

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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))	

NRC STAFF NOTICE OF APPEAL OF LBP-08-21, MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTION ADMISSIBILITY), AND ACCOMPANYING BRIEF

Adam S. Gendelman
Sara E. Brock
Counsel for NRC Staff

November 10, 2008

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NRC STAFF NOTICE OF APPEAL OF LBP-08-21

Pursuant to Title 10, *Code of Federal Regulations*, Section 2.311(a) and (c), the NRC staff files this Notice of Appeal and attached brief from the Atomic Safety and Licensing Board's October 30, 2008 Memorandum and Order, which admitted and held in abeyance one contention in the above captioned proceeding concerning the Westinghouse Advanced Passive 1000 design certification.

Respectfully submitted,

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Dated at Rockville, Maryland
this 10th day of November, 2008

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NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-08-21

INTRODUCTION

Pursuant to [Title 10, *Code of Federal Regulations*] 10 C.F.R. § 2.311(c), the staff of the Nuclear Regulatory Commission (Staff) hereby appeals the decision of the Atomic Safety and Licensing Board (Board) in *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC __ (slip op.) (October 30, 2008) (LBP-08-21). This decision granted intervention to the North Carolina Waste Awareness and Reduction Network (NC WARN, or Petitioner), admitting a sole contention from its "Petition for Intervention and Request for Hearing" (Petition). However, the contention is inadmissible, and thus the Petition should have been wholly denied.

STATEMENT OF THE CASE

On February 18, 2008, Progress Energy Carolinas, Inc. (PEC, or Applicant) submitted an application for a combined license to construct and operate two Westinghouse Advanced Passive 1000 (AP1000) nuclear power plants (Units 2 and 3) at the Shearon Harris site (Harris COLA), in Wake County, North Carolina.

On June 4, 2008, a "Notice of Hearing and Opportunity to Petition for Leave to Intervene" was published in the Federal Register for the Harris COLA. See "Progress Energy Carolinas, Inc.; Notice of Hearing and Opportunity to Petition for Leave 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 24, 2008, NC WARN filed a “Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration” (Motion to Suspend), which the Commission denied on July 23, 2008. *Progress Energy Carolinas, Inc.* (Shearon Harris, Units 2 and 3) CLI-08-15, 68 NRC __ (slip op.) (July 23, 2008) (CLI-08-15). On August 4, 2008, NC WARN served the present Petition via electronic mail (e-mail) and U.S. mail. On August 6, 2008, the Petition was filed via the Commission’s E-Filing system. The Staff filed its answer on August 29, 2008, as did the Applicant. The Petitioner filed a reply on September 5, 2008. The Board issued its Memorandum and Order (Ruling on Standing and Contention Admissibility), LBP-08-21, on October 30, 2008, admitting contention “TC [Technical Contention]-1.” This contention, as admitted by the Board, asserts that the Harris COLA does not include items described in the AP 1000 design control document (DCD).

STATEMENT OF THE ISSUES

The Board, in concluding that the Petition presented one admissible contention, committed error. The Board’s decision was erroneous because the contention, which alleges omissions in the COLA, amounts to a challenge to the Part 52 process, which allows design issues to be resolved in rulemaking, and license applications to reference standard designs. The board also erred in admitting the contention because it does not comply with 10 C.F.R. § 2.309(f)(1)(vi).

LEGAL STANDARDS

A. Legal Standard for Interlocutory Review of a Licensing Board Order Granting a Petition to Intervene or Request for Hearing

Pursuant to 10 C.F.R. § 2.311(c), “[a]n order granting a petition to intervene and/or request for hearing is appealable by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied.” If contention TC-1 had not

been erroneously admitted, the Petition would have been wholly denied. Thus, this is an appeal as of right pursuant to 10 C.F.R. § 2.311(c).¹

B. Legal Standards for Contention Admissibility

The legal requirements governing the admissibility of contentions are well established and are currently set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice.

Section 2.309(f) provides:

- (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
 - (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
 - (ii) Provide a brief explanation of the basis for the contention;
 - (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
 - (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
 - (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
 - (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application

¹In its answer to the Petition, the Staff initially supported the admission of a portion of contention EC [Environmental Contention]-1, concerning underestimation of costs, prior to an amendment of the Harris COLA. See October 6, 2008 Letter from John H. O'Neill, Counsel for Applicant, Enclosure 2. The Board found contention EC-1 inadmissible, admitting only contention TC-1.

fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

- (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

10 C.F.R. § 2.309(f)(1) and (2). The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for reconsideration denied*, CLI-02-01, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of a contention. Final Rule, "Changes to the Adjudicatory Process," 69 Fed. Reg. 2182, 2221 (Jan 14, 2004); *see also Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC at 325; *Ariz. Pub. Serv. Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). "Mere 'notice pleading' does not suffice." *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006).

