

November 20, 2008

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))	
_____)	

RESPONSE BY NC WARN IN OPPOSITION TO
NRC STAFF AND PROGRESS ENERGY APPEALS FROM LBP-08-21

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INTRODUCTION

PURSUANT to 10 C.F.R. § 2.311(a), now comes the North Carolina Waste Awareness and Reduction Network, Inc. (“NC WARN”), by and through the undersigned counsel, with a response in opposition to the NRC Staff Notice of Appeal of LBP-08-21, and the Progress Energy’s Appeal of Atomic Safety and Licensing Board’s Decision Admitting NC WARN, both appeals submitted to the Commission on November 10, 2008. Both opposing parties appealed the decision by the Atomic Safety and Licensing Board (“ASLB”) in *Progress Energy Carolina, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 NRC ____ (slip op.) (October 30, 2008).

STATEMENT OF THE CASE

This proceeding concerns the COLA for the proposed Shearon Harris Nuclear Power Plant, Units 2 and 3 (“Harris”) filed pursuant to 10 C.F.R. Part 52 Subpart C by Progress Energy on February 18, 2008.¹ A qualified acceptance of the application for docketing by the NRC was sent to Progress Energy on April 17, 2008.² Notice of hearing and opportunity to petition for leave to intervene was published in 73 F.R. 31899 on June 4, 2008. The COLA incorporates by reference 10 C.F.R. Part 52, Appendix D which includes the Westinghouse AP1000 pressurized water reactor Design Control

¹ The Harris COLA documents are available at www.nrc.gov/reactors/new-reactors/col/harris.html

² ADAMS Accession No. ML081070226.

Document (“DCD”) Revision 16,³ although Revision 16 has subsequently been replaced by Revision 17 as part of the ongoing certification review in NRC Docket No. 52-006.

On June 24, 2008, NC WARN filed a Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration, which was denied by the Commission in Memorandum and Order, CLI-08-15 on July 23, 2008. On August 4, 2008, NC WARN submitted its Petition for Intervention and Request for Hearing (“Petition”).⁴ On August 29, 2008, both the NRC Staff and the applicant, Progress Energy, filed Answers opposing the Petition. On September 5, 2008, NC WARN filed its Reply to those answers. Without hearing oral arguments from the parties, the ASLB issued its Memorandum and Order, LBP-08-21, on October 30, 2008. In its Memorandum and Order, the ASLB only found one contention admissible and as a result, the opposing parties brought interlocutory appeals pursuant to 10 C.F.R. § 2.311(c), which both filed on October 30, 2008.

STATEMENT OF THE ISSUES

In its decision in LBP-08-21, the ASLB properly determined that NC WARN has standing and admitted one of NC WARN's eleven contentions, designated as Contention TC-1.⁵ This contention, presented in full below, alleges that the Harris

³ The AP1000 DCD Revision 16 reference documents are also available at the NRC Harris website cited in footnote 1 herein.

⁴ NC WARN adopts its Petition herein by reference in which it provides the legal basis and factual support for its contentions.

⁵ NC WARN's position is that the ASLB improperly rejected the other ten contentions, although that is a matter not before the Commission at this time.

COLA is incomplete because the final designs and operating procedures for major safety components are omitted. In submitting the contention, NC WARN followed the Commission's directive in CLI-08-15 and raised "claims of deficiencies in a license application." As limited by the ASLB, Contention TC-1 remains an admissible contention pursuant to 10 C.F.R. § 2.309(f)(1) and is not a direct challenge to agency policy or rules. As support for this response, NC WARN adopts herein by reference its other filings in the matter and the ASLB's determinations in LBP-08-21 regarding the admissibility of this contention.

ARGUMENT

Overview. Contention TC-I (AP1000 Certification) is presented in NC WARN's Petition, pages 13 - 18, and reads:

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 for the AP1000 Revision 16 would require changes in Progress Energy's application, the final design and operational procedures. Regardless whether the components are certified or not, the COLA cannot be reviewed without the full disclosure of all designs and operational procedures.

The legal basis and factual support for the contention were provided in the Petition as part of the contention and in the earlier Petition section on legal considerations that impact all contentions.

