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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

October 2, 2001 (3:09PM)

OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:)	
)	Docket Nos. 50-369-LR
Duke Energy Corporation)	50-370-LR
)	50-413-LR
(McGuire Units 1 and 2, and)	50-414-LR
Catawba Units 1 and 2))	

DUKE ENERGY CORPORATION'S RESPONSE TO
REQUESTS FOR HEARING AND PETITIONS FOR LEAVE TO INTERVENE

I. INTRODUCTION

Duke Energy Corporation ("Duke"), the applicant in the above-captioned matter, herein responds to the requests for hearing and petitions for leave to intervene filed by the Blue Ridge Environmental Defense League ("BREDL") and the Nuclear Information and Resource Service ("NIRS") (hereinafter, "Petitioners" refers to BREDL and NIRS). In accordance with 10 C.F.R. § 2.714(c), this response addresses the matter of the Petitioners' standing to intervene.¹

The two petitions respond to the Notice of Opportunity for Hearing published by the Nuclear Regulatory Commission ("NRC" or "Commission") in the *Federal Register* on August 15, 2001 (66 Fed. Reg. 42893) concerning Duke's application to renew for an additional 20 years the operating licenses for the McGuire Nuclear Station ("McGuire"), Units 1 and 2

¹ Both Petitioners identify specific aspects of this matter that are of interest to them. Duke does not view these as proposed contentions and will respond to the issue of admissibility of any proposed contentions at the appropriate time designated by the Commission or Atomic Safety and Licensing Board.

(Dockets 50-369 and 50-370), and Catawba Nuclear Station (“Catawba”), Units 1 and 2 (Dockets 50-413 and 50-414). As discussed below, Duke does not contest BREDL’s claim of representational standing in this matter. As further discussed below, NIRS has not satisfied the Commission’s requirements for standing to intervene. Therefore, under 10 C.F.R. § 2.714, the NIRS petition should be denied.²

II. DISCUSSION

A. The NRC’s Standing Requirements

Under 10 C.F.R. § 2.714(a)(2), petitions to intervene must:

set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

The Commission has further determined that to satisfy the standing requirements of 10 C.F.R. § 2.714, a petitioner must demonstrate that the proposed action will cause an injury in fact that is within the zone of interests protected by the governing statute; that the injury can be fairly traced to the challenged action; and that the injury is likely to be redressed by a favorable decision. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). In particular, the Commission has held that it is incumbent upon the petitioner to allege some “plausible chain of causation” from the licensing action at issue to the alleged harm that would be redressed. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999).

² The BREDL petition was timely filed on September 14, 2001. The NIRS petition received by Duke was, although dated September 11, 2001, actually postmarked on September 17, 2001 — which is not timely service.

With regard to the standing of organizations that petition to intervene, such as BREDL and NIRS, the Commission has held that the organization must demonstrate that the action will cause an injury-in-fact to either: (1) the organization's interests; or (2) the interests of its members. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994). Where standing is based on an injury to the organization itself, the petitioner must demonstrate that its interests have been adversely affected, applying the same injury-in-fact standard as for an individual. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 126 (1992). If standing is based on injury to an organization's members (so-called "representational standing"), the petitioner must "identify at least one of its members by name and address and demonstrate how that member may be affected ... and show (preferably by affidavit) that the group is authorized to request a hearing on behalf of that member." *Northern States Power Co.* (Independent Spent Fuel Storage Installation), LBP-96-22, 44 NRC 138, 141 (1996). To derive standing from a member, the organization must demonstrate that the individual member has standing to participate and has authorized the organization to represent his or her interests. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 390-96 (1979).

Although the NRC has applied a presumption of standing in initial reactor operating license proceedings for individuals who live within 50 miles of a plant, it has also held that a more stringent standard applies to proceedings involving license amendments lacking an "obvious potential for off-site consequences." *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *see also Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985) (residence 43 miles from the plant is inadequate for

standing with respect to a spent fuel pool expansion). The Commission has not yet addressed the applicability of the proximity presumption to a license renewal proceeding. *See Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 n.2 (1999); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 53 NRC ___, slip op. at 32 n.20 (2001).

B. The Petitioners' Standing

Based on their petitions, it is clear that both BREDL and NIRS seek to demonstrate their standing based upon the standing of their members (that is, “representational standing”). BREDL has provided affidavits from numerous BREDL members who live near McGuire, Catawba, or both. NIRS has provided affidavits from two members. The difference in the showing of the members of the two groups compels a different result.

1. Standing of BREDL

Attached to the BREDL Petition are the affidavits of 23 individuals who are BREDL members. According to the affidavits, these BREDL members live as close as five miles from McGuire and as close as three miles from Catawba. The affidavits further allege the potential for injuries due to accidents during reactor operations. While the Commission has not yet ruled on the applicability of the proximity presumption in license renewal proceedings, Duke does not contest BREDL’s standing — based on the relatively close proximity of the residence of BREDL’s nearest members and the allegations of offsite harm.

