July 3, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Secretary

In the Matter of	)	
	)	
Progress Energy Carolinas, Inc.	)	Docket Nos. 52-022 COL
	)	52-023 COL
(Shearon Harris Nuclear Power Plant,	)	
Units 2 and 3)	)	
	)	

PROGRESS ENERGY'S RESPONSE IN OPPOSITION TO MOTION TO IMMEDIATELY SUSPEND HEARING NOTICE AND REQUEST FOR EXPEDITED CONSIDERATION BY THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK

INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323(c) and 2.342(d), Progress Energy Carolinas, Inc. ("Progress") submits this response ("Response") in opposition to the North Carolina Waste Awareness and Reduction Network's ("NC WARN") Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration ("Motion") filed on June 24, 2008 in the above captioned dockets. In the Motion, NC WARN requests that the Secretary of the Nuclear Regulatory Commission ("NRC" or "Commission") immediately suspend the hearing notice for the combined licenses ("COL") application for the Shearon Harris Nuclear Power Plant ("Harris"), Units 2 and 3 ("Harris COLA"). Motion at 1.

The Motion should be denied because it is technically deficient – it is untimely and fails to address, much less satisfy, the requirements for a motion to stay. Moreover, the Motion must be denied because it is an impermissible challenge to NRC rules and procedures. NC WARN

may not, in the context of the notice of an opportunity for petition to intervene in the Harris COL proceeding, challenge (1) the process for certifying the Westinghouse AP1000 Design pursuant to 10 C.F.R. Part 52, Subpart B, in parallel with the process for issuance of combined licenses for Harris Units 2 and 3 pursuant to 10 C.F.R. Part 52, Subpart C, or (2) the determination by the NRC Staff that the Harris COLA is complete. Nor is NC WARN disadvantaged because additional information may be provided to the NRC Staff over the course of the licensing proceeding. NC WARN's Motion seeks to overturn the Commission's carefully crafted set of rules and policies that ensure that a balance is struck to achieve the goals of efficiencies afforded by standardization in plant designs, reducing the time for completion of licensing proceedings and ensuring fairness to all parties.

BACKGROUND

On July 2, 2008, the NRC Staff filed its "Response to Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration by the North Carolina Waste Awareness and Reduction Network" ("Staff Response"). Progress adopts and will not repeat the facts set forth in the Background section of the Staff Response. Staff Response at 1-2.

DISCUSSION

I. THE MOTION IS TECHNICALLY DEFICIENT

A. The Motion is untimely

Motions[1] "must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). The action complained of, issuance of the Notice of Hearing and Opportunity to Petition for Leave to Intervene, occurred on June 4, 2008. NC WARN did not file its Motion until June 24, 2008 (not June 23 as stated in NC WARN's Certificate of Counsel), twenty days after the Federal Register notice. NC WARN provides no justification for the delay. Therefore, the Motion should be dismissed as untimely.[2] 10 C.F.R. § 2.346(c).

B. The Motion does not meet the requirements for a stay

By requesting an immediate and indefinite suspension of the hearing notice in the Harris COLA proceeding, NC WARN is effectively requesting a stay of the proceeding. Stay requests are addressed in 10 C.F.R. § 2.342 with respect to decisions or actions of a presiding officer in an NRC adjudicatory proceeding. Because an Atomic Safety and Licensing Board has not yet been constituted for this proceeding, the Commission itself currently acts in the role of the presiding officer. Although the regulations in this section contemplate a stay pending filing of and a

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[1] Progress notes at the outset that NC WARN has not shown any right to file a motion regarding the Harris COLA, as it is not a party to any proceeding concerning the Harris COLA. Notice has been published of the opportunity to request a hearing on the Harris COLA, but no request for a hearing has been filed and no proceeding has been instituted. NC WARN's assertion in the Motion that it "fully intends to petition to intervene and request a hearing" (Motion at 2) is not the same as having done so and certainly does not suggest that NC WARN's petition would be granted. By responding to this Motion, Progress does not concede that NC WARN is, or will ever be, a party to the Harris COLA proceeding.

[2] To the extent the Motion challenges the NRC Staff's acceptance of the Harris COLA for docketing, the Motion is even more untimely. The Notice of Acceptance for Docketing was issued on April 23, 2008, over two months before the Motion was filed. 73 Fed. Reg. 21,995 (Apr. 23, 2008).

decision on a petition for review, they provide useful guidance on the demonstration required by a petitioner in order to prevail.

> 10 C.F.R. § 2.342(e) establishes a four-fold test for ruling on applications for stay:
>
> 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties; and
>
> (4) Where the public interest lies.

