June 22, 2012

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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)	)	
	)	
(Combined License Application)	)	

PROGRESS ENERGY CAROLINAS, INC.'S ANSWER OPPOSING PETITION TO SUSPEND FINAL LICENSING DECISIONS

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323, and the Order of the Secretary issued June 19, 2012,[1] Progress Energy Carolinas, Inc. ("Progress Energy") hereby answers and opposes the Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings ("Petition"), which the North Carolina Waste Reduction and Awareness Network, Inc. ("NCWARN") filed on June 18, 2012 in the combined construction permit and operating license ("COL") proceeding for the Shearon Harris Nuclear Power Plant, Units 2 and 3 ("Harris"). The Petition, which was filed in nineteen separate proceedings by some twenty-three individuals and organizations ("Petitioners") that have intervened, or attempted to intervene, in opposition to those proceedings, requests (1) suspension of all final licensing decisions until completion of the proceedings on the Commission's Waste Confidence Decision Update ("WCD Update") and Temporary Storage Rule ("TSR") remanded

[1] Calvert Cliffs Nuclear Project, L.L.C., *et al.* (Calvert Cliffs Nuclear Power Plant, Unit 3, *et al.*), Order (June 19, 2012) (directing that any response to the Petition be filed no later than 12:00 p.m. EDT Monday, June 25, 2012, and not exceed ten pages).

by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit")[2]; and (2) establishment of special procedures and timetable for Petitioners to comment on any generic determinations that result from the remanded proceedings, and to submit contentions on site-specific issues where Petitioners believe a generic determination is insufficient. Petition at 3, 10-11.

Petitions to the Commission to suspend proceedings or to hold them in abeyance are treated as motions under 10 C.F.R. § 2.323. Ameren Missouri, *et al.* (Callaway Plant, Unit 2, *et al.*), CLI-11-05, 74 N.R.C. __, slip op. at 18-19 & n.65 (Sept. 9, 2011); AmerGen Energy Co., LLC, *et al*. (Oyster Creek Nuclear Generating Station *et al*.), CLI-08-23, 68 N.R.C. 461, 476 (2008); Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 N.R.C. 230, 237 (2002). Further, the Commission has previously indicated that suspension motions such as this are best addressed to it. Callaway, CLI-11-05, 74 N.R.C. __, slip op. at 19 n.65; Oyster Creek, CLI-08-23, 68 N.R.C. at 476; Diablo Canyon, CLI-02-23, 56 N.R.C. at 237.

As discussed below, the Petition is without merit and should be denied for multiple reasons. With respect to this COL proceeding, a final licensing decision is currently not imminent.[3] Thus, any request now to delay the final licensing decision is premature, to say the least. Further, the Commission considers a request to suspend licensing proceedings, including a request to suspend final licensing decisions, a "'drastic'" action that is not warranted absent "'immediate threats to public health and safety.'" Callaway, CLI-11-05, 74 N.R.C. __, slip op. at 19, quoting Oyster Creek, CLI-08-23, 68 N.R.C. at 484. See also Vermont Yankee Nuclear

[2] New York v. Nuclear Regulatory Comm'n, No. 11-1045, 2012 WL 2053581 (D.C. Cir. June 8, 2012).

[3] The Harris Final Safety Evaluation Report is tentatively scheduled for completion in September 2013 and the Final Environmental Impact Statement is tentatively scheduled to be issued to the Environmental Protection Agency in January 2014. See http://www.nrc.gov/reactors/new-reactors/col/harris/review-schedule.html.

Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 173-74 (2000). The Petition neither addresses nor satisfies this standard, and otherwise provides no information even remotely suggesting any threat to public health and safety. Indeed, Petitioners' arguments are entirely procedural.

Neither Petitioners nor any other person should be accorded any special procedural rights with respect to commenting on the WCD Update and TSR remand proceedings, or for requesting late-intervention or hearings on late-contentions in any proceeding. Although the Commission has not yet indicated how it will handle the generic remand proceedings, public participation should be consistent with the established processes for any actions the Commission directs in response to the D.C. Circuit remand. Callaway, CLI-11-05, 74 N.R.C. __, slip op. at 37. With respect to individual licensing proceedings, the Commission has previously rejected similar requests for special procedures and timetables, making it abundantly clear that its existing procedures are more than adequate. Id. at 35.

In addition, NCWARN is not a party to the Harris COL proceeding. Therefore, as discussed below, NCWARN is not entitled to seek suspension of the proceeding.

