

June 18, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Carolina Power & Light Co.) Docket No. 50-400-LR
)
(Shearon Harris Nuclear Power Plant, Unit 1)
_____)

NRC STAFF RESPONSE TO
PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING
FILED BY THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION
NETWORK AND THE NUCLEAR INFORMATION AND RESOURCE SERVICE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the U.S. Nuclear Regulatory Commission Staff ("NRC Staff") hereby files its response to the request for hearing and petition for leave to intervene, dated May 18, 2007, filed on behalf of the North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) and the Nuclear Information and Resource Service, Inc. (NIRS) (collectively "Petitioners").¹ For the reasons set forth below, the Staff respectfully submits that the Petitioners have failed to establish their standing to intervene and have not presented a contention that is admissible for litigation in this license renewal proceeding. Accordingly, the Petition should be denied.

BACKGROUND

By letter dated November 16, 2006, Carolina Power & Light Company, doing business

¹ See Petition for Leave to Intervene and Request for a Hearing With Respect to Renewal of Facility Operating License No. NPF-63 by the North Carolina Waste Awareness and Reduction Network and the Nuclear Information and Resource Service, dated May 18, 2007 (Petition).

as Progress Energy Carolinas, Inc., a subsidiary of Progress Energy, Inc. (Applicant) submitted an application for renewal of Facility Operating License (FOL) No. NPF-63 for the Shearon Harris Nuclear Power Plant (HNP), Unit No. 1.² The application seeks to extend the term of operation for the facility for a period of 20 years beyond the expiration date of the current operating license, which otherwise expires at midnight on October 24, 2026.³

On January 12, 2007, the NRC published a notice of acceptance for docketing of the HNP license renewal application.⁴ On March 20, 2007, the NRC published a notice of opportunity for a hearing on the application, and a notice of intent to prepare an environmental impact statement and conduct an environmental scoping process for the HNP license renewal application.⁵ The notice specified the requirements for filing requests for hearing and petitions for leave to intervene, indicated that environmental scoping meetings would be held on April 18, 2007, and invited members of the public to participate in the environmental scoping process.

On May 19, 2007,⁶ a petition to intervene and request for a hearing was filed by NC

² Letter from Cornelius J. Gannon, Jr., Vice President, Harris Nuclear Plant, Progress Energy Carolinas, Inc., to U.S. NRC (Nov. 14, 2006) (ML063350267) (Application Cover Letter); Harris Nuclear Plant License Renewal Application (Agencywide Documents Access and Management System (ADAMS) Accession No. ML063350270); Applicant's Environmental Report – Operating License Renewal Stage (ML063350276) (ADAMS Package ML063350262).

³ Application Cover Letter at 1. The Petition erroneously uses 2027 for an expiration date. *E.g.*, Petition at 2.

⁴ Notice of Acceptance for Docketing of the Application, for Facility Operating License No. NPF-63 for an Additional 20-Year Period; Carolina Power & Light Company, Shearon Harris Nuclear Power Plant, Unit 1, 72 Fed. Reg 1562 (Jan. 12, 2007).

⁵ Notice of Opportunity for Hearing, and Notice of Intent To Prepare an Environmental Impact Statement and Conduct the Scoping Process for Facility Operating License No. NPF-63 for an Additional 20-Year Period Carolina Power & Light Company Shearon Harris Nuclear Power Plant, Unit 1 (72 Fed. Reg. 13139) (March 20, 2007) (Notice). As indicated in the notice, the NRC will prepare an EIS that will be used as a supplement to NUREG-1437, the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (GEIS), dated May 1996. *Id.* at 13,141.

⁶ The Petition, which was dated May 18, 2007, was partially e-mailed to (continued. . .)

WARN and NIRS, two membership organizations which requested a hearing on behalf certain members thereof. Petition at 6. In their Petition, NC WARN and NIRS proffered four contentions: Technical Contention TC-1 (Fire Protection), and Environmental Contentions EC-1 (Aviation attacks), EC-2 (Aviation attacks and fires), and EC-3 (Evacuation plan).⁷ The Petition also requested that the Commission require backfits to redress inoperable fire barrier systems, and to prevent aviation attacks and associated fires.⁸

The Staff has carefully reviewed the Petition, and respectfully submits that the Petitioners have not established their standing to intervene or presented an admissible contention within the scope of this license renewal proceeding.

DISCUSSION

A. The Petitioners Have Failed to Establish Their Standing to Intervene.

1. Applicable Legal Requirements

In accordance with the Commission's Rules of Practice,⁹ "[a]ny person¹⁰ whose interest may be affected by a proceeding and who desires to participate as a party must file a written

(. . .continued)

OGCMAILCENTER@NRC.GOV (the e-mail address provided in the Notice) on May 19, 2007, but two attachments to the Petition were not included in the e-mail. A complete hard copy of the Petition was received by the Office of General Counsel on May 23, 2007. The copy was sent via U.S. Priority Mail and the postage indicated a purchase date of May 20, 2007.

