UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 3699 **DOCKETED 12/28/01**

COMMISSIONERS **SERVED 12/28/01**

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

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

CLI-01-27

MEMORANDUM AND ORDER

Today the Commission considers a petition by the Blue Ridge Environmental Defense League ("BREDL") to dismiss, as legally invalid, Duke Energy Corporation's ("Duke") application to renew four power reactor operating licenses.[1] In the alternative, BREDL asks us to hold the license renewal proceeding in abeyance to await the conclusion of our ongoing comprehensive review of the NRC's terrorism-related rules and policies. We see no basis for terminating or postponing our license renewal process, because that process will address many issues entirely unconnected to terrorism, will result in no immediate licensing action, and will cause BREDL no injury other than litigation costs. BREDL's legal challenges to Duke Energy's application can be considered during the license renewal adjudication.

[1] Although styled a "petition," BREDL's pleading is in fact a motion.

PROCEDURAL BACKGROUND

This proceeding stems from Duke's June 13, 2001 application to renew licenses for four nuclear power plants for an additional 20 years of operation, effective at their licenses' respective expiration dates. The operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station expire in 2021, 2023, 2024, and 2026, respectively. On July 16th, this agency published in the *Federal Register* a notice that it had received Duke's application (66 Fed. Reg. 37,072) and, on August 15th, a notice of opportunity for hearing on the application (66 Fed. Reg. 42,893). In response to the August 15th notice, BREDL and the Nuclear Information and Resource Service ("NIRS") each submitted a timely petition to intervene and request for hearing to oppose Duke's license renewal application. On October 4th, the Commission referred those petitions and requests to the Licensing Board Panel. *See* CLI-01-20, 54 NRC 211 (2001).

On October 16th, the Licensing Board issued an unpublished order establishing a schedule for the filing of pleadings. The Board modified this schedule on October 31st (*see* LBP-01-31, 54 NRC 242) and again on November 15th (*see* unpublished Memorandum and Order Granting in Part Request for Additional Extension of Time). Meanwhile, BREDL filed the instant petition, dated October 23rd. Duke and the NRC staff each filed a response opposing the petition, while NIRS filed a response supporting it.

DISCUSSION

BREDL seeks to dismiss this proceeding or, alternatively, hold it in abeyance pending both the completion of the first 20 years of operation at Catawba Unit 1 and agency decisions on major anticipated changes in the current licensing basis, *i.e.*, the use of plutonium/mixed

oxide ("MOX") fuel and changes to account for increased security threats.[2] In support of its two requests for relief, BREDL offers arguments relating to the risk of terrorist attacks,[3] the use of plutonium/MOX fuel,[4] and the NRC staff's purportedly improper grant to Duke of an exemption from a filing requirement.[5]

A. Motion to Hold Proceeding in Abeyance

Two other decisions issued today deal with requests, similar to BREDL's, to hold proceedings in abeyance pending the Commission's generic consideration of terrorism-related issues. *See Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC ___ (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC ___ (2001). Our *Private Fuel Storage* decision explains in detail our general approach: "we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies." *See* CLI-01-26, 54 NRC at ___, slip op. at 5. None of these considerations justifies a postponement of the current license renewal proceeding.

---

[2] BREDL also alludes to a third possible change in the licensing basis: a decision on the facility license operator. However, aside from a single cursory reference, BREDL does not address this third current licensing basis, nor does BREDL explain its relevance. We therefore reject the matter as insufficiently developed. *See GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 204 n.6 (2000).

[3] *See* Petition at 2-3, 11-16. *See also* NIRS Response at 3-6.

[4] *See* Petition at 1-2, 5-9. *See also* NIRS Response, *passim*.

[5] *See* Petition at 2, 9-11. We have also considered several less-developed arguments raised by BREDL (*see id.* at 2, 18) and have concluded that they support neither dismissing this proceeding nor holding it in abeyance.

