

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	Docket Nos. 52-022-COL
Progress Energy Carolinas, Inc.)	52-023-COL
)	
Shearon Harris Nuclear Power Plant, Units 2 and 3)	ASLBP No. 08-868-04-COL
)	

**PROGRESS RESPONSE OPPOSING THE MOTION BY
THE NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK
FOR LEAVE TO FILE A NEW CONTENTION**

Pursuant to the Atomic Safety and Licensing Board (“ASLB” or “Board”) November 19, 2008 Order,¹ Progress Energy Carolinas, Inc. (“Progress”) hereby responds to the North Carolina Waste Awareness and Reduction Network (“NC WARN”) November 13, 2008 Motion² for leave to file new Contention TC-7. For the reasons discussed below, the Board should deny the NC WARN TC-7 Motion.

I. Background

This proceeding involves the application, submitted by Progress on February 18, 2008, for a combined license to construct and operate two Westinghouse AP1000 pressurized water reactors at Harris (the “Application” or “COLA”).³ On August 4, 2008, NC WARN filed its Petition for Intervention and Request for Hearing (“NC WARN Hearing Petition”). On October 30, 2008, the Board in the above captioned proceeding admitted one contention (TC-1).⁴ The

¹ *Order* (Scheduling Order for Responses to Late-Filed Contentions) (Nov. 19, 2008) (“Late-Filed Contention Order”).

² *Motion By NC WARN to Allow New Contention* (Nov. 13, 2008) (“NC WARN TC-7 Motion”).

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

⁴ *Memorandum and Order* (Ruling on Standing and Contention Admissibility), LBP-08-21, 68 N.R.C. ___, slip op. (Oct. 30, 2008) (“LBP-08-21”).

Board referred Contention TC-1 to the U.S. Nuclear Regulatory Commission Staff (“Staff”) for further review in the rulemaking to amend the AP1000 design certification,⁵ and held any hearing on Contention TC-1 in abeyance pending such further review. On November 10, 2008, the Staff and Progress each appealed LBP-08-21 to the Commission.⁶ On November 20, 2008, NC WARN replied to those appeals.⁷

On November 13, 2008, NC WARN filed the NC WARN TC-7 Motion that primarily discusses Contention TC-7 as new contention, incorporating related past NC WARN filings by reference but also requests the Board grant NC WARN leave to file Contention TC-7. Contention TC-7 relates to the completeness of the AP1000 design similar to admitted Contention TC-1. NC WARN states, “The new contention, designated as TC-7, adopts the arguments of the admitted contention but it should be noted that the new contention, although similar, covers new ground.” NC WARN TC-7 Motion at 4. Also, in one paragraph, NC WARN provides conclusory statements intended to demonstrate that the Board should grant leave to file Contention TC-7. NC WARN TC-7 Motion at 3. This response addresses that request for leave to file Contention TC-7.⁸

II. Legal Standards for Considering Late-Filed Contentions

The Late-Filed Contention Order provides, among other things, that a motion for leave to file late-filed contentions must address both (1) the factors for late-filed contentions under 10

⁵ *Westinghouse Electric Co.; Acceptance for Docketing of A Design Certification Rule Amendment Request for the AP1000 Design*, Docket 52-006, 73 Fed. Reg. 4,926 (Jan. 28, 2008) (“AP1000 DC Amendment Rulemaking”).

⁶ *NRC Staff notice of Appeal of LBP-08-21, Memorandum and Order (Ruling on Standing and Contention Admissibility), and Accompanying Brief* (Nov. 10, 2008) and *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).

⁷ *Response by NC WARN in Opposition to NRC Staff and Progress Energy Appeals from LBP-08-21* (Nov. 20, 2008).

⁸ Under the Board’s November 19 Order, the admissibility of Contention TC-7 will be addressed only if the Board grants leave for NC WARN to file the new contention. Late-Filed Contention Order at 2.

C.F.R. § 2.309(f)(2);⁹ and (2) the factors for nontimely filings pursuant to 10 C.F.R. § 2.309(c).¹⁰ Order at 1-2. Progress concurs that addressing all eleven factors is the correct standard to apply when evaluating a late-filed contention – that the late-filed contention must meet the three admissibility criteria contained in 10 C.F.R. § 2.309(f)(2) and the eight criteria contained in 10 C.F.R. § 2.309(c).

