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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair  
Dr. Peter S. Lam  
Dr. Alice Mignerey

In the Matter of:

CAROLINA POWER & LIGHT COMPANY  
(Shearon Harris Nuclear Power Plant, Unit 1)

Docket No. 50-400-LR

ASLBP No. 07-855-02-LR-BD01

June 25, 2007

PETITIONERS' REPLY TO OPPOSITION OF CPL AND NRC STAFF  
TO PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING

NOW COME the Petitioners, the North Carolina Waste Awareness and Reduction Network ("NC WARN") and the Nuclear Information and Resource Service ("NIRS") with a reply to Carolina Power & Light Company's Answer to Petition for Leave to Intervene of NCWARN and NIRS<sup>1</sup>, and a reply to 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, both filed by email and mail on June 18, 2007. This Reply adopts in full the contents of the Petition for Leave to Intervene and Request for a Hearing (the "Petition"), filed on May 19, 2007

Petitioners additionally request leave from the Atomic Safety and Licensing Board ("ASLB") to supplement their Petition with the addition of a document not available when the Petition was filed. (See Section III).

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<sup>1</sup> Carolina Power & Light ("CPL") is now doing business as Progress Energy.

Introduction. The primary responsibility of the NRC in all licensing activities is to ensure that the nuclear power plants, such as the Shearon Harris Nuclear Power Plant ("SHNPP"), are operated safely and are protective of public health and safety. The SHNPP has been out of compliance with fire protection regulations since 1989. Both CPL and the NRC have been aware that it cannot withstand an aviation attack or the fires generated by the attack since at least 1982 when the Argonne National Laboratory submitted its "Evaluation of Aircraft Hazards Analysis for Nuclear Power Plants," NUREG-2859. The insufficiencies in the evacuation plan continue to compound through the significantly increased population around the plant. These fatal flaws in the relicensing are not expected to be corrected in the near term, nor in the period of the license extension.

As shown in the initial filing by the Petitioners, including the declarations of the members of the Petitioners, the Petitioners clearly have standing to intervene in this proceeding. (Petition, Exhibits 1 and 2). The members of the Petitioners and their families reside in close proximity to the SHNPP and are directly endangered by the plant's continuing operation and these uncorrected flaws.

The Petitioners further meet the second prong in the 10 C.F.R. § 2.309 test for intervention by presenting as least one admissible contention; in this matter, they have raised four admissible contentions. The legal arguments in the Petition, based on the documents and the other affidavits and exhibits, overwhelmingly support the contentions by the Petitioners that the SHNPP should not be relicensed for the following: (a) the SHNPP is currently not in compliance with fire protection regulations; (b) the SHNPP is susceptible to aircraft attacks; (c) the SHNPP is susceptible to a significant fire caused by aviation attacks; and (d) the 1987 evacuation plan is insufficient to protect public health and safety in light of the significant population increases around the SHNPP.

As such, the Petitioners have met all of the requirements necessary to intervene in this proceeding. The intervention by Petitioners is of critical importance to ensure that the NRC does not grant the license renewal before these risks are fully addressed and that CPL can show that it will be in compliance for the remainder of its licence and during the relicensing period. CPL's application fails to satisfy the fundamental requirement of the Atomic Energy Act<sup>2</sup> to ensure safe operation of the SHNPP during the license renewal term.

I. Petitioners have demonstrated that they have standing to intervene in this proceeding.

Both of the opposing parties maintain that the Petitioners do not have standing pursuant to 10 C.F.R. § 2.309 for the simple reason that none of the affiants state that they have specifically authorized the Petitioners to represent them in this proceeding. *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994) and others. The term "authorized" is simply not a mandatory "code word" that if it is lacking, the members of the Petitioners and the Petitioners do not have standing.<sup>3</sup> Standing stems from the real world damages and injuries that a continuing operation has on someone, not on what is pleaded.

On the face of each of their declarations, the affiants squarely lay out their interests in the safety of the SHNPP, how the ongoing operation of the SHNPP affects them and their families and that they are members in one of the Petitioner's organizations. (Petition, Exhibits 1 and 2). On its face, the Petition further clearly states that the Petitioners bring this action on behalf of their members, and that those members, including the affiants, would be significantly and adversely impacted by the relicensing of the SHNPP. These statements clearly

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<sup>2</sup> Atomic Energy Act of 1954, as Amended; see NUREG 0980 (June 2006).