Included in the support for the contention was a list of items that were not final in the DCD Revision 16 that is part of the COLA by reference. In admitting the contention, the ASLB limited the contention to those specifically asserted omissions from the COLA,

as follows:

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

- a. The design of the reactor containment.
- b. The control room set up and operation decision-making procedures.
- c. Seismic qualifications for various components of the AP 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.

It should be noted that the ASLB appears to have erroneously failed to include the unresolved “sump” problem at the AP1000 reactors and the ability of the reactors to withstand aviation attacks, both of which were specifically asserted in the contention.

The contention was not limited by the ASLB to simply this list of the specific omissions, but these omissions as they were supported by the facts and allegations in the contention. LBP-08-21, at 9. The ASLB determined that these components are required to be included in the COLA.

I. NC WARN followed the Commission’s directive by submitting a contention on the inadequacies of the COLA based on its lack of final design and operating procedures.

As an initial filing in this docket, NC WARN moved on June 24, 2008, to suspend the notice of hearing which was subsequently denied by the Commission in its

Memorandum and Order, CLI-08-15. However, in denying this motion the Commission issued a directive that:

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 the outset of NRC adjudications.

In reaching this position, the Commission cited the Final Policy Statement on the Conduct of New Reactor Licensing Proceedings,⁶ in which it explained the process as follows:

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 design certification rulemaking, and hold that contention in abeyance, if it is otherwise admissible.

In carrying out this directive, the ASLB determined “that Petitioner’s Contention TC-1 was not a challenge to the AP1000 design review process, but rather a challenge to the Application itself.” LBP-08-21, at 8. As determined by the ASLB, NC WARN in Contention TC-1 “set forth facts indicating specific omissions from the COLA that falls within the scenario contemplated by the Commission.” LBP-08-21, at 9.

NC WARN agrees with the ASLB in that the contention challenges the application, rather than the design certification application. In the support section and conclusion in Contention TC-1, NC WARN carefully explained the omissions in the COLA, taking the unresolved designs and operational procedures that have not yet

⁶ 73 FR 20,972 (April 17, 2008).

been finalized in the AP1000 design review process, contending that until those designs and operational procedures were finalized, the COLA was simply not complete.

II. Contention TC-1 remains an admissible contention even as limited by the ASLB to specific omissions in the COLA.

As determined by the ASLB, the contention is admissible in that it meets all the requirements of admissibility in 10 C.F.R. § 2.309(f)(1):

(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 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.

In LBP-08-21 at 6, the ASLB briefly addresses the criteria for admissibility for

contentions but relies by reference to the thorough recitation of relevant case law presented in *Duke Energy Carolinas, LLC* (William States Lee Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC ____ (slip op. at 4-10) (September 22, 2008). In this response, NC WARN also will rely on that recitation.

As stated in the NRC Staff Answer to [Intervention Petition] at page 4, the rule on admissibility of contentions is “strict by design,” but the relevant case law clearly holds that this restriction is not so strict that a contention cannot or should not be admitted. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001). Contrary to the numerous “scattershot” arguments propounded by Progress Energy to eliminate all of the contentions, a variety of contentions have been admitted by ASLBs at a number of the latest rounds of petitions on the adequacies of COLAs. See for example, *Tennessee Valley Authority*, (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC ____ (slip op.) (September 12, 2008). In the present proceeding, the NRC Staff originally requested that another of NC WARN’s contentions was admitted. NRC Staff Answer to [Intervention Petition], August 29, 2008, at 37.

On its face, the Petition meets the admissibility requirements as they relate to the contention *sub judice*. The Petition sets forth with particularity the contention sought to be raised in clear language; Contention TC-1 states unequivocally that the COLA is not complete as many of the most important safety-related design components and operational procedures are not finalized. Contention TC-1 contains a specific statement of the issue of law in both the support section of the contention and in the legal considerations section of the Petition. It provides a brief explanation of the basis for the

omissions in the COLA through a discussion of the explicit and unresolved issues in the DCD. By following the Commission's directive described in Section I above, NC WARN demonstrates that the issue of these particular omissions was clearly in the scope of the proceeding. The final designs and operational procedures are material to the findings the NRC must make to support any licensing decision, i.e., that the final design and operational procedures are sufficient to protect public safety as required by the Atomic Energy Act, 42 U.S.C. §2011 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* On its face, the contention provides a concise statement of the alleged facts, referencing several NRC and Westinghouse documents about the status of the final design for those particular components in the DCD review process. For each of the listed components, the contention identifies each omission directly and provides the supporting reasons for NC WARN's belief that those items are required to be finalized in the COLA.