In *Florida Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant Units 1 and 2, *et al.*), CLI-06-21, 64 N.R.C. 30, 33 (2006), the Commission held that, for petitioners who have missed the initial intervention deadline, their untimely filed contentions would have to meet the criteria contained in both 10 C.F.R. §§ 2.309(f)(2) and 2.309(c). The Commission has also held that both regulations apply when considering the admissibility of purportedly material information in support of a contention that that was first submitted as part of a reply pleading to an initial intervention petition. *Louisiana Energy Services, L.P.* (National Enrichment Facility),

⁹ 10 C.F.R. § 2.309(f)(2) provides in relevant part:
contentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that--
(i) The information upon which the amended or new contention is based was not previously available;
(ii) The information upon which the amended or new contention is based is materially different than information previously available; and
(iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

¹⁰ The eight criteria contained in 10 C.F.R. 2.309(c)(1) to evaluate nontimely filings are:
(i) Good cause, if any, for the failure to file on time;
(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

CLI-04-25, 60 N.R.C. 223, 224 (2004) (“*LES*”) (the initial petition was timely filed, but the supporting material filed in support of the contention was not). There, the Commission held that the ““untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), [could not] be considered in determining the admissibility of their contentions.”” *Id.* (quoting *LES*, LBP-04-14, 60 N.R.C. 40, 58 (2004)) (emphasis added). The Commission has since expanded its ruling in the *LES* proceeding by holding that, “[n]ew bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. § 2.309(c), (f)(2).” *Nuclear Management Company, LLC* (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. 727, 732 (2006) (emphasis added); *see also, Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 N.R.C. 241, 256-60 (2008) (considering the admissibility of documents relating to petitioner’s standing and certain contentions under both 10 C.F.R. §§ 2.309(f)(2) and 2.309(c)).

Progress submits that the Commission’s holding in *Palisades* should apply to this proceeding. Otherwise, a contention that meets the criteria set forth in 10 C.F.R. § 2.309(f)(2) could be admitted into the proceeding even though a balance of the factors contained in 10 C.F.R. § 2.309(c) might weigh against admitting the contention. For example, the 10 C.F.R. § 2.309(f)(2) criteria do not consider whether other means are available to protect the petitioner’s interest, the extent to which the petitioner’s interests will be represented by other parties, or the extent to which admitting the contention might broaden the issues or delay the proceeding. *See* 10 C.F.R. § 2.309(c)(1)(v)-(vii). In this proceeding, Progress has referenced the AP1000 DC Rule¹¹ and the AP1000 DC Amendment Rulemaking in its COLA. Therefore, it is logical and

¹¹ *Design Certification Rule for the AP1000 Design*, 10 C.F.R. Part 52, App. D (“AP1000 DC Rule”).

sensible that NC WARN should explain whether a petition for rulemaking (10 C.F.R. §§ 2.801 *et seq.*) related to the AP1000 DC Rule or participation in the AP1000 DC Amendment Rulemaking are adequate to protect its interests, rather than leaving it for the other Parties and the Board to speculate.

Other licensing boards have addressed the question of how to apply these regulations to contentions filed after the deadline for initial intervention petitions, with differing results. *See, e.g., Shaw Areva MOX Services* (Mixed Oxide Fuel Fabrication Facility) LBP-07-14, 66 N.R.C. 169, 210 n. 95 (2007) (issuing a scheduling order stating that petitioners whose original petition was timely and have demonstrated their standing need only demonstrate that a late-filed contention complies with § 2.309(f)(2));¹² *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 N.R.C. 568, 571-575 (2006) (espousing in dicta that a crabbed reading of 10 C.F.R. § 2.309(f)(2)(iii) need not be reconciled with the plain language of 10 C.F.R. § 2.309(b)); *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-11, 63 N.R.C. 391, 396 n.3 (2006) (opining in dicta that only a contention that fails to satisfy 10 C.F.R. § 2.309(f)(2)(iii) is untimely and, therefore, must satisfy 10 C.F.R. § 2.309(c)(1)); *Vermont Yankee*, LBP-05-32, 62 N.R.C. 813, 821 & n. 21 (2005) (stating in dicta that applying the Commissions regulations is “neither logical nor sensible”). Progress reads this Board’s Late-Filed Contention Order as adopting the plain language of the NRC Rules of Practice (10 C.F.R. Part 2) and Commission precedents.

¹² In that proceeding to date, the late-filed contention were not admitted for reasons other than timeliness; therefore, the scheduling order is arguably dicta. *Mixed Oxide Fuel Fabrication Facility*, LBP-08-11, 67 N.R.C. __, slip op. (June 27, 2008).

Notwithstanding the dicta of other boards, Progress respectfully submits that that the Commission's decision in *Palisades* should apply to this proceeding.¹³

Progress agrees that proposed Contention TC-7 should be evaluated under the late-filed criteria contained in both 10 C.F.R. §§ 2.309(c) and 2.309(f)(2). Only if the proposed contention meets both standards should the Board grant leave to file Contention TC-7. As discussed below, NC WARN TC-7 Motion should be rejected because it does not meet the criteria in 10 C.F.R. §§ 2.309(c) or 2.309(f)(2).

