

RAS 4005

February 14, 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

2002 MAR -4 PM 3: 06

In the Matter of

OFFICE OF THE SECRETARY  
RULING MAKINGS AND  
ADJUDICATIONS STAFF

DUKE ENERGY CORPORATION

McGuire Nuclear Station, Units 1 and 2;

Docket Nos. 50-369 & 50-370

Catawba Nuclear Station, Units 1 and 2

Docket Nos. 50-413 & 50-414

**Blue Ridge Environmental Defense League (BREDL) response, in regard to  
NIRS MOX Contention, to**

NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-02-04

and

**MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DUKE ENERGY  
CORPORATION FROM ATOMIC SAFETY AND LICENSING BOARD  
MEMORANDUM AND ORDER LBP-02-04  
(RULING ON STANDING AND CONTENTIONS)**

This response by the Blue Ridge Environmental Defense League (BREDL) regarding Contention One (the MOX fuel contention by NIRS) of this proceeding is made in addition to BREDL's response regarding Contention Two (Ice Condensers, SAMAs and Station Blackout). BREDL also wants to state for the record its full support for NIRS' response to the appeal, and ask that the Commissioners uphold this contention in their decision. While BREDL obviously did not agree with all of the findings of the Board in its January 24, 2002 order/decision, we did find the decisions to be consistently well-reasoned, thoughtful, and beyond challenging through appeal.

## Introduction

In CLI-01-027, December 28, 2001, the Commissioners issued their decision to deny BREDL's October 23, 2001 Petition (Motion) to Dismiss these Proceedings. In the decision, Commissioners wrote, on Page :

“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. 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. BRED's exemption. argument raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing. 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.”

This decision was then referenced in part by the Licensing Board in arriving at its well-founded decision of January 24, 2002, to admit, consolidate, and reframe NIRS contentions on plutonium/MOX fuel as follows:

“Anticipated MOX fuel use in the Duke plants will have a significant impact on aging and environmental license renewal issues during the extended period of operations in the Duke plants, through mechanisms including changes in the fission neutron spectrum and the abundances of fission products, and must therefore be considered in the license renewal application and addressed in the Supplemental EIS.”LBP-02-04,

1. The issue of whether the Pu/MOX fuel program is a proposal under NEPA should be examined not through the NRC's regulations, but through the Council on Environmental Quality's regulations on NEPA. The CEQ consistently states that NEPA should be implemented in a timely manner and as early as possible; and that a proposal by a federal agency (the Pu/MOX program is a federal

program under contract to a private consortium of which Duke Energy is a part).

2. The CEQ regulations describe a process that is flexible, while the arguments set forth by the NRC staff and Duke Energy envision an unwieldy process triggered only by an amendment or license application.

3. In the case of Pu/MOX fuel, the Commission has stated that the time line for licensing the Mixed Oxide Fuel Fabrication Facility requires an expeditious process to meet national policy goals. Yet, the time line for the use of that fuel in Duke Reactors is portrayed as remote and speculative.

4. In this instance, the Commission should ere on the side of NEPA and the public and analyze Pu/MOX as a “reasonable alternative” at Duke Reactors within the confines of this SEIS. The public has expressed the need for analyzing MOX at NRC NEPA scoping meetings for both the relicensing of Catawba and McGuire and at three scoping meetings for the MOX fuel plant.

5. CEQ regulations clearly state that early timing is essential:

- “Federal agencies shall to the fullest extent possible “use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.” CEQ Sec 1500.2(e).
- “Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.” CEQ Sec 1501.2
- “There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” CEQ 1501.7
- “An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or presented with a proposal....The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.”CEQ 1502.5
- “For projects directly undertaken by Federal Agencies the EIS shall be prepared at the feasibility analysis state and may be supplemented at a later stage if necessary.” CEQ

1502.5(a)

When considering these over-riding NEPA regulations, BREDL requests that the Commission refer to, and consider, the Official Transcript of the Charlotte, NC prehearing of December 19-20, 2001, Pages 584 to 624.

In addition to the arguments made by NIRS (and supported by BREDL), an additional statement made during that discussion (Pages 621-23) is reiterated here:

“MR. MONIAK: Could I raise one issue about MOX given the fact that we have submitted the petition or motion to the Commission?”

