

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
PROGRESS ENERGY CAROLINAS, INC.) Docket Nos. 52-022 and 52-023
)
Shearon Harris Nuclear Site)
(Units 2 and 3))

NRC STAFF RESPONSE TO MOTION TO IMMEDIATELY SUSPEND HEARING NOTICE AND
REQUEST FOR EXPEDITED CONSIDERATION BY THE NORTH CAROLINA WASTE
AWARENESS AND REDUCTION NETWORK

Sara E. Brock
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July 2, 2008

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INTRODUCTION

The NRC Staff (Staff) opposes the “Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration” (Motion) filed by the North Carolina Waste Awareness and Reduction Network (NC WARN). NC WARN has failed to identify any valid basis to support their requested extraordinary remedy.

BACKGROUND

Progress Energy Carolinas, Inc. (PEC) submitted an application dated February 18, 2008, for a combined license (COL) for Shearon Harris Units 2 and 3 (Harris COLA), to be located in Wake County, North Carolina. On March 10, 2008, the Nuclear Regulatory Commission (NRC) issued a press release noting the availability of the Harris COLA on its website. See “Harris Application for New Reactors Available on NRC Website” Press Release No. 08-049, March 10, 2008, ADAMS Accession No. ML080700786. Notice of the receipt and availability of the Harris COLA was published in the Federal Register on March 17, 2008. See “Progress Energy; Notice of Receipt and Availability of Application for a Combined License,” 73 Fed. Reg. 14,281 (Mar. 17, 2008). On April 17, 2008, the Staff completed its acceptance

review of the Harris COLA and determined it was acceptable for docketing. See Letter to James Scarola, dated April 17, 2008, ADAMS Accession No. ML081070226 (Apr. 17th Letter). On April 23, 2008, Notice of docketing of the Harris COLA was published in the Federal Register. See “Progress Energy; Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3,” 73 Fed. Reg. 21,995 (Apr. 23, 2008). On May 16, 2008, the Staff published a schedule for its review of the Harris COLA which targets issuance of the Final Environmental Impact Statement (FEIS) in May 2010, and issuance of the Final Safety Evaluation Report (FSER) in April 2011.¹ See Letter to James Scarola dated May 16, 2008, ADAMS Accession No. ML081370104. On June 4, 2008, the Notice of Hearing and Opportunity to Petition to Intervene for the Harris COLA was published in the Federal Register. See “Progress Energy Carolinas, Inc.; Notice of Hearing and Opportunity for Leave to Petition to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Shearon Harris Units 2 and 3,” 73 Fed. Reg. 31,899 (June 4, 2008). On June 25, 2008, the instant motion was filed.²

¹ The Staff notes that this is a standard COLA schedule, and it is unclear what the basis is for NC WARN’s apparent belief that the Staff has delayed its entire safety review and environmental review. See Motion at 9. The Staff has not delayed either the safety or environmental review; the reviews are progressing according to the Staff’s published schedules.

² As a preliminary matter, the Staff notes that this motion was not filed using the E-Filing system. The Nuclear Regulatory Commission’s regulations require that documents filed in Commission adjudicatory proceedings are to be electronically transmitted through the E-Filing system. 10 CFR § 2.302(a); 72 Fed. Reg. 49,139 (Aug. 28, 2007). The rule is applicable to new proceedings noticed on or after October 15, 2007. 72 Fed. Reg. 49,139. A participant can be exempt from electronic filing upon a finding of good cause by the Commission or presiding officer. 10 C.F.R. § 2.302(g)(3). The request for an exemption must be made with the first filing in the proceeding or after the first filing in the proceeding if the requestor shows that the interests of fairness so require. 10 C.F.R. § 2.302(g)(4). The E-Filing rule is not satisfied when a participant files by attaching the document to electronic mail (e-mail). 72 Fed. Reg. at 49,144. The Notice of Hearing for the Harris COLA specifically included the E-filing requirements. See 73 Fed. Reg. at 31899-31900. NC WARN’s failure to follow the E-filing procedures is grounds for rejection of their motion. See, e.g., *Amergen Energy Co.* (Three Mile Island Nuclear Station, Unit 1), 2008 NRC LEXIS 80 (2008) (ADAMS Accession No. ML081550359) (The Secretary denied a petition to intervene for, among other reasons, failure to e-file.).

