

August 14, 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 FOR RECONSIDERATION BY
THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK**

INTRODUCTION

On August 4, 2008, the North Carolina Waste Awareness and Reduction Network (“NC WARN”) filed a Petition for Intervention and Request for Hearing in the above captioned dockets (“Petition to Intervene”). On page 7 of the Petition to Intervene, NC WARN requests reconsideration of the Nuclear Regulatory Commission’s (“NRC” or “Commission”) July 23, 2008 Order denying NC WARN’s June 24, 2008 Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration (“Motion to Suspend”).¹ Contention TC-1 repeats NC WARN’s Motion to Suspend, dressed up as a contention and offered in support of NC WARN’s Motion for Reconsideration.² Pursuant to 10 C.F.R. § 2.345(b), Progress Energy Carolinas, Inc. (“Progress”) submits this response in opposition to NC WARN’s Motion for Reconsideration.

¹ Memorandum and Order, CLI-08-15 (July 23, 2008) (“Order” or “CLI-08-15”).

² Petition to Intervene at 7, 13-18.

NC WARN’s Motion for Reconsideration should be dismissed, because it fails to satisfy the applicable Commission regulations governing motions for reconsideration of Commission decisions. NC WARN did not request leave to file its motion and failed to identify any error in the Commission’s decision. NC WARN did not state the relief sought. NC WARN also ignored the Commission’s regulations because it failed to consult with Progress in an effort to resolve the issues raised before filing the Motion for Reconsideration. Each of these errors provides a basis to reject NC WARN’s Motion for Reconsideration. See 10 C.F.R. §§ 2.323, 2.341, and 2.345.

Finally, Contention TC-1 is improperly before the Atomic Safety and Licensing Board (“Board”). Contention TC-1 is offered in support of NC WARN’s Motion for Reconsideration and is no more than a restatement of the Motion to Suspend, which the Commission has rejected. A Board cannot reconsider a Commission decision, and the Commission and the Board should not both exercise jurisdiction over the same issue in the same proceeding. Therefore, the Commission properly has jurisdiction over Contention TC-1 in deciding the Motion for Reconsideration.

BACKGROUND

On June 24, 2008, NC WARN filed its Motion to Suspend³ in connection with the combined licenses (“COL”) application for the Shearon Harris Nuclear Power Plant (“Harris”), Units 2 and 3 (“Harris COLA”). NC WARN requested that the Commission immediately suspend the hearing notice until: (1) Progress 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 the AP1000 reactor, Revision 16, and any resulting modifications are incorporated into

³ Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration (June 24, 2008).

the design and operational practices at Harris Units 2 and 3. Motion to Suspend at 1-2. The NRC Staff and Progress filed responses in opposition to the Motion to Suspend on July 2, 2008 and July 3, 2008, respectively.⁴ On July 10, 2008, NC WARN filed a supplement to the Motion to Suspend.⁵ The Commission denied NC WARN’s Motion to Suspend on July 23, 2008, explaining that Staff requests for more information do not make an application incomplete, and reaffirming its policy that NRC regulations allow for simultaneous proceedings on COL applications referencing a certified design that has been docketed but not approved and on the design certification rulemaking itself. CLI-08-15 (July 23, 2008). NC WARN filed its Petition to Intervene on August 4, 2008, and included its Motion for Reconsideration as part of that filing. On August 8, 2008, the Secretary of the Commission issued a memorandum referring the Petition to Intervene to E. Roy Hawkens, Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, for appropriate action in accordance with 10 C.F.R. § 2.346(i).⁶

DISCUSSION

I. NC WARN’s Motion for Reconsideration Fails to Satisfy the Applicable Regulations

Motions for reconsideration of Commission decisions are governed by 10 C.F.R. §§ 2.323, 2.341, and 2.345. NC WARN’s Motion for Reconsideration fails to comply with these regulations and should therefore be dismissed. First, “[m]otions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.” 10 C.F.R.

⁴ NRC Staff Response to Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration (July 2, 2008); Progress Energy’s Response in Opposition to Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration (July 3, 2008).

⁵ Supplement to Motion to Immediately Suspend Hearing Notice (July 10, 2008).

⁶ Memorandum, Vietti-Cook to Hawken, Request for Hearing with Respect to the Combined Operating License (Aug. 2, 2008) (“Secretary’s Memorandum”), available at ADAMS Accession No. ML082240755.