2. Standing of NIRS

NIRS has provided declarations from Phillip Barnette and Jan Jenson, which attempt to establish representational standing for NIRS. Unlike BREDL, however, NIRS has failed to establish representational standing.

Mr. Barnette's declaration indicates no more than that he has "serious concerns about the hazards to [his] health and the health of [his] family members posed by the extended operation" of the plants. Mr. Barnette states that he resides in Old Fort, North Carolina, which is more than 50 miles from both Catawba and McGuire. Accordingly, his claim of standing — which cannot be based on his nearby residence — is based on his claim of harm associated with property he owns "within forty miles of the Catawba and McGuire reactors." Barnette Declaration at 1. He further bases his claim of standing on some intermittent contacts with the plants through visits to extended family within 40 miles of the plant, and consumption of produce grown on the extended family's property. *Id.* at 2.

Mr. Barnette's claims of standing based on "hazards" to his health due to his residence and his property cannot be accepted. Even if the Commission had previously accepted a presumption of standing based solely on nearby residence for license renewal proceedings (as discussed above, it has not), Mr. Barnette's claim would not meet that presumption. Mr. Barnette's residence is over 50 miles from both McGuire and Catawba. Moreover, the property that Mr. Barnette owns is apparently 40 miles from both plants, the nature of that property is never identified, and there is no indication that he even visits the property. Even if he did regularly visit the property, in a license renewal context — where the issue is simply continued operation under the existing NRC-approved licensing bases — the 40-mile distance exceeds any reasonable interpretation of "close proximity" in which there is such an "obvious potential for offsite consequences" that there should be a presumption of standing. Mr. Barnette has made only generalized statements of "hazards" to his health and has shown no plausible chain of

causation from extending the license that could lead to health effects at a distance that is, for example, well outside even the 10-mile emergency planning zone for the plants.³

Additionally, Mr. Barnette's claim of standing based on intermittent visits with and injuries to others (*i.e.*, his family) who live within 40 miles from the plant is an inadequate demonstration of a personal "injury in fact." First, these visits and family members are apparently no closer than the distance of Mr. Barnette's own property (40 miles), which is too distant to be presumed to confer standing. Second, his infrequent trips (six to eight times per year) to visit his extended family fall far short of the seven days per month considered acceptable in a license transfer case where the claim of standing was based on visits to property near the plant.⁴ Finally, any claims of injury to his extended family, rather than to himself, would as a matter of law not be sufficient.⁵

The Jensen Declaration states that Ms. Jensen lives in Statesville, North Carolina, and that she is within "forty miles of the Catawba and McGuire reactors." The declaration alleges harm based on extended operation of the reactors due to "increased radioactive releases from extended operations, wastes generated, and any accident which becomes more likely with time, age and changes in reactor operations."

³ Both Mr. Barnette and Ms. Jensen also raise the spectre of harm due to "future shipments of plutonium fuel on the roads near my home." As is discussed below, this alleged harm is entirely outside the scope of the present license renewal application. These are injuries that cannot be traced to the present action and could not be redressed in this proceeding.

⁴ In *Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2)*, LBP-93-05, 37 NRC 96 (1993), the presiding Licensing Board found (and the Commission subsequently agreed) that a petitioner who resided on property 35 miles from the plant for seven days a month had sufficient contact with a plant to justify a claim of standing in a license transfer case. *Georgia Power Co. (Vogtle Elec. Generating Plant, Units 1 and 2)*, CLI-93-16, 38 NRC 25, 35 (1993). The case at hand, however, is quite different. Here, Mr. Barnette has failed to establish contacts of an equivalent frequency or nature.

⁵ See *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). The Court stated that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."

By residing in Statesville, it appears that Ms. Jenson resides approximately 25 miles from McGuire and more than 50 miles from Catawba. Residence at these distances, coupled with a generalized boilerplate allegation of “hazards” or harm due to aging and potential radiation releases, is not sufficient to confer standing. The license renewal application involves continued operation of plants that are already built and operating. Operations would continue under the existing NRC licensing bases — which have been determined to be adequate for protection of public health and safety. In the absence of a proximity presumption, Ms. Jenson and NIRS have not established a plausible chain of causation as to how license renewal would pose a distinct new harm or threat at distances of 25 or 50 miles from the plant (again, well outside even the 10-mile emergency planning zones).⁶

Therefore, Duke concludes that both affidavits are inadequate and NIRS has failed to establish standing.

C. The Petitioners’ “Specific Aspects” of Proceeding

Both Petitioners have identified “specific aspects” of the subject matter of the proceeding in which they wish to intervene.⁷ Because both Petitioners generally cite matters such as “general aging issues,” including embrittlement of metal parts of the reactor, issues related to aging of the ice condenser system, and general environmental issues, each of the Petitioners has identified at least one “specific aspect” arguably within the scope of a license renewal proceeding. While this might be sufficient to satisfy the pleading requirement, Duke

⁶ At a minimum, the showing is insufficient to confer standing with respect to Catawba at a distance of over 50 miles.