These rules focus the hearing process on real disputes susceptible to resolution in an adjudication. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). For example, "a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations or to express generalized grievances about NRC policies." *Id.* NRC regulations do not allow a contention to attack a regulation unless the proponent requests a waiver from the Commission. *See* 10 C.F.R. § 2.335; *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17-18 and n.15 (2007), *citing Millstone*, CLI-01-24, 54 NRC at 364.

DISCUSSION

THE LICENSING BOARD ERRED IN ADMITTING CONTENTION TC-1

The Board admitted the following contention:

CONTENTION: The COLA is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time. The COLA adopts by reference a design and operational procedures that have not been certified by the NRC or accepted by the applicant. Modifications to the design or operational procedures of the AP1000 Revision 16 would require changes in Progress Energy's application, the final design and operational procedures. Regardless of whether the components are certified or not, the COLA cannot be reviewed without the full disclosure of all designs and operational procedures.

LBP-08-21 at 6. In admitting the contention, the Licensing Board limited the contention to the asserted omissions from the COLA, as stated below:

Specifically at the proposed Harris reactors, the application does not contain the following:

- a. The final design of the reactor containment.
- b. The control room set up and operator decision-making procedures.
- c. Seismic qualifications for various components of the AP1000 reactors.
- d. The establishment of fire protection areas.
- e. Technology requirements for heat removal.
- f. Human factors engineering design throughout the plant.
- g. Plant personnel requirements.
- h. Alarm systems throughout the plant.
- i. Plant-wide requirements for pipes and conduits.

Id. at 7. The admission of this contention was erroneous, as the contention is a challenge to the Part 52 process. Further, the contention does not comply with 10 C.F.R. § 2.309(f)(1)(vi).

1. Contention TC-1 is a challenge to the Part 52 process, and is thus inadmissible

The admission of this contention was erroneous, as it is a challenge to the Part 52 process. The admitted contention alleges that nine enumerated items must be contained in the COLA. It is undisputed that these items are contained in the DCD. See Petition at 14. When an applicant for a combined license references a certified design, or an application for a certified design, the DCD is incorporated by reference into the COLA. Pursuant to Commission Policy, an otherwise admissible contention which challenges an application for a certified design is referred to the Commission Staff for resolution in the rulemaking process. Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,972 (Apr. 17, 2008). The admitted contention does not dispute whether these items were in the DCD, rather it argued that these items should be required to be in the COLA, rather than the DCD. See Petitioner's Reply at 6.

As recently reaffirmed by the U.S. Court of Appeals for the First Circuit, the NRC may determine generic issues in rulemaking, rather than through litigation in individual cases. See *Massachusetts v. U.S. Nuclear Regulatory Commission*, 522 F.3d 115, 119 (1st Cir 2008). The NRC certifies generic nuclear reactor designs through rulemaking. See 10 C.F.R. Part 52, Subpart B. NC WARN first raised this contention in its Motion to Suspend, and argued that it should not have to file a design-related contention on the Harris COLA until after the DCD rulemaking was complete. See Motion to Suspend at 8. In response, the Commission noted that “[a] specific provision of Part 52, however, allows applicants to reference a certified design that has been docketed *but not approved* [10 C.F.R. § 52.55(c)] and Petitioners may not challenge Commission regulations in licensing proceedings.” (Emphasis added). CLI-08-15 at 3. Contention TC-1 is a challenge to 10 C.F.R. § 52.55(c), and is an impermissible challenge to Commission regulations. On this ground alone, it is inadmissible, and the Licensing Board decision admitting it was in error.

2. Contention TC-1 is inadmissible for failure to comply with 10 C.F.R. 2.309(f)(vi)

In addition to impermissibly challenging Commission rules, the contention is inadmissible because it does not satisfy the requirements of 10 C.F.R. 2.309(f)(1)(vi). The Board attempted to remedy this failure by limiting the contention to NC WARN's list of nine items that the Petitioner wished to see in the COLA, describing the contention as one of omission. LBP-08-21 at 9. However, in order for a contention of omission to be admissible, a Petitioner who believes that an application fails to contain information on a relevant matter required by law must identify each failure, and the supporting reasons for the Petitioner's belief. 10 C.F.R. 2.309(f)(1)(vi). A contention that simply alleges that a matter ought to be considered does not provide the requisite basis for an admissible contention. See *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 346 (1993). The Licensing Board erroneously relieved the Petitioner of its burden to proffer reasons why these items must be included in the COLA. Instead, the Board stated:

We find both Applicant and Staff to have failed to provide information regarding whether or not the asserted information was indeed omitted in the COLA, nor did either provide information indicating whether such allegedly omitted information indeed is required to be in a COLA. Thus, we find Petitioner's asserted omissions to be uncontroverted, and therefore admissible.

