

December 8, 2008

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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 TO NC WARN'S
MOTION TO SUPPLEMENT LATE-FILED CONTENTION TC-7**

On November 13, 2008, North Carolina Waste Awareness and Reduction Network ("NC WARN") filed a new contention ("Contention TC-7").¹ On November 24, 2008, Progress Energy Carolinas, Inc. ("Progress") and the NRC Staff filed separate answers pursuant to the Atomic Safety and Licensing Board ("Board") Order of November 19, 2008 ("Scheduling Order"). On November 28, 2008, NC WARN filed its *Reply by NC WARN to Responses by Progress and NRC Staff in Opposition to NC WARN's Motion for Leave to File a New Contention* ("NC WARN Motion to Supplement").

NRC regulations do not permit replies to answers to motions, absent leave of the Board in compelling circumstances.² When a filing does not fit cleanly into the NRC procedural rules of practice, it is treated as a motion under 10 C.F.R. § 2.323.³ Accordingly, Progress believes that procedural efficiency would be served by treating the impermissible reply as a motion to supplement NC WARN's Contention TC-7 Motion, rather than challenging the impermissible

¹ *Motion by NC WARN to Allow New Contention* (Nov. 13, 2008) ("Contention TC-7 Motion").

² 10 C.F.R. § 2.323(c).

³ See *Exelon Nuclear Texas Holdings, LLC* (Victoria County Station, Units 1 and 2), Commission Order at 1 (Nov. 12, 2008); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 N.R.C. ___, slip op. at 17 (Oct. 6, 2008).

reply. Pursuant to 10 C.F.R. § 2.323(c), Progress files this response to the NC WARN Motion to Supplement to address the arguments proffered by NC WARN regarding timeliness.

NC WARN admits that its Contention TC-7 Motion did not explicitly address the criteria for late-filed contentions as required by 10 C.F.R. § 2.309(c).⁴ NC WARN asserts that it is not required to address those factors, claiming that “it has already addressed these criteria in its initial Petition to Intervene.”⁵ NC WARN’s unsupported assertion is inaccurate. Nowhere in its Petition to Intervene were the nontimely filing factors of 10 C.F.R. § 2.309(c) addressed. This absence is not surprising as the Petition to Intervene was filed within the time limits of 10 C.F.R. § 2.309(b). For the reasons that Progress has previously discussed,⁶ addressing the nontimely filing factors of 10 C.F.R. § 2.309(c) is required when contentions are submitted outside the time limits of 10 C.F.R. § 2.309(b).

NC WARN further asserts that, even if the nontimely filing factors apply, its Contention TC-7 Motion meets those factors.⁷ In contrast, the NRC Staff urges that the nontimely filing factors weigh against granting leave to file Contention TC-7.⁸ The NRC Staff finds that two of the factors, §§ 2.309(c)(1)(i) and (viii), weigh against NC WARN, while the remaining six factors, §§ 2.309(c)(1)(ii)-(vii), weigh in favor of NC WARN. Nevertheless, in light of the importance attached by the Commission to the first factor, the NRC Staff found the overall

⁴ NC WARN Motion to Supplement at 4.

⁵ *Id.*; see *NC WARN Petition for Intervention and Request for Hearing* (Aug. 4, 2008) (“Petition to Intervene”).

⁶ *Progress Response Opposing the Motion by the North Carolina Waste Awareness and Reduction Network For Leave to File a New Contention* at 3-6 (Nov. 24, 2008) (“Progress TC-7 Response”).

⁷ NC WARN Motion to Supplement at 4-6.

⁸ *NRC Staff Answer To “Motion By NC WARN To Allow New Contention”* at 5-6 (Nov. 24, 2008) (“Staff TC-7 Response”).

balance tilted against NC WARN.⁹ Progress agrees with the NRC Staff that the overall balance weighs against granting leave to file Contention TC-7 for the reasons discussed below.

DISCUSSION

10 C.F.R. § 2.309(c)(1)(i): Good cause, if any, for the failure to file on time. NC

WARN argues that, because Revision 17 to the AP1000 DCD was not available at the time NC WARN filed its Petition to Intervene, there is good cause for filing Contention TC-7 on November 13, 2008.¹⁰ The NRC Staff argues that there is no good cause for NC WARN's untimely filing because the filing is not based on any new information.¹¹ Progress agrees with the NRC Staff that NC WARN lacks good cause.

