UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Gregory B. Jaczko, Chairman
Dale E. Klein
Kristine L. Svinicki

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)	)	

CLI-10-09

MEMORANDUM AND ORDER

This proceeding concerns the application of Progress Energy Carolinas, Inc. (Progress) for a combined license (COL) under 10 C.F.R. Part 52 to construct and operate two new nuclear reactor units at the Shearon Harris Nuclear Power Plant Site located in Wake County, North Carolina. The North Carolina Waste Awareness and Reduction Network, Inc. (NC WARN) filed a notice of appeal, and supporting brief, of two Commission decisions and three Licensing Board decisions in this proceeding.[1] NC WARN also requests the opportunity for oral argument on the issues raised in its appeal. Progress and the NRC Staff oppose the appeal and the request for oral argument.[2]

[1] *Notice of Appeal, Request for Oral Argument and Brief Supporting Notice of Appeal by NC Warn* (July 22, 2009) (NC WARN Appeal).

[2] *Brief of Progress Energy Carolinas, Inc. in Opposition to NC WARN's Notice of Appeal, Request for Oral Argument, and Brief Supporting Notice of Appeal* (Aug. 3, 2009); *NRC Staff Brief in Opposition to NC WARN'S Appeal and Request for Oral Argument* (Aug. 3, 2009).

For the reasons set forth below, we deny the appeal of NC WARN as well as the embedded motion to suspend the proceeding. We also deny the request for oral argument because we find it to be unnecessary.

I. BACKGROUND

On February 19, 2008, Progress submitted an application for a COL to construct and operate two Westinghouse AP1000 reactors at the Shearon Harris site. The application was docketed and a Notice of Hearing and Opportunity to Petition for Leave to Intervene was published in the *Federal Register*.[3] In response, NC WARN filed a motion to immediately suspend the hearing notice on June 24, 2008.[4] We denied the motion in CLI-08-15, on July 23, 2008.[5]

Thereafter, NC WARN timely filed a request for hearing and petition for leave to intervene, asserting that it had representational standing on behalf of its members and proffering eleven contentions.[6] Progress and the NRC Staff timely filed answers. Progress did not contest NC WARN's standing, but opposed admission of all eleven contentions.[7] The NRC

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[3] Acceptance for Docketing of an Application for Combined License for Shearon Harris Units 2 and 3, 73 Fed. Reg. 21,995 (Apr. 23, 2008); Notice of Hearing and Opportunity to Petition for Leave to Intervene and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation on a Combined License for the Shearon Harris Units 2 and 3, 73 Fed. Reg. 31,899 (June 4, 2008).

[4] *Motion to Immediately Suspend Hearing Notice and Request for Expedited Consideration by the North Carolina Waste Awareness and Reduction Network* (June 24, 2008).

[5] CLI-08-15, 68 NRC 1 (2008).

[6] *Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network* (Aug. 4, 2008) (NC WARN Petition).

[7] *Progress Energy's Answer Opposing Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network* (Aug. 29, 2008) (Progress Answer).

Staff also did not challenge NC WARN's standing, and opposed all but a portion of one of the contentions.[8] NC WARN filed a timely reply.[9] In addition, the North Carolina Utilities Commission (NCUC) and the South Carolina Office of Regulatory Staff (SC ORS) each requested to participate as an interested governmental entity in any hearing pursuant to 10 C.F.R. § 2.315(c) and requested to be added to the service list.[10] Neither Progress nor the Staff opposed those requests.[11]

As part of its petition to intervene and request for hearing, NC WARN sought reconsideration of our ruling in CLI-08-15 that denied NC WARN's motion to immediately suspend the hearing notice.[12] Recognizing that it lacked jurisdiction to reconsider a Commission decision, the Board promptly issued a memorandum and order explaining that its standing and contention admissibility ruling would not address the embedded motion.[13] We

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[8] *NRC Staff Answer to "Petition for Intervention and Request for Hearing by the North Carolina Waste Awareness and Reduction Network"* (Aug. 29, 2008) (NRC Staff Answer).

[9] *NC WARN's Reply to Staff and Progress Energy Answers to Petition for Intervention and Request for Hearing* (Sept. 5, 2008) (NC WARN Sept. 5, 2008 Reply).

[10] *Request of the North Carolina Utilities Commission for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List* (July 28, 2008); *Request of the South Carolina Office of the Regulatory Staff for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List* (Aug. 4, 2008).

[11] *Progress Energy's Response to Requests of the North Carolina Utilities Commission and the South Carolina Office of the Regulatory Staff* (Aug. 28, 2009); *NRC Staff Answer to* "*Request of the North Carolina Utilities Commission for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List"* (Aug. 20, 2008); *NRC Staff Answer to "Request of the South Carolina Office of the Regulatory Staff for an Opportunity to Participate in any Hearing and to Be Added to the Official Service List"* (Aug. 28, 2008).

[12] NC WARN Petition at 7.

[13] Licensing Board Memorandum and Order (Concerning Administrative Matters) (Aug. 20, 2008) (unpublished).

denied the embedded motion for reconsideration in an unpublished decision on September 11, 2008.[14]

The Atomic Safety and Licensing Board issued LBP-08-21 on October 30, 2008, which granted NC WARN's request for hearing and admitted NCUC and SC ORS as interested governmental entities.[15] The Board found that NC WARN had demonstrated representational standing and had proffered one admissible contention, namely, Contention TC-1 – NC WARN's assertion that the COL application is incomplete due to ongoing review of revisions to the AP1000 certified design.[16]

On November 10, 2008, Progress and the NRC Staff appealed the Board's ruling in LBP-08-21, arguing that the Board erred in admitting Contention TC-1 and referring it to the Staff to "sort out" its relevance to the ongoing AP1000 design certification amendment proceeding.[17] NC WARN filed an answer in opposition to the Progress and NRC Staff appeals.[18] Meanwhile, on November 13, 2008, NC WARN filed a motion to hold the proceeding in abeyance pending completion of the design certification rulemaking.[19] NC WARN included

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[14] Order (Sept. 11, 2008) (unpublished).

[15] LBP-08-21, 68 NRC 554 (2008).

[16] *Id.* at 559-64.

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

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

[19] *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* (Nov. 13, 2008).

within this motion a request that we reconsider our ruling in CLI-08-15 denying NC WARN's motion to immediately suspend the hearing notice.[20]

In CLI-09-8, we agreed with Progress and the Staff, holding that the Board erred in referring Contention TC-1 to the NRC Staff without making an appropriate contention admissibility determination under 10 C.F.R. § 2.309(f)(1).[21] Accordingly, we remanded the proceeding to the Board for reassessment of the admissibility of Contention TC-1. We also instructed that if the Board found the contention to be "otherwise admissible," it then must determine if referral to the NRC Staff for resolution in the AP1000 design certification rulemaking would be appropriate.[22] In addition, we rejected NC WARN's November 13, 2008 motion to hold the proceeding in abeyance as well as the motion for reconsideration of CLI-08-15 embedded within it.[23]

In the time between the appeal of LBP-08-21 and our decision in CLI-09-8, NC WARN filed before the Board a motion to allow a new contention.[24] Labeled as Contention TC-7, the purportedly new contention states that the COL application is incomplete due to the filing of Revision 17 to the AP1000 certified design and incorporates NC WARN's arguments made in support of then-admitted Contention TC-1. Upon Progress' motion that the Board issue a scheduling order governing the responses to this and future new or amended contention

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[20] *Id.* at 2.

[21] CLI-09-8, 69 NRC 317 (2009).

[22] *Id.* at 327.

[23] *Id.* at 328-29.

[24] *Motion by NC WARN to Allow New Contention* (Nov. 13, 2008) (NC WARN New Contention Motion).

motions, the Board established a two-part briefing schedule for new or amended contentions. First, the parties were required to address the timing factors under subsections 2.309(c) and (f)(2). If the Board determined that NC WARN met the timing requirements under this section and granted the motion for leave to file a new or amended contention, then the parties would be required to address the contention admissibility factors in section 2.309(f)(1).[25] Consistent with the Board's order, Progress and the Staff filed their answers opposing admission of Contention TC-7 on the grounds that the new contention motion failed to meet the requirements of 10 C.F.R. § 2.309(f)(2) and (c).[26] The second part of the Board's established briefing schedule was not initiated because the Board determined that NC WARN failed to meet the requirements of 10 C.F.R. § 2.309(f)(2) and (c), and thus denied the motion.[27]

Finally, on remand from CLI-09-8, the Board determined that Contention TC-1 did not meet the contention admissibility requirements under 10 C.F.R. § 2.309(f)(1).[28] Accordingly, the Board denied NC WARN's petition to intervene and request for hearing, denied the participation requests of NCUC and SC ORS as moot, and terminated the proceeding.[29] NC WARN's timely appeal followed.

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[25] Licensing Board Order (Scheduling Order for Responses to Late-filed Contentions) (Nov. 19, 2008) (unpublished).

[26] *Progress Response Opposing the Motion by the North Carolina Waste Awareness and Reduction Network for Leave to File a New Contention* (Nov. 24, 2008); *NRC Staff Answer to "Motion by NC WARN to Allow New Contention"* (Nov. 24, 2008).

[27] Licensing Board Memorandum and Order (Ruling on Request to Admit New Contention) (Dec. 23, 2008) (unpublished) (Licensing Board New Contention Decision).

