UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/23/08
SERVED 07/23/08

COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

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)	)	
	)	

CLI-08-15

MEMORANDUM AND ORDER

On June 23, 2008, the North Carolina Waste Awareness and Reduction Network (NC WARN) filed with the Secretary of the Commission a motion to immediately suspend the hearing notice in this proceeding. NC WARN also asked for expedited consideration of its motion. On July 2, 2008, the NRC staff filed a response in opposition to the motion, and the Applicant filed a response in opposition to the motion on July 3, 2008. For the reasons specified below, NC WARN's motion is denied.[1]

In its motion, NC WARN requests that the Commission immediately suspend the hearing notice until: (1) the applicant responds to data requests and other schedule issues concerning the Harris Lake and its water levels, alternative water sources, the impacts on aquatic species, and transportation impacts; and (2) the Commission completes its design certification review of

[1] The NRC has received several e-mail requests supporting NC WARN's motion. For the reasons discussed in this Memorandum and Order, these requests are also denied. Requests have been received from the Mayor of the Town of Carrboro, North Carolina, North Carolina State Senator Ellie Kinnaird, and Vinnie DeBenedetto.

the AP1000 reactor, Revision 16, and any resulting modifications are incorporated into the design and operational practices at the Shearon Harris Nuclear Power Plant Units 2 and 3.

NC WARN first argues that the NRC should suspend the hearing notice because the COL application is not complete. NC WARN states that information regarding the water levels at Harris Lake and information concerning an intake on the Cape Fear River are missing. As support, NC WARN cites an April 17, 2008 letter from the NRC staff to the Applicant that lists specific issues that may "introduce uncertainty into the review schedule." NC WARN argues that this letter shows that the COL application is incomplete and that the notice of hearing should be suspended until the application is complete enough for the NRC staff to establish a review schedule.

The Commission, however, disagrees with this interpretation. The NRC staff did not state the application was incomplete or that they were unable to establish a review schedule. In fact, in the April 17, 2008 letter, the NRC staff docketed the application, thus finding that the application was sufficient enough to commence review.[2] Subsequently, in a May 16, 2008 letter, the NRC staff established a schedule for reviewing the Shearon Harris COL application. The mere fact that the staff is asking for more information does not make an application incomplete.[3] If the Petitioners believe the Application is incomplete in some way, they may file a contention to that effect. Indeed, the very purpose of NRC adjudicatory hearings is to consider claims of deficiencies in a license application; such contentions are commonplace at

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[2] This docketing decision is not challengeable in an adjudicatory proceeding. Instead, in adjudicatory proceedings "it is the license application, not the NRC staff review that is at issue." *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998).

[3] *See, e.g., Notice of Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3*, 73 Fed. Reg. 21,995 (April 23, 2008) (Noting that the docketing of an application does not preclude the NRC staff from requesting additional information from the applicant.).

the outset of NRC adjudications. [4] Accordingly, this claim does not provide a basis for suspending the hearing notice.

NC WARN's second argument is that the NRC should delay the notice of hearing for this COL application until the completion of the certified design rulemaking for the AP1000, Revision 16. According to NC WARN, it is impossible to hold a fair hearing until the completion of the design certification rulemaking because of the interconnections between the design and the rest of the COL application.

A specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed but not approved,[5] and Petitioners may not challenge Commission regulations in licensing proceedings.[6] Thus, although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant - at its own risk - to submit a COL application that does not reference a certified design.

The Commission discussed this very situation in its Final Policy Statement on the Conduct of New Reactor Licensing Proceedings.[7] In that policy statement the Commission stated that issues concerning a design certification application should be resolved in the design certification rulemaking and not in a COL proceeding. When a contention is raised in a COL

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[4] *See, e.g., AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-7, 63 NRC 188 (2006) (deciding two petitions to intervene and requests for hearing); *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 NRC 33, *pet. for review denied*, CLI-01-25, 54 NRC 368 (2001) (deciding two petitions to intervene and requests for hearing); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1998), *aff'd in part*, CLI-98-13, 48 NRC 126 (1998) (deciding five petitions to intervene and requests for hearing).

[5] 10 C.F.R. § 52.55(c).

[6] 10 C.F.R. § 2.335(a).

[7] 73 Fed. Reg. 20,963 (April 17, 2008).

proceeding that challenges information in the design certification rulemaking, licensing boards "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."[8] If an applicant later decides not to reference a certified design, and instead proceeds with a site-specific design, any admissible issues would have to be addressed in the licensing adjudication.

Accordingly, there is no basis to hold this notice of hearing in abeyance pending completion of the design certification rulemaking. In sum, in accordance with 10 C.F.R. Part 52, Petitioners have sufficient information to formulate contentions before the August 4, 2008 deadline.

IT IS SO ORDERED.

For the Commission

/RA/

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Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of July 2008.

[8] *Id*. at 20,972.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PROGRESS ENERGY, INC.	)	Docket No. 52-022 and 52-023-COL
	)	
(Shearon Harris, Units 2 and 3)	)	
	)	
(Combined Operating License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-15) have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 23rd day of July 2008