

November 24, 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))	

**PROGRESS RESPONSE TO
THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK
SECOND MOTION TO HOLD PROCEEDING IN ABEYANCE**

Pursuant to 10 C.F.R. § 2.323(c), Progress Energy Carolinas, Inc. (“Progress”) submits this response to the *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* (“Second Stay Motion”) filed by North Carolina Waste Awareness and Reduction Network (“NC WARN”) on November 13, 2008. The Commission should deny the Second Stay Motion because it is impermissible, untimely, and fails to address or satisfy the requirements for a motion to stay.

BACKGROUND

On February 18, 2008, Progress submitted an application for a Combined Construction Permit and Operating License Application (“COLA”) for two Westinghouse AP1000 pressurized water reactors at the Shearon Harris Nuclear Power Plant (“Harris”) site.¹ On June 4, 2008, the NRC published a Notice of Hearing and Opportunity to Petition for Leave to Intervene.² On

¹ Harris Units 2 and 3 Combined License Application (Rev. 0, Feb. 18, 2008), transmittal letter available at ADAMS Accession No. ML080580078. Entire COLA available at <http://www.nrc.gov/reactors/new-reactors/col/harris.html>.

² 73 Fed. Reg. 31,899 (June 4, 2008) (“Notice of Hearing”).

June 23, 2008, NC WARN filed a motion to suspend the Notice of Hearing until after the completion of the rulemaking on the AP1000 Rev. 16.³ The Commission denied NC WARN's Motion to Suspend in an order issued on July 23, 2008.⁴

On August 4, 2008, NC WARN filed a Petition for Intervention and Request for Hearing, which included a request for reconsideration of CLI-08-15.⁵ The Commission denied NC WARN's request for reconsideration on September 11, 2008.⁶ NC WARN's Petition for Intervention also included Contention TC-1, which incorporates by reference the Motion to Suspend and makes essentially the same arguments.⁷ On October 30, 2008, the Atomic Safety and Licensing Board ("Board") issued an order granting NC WARN standing to participate in the proceeding, rejecting ten of NC WARN's eleven contentions, and referring a narrowed version of Contention TC-1 to the NRC Staff for review as part of the AP1000 DC Amendment Rulemaking.⁸ On November 10, 2008, both Progress and the NRC Staff filed appeals of LBP-08-21 with the Commission,⁹ arguing that the Petition for Intervention should have been wholly denied and the Board direction was inconsistent with the Commission direction in CLI-08-15 and the Final Policy Statement on the Conduct of New Reactor Licensing Proceedings ("Final

³ Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration (June 23, 2008) ("Motion to Suspend").

⁴ Memorandum and Order, CLI-08-15, 68 N.R.C. ___, slip op. (July 23, 2008) ("CLI-08-15").

⁵ Petition For Intervention And Request For Hearing By The North Carolina Waste Awareness And Reduction Network (Aug. 4, 2008) ("Petition for Intervention").

⁶ Commission Order (Sept. 11, 2008) ("September 11, 2008 Order").

⁷ Petition for Intervention at 13-18.

⁸ Memorandum and Order (Ruling on Standing and Contention Admissibility), LBP-08-21, 68 N.R.C. ___, slip op. (Oct. 30, 2008) ("LBP-08-21").

⁹ Progress Energy's Appeal of the Atomic Safety and Licensing Board's Decision Admitting the North Carolina Waste Awareness and Reduction Network (Nov. 10, 2008) ("Progress Appeal"); NRC Staff Notice of Appeal of LBP-08-21: Memorandum and Order (Ruling on Standing and Contention Admissibility), and Accompanying Brief (Nov. 10, 2008) ("Staff Appeal").

New Reactor Hearing Policy”).¹⁰ On November 13, 2008, NC WARN filed its Second Stay Motion now before the Commission.

On November 20, 2008, NC WARN filed a response in opposition to the Progress Appeal and Staff Appeal.¹¹ The Second Stay Motion and the Appeals of LBP-08-21 relate to differing aspects of CLI-08-15 and the Commission’s policy that the design certification rulemaking and Harris COLA adjudication can proceed in parallel.¹² The Progress Appeal discusses when specific contentions should be held in abeyance; the Second Stay Motion requests that the entire proceeding be held in abeyance; both are aspects of the matters resolved by CLI-08-15.¹³

¹⁰ LBP-08-21, slip op. at 1-2 & 5-9, *citing* Final Policy Statement on the Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963 (Apr. 17, 2008) & CLI-08-15.

¹¹ Response by NC WARN in Opposition to NRC Staff and Progress Energy Appeals from LBP-08-21 (Nov. 20, 2008) (“NC WARN Appeal Response”).

