

**RAS 3559**

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**DOCKETED 11/13/01**

BEFORE THE COMMISSION

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) )

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NRC STAFF'S RESPONSE TO BLUE RIDGE ENVIRONMENTAL DEFENSE  
LEAGUE'S PETITION TO DISMISS LICENSING PROCEEDING  
OR, IN THE ALTERNATIVE, HOLD IT IN ABEYANCE

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November 8, 2001

**Table of Contents**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

BACKGROUND ..... 2

DISCUSSION ..... 3

    1. BREDL’S Pleading is Premature ..... 3

    2. The Issues Raised Do Not Demonstrate A Basis For Dismissal Of The  
    License Renewal Application ..... 4

        A. Alleged inadequacy of a staff document not yet prepared is not  
        grounds for dismissal ..... 4

        B. BREDL cannot challenge the granting of an exemption ..... 7

    3. There Is No Basis For Suspending Or Dismissing The Proceedings  
    Due To Potential Future Changes To Safeguards Requirements ..... 10

CONCLUSION ..... 13

**TABLE OF AUTHORITIES**

**FEDERAL DECISIONS**

*Kleppe v. Sierra Club*, 427 U.S. 390 (1976) . . . . . 6

*Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516 (1<sup>st</sup> Cir. 1989) . . . . . 9

*Society Hill Towers Owners' Assoc. v. Rendell*, 210 F.3d 168 (3<sup>rd</sup> Cir. 2000) . . . . . 6

**ADMINISTRATIVE DECISIONS**

**Commission**

*Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4)  
CLI-80-12, 11 NRC 514 (1980) . . . . . 4

*Commonwealth Edison Co.* (Zion Nuclear Power Station), CLI-00-05, 51 NRC 90 (2000) . . 7, 9

*Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3),  
CLI-99-11, 49 NRC 328 (1999) . . . . . 13

*Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2),  
CLI-95-09, 41 NRC 404 (1995) . . . . . 10

*Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1),  
CLI-83-25, 18 NRC 327 (1983) . . . . . 3

Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3),  
CLI-01-3, 53 NRC 22 (2001) . . . . . 11

*Private Fuel Storage* (Independent Spent Fuel Storage Installation),  
CLI-01-12, 53 NRC \_\_, 2001 WL 709427 (2001) . . . . . 8, 9

*United States Department of Energy Project Management Corp.*  
*Tennessee Valley Authority* (Clinch River Breeder Reactor Plant)  
CLI-82-23, 16 NRC 412 (1982) . . . . . 6

*Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station),  
CLI-00-20, 52 NRC 151 (2000) . . . . . 10

**Atomic Licensing Appeal Board**

*Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 12 NRC 312 (1981) . . . . . 5

**STATUTES**

Atomic Energy Act of 1954, as amended, section 161b, 42 U.S.C. § 2201(b) . . . . . 12  
Atomic Energy Act of 1954, as amended, section 189a, 41 U.S.C. § 2239(a)(1)(A) . . . . . 8

**REGULATIONS**

10 C.F.R. § 2.202 . . . . . 13  
10 C.F.R. § 2.730 . . . . . 1  
10 C.F.R. § 2.730(c) . . . . . 1  
10 C.F.R. § 50.54(e) . . . . . 13  
10 C.F.R. § 50.54(h) . . . . . 13  
10 C.F.R. §§ 51.71(d) . . . . . 11  
10 C.F.R. § 51.95(c) . . . . . 11  
10 C.F.R. § 54.17 . . . . . 3  
10 C.F.R. §54.17(c) . . . . . 7, 9, 10

**FEDERAL REGISTER**

“Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), Exemption,” 64 Fed. Reg. 54,924 (Oct. 8, 1999) . . . . . 7, 9  
“Establishment of Atomic Safety and Licensing Board,” 66 Fed. Reg. 52,158 (2001) . . . . . 2  
“Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing,” 66 Fed. Reg. 60,693 (2001). . . . . 5  
“Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943 (Dec. 13, 1991). . . . . 9  
“Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461(May 8, 1995) . . . . . 9

**MISCELLANEOUS**

NRC Press Release No. 01-112 (September 21, 2001),  
 (“NRC Reacts to Terrorist Attacks”) . . . . . 11

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INTRODUCTION

On October 24, 2001, the Blue Ridge Environmental Defense League (BREDL) filed the "Blue Ridge Environmental Defense League Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance" (BREDL Pleading).<sup>1</sup> Pursuant to 10 C.F.R. § 2.730(c), the NRC staff (Staff) hereby files its response to BREDL's pleading.<sup>2</sup> For the reasons stated below, the Staff submits that the Pleading is premature in that BREDL is not a party and a hearing has not been ordered. In addition, the issues raised by BREDL are in the nature of contentions and are more properly raised before a licensing board. Finally, BREDL has failed to demonstrate that this proceeding must be dismissed or suspended in order to protect public health and safety. Therefore, the Staff respectfully requests that BREDL's pleading be denied.