DISCUSSION

The motion, in essence, is an objection to the long-standing NRC requirements that a Petitioner file proposed contentions based on the license application at the start of the Staff review, rather than after the Staff review is completed. See 10 CFR §§ 2.104; 2.309. The motion further objects to NRC regulations that allow a COL applicant to reference a design for which a design certification application has been docketed but not yet granted. Quite simply, PEC filed its Harris COLA and referenced Appendix D to Part 52 (the AP1000 design certification rule) as well as the Westinghouse application for an amendment to Appendix D (Rev. 16). This is specifically allowed by 10 CFR § 52.55(c).³ The Staff docketed the application, and the Commission issued the Notice of Hearing “as soon as practicable after the application had been docketed” in accordance with 10 CFR § 2.104. The Commission has previously stated in licensing proceedings “it is the license application, not the NRC staff review, that is at issue.” See *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998). The possibility that the Staff review may yield new information does not justify extending the intervention period because the NRC has procedures that will allow a petitioner to proffer a late filed contention. *Id.*; 10 C.F.R. § 2.309(c). There is nothing unique about the Harris COLA which justifies any departure from the routine 60 day period for intervention. NC WARN appears to have several misconceptions about the design certification process and the status of the Harris COLA review. While no further response to the motion is necessary, the Staff, in the interest of clarifying the public record, will address several

³ Indeed, of the 9 COL’s applications currently pending before the Staff, 8 of the applications take advantage of this provision and reference design certification applications rather than certified designs. See <http://www.nrc.gov/reactors/new-licensing/new-licensing-files/new-rx-licensing-app-legend.pdf>.

of the most serious misconceptions. The Staff will first review the status of the Harris COLA review, followed by an explanation of the design certification process and concluding with an explanation of why NC WARN's use of the "precedent" of the Bellefonte COLA and the Calvert Cliffs COLA is incorrect. In explaining the design certification process the Staff will explain the role of the design certification in the adjudicatory COL, the two-tier rule structure of the AP1000, the role of the probabilistic risk assessment in the design certification process, the timing of plant-specific exemptions from the design certification and the differences between the Harris COLA review and the AP1000 amendment application review.

A. The NRC Staff Did Not Declare the Application to be Incomplete.

As is its routine practice, the NRC Staff identifies issues likely to impact the review schedule during its acceptance review and identifies those issues to the applicant and to members of the public. In its April 17th Letter the Staff identified three areas that introduced uncertainty into the review schedule. See April 17th Letter at 1. One of the areas was the need to complete a transportation impact analysis regarding any reconstruction of roads involved with raising the Harris lake level. See April 17th Letter, Enclosure 1. Another area was the need for sampling for aquatic species at the intake structures. See April 17th Letter, Enclosure 1. At no point has the Staff, as NC WARN alleges, suggested that the Harris COLA lacks adequate detail regarding cooling water. Motion at 5. Indeed, low flow conditions are discussed in Chapter 2 of the Final Safety Analysis Report (FSAR) for the Harris COLA. See FSAR 2.4.11, ADAMS Accession No. ML080600545.

B. NC WARN Demonstrates a Fundamental Misunderstanding of the Nature of a Design Certification Process.

1. NC WARN Misunderstands the Role of the Design Certification in the Adjudicatory Process for a COL.

As recently re-affirmed by the 1st Circuit, the NRC may determine generic issues in rulemaking rather than through litigation in individual cases. See *Massachusetts v. U.S.*, 522

F.3d 115, 119 (1st Cir. 2008). The NRC certifies generic nuclear reactor designs through rulemaking. Thus, to the extent a member of the public is concerned about any specific design certification, their opportunity to participate on these issues is to file comments on the proposed rule. Pursuant to the Commission Policy Statement on New Reactor Licensing Proceedings, 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. See Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008). 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 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. See *Id.* A petitioner is foreclosed from filing contentions regarding a previously certified design in a COL proceeding. Thus, NC WARN, or any other petitioner is foreclosed from filing contentions regarding the previously certified AP1000 design. See 10 CFR Part 52, Appendix D, VI. (Issue Resolution). To the extent that NC WARN, or any other petitioner, has concerns regarding those aspects of the AP1000 design which are being amended as part of Rev. 16, they may file comments on the proposed rule when it is issued. Since issues regarding the design will not be heard in the COLA adjudication, the pending Rev. 16 application does not provide a basis for suspending the Notice of Hearing for the Harris COLA.