⁷ See Petition at 18, 24, 30, 35.

⁸ See, e.g., Petition at 38, 39.

⁹ Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, 10 C.F.R. Part 2.

¹⁰ "Person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission; and (2) any legal successor, representative, agent, or agency of the foregoing. 10 C.F.R. § 2.4.

request for hearing or petition for leave to intervene and a specification of the contentions that the person seeks to have litigated in the hearing.” 10 C.F.R. § 2.309(a). The regulations further provide that the Licensing Board “will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)].” *Id.*

Under the standing requirements set forth in 10 C.F.R. § 2.309(d)(1), a request for hearing or petition for leave to intervene must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1). The regulations further state that the Licensing Board “will determine whether the petitioner has an interest affected by the proceeding considering the factors enumerated in § 2.309(d)(1)-(2), among other things.” 10 C.F.R. § 2.309(d)(3).¹¹

As the Commission has observed, “[a]t the heart of the standing inquiry is whether the petitioner has ‘alleged such a personal stake in the outcome of the controversy’ as to demonstrate that a concrete adverseness exists which will sharpen the presentation of issues.” *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 71 (1994), *citing Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Commission further observed:

¹¹ 10 C.F.R. § 2.309(d)(2) concerns petitions filed by State or local governmental bodies or affected, Federally-recognized Indian tribes, and does not apply to the Petition.

To demonstrate such a “personal stake”, the Commission applies contemporaneous judicial concepts of standing. Accordingly, a petitioner must (1) allege an “injury in fact” that is (2) “fairly traceable to the challenged action” and (3) is “likely” to be “redressed by a favorable decision.”

Id., citing *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992), and *Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1)*, CLI-93-21, 38 NRC 87, 92 (1993). See also, *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

In a license renewal proceeding, standing to intervene has been found to exist based upon a proximity presumption. *E.g.*, *Florida Power and Light Company* (Turkey Point, Units 3 and 4), LBP-01-06, 53 NRC 138, 150 (2001), *aff'd* on other grounds, CLI-01-17, 54 NRC 3 (2001); *Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188, 196-197 (2006). The proximity presumption establishes standing without the need to establish the elements of injury, causation, or redressability. *Turkey Point*, LBP-01-06, 53 NRC at 150 (2001).

Any organization seeking to establish its “representational standing” (*i.e.*, organizational standing based upon the standing of its members) must also show that at least one of its members may be affected by the proceeding (*e.g.*, by identifying the member’s activities near the site), must identify that member, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf.

E.g., *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC ___ (April 26, 2007) (slip op. at 8); *Oyster Creek*, LBP-06-07, 63 NRC at 195 (2006) (citing *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 192, 202 (2000).

Further, for the organization to establish representational standing, the member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither

the asserted claim nor the requested relief must require an individual member to participate in the organization's legal action. *Id.*; *PFS*, CLI-99-10, 49 NRC 318 at 323 (1999) (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

2. Petitioners Lack Representational Standing

In their Petition, both NC WARN and NIRS seek to establish representational standing to intervene. Six persons provided notarized Declarations stating that they are members of NC WARN, and that they live approximately 7 or 8 miles from the plant (the addresses were provided).¹² All six declare concerns related to evacuation;¹³ one also declares concerns about fire safety and airplanes flying near the plant.¹⁴ One person provided a notarized Declaration stating that she is a member of NIRS, that she lives less than 15 miles from the plant (the address was provided), and that she is concerned about notification and evacuation in the event of an accident at the plant.¹⁵ These residences, all of which are physically close to the plant, would support a proximity presumption of standing for the Declarants, in their individual capacity.

Notwithstanding the proximity of the Declarants' residences to the facility, the Declarations fail to support representational standing for the Petitioners by failing to authorize representation in the license renewal proceeding. All of the Declarants expressed concerns about issues associated with current plant operations, but none provided any explicit statement

¹² Declarations were submitted by NC WARN members Worth Glover, Jr., Elbert Green, Tony A. Hackney, Judy Hogan, Derry J. Smith, Jr., and Robert L. Smith. See Petition, Attachment 1.

¹³ See Petition, Attachment 1.

¹⁴ Petition, Attachment 1, Declaration of Judy Hogan.

