will include radioactive wet waste reduction initiatives for Class B and C waste.
>
> The storage facility will be sited such that it could be sized to accommodate storage of Class B and C waste over the operating life of the plant and designed to accommodate future expansion as needed. Capacity would be added in phases based on the expected availability of off-site treatment and storage, and disposal facilities.

Id. (emphasis added).

The foregoing language in the Revised Extended LLRW Plan contrasts sharply with the language in the Extended LLRW Plan. That plan lacked specific content or meaningful commitments. It included statements such as "[i]f additional storage capacity for [LLRW] is required, further temporary storage would be developed in accordance with NUREG-0800" and

"the existing regulatory framework would allow Progress Energy to conduct written safety analyses under 10 C.F.R. § 50.59." LBP-10-20, 72 NRC at __ (slip op. at 25). We held that such statements, however laudable, were too general and vague and did not provide sufficient information to enable the Commission to reach a final conclusion, before issuance of the proposed license, as to whether PEF's means for controlling and limiting radiation exposures would, in fact, meet the limits set forth in 10 C.F.R. Part 20. Id. at __ (slip op. at 30-31).

In contrast, the language in the Revised Extended LLRW Plan, quoted above, includes enforceable promises to take concrete actions. The quoted language provides sufficient information to allow the NRC to evaluate whether PEF's on-site management of LLRW will, in fact, comply with Part 20. In addition, this language is enforceable (e.g., if PEF failed to take one of these concrete actions, NRC enforcement attorneys could go to court and reasonably expect to obtain a judicial order directing PEF to implement these commitments).

We note that the Revised Extended LLRW Plan goes on to describe, in similar affirmative language, how the on-site storage "would" be designed (e.g., "the outside storage pad would be an engineered feature designed to minimize settling and would be constructed of reinforced concrete or engineered gravel") id. § 11.4.6.3.1, and how it "would" be operated (e.g., "The use of hold-down devices to secure the waste container during severe environmental events, such as strong winds, would be provided for"). Id. § 11.4.6.3.2.

In short, we reject the complaint reflected in the middle sentence of C-8A that PEF's Revised Extended LLRW Plan "fails to offer sufficient information to demonstrate the adequacy of PEF's plans for storing" LLRW, Motion to Admit C-8A at 3, and conclude that it satisfies the requirements of 10 C.F.R. § 52.79(a)(3).[20]

[20] We note also that the Intervenors attempt to raise two new issues in their answer. First, they seek to raise issues associated with 10 C.F.R. Part 100 "Reactor Site Criteria" stating that "with the passage of a solar year our expert, preparing for hearing has expanded the basis of concern and is now looking at Part 100 with respect to this contention." Intervenors' Answer at 10. He may be looking at Part 100, but we are not. Part 100 was never asserted as legal or factual support for C-8A, and we will not allow it to be introduced in such an inappropriate and cavalier

IV. CONCLUSION AND ORDER

In conclusion, the Board grants PEF's motion for summary disposition of C-8A. We agree that the motion satisfies the first criterion for summary disposition – that the resolution of the contention raises no genuine issue as to any material fact. We also agree, as a matter of law, that PEF's Revised Extended LLRW Plan satisfies 10 C.F.R. § 52.79(a) because it provides concrete and enforceable commitments that provide a "level of information sufficient to enable the Commission to reach a final conclusion," before the issuance of the COL, to resolve whether PEF's means for controlling and limiting radioactive effluents and radiation exposures during the extended period will be "within the limits" set forth in 10 C.F.R. Part 20.

Petitions for review of this order may be filed with the Commission pursuant to 10 C.F.R. § 2.341. Such petitions must be filed within fifteen (15) days of the service of this order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

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Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

_____
Dr. William M. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 4, 2011

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manner now. Second, Intervenors raise a concern that the proposed site for the storage unit is at risk of a storm surge from a category 5 hurricane. Id. at 8. Again, given that C-8A makes no reference to the threat of storm surge, an answer to a motion for summary disposition is neither the proper time nor the proper place to raise this concern.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 **MEMORANDUM AND ORDER (Granting Motion for Summary Disposition of Contention 8A) (LBP-11-31)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of November 2011