§ 2.323(e). NC WARN did not request leave to file its Motion for Reconsideration. Further, NC WARN’s Motion includes nothing for the Commission to reconsider. NC WARN identifies no clear and material error in the Commission’s decision. Instead, NC WARN references Contention TC-1, which repeats the arguments made in its Motion to Suspend. Petition to Intervene at 13-18. As the Commission has explained, “petitions for reconsideration should not be used merely to reargue matters that the Commission already has considered but rejected. Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification.” Dominion Nuclear Connecticut (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 N.R.C. 433, 434 (2003), petition for review denied, 114 Fed. Appx. 36 (2d Cir. Nov. 16, 2004) (internal citations and quotations omitted); see also Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 N.R.C. 1, 5-6 (1980); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-88-3, 28 N.R.C. 1, 2 (1988). Because NC WARN has not requested leave to file its Motion for Reconsideration and has not presented compelling circumstances, the Motion for Reconsideration should be dismissed.

NC WARN’s only addition to arguments in response to the Commission’s invitation to submit a contention claiming deficiencies in the content of the COLA is a list of nine broad categories of items that NC WARN asserts without basis are not contained in the Harris COLA. Petition to Intervene at 16. NC WARN asserts that “the COLA is incomplete and cannot be reviewed by the NRC staff or affected petitioners.” Id. With regard to the NRC staff, the Commission decision stated that the NRC Staff decision to docket the COLA and commence review of it was not subject to challenge in an adjudicatory proceeding. CLI-08-15 at 2 n.2.

With regard to the Petitioner, the Commission concluded that “Petitioners have sufficient information to formulate contentions before the August 4, 2008 deadline.” CLI-08-15 at 4. The Commission has ruled that the COLA can be reviewed. Furthermore, a list of nine broad categories that NC WARN asserts are not contained in the COLA points to no error in the Commission’s decision and provides no support for Contention TC-1 because it is an impermissible challenge to the AP1000 Design Certification Rule (10 C.F.R. Part 52, App. D).⁷

The AP1000 Final Design Certification Rule states:

The Commission has determined that the structures, systems, components, and design features of the AP1000 design comply with the provisions of the Atomic Energy Act of 1954, as amended, and the applicable regulations identified in Section V of this appendix; and therefore, provide adequate protection to the health and safety of the public. A conclusion that a matter is resolved includes the finding that additional or alternative structures, systems, components, design features, design criteria, testing, analyses, acceptance criteria, or justifications are not necessary for the AP1000 design.

10 C.F.R. Part 52, App. D, § VI.A. Therefore, the NRC has determined that the AP1000 design not only provides adequate protection, but also that additional features are not needed. In claiming that the COLA does not contain nine broad categories of items, NC WARN apparently has not recognized that the Harris COLA incorporates by reference the AP1000 Design Certification Rule.⁸ Such a broad challenge to the adequacy of the AP1000 design is an impermissible collateral attack on the AP1000 Design Certification Rule, 10 C.F.R. Part 52,

⁷ In addition, NC WARN erroneously asserts that “Westinghouse submitted its AP1000 revision 16 to the NRC in March 2002.” Petition at 16-17. Westinghouse actually submitted its AP1000 Revision 15 in 2002, and the Commission issued a final rule certifying that design in 2006. Final Rule, AP1000 Design Certification, 71 Fed. Reg. 4,464 (Jan. 27, 2006). Thus, anything contained in Revision 15 has already been approved by the Commission.

⁸ “This COL application incorporates by reference Appendix D to 10 CFR Part 52, as amended by Westinghouse Electric Company’s AP 1000 Design Control Document (DCD), Revision 16 which was submitted to the NRC on May 26, 2007, and Westinghouse Technical Report APP-GW-GLR-134, ‘AP 1000 DCD Impacts to Support COLA Standardization,’ Revision 3, which was submitted on January 14, 2008. This COL application includes the information required by 10 CFR Part 52, Appendix D, Section IV.A.2 and 3.” Progress letter NPD-NRC-2008-001 to the NRC dated Feb. 28, 2008 at 1, available at ADAMS Accession No. ML080580078.

App. D.⁹ See 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).

Second, a motion for reconsideration “must state the relief sought.” 10 C.F.R. § 2.345(b). NC WARN requests that the Commission reconsider its Order denying NC WARN’s Motion to Suspend, and then goes on to present the support for its Motion for Reconsideration in a contention that it apparently seeks to have admitted by the Board. Petition to Intervene at 13-18. NC WARN does not state the relief it seeks, and such relief is not apparent on the face of the Motion to Reconsider. It is not clear whether NC WARN is again asking the Commission to suspend the Harris COLA proceeding indefinitely, as it did in its original Motion to Suspend. NC WARN appears to be asking the Board to admit Contention TC-1 as a contention and the Motion for Reconsideration is meant to address the fatal flaw in Contention TC-1, i.e., it has been rejected by the Commission. In any event, it is simply unclear what relief NC WARN is seeking, and because its Motion for Reconsideration does not state the relief sought, it fails to satisfy 10 C.F.R. § 2.345(b) and should be dismissed.