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<sup>1</sup> Although BREDL's Pleading is dated October 23, 2001, it was not properly served until October 24, 2001, as indicated in the certificate of service, when it was placed in the mail and e-mailed to the service list. The Staff notes that the certificate of service accompanying the e-mail filing did not indicate service on the Atomic Safety and Licensing Board hearing this matter.

<sup>2</sup> BREDL has labeled its pleading a "petition." Since no regulation permits such a pleading or governs the time for responses, the Staff is treating it as if it were a motion filed pursuant to 10 CFR § 2.730.

BACKGROUND

The instant case relates to the June 13, 2001 application by Duke Energy Corporation (Duke) to renew the facility operating licenses for McGuire Nuclear Station, Units 1 and 2 (McGuire), and Catawba Nuclear Station, Units 1 and 2 (Catawba). On August 15, 2001, the NRC published a "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing." 66 Fed. Reg. 60,693 (2001). On September 14, 2001, BREDL filed a petition for intervention and request for hearing in the license renewal matter.<sup>3</sup> On October 4, 2001, the Commission referred the petition to the Chief Administrative Judge for assignment of an Atomic Safety and Licensing Board (ASLB) to, *inter alia*, rule on the petition.<sup>4</sup> On October 5, 2001, a Licensing Board was established.<sup>5</sup> The Licensing Board issued an Order on October 16, 2001, establishing a schedule for filing amended petitions, responses thereto, and for a pre-hearing conference regarding the admission of contentions.<sup>6</sup> As of this date, contentions have not been submitted, BREDL has not been admitted as a party, and a hearing has not been ordered in connection with the license renewal request.

BREDL asks the Commission to dismiss the licensing proceeding, without prejudice, to permit Duke to file what BREDL considers a "complete" license application at a later date. BREDL Pleading at 3. BREDL also asks that the matter be held in abeyance pending decisions regarding the use of mixed-oxide fuel (MOX), the completion of 20 years of operation at Catawba, changes

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<sup>3</sup> On the same date, the Nuclear Information and Resource Service (NIRS) filed its Petition to Intervene and Request for Hearing.

<sup>4</sup> Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel, CLI-01-20, 54 NRC \_\_\_ (October 4, 2001).

<sup>5</sup> Establishment of Atomic Safety and Licensing Board, 66 Fed. Reg. 52,158 (2001).

<sup>6</sup> Order (Setting Deadlines, Schedule and Guidance for Proceeding), (October 16, 2001). On October 30, 2001, the dates were extended following a motion to extend time filed by NIRS. See Memorandum and Order (Granting Motion to Extend Time and Resetting Deadlines and Schedule for Proceedings), LBP-01-31, 54 NRC \_\_\_ (October 31, 2001).

in NRC requirements regarding design basis threats and other security matters, and a decision regarding the facility license operator.<sup>7</sup> *Id.* BREDL bases its pleading on three assertions: (1) in the Environmental Impact Statement that the Staff will prepare in conjunction with the review of the license renewal request, the Staff does not intend to address the potential use of MOX in the future at McGuire and Catawba; (2) the granting of the exemption to 10 C.F.R. § 54.17 that permitted Duke to apply for license renewal before twenty years of operation by three of the four reactors was based on invalid statements by Duke regarding its aging management program; and (3) major changes in NRC security regulations pertaining to security and safeguards will be required in the aftermath of the September 11, 2001 terrorist attacks and McGuire and Catawba are particularly vulnerable to acts of sabotage. BREDL Pleading at 2.