⁷ BREDL specifically cites nine enumerated aspects of “interest.” NIRS does not enumerate its aspects, but lists several.

nonetheless does not concede that other “specific aspects” identified by BREDL and NIRS properly fall within the scope of a license renewal proceeding.

Notably, both Petitioners’ concerns include safety and environmental issues related to the possible future use and storage of mixed-oxide (“MOX”) fuel at McGuire and Catawba. MOX fuel, however, is not an issue in the current license renewal application. In the cover letter accompanying its license renewal application (at page 4), Duke stated that it is currently evaluating and planning for the possible future use of MOX fuel at McGuire and Catawba, as part of the international program to reduce stockpiles of surplus weapons plutonium in the United States and in Russia. However, Duke explicitly indicated that the use of MOX fuel is not now part of the licensing basis at McGuire and Catawba (*i.e.*, it is not presently authorized) and that the license renewal application “assumes throughout that licensed activities are now conducted, and will continue to be conducted, in accordance with the facilities’ current licensing basis (*e.g.*, use of low enriched fuel only).”

At the present time, the use of MOX fuel at McGuire and Catawba is not a certainty.⁸ Any future use of MOX fuel at Duke reactors — if it ever occurs — will be a licensing activity that is separate from, and independent of, this license renewal application. The current license renewal application does not seek approval for MOX fuel use, is in no way dependent upon the use of MOX fuel, and is of importance to Duke regardless of whether MOX

⁸ Duke’s current plans anticipate the submittal in spring 2002 of a license amendment request to allow the loading of a very small number of MOX fuel lead assemblies. Under that schedule, use of those demonstration MOX fuel assemblies would begin no earlier than early 2004. The current schedule also calls for submittal in late 2003 or early 2004 of license amendment requests to allow the use of MOX fuel in batch quantities, with such use beginning no earlier than 2007. The eventual schedules for MOX fuel-related license amendment requests and for use of MOX fuel at McGuire and Catawba are dependent on various factors, including — but not limited to — NRC reviews, U.S. Department of Energy actions, international agreements, and plutonium disposition activities in Russia. Based on the number and type of external factors involved, the currently contemplated schedule is subject to change.

fuel is ever authorized and used. Should a final decision be made to use MOX fuel at McGuire and Catawba, Duke would seek the appropriate authorization from the NRC as a separate licensing matter. This process would include all required safety analyses and environmental evaluations. Under NRC regulations, there would also be an opportunity for public participation in connection with any MOX fuel-related license amendment application.

In addition to MOX fuel issues, the Petitioners identify other “specific aspects” that are actually relevant to current plant operation within the current licensing basis (e.g., statements that the NRC should reassess the design basis threat and conduct “realistic assessments of terrorism impacts” on nuclear power plant operations, and concerns about the effect of population growth around McGuire and Catawba). As the Commission has frequently emphasized, such topics are beyond the scope of NRC license renewal proceedings.⁹ Duke will address issues related to the scope of the proceeding in more detail in response to the admissibility of any proposed contentions.

⁹ See *Florida Power & Light Co.*, CLI-01-17, 53 NRC ___, slip op. at 7 (“In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant’s current licensing basis to re-analysis during the license renewal review. The current licensing basis represents an ‘evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.’ 60 Fed. Reg. at 22, 473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.”)

III. CONCLUSION

For reasons set forth above, the NIRS Petition does not satisfy the standing requirements of 10 C.F.R. § 2.714 and therefore, should be denied. Duke does not contest BREDL's claim of representational standing.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is fluid and cursive, with a long horizontal line extending to the right from the end of the name.

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ATTORNEYS FOR DUKE ENERGY
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Dated in Washington, D.C.
this 1st day of October 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	Docket Nos. 50-369
Duke Energy Corporation)	50-370
)	50-413
(McGuire Units 1 and 2, and)	50-414
Catawba Units 1 and 2))	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Dated at Washington, District of Columbia
this 1st day of October 2001

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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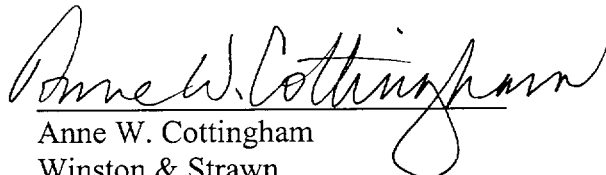
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Dated at Washington, District of Columbia
this 1st day of October 2001

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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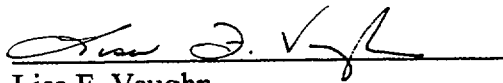
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Dated at Washington, District of Columbia
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S RESPONSE TO REQUESTS FOR HEARING AND PETITIONS FOR LEAVE TO INTERVENE" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 1st day of October 2001. Additional courtesy e-mail service has been made this same day as shown below.

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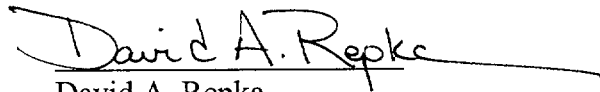
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