Finally, “[a] motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful.” 10 C.F.R. § 2.323(b). NC WARN did

⁹ In May of 2007, Westinghouse submitted an application to amend the AP1000 Design Certification Rule (Revision 16). Westinghouse Application to Amend the AP1000 Design Certification Rule (May 26, 2007), available at ADAMS Accession No. ML071580757. Only those elements of the AP1000 Revision 16 that amend the Final Rule are the subject of current rulemaking. NC WARN has made no effort to identify what, if anything, in its list of nine broad categories of items purported to be omitted are addressed in Revision 16 and thus might be considered as part of the AP1000 Revision 16 amendment proceeding. In making a broad challenge to (a) reactor containment design; (b) control room set up and operator decision-making procedures; (c) seismic qualifications of unspecified components; (d) fire protection areas; (e) heat removal technology; (f) human factors engineering; (g) plant personnel requirements; (h) plant-wide alarm systems; and (i) plant-wide pipe and conduit requirements, NC WARN is making an impermissible challenge to the issue resolution determination with regard to the AP1000 design. 10 C.F.R. Part 52, App. D, § VI.A.

not include a certification, did not contact Progress, and did not attempt to resolve the issue raised in the Motion for Reconsideration. Thus, this procedural regulation also requires that the Motion for Reconsideration be rejected.

II. Contention TC-1 Is Improperly Before The Board

NC WARN explains that Contention TC-1 is offered in support of its Motion for Reconsideration. Petition to Intervene at 7. Because NC WARN's Motion for Reconsideration should be dismissed, Contention TC-1 should not be before the Board. As explained above, Contention TC-1 is nothing more than a challenge to the Commission's decision to deny NC WARN's Motion to Suspend. A decision by the Commission, however, cannot be reviewed by the Board. See, e.g., Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 N.R.C. 849, 871-72 (1986); see also Ohio Edison Co. (Perry Nuclear Power Plant, Unit 1), LBP-92-32, 36 N.R.C. 269, 283 (1992) ("The repose doctrine of law of the case acts to bar relitigation of the same issue in subsequent stages of the same proceeding"), aff'd on other grounds, City of Cleveland v. NRC, 68 F.3d 1361 (D.C. Cir. 1995) (footnote omitted). Since the Board is bound by the Commission's decision to deny the Motion to Suspend, and Contention TC-1 raises the same issues and repeats the same arguments made in the Motion to Suspend, it would be a waste of both the Board's and the parties' time to brief and argue Contention TC-1.

In addition, the Board should not have jurisdiction over Contention TC-1. NC WARN's Motion for Reconsideration, which TC-1 is offered to support, is pending before the Commission. The Secretary's Memorandum referred to the Board NC WARN's petition to intervene and request for a hearing, but not the Motion for Reconsideration. The Commission should also retain jurisdiction over Contention TC-1. The issue of when jurisdiction passes between a board and its appellate body is determined by common sense and the realities of

litigation so that the movant's "request be ruled upon with undue delay." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 N.R.C. 755, 757 (1983). As NC WARN recognizes, Contention TC-1 cannot be admitted without reconsidering the Commission's ruling in CLI-08-15. Therefore, to avoid undue delay, the Commission should retain jurisdiction over Contention TC-1. This case is in a relatively unique litigation posture in that the Commission is the body with the most extensive involvement in the case at this point. Therefore, both common sense and the realities of litigation warrant that the Commission deny admission of Contention TC-1.

Because the issues raised in Contention TC-1 have already been decided by the Commission and are not reviewable by the Board, and because the Motion to Reconsider is currently under the jurisdiction of the Commission, Contention TC-1 should not have been referred to the Board and should be withdrawn by the Secretary from the referral to the Board. Furthermore, as discussed above and in CLI-08-15, Contention TC-1 is an impermissible challenge to the regulations and is therefore clearly inadmissible.

CONCLUSION

For the reasons stated above, NC WARN's Motion for Reconsideration should be denied and admission of Contention TC-1 should be denied by the Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Progress Energy's Response in Opposition to Motion for Reconsideration by the North Carolina Waste Awareness and Reduction Network" were served on the service list for this proceeding by the Electronic Information Exchange, and courtesy copies were sent by e-mail to the persons listed below, this 14th day of August, 2008.

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