#### DISCUSSION

##### 1. BREDL'S Pleading Is Premature

Procedurally, this proceeding is at a stage where, although petitions for leave to intervene have been filed, no parties have been admitted to the proceeding, contentions have not yet been presented to the Licensing Board, and a hearing has not been ordered. Contentions are not scheduled to be filed until November 27, 2001. The prehearing conference to argue the admission of contentions is scheduled for December 18 and 19, 2001. Therefore, it is likely that a decision regarding *whether* to hold a hearing on the application for license renewal and whether BREDL will be admitted to any hearing ordered will not be made until January of 2002. Until such time as a hearing is ordered and BREDL is admitted as a party, BREDL does not have standing to request the relief it is now seeking from the Commission.<sup>8</sup>

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<sup>7</sup> The Staff notes that, other than this reference to the facility license operator, there is no further mention of it in BREDL's pleading

<sup>8</sup> See, e.g., *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 330 (1983) (A petitioner for intervention must first become a party to the proceeding (continued...))

2. The Issues Raised Do Not Demonstrate A Basis For Dismissal Of The License Renewal Application.

- A. Alleged inadequacy of a staff document not yet prepared is not grounds for dismissal.

BREDL seeks a dismissal of the license renewal application on the basis of an assertion that the Staff does not intend to consider the effects of the future use of mixed-oxide fuel (MOX) on aging and accident consequences:

The NRC Staff's decision to allow the licensee to apply for an amendment to irradiate plutonium/MOX fuel concurrently with the license renewal process violates NEPA because it is based on the Staff's unlawful intention to issue an EIS without evaluating the question of the impacts of plutonium/MOX fuel use on reactor operations, accident source terms, nonproliferation, and increased aging impacts.

BREDL's Pleading at 7.<sup>9</sup> BREDL has not demonstrated that there is any cause to dismiss the application based upon an allegation that the Staff may not address an issue in an EIS it has not yet prepared. The issue of whether an EIS is adequate is an issue for hearing, should BREDL submit an acceptable contention addressing that matter. Such issue, if it is to be heard at all, should be raised in the normal course of a proceeding. There is no basis or authority cited that would suggest that such a contention should be addressed outside the normal procedures that govern NRC hearings. Nor has BREDL provided an adequate reason for the Commission to exercise its "inherent supervisory authority" to order the Staff to consider the possible future use of MOX at McGuire and Catawba. See e.g. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980). The Staff submits that

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<sup>8</sup>(...continued)

before its motion to disqualify a Commissioner from participating in a proceeding may be entertained).

<sup>9</sup> Much of what BREDL raises regarding the alleged failure to consider the use of MOX in the EIS are in reality safety issues that would not be addressed in the EIS, but rather in the Staff's Safety Evaluation Report if at all relevant. In any event, the possible future use of MOX is beyond the scope of this license renewal proceeding.



there is no basis for the Commission to exercise its authority and, in fact, the situation militates against the exercise of the authority in this instance.

The question of whether the possible use of MOX at Catawba and McGuire should be considered in the license renewal proceeding relates to the scope of the proceeding. The proper scope of this license renewal proceeding was specified in the Commission's Order referring the requests for intervention to the Licensing Board. CLI-01-20, 54 NRC\_\_ (sl. op. at 2-3). This Order authorized the Board to decide the admissibility of contentions within the scope defined in the Order. *Id.* at 2. It is, therefore, left to the Board to decide, in the first instance, whether contentions proposed by a petitioner fall within the scope of this proceeding. This case should proceed before the Licensing Board established for that purpose. If the Commission decides to address BREDL's claim that MOX should be considered, then the Staff submits that the Commission should determine that the future possible use of MOX is outside the scope of this proceeding as defined in its referral order. In addition, since the Staff's EIS has not yet been issued, the Board should await the preparation of the Staff's EIS before determining its adequacy. "Prematurely concluding that such a document is inadequate before it is even produced deprives the participants of their opportunity to explore the matter during the hearing, as the Commission's regulations contemplate." *Consumers Power Co. (Big Rock Point Nuclear Plant)*, ALAB-636, 12 NRC 312, 331 (1981). The alleged shortcomings of a future Staff document is not grounds to dismiss the license renewal application.