[28] LBP-09-8, 69 NRC 736 (2009).

[29] *Id.* at 746.

II. DISCUSSION

NC WARN challenges the three Board orders discussed above: (1) LBP-08-21, finding ten of NC WARN's original contentions to be inadmissible, but admitting Contention TC-1; (2) the December 23, 2008 unpublished order denying the motion for leave to file Contention TC-7; and (3) LBP-09-8, finding Contention TC-1 to be inadmissible and terminating the proceeding. In addition, NC WARN "appeals" the two Commission orders discussed above: (1) CLI-08-15, denying NC WARN's motion to immediately suspend the hearing notice; and (2) CLI-09-8, remanding the Board's contention admissibility determination on Contention TC-1, denying the motion for reconsideration of CLI-08-15, and denying the motion to suspend the proceeding.

These appeals, and NC WARN's request for oral argument, are addressed below. We begin with NC WARN's request for oral argument.

A. Request for Oral Argument

Pursuant to 10 C.F.R. § 2.343, the Commission has discretion to "allow oral argument upon the request of a party made in a petition for review, brief on review, or upon its own initiative." In order to grant a request for oral argument, we require a showing of how it will assist us in reaching a decision.[30] The only statement made in NC WARN's appeal supporting its request for oral argument is that it should be granted "in light of the arguments given above [in the appeal] and the serious and significant issues raised."[31] We decline to exercise our

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[30] *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2, 37 NRC 55, 59 n.4 (1993) (denying request for oral argument because showing was not made); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 68-69 (1992) (reiterating holding in earlier decision that request must be accompanied with an explanation of how oral argument will assist the Commission in reaching a decision).

[31] NC WARN Appeal at 30.

discretion here because the written record in this case is thorough, effectively sets forth the positions of the participants, and, overall, contains sufficient information on which to base our decision.[32] We therefore deny the request for oral argument.

B. CLI-08-15 and CLI-09-8

As discussed above, in CLI-08-15 we denied NC WARN's motion to suspend the hearing notice; in CLI-09-8 we remanded the issue of the admissibility of Contention TC-1 to the Board and denied an embedded motion for reconsideration of CLI-08-15 and an embedded motion to hold the proceeding in abeyance. NC WARN styled its challenges to CLI-08-15 and CLI-09-8 as appeals.[33] However, our rules do not permit such "appeals." In substance, NC WARN's appeals of CLI-08-15 and CLI-09-8 are motions for reconsideration,[34] which are appropriately considered under 10 C.F.R. § 2.323(e).

A motion for reconsideration may not be filed except upon leave of the adjudicatory body that rendered the decision. If leave is granted, the motion must show "compelling circumstances, such as the existence of an unanticipated, clear and material error, which could not have been anticipated, that renders the decision invalid."[35]

NC WARN's challenges to these two Commission decisions are procedurally defective because NC WARN has not sought leave to file the "motions." This alone is sufficient reason to

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[32] *See Comanche Peak*, CLI-92-12, 36 NRC at 68-69.

[33] *See* NC WARN Appeal at 1.

[34] *See id.* at 30 (concluding that "the decisions by the ASLB and the Commission not to hold this proceeding in abeyance should be reconsidered and reversed").

[35] 10 C.F.R. § 2.323(e). In addition, "[t]he motion must be filed within ten (10) days of the action for which reconsideration is requested." *Id.*

deny them.[36] In any event, NC WARN also has failed to assert any compelling circumstances that would justify reconsideration of our denial in CLI-08-15 of NC WARN's motion to immediately suspend the proceeding, or the denial in CLI-09-8 of NC WARN's embedded motion for reconsideration of CLI-08-15[37] and additional motion to hold the proceeding in abeyance. Rather, NC WARN incorporates by reference the legal arguments made in the previous motions and pleadings that were the subject of CLI-08-15 and CLI-09-8 and otherwise provides no new justification as to why these decisions deserve reconsideration.[38] Thus, we find no "changed circumstances that could not previously have been brought to us,"[39] and we decline to disturb our rulings in CLI-08-15 and CLI-09-8.[40]

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[36] *See* Order (Sept. 11, 2008) (unpublished) (citing 10 C.F.R. §§ 2.323(e), 2.345(b)). Further, NC WARN's request is untimely, as more than 10 days have passed since the issuance of either decision.

[37] That makes this the third motion for reconsideration of CLI-08-15. As we explained earlier in this proceeding, "[o]ur rules do not provide for multiple requests for reconsideration of the same decision." CLI-09-8, 69 NRC at 328.

[38] NC WARN Appeal at 2. NC WARN also, as it did in support of its November 13, 2008 motion for reconsideration, "adopts . . . the compelling arguments in the Texans for a Sound Energy Policy's Petition to Hold Docketing Decision And/or Hearing Notice for Victoria Combined License Application in Abeyance . . . filed on November 3, 2008." *Id.* at 17 n.9. We find this support to be unpersuasive, as we did in CLI-09-8. *See* CLI-09-8, 69 NRC at 329.

[39] CLI-09-8, 69 NRC at 328-29 n.48 (citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-7, 29 NRC 395, 398 n.8 (1989)).

[40] NC WARN requests that the Commission reconsider "[p]recluding NC WARN from raising the issue of the lack of finality of reactor design and procedures." NC WARN Appeal at 17-18. We again reject this request. Our rules permit the filing of a combined license application during the pendency of a design certification rulemaking.

C. LBP-08-21

In its appeal of LBP-08-21, NC WARN asserts that the Board erred in denying ten of its originally proffered contentions.[41]

Our rules of practice provide for an automatic right to appeal a Board decision wholly denying a petition to intervene.[42] We will defer to the Board's rulings on standing and contention admissibility, however, unless the appeal points to an error of law or abuse of discretion.[43]

Our contention admissibility "requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements."[44] Under our rules:

> A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
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> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

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[41] NC WARN's standing is not at issue here.

[42] *See* 10 C.F.R. § 2.311(c). This occurred when the Board found the last remaining contention, Contention TC-1, inadmissible in LBP-09-8.

[43] *See Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 336 (2009); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

[44] *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 437 (2006).

> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
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> (vi) . . . Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.[45]

Applying these factors, we find that the Board did not err in rejecting NC WARN's proposed contentions, as discussed below.

1. Contention TC-2 (Track record of fire violations)

> The event of a significant fire can lead to the loss of the operators' ability to achieve and maintain hot standby/shutdown conditions further resulting in significant accidental release of radiation and posing a severe threat to public health and safety. Given its track record of noncompliance of fire regulations at the existing Harris Unit 1, Progress Energy should not be granted a COL for the two proposed reactors. The existing Harris reactor has been out of compliance since at least 1992 with requirements to maintain the post-fire safe shutdown systems of the reactor that minimize the probability and effects of fires and explosions. Given Progress Energy's history of noncompliance at the existing Harris reactor, NC WARN anticipates similar noncompliance at the proposed Harris reactors.[46]

In Contention TC-2, NC WARN references perceived violations of NRC fire protection regulations involving the existing reactor in operation at the site, Unit 1. As argued in the petition, these violations present "both a risk to [the existing] reactor and an additional risk to the proposed Harris reactors."[47] NC WARN does not elaborate on this claim except to suggest that

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[45] 10 C.F.R. § 2.309(f)(1).

[46] NC WARN Petition at 18.

[47] *Id.* at 23.

a potential accident at the existing reactor could have an impact on the proposed reactors.[48] In addition, NC WARN speculates that Progress will not comply with the fire regulations for the proposed reactors given its "history of noncompliance at the existing Harris reactor."[49]

NC WARN also challenges the "one fire assumption" in the design of the AP1000, which is used in performing the safe shutdown evaluation. In support of this challenge, NC WARN asserts that the "risk of 'multiple spurious actuation'" renders this a false assumption.[50] On appeal, NC WARN maintains that in finding the contention to be inadmissible, the Board ignored the past record of fire violations and treated them as irrelevant.[51]

We find no reversible error in the Board's decision. To the extent that Contention TC-2 challenges compliance with fire protection regulations at existing Unit 1, the Board appropriately ruled that the issue is outside the scope of this COL proceeding for proposed Units 2 and 3, and therefore fails to meet 10 C.F.R. § 2.309(f)(1)(iii).[52] With regard to the COL application, the Board reasonably concluded that NC WARN has not met the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) because it has not demonstrated any link between the purported violations at Unit 1 and any future noncompliance or resulting safety risk affecting proposed Units 2 and 3. Contrary to NC WARN's assertion, the Board did not find the claimed violations

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[48] *See id.* at 24 ("No assurance can be given by Progress Energy or the NRC that public health and safety will be protected or that potential accidents at the existing Harris reactor will have no impact on the proposed Harris reactors.").

[49] *Id.* at 18.

[50] *Id.* at 23-24.

[51] *See* NC WARN Appeal at 19.

[52] *See Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-08-17, 68 NRC 231, 240 (2008) (finding claim of deficiency in construction of concrete containment to be insufficient because it was not linked to application at issue in the proceeding).

irrelevant in and of themselves; rather the Board pointed out that NC WARN had not shown, with more than bare assertions, how these violations were relevant to the COL proceeding.[53]

On appeal, NC WARN emphasizes that the purported track-record of noncompliance means that Progress cannot be trusted with a COL for Units 2 and 3.[54] This argument, which amounts to a challenge to the character or integrity of the applicant, fails as well. "We have . . . placed strict limits on 'management' and 'character' contentions."[55] "When 'character' or 'integrity' issues are raised, we expect them to be directly germane to the challenged licensing action,"[56] and "be of more than historical interest."[57] As the Board pointed out, NC WARN has failed to provide the requisite link between what are essentially historical claims regarding the existing unit and the COL application in this proceeding.