<sup>3</sup> If "authorized" is deemed to be a mandatory word for standing in this proceeding, then Petitioner request leave to amend the Petition to include it.

demonstrate that these members have authorized the organization to represent his or her interests and meets the requirements for representational standing.

The Petition and the declarations also show organizational standing in that the individual members have standing by the very fact that each of them and their families live in close proximity to the SHNPP. Given the test for organizational standing in the matter of *Private Fuel Storage LLC* CLI-99-10, 49 NRC 318, 323 (1999), the Petitioners meet all of its provisions, that they have (1) a particularized injury, (2) that is fairly traceable to the challenged action, and (3) is likely to be redressed by a favorable decision. These are commonly referred to in Federal case law as "injury in fact," causality and redressability. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). The members of NC WARN all live approximately seven or eight miles from the plant and have serious and relevant concerns about their ability, and the ability of their families, to safely evacuate in case of an emergency; the member of NIRS lives fifteen miles away and has similar concerns about her safety. The continuation of the SHNPP's operation while it is out of compliance with serious safety regulations, along with the inability for the affiants and all other members of the public, to safely evacuate them and their families, is directly traceable to the potential of serious accidents now and in the futures. And of course, if Petitioners receive favorable decision, and the plant is not relicensed, then the concerns by the affiants and Petitioners are directly addressed.

Petitioners clearly have demonstrated that they have standing to intervene in this proceeding.

II. Petitioners' contentions clearly meet the commission's standards for admissibility.

The Petitioners meet the requirements for contentions set forth in 10 C.F.R. § 2.309(f), and have shown in their Petition: (a) that there is a legal basis for each contention; (b) that

there is a brief and concise explanation of each that is supported by competent evidence, readily available documents, alleged facts and/or proposed expert testimony; (c) that the contentions are within the scope of the proceeding; and (d) that the contentions are material to the NRC's findings in the matter. Each of these will be addressed below.

A. Each contention has a legal basis. Most of the issues raised by the opposing parties were fully addressed in the legal arguments presented in the Petition. Rather than repeat those arguments herein, Petitioners adopt them by reference and urge the members of the ASLB to fully review the Petition.

B. Each contention has a brief and concise explanation that is supported by competent evidence, readily available documents, alleged facts and/or proposed expert testimony. The NRC 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." *Amergen Energy Company LLC (Oyster Creek Generating Station)*, CLI-06-24, 64 NRC 111, 119-119 (2006). Herein, the arguments in the Petition provide the legal basis for the validity of the contentions; they are further supported by overwhelmingly compelling and uncontroverted documents and sources. The documents were clearly cited and are readily available, many with accession numbers from the NRC's ADAMS system. These documents are primarily NRC documents, those submitted by CPL, and those in other proceedings before the NRC. At a hearing on the merits, each of the documents referenced in the Petition would be admissible as evidence. The contentions clearly meet all of the pleading requirements in the procedural rules.

It should be noted that neither of the opposing parties question the factual or evidentiary basis of the contentions nor deny in even general terms the seriousness of the allegations that

are raised. The opposing parties' arguments go instead toward the admissibility of each of the contentions.

C. Each contention is within the scope of the relicensing proceeding. As the initial premise that affects the admissibility of each of the four contentions, Petitioners assert that all relicensing decisions are premised on the presumption that the nuclear plant in question is operating safely and in full compliance with the relevant regulations. This is fundamental to all licensing and in particular to relicensing; as stated in *Florida Power & Light Co. (Turkey Point Nuclear Plant, Units 3 and 4)*, CLI-01-17, 54 NRC 3 (2001) ("*Turkey Point*"), the purpose of the technical review by the NRC staff in relicensing is "to assure that public health and safety requirements are satisfied." The opposing parties cite *Turkey Point* for its statement that

Accordingly, the NRC's license renewal review focuses upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs. License renewal reviews are not intended to "duplicate the Commission's ongoing review of operating reactors." See "Final Rule, Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, [at] 64,946 (Dec. 13, 1991).

This contrasts with the 1991 Statement of Consideration cited in the Petition on page 8. In the initial license renewal rulemaking, the Commission made a determination that:

With the exception of age-related degradation unique to license renewal and possibly some few other issues related to safety only during extended operation, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation so that operation will not be inimical to public health and safety or common defense and security.

56 Fed. Reg. at 64,946. Thus, 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 it does so only because of its presumption that the current regulatory process provides a reasonable assurance that the Commission regulatory programs, staff inspections and enforcement minimize the risk to the public health and safety.