"At the least, one seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it." Consumers Power Co. (Midland Plant, Units 1 & 2), ALAB-395, 5 N.R.C. 772, 785 (1977). NC WARN, however, makes no effort to address the first, third, or fourth factors of the 10 C.F.R. § 2.342(e) test. The Motion does not even assert that NC WARN is likely to prevail on the merits of anything,[3] that Progress would not be substantially harmed by a stay, or that the public interest favors a stay. NC WARN also does not argue that it would be irreparably injured unless a stay is granted, though it does complain of an inability "to prioritize the use of its limited resources to evaluate the application [because] it does not have the final application" and calls the "work of reviewing" the Harris COLA, which it argues is incomplete, "time-consuming and expensive." Motion at 9, 13. As discussed in greater detail below, NC WARN does have the final application – the NRC Staff has determined that the Harris COLA is complete – and the NRC procedure that separates proceedings for design certification from those for licensing in no way injures NC WARN or other potential intervenors.

[3] NC WARN raises safety issues regarding the AP100 Revision 16 design, such as alleged unresolved flaws with the design (Motion at 6) and alleged inadequacy of high density spent fuel pools (Motion at 11). While Progress disagrees with these allegations, these issues are irrelevant to NC WARN's request for a stay of the Harris COLA proceeding and therefore are not addressed in this Response.

In contrast, granting a stay would substantially harm Progress and would not be in the public interest. NRC policy states that "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications." Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 19 (1998). By requesting that the hearing notice for the Harris COLA proceeding be suspended until "[t]he Commission completes its certification of the AP1000 reactors, revision 16, and any resulting modifications are incorporated into the design and operational practices at [Harris] Units 2 and 3" (Motion at 1-2), NC WARN is attempting to impose a moratorium on all license applications for new reactors for at least two years and possibly much longer. See AP1000 Design Certification Amendment, Application Review Schedule, http://www.nrc.gov/reactors/new-licensing/design-cert/amended-ap1000.html. Thus, granting a stay in this proceeding would not only harm Progress but also would set a precedent to harm all applicants who rely on the procedures set forth in 10 C.F.R. Parts 2 and 52, the Commission's Final Policy Statement on Conduct of New Reactor Licensing Proceedings (CLI-08-07, 73 Fed. Reg. 20,963 (Apr. 17, 2008)), and the schedules set by the NRC Staff to license new reactors. Granting a stay would also be a disservice to the public. The North Carolina Utilities Commission has recognized the need for additional power, which Harris Units 2 and 3 will provide. See Harris COLA, Part 3, §8.4.1. In addition, the inherent purpose of a public hearing is to benefit the public. Thus, delaying such a hearing for at least two years thwarts the public's interest. Because NC WARN has not demonstrated that it meets the four-factor test for granting a stay in 10 C.F.R. § 2.342(e), it has utterly failed to demonstrate that it is entitled to the stay it seeks.[4]

[4] The Secretary of the Commission has recently ruled on two other motions to suspend or delay hearings in COLA proceedings. In Tennessee Valley Authority (Bellefonte Nuclear Power Plant Units 3 and 4), Order, Docket Nos. 52-014 and 52-015 (Apr. 7, 2008), the Secretary denied a motion by Bellefonte Efficiency and Sustainability

II. THE MOTION IS AN IMPERMISSIBLE CHALLENGE TO NRC REGULATIONS AND PROCEDURES

A. The Motion challenges 10 C.F.R. Part 52

NC WARN requests a stay of the Harris COLA proceeding because, "[t]he NRC cannot hold a 'fair hearing' at this time as the application adopts by reference a design and operational practices that have not been certified by the NRC or accepted by the applicant, [and] it is impossible to conduct a meaningful technical and safety review of the Harris COLA without knowing the final design of the AP1000 revision 16." Motion at 5-6. NC WARN further argues that the "separation of design certification and licensing application leads to an inefficient and costly review and hearing process . . . ." Motion at 8.