LBP-08-21 at 9. (Emphasis in original). It is not the Staff or the Applicant's responsibility to "provide information" as to asserted omissions in a COLA where a Petitioner has not complied with 10 C.F.R. § 2.309(f)(1)(vi) in explaining why it believes missing information is required.

The Licensing Board recognized that some of the asserted omissions do not concern information that would ordinarily be required in a COLA. Again misallocating the Petitioner's responsibilities under 10 C.F.R. § 2.309(f)(1)(vi), the Board stated:

Although certain asserted omissions appear to us to be with respect to information which would not ordinarily be required to be set out in the COLA, in the absence of information or pleadings on that topic, we refer that entire list to the Staff with confidence that Staff will sort out those matters in their consideration in the design certification rulemaking.

LBP-08-21 at 9, n.7. NC WARN failed to set forth reasons for why these nine items must be included in the Harris COLA, in clear contravention of 10 C.F.R. §2.309(f)(1)(vi). The Board instead required the Applicant or Staff to provide information as to why contention TC-1 was inadmissible. Thus, the Licensing Board decision admitting this contention was in error.

NC WARN failed to provide the requisite specificity as to what it wished to litigate. The only regulatory requirement NC WARN referenced was in its reply filing, when it provided citations to 10 C.F.R. § 50.34(a)(4), which states what must be included in a construction permit, and a vague reference to 10 C.F.R. § 2.101, which provides for the filing of applications. See NC WARN Reply at 6. Such vague references do not meet the 10 C.F.R. §2.309(v)(1)(vi) requirement to explain why these alleged omissions are required by law to be addressed.

A petitioner is required to set forth the basis for its contention with enough specificity such that the parties are sufficiently put on notice to know what they have to defend against or oppose. See *Kansas Gas & Electric Co.*, (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34 (1984). Here, Petitioners failed to do so. The nine admitted omissions are extremely vague. For example, it is quite unclear what omission “e,” “Technology Requirements for Heat Removal,” or omission “g,” “Plant Personnel Requirements,” are referencing. If NC WARN had included supporting reasons for its belief as to why each of these items must be included in the Harris COLA, as required by 10 C.F.R. § 2.309(f)(1)(vi), it might have provided the requisite specificity to enable the Staff to either agree that these items should be included but were not, show where they were in fact included, or show why they need not be included. However, the Licensing Board improperly relieved Petitioner of its burden to explain its beliefs as to why these items must be included, and instead placed the onus on the Applicant and Staff to explain why they need not be included in the Harris COLA, in contravention of 10 C.F.R. § 2.309(f)(1)(vi).

Lastly, even if contention TC-1 is viewed a challenge to the DCD, it should not have been held in abeyance because it is not otherwise admissible. In admitting the contention and holding it in abeyance, the Board recites the Commission's decision in LBP-08-15, where the Commission denied the Petitioner's Motion to Suspend. The Board stated that the Commission "directed Petitioner, and, indirectly, this Board that if Petitioner identified specific omissions in the COLA, those omissions should be addressed in a contention to this Board which, in turn, 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." LBP-08-21 at 8, citing CLI-08-15 at 4. However, the Licensing Board misconstrues CLI-08-15. The Board apparently ignored the critical requirement that in order to be admitted and held in abeyance, a contention must be otherwise admissible. For the reasons discussed above, the contention is not admissible because it is an impermissible attack on Commission regulations, and because it fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi). Accordingly, the contention should not have been admitted, and the Petition should have been denied in its entirety. Another Licensing Board recently dismissed a similar contention concerning the AP 1000 DCD, stating:

[I]f [the petitioner] had submitted an *otherwise admissible contention* challenging specific aspects of the Revision 16 design, the Board would refer that contention to the NRC Staff for consideration in the design certification rulemaking, and hold the contention in abeyance. *But [the petitioner] does not adequately identify any aspect of the pending amendment to the AP1000 design with which it takes issue.*

(Emphasis added). *Duke Energy Carolinas, L.L.C.* (William States Lee III Nuclear Station, Units 1 and 2) LBP-08-17, 67 NRC __ (Sept. 22, 2008) (slip op. at 11). NC WARN has not identified a relevant omission, nor shown that a genuine dispute exists with the application. Thus, contention TC-1 is inadmissible.

CONCLUSION

As stated above, the Board erred. Contention TC-1 is a challenge to Part 52; NC WARN has conceded that the admitted alleged omissions are included in the DCD, thus the contention is inadmissible. Contention TC-1 fails to comply with 10 C.F.R. 2.309(f)(1)(vi), and is thus inadmissible. Therefore, the Commission should reverse the Board's ruling admitting contention TC-1, and deny the Petition in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF NOTICE OF APPEAL OF LBP-08-21, MEMORANDUM AND ORDER (RULING ON STANDING AND CONTENTION ADMISSIBILITY), AND ACCOMPANYING BRIEF" has been served upon the following persons by Electronic Information Exchange this 10th day of November, 2008:

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