The presumption of compliance that was raised in the Petition, and elaborated herein, is that the Commission presumes that its regulatory process is adequate for all plants. In the 1995 Statement of Consideration ("SOC") for license renewal, in looking at compliance with current licensing basis ("CLB"), the Commission expressed this presumption as follows:

The Commission does not contend that all reactors are in 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 noncompliances will occur.

60 Fed. Reg. 22473-4 (emphasis added).

Petitioners make no assertions herein that all reactors throughout the country are operated in an unsafe manner or that the NRC has allowed all reactors to continue to operate unsafely; what the Petitioners are asserting is that in the matter of the SHNPP, the NRC has allowed CPL to operate in an unsafe manner and there is no **reasonable assurance** that the present noncompliances will be rectified. The presumption of compliance therefore must be a rebuttable one in a specific case when it is shown, as it is clearly shown in the Petition, that the current regulatory process does not adequately protect public health and safety or when the plant is not in compliance with the relevant regulations or provisions of its license and has no expectation that it will be in compliance.

The 2005 review plan for the NRC staff outlines the scope of the review for the relicensing, stating that:

In addition to the technical information required by 10 CFR 54.21, a license renewal application must contain general information (10 CFR 54.19), necessary technical specification changes (10 CFR 54.22), and environmental information (10 CFR 54.23). The application must be sufficiently detailed to permit the reviewers to determine (1) whether there is **reasonable assurance** that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB and (2) whether any

changes made to the plant's CLB to comply with 10 CFR Part 54 are in accord with the Atomic Energy Act of 1954 and NRC regulations.<sup>4</sup>

(emphasis added). The relicensing review focuses on whether there is a **reasonable assurance** that the plant can be operated in accordance with its current licensing basis. This review therefore needs to look at past noncompliances, present status and time lines to correct the problems.

Further arguments that the contentions are within the scope of the proceeding are presented in more detail in the Petition and additional specific arguments are given below.

1. Contention TC-1 (Fire Protection). The Petition clearly states that SHNPP has been out of compliance with the fire protection regulations since at least 1992 and is out of compliance today.<sup>5</sup> The opposing parties misread the contention by claiming that the Petitioners are only alleging that the SHNPP is currently out of compliance. There simply has been no demonstration or firm commitment that the SHNPP will come into compliance with these regulations in the near future, during the remainder of its present license period or during the license extension period. Of course, Petitioners would greatly prefer that the plant comes into compliance as soon as possible; they are exhausting other administrative remedies, such as the § 2.206 Petition they and others have filed with the Commission, in the attempt to compel compliance. There is however no reasonable assurance in the response to the § 2.206 Petition or elsewhere that CPL will ever bring the SHNPP into compliance, or that the NRC, through its policies, inspections and enforcement, will cause it to come into compliance. As

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<sup>4</sup> NUREG-1800, Rev. 1, "Standard Review Plan for Review of License Renewal Application for Nuclear Power Plants," September 2005.

<sup>5</sup> The NRC Director recently concluded that the SHNPP has been out of compliance with the fire protection regulations since 1989. See discussion in Section III below.



such, there is no reasonable assurance that this plant will operate safely and protective of public health and safety.

2. Contentions EC-1 (Aviation attacks) and EC-2 (Aviation attacks and fire). The position of the opposing parties is that no terrorism-related contentions are admissible under any circumstances. The NRC staff cites the recent Commission decision in *Amergen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124 (2007), that terrorism-related contentions are inadmissible in a license renewal proceeding. This decision frankly ignores the mandate from the Supreme Court in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), cert. den. 549 US \_\_\_ (06-466, January 16, 2007) that, as a matter of law, the Commission erred in determining that the National Environmental Policy Act (“NEPA”) does not require the agency to consider the potential environmental impacts of terrorist attacks at nuclear facilities.<sup>6</sup> In the context of relicensing the SHNPP, the Petitioners urge the ASLB to reconsider the scope of the decision in *Amergen Energy*. As shown in the Petition, it is clear that deliberate malicious actions must be considered by the NRC in licensing decisions. It is further clear that aviation attacks are design basis threats that must be specifically addressed at the SHNPP.

The NRC staff’s conclusion that all aviation attacks are terrorism-related so therefore all contentions raising the issue of aviation attacks are not admissible is circular reasoning. It ignores the fact that not all aviation attacks would be from “terrorists” attacks; terrorism has a political component to it while aviation attacks could be motivated by any number of causes. Congress has defined terrorism and the crimes associated with terrorism in the Federal Criminal Code, 18 U.S.C. § 2331, with terrorism defined as:

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<sup>6</sup> What is most surprising about the *Amergen Energy Co. LLC* decision is that the Commission bases its conclusion on a government brief that was not accepted by the Supreme Court.

activities that involve violent... or life-threatening acts... that are a violation of the criminal laws of the United States or of any State and... appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and... (C) occur primarily within the territorial jurisdiction of the United States... [or]... (C) occur primarily outside the territorial jurisdiction of the United States ...