¹² The NC WARN Appeal Response incorrectly states that both Progress and the Staff argue that Contention TC-1 is a challenge to the AP1000 DC Rule. NC WARN Appeal Response at 10. While the Staff Appeal so argues, Progress believes that LBP-08-21 narrowed the scope of Contention TC-1 in two ways. First, it limited Contention TC-1 to nine specific alleged omissions. Second, it concluded that Contention TC-1 as admitted does not apply to issues resolved in the AP1000 DC Rule. Therefore, the Progress Appeal addresses only issues within the scope of the AP1000 DC Amendment Rulemaking. Progress Appeal at 4. Furthermore, NC WARN suggested oral argument in its Appeal Response. Because the issues on appeal and those raised in NC WARN’s Second Stay Motion address two related aspects of the same policy, if the Commission in its discretion concludes that oral argument would be helpful, Progress respectfully suggests that the scope of such argument should encompass both the Appeals and the Second Stay Motion.

¹³ In addition, both Progress and the Staff argue in their Appeals that Contention TC-1 should be dismissed because it is impermissibly vague. *See* Progress Appeal at 9 n.23 & 17 n. 29; Staff Appeal at 8. The NC WARN Appeal Response further illustrates that Contention TC-1 is vague because it alleges that for the first time a new interpretation of Contention TC-1. NC WARN now contends that Contention TC-1 cannot be resolved by finalizing the design certification amendment rulemaking, alleging:

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.

NC WARN Appeal Response at 8. As now formulated by NC WARN, Contention TC-1 is a challenge to the Commission direction that once contentions are resolved in rulemaking, the contention must be denied in the licensing proceeding. CLI-08-15 at 4; *see also* Final New Reactor Hearing Policy, 73 Fed. Reg. at 20,972. Also, the new interpretation challenges the finality provisions of the AP1000 DC Rule. The AP1000 DC Rule requires that resolution of a matter in the AP1000 DC Rule precludes challenges to its alternatives. 10 C.F.R. Part 52, App. D, § VI.A. Therefore, “mere mention” of an issue in the COLA does resolve the matter and precludes further challenges without needing the applicant to “subsequently adopt” the resolution. As illustrated by the NC WARN Appeal Response, the nature of Contention TC-1 continues to evolve with each of NC WARN’s interpretations and is too vague to state an issue of law or fact to be controverted as required by 10 C.F.R. § 2.309(f)(1)(i).

ARGUMENT

I. The Second Stay Motion is Impermissible and Untimely

NC WARN requests that the Commission reconsider CLI-08-15.¹⁴ The Commission should deny the Second Stay Motion because NC WARN's request for reconsideration is both impermissible and untimely. In CLI-08-15, the Commission denied NC WARN's Motion to Suspend. As noted above, NC WARN filed a request for reconsideration with its Petition to Intervene, and the Commission dismissed that request as procedurally defective in its September 11, 2008 Order. Neither Commission precedent, regulations, nor common sense allows for NC WARN to have yet a third bite at the apple. Even if this were not an impermissible second request for reconsideration, it still fails for two reasons. First, 10 C.F.R. § 2.323(e) makes clear that requests for reconsideration may only be filed upon leave of the Commission. NC WARN's failure to request leave to file in its first request for reconsideration led, in part, to its denial,¹⁵ and again NC WARN has failed to seek leave to file such a request. Second, 10 C.F.R. § 2.323(e) requires that a motion for reconsideration be filed within 10 days of issuance of the order to be reconsidered. Because the Commission issued CLI-08-15 on July 23, 2008, NC WARN's latest request for reconsideration is clearly untimely. As the motion for reconsideration must be denied, so too must the remainder of the Second Stay Motion, because, as is discussed below, the Second Stay Motion does not make the extraordinary showing warranting revisiting the sound Commission decision in CLI-08-15.

II. The Second Stay Motion Does Not Meet the Requirements for a Stay

Stay requests are addressed in 10 C.F.R. § 2.342. Although the regulations in this section contemplate a stay pending filing of, and a decision on, a petition for review, they provide useful

¹⁴ Second Stay Motion at 2.

¹⁵ See September 11, 2008 Order at 1.

guidance on the demonstration required by a petitioner in order to prevail. 10 C.F.R. § 2.342(e) establishes a four-fold test for ruling on applications for stay:

- 1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

“At the least, one seeking a stay bears the burden of marshalling the evidence and making the arguments which demonstrate his entitlement to it.”¹⁶ NC WARN makes no effort to address these factors. The Second Stay Motion fails to demonstrate NC WARN’s entitlement to a stay.