2. NC WARN Misconstrues the Two-Tier Rule Structure of the AP1000.

In the design certifications that have been certified thus far, the NRC has adopted a two-tier rule structure. The definitions for the two tier rule structure are included in the appendix to Part 52 which certifies the design. Appendix D to Part 52 contains the Design Certification Rule for the AP1000 Design. See 10 CFR Part 52, Appendix D. Tier 1 means:

The portion of the design related information contained in the generic DCD that is approved and certified by this appendix (Tier 1 information). The design descriptions, interface requirements, and site parameters are derived from Tier 2 information. Tier 1 information includes;

1. Definitions and general provisions;
2. Design Descriptions
3. Inspections, tests, analysis, and acceptance criteria (ITAAC);
4. Significant site parameters; and
5. Significant interface requirements.

See 10 CFR Part 52, Appendix D Section II, D.

Tier 2 means:

The portion of the design-related information contained in the generic DCD that is approved but not certified by this appendix (Tier 2 information). Compliance with Tier 2 is required, but generic changes to and plant-specific departures from Tier 2 are governed by Section VIII of this appendix. Compliance with Tier 2 provides a sufficient, but not the only acceptable, method for complying with Tier 1. Compliance methods differing from Tier 2 must satisfy the change process in Section VIII of this appendix. Regardless of these differences, an applicant or licensee must meet the requirement in Section III.B of this appendix to reference Tier 2 when referencing Tier 1. Tier 2 information includes:

1. Information required by §§52.47(a) and 52.47(c), with the exception of generic technical specifications and conceptual design information;
2. Supporting information on the inspections, tests, and analyses that will be performed to demonstrate that the acceptance criteria in the ITAAC have been met; and
3. Combined license (COL) action items (COL license information), which identify certain matters that must be addressed in the site-specific portion of the final safety analysis report (FSAR) by an applicant who references this appendix. These items constitute information requirements but are not the only acceptable set of information in the FSAR. An applicant may depart from or omit these items, provided that the departure or omission is identified and justified in the FSAR. After issuance of a construction permit or COL, these items are not requirements for the licensee unless such items are restated in the FSAR.
4. The investment protection short-term availability controls in Section 16.3 of the DCD.

10 CFR Part 52 Appendix D, Section II.E. As defined above, both Tier 1 and Tier 2 information have been approved by the NRC. NC WARN goes through a list of “components” objecting to the placement of these “components” in Tier 2, rather than Tier 1. See Motion at 7, 11. Tier 2 information includes all of the systems, structures and components of a design. See 10 CFR

Part 52 Appendix D, Section II.E, *citing* 52.47(a). Aspects of the systems, structures and components are included in Tier 1. For example, one of the cited examples by NC WARN of Tier 2 information is containment. The Containment System is described in Tier 2, Section 6.2 of the design control document (DCD). However, aspects of the containment system are also found in Tier 1, in Section 2.2.1. For example, one of several Tier 1 requirements related to the containment system for the AP1000 is that the “seismic Category I equipment identified in Table 2.2.1-1 can withstand seismic design basis loads without loss of structural integrity and safety function.” See AP1000 Design Control Document, Tier 1, 2.2.1-1 Rev. 15.⁴ The procedures for changes or departures from the DCD are different for Tier 1 and Tier 2 information. These procedures for changes or departures from the certified design are explained in Appendix D, Section VIII.

The Staff cannot determine what NC WARN means when it says “but of the 172 interconnected Westinghouse design documents, totaling more than 6,500 pages, only 21 of the components appear to have been certified by the NRC.” Motion at 7. On January 27, 2006 the NRC issued the final design certification rule for the AP1000, which was incorporated into the regulations in Appendix D. See 71 Fed. Reg. 4464 (Jan. 27, 2006). On January 18, 2008 the NRC docketed an application for an amendment to the AP1000 design certification rule.⁵ The Staff anticipates issuing its Final Safety Evaluation on the AP1000 amendment application in March, 2010.⁶ See Letter to W.E. Cummins, dated February 15, 2008, ADAMS Accession No.