It is well established that petitioners may not use an adjudicatory hearing to attack generic NRC requirements or regulations. 10 C.F.R. § 2.335(a); Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999). "[A] licensing proceeding . . . is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process." Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 A.E.C. 13, 20, aff'd in part on other grounds, CLI-74-32, 8 A.E.C. 217 (1974) (footnote omitted). However,

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Team ("BEST") to suspend the hearing in the Bellefonte COLA proceeding based on BEST's argument that NRC Staff requests for additional information made the application incomplete. Bellefonte Order at 1, 3. The Secretary did, however, grant interested persons a 60-day extension from the date of the Order because the Notice of Hearing failed to identify the design certification rule and rulemaking incorporated by reference into the application. Id. at 2-3. The Blue Ridge Environmental Defense League ("BREDL"), the parent organization of BEST, attempted a similar argument in its motion requesting an amended deadline in Dominion Virginia Power (Combined License Application for North Anna Unit 3), Docket No. 52-017 (Apr. 28, 2008). BREDL asserted that the initial Notice of Hearing in that proceeding was defective because it did not provide citations to the Early Site Permit and design certification rulemaking, but the Secretary denied BREDL's motion because the notice cited to another document with a cover letter that plainly contained the citations alleged to be missing. Dominion Virginia Power (Combined License Application for North Anna Unit 3), Order at 1-2, Docket No. 52-017 (May 1, 2008). In the instant Motion, NC WARN makes no similar argument regarding deficiencies in the Notice of Hearing, nor could it because the notice in the Harris COLA proceeding identifies the design certification rule and rulemaking incorporated by reference into the application. See 73 Fed. Reg. 31,899, 31,899 (June 4, 2008). In addition, NC WARN's discussion of the Calvert Cliffs Nuclear Power Plant COLA proceeding (Motion at 14) is irrelevant as no Notice of Hearing has been issued on that COLA.

NC WARN's arguments above are actually a broad challenge to 10 C.F.R. Part 52, subparts B and C, and a specific challenge to 10 C.F.R. § 52.55(c).

NC WARN's claim that "it is impossible to conduct a meaningful technical and safety review of the Harris COLA without knowing the final design of the AP1000 revision 16" (Motion at 6) is an impermissible collateral attack on the Commission's regulation at 10 C.F.R. § 52.55(c): "An applicant for a construction permit or a combined license may, at its own risk, reference in its application a design for which a design certification application has been docketed but not granted." Further, there is no reason that a meaningful technical and safety review of the Harris COLA should not be possible, because the COLA incorporates by reference the design certification application for AP1000 Revision 16. See Letter from J. Scarola, Progress Energy, to W. Borchardt, Director, NRC Office of New Reactors, Application for Combined License for Shearon Harris Nuclear Power Plant Units 2 and 3 (Feb. 18, 2008) (ADAMS Accession No. ML080580078). That design certification application is available to NC WARN – its docket number is even cited in the Notice of Hearing in the Harris COLA proceeding – so NC WARN has the full opportunity to review it just as NC WARN can review any other part of the Harris COLA. If NC WARN takes issue with anything it finds in the design certification application, it can seek to participate in the AP1000 Revision 16 rulemaking proceeding.[5] NC

[5] NC WARN may not adjudicate the AP1000 design that is the subject of rulemaking in the Harris COLA proceeding. The Commission's Final Policy Statement on Conduct of New Reactor Licensing Proceedings issued earlier this year could not be more clear: "With respect to a design for which certification has been requested but not yet granted, the Commission intends to follow its longstanding precedent that 'licensing boards should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.' Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 345 (1999), quoting Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85 (1974). In accordance with these decisions, a licensing board should treat the NRC's docketing of a design certification application as the Commission's determination that the design is the subject of a general rulemaking. We believe that a contention that raises an issue on a design matter addressed in the design certification application should be resolved in the design certification rulemaking proceeding, and not the COL proceeding. Accordingly, in a COL proceeding in which the application references a docketed design certification application, the licensing board should refer such a contention to the staff for consideration in the

WARN's disagreement with 10 C.F.R. § 52.55(c) does not provide grounds to grant a stay of the Harris COLA proceeding.

In addition, NC WARN asserts that the procedures established in 10 C.F.R. Part 52, subparts B and C, which allow for the parallel certification of a nuclear plant design in a rulemaking proceeding and review of applications for a COL in an adjudicatory proceeding, are unfair and inefficient. Motion at 5-6, 8. Not only is such an attack impermissible, but the regulations that NC WARN attacks are also the product of a carefully considered rulemaking process, wherein the Commission rejected comments asserting that "no application for a combined license be considered unless it references a certified design." Final Rule on Early Site Permits, Standard Design Certifications, and Combined Licenses for Nuclear Power Reactors, 54 Fed. Reg. 15, 372, 15,383 (Apr. 18, 1989).

Despite NC WARN's assertion to the contrary, the Commission *can* hold a fair hearing on the Harris COLA at this time – and it *must* do so. The Atomic Energy Act requires that the NRC hold a hearing prior to granting a license or construction permit. See 42 U.S.C. § 2239(a)(1)(A); see also 42 U.S.C. § 2235(b). Under 10 C.F.R. § 52.85, a hearing on a COLA is subject to all of the requirements in 10 C.F.R. Part 2, under which the NRC provides a hearing on the application only. This limited scope is specified in the Notice of Hearing: "The hearing will consider the application dated February 18, 2008, filed by Progress Energy Carolinas, Inc., pursuant to Subpart C of 10 CFR Part 52, for a combined license (COL)." 73 Fed. Reg. 31,899, 31,899 (June 4, 2008). NC WARN's criticism of the Commission's procedures does not support the granting of a stay in the Harris COLA proceeding.