Finally, NC WARN's challenge to the "one fire assumption" in the AP1000 design constitutes an impermissible challenge to Commission regulations.[58] Elements of the AP1000 design concerning fire protection, including the "one fire assumption," were addressed in the initial AP1000 rulemaking, and are not currently at issue in the ongoing design certification

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[53] LBP-08-21, 68 NRC at 565-66.

[54] NC WARN Appeal at 19-20.

[55] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001).

[56] *Id.* at 367.

[57] *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 120 (1995).

[58] *See* 10 C.F.R. § 2.335(a). Further, NC WARN has not requested a waiver pursuant to 10 C.F.R. § 2.335(b).

amendment rulemaking.[59] For these reasons, and for the reasons the Board gave, we find that the Board did not err in determining that Contention TC-2 is inadmissible.

2. Contention TC-3 (Aircraft attacks)

> Progress Energy's [environmental report (ER)] fails to satisfy [the National Environmental Policy Act (NEPA)] because it does not address the environmental impacts of a successful attack by the deliberate and malicious crash of a fuel-laden and/or explosive-laden aircraft and resulting severe accidents of the aircraft's impact and penetration on the facility. It is unreasonable for the NRC to dismiss the possibility of an aviation attack on the existing and proposed Harris reactors in light of the studies by the NRC that this is a real possibility that could have devastating results.[60]

Even though Contention TC-3 mentions NEPA in the body of the contention, which suggests that the contention addresses environmental issues, NC WARN also addresses safety issues in connection with Contention TC-3. Of the environmental issues it raises, NC WARN insists that the "Commission's basis for refusing to consider the environmental impacts of deliberate and malicious acts in a COL is no longer viable, and therefore may be challenged in this proceeding."[61] In support of this claim, NC WARN argues, among other things, that the

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[59] There has been no change in this section of Revision 16 from what was approved in Revision 15 (10 C.F.R. Part 52, Appendix D). *See* NRC Staff Answer at 20. *Compare* Westinghouse AP1000 Design Control Document, Rev. 15, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ML053460410), *with* Westinghouse AP1000 Design Control Document, Rev. 16, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ML071580937). On September 22, 2008, Westinghouse submitted Revision 17 to the AP1000 design. Letter from Robert Sisk, Manager, Licensing and Customer Interface, Regulatory Affairs and Standardization, Westinghouse, to U.S. Nuclear Regulatory Commission (Sept. 22, 2008) (ML083230167). Prior to the Board's reassessed ruling on Contention TC-1 and termination of the proceeding, Progress notified the Board and the parties that it had revised its COL application to include, among others, changes reflected in Revision 17. Letter from John H. O'Neill, Jr., counsel for Progress Energy, to Board (June 22, 2009) (ML091730590). The "one fire assumption" remains unchanged in Revision 17. *See* Westinghouse AP1000 Design Control Document, Rev. 17, Tier 2, Chapter 9, Appendix 9A, section 9A.2.7.1, at 9A-5 (ML083230723).

[60] NC WARN Petition at 24. In its appeal NC WARN jointly addressed Contentions TC-3 and TC-4, but they are addressed separately here. *See* NC WARN Appeal at 20-21.

[61] NC WARN Petition at 25.

Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*[62] should control in this proceeding.[63] NC WARN also asserts that the ER does not provide alternatives for mitigating the consequences of an aircraft impact. According to NC WARN, this is required as part of the severe accident mitigation alternatives (SAMA) analysis.[64]

Of the safety-related issues it raises, NC WARN quotes 10 C.F.R. § 50.34(a)(4) for the proposition that NRC regulations require "that a nuclear power plant must be designed against accidents that are 'anticipated during the life of the facility.'"[65] NC WARN then argues that an aircraft attack is reasonably foreseeable and should "qualify as a design-basis threat (DBT), i.e., an accident that must be designed against under NRC safety regulations."[66] NC WARN also incorporates the fire safety discussion in Contention TC-2 that "the various structures, systems, and components of the plant cannot be relied upon if the plant is not in compliance with safety-related rules that leave all of the post-fire safe shutdown systems vulnerable."[67] In addition, NC WARN provides examples of the possible effects after an aircraft impact, citing various studies.[68]

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[62] 449 F.3d 1016 (9th Cir. 2006).

[63] NC WARN Petition at 29.

[64] *Id.* at 30.

[65] *Id.* at 24-25.

[66] *Id.* at 25.

[67] *Id.* at 26.

[68] *Id.* at 25-28.

On appeal, NC WARN discusses only its environmental arguments,[69] apparently abandoning the safety-related ones.[70] Nevertheless, we address both the environmental and safety aspects of Contention TC-3.

With regard to the contention's environmental aspects, we continue to maintain that the environmental effects of aircraft impacts from terrorist attacks are outside the scope of the NRC's NEPA review.[71] We have made clear that outside of the Ninth Circuit, as is the case here, we will not apply the *Mothers for Peace* ruling.[72] We have complied with the Ninth Circuit's ruling for facilities within that Circuit, as we are required to do. That experience, however, is very limited and does not demonstrate that conducting environmental analyses of terrorist scenarios for the licensing of all major facilities would be practicable or lead to meaningful additional information. Therefore, we are not persuaded by the Chairman's dissent, and are not prepared to abandon our carefully-considered decisions without sufficient justification. This ruling reflects the Commission's consistent position on the requirements of NEPA and their application, and fundamentally, we continue to disagree with the Chairman's

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[69] *See* NC WARN Appeal at 20-21.

[70] We will deem waived arguments made before the Board that are abandoned on appeal. *See International Uranium Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 414 (1990).

[71] *AmerGen Energy Co. LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007). The Third Circuit recently held that because the petitioner in *Oyster Creek* had not shown a "reasonably close causal relationship" between an aircraft attack and the relicensing proceeding at issue, "such an attack does not warrant NEPA evaluation." *N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009). In doing so, the Third Circuit discussed its departure from the Ninth Circuit's reasoning in *Mothers for Peace*. *Id.* at 142-43.

[72] *See, e.g., South Carolina Electric and Gas Co. and South Carolina Service Authority (also Referred to as Santee Cooper)* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC __ (Jan. 7, 2010) (slip op. at 16-17).

assertion that our approach is at odds with the agency's commitment to transparency. Accordingly, to the extent that the contention asserts that the NRC must address these environmental effects, it is inadmissible.[73]

With regard to the contention's remaining aspects, as an initial matter we note – as we did recently in the *Summer* COL proceeding[74] – that NC WARN appears to confuse the concepts of "design basis threat," that is, the set of events that must be considered in the design of plant security features, and a "design basis event," that is, an accident that must be considered in plant design.[75] Under either interpretation, however, the contention is inadmissible.

First, with respect to the design basis threat, the NRC has concluded that protection against the threat of air attacks is adequately provided by other federal agencies and what measures reasonably can be expected of licensees. Accordingly, the agency decided not to include the threat of air attacks in the 2007 revision to the design basis threat rule. The Ninth Circuit recently upheld this decision, finding the NRC's conclusions to be reasonable.[76] Thus,

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[73] This includes NC WARN's assertion that the NRC must consider aircraft attacks as part of its SAMA and severe accident mitigation design alternatives (SAMDA) analysis, which arise in connection with the agency's NEPA obligations. Further, to the extent it challenges the SAMDA analysis, it is an impermissible challenge to the AP1000 certified design in 10 C.F.R. Part 52, Appendix D. *See* 10 C.F.R. § 51.107(c).

[74] *Summer*, CLI-10-1, 71 NRC __ (slip op. at 13).

[75] *Compare* 10 C.F.R. § 50.34(a)(4) (design basis event), *with* 10 C.F.R. § 73.1 (design basis threat).

[76] *See Pub. Citizen v. NRC*, 573 F.3d 916, 925-26 (9th Cir. 2009). *See generally* Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705 (Mar. 19, 2007).

NC WARN's challenge, to the extent that it asserts the application should consider air attacks as a design basis threat, is outside the scope of the proceeding.[77]

Second, as a safety matter, a recent final rule requires applicants for new nuclear power reactors to perform a design-specific assessment of the effects of the impact of a large, commercial aircraft.[78] Because the AP1000 vendor has submitted a proposed amendment to the design that is intended to comply with the final rule, which is currently under consideration in the AP1000 design certification amendment rulemaking, this aspect of the contention effectively is moot.[79] We therefore find no error or abuse of discretion in the Board's decision regarding Contention TC-3 for the above reasons.

3. Contention TC-4 (Aviation attacks and fires)

> The ER for the COL for the proposed Harris reactors fails to satisfy NEPA because it does not address a significant fire involving noncompliant fire protection features for both primary and redundant safe shutdown electrical circuits caused by a deliberate malicious action using a fuel-laden and/or explosive-laden aircraft on the facility.[80]

In a nutshell, Contention TC-4, both before the Board and on appeal, combines and repeats the arguments made in support of Contentions TC-2 and TC-3.[81] This contention is

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[77] *See* 10 C.F.R. § 2.309(f)(1)(iii).

