

July 20, 2007

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

Before the Atomic Safety and Licensing Board

July 20, 2007 (3:54pm)

**OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF**

In the Matter of:)	
)	Docket No. 50-400-LR
CAROLINA POWER & LIGHT COMPANY)	
)	ASLBP No. 07-855-02-LR
(Shearon Harris Nuclear Power Plant, Unit 1))	

**CAROLINA POWER & LIGHT COMPANY’S RESPONSE IN OPPOSITION TO
NCWARN AND NIRS MOTION FOR STAY OF PROCEEDINGS**

I. INTRODUCTION

Carolina Power & Light Company, doing business as Progress Energy Carolinas, Inc. (“Progress Energy”), hereby responds to and opposes North Carolina Waste Awareness and Reduction Network’s and the Nuclear Information and Resource Service’s (collectively, “Petitioners”) motion for a stay of the above-captioned proceedings made during oral argument on July 17, 2007 (“Motion”). The Motion should be denied because Petitioners lack standing to seek such relief and the Board is without authority to grant it.

II. PROCEDURAL BACKGROUND

On July 17, 2007, at the conclusion of oral argument on Petitioners’ Petition for Leave to Intervene and Request for a Hearing with Respect to Renewal of Facility Operating License No. NPF-63 (“Petition”), Counsel for Petitioners moved for a stay of this license renewal proceeding pending Progress Energy’s filing of a license amendment request to apply National Fire Protection Association Standard NFPA 805 to the Harris Nuclear Plant (“Harris”) and

completion of the Commission's decision on the license amendment. As discussed during the oral argument, the scheduled date for filing the license amendment request is May 2008,¹ with final action by the Commission anticipated in 2010.

The Board directed all parties to simultaneously file briefs on the Motion by close of business on Friday, July 20, 2007.

III. ARGUMENT

A. The Motion Seeks Relief that the Petitioners Are Not Entitled to Seek and the Board Cannot Provide Under the Commission's Regulations

1. Petitioners Do Not Have Standing to Move for a Stay of the Proceeding

The Commission's regulations are clear that in order to become a party to a proceeding, a petitioner must meet the requirements of 10 C.F.R. § 2.309. Where there is a pending request for hearing or petition for leave to intervene, the Board's authority is limited to ruling on the pending request. See 10 C.F.R. § 2.309(i) (2007). Although a petition for leave to intervene can request relief that would be granted only after the petition for leave to intervene is granted,² such relief cannot be granted unless and until the petition for leave to intervene is granted.³

Because Petitioners seek to be admitted but are not parties to this proceeding, they have no standing to request a stay. It is well-established that only one who is a party to an NRC proceeding has standing to move for a stay of the proceeding, where otherwise allowed by the Commission's regulations;⁴ and where a movant is not a party to a proceeding, he cannot seek a

¹ See Letter from C.S. Hinnant, Senior Vice President and Chief Nuclear Officer, Progress Energy, to United States Nuclear Regulatory Commission (June 10, 2005) (ADAMS Accession No. ML051720404).

² See, e.g., 10 C.F.R. § 2.309(g) (2007) (allowing the petition to intervene to request that particular hearing procedures apply).

³ See, e.g., 10 C.F.R. § 2.310 (2007) (requiring the Board to determine that a petition for leave to intervene should be granted and a hearing held before the Board can determine applicable hearing procedures).

⁴ As discussed below, no regulation allows a party to seek a stay of a proceeding pending an event unrelated to the proceeding.

stay of that proceeding. See, e.g., Texas Utils. Elec. Co., et al. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 N.R.C. 55, 57-58 (1993); see also Entergy Nuclear Vermont Yankee LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station) and Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-07-13, 65 N.R.C. 211, 214-15 (2007) (holding that in order to seek a stay of a proceeding, pursuant to 10 C.F.R. § 2.802(d), the petitioner has to be a party to the proceeding that petitioner seeks to have stayed). Even where a petitioner has requested to become a party to a proceeding (and would otherwise be allowed by the Commission's regulations to request a stay under appropriate circumstances), but has not yet been admitted as a party, such a petitioner does not have standing to request a stay unless and until it is granted party status. See, e.g., In re Shieldalloy Metallurgical Corp. and NUREG-1757, 2007 NRC LEXIS 11 at *3-*4 (January 12, 2007).

