August 3, 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 NC WARN'S MOTION TO REOPEN AND ADMISSION OF WASTE CONFIDENCE CONTENTION

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.309(h)(1) and 2.323, Progress Energy Carolinas, Inc. ("Progress Energy") hereby opposes the motion to reopen the record and admit a contention concerning temporary storage and ultimate disposal of spent nuclear fuel ("the waste confidence contention") filed by the North Carolina Waste Reduction and Awareness Network, Inc. ("NC WARN") on July 9, 2012, in the combined construction permit and operating license ("COL") proceeding for the Shearon Harris Nuclear Power Plant, Units 2 and 3 ("Harris"). [1] NC WARN seeks reopening of the record and admission of this contention based on the June 8, 2012 decision of the United States Court of Appeals for the District of Columbia Circuit [2] remanding

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[1] NC WARN's Motion to Reopen the Record and Admit Contention Concerning Temporary Storage and Ultimate Disposal of Nuclear Waste at the Shearon Harris Nuclear Power Plant (July 9, 2012) ("Motion").

2 *New York v. NRC*, 681 F.3d 470 (D.C. Cir. 2012) ("*NY v. NRC*").

for further proceedings certain issues related to the Commission's Waste Confidence Decision Update[3] and Temporary Storage Rule. [4]

For the reasons set forth below, the Commission should deny the Motion and reject the waste confidence contention. The mandate in *NY v. NRC* has not yet issued, hence the motion impermissibly seeks to challenge a Commission rule that remains in effect. Even if the mandate issues, admission of this contention would be inappropriate if the Commission decides to address the remanded issues generically by rulemaking. Although, as of the date of this Answer, the Commission had not yet indicated how it will address the remanded issues, the Commission typically has handled such issues via a rulemaking. Should the Commission follow this course (and Progress Energy believes it should do so), the contention would be inadmissible. In any event, the Motion fails to meet the stringent standards for reopening a closed record, and the proposed contention fails to meet the requirements for an admissible contention by raising issues outside the scope of the proceeding, and by failing to raise a genuine dispute on a material issue.

II. DISCUSSION

A. The Waste Confidence Contention Impermissibly Challenges a Commission Regulation

The Commission should deny the motion and reject the waste confidence contention because it is an impermissible attack on a Commission regulation. The proposed contention asserts that the Harris Environmental Report ("ER") does not satisfy the National Environmental Policy Act ("NEPA") because it does not include a discussion of the environmental impacts of spent fuel storage after cessation of operation, including the impacts of spent fuel pool leakage, spent fuel pool fires, and failing to establish a spent fuel repository, and that unless and until the

[3] 75 Fed. Reg. 81,037 (Dec. 23, 2010).

[4] 10 C.F.R. § 51.23 (also referred to as the "Waste Confidence Rule").

NRC conducts such an analysis, no license may be issued. Motion at 3-4. The Waste Confidence Rule, which remains in effect as discussed below, provides that no such discussion is required. 10 C.F.R. § 51.23(b). Consequently, the proposed contention is barred. 10 C.F.R. § 2.335(a).

As NC WARN admits (Motion at 2), the mandate from the D.C. Circuit in *NY v. NRC* has not yet issued. Absent issuance of the mandate, the Commission's Waste Confidence Rule remains in effect. At the earliest, the mandate will not issue until August 29, 2012, seven days after the time period for requesting rehearing or rehearing *en banc* has expired. Fed. R. App. P. 41(b).[5] Should the NRC or any other party to the case seek rehearing or rehearing *en banc*, issuance of the mandate will be further delayed. *Id.* And if rehearing or rehearing *en banc* is granted, the mandate may not issue for a long time, if at all. Accordingly, the proposed contention impermissibly seeks to challenge a currently effective Commission rule, which by itself requires rejection of the contention.

Nor should the proposed contention be held in abeyance until issuance of the mandate, as NC WARN suggests (*see* Motion at 2). Generally, for a contention to be held in abeyance, it must otherwise be admissible. *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-8, 69 N.R.C. 317, 322 (2009); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 N.R.C. 385, 407 (2009); *Detroit Edison Co.* (Fermi Nuclear Power Plant, Unit 3), LBP-09-16, 70 N.R.C. 227, 251 (2009); *Conduct of New Reactor Licensing Proceedings; Final Policy Statement*, 73 Fed. Reg. 20,693, 20,972 (Apr. 17, 2008). The proposed waste confidence contention is not otherwise admissible because, as previously discussed, it is barred by an effective rule and, as discussed below, it fails to raise a genuine

[5] The D.C. Circuit has extended the time to file a petition for rehearing or rehearing en banc until August 22, 2012. *NY v. NRC,* No. 11-1045 (D.C. Cir. July 6, 2012) (*per curiam* Order).

dispute with the application. Thus, "[i]f the contention is inadmissible in the first instance, as is the case here, no further action is required on the part of the Board." *South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 N.R.C. 1, 10 (2010).