¹⁵ Petition, Attachment 2, Declaration of Beverly Ann D'Aquinni.

of concern regarding plant aging and/or license renewal.¹⁶ The member's Declarations, which are captioned with the plant's name and docket number, and are recently dated, do not specify any particular licensing action or other purpose for which they were prepared. The Declarations do not state that the Declarants have requested or authorized NIRS or NC WARN to represent them in this proceeding, or that those organizations have the members' permission to initiate litigation on their behalf regarding the application for license renewal. Accordingly, the Petition fails to establish a necessary prerequisite for NC WARN and NIRS to gain representational standing in this proceeding. See *Palisades*, CLI-07-18, 65 NRC __ (April 26, 2007) (slip op. at 8).

B. The Petitioners Have Failed to Proffer An Admissible Contention

1. Legal Requirements for Contentions

The legal requirements governing the admissibility of contentions are well established, and currently are set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice. Specifically, in order to be admitted, a Petitioner's contentions must satisfy the following requirements:

(f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:

(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;

¹⁶ See Petition, Attachments 1, 2.

(iv) Demonstrate that the issue raised in the contention 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.

(2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. 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)(1)-(2).

These requirements have been strictly applied in NRC adjudicatory proceedings, including license renewal proceedings. For example, in a recent decision involving license renewal, the

Commission stated:

To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design," and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the

validity of the contention." "Mere 'notice pleading' does not suffice." Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.

Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-119 (2006) (footnotes omitted; emphasis added).

2. Scope of License Renewal

The Commission has provided guidance for license renewal adjudications regarding what safety and environmental issues fall within or beyond its license renewal requirements.

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6 (2001). The failure of a proposed contention to demonstrate that the issue is within the scope of the proceeding is grounds for its dismissal. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

Specifically, the NRC conducts a technical review pursuant to 10 C.F.R. Part 54, to assure that pertinent public health and safety requirements have been satisfied. *Turkey Point*, CLI-01-17, 54 NRC at 6. In addition, the NRC performs an environmental review pursuant to 10 C.F.R. Part 51 to assess the potential impacts of twenty additional years of operation. *Id.* at 6-7. Regardless of whether or not a license renewal application has been filed for a facility, the Commission has a continuing responsibility to oversee the safety and security of ongoing plant operations, and it routinely oversees a broad range of operating issues under its statutory responsibility to assure the protection of public health and safety for operations under existing operating licenses. Therefore, for license renewal, the Commission has found it unnecessary to include a review of issues already monitored and reviewed in ongoing regulatory oversight processes. *Id.* at 8-10.

The Commission has clearly indicated that its license renewal safety review focuses on “plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended

operation.” *Id.* at 10, *quoting* 60 Fed. Reg. at 22,469. Further, the Commission stated that: “Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review; for our hearing process (like our Staff’s review) necessarily examines only the [safety] questions our safety rules make pertinent.” *Id.* at 10.

Further, as pertinent here, the Commission recently reiterated that terrorism-related National Environmental Policy Act (NEPA) contentions are not admissible in a license renewal proceeding. *Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *aff’g* LBP-06-7, 63 NRC 188 (2006). In that proceeding, the Commission held:

Today, notwithstanding a recent decision by the United States Court of Appeals for the Ninth Circuit, holding that the NRC may not exclude NEPA-terrorism contentions categorically, we reiterate our longstanding view that NEPA demands no terrorism inquiry. We also point out that, for license renewal, the NRC has in fact examined terrorism under NEPA and found the impacts similar to the impacts of already-analyzed severe reactor accidents. Hence, we affirm the Board’s rejection of New Jersey’s NEPA-terrorism contention.

Id. at 126 (footnotes omitted). In making its pronouncement in *Oyster Creek*, the Commission found that terrorism contentions are beyond the scope of license renewal. Citing previous agency decisions, the Commission stated:

"Terrorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to 'the detrimental effects of aging.' Consequently, they are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding." Moreover, as a general matter, NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications." "The 'environmental' effect caused by third-party miscreants 'is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'" "[T]he claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact."

Id. at 129 (footnotes omitted). The Commission is clear: terrorism contentions are inadmissible in a license renewal proceeding.

Similarly, the Commission has expressly held that “license renewal is not a forum for considering emergency-planning issues”; to the contrary, “emergency planning issues fall outside the scope of [a] license renewal proceeding.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 565, 567 (2005). Moreover, as the Commission has explained, “[i]ssues like emergency planning – which already are the focus of ongoing regulatory processes – do not come within the NRC’s safety review at the license renewal stage.” *Turkey Point*, CLI-01-17, 54 NRC at 10.

