

November 14, 2001
DOCKETED 11/15/01

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DUKE ENERGY CORPORATION)	Docket Nos. 50-369, 370, 413 and 414
)	
(McGuire Nuclear Station,)	
Units 1 and 2, and)	
Catawba Nuclear Station,)	
Units 1 and 2))	

NRC STAFF RESPONSES TO
(1) NIRS REPLY TO LICENSING BOARD MEMORANDUM AND ORDER
OF NOVEMBER 9, 2001
AND
(2) REPORT AND APPEAL BY NUCLEAR INFORMATION AND RESOURCE SERVICE
OF JUDGE YOUNG'S 11-09-01 MEMORANDUM AND ORDER
(DENYING REQUEST FOR ADDITIONAL EXTENSION OF TIME)

INTRODUCTION

In accordance with the Licensing Board's November 13, 2001 Order (Setting Response Deadlines and Telephone Conference), the NRC staff (Staff) hereby replies to NIRS' Reply to Licensing Board Memorandum and Order of November 9, 2001 (NIRS' Reply),¹ and Report and Appeal by Nuclear Information and Resource Service of Judge Young's 11-09-01 Memorandum and Order (Denying Request for Additional Extension of Time) (NIRS' Appeal). For the reasons discussed below, the Staff respectfully requests that both pleadings be dismissed or denied.

¹ According to the certificate of service accompanying NIRS' Reply, it was served by e-mail and first class mail. Although the certificate of service indicates that a copy was e-mailed to the service list, a copy was not, in fact, e-mailed to Staff counsel. Staff counsel was made aware of the filing on Tuesday, when inquiring about delivery of the Daily Event Reports to counsel for Duke Energy Corporation.

DISCUSSION

1. NIRS' Reply

NIRS is requesting that the Board Order the Staff to produce daily event reports (DERs) related to facilities other than McGuire and Catawba. In addition, in making its request, NIRS misstates the Staff position regarding the production of the DERs.

NIRS asserts that the Staff, in providing the DERs requested, has "acknowledge[d] that these documents rightfully belong in the public domain as a matter of a licensing proceeding impacting public health and safety." NIRS Reply at 1. Nothing could be further from the truth. As the Staff emphatically stated in the NRC Staff's Response to Atomic Safety and Licensing Board's Order Regarding Production of Documents filed November 8, 2001:

The NRC Staff is making these documents available as a courtesy to help expedite the current proceeding. However, the Staff maintains that it is under no obligation to make these documents available prior to discovery. Therefore, the Staff action should not be construed as a waiver of any rights or objections to the production of these documents or other documents similarly unavailable.

The Staff does not agree that the DERs should be publicly available and has made the documents available to a very limited extent for the sole purpose of avoiding the delays sought by NIRS.

NIRS is seeking to have the Board order the Staff to provide DERs for all PWR reactors. The Staff strenuously objects to any such expansion of NIRS' request or of the Board's Order. First, in addressing the DERs in its October 29, 2001 Motion to Extend Time, NIRS stated that it was seeking information including "the licensee's historical record of exceeding water temperatures" Motion to Extend Time at 3. Nowhere in the motion does NIRS request DER reports relating to reactors other than the two McGuire units and the two Catawba units. Similarly, in Paul Gunter's

declaration filed November 6, 2001, only Duke DERs were discussed.² Second, at no time during either telephone conference call (October 30, 2001 and November 7, 2001), did NIRS indicate that it was seeking DERs from facilities other than those involved in this proceeding. See, e.g., Transcript of Telephone Conference, Tuesday, October 30, 2001, at 53, 60, 66-67. Moreover, to the best of Staff counsel's recollection, no protest was made by NIRS' representatives when Judge Young, on several occasions, specified that the DERs for Catawba and McGuire were the only documents under consideration.³ Therefore, NIRS cannot, at this late date, request the Board to order the staff to produce documents not included in their motion.

More important, this proceeding concerns an application to renew the operating licenses for the four McGuire and Catawba reactors. The proceeding is limited to issues stated by the Commission in its order referring the matter to the ASLBP. Any information regarding other unrelated reactors is by definition beyond the scope of this proceeding. Consequently, such information is not required for the framing of contentions in this case and can only be regarded as a fishing expedition. Therefore, the request should be denied.

Finally, NRC regulations governing hearings do not provide for replies to responses. See, e.g., 10 C.F.R. § 2.730(c). Nor did the Board's Order provide for a reply to the Staff's response to the Order. Therefore, NIRS' Reply is an unsanctioned pleading and for that reason should be dismissed.

Based on the foregoing, NIRS' request for the Licensing Board to Order the Staff to produce DERs for reactors unrelated to the application for license renewal under consideration in this proceeding should be denied.

² Declaration of Paul Gunter, Nuclear Information and Resource Service (NIRS), Director of the Reactor Watchdog Project, Regarding Availability of Public Documents as Related to the Proposed License Extension of the McGuire and Catawba Nuclear Power Stations, November 6, 2001..

³ The Staff has not yet received a copy of the transcript from November 7, 2001.

2. NIRS Appeal

NIRS is seeking an additional 10 days extension of time to file its amended and supplemented petition based upon its assertion that it has not yet received the DERs sent by the Staff via overnight mail on Thursday, November 8, 2001. The Staff opposes any further extension.

The instant appeal by NIRS will only cause unnecessary delay without justification. As discussed in detail during the two telephone conferences, NIRS has been in possession of or has been able to access all documents necessary to prepare its contentions. If NIRS had been diligent in the preparation of its contentions, the short delay in receiving the DERs, between last Friday and yesterday, would not be an issue. Moreover, the Staff agreed to an extension of three weeks only due to the unavailability of the Generic Environmental Impact Statement, not of the DERs. It is the Staff's position that the DERs are unnecessary and a further extension of time is unnecessary due to the delay alleged by NIRS. Any delay in the delivery of the DERs, whether over the weekend or longer, is not grounds for a further extension of time. Nonetheless, despite the Staff's reluctance to do so because the DERs are *not* publicly available at this time, on November 13, 2001 copies of the DERs previously sent by overnight mail were e-mailed to Mary Olsen and Paul Gunter.⁴

NIRS' request for an additional ten days is clearly unjustified and does not meet the Commission's rule that any extension of time be granted only upon a finding of "unavoidable and extreme circumstances." See Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel, CLI-01-20, 54 NRC __ (2001), sl. op. at 7.

⁴ Copies of the DERs were sent to Paul Gunter via Federal Express to the address on the service list. According to Federal Express, the first attempt was made to deliver the package on November 9, 2001 at 11:35am but the customer was not available or the business was closed. The Staff submits that if a party provides an address for service, it is their obligation to ensure that someone is at the address to accept service during normal business hours. In this case, Mr. Gunter was aware that the documents were being served via overnight mail. (According to Federal Express, subsequent attempts on November 12th at 5:26am and November 13th at 5:15am were unsuccessful due to an "incorrect address." A fourth attempt on November 13th at 6:12pm was unsuccessful because the customer was unavailable or the business was closed.)

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that NIRS Reply be dismissed and NIRS Appeal be denied.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC staff

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSES TO (1) NIRS REPLY TO LICENSING BOARD MEMORANDUM AND ORDER OF NOVEMBER 9, 2001 AND (2) REPORT AND APPEAL BY NUCLEAR INFORMATION AND RESOURCE SERVICE OF JUDGE YOUNG'S 11-09-01 MEMORANDUM AND ORDER (DENYING REQUEST FOR ADDITIONAL EXTENSION OF TIME)" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; as indicated by two asterisks (**), by electronic mail, this 14TH day of November, 2001.

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