A. The Second Stay Motion Makes No Showing That NC WARN Is Likely to Prevail on the Merits

1. The Second Stay Motion Must Be Denied Because CLI-08-15 Is Controlling Precedent

As discussed above, this is the second time that NC WARN has filed a motion to suspend the Harris COLA proceeding until the completion of the design certification rulemaking; the Commission denied NC WARN’s first motion for this relief in CLI-08-15. To support the Second Stay Motion, NC WARN references arguments made by the Texans for a Sound Energy Policy (“TSEP”) in their petition to hold the Victoria County Station hearing notice in abeyance.¹⁷ Both NC WARN’s Second Stay Motion and the TSEP Petition that it references make arguments that NC WARN either raised or could have raised in its original Motion to Suspend. The Commission does not lightly revisit an order issued.¹⁸ Commission policy does

¹⁶ *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-395, 5 N.R.C. 772, 785 (1977).

¹⁷ 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 (Nov. 3, 2008) (“TSEP Petition”).

¹⁸ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 2), CLI-80-41, 12 N.R.C. 650, 652 (1980) (reconsidering a prior decision because the Staff newly identified significant policy issues); *see generally* U.S.

not countenance requests for reconsideration based on arguments that were or should have been raised earlier.¹⁹ The Harris COLA proceeding is governed by CLI-08-15, clearly establishing that the Final New Reactor Hearing Policy governs this specific adjudication and is controlling precedent in this proceeding. Regardless of whether the Commission decides to apply the policy in other proceedings, CLI-08-15 requires that the Final New Reactor Hearing Policy applies in this one. Because NC WARN has argued nothing new in its Second Stay Motion or by referencing the TSEP Petition, the Commission's denial of NC WARN's Motion to Suspend in CLI-08-15 warrants denial of the Second Stay Motion also.

2. Arguments Made in the TSEP Petition are Unpersuasive, Incorrect, and Inapplicable to the Harris Proceeding

In its Second Stay Motion, NC WARN asserts that the arguments made in the TSEP Petition are compelling, and it urges the Commission to consider those arguments in support of the Motion. Regardless of the merits of TSEP's arguments in the Victoria County Station COLA proceeding, they are not persuasive in this case. Therefore, NC WARN has not made a showing that it is likely to prevail on the merits by simply referencing the TSEP Petition; and it has failed to demonstrate a basis for a stay in this proceeding.

Many of TSEP's arguments make specific factual assertions about the ESBWR. Such arguments are simply inapplicable to the Harris COLA proceeding, because Progress has applied to build two AP1000 reactors. The AP1000 is an entirely different technology from the ESBWR.

Department of Energy, et al. (Clinch River Breeder Reactor Plant), CLI-82-8, 15 N.R.C. 1095, 1097 (Statement by Commissioner Asselstine) (1982).

¹⁹ "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, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-02-1, 55 N.R.C. 1, 2 (2002) (footnote omitted).

Other arguments in the TSEP Petition assert that it is unlawful for a COLA to reference an “uncertified” design. These arguments are both incorrect and inapplicable to the Harris COLA proceeding. Commission regulations specifically allow an applicant to reference a docketed design application.²⁰ Thus, a docketed design application is treated like a certified design, except that the applicant bears the risk that the ultimate design certification rule may differ from the design application. In any case, arguments relating to an “uncertified” design are inapplicable to this proceeding because the Harris COLA references a certified design – the AP1000.²¹ The AP1000 DC Rule is issued.²² The AP1000 DC Amendment Rulemaking is docketed and only some changes to the certified design are pending. The recent Revision 17 Submittal Letter does not impact the docketing. Nothing stated in transmitting Revision 17 asks for a new docket under 10 C.F.R. § 2.815. Specifically, the letter states the opposite: “Westinghouse looks forward to continued NRC progress reviewing the amendment to the AP1000 Design Certification Rule, as well as the successful generation of the NRC Final Safety Evaluation Report.”²³ NC WARN apparently asserts that any request for an amendment to a design certification, and further, even just a change to the amendment request, requires that the entire design be treated as uncertified, just as if a new design certification application has been requested. Such an argument flies in the face of the 2007 revision to Part 52 to allow amendments to a certified design.²⁴

²⁰ 10 C.F.R. § 52.55(c).

²¹ See 10 C.F.R. Part 52, App. D.

²² Final Rule, AP1000 Design Certification, 71 Fed. Reg. 4,464 (Jan. 27, 2006) (“AP1000 DC Rule”).

²³ Letter from Robert Sisk, Manager Licensing and Customer Interface, Regulatory Affairs and Standardization, Westinghouse, to U.S. Nuclear Regulatory Commission (Sept. 22, 2008) at 3 (ADAMS No. ML082800315) (“Revision 17 Submittal Letter”).

²⁴ 10 C.F.R. § 52.63(a)(1); see also *Final Rule, Licenses, Certifications, and Approvals for Nuclear Power Plants*, 72 Fed. Reg. 49,352 (Aug. 28, 2007).