Contentions raising environmental issues in a license renewal proceeding are similarly limited to those issues which are affected by license renewal and have not been addressed by rulemaking or on a generic basis. *See Id.* at 11-12. Part 51 divides the environmental requirements for license renewal into generic and plant-specific components. *Id.* at 11. The Generic Environmental Impact Statement (GEIS) contains “Category 1” issues for which the NRC drew generic conclusions. *Id.* Applicants for license renewal do not need to submit analyses of Category 1 issues in their Environmental Reports, but instead may reference and adopt the generic findings. *Id.* Applicants must provide plant-specific review of the non-generic “Category 2” issues. *Id.* Category 1 issues “are not subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings.” *Id.* at 12.¹⁷

The Commission recently reiterated this principle, and specified that the GEIS Category 1 conclusions may not be challenged in a license renewal proceeding:

¹⁷ In *Turkey Point*, the Commission recognized “that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule.” *Turkey Point*, CLI-01-17, 54 NRC at 12. No such waiver has requested or shown to be appropriate.

In 1996, the Commission amended the environmental review requirements in 10 C.F.R. Part 51 to address the scope of environmental review for license renewal applications. The regulations divide the license renewal environmental review into generic and plant-specific issues. The generic impacts of operating a plant for an additional 20 years that are common to all plants, or to a specific subgroup of plants, were addressed in a 1996 GEIS. Those generic impacts analyzed in the GEIS are designated "Category 1" issues. A license renewal applicant is generally excused from discussing Category 1 issues in its environmental report. . . .

. . . Because the generic environmental analysis was incorporated into a regulation, the conclusions of that analysis may not be challenged in litigation unless the rule is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.

Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 (2007) (footnotes omitted), *reconsideration denied* CLI-07-13, 65 NRC ___, (March 15, 2007) (slip op.).

C. The Petitioners' Proposed Contentions Are Not Admissible.

As discussed below, each of the four contentions proffered by Petitioners NC WARN and NIRS raise matters which are outside the scope of this license renewal proceeding. Accordingly, the Petitioners have failed to proffer an admissible contention, and their Petition should therefore be denied.

1. Proposed Technical Contention TC-1 (Fire Protection)

Proposed Technical Contention TC-1 raises concerns regarding fire protection at the facility. It states:

Given that the SHNPP has been out of compliance since at least 1992 with requirements to maintain the post-fire safe shutdown systems of the reactor that minimize the probability and effects of fires and explosions as required in its Current License Basis and is not expected to come into compliance until approximately 2015 or later, extending into the license renewal period, and given that in the event of a significant fire, continued non-compliance can

lead to the loss of the operators' ability to achieve and maintain hot standby/shutdown conditions further resulting in significant accidental release of radiation and posing a severe threat to public health and safety, it is therefore imprudent and improper to even consider extending the operating license for the SHNPP for an additional 20 years until the plant comes into full compliance with all relevant fire protection regulations.

Petition at 18-19.

To support Contention TC-1, the Petition cites an NRC assessment of severe accident risks, issued in October 1990, that fires will likely occur at nuclear power plants over their operating lifetime. Petition at 19. The Petition further states that the types of fire barriers included in the description of fire protection systems in the application "include extensive applications of inoperable fire barrier systems consisting of Thermo Lag, HEMYC and MT" – which subsequent fire tests have found "do not provide the level of required fire protection on standardized time and temperature industry fire tests under ASTM 119." Petition at 19-20. The Petition asserts – without any citation of authority --that a basic principle of relicensing is "that the plant is substantially in compliance with all relevant regulations" *Id.* at 21. The Petition then asserts that the plant has been out of compliance since 1992, as discussed in the "Statutory and Regulatory Framework" section¹⁸ of the Petition, so there is no reasonable assurance that the plant will be able to operate safely and achieve safe shutdown in the event of an emergency. *Id.*¹⁹ The Petition concludes support for contention TC-1 by stating "Therefore, as

¹⁸ The "Statutory and Regulatory Framework" section is located on pages 7-17. The Petition states that each contention adopts the legal arguments made in the section that provide the legal bases for admitting them as valid contentions. Petition at 18.

¹⁹ The Petition further discusses previous efforts by NC WARN, NIRS, and others regarding fire protection non-compliance, including the submittal of an emergency petition under 10 C.F.R. §2.206. Petition at 21-22. The Petition states that it incorporates by reference the 2.206 petition, a proposed Director's decision and the Petitioners' response thereto, a transcript, and numerous other documents. Petition at 22 n.8. Such broad and non-specific incorporation goes against the Commission's pleading requirements. See *e.g.*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89- (continued. . .)

a matter of law, the decision on the relicensing of the SHNPP should be denied until the plant is fully in compliance with the fire regulations." Petition at 24.