Furthermore, as discussed below, if no petitioner is found to have standing, or if none offers an admissible contention, there cannot be a hearing on a license renewal application, the Board's authority terminates, and any request for relief sought by petitioners in regard to the proceeding cannot be granted. Only if a petitioner has standing and has proffered an admissible contention can a hearing go forward and the petitioner's requests be entertained.

Here, Petitioners are trying to avoid a determination by the Board as to whether they have standing and have submitted an admissible contention. In essence, Petitioners are attempting to have the Board grant the relief sought by their contentions without having those contentions admitted or satisfying the standards for a hearing. They are attempting to do so by improperly seeking a stay of a proceeding to which they have not been admitted as parties. Such a tactic should not be permitted.

2. The Board Does Not Have Authority to Grant the Relief Requested

In addition to the Board being unable to grant a stay requested by a non-party, the Board does not have the authority under the Commission's regulations to defer ruling on Petitioners' standing and the admissibility of Petitioners' contentions as requested by the Motion. The Board was constituted for the sole and express purpose of "rul[ing] on the request [for hearing] and/or petition [for leave to intervene]" and to issue a notice of hearing or an appropriate order. Notice of Opportunity for Hearing regarding this Application, 72 Fed. Reg. 13,139, 13,140 (Mar. 20, 2007) ("Notice"). The Board does not have authority to defer ruling on Petitioners' Petition. Under 10 C.F.R. § 2.309(i) the presiding officer – here the Licensing Board – is required to rule on the Petition "within forty-five (45) days after the filing of answers and replies . . . [to] issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission."⁵

The Commission has stressed the importance of this requirement in license renewal proceedings:

Apart from our policy of encouraging settlements, we have an equally important policy supporting prompt decisionmaking – a policy that carries *added weight in license renewal proceedings* such as this one. We have expressed this "prompt decisionmaking" policy repeatedly and explicitly in our case law. We have also expressed it less directly in 10 C.F.R. § 2.309(i). That Rule *requires* a board to rule on any petition to intervene and/or request for hearing within 45 days of receiving the answers and replies associated with that petition and/or request.

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 568 (2005) (emphasis added) (footnotes omitted). Indeed, in Millstone, the Commission stressed that the threshold issues of standing and admissibility of contentions must

⁵ Paragraph (i) was added to Section 2.309 when the Commission amended Part 2 in 2004. In its statement of considerations, the Commission stated that "the presiding officer [should be required] to issue a decision on standing and admissibility of contentions within forty-five (45) days of the completion of the parties' filings." Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2181, 2204 (January 14, 2004).

be addressed before other aspects of a proceeding: “Until a board has addressed the threshold issues of standing and admissibility of contentions, the proceeding is too inchoate to call for aggressive Board encouragement of settlement.” *Id.* at 569. The same is true in regard to a motion for a stay of proceedings and the Commission has granted no extension in this proceeding.

Therefore, it is not within the Board’s authority or discretion to grant a stay without its first having ruled on the Petitioners’ standing and finding that at least one contention is admissible.

Furthermore, there is no Commission regulation that provides for the relief that Petitioners request. The Commission’s regulations regarding the stay of proceedings proscribe the circumstances under which a party to a proceeding may request a stay of the proceeding. 10 C.F.R. § 2.342(a) provides that “. . . any party to the proceeding may file an application for a stay of the effectiveness of the decision or action pending filing of and a decision on a petition for review.” See also Comanche Peak, 37 N.R.C. at 58. However, there is not yet any decision or action of the Board that Petitioners can request be stayed and the Motion points to no such decision or action justifying their request.⁶ Therefore, there is no regulatory basis for granting the relief Petitioners request and the Board has no authority to do so.