NC WARN asserts good cause exists solely because it filed Contention TC-7 within 60 days after Westinghouse formally submitted Revision 17.¹² Regardless of whether the 60-day window specified for initial contentions continues to apply, NC WARN knew or should have known that if it files a contention late, it must file as soon after the deadline as possible.¹³ In general, waiting two months or more without further justification does not demonstrate good cause.¹⁴ The fact that Westinghouse had filed Revision 17¹⁵ and summary information¹⁶ was publicly available sooner than NC WARN implies. For the reasons that Progress has previously

⁹ *Id.* at 6.

¹⁰ NC WARN Motion to Supplement at 4. Then again, Revision 17 to the AP1000 DCD was not available when NC WARN filed its Contention TC-7 Motion either. *Id.* at 3.

¹¹ Staff TC-7 Response at 6.

¹² NC WARN Motion to Supplement at 4.

¹³ *State of New Jersey* (Department of Law and Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 N.R.C. 289, 295 (1993) (*citing Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 N.R.C. 1041, 1048 (1983)).

¹⁴ *Westinghouse Electric Corporation* (Nuclear Fuel Export License for Czech Republic - Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994).

¹⁵ See Letter from John H. O'Neill, Jr., Counsel for Progress, to Atomic Safety and Licensing Board at 2 (Oct. 6, 2008).

¹⁶ NC WARN also apparently attended a public meeting during which Westinghouse briefed the NRC Staff on Revision 17. *Summary of Public Meeting On Westinghouse AP1000 Design Control Document Revision 17 At Rockville, Maryland*, Encl (3), ADAMS No. ML082660334 (attendance list identifying Jim Warren of NC WARN participating by telephone (although incorrectly stating he is associated with Westinghouse)).

stated,¹⁷ NC WARN has not shown why it was unable to file Contention TC-7 prior to the Board's decision on the Petition to Intervene.

Furthermore, NC WARN incorrectly asserts that “[t]he information contained in Westinghouse’s new filing of DCD Revision 17 was simply not available at the time NC WARN filed its original contentions because Westinghouse filed subsequently to that time.”¹⁸ Detailed information about the content of Revision 17 was available before NC WARN filed its Petition to Intervene.¹⁹ Availability of the information, not just the date of a specific document, needs to be evaluated in determining good cause.²⁰ Consider, as an example, information relating to aircraft crash analysis for the AP1000 design. NC WARN claims that an aircraft crash analysis for the AP1000 is one of a laundry list of areas covered in Revision 17, but not Revision 16.²¹ NC WARN’s discussion is incomplete, at best. As previously described by Progress, the Westinghouse analysis of aircraft impacts that is incorporated in Revision 17 has been available since April 3, 2008.²² This example illustrates that NC WARN is relying on old, not new, information. Because NC WARN has not stated with specificity what is the new information it is relying on, Progress agrees with the NRC Staff that this factor on good cause weighs heavily against NC WARN.

10 C.F.R. § 2.309(c)(1)(ii): The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding. NC WARN argues that it satisfies this factor

¹⁷ Progress TC-7 Response at 6-9.

¹⁸ NC WARN Motion to Supplement at 2.

¹⁹ Progress TC-7 Response at 6-7.

²⁰ *Catawba*, CLI-83-19, 17 N.R.C. at 1045, 1048.

²¹ Contention TC-7 Motion at 6.

²² *Progress Energy’s Answer Opposing Petition For Intervention And Request For Hearing By The North Carolina Waste Awareness And Reduction Network* at 35 (Aug. 29, 2008).

because the Board admitted NC WARN as a party.²³ The NRC Staff argues that, although the Board's decision admitting NC WARN as a party is currently on appeal,²⁴ this factor weighs in favor of NC WARN because the Board did admit NC WARN.²⁵ Progress believes that NC WARN should not have been admitted as a party for the reasons set forth in the Progress Appeal, but Progress concedes that NC WARN otherwise has standing. This factor does not weigh heavily one way or the other.

10 C.F.R. §§ 2.309(c)(1)(iii) and (iv): The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest. NC WARN argues that it demonstrated standing in its

Petition to Intervene and that neither the NRC Staff nor Progress challenged NC WARN's standing.²⁶ The NRC Staff states that these factors weigh in NC WARN's favor.²⁷ Progress agrees.