Staff Response to Contention TC-1

Contention TC-1 is inadmissible. In the Petitioners' own words, the gist of this contention is that "the SHNPP is currently not in compliance with fire protection regulations." Petition at 3. Similarly, the Petition discusses the Petitioners' efforts to raise their concerns regarding the lack of compliance with fire protection regulations in a petition for enforcement action under 10 C.F.R. § 2.206 and states that "[a]s they relate to the SHNPP license extension, these are the same issues that are at the heart of this contention." *Id.* at 23-24.

A review of Contention TC-1 supports the Petitioners' assessment that the contention pertains to compliance with fire protection regulations under current operations, rather than license renewal. The Petition fails to demonstrate that the issue raised in the contention is within the scope of this license renewal proceeding; fails to demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the license renewal action; and fails to provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact in this proceeding.

The contention is plainly outside the scope of the proceeding as it does not raise any aspect of the applicants' aging management review. See *Turkey Point*, CLI-01-17, 54 N.R.C. at 10. In particular, it fails to show that current compliance with fire protection requirements is material to the findings the NRC must make for granting or denying license renewal.

(. . .continued)

03, 29 N.R.C. 234, 241 (1989) ("The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point.")

In support of the contention, the Petition states that a basic principle of "relicensing" is that the plant is substantially in compliance with all relevant regulations, and it asserts that this is a "rebuttable presumption." Petition at 21. The Petitioners' argument regarding their ability to challenge current regulatory compliance in a license renewal proceeding, via a "rebuttable presumption" or otherwise, is incorrect. The Petition cites the Commission's 1991 Statement of Consideration²⁰ (SOC) for the license renewal rulemaking, 56 Fed. Reg. at 64946, in support of the Petitioners' own assertion that, "other than with respect to aging issues and issues that arise when significant new information becomes available, the NRC does not inquire into safety issues in the license renewal process but presumes that the current regulatory process is adequate." Petition at 8. The Petition then asserts that "[t]his presumption is rebuttable if it is shown that the current regulatory process is not adequate to protect public health and safety or if the plant is not in compliance with the relevant regulations or provisions of its license. *Id.*

Significantly, the Petitioners offer absolutely no case authority or reference to a regulation to support the assertions regarding rebuttability. Furthermore, the 1991 SOC²¹ issued for the license renewal rulemaking demonstrates that the rule explicitly "does not require submission of information relating to the adequacy of, or compliance with, the current licensing basis." 56 Fed. Reg. at 64961. In the 1995 SOC, the "Commission reaffirms its earlier conclusion that a special verification of CLB compliance in connection with the review of a

²⁰ The Petition cites to the 1991 SOC, which are not the most-recent for renewal. The Commission subsequently published revisions to the renewal rules. Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22461 (May 8, 1995).

²¹ Regarding how the 1995 rule revised the 1991 rule, the SOC for the 1995 rule noted: "The principal purpose of this final rule is to simplify and clarify the previous license renewal rule. Unless otherwise clarified or reevaluated, either directly or indirectly, in the discussion for this final rule, the conclusions in the SOC for the previous license renewal rule remain valid (56 FR 64943; December 13, 1991)." 60 Fed. Reg. at 22463

license renewal application is unnecessary." 60 Fed. Reg. at 22474.

The 1991 SOC further noted that "Section 54.29, which defines the standard for issuance of a renewed license, does not require a finding regarding the adequacy of, or compliance with, the plant's licensing basis." 56 Fed. Reg. at 64961. The Commission believed this guidance was clear, but decided to improve the rule. 60 Fed. Reg. at 22482. It narrowed § 54.29 to the findings to be made for issuance of a renewed license, and added § 54.30²² to address the licensee's responsibilities for addressing safety matters under its current license that are not within the scope of the renewal review. *Id.* The Commission stated "Separating the subjects into two different sections should minimize any possibility of misinterpreting the scope of the renewal review and finding." *Id.*

Therefore, any argument regarding the continued violation of the plant's current licensing basis²³ is not material to the findings the NRC must make; as such, the Petitioners' argument fails the materiality requirement of 10 C.F.R. 2.309(f)(1)(iv). The SOCs for the rulemaking do not support the "rebuttable presumption" argument in the Petition. To the contrary, the 1995 SOCs stated:

The Commission does not contend that all reactors are in

²² 54.30 Matters not subject to a renewal review.

(a) If the reviews required by § 54.21 (a) or (c) show that there is not reasonable assurance during the current license term that licensed activities will be conducted in accordance with the CLB, then the licensee shall take measures under its current license, as appropriate, to ensure that the intended function of those systems, structures or components will be maintained in accordance with the CLB throughout the term of its current license.

(b) The licensee's compliance with the obligation under Paragraph (a) of this section to take measures under its current license is not within the scope of the license renewal review.