III. Contention TC-7 is not timely under 10 C.F.R. § 2.309(f)(2)

Proposed Contention TC-7 fails to meet the late filed admissibility criteria under 10 C.F.R. § 2.309(f)(2). First, the information that is the basis of the NC WARN TC-7 Motion was previously available. At the very least, NC WARN has made no effort to allege with specificity what information is new. Second, NC WARN has not demonstrated that any information in AP1000 DC Revision 17 is a material difference. Third, NC WARN has not discussed, let alone justified, its delay of at least six weeks between the Revision 17 Submittal Letter¹⁴ and the filing of the NC WARN TC-7 Motion.

A. The Information That Is The Basis Of The NC WARN TC-7 Motion Was Previously Available

Contention TC-7 is purportedly based on the Revision 17 Submittal Letter.¹⁵ As NC WARN readily admits, much of the content of Revision 17 was previously available as a

¹³ The Commission has not ruled on the positions espoused by the other boards noted in this section.

¹⁴ Letter from Robert Sisk, Manager Licensing and Customer Interface, Regulatory Affairs and Standardization, Westinghouse, to U.S. Nuclear Regulatory Commission (Sept. 22, 2008) (ADAMS No. ML082800315) (“Revision 17 Submittal Letter”). NC WARN cites an incorrect ADAMS number (the number NC WARN cites is for an August 21, 2008 Westinghouse letter) and incorrectly alleges that the document was not available until October 17, 2008. NC WARN TC-7 Motion at 3 & n. 1. The Revision 17 Submittal Letter was available on ADAMS on October 6, 2008.

¹⁵ NC WARN TC-7 Motion at 3.

Westinghouse topical report.¹⁶ NC WARN TC-7 Motion at 5-6. Not only was TR-134 referenced in the COLA,¹⁷ the planned submittal of Revision 17 was discussed by the NRC during a public meeting on June 10, 2008 on the scope of the environmental review.¹⁸ NC WARN has made no effort to differentiate between the information publicly available before it filed the NC WARN Hearing Petition and the information in the Revision 17 Submittal Letter. NC WARN has failed to show what information was not previously available and has not demonstrated compliance with 10 C.F.R. § 2.309(f)(2)(i).

B. NC WARN Has Not Demonstrated That Any New Information In Revision 17 Is Material

NC WARN does not specifically identify how this “new information” is materially different. NC WARN makes only a broad conclusory statement. “This is new information that is materially different from earlier submittals by Westinghouse as those relate to the AP1000 DCD Revision 16 that has been adopted as part of the Harris COLA.” NC WARN TC-7 Motion at 3. Simply asserting the information is materially different is not sufficient. NC WARN fails to identify any different specific information discussed in the Revision 17 Submittal Letter, let alone assert in any way what differences are material.¹⁹ In support of Contention TC-7, NC

¹⁶ AP 1000 DCD Impacts to Support COLA Standardization, Rev. 3, ADAMS No. ML080220389, or Rev. 5, ADAMS No. ML081850550 (“TR-134”).

¹⁷ “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 No. ML080580078.

¹⁸ Shearon Harris Combined License Application Public Scoping Meeting (Afternoon Session), Transcript of June 10, 2008 at 90 (ADAMS No. ML087190250).

¹⁹ In addition to the Revision 17 Submittal Letter, additional description of the changes were described by Westinghouse in a public meeting on September 17, 2008 with the NRC. Westinghouse summary of Revision 17 Submittal Letter, ADAMS No. ML082660365 (“Sept. 17 Meeting Slides”). While NC WARN does not reference this meeting, NC WARN apparently attended the meeting. *Summary of Public Meeting On Westinghouse AP1000 Design Control Document Revision 17 At Rockville, Maryland*, Encl (3), ADAMS No. ML082660334

WARN provides a laundry list of items that are in Revision 17, stating, “the uncertified components specifically addressed in Revision 17, include turbine design changes, physical security, human factors engineering, responses to seismic activities and adverse weather conditions, radiation protection measures, technical specifications for valves and piping, accident analyses, and aircraft impact.”²⁰ NC WARN TC-7 Motion at 6. This partial laundry list of subjects covered in Revision 17 does not support the argument that the changes made in Revision 17 are in any way material. In fact, some of the changes are editorial. “These editorial changes include typographical errors and consistency reconciliations.” Revision 17 Submittal Letter at 3. Such editorial changes can not make a material difference. Progress has no obligation to speculate about what aspects of the Revision 17 Submittal Letter NC WARN thinks are material differences. Because NC WARN has not identified any specific material difference, NC WARN has not shown compliance with 10 C.F.R. § 2.309(f)(2)(ii).