II. DISCUSSION

A. NCWARN is Not a Party Entitled to Seek Suspension of this Proceeding

NCWARN is not a party to the Harris COL proceeding and, therefore, cannot seek to suspend decisions in the proceeding. NCWARN petitioned to intervene in this proceeding, was initially admitted, and then subsequently dismissed when its one admitted contention was

dismissed.[4] Accordingly, the contested portion of this proceeding has been terminated, and there are no intervenors in this proceeding.

The Commission's rules are clear that, aside from being permitted to make oral or written limited appearance statements in a proceeding, non-parties "may not otherwise participate in the proceeding." 10 C.F.R. § 2.315(a). This limitation means that, unless otherwise authorized by the Commission or presiding officer, a non-party motion will not be entertained. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No.1), CLI-83-25, 18 N.R.C. 327, 330, 333-34 (1983) (holding that, in light of petitioner's failure to intervene into a proceeding, the Commission would not entertain petitioner's disqualification motion). See also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), 1986 WL 328110 at *1 (July 11, 1986) (unpublished Appeal Board decision) (holding that a petitioner whose intervention petition is denied "is not a proper party to seek a stay of any Licensing Board action in this operating license proceeding").[5] Similarly, the Commission has held that only a party to a proceeding (or an Interested State with similar rights) may seek stay of final decisions under 10 C.F.R. § 2.802 (pending a petition for rulemaking). Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-13, 65 N.R.C. 211, 214-15 (2007). While the current Petition is not submitted under 10 C.F.R. § 2.802, the authorization in 10 C.F.R. § 2.802(d) would be meaningless if non-parties had a general right to seek stay or

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[4] Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-09, 73 N.R.C. 245, 245, 278-79 (2010); Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 N.R.C. 317, 330 (2009); Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-09-8, 69 N.R.C. 736, 745 (2009); Progress Energy Carolinas, Inc. (Shearon Harris Nuclear Power Plant, Units 2 and 3), LBP-08-21, 68 N.R.C. 554, 557-58 (2008).

[5] The Commission does allow motions by persons who have submitted petitions to intervene and are awaiting rulings – see Duke Energy Corp. (McGuire Nuclear Stations, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 N.R.C. 385, 398 n.8 (2001) – but that is not the situation here.

suspension of final decisions in proceedings. Under normal standards of statutory construction,[6] 10 C.F.R. § 2.802(d), which allows a party to seek suspension of a proceeding, implies that a non-party has no such right.

B. Suspension of Final Licensing Decisions is Premature and Inappropriate in the Absence of Any Immediate Threat to Public Health and Safety

The Commission should reject the Petition in the first instance because it is premature. As an initial matter, Petitioners acknowledge that the mandate has not issued from the D.C. Circuit. Petition at 3-4 n.1. Indeed, the mandate could be further delayed should, for example, rehearing be requested. Thus, there is no basis for the Commission to grant the relief requested by the Petition now. And even beyond the status of the Court's mandate, any suspension request is premature because issuance of the COL for Harris is not expected until 2014. There simply is no reason for the Commission to suspend a final COL decision on Harris now, or even when the Court's mandate issues. See Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station & Pilgrim Nuclear Power Station), CLI-07-3, 65 N.R.C. 13, 22 n.37 (2007) (holding that a request to withhold final decisions pending action on a rulemaking petition was premature when final decisions are not expected "for another year or more.").

Further, the Petition falls far short of the Commission's high standard for suspending a final licensing decision. The Petition does not even address the standard. The Commission has rejected analogous petitions that requested, among other things, suspension of final licensing decisions in numerous matters in light of the Commission's ongoing review of the Fukushima accident. Callaway, CLI-11-05, 74 N.R.C. __, slip op. at 3, 20. The Commission applied its longstanding precedent holding that such suspension would be a "'drastic'" action that is not warranted absent "'immediate threats to public health and safety.'" Id. at 19, quoting Oyster

[6] *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another).

Creek, CLI-08-23, 68 N.R.C. at 484. See also Vermont Yankee, CLI-00-20, 52 N.R.C. at 173-74. The same analysis applies here. The Petition specifically requests "suspen[sion of] final licensing decisions in all pending NRC licensing proceedings." Petition at 3. The Commission should reject the Petition because it does not even claim, let alone show, any threat to the public health and safety.

Moreover, with respect to this proceeding, there is no such threat. As the Commission has previously held in similar circumstances, "[a] site that currently contains no radiological materials and will not for [a number of years] cannot present an immediate threat to public safety." Private Fuel Storage, L.L.C., (Independent Spent Fuel Storage Installation), CLI-01-26, 54 N.R.C. 376, 381 (2001) (denying petition to suspend licensing proceeding for proposed independent spent fuel storage installation pending review of terrorism-related rules and policies following the 9/11 events).