10 C.F.R. § 54.30

²³ Such argument is made throughout the Petition. See, e.g. Petition at 10, 23, 24.

full compliance with their respective CLBs on a continuous basis. Rather, as discussed in the SOC for the previous rule, the regulatory process provides reasonable assurance that there is compliance with the CLB. The NRC conducts its inspection and enforcement activities under the presumption that non-compliances will occur.

60 Fed. Reg. 22473-4.

To the extent the Petition argues that a "rebuttable presumption" exists, it is an impermissible challenge to the Commission's rules, and cannot be used to support a contention in license renewal. See 10 C.F.R. § 2.335(a).

Accordingly, inasmuch as Contention TC-1 addresses current compliance and fails to raise a matter that is properly within the scope of this license renewal proceeding, it is not admissible under license renewal and should be rejected.

2. Proposed Environmental Contention EC-1 (Aviation attacks)

This contention asserts that potential terrorist attacks on the facility involving the use of aircraft must be considered in this license renewal proceeding. Contention EC-1 asserts:

The Environmental Report for the SHNPP license extension fails to satisfy NEPA because it does not address the environmental impacts of a successful attack by the deliberate and malicious crash of a fuel laden and/or explosive laden aircraft and the severe accident consequences of the aircraft's impact and penetration on the facility. It is unreasonable for the NRC to dismiss the possibility of an aviation attack on the SHNPP in light of the studies by the NRC that this is a real possibility that could have devastating results.

Petition at 24.

In support of Contention EC-1, the Petition states that the original EIS for the license did not evaluate the consequences of an aviation attack, and the "potential for accidents caused by deliberate malicious actions and the resulting equipment failures is not only reasonably foreseeable, but is likely enough to qualify as a "design-basis accident," *i.e.*, an accident that must be designed against under NRC safety regulations." *Id.* at 24-25. The Petition cites

several studies (published in 1982 and 2000) regarding aircraft hazards for nuclear power plants, the Commission's 2006 Design Basis Threat rulemaking proceeding and a related statement by NRC Chairman Klein, and a proposed Director's decision in response to a 10 C.F.R. § 2.206 petition, and concludes that neither the licensee nor the NRC has demonstrated that the plant can withstand an aviation attack. *Id.* at 25-29 .

In addition, the Petition asserts that "10 C.F.R. 51.53(c)[(3)](ii)(L) requires that the license renewal applicant consider alternatives to mitigate severe accidents if the staff has not previously evaluated SAMAs for the applicant's plant in an EIS or related supplement or in an environmental assessment." Petition at 29. It further asserts that SAMAs for aircraft impact have not previously been considered for this facility, and that the environmental report for license renewal does not address any such alternatives. *Id.* Finally, the Petition asserts that the Applicant's environmental report fails to satisfy 10 C.F.R. § 51.53(c)(3)(iii),²⁴ "because it does not consider reasonable alternatives for avoiding or reducing the environmental impacts of this class of accidents," and it asserts that the license renewal application "cannot be approved without a full study of the threats from aviation attacks and implementation of the SAMAs required to prevent or mitigate the impacts from those attacks. *Id.* at 30.

Staff Response to Contention EC-1

Contention EC-1 raises concerns which are clearly beyond the scope of this license renewal proceeding. The Commission recently upheld a Licensing Board decision in a license renewal proceeding, rejecting a contention challenging an applicant's failure to consider an

²⁴ Pursuant to 10 C.F.R. § 51.53(c)(3)(iii), "[t]he report must contain a consideration of alternatives for reducing adverse impacts, as required by § 51.45(c), for all Category 2 license renewal issues in Appendix B to subpart A of this part. No such consideration is required for Category 1 issues in Appendix B to subpart A of this part."

aircraft attack scenario in its environmental report's SAMA analysis. *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007), *aff'g* LBP-06-7, 63 NRC 188 (2006).²⁵ In addition to finding that such contentions are beyond the scope of matters required to be considered under NEPA, the Commission noted that there is no basis for admitting a NEPA-terrorism contention in a license renewal proceeding, because the NRC Staff's Generic Environmental Impact Statement had already performed a discretionary analysis of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events. *Oyster Creek*, CLI-07-8, 65 NRC at 131.

The Commission's decision in *Oyster Creek* establishes binding precedent for the resolution of Contention EC-1 in this proceeding. Accordingly, as in the *Oyster Creek* proceeding, this contention must be rejected.

3. Proposed Environmental Contention EC-2 (Aviation attack and fire)

Contention EC-2 asserts that the Applicant's Environmental Report is deficient for failing to consider the consequences of significant fires resulting from terrorist aviation attacks:

The Environmental Report for the SHNPP license extension fails to satisfy NEPA because it does not address a significant fire involving noncompliant fire protection features for both primary and redundant safe shutdown electrical circuits caused by a deliberate malicious action using a fuel-laden and/or explosive-laden aircraft on the facility.