10 C.F.R. § 2.309(c)(1)(v): The availability of other means whereby the requestor's/petitioner's interest will be protected. NC WARN argues that it "does not have the opportunity to submit contentions about the deficiencies in the Harris COLA in other proceedings."²⁸ The NRC Staff states that this factor weighs in favor of NC WARN because no

²³ NC WARN Motion to Supplement at 4.

²⁴ *NRC Staff Notice of Appeal of LBP-08-21, Memorandum and Order (Ruling on Standing and Contention Admissibility), and Accompanying Brief* (Nov. 10, 2008); *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").

²⁵ Staff TC-7 Response at 6.

²⁶ NC WARN Motion to Supplement at 4-5.

²⁷ Staff TC-7 Response at 6.

²⁸ NC WARN Motion to Supplement at 5. NC WARN also mischaracterizes Progress's argument, calling it absurd and not viable that NC WARN must prove that rulemaking would address its interest. *Id.* In fact, the Progress TC-7 Response (at 4-5) echoes direction from the Board encouraging NC WARN to address its issues in

other parties have been admitted to this proceeding.²⁹ Consistent with the arguments made in the Progress Appeal, Progress agrees.

10 C.F.R. § 2.309(c)(1)(vi): The extent to which the requestor's/petitioner's interests will be represented by existing parties. NC WARN argues that “[i]t is clear that the interests of NC WARN’s members will not be represented by existing parties, Progress Energy and the NRC Staff.”³⁰ The NRC Staff states that this factor weighs in favor of NC WARN because no other parties have been admitted to this proceeding.³¹ Progress agrees.

10 C.F.R. § 2.309(c)(1)(vii): The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding. NC WARN argues that admission of Contention TC-7 will cause no delays in the Harris COLA proceeding.³² The NRC Staff states that this factor weighs in favor of NC WARN because Contention TC-7 raises no new issues.³³ Progress agrees because the gravamen of Contention TC-7 is the same as Contention TC-1.

10 C.F.R. § 2.309(c)(1)(viii): The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record. Instead of addressing its ability to assist in developing a sound record, NC WARN restates its argument on the admissibility of Contention TC-7.³⁴ In contrast, the NRC Staff argues that nothing in Contention TC-7 would assist in developing a sound record.³⁵ Progress agrees with the NRC

rulemaking. Cf. Memorandum and Order (Ruling on Standing and Contention Admissibility), LBP-08-21, 68 N.R.C. ___, slip op. at 41 (Oct. 30, 2008).

²⁹ Staff TC-7 Response at 6.

³⁰ NC WARN Motion to Supplement at 6.

³¹ Staff TC-7 Response at 6.

³² NC WARN Motion to Supplement at 6.

³³ Staff TC-7 Response at 6.

³⁴ NC WARN Motion to Supplement at 6. The admissibility of Contention TC-7 will be addressed only if the Board grants leave for NC WARN to file the new contention. Scheduling Order at 2.

³⁵ Staff TC-7 Response at 6.

Staff. Furthermore, NC WARN's actions thus far do not demonstrate that it can assist in developing a sound record. For example, NC WARN has not proffered any expert opinion to support its assertions in Contention TC-7.

Overall Balance. As the NRC Staff argues, the Commission has held that the good cause factor is entitled to the most weight,³⁶ and if there is no showing of good cause for lateness, NC WARN's showing on the other factors must be particularly strong.³⁷ A balancing of the factors in 10 C.F.R. § 2.309(c)(1), particularly given the importance of good cause in 10 C.F.R. § 2.309(c)(1)(i), weighs in the totality against NC WARN.

CONCLUSION

For the reasons discussed above and previously stated in the Progress TC-7 Response, the Board should not grant NC WARN leave to file Contention TC-7.

Respectfully submitted,

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

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³⁶ *State of New Jersey*, CLI-93-25, 38 N.R.C. at 296.

³⁷ *Texas Utilities. Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-431, 6 N.R.C. 460, 462 (1977)).

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CERTIFICATE OF SERVICE

I hereby certify that “Progress Energy’s Response to NC WARN’s Motion to Supplement Late-Filed Contention TC-7,” dated December 8, 2008, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 8th day of December 2008.

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