The Petition incorrectly argues that the Commission's decision in Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-10-19, 72 N.R.C. 98 (2010) is "precedent" applicable here. Petition at 5, 10. Petitioners mischaracterize Indian Point. Contrary to Petitioners' assertions, the Commission did not order suspension of the Indian Point license renewal decision pending resolution of the Commission's initial waste confidence ruling. See Petition at 10. In that case, the Commission ruled that a proffered contention seeking to challenge onsite waste storage issues was inadmissible under "longstanding NRC policy" that licensing boards should not accept in individual licensing proceedings contentions that are, or are about to become, the subject of a general rulemaking by the Commission. Indian Point, CLI-10-19, 72 N.R.C. at 100. The Commission stated that, at that time, its "deliberations on the waste confidence update" were "continuing," and that "in any event [the Commission] will not

conclude action on the Indian Point license renewal application until the rulemaking is resolved." Id. The Commission's statement amounted to a mere observation that, as a practical matter, it would complete action on the waste confidence rulemaking before renewing Indian Point's operating license, which is, in fact, what occurred.[7] Moreover, the Indian Point decision provides no indication that the Commission intended that decision to result in suspension of the license renewal decision pending resolution of the rulemaking because the Commission nowhere addressed its own high threshold for such a suspension – a showing of an immediate threat to public health and safety. Thus, Petitioners' characterization of CLI-10-19 as precedent for suspending a final licensing decision pending completion of a rulemaking is far off the mark and provides no support for the present suspension request.

C. No Special Procedures or Timetable Are Required

The Commission should reject Petitioners' requests for special procedures and timetables on the same grounds that the Commission rejected similar requests in Callaway. First, Petitioners request that the Commission allow them to comment on any generic determination that the NRC may make with respect to the remanded WCD Update and TSR. Petition at 11. More specifically, the Petitioners request that, if the Commission prepares an environmental assessment to address the remanded issues, the Commission provide Petitioners an opportunity to comment on that assessment. Second, Petitioners request that the Commission allow them to raise contentions in individual licensing proceedings where they believe that the generic rulemaking is insufficient to address its concerns, and be provided with at least sixty days to seek

[7] At the time CLI-10-19 was issued, the Staff had not yet issued the final supplement to the safety evaluation report or the final supplemental environmental impact statement supporting license renewal, and would not do so for several months. See Milestone Schedule for Indian Point Units 2 and 3 License Renewal, available at http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html#schedule. The WCD Update issued in December 2010, and the Indian Point proceeding remains ongoing.

consideration of site-specific safety or environmental concerns raised by the remanded proceeding. Id. The Commission should reject both requests.

With respect to the first request, it should be denied because it is premature and unsupported. It is premature because the Commission has not yet established the processes it will employ to address the generic issues raised by the D.C. Circuit remand. Further, the Petition provides no support for requesting a level of public participation different from that which would typically accompany agency processes. Once the Commission does establish the processes for addressing those generic issues, any public participation should be "consistent with the established processes for any actions that [the Commission] directs the NRC Staff to undertake." Callaway, CLI-11-05, slip op. at 37 (rejecting Commonwealth of Massachusetts' request for "additional reasonable time following completion of the release of the NRC's own findings on the lessons of Fukushima to comment on them and propose licensing or regulatory changes as appropriate"). The Petition nowhere justifies any deviation from the normal course.

The second request should also be denied because "[n]either new procedures nor a separate timetable for raising new issues" is warranted. Callaway, CLI-11-05, slip op. at 35. When rejecting similar requests for new procedures and new timetables, including a sixty-day period for raising new issues following the publication of regulatory proposals or environmental decisions, id. at 32, the Commission held that its

> procedural rules contain ample provisions through which litigants may seek admission of new or amended contentions, seek stays of licensing board decisions, appeal adverse decisions, and file motions to reopen the record, as appropriate.

Id. at 35. Thus, for example, should NCWARN conclude that any generic rulemaking promulgated to address the issues raised by the remand is insufficient to address its site-specific

concerns, NCWARN would be free to petition for waiver of that rule under 10 C.F.R. § 2.335.[8] In other words, the Commission's rules already specify the precise means for Petitioners to seek redress of any site-specific concern they may have.

III. CONCLUSION

For all of the above stated reasons, the Petition should be denied.

Respectfully Submitted,

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

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[8] One of the four criteria used to evaluate a Section 2.335 petition for waiver is that the waiver petition raises "circumstances . . . unique to the facility rather than common to a large class of facilities." Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 559-560 (2005) (quotations and citations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that Progress Energy's Answer Opposing Petition to Suspend Final Licensing Decisions, dated June 22, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 22nd day of June, 2012.

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