Petition at 30.

²⁵ In *Oyster Creek*, the Commission noted that in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Jan. 16, 2007), the Ninth Circuit held that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility. The Commission respectfully disagreed with the Ninth Circuit's view, but stated that it will follow that ruling in the Ninth Circuit.—indicating its belief that a different outcome might be reached by other Courts of Appeals. *Oyster Creek*, CLI-07-8, 65 NRC at 128.

To support Contention EC-2, the Petitioner repeats material from Contentions TC-1 and EC-1.²⁶ The Petition repeats the allegation that the plant is not in compliance with fire protection regulations and repeats discussions, which appeared in its previous contentions, regarding its concerns that current fire barriers are insufficient – again without addressing how these matters are within the scope of license renewal. Petition at 30-34. The Petition concludes with the Petitioners' concern that SAMAs for fires caused by aircraft impact have not been evaluated. Petition at 34.

Staff Response to Proposed Contention EC-2

Contention EC-2 is inadmissible for the same reasons as Contention EC-1 above. Contention EC-2 is essentially a repetition of Contention EC-1, which is narrowed from "threats from aviation attacks" to "risks associated with fires and explosions caused by aviation attacks." Petition at 30, 35. The Petition does not clarify how EC-2 is something other than a specific example of issues raised in Contention EC-1. As discussed above, a contention claiming that NEPA requires the NRC to consider, as part of its license renewal review, the consequences of an aircraft attack on the reactor, is inadmissible. In addition, as discussed above, the current design of the plant (including any alleged susceptibility to accidents or terrorist attacks) is beyond the scope of a license renewal proceeding, and does not support an admissible contention.²⁷ In sum, this contention is inadmissible for the reasons stated in response to

²⁶ *E.g.*, Petition at 30 (citing Contention EC-1), 31 (citing Contention TC-1), 32 (citing Contentions TC-1 and EC-1), and 33 (citing Contention EC-1).

²⁷ The Staff notes that the Petitioners' concerns regarding airplane crashes are expressed differently in the Petitioners' summary of the contention (presented at page 3 of the Petition), as compared to the discussion presented in Contentions EC-1 and EC-2. The summary at page 3 addresses susceptibility to aircraft attacks and to a significant fire caused by aviation attacks; in contrast, Contentions EC-1 and EC-2 assert that the Applicant's environmental report failed to consider the environmental impacts of an aviation attack and associated fire. As previously discussed, the current design of the plant including any susceptibility to terrorist actions, is not within the scope of a license renewal proceeding, and does not support an admissible contention. Furthermore, the changing nature (continued. . .)

Contention EC-1.

4. Proposed Environmental Contention EC-3 (Evacuation Plan)

The Petitioners' final contention raises an emergency planning concern. It states:

Due to highly significant and unforeseen changes in circumstances, through dramatically increased populations and changing land uses, the evacuation plan for the SHNPP does not adequately protect the health and safety of the residents, students and workers around the plant.

Petition at 35.

In support of this contention, the Petition states that the facility's "evacuation plan" was approved in 1987 as part of the initial licensing process; and it asserts that "[t]he opportunity to reassess the adequacy of the evacuation plan should be in the present ER and EIS as part of the relicensing review, and should focus on the significant changes with the plant and its environment, including the human environment." *Id.*²⁸ According to the Petitioners, the NRC's findings on emergency plans at the time the plant was licensed "cannot be relied upon during the entire 60-year period until the proposed relicensing period would expire." *Id.* The Petition concludes that relicensing cannot be approved without population studies and "the ability of the evacuation plan to provide 'reasonable assurance' that all of these people will be provided adequate care in case of an accident." *Id.* at 38.

Staff Response to Contention EC-3

As discussed *supra*, at 11, the Commission has explicitly held that emergency planning

(. . .continued)

of the Petition's description of the contention goes against the Commission's strict contention pleading rules. See Oyster Creek, CLI-06-24, 64 NRC at 118-119 (2006).

²⁸ The Petitioners offer an expert's opinion as to population growth around the plant, and information regarding traffic. Among other items offered is a concern expressed by certain Orange County Commissioners regarding the adequacy of evacuation planning, and a reference to a study that has not yet been completed. Petition 35-38.

issues are not admissible in a license renewal proceeding. Issues like emergency planning, which already are the focus of ongoing regulatory processes, do not come within the NRC's safety review at the license renewal stage. *Turkey Point*, CLI-01-17, 54 NRC at 9-10. A contention concerned with the adequacy of evacuation planning does not relate to aging, and is beyond the scope of a license renewal proceeding. Note that the Petitioner labeled the emergency planning contention as "environmental" but the plain language of the contention shows the issue is safety.