In LBP-08-21, the ASLB limited the contention to the specifically identified omissions listed above, and then referred them to the Staff for resolution in the design certification rulemaking. Contrary to the arguments made by the opposing parties, the ASLB adopted the basis and support for the contention and did not limit the contention solely to whether those items are somehow mentioned in the COLA, but whether the **final** designs and operational procedures were present. A reference to the containment, as an example, would not be an adequate response to the allegations in the contention, unless the final design for the containment had been made and subsequently adopted by the applicant as part of the COLA. A mere mention in the COLA does not correct the omission.

The primary argument raised by the opposing parties that the contention is not admissible is that the contention does not comply with the requirement in 10 C.F.R. § 2.309(f)(1)(v) that contentions raising omissions need to show that the items are actually required in the COLA. This argument is faulty in that the NRC regulations require a nuclear power plant to be designed and operated to protect public health and safety. To meet this requirement, 10 C.F.R. § 50.34(a)(4) provides that a construction permit application for a nuclear power plant must include:

a preliminary analysis and evaluation of the design and performance of structures, systems, and components of the facility with the objective of assessing the risk to public health and safety resulting from operation of the facility and including determination of the margins of safety during normal operations and transient conditions anticipated during the life of the facility, and the adequacy of structures, systems, and components provided for the prevention of accidents and the mitigation of the consequences of accidents.

The specific items in Contention TC-1 are some of the most important design components and operational procedures necessary to have finalized prior to the analysis and evaluation for the prevention of accidents and the mitigation of their consequences. The opposing parties' arguments ignore the uncontroverted facts that the AP1000 DCD Revision 16 is incorporated by reference in the COLA and that any unresolved issue or uncertified component in the DCD are *de facto* omissions in the COLA. The certification process's only purpose is for review and certification of the design components and operational procedures that necessarily are requirements for the COLA.

Contention TC-1 cites to sections of the DCD and Westinghouse documents that unequivocally demonstrate that these major safety-related components have not been

reviewed or certified by the NRC Staff, and are not final. That these items may be resolved at some unknown time in the future through the AP1000 certification process does not diminish the legal and factual position that the COLA is incomplete now because these nine listed items, and the two additional items erroneously omitted by the ASLB, have not been finalized. However, as recognized by the ASLB, the unresolved issues in the DCD for the AP1000 Revision16 are not only not final, they have been adopted by reference for the proposed Harris reactors and are, as such, they are omissions in the application.

III. Contention TC-1 does not challenge the AP1000 certification rule although it may illustrate the problems with separating design certification and review of COLAs.

The opposing parties argue strenuously that Contention TC-1 is a direct challenge to an agency rule and that without a waiver pursuant to 10 C.F.R. § 2.335, NC WARN cannot raise the issue of whether the COLA is complete. Both opposing parties are attempting to make Contention TC-1 into something that it is not. As described above, the ASLB determined that the contention simply was not a direct challenge to the AP1000 rule making in 10 C.F.R. Part 52, Appendix D. On its face, the contention is clear that it does not challenge the certification process and concludes, that “regardless of whether the reactor components are certified or not at some time in the future, the COLA does not contain the necessary information on major design and operational components. Neither the NRC staff nor Progress Energy knows at this time what the final design will end up being.” Petition, at 18. The contention stands on its own merit, regardless of the current status of the AP1000 certification process.

NC WARN readily admits that Contention TC-1 may highlight some of the problems with the AP1000 certification process and that the current two-track system has led to serious disconnects in timetables, with COLAs, such as the Harris COLA, being reviewed without the finalization of major safety-related design and operational procedures. The various revisions of the AP1000 design, now into Revision 17, have highlighted the lack of clarity in what the final design and operational procedures may be for Harris.