⁴ http://www.nrc.gov/reactors/new-licensing/design-cert/ap1000/dcd/Tier%201/Chapter%202/2-2_r15.pdf.

⁵ Rev 16 does contain 172 separate files, which are available (in a non-proprietary version) on the NRC website at <http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML071580939>.

⁶ As noted in the Motion, the Staff did note the recirculation screen design as a potential schedule risk. See Motion at 6. On March 3, 2008 Westinghouse submitted Technical Report 147, “AP1000 Containment Recirculation and IRWST Screen Design,” ML080660625 and WCAP- 16914, “Evaluation of (continued. . .)

ML080370179. After completion of the FSER the proposed rule will be issued for public comment. To the extent the movant, or any other member of the public, has a concern about the revisions to the AP1000, including the determination of what material is included in Tier 1, they are invited to comment on the proposed rule when it is issued.

Contrary to NC WARN's premise, the review process for Rev. 16 does not necessarily result in changes to individual COLAs. See Motion at 4, 9. It is true that if Rev. 16 changes during the review in a way that would require the Harris COLA to be amended, PEC would have to revise its application. However, whether or not this will happen in the context of the Rev. 16 review is entirely speculative. NC WARN is correct that this was discussed at the Scoping Meeting on June 10, 2008. See *Id.* As discussed at that meeting, to the extent there are changes to the COLA, due to design changes, or for any other reasons, NC WARN, or any other Petitioner, could file contentions using the late filing criteria in 10 CFR 2.309(c). Thus, the on-going review of Rev. 16 does not provide a basis to suspend the Harris COLA Notice of Hearing.

3. A Valid Probabilistic Risk Assessment for the AP1000 can be Performed.

NC WARN's assertions that it is "impossible to conduct aPRA... [on] DCD Revision 16" is unfounded. Motion at 7. The reference to paragraph 3.6 of the introduction to the AP1000 DCD application does not support this assertion. Motion at 8. Paragraph 3.6 simply explains the reasons why the PRA documentation is separated from the DCD as a matter of practicality. This explanation is unchanged from the certified AP1000 DCD. See AP1000 Design Control Document, Rev. 15, Paragraph 3.6, Intro-6, ADAMS Accession No.

(. . .continued)

Debris Loading Head Loss Tests for AP1000 Recirculation and in-Containment Refueling Water Storage Tank (IRWST) Screen Design," ADAMS Accession No. ML080650718. The NRC Staff is currently reviewing these submittals.

ML053460409. NC WARN's concern with the SAMDA analysis is also unfounded. See Motion at 10. Section 7.3 of the Harris COLA environmental report provides current information on the site-specific analysis by repeating the AP1000 SAMDA analysis for Harris site applicability. See Harris COLA Environmental Report Chapter 7, ADAMS Accession No. ML080600910. Thus, there is no missing information that would justify suspending the notice of hearing.

4. The "Timing" of Plant-Specific Exemptions to a DCD is the Same Regardless of Whether or Not the Certification is Complete.

As part of a COLA, an applicant referencing a design certification is required to identify any requests for plant-specific departures or exemptions. For the Harris COLA, these requests are identified in Part 7. See Harris COLA part 7 (ADAMS Accession No. ML080640587). NC WARN is correct that PEC could potentially amend the COLA at some point in the future to request more exemptions. This is purely speculative, and irrelevant, since the Commission has consistently held that an application may be modified or improved as the review goes forward. See, e.g., *Curators of the University of Missouri* (Byproduct License No. 24-00513-32; Special Nuclear Materials License No. SNM-247), CLI-95-08, 41 NRC 386, 395 (1995). Thus, the fact that it is a theoretical possibility that PEC may amend its COLA does not provide grounds to suspend the Notice of Hearing.

5. Those Matters Which are Part of the COLA Review are Distinguishable from Those Matters which are Part of the Rev. 16 Review.