[78] *See* Final Rule, Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs, 74 Fed. Reg. 28,112, 28,112 (June 12, 2009). In promulgating the final rule, the Commission determined that the impact of a large, commercial aircraft is a beyond-design basis event. *Id.*

[79] When the Licensing Board made its admissibility determination on this contention, the proposed rule was pending. *See* Proposed Rule, Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs, 72 Fed. Reg. 56,287 (Oct. 3, 2007). The Board thus found the contention inadmissible to the extent that it challenged a matter that was the subject of an ongoing rulemaking. We find no error in the Board's analysis in this regard.

[80] NC WARN Petition at 31.

[81] *See id.* at 31-33; NC WARN Appeal at 20-21.

inadmissible for the reasons the Board gave,[82] as well as the reasons discussed above. The Board did not err or abuse its discretion in finding this contention to be inadmissible.

4. Contention TC-5 (High density spent fuel pools)

> The ER for the proposed Harris reactors fails to satisfy NEPA because it does not consider the potential impacts of a radiation release caused by high-density storage of highly-radioactive "spent" fuel in its spent fuel pools. The [COL application] indicates that spent fuel rods would be stored in two newly constructed cooling pools in buildings designed to withstand only weather-related impacts. The proposed high-density storage heightens the risk of catastrophic radiation releases due to accident or terrorism.[83]

NC WARN asserts in Contention TC-5 that the design of the spent fuel pools at the current reactor and proposed reactors increases the risk of fire in the event of a loss-of-pool-coolant accident or terrorist attack.[84] According to NC WARN, the NRC should evaluate the releases from these events in its NEPA analysis. Contention TC-5 also incorporates the arguments made in support of Contentions TC-3 and TC-4 regarding aircraft attacks.[85] The Board found Contention TC-5 to be inadmissible on the grounds that NC WARN failed to provide supporting references for its arguments; it improperly challenged the AP1000 certified design; it impermissibly challenged Revision 16 of the AP1000 design control document (DCD);[86] and, to the extent it raised issues regarding the environmental consequences of terrorist attacks, it improperly raised matters outside the scope of the proceeding.[87]

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[82] *See* LBP-08-21, 68 NRC at 568-69.

[83] NC WARN Petition at 33-34.

[84] *Id.* at 34-36.

[85] *Id.* at 36.

[86] The Board erred in rejecting this argument out of hand. *See* LBP-08-21, 68 NRC 571. As we explained in our Policy Statement on the Conduct of New Reactor Licensing Proceedings, contentions that challenge a docketed, but not yet certified design that are "otherwise admissible" should be referred to the NRC Staff for consideration in the design review (continued ...)

In its appeal, NC WARN argues that the Board erred in finding Contention TC-5 inadmissible as a challenge to the certified design because Westinghouse's submission of Revision 17 means there is "a significant deficiency in the [COL application]" from the absence of a final design.[88] NC WARN elaborates that "[t]he regulatory required SAMDAs simply cannot be investigated or developed until the final designs and procedures are finalized."[89]

The Board's determination that Contention TC-5 is inadmissible was reasonable. To the extent that the contention asserts that NEPA requires the Commission to analyze the environmental impacts of terrorist attacks – either by its incorporation of Contentions TC-3 and 4 or the argument that a SAMDA analysis should be performed – it is inadmissible. As discussed above with respect to Contention TC-3, we decline to apply the ruling in *Mothers for Peace* outside of the Ninth Circuit. To the extent that NC WARN challenges the AP1000 design certified in Part 52, Appendix D, it is an impermissible challenge to NRC regulations, as is the challenge regarding the absence of a "final" design. As we have reiterated in other COL proceedings, NRC regulations permit an applicant to reference a docketed, but not yet certified, design.[90]

(… continued)
proceeding and held in abeyance. Conduct of New Reactor Licensing Proceedings; Final Policy Statement, 73 Fed. Reg. 20,963, 20,972 (Apr. 17, 2008) (providing instructions for treatment of certain design-related contentions in a proceeding on a COL application referencing a design for which certification has been requested, but not yet approved) (New Reactor Policy Statement). Nevertheless, the Board's oversight does not rise to the level of reversible error because the contention, in any event, is not otherwise admissible for the reasons discussed below.

[87] LBP-08-21, 68 NRC at 571.

[88] NC WARN Appeal at 22.

[89] *Id.*

[90] *See* 10 C.F.R. § 52.55(c); *Summer*, CLI-10-1, 71 NRC __ (slip op. at 10); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 3), CLI-09-4, 69 NRC 80, 85 (2009); *see also Luminant*
(continued ...)

5. Contention TC-6 (Reliability of uranium fuel)

> The assumption that uranium fuel is a reliable source of fuel for the projected operating life of the proposed Harris reactors is not supported in the [COL application] submitted by Progress Energy.[91]

NC WARN states that worldwide uranium consumption has exceeded uranium production, and consequently asserts that Progress has failed to "fully and credibly discuss the reliability of uranium fuel supply" in its COL application. NC WARN cites information from the World Nuclear Association website to support this argument.[92]

Due to ambiguity in the petition, the Board treated the contention as both a contention asserting an omission in the application or as one asserting flaws in an existing analysis, and found the contention inadmissible under either interpretation.[93] The Board explained that Contention TC-6 failed as a contention of omission because the ER contains a discussion of "Uranium Fuel and Energy Consumption."[94] The Board then reasoned that the contention did not sufficiently challenge the analysis contained in the application. As an alternative basis for its ruling, the Board, "in an abundance of caution, examined" the information from the World Nuclear Association website cited in support of the contention and noted that it directly contradicted NC WARN's claim that uranium is in short supply.[95]

(… continued)
Generating Co., LLC (Comanche Peak Nuclear Power Plant, Units 3 and 4), Nos. 52-034-COL and 52-035-COL (Apr. 27, 2009) (unpublished); *infra* Sections II.D, II.E.

[91] NC WARN Petition at 36-37.

[92] *Id.* at 37-38.

[93] LBP-08-21, 68 NRC at 573.

[94] *Id.* at 573 (citing Shearon Harris Nuclear Power Plant Units 2 and 3 COL Application, Part 3, Environmental Report (Rev. 0), section 10.2.2.3 (Feb. 2008) (ML080601078) (ER)).

[95] *Id.* at 573-74.

On appeal, NC WARN argues that the Board "apparently made evidentiary findings without allowing the parties the opportunity to put on evidence at hearing or even allow motions for summary disposition."[96] NC WARN provides no support for this assertion, merely stating that "[i]t is not clear what factual evidence the ASLB based its decisions on or if the members of the ASLB relied on their own biases and beliefs outside any hearing record."[97] The decision consists of the Board's determination that the contention was insufficiently supported and failed to show that a genuine dispute exists on a material issue of law or fact with the application in contravention of 10 C.F.R. § 2.309(f)(1)(v) and (vi). The Board – appropriately – reviewed the materials cited in support of the contention, while making no pronouncements on whether the information contained in the application or the claims made in the petition were valid.[98] "We expect our licensing boards to examine cited materials to verify that they do, in fact, support a contention."[99] We therefore decline to disturb the Board's ruling on Contention TC-6.

6. Contention EC-1 (Underestimation of costs)

> In its [COL application], Progress Energy grossly underestimates the costs and risks of the proposed Harris reactors and grossly overestimates the costs of their alternatives. The lack of a reasonable cost basis means that there can be no reasonable analysis of comparative sources of energy generation, energy efficiency or other energy management strategies.[100]

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[96] NC WARN Appeal at 22.

[97] *Id.* NC WARN repeats its general claim of Board bias and/or Board reliance on extra-record material for a number of its contentions. We reject all of these unsupported assertions.

[98] *See, e.g.*, *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457, 462 (2006); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

[99] *USEC Inc.*, CLI-06-10, 63 NRC at 457.

[100] NC WARN Petition at 38.

According to NC WARN, Contention EC-1 challenges "[o]ne of the fundamental deficiencies in the present ER[:] . . . the lack of a realistic and up-to-date cost estimate for the proposed Harris reactors."[101] NC WARN points out what it asserts to be a discrepancy in the higher estimated cost of reactors proposed by Progress Energy Florida, Inc., for a greenfield site in Levy County, Florida. In addition, NC WARN asserts that the estimates do not account for the cost of "transmission lines (excluding AFUDC [allowance for funds used during construction]), . . . [f]ederal subsidies, such as the cost of high-level waste disposal at the proposed Yucca Mountain repository . . . , tax breaks and direct subsidies, and liability coverage under the Price-Anderson Act."[102] NC WARN then argues that Progress Energy Carolinas, Inc. – the applicant here – "has not addressed any of the substantive issues about the costs and risks" (of which NC WARN lists examples),[103] "nor shown any of its analysis to support its decision to construct the proposed Harris reactors despite the costs and risks."[104] Further, NC WARN asserts, the ER does not accurately present the costs of alternative energy sources, and "in large part ignores the positive benefits of energy efficiency, cogeneration, purchased power and alternative energy sources to reduce or meet the reduced energy demand."[105]

After this contention was briefed, but before the Board ruled on the petition, Progress sent a letter to the Board explaining, among other things, that it had substituted the higher cost estimate in the ER for the proposed Levy County reactors for the cost estimate in the ER for the

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[101] *Id.* at 39.