B. The Contention Raises Generic Issues That Should Be Resolved Through Rulemaking

Should the mandate issue, Progress Energy respectfully submits that the Commission should address the issues raised in the D.C. Circuit remand generically through rulemaking and reject the proposed contention on this basis. The Commission has long held that a contention seeking to litigate a matter that is, or is about to become, the subject of a rulemaking is inadmissible. *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-08, 74 N.R.C. __, slip op. at 19 & n.68 (Sept. 27, 2011) (citing *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 A.E.C. 79, 85, 89 (1974). As the Commission has previously explained, "[i]n the area of waste storage, the Commission largely has chosen to proceed generically."[6] The use of rulemaking to evaluate the environmental impacts from spent nuclear fuel has long been judicially approved,[7] and *NY v. NRC* does not disturb this authority.[8] Further, the issues to be considered on remand remain generic in nature and are thus best addressed through rulemaking rather than in individual proceedings. Indeed, predating the Court's decision, the Commission already has underway a plan for preparation of a generic environmental impact statement and rulemaking assessing the safety and environmental impacts of longer term HLW storage.[9] For such reasons, the industry

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[6] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 343 (1999).

[7] *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87, 100-01 (1983); *Minnesota v. NRC*, 602 F.2d 412, 416-17 (D.C. Cir. 1979).

[8] *NY v. NRC*, slip op at 20.

[9] SRM -SECY-09-0090: Final Update of the Commission's Waste Confidence Decision (Sept. 15, 2010) (requiring the NRC Staff, apart from the final waste confidence rule update, to initiate a study to update the rule to account for waste storage onsite and/or at offsite storage facilities for 200-300 years or more).

has recommended to the Commission that if the mandate in *NY v. NRC* issues, the remanded issues should once more be generically addressed through rulemaking.[10] This course of action would avoid unnecessary expenditure of resources that would result if the remanded issues were litigated in the eighteen proceedings in which this same waste confidence contention has been filed, and would eliminate the potential for inconsistent decisions.

In addition, the Commission should rule on the Motion and proposed contention itself, rather than referring them to a licensing board, in order to ensure consistent results are reached with other petitions pending before the Commission, and similar motions pending before the Commission and multiple licensing boards. Currently pending before the Commission is the Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 18, 2012) ("Petition") filed by NC WARN and some twenty-three other individuals and organizations in this and eighteen other proceedings. Although the Commission has not yet ruled on the Petition, the Petition obviously addresses the same substantive issues that are raised in the proposed contention. Indeed, the proposed contention asserts that "unless and until the NRC conducts such an analysis [of the impacts of spent fuel storage after permanent cessation of operations], no license may be issued." Motion at 4. Clearly, the proposed contention is tantamount to a request for suspension of final decision-making in this proceeding. The Commission should therefore address the issues raised in the contention itself so that the proposed contention's resolution is consistent with the Petition's resolution, as well as the resolution of the substantively-identical contentions and suspension petitions filed in numerous other licensing proceedings.

[10] Letter from E. Ginsberg, Nuclear Energy Institute, to Secretary, U.S. NRC, Response to Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Completion of Remanded Waste Confidence Proceedings (June 25, 2012) at 4-5.

C. The Motion Fails to Meet the Reopening Standards

NC WARN petitioned to intervene in this proceeding, was initially admitted, and then subsequently dismissed when its one admitted contention was rejected.[11] Accordingly, the contested portion of this proceeding has been terminated, and there are no intervenors in this proceeding. Thus, the Motion must satisfy all of the standards for reopening a closed record in 10 C.F.R. § 2.326. The Motion fails to do so.

The Motion should be denied because it is not supported by an affidavit as required by Section 2.326(b). That section states unequivocally:

> The motion must be accompanied by affidavits that set forth the factual and/or technical bases for the movant's claim that the criteria of paragraph (a) of this section have been satisfied. Affidavits must be given by competent individuals with knowledge of the facts alleged, or by experts in the disciplines appropriate to the issues raised. Evidence contained in affidavits must meet the admissibility standards of this subpart. Each of the criteria must be separately addressed, with a specific explanation of why it has been met. . . .

10 C.F.R. § 2.326(b). The failure to meet this mandatory affidavit requirement is alone sufficient grounds to reject the Motion. *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 N.R.C. 62, 76 (1992), citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-89-1, 29 N.R.C. 89, 93-94 (1989).