The Staff disagrees with the characterization that it is impossible to tell which matters are addressed in the COLA review and which are addressed in the DC review. Motion at 10. NC WARN suggests that the AP1000 design is some sort of black box about which no information is known. This is simply not true. The AP1000 design is a certified design. The amendment to the design (Rev. 16) is a public document. See

<http://adamswebsearch2.nrc.gov/idmws/ViewDocByAccession.asp?AccessionNumber=ML071580939>. Moreover, the Harris COLA is a public document. See <http://www.nrc.gov/reactors/new-licensing/col/harris.html>. It is relatively simple to determine which matters are being addressed

by reviewing the two applications. Thus, NC WARN's apparent difficulty in distinguishing between the two reviews does not provide a basis for suspending the Notice of Hearing.

C. The Status of the Bellefonte COLA Review and the Calvert Cliffs COLA Review.

1. *The Commission Did Not Delay the Bellefonte COLA Deadline Pending "Completion" of the Application.*

Similarly, the movant misconstrues the delay in the Bellefonte COLA opportunity to intervene.⁷ In that instance the Commission extended the deadline for petitions to intervene by 60 days in order to enhance public participation in the proceeding, noting that the notice of hearing did not identify the design certification rule and the rulemaking incorporated by reference into the Bellefonte application and provide information on how to access this information. See *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4) Unpublished Order (April 7, 2008) (ADAMS Accession No. ML080980595). Unlike the Bellefonte notice of hearing, the Harris COLA Notice of Hearing did in fact include the information the Commission deemed missing from the Bellefonte notice. See 73 Fed. Reg. 31,899 (June 4, 2008). Regarding the hydrology data in the Bellefonte application, the Commission reiterated that;

RAI's and 'open items' are a normal part of the licensing review process and do not provide a basis either for extending the deadline for submission of contentions or for suspending or withdrawing the Notice of Hearing.... If the applicant's response to the Staff's RAI or the revised hydrology review provides new and materially different information, BEST will not be harmed because it will have an opportunity to proffer contentions based upon that new information under 10 C.F.R. § 2.309(f).

⁷ NC WARN does not cite a source for the statement "In that [Bellefonte] proceeding, the NRC staff stated that their safety and environmental reviews were delayed until it received the data requested from the applicant about water flows and seismic activities on the site." The Staff is unaware of having made any such statement. The Bellefonte review is proceeding according to schedule. The Staff has stated that the Bellefonte schedule has certain risks, including the resolution of seismic and hydrology issues. See Jan. 18th letter.

Id. at 2. Rather than supporting the position of NC WARN, this Commission ruling reiterated the long-standing Commission policy that a potential intervenor must file contentions at the beginning of the proceeding based on the application. Thus, the process in the Bellefonte proceeding does not provide a basis to suspend the Harris COLA Notice of Hearing.

2. The Review of the Calvert Cliffs COLA Has Not Been Suspended by the Staff.

NC WARN states, without basis, that the Staff recognized the need to delay its review of the Calvert Cliffs COLA until the design certification is complete. See Motion at 14. The Staff has not delayed the review of the Calvert Cliffs COLA until the design certification is complete. Rather, similar to the AP1000 design center, the Staff acknowledged the interdependencies of the two reviews. However, the reviews are progressing in parallel. See Letter from John Rycyna to George Vanderheyden (June 3, 2008) (ADAMS Accession No. ML081510149). Thus, the status of the Calvert Cliffs COLA does not provide a basis to suspend the Harris Notice of Hearing.

CONCLUSION

NC WARN has failed to proffer any basis for their extraordinary request to suspend the Notice of Hearing. As discussed above, neither the pending amendment to the AP1000 design nor the alleged missing information in the Harris COLA provide a basis for suspending the Notice of Hearing. Therefore the Notice of Hearing should not be suspended in the instant case.

/signed (electronically) by/

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NOTICE OF APPEARANCE FOR SARA E. BROCK

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

/signed (electronically) by/
Sara E. Brock
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 2nd day of July, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO MOTION TO IMMEDIATELY SUSPEND HEARING NOTICE AND REQUEST FOR EXPEDITED CONSIDERATION BY THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK" and "NOTICE OF APPEARANCE FOR SARA E. BROCK" have been served upon the following persons by Electronic Information Exchange⁸ this 2nd day of July, 2008:

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⁸ With the exception of Mr. O'Neill who was served via regular e-mail since he is not currently listed on the EIE.