BREDL asserts that the proceeding should be dismissed or held in abeyance because major changes in security and safeguards requirements at all nuclear power plants are inevitable in the aftermath of the September 11, 2001, terrorist attacks and the Commission's consequent "top-to-bottom" regulatory review.[6] In a related argument, BREDL asserts that the NRC cannot claim to have taken the "hard look" required under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, if the agency fails to make a fundamental safety inquiry into the security risks inherent in operating centralized energy sources that can function as radiological weaponry. In addition, BREDL claims that meaningful review of the license renewal application requires consideration of future heightened security costs. According to BREDL, it is impossible to evaluate meaningfully nuclear plant aging and economic issues without considering the impact of increased security measures on the financial viability of nuclear energy.

These are not persuasive arguments for refusing to go forward with a license renewal adjudication. A fundamental reason is that this license renewal proceeding has just begun and is not near a final decision. Duke's requested license renewals, if granted, will not take effect for at least another 20 years.[7] Hence, we see no risk here of any immediate threat to the public health and safety.[8]

---

[6] *See generally Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC ___, slip op. at 2 n.3 (Nov. 14, 2001).

[7] *See* Response of Duke Energy Corp. to BREDL's Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance, dated Nov. 5, 2001, at 14 n.21.

[8] *Cf. Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (the Commission rejected a challenge to the sufficiency of its Subpart M regulations "to evaluate adequately the effects of industry consolidation").

"[T]he Commission historically has been reluctant to suspend pending adjudications to await developments in other . . . proceedings."[9] For example, we did not hold adjudications in abeyance pending the results of an ongoing reexamination of our rules in the aftermath of the Three Mile Island accident.[10] More recently, we were unsympathetic to a licensee's efforts to place a portion of its own materials license adjudication "on hold" pending its making certain market-driven business decisions.[11] This general reluctance is firmly grounded in our longstanding commitment to efficient and expeditious decisionmaking, as reiterated in our 1998 Adjudicatory Policy Statement (balancing the applicants' and licensees' interest in a prompt decision on their applications with the intervenors' and petitioners' interest in an opportunity for a hearing).[12]

BREDL will suffer no cognizable injury from going forward with the hearing process. We are unpersuaded by BREDL's assertion that the "piecemeal" nature of the adjudication "makes it impossible to perform a complete or effective evaluation of the issues ... within the scope of the current hearing" and "is wasteful of [the petitioners'] resources." *See* Petition at 16. We

---

[9] *See Consolidated Edison Co. of NY* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229 (2001) (declining to suspend a license transfer adjudication pending completion of a similar NRC adjudication involving another nuclear plant at the same location). *See also Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343 (1999) (declining to suspend a license transfer adjudication pending conclusion of a New York Public Service Commission proceeding).

[10] *See Interim Statement of Policy and Procedure*, 44 Fed. Reg. 58,559 (Oct. 10, 1979) (in the aftermath of the 1979 TMI accident, the Commission (1) initiated internal reviews to see whether new rules or policies were necessary, (2) allowed Licensing Board hearings to move their hearings forward in the meantime, (3) authorized the NRC staff to take litigating positions even on TMI-related issues, and (4) announced that no actual licenses would issue, absent express Commission authorization, during the pendency of the NRC's "lessons learned" review).

[11] *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001).

[12] *See Statement of Policy on Conduct of Adjudicatory Proceedings*," 48 NRC 18 at 18, 24 (1998), 63 Fed. Reg. 41,872 (Aug. 5, 1998). *See also Hydro*, CLI-01-4, 53 NRC at 38.

have repeatedly rejected such resource-related arguments in prior proceedings, and do so again here. As we stated just this March in *Consolidated Edison Co. of NY* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229-30 (2001), "litigation invariably results in the parties' loss of both time and money. We cannot postpone cases for many weeks or months simply because going forward will prove difficult for litigants or their lawyers."

Termination or postponement of license renewal adjudications contravenes the Commission's interest in "regulatory finality" and "sound case management."[13] Our initial order in the instant case expressed our commitment to expeditious consideration of license renewal applications. *See* CLI-01-20, 54 NRC at ___, slip op. at 5, 7. License renewal, by its very nature, contemplates a limited inquiry -- *i.e.*, the safety and environmental consequences of an additional 20-year operating period.[14] License renewal focuses on *aging* issues, not on everyday operating issues.[15] Hence, it is far from clear that upcoming terrorism-related changes in our rules, if any, will bear on license renewal reviews. But, to the extent the Commission does, during a later stage of this adjudication, modify this agency's safety, environmental or safeguards rules in a manner that affects issues material to this adjudication, our procedural rules allow for the possibility of late-filed contentions to address such new developments.[16] Moreover, if our generic review leads to new rules applicable here, there will be time enough to apply them.