[102] *Id.* at 40.

[103] *Id.* at 41.

[104] *Id.* at 42.

[105] *Id.*

proposed Harris reactors.[106] NC WARN responded by letter that this rendered moot the part of the contention "that alleges that the estimate in the ER is understated," but not "[t]he remainder of the contention regarding the cost-benefit analysis requirements."[107] In ruling on the contention, the Board acknowledged both letters, but stated that they had no bearing on the Board's decision.[108] Instead, the Board primarily relied on the *Midland* case, in which the Atomic Safety and Licensing Appeal Board held that it is inappropriate for the agency to consider economic costs when no environmentally preferable alternative has been identified.[109] Based on *Midland*, the Board determined that a COL applicant is required to provide a cost estimate in its ER "*only* where the [a]pplicant's alternatives analysis indicates that there is an environmentally preferable alternative."[110] Because Progress had not identified an environmentally preferable alternative in its ER, the Board rejected Contention EC-1 "because it relies upon the faulty premise that NEPA, or our [a]gency's implementation of NEPA, requires [Progress] to provide cost estimates in its ER."[111]

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[106] Letter from John H. O'Neill, Jr., Counsel for Progress Energy, to Board (Oct. 6, 2008) at 2-3.

[107] Letter from John D. Runkle, Counsel for NC WARN, to Board (Oct. 13, 2008) at 2. NC WARN also requested that the Board "take notice" of costs it asserted were omitted from Progress' amended cost estimate. *Id.*

[108] LBP-08-21, 68 NRC at 575 n.23.

[109] *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155, 163 n.25 (1978).

[110] *Id.* at 576 (emphasis in original).

[111] *Id.* at 577.

On appeal, NC WARN acknowledges that its claims relating to Progress' cost estimates are now moot.[112] However, NC WARN argues that the Board's "rationale for determining that costs are not required to be considered in the ER [only when there is an environmentally preferable alternative] is arbitrary and unreasonable."[113] According to NC WARN, this is because the Board "fails to comprehend that in the context of [a] reactor licensing case, the 'no reactor' option always has far fewer environmental impacts than the proposed 'two reactor' option and is therefore environmentally preferable."[114]

As an initial matter, we agree with NC WARN that its claims relating to Progress' cost estimates are now moot. In its initial petition, NC WARN used data from the proposed Levy County reactors as an example of a more current cost estimate. When Progress amended its ER to use the Levy County cost estimate, this portion of the contention was rendered moot.[115]

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[112] NC WARN Appeal at 24 (stating, "*[t]he above discussion aside*, this contention was rendered in large part moot") (emphasis added). The subject of the "above discussion" to which NC WARN refers is NC WARN's disagreement with the Board's rationale for determining that a cost-benefit analysis is not required, and NC WARN's assertion that there are environmentally preferable alternatives to the proposed reactors – specifically, the "no-reactor" option. *See id.* at 23 (stating that "the 'no reactor' option always has far fewer environmental impacts than the proposed 'two reactor' option and is therefore environmentally preferable").

NC WARN also states on appeal that "it should be noted that the [Levy County] cost estimates did not include financing costs that could add an additional 50 percent to the total cost of the reactors." *Id.* at 24. NC WARN fails to explain the relevance of this information or the relief it desires. Even if we were to consider it, NC WARN offers no facts or expert opinion – in contravention of 10 C.F.R. § 2.309(f)(1)(v) – to support its assertion that the total cost of the reactors will increase an additional fifty percent with financing costs.

[113] *Id.* at 23.

[114] *Id.*

[115] NC WARN did not state its view as to whether any of its other "underestimation of costs" arguments were not rendered moot by Progress' amended cost estimate. Nonetheless, to the extent it takes the position that any of them remain viable (e.g., its arguments regarding costs for transmission lines, federal subsidies "such as the cost of high-level waste disposal," tax (continued ...)

Therefore, we address the balance of the contention – NC WARN's assertion that a cost-benefit analysis is required, and its assertion that this cost-benefit analysis should include a comparison to alternative energy sources.

In our recent ruling in the *Summe*r COL proceeding – which was issued after the Board's decision in LBP-08-21 – we explained that if a petitioner has proffered an admissible contention asserting an environmentally preferable alternative to the proposed reactor(s), this also would trigger the requirement in *Midland* that the ER contain cost estimates.[116] The question before us in this matter, then, is whether NC WARN has stated an admissible contention that asserts an environmentally preferable alternative to the proposed reactors.

Although the Board did not reach the issue, it suggested in a footnote that NC WARN had not "properly challenged" Progress' alternatives analysis.[117] Based on our reading of the petition, we find that the Board's decision to reject the contention did not constitute reversible error.

Contrary to the requirements in 10 C.F.R. § 2.309(f)(1)(v), NC WARN merely asserts, without any facts or expert opinion offered in support, that

> [i]n contrast to the underestimation of reactor costs, the costs, impacts, and requirements for the renewable energy alternatives are particularly inaccurate in the ER, with inflated land requirements for wind and solar, and unreasonable conclusions that the waste impacts of wind and solar are greater than that of a nuclear power plant. Progress Energy has substituted its calculation of land requirements for flat plate or

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breaks and direct subsidies, liability coverage under the Price-Anderson Act, or the risks of nuclear energy), *see* NC WARN Petition at 40, we deem them abandoned. NC WARN does not mention these arguments on appeal. *See White Mesa*, CLI-01-21, 54 NRC at 253.

[116] *See Summer*, CLI-10-1, 71 NRC __ (slip op. at 30-31).

[117] *See* LBP-08-21, 68 NRC at 576 n.25.

> tracking photovoltaics, for solar thermal plants which is a completely different technology.[118]

There is no support or explanation offered to elucidate what land requirements ought to have been considered (i.e., how they differed from what is assumed in the application), or why the conclusions regarding the waste impacts of power generation using wind and solar technologies are unreasonable. Likewise, there is no support offered for NC WARN's assertion in its petition that Progress has underestimated the environmental impact of the proposed reactors.[119] Moreover, with no specific mention in its appeal, NC WARN apparently has abandoned this discussion concerning the benefits of alternative energy sources.[120]

The only alternative that NC WARN mentions on appeal is the "no reactor" option. The "no reactor" option, or no-action alternative, was not raised before the Board and is therefore improperly raised on appeal.[121] Even were we to consider it, NC WARN has provided no facts

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[118] NC WARN Petition at 42.

[119] *Id.* (stating, without more, that "Progress Energy includes only the 192-acre footprint for the land use impact of the proposed reactors, omitting the thousands of acres to be flooded by increasing the size of the Harris Lake, the land taken for new transmission lines, relocated roads and bridges, and other infrastructure needs"). As Progress points out in its answer, these asserted omissions are not, in fact, omitted from the ER. *See* Progress Answer at 71-73 (citing ER sections 10.1.1, 10.2.1.1, 10.3.1.1, 10.3.1.2, 10.3.1.3, 10.3.1.8, 10.3.2.2, 10.3.2.7, 10.3.3, and tables 10.1-1 and 10.4-1). The same is true for NC WARN's statement that the ER "*in large part* ignores the positive benefits of energy efficiency, cogeneration, purchased power and alternative energy sources to reduce or meet the reduced energy demand." NC WARN Petition at 42 (emphasis added). A discussion of these options is included in the ER, as Progress points out, and it is not otherwise clear what portion of the analysis in the application is challenged by NC WARN. *See* Progress Answer at 73-76 (citing ER sections 8.2.2.2, 8.3.3, 9.2.1.1, 9.2.1.3, 9.2.2, 9.2.3, and table 9.2-1).

[120] *See White Mesa*, CLI-01-21, 54 NRC at 253.

[121] *See Millstone*, CLI-08-17, 68 NRC at 239 n.38 (citing *USEC Inc.*, CLI-06-10, 63 NRC at 460).

or expert opinion in support of its assertion that this option "always has far fewer environmental impacts than the proposed 'two reactor' option."[122]

Therefore, as the Board suggested, NC WARN has not "properly challenged"[123] Progress' alternatives analysis or conclusion that there is no environmentally preferable alternative to the two reactors. Consequently, the balance of Contention EC-1 is inadmissible. For the above reasons, we find no reversible error or abuse of discretion in the Board's finding Contention EC-1 inadmissible.

7. Contention EC-2 (Carbon Footprint)

> Progress Energy fails to present evidence or analysis of the "carbon footprint," i.e., the atmospheric carbon generated by mining and fuel processing, the construction and operation, the long-term waste storage, associated with the proposed Harris reactors in its ER.[124]

In support of Contention EC-2, NC WARN asserts that "[t]he proposed Harris reactors would contribute to th[e] problem" of climate destabilization from greenhouse gases.[125] Therefore, according to NC WARN, the application "needs to include an analysis of the emission of greenhouse gases in the entire cycle, i.e.," mining, transporting, and processing uranium ores; producing and transporting raw materials and components; constructing, operating, and closing the proposed reactors; and transporting and disposing radioactive waste.[126]

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[122] NC WARN Appeal at 23.

[123] LBP-08-21, 68 NRC at 576 n.25.

[124] NC WARN Petition at 43.

[125] *Id.* at 43-44.

[126] *Id.* at 44.