Finally, a decision not to address the possible use of MOX in the EIS would not render the EIS inadequate. At the present time, there is no application pending before the NRC concerning the use of MOX at McGuire or Catawba. Although Duke has indicated that it is planning to submit such an application in the future, it has not yet done so. It is, in any event, not part of the license renewal request. Therefore, the use of MOX is beyond the scope of this proceeding. Even assuming that use of MOX at a specific reactor might be a major federal action requiring the

preparation of an EIS, there is no proposal before the agency to consider. See *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). See also *Society Hill Towers Owners' Assoc. v. Rendell*, 210 F.3d 168,181-82 (3<sup>rd</sup> Cir. 2000) ("NEPA only requires consideration of the cumulative impact of proposed, and not merely contemplated, future actions."); *United States Department of Energy Project Management Corp. Tennessee Valley Authority (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412, 424 (1982). In addition, if the granting of the license renewal request "will not result in any irreversible or irretrievable commitments" related to a future license amendment, each proposal can be addressed separately. See, e.g., *Clinch River*, CLI-82-23, 16 NRC at 424.<sup>10</sup>

Here, the granting (or denial) of the license renewal request would not impact adversely upon the staff's consideration of a later application for use of MOX at McGuire and Catawba, nor would it "result in any irreversible or irretrievable commitments" relating to the review of a later application to use MOX. Therefore, the possibility of use of MOX at a specific reactor in the future need not be addressed in an EIS related to this application for license renewal. If and when a proposal is made, that is, when an application to use MOX at McGuire and Catawba is filed, it will be evaluated in accordance with the requirements of the appropriate statutes and regulations. There is no requirement that the Staff evaluate future license amendments before they are proposed. Thus, BREDL's assertion does not demonstrate a basis to either dismiss the application or hold the proceeding in abeyance. The use of MOX is not part of the proposal before the Commission. In sum, the narrow scope of this proceeding was specified in the Commission's referral Order, and nothing cited by BREDL should cause an expansion of that scope.

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<sup>10</sup> In addition, unlike *Clinch River*, which involved one project, here we are concerned with two separate and distinct projects, one pending and one in the future. *Id.*

B. BREDL cannot challenge the granting of an exemption.

BREDL seeks to dismiss the license renewal proceeding on the grounds that the exemptions issued on October 1, 1999,<sup>11</sup> which allow the licensee to submit its license renewal application earlier than twenty years before the expiration of the operating license currently in effect as required by 10 C.F.R. §54.17(c), were predicated upon false assertions made by the licensee regarding its aging management program.<sup>12</sup> This amounts to a challenge of a completed agency action, specifically an exemption that has already been granted to the licensee. This challenge does not provide a basis for suspending or dismissing the present proceeding and, accordingly, the Staff respectfully submits that BREDL's pleading should be denied.

The exemptions requested by the licensee did not give rise to any hearing rights at the time the requests were made, and certainly do not give rise to any hearing rights after the exemptions have been granted. The Commission has held that an exemption request unrelated to initial licensing or a license amendment does not fall under the Atomic Energy Act section 189a hearing requirement. See *Commonwealth Edison Co. (Zion Nuclear Power Station)*, CLI-00-05, 51 NRC 90, 96 (2000). There is no right to a hearing under the AEA unless the exemption in question can properly be characterized as one of the circumstances specifically identified in section 189a of the

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<sup>11</sup> "Duke Energy Corporation (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), Exemption," 64 Fed. Reg. 54,924 (Oct. 8, 1999) (Exemption).

<sup>12</sup> BREDL specifically asserts that the licensee's claim of an ongoing exchange of information on plant specific operating experience among the licensee's nuclear facilities was in error, and that this was part of the basis for the exemptions. BREDL Pleading at 9. This argument, and the examples cited in its support (BREDL Pleading at 9-10), are irrelevant since the assertion by the licensee that there would be "regular and systematic exchanges of information on plant-specific operating experience among all three Duke nuclear stations," although referenced in the exemptions, was not the basis for the granting of the exemptions. Exemption, 64 Fed. Reg. at 54,924. The basis for the exemptions was that "McGuire, Unit 2, and both Catawba units are sufficiently similar to McGuire, Unit 1, such that the operating experience for McGuire, Unit 1, should apply to the other three units" and "the other three units have accumulated significant operating experience." *Id.*

AEA, as amended, as giving rise to a hearing right. See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC at \_\_ , 2001 WL 709427 (2001); *Zion*, CLI-00-05, 51 NRC at 96. Section 189(a) of the AEA, as amended, provides that “[i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any party whose interest may be affected by the proceeding and admit that person as a party to the proceeding.” 41 U.S.C. § 2239(a)(1)(A). The exemptions in the instant case do not constitute one of the circumstances giving rise to a hearing right.