B. Under Any Circumstances Petitioners Have Failed to Meet the Requirements for Seeking a Stay

In determining whether to grant injunctive relief, the Commission has long applied the following four factors set forth in Virginia Petroleum Jobbers Ass’n v. Federal Power Commission, 259 F.2d 921, 925 (D.C.Cir.1958), which have been codified into the

⁶ Likewise, Petitioners have not filed a petition for rulemaking with the Commission and cannot seek a stay under 10 C.F.R. § 2.802.

Commission's rules of practice and procedure at 10 C.F.R. § 2.342 (formerly 10 C.F.R. § 2.788). Under 10 C.F.R. § 2.342, a movant must briefly describe the reasons for requesting the stay by addressing the factors listed in 10 C.F.R. § 2.342(e). See 10 C.F.R. § 2.342(b)(2); Comanche Peak, 37 N.R.C. at 58 n.2; U.S. Dep't of Energy, Project Mgmt. Corp., Tenn. Valley Auth. (Clinch River Breeder Reactor Plant), ALAB-721, 17 N.R.C. 539, 543 (1983). These factors are (1) whether the movant would otherwise be irreparably injured in the absence of a stay; (2) whether the movant demonstrates a "strong showing" that it will succeed on the merits; (3) whether a stay would be to the detriment of other parties; and (4) what is in the public interest. Clinch River, 17 N.R.C. at 543 (citing, among others, Ala. Power Co. (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 N.R.C. 795, (1981)). The movant bears the burden of persuasion relative to each element of this four-factor inquiry. See Pub. Serv. Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 N.R.C. 253, 270 (1978) (allocating to movant burden of persuasion regarding the four-factor stay analysis). Although all four factors must be weighed, the irreparable injury factor is accorded significant attention. See Ala. Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 N.R.C. 795, 797 (1981). All four factors here weigh heavily against granting the Motion. Petitioners did not address these factors at oral argument.⁷

First, Petitioners would not be irreparably harmed by the absence of a stay. The current operating license for Harris does not expire until 2027. Petitioners will not be subject to any effect of the renewal of the Harris license until the expiration of the current license. In the interim, Petitioners have at their disposal both 10 C.F.R. §§ 2.206 and 2.802 to address any

⁷ Under 10 C.F.R. § 2.323(c), the non-moving party has a right to file a response to a motion. Progress Energy reserves the right to address any such demonstration that Petitioners might attempt to make in their written motion.

concerns they have about the current licensing basis of Harris, and they may seek to participate in any proceeding relating to the NFPA 805 license amendment request for the future licensing basis of Harris.

Second, Petitioners have not demonstrated a “strong showing” that they will succeed on the merits. Petitioners admitted in oral argument that they are not challenging aging management, which defines the scope of a technical contention in license renewal. For the reasons set forth in Applicant’s Answer and the NRC Staff’s Answer and further discussed during oral argument, Petitioners have not proffered an admissible contention and this proceeding should be dismissed.

Third, the stay would be detrimental to Progress Energy by causing needless delay in the license renewal proceeding and thereby additional cost, and would be contrary to the Commission’s policy of prompt decisionmaking in license renewal proceedings.

Fourth, the public interest weighs in favor of denying the stay. The public interest is served by timely completion of adjudicatory proceedings. See, e.g., Millstone, 62 N.R.C. at 568-69; see also Pacific Gas & Electric Co. (Diablo Canyon Power Plant, Units 1 and 2), CLI-02-16, 55 N.R.C. 317, 334 (2002).

In short, a balancing of the four factors to be considered in deciding whether to grant any stay would require that the Motion be denied.

IV. CONCLUSION

For the reasons stated above, the Motion should be denied.

Respectfully Submitted,



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Dated: July 20, 2007

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NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Carolina Power & Light Company's Response in Opposition to NCWARN and NIRS Motion for Stay of Proceedings," dated July 20, 2007, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 20th day of July, 2007.

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