The NRC Staff pointed out in its answer that the application did contain information on the carbon imprint of the reactor life cycle and uranium fuel cycle.[127] Accordingly, the Board reasoned that NC WARN erred when it asserted "that the [COL application] must consider these matters and implie[d] that it did not."[128] NC WARN therefore failed to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact as required under 10 C.F.R. § 2.309(f)(1)(vi). Furthermore, the Board noted that NC WARN did not reference any portion of the COL application with which it takes issue, which also is required under section 2.309(f)(1)(vi).[129]

In addition to finding the contention inadmissible, the Board provided additional views that it characterized as "not relevant to [its] finding."[130] On appeal, NC WARN asserts that the Board's inclusion of these additional views indicates that it "apparently made evidentiary

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[127] NRC Staff Answer at 40-41 (citing ER sections 9.2.3.1.1 and 9.2.3.2.1; Parliamentary Office of Science and Technology, "Carbon Footprint of Electricity Generation," No. 268 (Oct. 2006), *available at* www.parliament.uk/documents/upload/postpn268.pdf (last visited Oct. 29, 2009)).

[128] LBP-08-21, 68 NRC at 579.

[129] *Id.*

[130] *Id.* The Board opined that even if NC WARN had asserted with particularity an error in the applicant's analysis, it then would be faced with the "significant hurdle" of showing the requisite materiality of such an issue. This "impediment" would arise from (in the Board's assessment) the low carbon imprint of nuclear power generation compared to that of "the only viable power generation alternatives (which are fossil-fueled)" rendering the carbon imprint issue immaterial to the decision the NRC must make. *Id.* The Board also suggested that the Commission consider amending Table S-3 in 10 C.F.R. § 51.51. *Id.* at 579-80. Because the Board did not refer to us its decision on this contention (as two other boards have done, *see Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 and 2), LBP-08-17, 68 NRC 431 (2008); *Tennessee Valley Authority* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361 (2008)), we need not address the Board's additional views on the matter. However, the guidance that we provided in our recent decision declining review of the referred rulings in the *Bellefonte* and *Lee* COL proceedings applies equally here. *See Duke Energy Carolinas, LLC* (Combined License Application for William States Lee III Nuclear Station, Units 1 and 2), CLI-09-21, 70 NRC __ (Nov. 3, 2009) (slip op. at 6).

findings but did not allow the parties the opportunity to put on evidence at hearing or even allow motions for summary disposition."[131] NC WARN claims that the Board "based its decision on a report in the [COL application] and the members . . . appeared to rely on their own biases and beliefs outside any hearing record."[132] In addition, NC WARN asserts that "[a] clear reading of the contention shows that the [p]etition provides reports and citations to documents . . . that directly challenge the report relied upon in the [COL application]."[133]

As we stated above,[134] NC WARN offers no support for this assertion, nor do we find any. Contrary to NC WARN's argument, the Board provided a clear rationale for its admissibility ruling, noting the areas where the application appeared to contain information that NC WARN erroneously claimed was omitted.[135] The Board also made clear that its additional views had no bearing on its admissibility decision.[136] Further, NC WARN's assertions that it provided sufficient support for the contention do not directly challenge the Board's finding that the contention erroneously asserted an omission in the application. Because the application contained the information NC WARN asserted was missing, the Board did not err or abuse its discretion in concluding that NC WARN failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

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[131] NC WARN Appeal at 25.

[132] *Id.* The Board cited an October 2006 report from the United Kingdom's Parliamentary Office of Science and Technology entitled "Carbon Footprint of Electricity Generation, No. 268," which is referenced in the Chapter 9 of the ER. *See* LBP-08-21, 68 NRC at 578-79; *supra* note 127.

[133] *Id.*

[134] *See supra* note 97.

[135] LBP-08-21, 68 NRC at 579.

[136] *Id.*

For these reasons, we reject NC WARN's unsupported claims that the Board improperly made evidentiary findings, and find that the Board reasonably concluded that Contention EC-2 is inadmissible.

8. Contention EC-3 (Water requirements)

> The [COL application] does not identify the plans for meeting the water requirements for the proposed Harris reactors with sufficient detail to determine if there will be adequate water during adverse weather conditions, such as droughts, and the environmental impacts for water withdrawals during both normal and adverse conditions.[137]

Contention EC-3 addresses both environmental and safety issues, although they are not clearly delineated. First, NC WARN argues that "without a clear plan on how [cooling water for safe shutdown] will be provided, the COLA is incomplete."[138] Second, NC WARN asserts that the NRC Staff "declared the application to be incomplete" with respect to "the environmental impacts caused by changing water levels at the Harris Lake and the intake on the Cape Fear River."[139] Third, NC WARN lists a series of perceived deficiencies in the application:

a. Analysis of the additive and synergistic impacts on the local and downstream ecosystem from the reactor thermal discharge on water in Harris Lake, which is already elevated in temperature.

b. Analysis of the impact of warmed water on condenser cooling.

c. The evaluation of increasingly warmer water on reactor cooling.

d. Evaluation of the impact of warmer ambient water temperatures on total withdrawal, consumption, and evaporation.

e. Analysis of the impacts of the proposed water withdrawal from the Cape Fear River for the proposed Harris reactors on the other facilities and municipalities

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[137] NC WARN Petition at 45.

[138] *Id.* at 46.

[139] *Id.*

downstream that use the river for either or both water supply and wastewater discharge.

f. Analysis of the impact of pollution in water at warmer temperatures on the ecology of Harris Lake and downstream.

g. A full analysis of the impact of reactor heat increasing the temperature in water on the other pollutants in the water, including implications for the food chain.

h. Analysis of the impact of reactors going off-line on regional grid stability.

j. An evaluation of the potential for extended drought locally, and in the region, that would exacerbate all of the issues identified above.[140]

Fourth, NC WARN mentions that Progress' commitment not to withdraw water from the Cape Fear River during low flow periods" is often "coincident with its summer peak demand."[141] Finally, NC WARN argues that there is a "significant safety concern" caused by reactors "go[ing] to low-power or off-line due to elevated cooling water temperatures and the loss of efficiency in power production due to loss of effective condensation of steam used to generate power."[142]

We first address NC WARN's insistence that in the letter announcing the docketing of the application, the NRC Staff declared the application to be incomplete for two items related to water use impacts. We made clear in CLI-08-15 that the Staff's letter did not state that the application was incomplete. To the contrary, the NRC Staff found that the application was sufficient to commence review. As we stated then, "[t]he mere fact that the staff is asking for more information does not make an application incomplete."[143] Therefore, we again reject this argument.

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[140] *Id.* at 46-47.

[141] *Id.* at 47.

[142] *Id.*

[143] CLI-08-15, 68 NRC at 3.

Next, we address the various components of Contention TC-3. As Progress explained in its answer, the ER describes the source of water for the two proposed reactors as the Harris Reservoir, with the Cape Fear River providing make-up water.[144] Other sections of the ER also discuss water supply.[145] Moreover, the final safety analysis report (FSAR) states that for safety-related water supply, the proposed plants – which utilize a passive containment cooling system – will not rely on an external water source.[146] NC WARN does not challenge these provisions of the COL application, or otherwise elaborate on its assertions that Progress does not have a "clear plan" on how sufficient cooling water will be provided for plant operations. Thus, for this argument, NC WARN has failed to show a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).

Further, the list of arguments that NC WARN labels "a" through "j" also do not show a genuine dispute on a material issue of law or fact. For example, the ER contains information relating to NC WARN's assertion in "a" on the impacts of thermal discharge.[147] NC WARN does not challenge the analyses or conclusions in these sections, let alone cite them. In its appeal, NC WARN emphasizes – without elaboration – that the Board erred in pointing out NC WARN's failure to cite specific sections of the application that it challenged because "it is clear in the

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[144] Progress Answer at 98; ER section 5.2.1.

[145] Progress Answer at 98; ER sections 3.3, 3.4, 4.2.

[146] *See* Progress Answer at 112-13; Shearon Harris Nuclear Power Plant Units 2 and 3 COL Application, Part 2, Final Safety Analysis Report (Rev. 0), section 2.4.11, at 2.4-36 (Feb. 2008) (ML080600902).

[147] *See* Progress Answer at 101-02; ER section 5.3.2.

contention that this analysis was not included in any section."[148] NC WARN asserts that it is not required to cite any specific sections when "[t]he primary allegation is that the information is missing, not that it is required to be in a specific section."[149]

NC WARN's general proposition misunderstands the concept of a "contention of omission."[150] "There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application."[151] Here, NC WARN has made generalized assertions that mirror the general subject matter of what is included in various portions of the application. Because the challenged issues are in fact addressed in the COL application, NC WARN's contentions go to the adequacy of the ER discussion. For example, argument "a" does not assert an omission. Thermal impacts of the proposed units are discussed in ER section 5.3.2.[152] As a challenge to the adequacy or validity of the thermal impacts analyses within the application, it also fails because it does not indicate what is wrong with them aside from stating that they are "deficient." The remaining arguments through "j" suffer from similar inadequacies.

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[148] NC WARN Appeal at 26-27. NC WARN also asserts that the Board improperly based its admissibility determination "on its assessment of the credibility of the factual allegations in the Petition." We reject this argument for the same reasons discussed in notes 97 and 134, *supra*.

[149] NC WARN Appeal at 27.

[150] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

[151] *Id.*

[152] ER section 5.3.2.