C. NC WARN Has Not Justified Delaying Its Filing Until After The Board Ruled On Contentions

NC WARN does not address whether its filing was timely. NC WARN does not provide any explanation of its dilatoriness in filing Contention TC-7; although it had the information probably as early as September 17 and admits to having it by October 3, NC WARN waited approximately two weeks after the Board had ruled on the NC WARN Hearing Petition to submit Contention TC-7. NC WARN acknowledges that it has not reviewed the content of

(attendance list identifying Jim Warren of NC WARN participating by telephone (although incorrectly stating he is associated with Westinghouse)).

²⁰ While NC WARN asserts this is a list of “uncertified” components -- which Progress assumes means Tier 2 items -- in fact, several of the items on NC WARN’s laundry list, including human factors engineering and response to adverse weather conditions also include changes to Tier 1 items. Sept. 17 Meeting Slides at 7. In addition, it is reasonable to assume that the NC WARN laundry list is derived is from the Sept. 17 Meeting Slides rather than the Revision 17 Submittal Letter because, except for piping design and human factors engineering, the Revision 17 Submittal Letter describes the changes generically.

Revision 17 in the AP1000 DC Amendment Rulemaking.²¹ If NC WARN is claiming the new information is the content of Revision 17, that information was not readily available to the public before November 20, 2008 and cannot be the basis for Contention TC-7. On the other hand, if NC WARN believes the existence of Revision 17 is the new information; Progress specifically provided the Board and all Parties to this proceeding copies of the Revision 17 Submittal Letter on October 3, 2008.

NC WARN cites a laundry list of “uncertified components” that must be from a September 17, 2008 Westinghouse meeting with the NRC because the Revision 17 Submittal Letter does not discuss all of these subjects. NC WARN apparently had this information as much as two weeks earlier than the NC WARN TC-7 Motion implies. Despite having ample time to submit a contention based on the Revision 17 Submittal Letter prior to the Board ruling on the NC WARN Hearing Petition,²² NC WARN does not address the delay between when the information was available and when Contention TC-7 was submitted. Delaying submittal of Contention TC-7 for at least 6 weeks, including waiting approximately 2 weeks after the Board ruled on the NC WARN Hearing Petition, is untimely. NC WARN has not shown that its filing was timely after the purported new information was available; therefore, NC WARN does not demonstrate compliance with 10 C.F.R. § 2.309(f)(2)(iii).

IV. The NC WARN TC-7 Motion Should Be Denied As NC WARN Did Not Address The Nontimely Filing Factors In 10 C.F.R. § 2.309(c)

NC WARN makes no attempt to demonstrate that Contention TC-7 meets the late-filed criteria contained in 10 C.F.R. § 2.309(c). “[T]his omission provides an independent and

²¹ *Id.* at 5. The AP1000 DCD Revision 17 was released to ADAMS on Nov. 20, 2008; therefore, is reasonable to believe that NC WARN did not review Revision 17 before filing the NC WARN TC-7 Motion.

²² Specifically, the Board informed the Parties that it would rule on the NC WARN Hearing Petition by the end of October. *Memorandum* (Notice of Expected Issuance of Decision) (Oct. 20, 2008).

sufficient basis for not admitting its belated contentions.” *Oyster Creek*, LBP-06-11, 63 N.R.C. at 396 n. 3 (citing *Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2)*, CLI-98-25, 48 N.R.C. 325, 347 (1998)). The Board should find that NC WARN has not demonstrated a basis for leave to file Contention TC-7.

As discussed above, Progress believes that Commission precedent mandates that eight factors for nontimely filings be addressed. 10 C.F.R. § 2.309(c)(2). NC WARN should address these eight factors with regard to Contention TC-7 as they are relevant to the NC WARN TC-7 Motion. For the reasons discussed above, NC WARN should address, at the very least, whether other proceedings are adequate to protect its interest, whether its interests will be represented by other parties, or the extent to which admitting the contention might broaden the issues or delay the proceeding. *See* 10 C.F.R. 2.309(c)(1)(v)-(vii). The other Parties and the Board are not obliged to speculate as to where NC WARN perceives its interests lay. Because NC WARN has not addressed the eight nontimely filing factors, the NC WARN TC-7 Motion should be denied as procedurally deficient on its face.

V. Conclusion

For the foregoing reasons, the Board should deny NC WARN leave to file Contention TC-7.

Respectfully Submitted,

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

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November 24, 2008

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Units 2 and 3)	

CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing “Progress Response Opposing the Motion by the North Carolina Waste Awareness and Reduction Network For Leave to File a New Contention” dated November 24, 2008, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, and courtesy copies were provided by email to the persons listed below, this 24th day of November 2008.

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