Without making light of the seriousness of the impacts of an aviation attack, it makes little difference to the disastrous outcome at the nuclear plant whether the motivation for the attack is political or psychotic. No matter what the motivation, the SHNPP is not designed to withstand the impacts of an aviation attack or its direct consequences.

The decision in *Amergen Energy Co. LLC* further ignores one of the basic premises in relicensing, that these specific safety issues at the SHNPP were already considered in the initial licensing. In the licensing of the SHNPP, aviation attacks were not considered, nor were the fire hazards directly caused by those attacks. What is more important, the Severe Accident Mitigation Alternatives ("SAMAs") for aircraft impacts have not been previously analyzed for the SHNPP. The purpose of the review during the relicensing of the SHNPP is to ensure that plant changes, i.e., structural fortifications, hardening of vital safe shutdown systems and hardware, procedures and training, with the potential for improving severe-accident safety performance are identified and evaluated for that specific plant.

CPL and the NRC knew or should have known since 1982 when the Argonne National Laboratory submitted its "Evaluation of Aircraft Hazards Analysis for Nuclear Power Plants," NUREG-2859, that the SHNPP was at risk from aviation attacks and the subsequent risks associated with aviation attacks. The NRC staff in its brief declares that the impacts of aircraft attacks are not an issue based on the results of recent, albeit undisclosed, studies. The results of studies are a matter in dispute that should be left to the ASLB for adjudication. The issues for the relicensing proceeding are whether the Commission has resolved these issues for the

SHNPP, and whether during the period of relicensing renewal period the risk to public health and safety from an aviation attack and its consequences will be mitigated.

3. Contention EC-3 (Emergency Planning). As discussed at length in the Petition and the supporting exhibits, including the declaration of Stephen Wing, PhD, the evacuation plans for the SHNPP are grossly inadequate because of the changing conditions. The population around the SHNPP has significantly increased from 1987 to the present, from the present to the end of the initial licensing period, and during the period of the licensing extension. Similarly to the contentions above, there is no reasonable assurance that the current inadequacies of the plans, and the likely compounded inadequacies in the future, will be resolved in a manner that protects public health and safety.

D. Each contention is material to the NRC's findings in the matter. Each of the contentions are material in that go directly to the most crucial, and at the same time unresolved, threats to public health and safety from the continuing operation of the SHNPP. The NRC simply cannot make its ultimate determination that the SHNPP can be operated safely and protective of public health and safety during license extension without resolving the issues raised in each contention.

III. Petitioners request leave to supplement the Petition with the addition of a document not available when the Petition was filed.

The final Director's Decision in the § 2.206 Petition on the lack of compliance with fire protection regulations at the SHNPP brought by the Petitioners and other parties, was issued on June 13, 2007, subsequently to the filing the present Petition.<sup>7</sup> This was directly presented

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<sup>7</sup> Director's Decision Under 10 C.F.R. 2.206, Docket No. 50-400, DD-07-03 (June 13, 2007). ADAMS accession number for cover letter is ML071500446; for Director's Decision, ML071500403; and for Federal Register notice, ML071490151.

in the Petition, and with the leave of the ASLB, the Director's Decision is incorporated into the Petition by reference. The findings of the Director are relevant to the relicensing as they show that the SHNPP has been out of compliance with the fire regulations since 1989 and that there is no time line for it to come into compliance. Although the § 2.206 Petition was denied by the Director for a variety of reasons, it may still be reviewed by the Commission.

THEREFORE, in light of the above, Petitioners pray that they be allowed to intervene in this proceeding and that their contentions are admitted.

This is the 25<sup>th</sup> day of June, 2007.

FOR THE PETITIONERS



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CERTIFICATE OF SERVICE

I hereby certify that copies of this PETITIONERS' REPLY TO OPPOSITION OF CPL AND NRC STAFF TO PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR A HEARING was served by electronic mail per the service list prepared by Debra Wolf, Law Clerk, ASLB Panel, and by deposit in the U.S. Postal Service, postage prepaid, on the following:

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This is the 25<sup>th</sup> day of June, 2007.

  
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