The "Commission thoroughly evaluated emergency planning considerations in the previous license renewal rulemaking. These evaluations and conclusions are still valid and can be found in the SOC for the previous license renewal rule (56 FR 64943 at 64966)." 60 Fed. Reg. 22461, 22468. In this regard, the Commission has stated that the "primary reason" it "excluded emergency planning issues from license renewal proceedings was to limit the scope of those proceedings to 'age-related degradation unique to license renewal.'" *Millstone*, CLI-05-24, 62 NRC at 560-61 (2005) (*citing, inter alia*, Final Rule, "Nuclear Power Plant Renewal," 56 Fed. Reg. 64,943, 64,961 (Dec. 13, 1991)). As the Commission explained:

Emergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the [facility] license renewal application. Consequently, it makes no sense to spend the parties' and our own valuable resources litigating allegations of *current* deficiencies in a proceeding that is directed to *future*-oriented issues of aging."

Id. at 561.

In sum, the Commission has clearly held that emergency planning contentions are beyond the permissible scope of a license renewal proceeding. Contention EC-3 is therefore

inadmissible and should be rejected.²⁹

5. Petitioners' Backfit Request

In their Petition, NC WARN and NIRS included the following request for a backfit:

It is evident, in light of the above and in the projected evidence to be given at the hearing, that a backfit is needed for all applications of inoperable fire barrier systems including the rerouting of electrical cables out of fire zones as identified in NUREG-0800 BTP 9.5.1 and 10 C.F.R. 50 Appendix R Paragraph III.G.2 and upgrading inoperable fire barrier systems with qualified, maintainable and inspectable fire barrier systems to assure that post-fire safe shutdown systems will be maintained to be free of fire damage.

Petition at 38-39.

Staff Response to Backfit Request

The NRC's rules governing adjudicatory proceedings, found in 10 C.F.R. Part 2, do not provide for the filing of a backfit request with the Commission. *Entergy Nuclear Operations Inc.* (Pilgrim Nuclear Power Station); *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-26, 64 NRC 225, 226 (2006). Such a request "amounts to a request for agency enforcement action, a request not suitable for a license renewal adjudication, but perhaps suitable for consideration under 10 C.F.R. § 2.206." *Id.* at 226-27.

As in the situation presented in CLI-06-26, the Petitioners' request for the imposition of backfit requirements is not a proper subject for consideration in this proceeding. Moreover, the Petitioners have already filed a petition, pursuant to 10 C.F.R. § 2.206, requesting enforcement action at Shearon Harris based on their fire safety concerns. Petition at 7. Their request for the

²⁹ Although Contention EC-3 is inadmissible, NRC regulations provide two other procedural mechanisms (10 C.F.R. §§ 2.206 and 2.802) by which Petitioners may pursue their concerns about the adequacy of the Applicants' current emergency plan. *Millstone*, 62 NRC at 562-63.

imposition of backfit requirements as part of this license renewal proceeding should therefore be rejected.

CONCLUSION

For the reasons set forth above, the Petitioners have failed to establish their standing to intervene in this license renewal proceeding, and have failed to proffer at least one admissible contention. The Petition of NC WARN and NIRS should therefore be denied.

Respectfully submitted,

/RA/

David E. Roth
Sherwin E. Turk
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of June, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CAROLINA POWER & LIGHT CO.) Docket No. 50-400-LR
)
(Shearon Harris Nuclear Power Plant,)
Unit 1))

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF RESPONSE TO PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING FILED BY NC WARN AND NIRS have been served on the following by electronic mail with copies by deposit in the NRC's internal mail system (as indicated by a double asterisk), or by deposit in the U.S. Postal Service (as indicated by an asterisk) this 18th day of June, 2007:

Ann Marshall Young, Chair**
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: AMY@nrc.gov

Peter S. Lam**
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: PSL@nrc.gov

Alice Mignerey**
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: mignerey@mail.umd.edu
E-mail: ACM3@nrc.gov

Atomic Safety and Licensing Board Panel**
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555
(Hardcopy only)

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

Office of the Secretary**
Attn: Rulemaking and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555
E-mail: HEARINGDOCKET@nrc.gov

John D. Runkle, Esq.*
Attorney at Law
P.O. Box 3793
Chapel Hill, NC 27515
E-mail: jrunkle@mindspring.com

John H. O'Neill, Jr., Esq.*
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
E-mail: John.ONeill@pillsburylaw.com

Debra Wolf, Law Clerk
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: daw1@nrc.gov

/RA/

David R. Roth
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 18th day of June 2007