Additionally, NC WARN does not elaborate on the relevance of, or provide support for, its statement that Progress' plan not to withdraw water from the Cape Fear River during low flow conditions coincides with summer peak demand. Nor does it cite any facts or expert opinion in support of its statement that there are safety and energy-efficiency concerns stemming from a reactor going off-line when cooling water temperatures are elevated.[153] Moreover, NC WARN does not explain what these concerns would be, and we decline to speculate as to what aspect of the application NC WARN is challenging.[154]

For these reasons, and for the reasons the Board gave,[155] this contention is inadmissible.

9. Contention EC-4 (Deficiencies in emergency planning)

> The area around the Harris site has changed considerably since the first reactor was constructed from dramatically increased populations and changing land uses. The ER does not provide an adequate analysis of the current populations and land use, and does not address the forecasted growth in the area. As a result, emergency planning that adequately protects the health and safety of the residents, students and workers around the proposed Harris reactors cannot be adequately accomplished.[156]

In Contention EC-4, NC WARN argues that the application does not address adequately the impacts on emergency planning from population increases and changes in land use within the 10-mile emergency planning zone and the 50-mile ingestion pathway since Harris Unit 1 was licensed. NC WARN also implies that Progress does not have a "solid grasp" on the

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[153] *See* 10 C.F.R. § 2.309(f)(1)(v).

[154] *See id.* § 2.309(f)(1)(vi).

[155] *See* LBP-08-21, 68 NRC at 582-83.

[156] NC WARN Petition at 48.

medical needs of members of susceptible populations living around the plant.[157] For this, NC WARN states that additional studies are needed, and references the affidavit of Dr. Steven Wing, which was not prepared for this case, but rather was submitted in support of NC WARN's petition to intervene and request for hearing in the *Shearon Harris* license renewal proceeding.[158] In that affidavit, Dr. Wing noted an increase in population and stated that "'the evacuation plan for the Shearon Harris nuclear plant must provide care for all persons around the plant, and make special provisions for susceptible populations.'"[159]

In addition, NC WARN maintains that "[t]he ER needs to examine the forecasted increase in vehicle use on the highways in the area" and that "evacuation routes may be impassible at most times of day without extensive new spending on highway expansions and improvements."[160] It also claims that "potential changes in infrastructure," such as removal of roads or bridges if Harris Lake is expanded, "could limit the ability for safe evacuation."[161] NC WARN repeats these arguments on appeal and argues that the Board did not consider Dr. Wing's affidavit, and that, in finding it inadmissible, the Board misrepresented what is in the contention, and its members "relied on their own biases and beliefs."[162]

At the outset we conclude that the Board fairly presented the contents of Contention EC-4. The Board noted, without opining on the validity of the information in the application or

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[157] *Id.* at 49-50.

[158] *Id.* at 50-51.

[159] *Id.* at 51.

[160] *Id.* at 49.

[161] *Id.*

[162] NC WARN Appeal at 27-28.

the petition, that increased population, projected land use, the need for changes in infrastructure (including the coordination of a transportation study with the State), and additional considerations relating to the evacuation of certain susceptible populations are addressed in the ER and/or the emergency plan (Part 5 of the COL application).[163] Because NC WARN neither explained how these sections are inadequate, nor cited any section of the application that it challenged, the Board reasonably found that NC WARN had failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).[164] Furthermore, we reject NC WARN's claim that the Board erred in its treatment of Dr. Wing's affidavit. The Board determined that NC WARN failed to explain its relevance to the emergency planning for the proposed reactors.[165] Because it was filed in a separate proceeding regarding the existing Shearon Harris Unit 1 reactor, its relevance to this proceeding is not immediately apparent; nor is it apparent whether Dr. Wing even reviewed the COL application at issue here.[166]

For these reasons, the Board did not err or abuse its discretion in finding Contention EC-4 to be inadmissible.

10. Contention EC-5 (Waste disposal)

> The [COL application] fails to evaluate whether and in what time frame the irradiated "spent" fuel generated by the proposed Harris nuclear reactors can be safely disposed. The ER does not contain any discussion of the environmental implications of the lack of options for permanent disposal of the irradiated fuel to be generated by the Harris site.[167]

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[163] LBP-08-21, 68 NRC at 585-86; *see also supra* notes 97 and 134.

[164] LBP-08-21, 68 NRC at 585-86.

[165] *Id.* at 586.

[166] *Cf. Crow Butte*, CLI-09-9, 69 NRC at 343.

[167] NC WARN Petition at 51-52.

Contention EC-5 is, as NC WARN concedes, a direct challenge to NRC regulations – the Waste Confidence Rule, 10 C.F.R. § 51.23. Indeed, NC WARN agrees with the Board's assessment in this regard.[168] However, NC WARN nevertheless asserts that the Board erred in "agreeing with the faulty premises behind the rule" and that the Commission should allow challenges to Commission rules on a case-by-case basis."[169] This contention is an impermissible challenge to NRC regulations.[170] NC WARN has not requested, nor has it demonstrated any supporting reasons for, a waiver of the Waste Confidence Rule under 10 C.F.R. § 2.335(b). Therefore the contention is inadmissible. That the Waste Confidence Rule is currently subject to an ongoing rulemaking also supports this determination.[171] Pursuant to longstanding Commission precedent, a contention that is the subject of what is, or is about to become, the subject of a rulemaking is inadmissible.[172]

In sum, NC WARN has shown no error or abuse of discretion in the Board's decision in LBP-08-21 to merit reversal of the Board's rulings, and we find none.

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[168] NC WARN Appeal at 28.

[169] *Id.* at 28-29.

[170] *See* LBP-08-21, 68 NRC at 587.

[171] *See* Consideration of Environmental Impacts of Temporary Storage of Spent Fuel after Cessation of Reactor Operation, 73 Fed. Reg. 59,547 (Oct. 9, 2008); Waste Confidence Decision Update, 73 Fed. Reg. 59,551 (Oct. 9, 2008).

[172] *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999); *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974). *But see* New Reactor Policy Statement, 73 Fed. Reg. at 20,972; *infra* Sections II.D, II.E. Contention EC-5 does not pertain to design issues.

D. LBP-09-8

NC WARN appeals the Board's ruling in LBP-09-8 that found Contention TC-1 to be inadmissible. As stated above, we will defer to a board's determination on issues of standing and contention admissibility absent error or abuse of discretion.

1. Contention TC-1 (AP1000 Certification)

> The [COL application] is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time. The [COL application] adopts by reference a design and operational procedures that have not been certified by the NRC or accepted by the applicant. Modifications to the design or operational procedures for the AP1000 Revision 16 would require changes in Progress Energy's application, the final design and operational procedures. Regardless whether the components are certified or not, the [COL application] cannot be reviewed without the full disclosure of all designs and operational procedures.[173]

According to NC WARN, the COL application is incomplete because the design certification rulemaking is ongoing with the submission of Revision 16 to the AP1000 design for the NRC Staff's review. Regarding the COL application, NC WARN states generally that the design and operational practices are lacking. NC WARN then lists nine asserted omissions from the application:

a. The final design of the reactor containment.
b. The control room set up and operator decision-making procedures.
c. Seismic qualifications for various components of the AP1000 reactors.
d. The establishment of fire protection areas.
e. Technology requirements for heat removal.
f. Human factors engineering design throughout the plant.
g. Plant personnel requirements.
h. Alarm systems throughout the plant.
i. Plant-wide requirements for pipes and conduits.[174]

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[173] NC WARN Petition at 13.

[174] *Id.* at 16.

In addition, NC WARN states what it believes to be deficiencies in the AP1000 design. NC WARN maintains that "there are a number of serious safety inadequacies in the AP1000 revision 16 design that have not been satisfactorily addressed," such as "an incomplete recirculation screen design, i.e., the 'sump problem.'"[175] Furthermore, NC WARN argues, because Tier 2 components have not been certified, the certified Tier 1 components have not been "fully approved as they depend on the interaction with non-certified components."[176] NC WARN asserts that changes in the design certification process would require Progress to modify its application; therefore, the application is incomplete.[177] NC WARN concludes that "[i]t is impossible to conduct a meaningful technical and safety review of the COLA without knowing the final design of the reactors as they would be constructed by Progress Energy."[178]

The Board originally determined that this contention was admissible as limited to the list of nine purported omissions in the COL application, and referred it to the NRC Staff for its "review and consideration . . . in the design certification rulemaking."[179] In CLI-09-8, we reversed this ruling and remanded the contention to the Board because, among other things, it did not appear that the Board had applied fully the contention admissibility factors in 10 C.F.R. § 2.309(f)(1) before referring the contention to the Staff.[180] On remand, the Board reassessed the admissibility of Contention TC-1 consistent with our direction, and found that NC WARN: (1)

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[175] *Id.* at 14.

[176] *Id.*

[177] *Id.* at 15.

[178] *Id.* at 13.

[179] LBP-08-21, 68 NRC at 563-64.