BREDL insinuates that the exemptions provided the basis for the present license renewal application and therefore should be viewed as somehow amending the licenses. The Commission has found that an exemption came within the hearing rights of interested parties where “the exemption raises material questions directly connected to an agency licensing action.” *PFS*, CLI-01-12, 53 NRC at \_\_ , 2001 WL 709427 at \*\*6 (2001). One must examine whether an exemption in a particular case is, in effect, an amendment of the facility license or a modification of the rules and regulations dealing with the activities of licensees. *Zion*, CLI-00-05, 51 NRC at 96. The exemptions issued to the licensee in the instant case simply allowed the licensee to file its license renewal application earlier than twenty years before the expiration of the operating licenses currently in effect. The exemptions did not constitute an amendment of the licenses or modification of the regulations, and do not impact the substantive review or hearing rights that will apply to the license renewal application in the course of the instant proceedings.

In *Private Fuel Storage*, the Commission determined that an exemption from seismic analysis and design value regulations directly affected the licensability of a proposed ISFSI. CLI-01-12, 53 NRC at \_\_, 2001 WL 709427 at \*\*6. The Commission there noted that the exemption did not involve an “already-licensed facility asking for relief from performing a duty imposed by NRC

regulations.” *Id.* The exemption sought in *Private Fuel Storage* would have had a direct affect on the facility, forming the basis for issuance of a license. *Id.* This can be distinguished from other cases in which an exemption to NRC regulations was sought for an already-licensed facility, as in the instant case. See *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1519-21 (1<sup>st</sup> Cir. 1989) (determining an exemption from a regulation requiring a full-participation emergency preparedness exercise did not alter the license or change the licensee’s duty to follow NRC rules and only changed which rule applied for a brief amount of time); *Zion*, CLI-00-05, 51 NRC at 97-98 (rejecting an argument that an exemption from particular security regulations for a facility that was to be decommissioned constituted an amendment). As stated above, the exemptions granted to the licensee in the instant case will not affect the level of review that will be undertaken in conjunction with the license renewal application.

BREDL has failed to establish that the exemptions affect any substantive matter properly considered under Part 54. The twenty year limit was imposed by the Commission to ensure that sufficient operating experience was accumulated to identify any plant specific aging concerns. In initially promulgating 10 C.F.R. §54.17(c) in 1991, the Commission stated that the purpose of the time limit was “to ensure that substantial operating experience is accumulated by a licensee before it submits a renewal application.” “Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943, 64,963 (Dec. 13, 1991). In issuing the amended Part 54 in 1995, the Commission indicated it would consider an exemption to this requirement if sufficient information was available on a plant-specific basis to justify submission of an application to renew a license before the completion of twenty years of operation. “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,488 (May 8, 1995). In the instant case the Staff determined that the operating experience for McGuire, Unit 1, should apply to the other three units, based upon similarities in design, operation, and maintenance of the units. Exemption, 64 Fed. Reg. at 54,924. Therefore, sufficient combined operating experience would exist, achieving the underlying purpose and intent

of 10 C.F.R. §54.17(c). *Id.* BREDL has not provided any support for an assertion challenging the grounds upon which the exemptions were granted.

The exemptions granted to the licensee constitute completed agency action, and BREDL should not be permitted to raise a challenge to them in the present license renewal proceeding where no hearing would have been warranted at the time the exemptions were applied for and granted.

3. There Is No Basis For Suspending Or Dismissing The Proceedings Due To Potential Future Changes to Safeguards Requirements.

In order to establish that a proceeding should be held in abeyance or suspended, the moving party must demonstrate the existence of “immediate threats to public health and safety requiring such a drastic action,”<sup>13</sup> or that suspension is required in order to avert irreparable injury or “substantial prejudice.”<sup>14</sup> BREDL has failed to establish any of these factors and, therefore, its pleading should be denied.

BREDL is seeking to dismiss the license renewal application, or hold it in abeyance, on the basis of an assertion that major changes to the future security and safeguard requirements at nuclear power plants are inevitable following the terrorist attacks of September 11, 2001. In its pleading, BREDL seems to raise three concerns it believes must be addressed following the events of September 11, and that it asserts would justify the dismissal or suspension of the license renewal proceeding. BREDL alludes to public safety concerns and nuclear power plant vulnerability, pending legislative changes intended to combat terrorism, and the idea that the associated costs and economic impacts of these changes will affect the license renewal analysis.