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design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible. Upon adoption of a final design certification rule, such a contention should be denied." 73 Fed. Reg. at 20,972.

B. The Motion challenges the NRC Staff's determination that the Harris COLA is complete

The Motion also requests that a stay be granted because, contrary to the NRC Staff's finding, NC WARN asserts that the Harris COLA is incomplete. NC WARN bases this assertion on the very letter issued by the NRC Staff to notify Progress that the Harris COLA is complete. Motion at 5. NC WARN states that this letter mentions "two areas that have introduced uncertainty into the staff's development of a review schedule." Motion at 3. In actuality, this quote comes not from the letter but from an attachment regarding schedule issues. See Letter from S. Sanders, NRC Division of New Reactor Licensing, Office of New Reactors, to J. Scarola, Progress Energy, Acceptance Review for the Shearon Harris Nuclear Power Plant Units 2 and 3 Combined License Application (Apr. 17, 2008), ADAMS Accession No. ML081070226, Enclosure 1, at 1 ("Acceptance Letter"). The Motion improperly characterizes the mention of these two schedule issues as signifying a deficiency in the Harris COLA, challenging the Staff's determination that the Harris COLA is complete. As the Acceptance Letter explains, the issues NC WARN cites pertain not to the COLA's completeness but to the NRC Staff's ability to set a schedule for its own review. NC WARN points to no Commission rule, regulation, or even policy that requires the NRC Staff to set a review schedule for an application to be deemed complete. Furthermore, the NRC Staff actually set a review schedule for the Harris COLA on May 16, 2008. Letter from S. Sanders, NRC Division of New Reactor Licensing, Office of New Reactors, to J. Scarola, Progress Energy, Shearon Harris Nuclear Power Plant Units 2 and 3 Combined License Application Review Schedule (May 16, 2008), ADAMS Accession No. ML081370104.

The NRC Staff has accepted the Harris COLA and is in the process of reviewing it. The Commission has made it clear that the manner in which the NRC Staff conducts its sufficiency

review and whether its decision to accept an application for review was correct are not matters within the purview of an adjudicatory proceeding. Curators of the University of Missouri, CLI-95-8, 41 N.R.C. 386, 395-96 (1995); Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 N.R.C. 232, 242, aff'd, CLI-98-25, 48 N.R.C. 325, 349 (1998), aff'd sub nom., Nat'l Whistleblower Ctr. v. NRC, 208 F.3d 256 (D.C. Cir. 2000), cert. denied, 531 U.S. 1070 (2001).

NC WARN's argument that open issue areas discussed in the "Schedule Issues" attachment to the Acceptance Letter show that the Harris COLA is incomplete is analogous to arguments that requests for additional information ("RAIs") signify a deficiency in an application. It is well established, however, that the issuance of RAIs by the Staff, and the pendency of RAI responses, provide no basis for deeming an application deficient or incomplete. As the Commission has explained, "'RAIs are a standard and ongoing part of NRC licensing reviews.' They are a routine means for our staff to request clarification or further discussion of particular items in the application. " Oconee, CLI-99-11, 49 N.R.C. at 336 (quoting Calvert Cliffs, CLI-98-25, 48 N.R.C. at 349; see also Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-33, 60 N.R.C. 749, 753 (2004) (holding that RAIs do not indicate that an application is incomplete); Safety Light Corp. (Bloomsburg, Pennsylvania Site), LBP-04-25, 60 N.R.C. 516, 525-26 (2004) (holding that RAIs do not suggest that an application is deficient). Thus, the fact that additional information will be provided to the NRC Staff during the review of the application does not provide grounds for granting a stay of the Harris COLA proceeding.

CONCLUSION

For the reasons stated above, the Motion to suspend the proceeding on the Harris COLA should be denied.

Respectfully submitted,

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Carolina Power & Light Company	)	Docket Nos. 52-022 COL
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Progress Energy's Response in Opposition to Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration by the North Carolina Waste Awareness and Reduction Network" were served on the persons listed below in accordance with the Commission E-Filing rule, which the NRC promulgated in August 2007 (72 Fed. Reg. 49,139), and, where indicated by an asterisk, by e-mail, this 3rd day of July, 2008.

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