3. Simultaneous COLA Adjudications and Design Certification Rulemakings Are Lawful

NC WARN argues in the Second Stay Motion that conducting COLA adjudications and design certification rulemakings in parallel is unlawful.²⁵ The regulations in 10 C.F.R. Part 52 which require separate and simultaneous proceedings for COLA adjudications and design certification rulemakings, however, are entirely lawful. As the First Circuit Court of Appeals recently affirmed in *Massachusetts v. U.S. Nuclear Regulatory Commission*, the Commission has the authority to determine which issues should be decided in a rulemaking and which in an adjudication.²⁶ Those contentions that are clearly within the scope of an ongoing general design certification rulemaking or amendment rulemaking are properly referred to the appropriate rulemaking. Whether the contentions should be held in abeyance, dismissed, or dealt with via some other procedure formulated to achieve a fair process for each proceeding is within the discretion of the Commission. For this proceeding, CLI-08-15 requires that contentions within the scope of the AP1000 DC Amendment Rulemaking be referred to the Staff, and NC WARN has not provided any basis to revisit CLI-08-15.²⁷

B. Denying the Second Stay Motion Would Not Irreparably Injure NC WARN, But Granting the Second Stay Motion Would Harm the Other Parties and the Public Interest

NC WARN has not satisfied the remaining criteria for a stay, because the Second Stay Motion does not show that NC WARN would be irreparably harmed were the Commission to deny it. Indeed, granting the Second Stay Motion would harm Progress and the precedent would

²⁵ Second Stay Motion at 2.

²⁶ 522 F.3d 115, 119 (1st Cir. 2008).

²⁷ Progress, however, notes that CLI-08-15 as interpreted by the Board in LBP-08-21 is inconsistent with the regulations in Part 52 and the Final New Reactor Hearing Policy. As argued in the Progress Appeal, contentions raising issues related to the site-specific Design Control Document required to be provided in a COLA should be adjudicated in that COLA proceeding. Progress Appeal at 7.

be a fatal blow to the public interest in a predictable and efficient licensing process for vital new and clean baseload electric generating plants.

NC WARN states that failure to grant a stay makes it nearly impossible for NC WARN to participate in the Harris COLA proceeding,²⁸ but it makes no effort to explain why this would be the case. In any event, the burden of participating in litigation is not the type of harm that can form the basis for a stay.²⁹ Because the only harm that NC WARN alleges is the burden of participating in the proceeding, NC WARN has not alleged irreparable harm as basis for a stay. Further, a review of the proceeding thus far belies this assertion. As noted above, NC WARN has been making the same arguments found in the Second Stay Motion since June 24, 2008. Nevertheless, NC WARN filed a Petition for Intervention and has also been participating in the AP1000 DC Amendment Proceeding.³⁰ It seems that parallel proceedings *per se* are not precluding NC WARN from participating.

In contrast, granting a stay would substantially harm Progress and would not be in the public interest. As Progress argued in response to NC WARN's Motion to Suspend, staying the Harris COLA proceeding until completion of the AP1000 DC Amendment Rulemaking would contradict the Commission's policy that "applicants for a license are . . . entitled to a prompt resolution of disputes concerning their applications."³¹ Granting a stay in this proceeding would not only harm Progress but also would set a precedent harming all applicants who rely on the procedures set forth in 10 C.F.R. Parts 2 and 52, the Final New Reactor Hearing Policy, and the

²⁸ Second Stay Motion at 2.

²⁹ *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-11, 55 N.R.C. 260, 263 (2002).

³⁰ *See, e.g., NRC Summary of Public Meeting on Westinghouse AP1000 Design Control Document Revision 17 at Rockville, Maryland, September 17, 2008* (Sept. 23, 2008), Enclosure 3 (ADAMS Accession No. ML082660334) (attendance list identifying Jim Warren of NC WARN participating by telephone (although incorrectly stating he is associated with Westinghouse)).

³¹ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 19 (1998).

schedules set by the NRC Staff to license new reactors. The public interest would also be harmed by granting a stay of the Harris COLA proceeding, given the demonstrated need for power in North Carolina which Harris Units 2 and 3 will help to alleviate.³²

Because NC WARN has not demonstrated that it meets the four-factor test for granting a stay in 10 C.F.R. § 2.342(e), it has failed to demonstrate that it is entitled to the stay it seeks.

CONCLUSION

For the reasons stated above, the Commission should deny the Second Stay Motion.

Respectfully submitted,

/Signed electronically by John H. O'Neill, Jr./

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³² See Harris COLA, Part 3, § 8.4.1.

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Carolina Power & Light Company)	Docket Nos. 52-022 COL
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CERTIFICATE OF SERVICE

I hereby certify that “Progress Response to NC WARN’s Second Motion to Hold Proceeding in Abeyance,” dated November 24, 2008, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 24th day of November 2008.

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