Throughout its Answer, Progress Energy attempts to draw inferences from other motions and filings by NC WARN and other parties that the real purpose of this contention is to challenge the faulty certification review process. Progress Energy's Answer to [Intervention Petition]. Several filings in this docket and others discuss at length the procedural and legality of this serious industry-wide problem.⁷ Without repeating the arguments made in other dockets or other filings, NC WARN believes the present procedure of certifying the designs and operational procedures in one docket while allowing the review of the COLA in another docket has led to the circumstance that Contention TC-1 specifically addresses, i.e., that the Harris COLA is incomplete

⁷ In the present docket, NC WARN has illustrated the unreasonableness of the process in NC WARN's Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration, June 24, 2008; Motion by NC WARN to Allow New Contention, November 13, 2008; and Motion by NC WARN to Hold the Harris Combined License Application Adjudication in Abeyance Pending Completion of Rulemaking on the Standard Design Certification Application for the AP1000 Reactor Design, November 13, 2008. The unlawfulness of the process is being considered in the Texans For a Sound Energy Policy's Petition to Hold Docketing Decision And/or Hearing Notice For Victoria Combined License Application in Abeyance Pending Completion of Rulemaking on Design Certification Application For Economically Simplified Boiling Water Reactor, November 3, 2008; and the AP1000 Oversight Group's Response to the TSEP Petition, November 18, 2008.

and cannot be reviewed because major design components and operational procedures are not final. As a result, the Commission cannot meet its fundamental mandates of protecting public health and safety.

CONCLUSION

In light of the above, NC WARN prays that the Commission upholds the determination by the ASLB in LBP-08-21 that this contention is admitted and that a hearing on this contention is held in due course. If the Commission deems it appropriate, NC WARN would like the opportunity to present oral arguments on this matter.

Respectfully submitted this the 20th day of November 2008.

_____/s/jr_____
John D. Runkle
Attorney at Law
Post Office Box 3793
Chapel Hill, N.C. 27515-3793
919-942-0600
jrunkle@pricecreek.com

CERTIFICATE OF SERVICE

I hereby certify that copies of this RESPONSE BY NC WARN IN OPPOSITION TO NRC STAFF AND PROGRESS ENERGY APPEALS FROM LBP-08-21 was served on the following via email and via the EIE system:

Office of the Secretary
Office of the Secretary
ATTN: Docketing and Service
Mail Stop 0-16C1
US Nuclear Regulatory Commission
Washington, DC 20555-0001
hearingdocket@nrc.gov

Dr. Paul B. Abramson, Chairman
Dr. Michael F. Kennedy
Dr. William E Kastenbergl
Atomic Safety & Licensing Board
Mail Stop – T-3 F23
US Nuclear Regulatory Commission
Washington, DC 20555-0001
paul.abramson@nrc.gov
michael.kennedy@nrc.gov
william.kastenbergl@nrc.gov

Sara E. Brock
Adam S. Gendelman
Office of the General Counsel
Mail Stop O-15 D21
US Nuclear Regulatory Commission
Washington, DC 20555-0001
sara.brock@nrc.gov
adam.gendelman@nrc.gov

Manny Comar
Site Safety Project Manager
US Nuclear Regulatory Commission
Washington, DC 20555-0001
manny.comar@nrc.gov

John H. O'Neill, Jr
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037
John.O'Neill@Pillsburylaw.com

David T. Conley
Associate General Counsel
Legal Department
Progress Energy Service Company LLC
411 Fayetteville Street, PEB 17
Raleigh, NC 27602-1551
dave.conley@pgnmail.com

Diane Curran
Harmon, Curran Spielberg & Eisenberg LLP
1726 M Street NW, Suite 600
Washington, D.C. 20036
dcurran@harmoncurran.com

Louis S. Watson, Jr.
N.C. Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325
swatson@ncmail.net

Florence P. Belser
S.C. Office of Regulatory Staff
1441 Main Street, Suite 300
Columbia, SC 29201
fbelser@regstaff.sc.gov

This is the 20th day of November 2008.

_____/s/jr_____
John D. Runkle, Attorney at Law