In addition, the Motion fails to meet all of the Section 2.326(a) criteria for reopening the record. For example, the Motion fails to demonstrate that a materially different result would be likely. 10 C.F.R. § 2.326(a)(3). The Motion relies on bare assertions and speculation in claiming that this requirement is met, which Commission precedent clearly holds is insufficient

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11 *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-09, 71 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).

to support a motion to reopen. *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 N.R.C. 235, 287 (2009) ("Bare assertions and speculation . . . do not supply the requisite support" for a motion to reopen) (footnote omitted). For example, the Motion provides that "if severe accident mitigation alternatives ("SAMAs") were imposed . . . the outcome of the Environmental Report could be affected in three major respects." Motion at 9 (emphasis added). The Motion then makes a bare assertion alleging an "implication" of the DC Circuit's ruling, speculates that the COL could be denied if the proposed Harris reactors were unable to comply with purported new mandatory requirements, and speculates that the cost of adopting these mandatory measures is likely to be significant. *Id.* These unsupported and speculative assertions fall far short of the Commission's stringent standards for reopening a closed record.

D. The Proposed Contention is Inadmissible Under Section 2.309(f)(1)

The proposed contention should be rejected not only because it impermissibly challenges an effective Commission rule, but also because it fails to raise a genuine dispute with the Harris COL application, as required by 10 C.F.R. § 2.309(f)(1)(vi). The Commission's rules prescribe that contentions must be based on the applicant's documents and on data and conclusions in the NRC Staff's draft or final environmental impact statements. 10 C.F.R. § 2.309(f)(2). Contrary to this requirement, the proposed contention asserts in part that "no license may be issued" unless certain analyses can be performed. Motion at 4. This assertion is not a challenge to the application or the Staff's environmental documents. Rather, it is a roundabout way of seeking suspension of the final licensing decision. Indeed, NC WARN appears to recognize as much, because, as previously noted, it has already filed such a suspension request with the Commission. *See* Petition. NC WARN need not be provided two bites at this apple, and this aspect of the contention is otherwise fail to raise a genuine dispute with the COL application.

In addition, the challenge to the sufficiency of the Harris environmental report ("ER") fails to raise a genuine dispute with the application because there is no requirement in 10 C.F.R. Part 51 for a combined license applicant to update an originally compliant ER in light of subsequent events. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 N.R.C. __, slip op. at 13 (Nov. 18, 2011) ("LBP-11-32");[12] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-12-13, 75 N.R.C. __, slip op. at 6 (June 27, 2012) ("LBP-12-13"). It should be noted that "Part 51, not NEPA, is the source of the legal requirements applicable to the applicant's environmental report." *Diablo Canyon*, LBP-11-32 at 12 & n.29 (citing *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 N.R.C. 27, 34 (2010). 10 C.F.R. § 51.50 specifies the contents of a combined license application's ER (including compliance with Sections 51.45, 51.51, and 51.52), and there is no requirement that an applicant supplement the ER. *See* 10 C.F.R. § 51.45 ("An applicant . . . may submit a supplement to an [ER] at any time") (emphasis added). Absent any requirement in Part 51 for an applicant to supplement an originally compliant ER based on subsequent events and information, "subsequent events and information (regardless of how 'significant') are simply not material to the compliance status of the ER" and "do not create a 'genuine dispute' as to the compliance status of the ER." *Diablo Canyon*, LBP-12-13 at 6 (emphasis in original). "[B]ecause an applicant has no duty to supplement its ER [based on subsequent information], there is no deficiency that can form the basis of a

12 On referral from the Board, the Commission declined to review the Board's ruling that an applicant has no duty to supplement an ER. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 N.R.C. __, slip op. at 7 & n.31 (June 7, 2012).

contention." *Id.* at 8.[13] Consequently, the issues that NC WARN seeks to litigate fail to raise a genuine dispute with the Harris COL application.

III. CONCLUSION

For all of the above stated reasons, the Motion should be denied and the proposed contention should be rejected as inadmissible.

Respectfully Submitted,

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

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Dated: August 3, 2012

[13] *See also Union Electric Co.* (Callaway Plant, Unit 1), LBP-12-15, 76 N.R.C. __, slip op. (July 17, 2012) (concurring opinion of Judge Trikouros).

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CERTIFICATE OF SERVICE

I hereby certify that Progress Energy's Answer Opposing NC WARN's Motion to Reopen and Admission of Waste Confidence Contention, dated August 3, 2012, was provided to the Electronic Information Exchange for service to those individuals on the service list in this proceeding, this 3rd day of August, 2012.

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