B. Petition to Dismiss

---

[13] *See Hydro*, CLI-01-4, 53 NRC at 40.

[14] *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-13 (2001).

[15] *See id.* at 7, 9-10.

[16] *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996), referring to the standards set forth in 10 C.F.R. § 2.714(a)(1).

This proceeding has barely begun, BREDL and NIRS have only recently submitted contentions, and the Board has yet to rule on petitions to intervene or requests for hearing. Under these circumstances, we consider it premature to address contention-like arguments such as those BREDL presents here regarding plutonium/MOX fuel and Duke's exemption from a filing requirement. BREDL's "fuel" argument raises a much-litigated environmental law issue: the so-called "cumulative impact" issue.[17] In this proceeding, the issue is styled: whether the NRC staff is obliged to consider in an Environmental Impact Statement the cumulative effect of the instant license extension action together with an as-yet-unfiled application for an amendment permitting use of plutonium/MOX fuel. BREDL's "exemption" argument raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing.[18] We believe it is generally preferable for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record.

---

[17] *See generally Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Society Hill Towers Owners' Assoc. v. Rendell*, 210 F.3d 168, 180-82 (3rd Cir. 2000); *Hydro Resources*, CLI-01-4, 53 NRC at 57-62; *United States Department of Energy Project Management Corp.; Tennessee Valley Auth'y* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 424 (1982), *rev'd and remanded per curiam on other grounds sub nom. Natural Resources Defense Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982).

[18] *See generally Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466, 467 n.3 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station), CLI-00-5, 51 NRC 90, 94-98 (2000); *Clinch River*, CLI-82-23, 16 NRC at 421.

CONCLUSION

The Commission *denies* BREDL's petition to dismiss this proceeding or, in the alternative, to hold it in abeyance.

IT IS SO ORDERED.

For the Commission[19]

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December, 2001.

[19] Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-01-27) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail.

Office of Commission Appellate
Adjudication**
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young, Chair**
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: amy@nrc.gov)

Administrative Judge
Charles N. Kelber**
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: cnk@nrc.gov)

Administrative Judge, ASLBP
Lester S. Rubenstein**
4760 East Country Villa Drive
Tucson, AZ 85718
(E-mail: lesrrr@msn.com)

Susan L. Uttal, Esq.**
Antonio Fernández, Esq.**
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: slu@nrc.gov; axf2@nrc.gov)

Michael S. Tuckman, Executive Vice President*
Nuclear Generation
Duke Energy Corporation
526 South Church Street
P.O. Box 1006
Charlotte, NC 28201-1006
(E-mail: mtuckman@duke-energy.com)

Docket Nos. 369/370/413/414-LR
COMMISSION MEMORANDUM AND ORDER (CLI-01-27)

Mary Olson*
Director of the Southeast Office
Nuclear Information and Resource Service
729 Haywood Road, 1-A
P.O. Box 7586
Asheville, NC 28802
(E-mail: nirs.se@mindspring.com)

Janet Marsh Zeller, Executive Director*
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
(E-mail: BREDL@skybest.com)

David A. Repka, Esq.*
Anne W. Cottingham, Esq.*
Winston & Strawn
1400 L Street, NW
Washington, DC 20005
(E-mail: drepka@winston.com; acotting@winston.com)

Lisa F. Vaughn, Esq.*
Duke Energy Corporation
422 South Church Street
Charlotte, NC 28202
(E-mail: lfvaughn@duke-energy.com)

Paul Gunter*
Nuclear Information and Resource Service
1424 16th St., NW
Washington, DC 20026
(E-mail: pgunter@nirs.org)

Jesse Riley
854 Henley Place
Charlotte, NC 28207
(E-mail: jlr2020@aol.com)

[Original signed by Emile L. Julian]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December