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<sup>13</sup> See e.g. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000).

<sup>14</sup> See e.g., *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-09, 41 NRC 404, 405 (1995) (the Commission may stay a parallel proceeding to avert “substantial prejudice,” such as where discovery would compromise an OI investigation).

BREDL Pleading at 11-13. Yet, BREDL has failed to provide any support for these assertions or proffer an explanation concerning how dismissal or suspension of the present proceeding would serve to ameliorate these concerns and why such actions are required to protect public health and safety or to avert irreparable injury or substantial prejudice.

The issues related to license renewal that are within the scope of the Commission's Order referring this matter to the ASLBP are unrelated to the terrorism issue raised by BREDL. Thus, a suspension of this matter is unnecessary.<sup>15</sup> The Commission's Order limits the scope of this proceeding to: "a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses . . . [and] . . . review of environmental issues . . . limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c)."

CLI-01-20, 54 NRC at \_\_\_ (sl.op. at 2). BREDL has failed to provide any reason to believe that the mere continuation of proceedings related to these issues would have any adverse impact on public health and safety or cause any irreparable injury or substantial prejudice.

The Commission is fully aware of the events of September 11, and is assessing the need to take those events into consideration to the extent they may affect the licensing and regulation of nuclear facilities. The Commission has directed the Staff to review the NRC's security regulations and procedures in light of those events,<sup>16</sup> and the Staff is currently engaged in these and other efforts to address the events of September 11, consistent with the Commission's responsibility to assure protection of public health and safety.

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<sup>15</sup> See, e.g., *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 29 (2001) (stay of appellate proceedings to await developments concerning an unrelated issue was unwarranted).

<sup>16</sup> See NRC Press Release No. 01-112 (September 21, 2001) ("NRC Reacts to Terrorist Attacks").

While the events of September 11 are without question significant, BREDL has provided no reason to believe that any imminent danger to public health and safety would result from a continuation of adjudicatory proceedings relating to the license renewal application. In fact, nothing is likely to change regarding the operation of the facilities as a result of the license renewal proceeding. The facilities are approximately half way through their original operating license terms. Duke is not requesting any changes in the systems, structures, components or operations of McGuire or Catawba in this renewal request. Therefore, the *status quo* will be preserved. The only request pending before the Commission is that the licenses be renewed. Nothing in that request touches upon the safeguards issue raised by BREDL.

Further, as stated above, the Commission has initiated various generic efforts related to the events of September 11, with potential applicability to a range of nuclear facilities. It is entirely appropriate that the Commission continue with these efforts. At the same time, however, it is also appropriate that the Commission should continue to perform its statutory responsibilities for the licensing and regulation of nuclear facilities in a timely and deliberate manner,<sup>17</sup> and that the agency's review and adjudication of license renewal applications need not and should not be disrupted -- particularly where, as here, those activities can have no adverse impact on public health and safety. Therefore, there is no reason to hold the license renewal proceeding in abeyance.

In any event, if the Commission's review of the September 11 events leads it to conclude that it should modify its license requirements, it may do so at any time by rule, regulation or order; and it may make such requirements applicable both to applicants and licensees of nuclear facilities. See, e.g., Atomic Energy Act of 1954, as amended, sec. 161b, 42 U.S.C. §2201(b);

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<sup>17</sup> See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999), citing *Duke Power Co.* (Catawba Nuclear Station), CLI-83-19, 17 NRC 1041, 1048 (1983) (finding "a substantial public interest in efficient and expeditious administrative proceedings").



10 C.F.R. §§2.202 and 50.54(e) and (h). Thus, continuation of this proceeding will not detract from the Commission's protection of public health and safety. Therefore, the Staff respectfully submits that BREDL's pleading should be denied.

CONCLUSION

For the reasons stated above, the Staff respectfully requests that BREDL's pleading to dismiss the license renewal proceeding or to hold in abeyance be denied.

Respectfully submitted,

**/RA/**

Susan L. Uttal  
Counsel for NRC staff

Dated at Rockville, Maryland  
this 8<sup>th</sup> day of November 2001.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S PETITION TO DISMISS LICENSING PROCEEDING OR, IN THE ALTERNATIVE, HOLD IT IN ABEYANCE" 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 8<sup>TH</sup> day of November, 2001.

Ann Marshall Young, Chair\*\* \*  
Administrative Judge  
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