[180] CLI-09-8, 69 NRC at 325-26.

erroneously asserted omissions from the application that were incorporated by reference as part of the AP1000 certified design in 10 C.F.R. Part 52, Appendix D; (2) did not discuss any specific flaws in the application where the analyses are set forth; and (3) impermissibly challenged the process established in NRC regulations that permits an applicant to reference a docketed, but not approved, design.[181] Therefore the Board determined that the contention was inadmissible for failing to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) and for challenging Commission regulations.[182] Because the contention was not admitted, the Board did not address[183] the issue of whether to refer the contention to the NRC Staff for resolution in the AP1000 design certification amendment rulemaking.[184]

On appeal, NC WARN repeats many of the above arguments.[185] It insists that "[a]ny unresolved issue or uncertified component in the DCD are *de facto* omissions in the [COL application]," [186] and emphasizes that its "assertions were that the omissions are of the *final* designs and operating procedures, not that the [COL application] did not mention them."[187] It further contends that "[f]rom a policy point of view, the Commission should reconsider the issue

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[181] LBP-09-8, 69 NRC at 743-45.

[182] *Id.*

[183] *See* CLI-09-8, 69 NRC at 327; New Reactor Policy Statement, 73 Fed. Reg. at 20,972.

[184] LBP-09-8, 69 NRC at 745.

[185] NC WARN combines its arguments for Contentions TC-1 and TC-7 in its appeal, but they are discussed separately here.

[186] NC WARN Appeal at 14.

[187] *Id.* at 16.

[of the lack of finality of reactor design and procedures] because its 'anticipated' process, i.e., having the designs certified prior to licensing, has provided a failure."[188]

NC WARN agrees – in its petition and on appeal – that the application incorporates 10 C.F.R. Part 52, Appendix D and Revision 16 by reference, thus acknowledging that its purported contention of omission addresses items that are part of the application.[189] Because NC WARN does not specifically challenge the analyses in the application or provide support for its general assertions, it has failed to meet the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi). What remains of the contention is what NC WARN emphasizes – that the *final design* is the omission. Contention TC-1 therefore amounts to an impermissible challenge to Part 52 of the Commission's regulations, which allows an applicant to submit an application referencing a docketed, but not yet approved, design.[190] As a consequence, Contention TC-1 is inadmissible. We find no error in the Board's reassessed ruling on Contention TC-1.

E. December 23, 2008 Unpublished Board Decision (Contention TC-7)

While the NRC Staff and Progress appeals challenging the admission of Contention TC-1 were pending, NC WARN filed with the Board a motion for leave to file a new contention. That contention, Contention TC-7, states:

> The [COL application] is incomplete because many of the major safety components and procedures at proposed Harris reactors are only conditional at this time and will be for the indefinite future. In its [COL application], Progress Energy has adopted the AP1000

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[188] *Id.* at 18.

[189] *See id.* at 14; NC WARN Petition at 13.

[190] As we explained in denying NC WARN's motion to immediately suspend the notice of hearing, "although the Commission anticipated that applicants would first seek to have designs certified before submitting COLs which reference those designs, the NRC's regulations, nonetheless, allow an applicant – at its own risk – to submit a COL application that does not reference a certified design." CLI-08-15, 68 NRC at 4.

> Revision 16 which has not been certified by the NRC and with the filing of Revision 17 by Westinghouse, Revision 16 will no longer be reviewed by the NRC Staff. Progress Energy is now required to resubmit its [COL application] as a plant-specific design or to adopt Revision 17 by reference and provide a timetable when its safety components will be certified. The [COL application] cannot be reviewed at this time without the full disclosure of all designs and operational procedures. Either plant-specific design or adoption of AP1000 Revision 17 would require changes in Progress Energy's application, the final design and operational procedures.[191]

Mostly repeating arguments made in support of Contention TC-1, but applying them to the subsequent Revision 17 of the AP1000 DCD, NC WARN lists "the uncertified components specifically addressed in Revision 17," which "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."[192] NC WARN adds that "[t]hese non-certified components interact with Tier 1 components and each other to a significant degree."[193] Because Revision 17 is under consideration in the ongoing design certification amendment rulemaking, the design has not been finalized, and NC WARN insists that the application is incomplete.[194]

NC WARN asserts on appeal that the Board "arbitrarily dismissed Contention TC-7" after admitting Contention TC-1 "even though the contentions addressed a similar issue, following the same legal and factual logic."[195] NC WARN also asserts that its motion was timely; it explained that when it filed its new contention motion, Revision 17 was not publicly available. Because it

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[191] NC WARN New Contention Motion at 4-5.

[192] *Id.* at 6.

[193] *Id.*

[194] *Id.* at 4-8.

[195] NC WARN Appeal at 15.

did not have access to the document, NC WARN based its motion on the cover letter for Revision 17 and presentations made by Westinghouse Electric Company (the AP1000 vendor) to the NRC Staff, "[r]ather than wait for Revision 17 to be available."[196]

In accordance with the procedure established by the Board, the parties briefed only the issue of the motion's timeliness, not the admissibility of the proposed new contention. In its unpublished decision issued on December 23, 2008, the Board denied the motion for leave to file Contention TC-7. One of the bases on which the Board denied the motion was that NC WARN did not demonstrate that the information on which the contention is based is materially different from what was previously available in the COL application.[197] The Board therefore determined that NC WARN had not made the requisite showing under 10 C.F.R. § 2.309(f)(2)(ii), and found the contention to be nontimely. The Board went on to rule that NC WARN had not adequately addressed the factors for nontimely contentions under 10 C.F.R. § 2.309(c)(1). Therefore, the Board denied the motion.[198]

We need not decide whether the Board's timeliness ruling was in error, because we find Contention TC-7 to be inadmissible. As an alternative basis for its holding, the Board concluded that "even had NC WARN satisfied the criteria relating to untimeliness, the substantive focus of Contention TC-7 on the revisions in the design certification process would present an inadmissible contention."[199] Proposed Contention TC-7 is substantively similar to Contention TC-1. The only difference is that Contention TC-7 challenges the completeness of the

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[196] *Id.*

[197] Licensing Board New Contention Decision at 5.

[198] *Id.* at 4-6.

[199] *Id.* at 11.

application based on Progress' adoption of Revision 17 to the AP1000 design, rather than Revision 16.[200] Like Contention TC-1, NC WARN explains that Contention TC-7 is written as a contention of omission.[201] However, NC WARN admits that the components it identifies in Contention TC-7 as examples of the application being "incomplete" are "specifically addressed in Revision 17."[202] Indeed, as NC WARN emphasizes in its appeal regarding both contentions, its assertions "were that the omissions are of the *final* designs and operating procedures, not that the [COL application] did not mention them."[203] Thus, Contention TC-7 is fundamentally a challenge that the application will be affected by a design that is not yet certified. Because, as stated above, our regulations expressly allow a COL applicant to reference an uncertified design, Contention TC-7 is an impermissible challenge to our regulations, and was appropriately excluded by the Board.

F. Motion to Suspend Proceeding

Finally, we consider what we construe to be a third motion to suspend the proceeding embedded within NC WARN's appeal. NC WARN requests, as it has "attempted twice so far, [that] the proceeding . . . be halted until the applicant is prepared to file a complete application."[204] In support, NC WARN "adopts herein the compelling arguments in the Texans for a Sound Energy Policy's Petition" to hold the docketing decision and/or hearing notice in

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[200] *See generally* NC WARN New Contention Motion at 4-8.

[201] *See* NC WARN Appeal at 15-16.

[202] NC WARN New Contention Motion at 6.

[203] NC WARN Appeal at 15-16.

[204] *Id.* at 17.

abeyance for the Victoria County Station COL application.[205] That petition requested that the *Victoria County Station* COL proceeding be held in abeyance pending the resolution of the design certification rulemaking for a different design.[206] As we explained in CLI-09-8, "our rules permit the filing of combined license applications in advance of design certifications."[207] Accordingly, we deny NC WARN's embedded motion to suspend the proceeding.

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[205] *Id.* at 17 n.9. NC WARN also states that it adopts several of the legal arguments made in its prior pleadings and incorporates them by reference because of the page limit imposed by 10 C.F.R. § 2.341(c)(2). *Id.* at 2. It does so without citation to specific arguments or page numbers. Such an approach leaves us and the other participants guessing as to which legal arguments are intended to be relevant. Moreover, this is effectively an attempt to circumvent our page-limit rules, which could be grounds for sanctions. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 393 (2001). Although we do not sanction NC WARN here, we do not consider these referenced arguments. The better practice is for participants "to abide by our current page-limit rules, and if they cannot, to file a motion to enlarge the number of pages permitted." *Id.* at 394.

[206] *See generally 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). No hearing notice has issued for the Victoria County project for reasons unrelated to the Texans for a Sound Energy Policy's Petition. *See* CLI-09-8, 69 NRC at 328 n.47.

[207] CLI-09-8, 69 NRC at 329.

III. CONCLUSION

For the reasons set forth by the Board and discussed above, we *deny* NC WARN's requests for oral argument and to suspend the proceeding, and *affirm* the Board's decisions in LBP-08-21; LBP-09-8; and the unpublished decision dated December 23, 2008.

IT IS SO ORDERED.

For the Commission

(NRC SEAL)

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 11th day of March, 2010.

Chairman Jaczko, dissenting:

I respectfully disagree with the majority decision to follow a policy of excluding the potential impacts of terrorism when conducting environmental reviews for facilities located outside the Ninth Circuit. As I explained in detail in my dissent in *Oyster Creek*, 64 NRC 124, 135 (2007), and have reiterated in more recent decisions, I believe that the agency should have a consistent, nationwide approach to the consideration of terrorism under NEPA. Further, I believe that, consistent with our commitment to transparency, the better policy course is to provide this important information to the public for all nuclear facilities.