JUDGE YOUNG: Go ahead.

MR. MONIAK: I would like to say in terms of whether this is a proposal or not, there is a distinction between the relicensing is a proposal by a private organization. Plutonium MOX fuel proposal is a major federal action, and has been addressed as such generically by the Department of Energy. There are different rules for applying NEPA as to whether it's private or federal. In all cases NEPA is supposed to be applied early in the process. The act of submitting a proposal is the latest point at which NEPA is triggered. That is the point in which something has to be done. There is no requirement in NEPA that say that an agency cannot begin scoping for NEPA at an earlier stage in order to avoid duplication of effort, NEPA is not just -- the reason many of us go to NEPA is because we can understand it. It's one of those elegant laws that is articulate and you don't see very often and it is -- you can really get it.

JUDGE KELBER: That's why Mr. Moniak, very often NEPA has been referred to as excellent policy and terrible law.

MR. MONIAK: In its implementation, but in bureaucracies it can be a terrible law. However, this is a proposal for which the Nuclear Regulatory Commission, it has plans to spend 3 to 4 million dollars in confirmatory research in the next 3 to 4 years using government funds. And this is a proposal in which the licensee is under contract as part of a consortium to the federal government to submit license amendments. They are under contract to the federal government, and I believe contracted with the federal government is a strong enough phrase as it is.

JUDGE RUBENSTEIN: Is this merit argument incorporated in your brief?

MR. MONIAK: I wanted to point these things out to say this is a proposal at this point.

JUDGE KELBER: Judge Rubenstein asked are these arguments cited in your brief to the commission.

MR. MONIAK: Not in those terms because I hadn't really thought of them in those terms, but I'm going to submit an addition.

JUDGE KELBER: Thank you for your contribution because I think it would make a useful comment to send it along to the Commission.

MR. MONIAK: Thank you.”

Unfortunately, BREDL was unable to complete an additional filing before the Commissioners issued their December 28, 2002 ruling.

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6. In its ruling on BREDL's motion/petition to dismiss, the Commissioners wrote that

“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.. We 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.”<sup>1</sup>

In making this ruling, the Commissioners failed to recognize that it is not litigation that is at issue,

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<sup>1</sup> CLI-01-27. MEMORANDUM AND ORDER. 12/28/01. Pages 5-6.

but public participation. The National Environmental Policy Act is the primary means for people to engage with decision makers on policies and programs that effect the quality of our environment and therefore our quality of life.

7. A prolonged discussion is not sought on the matter of when the NRC should analyze the impacts of MOX under NEPA. If the NRC completes an analysis within the confines of relicensing, it is not obligated to do anything more than supplement that Environmental Impact Statement during any Duke amendment applications.

The fact is that the public is engaged with the NRC at this time on this issue, and it is a regulatory burden on the public to prolong discussion through endless licensing processes.

8. The assertions of the NRC staff are undermined by its recent legal errors. In a January 7, 2002 memo (attached) to the Licensing Board, Staff Counsel Antonio Fernandez wrote:

“Dear Administrative Judges:

This is to correct a statement made during the prehearing conference which occurred on December 18 and 19, 2001. In this proceeding, in response to a Licensing Board inquiry regarding whether a petitioner could challenge a staff determination in an environmental assessment (EA) that an environmental impact statement (EIS) is not necessary, staff counsel indicated that, to his knowledge, a petitioner cannot challenge the environmental document prepared by the Staff. Transcript at 598-99. This statement was incorrect.

A petitioner may attempt to raise a challenge to a determination by the staff in an EA and finding of no significant impact (FONSI) that an EIS is not warranted. Any such challenge would be required to meet the criteria of 10 C.F.R. § 2.714 and relevant Commission precedent regarding intervention, the admission of contentions and, as applicable, the admission of late- filed contentions.

I apologize for any inconvenience this may have caused.”

This error illustrates the likelihood that petitioners will be faced with a conflict with the NRC in the

near future that can be avoided simply by treating the plutonium/MOX program as a “reasonable alternative” as defined by the NRC, the DOE, and the licensee.

This letter is also raised here to highlight the supreme arrogance of the staff in claiming that “*The Licensing Board Misinterpreted the Meaning of “Current Licensing Basis,”*” (NRC staff appeal at Pages 7-8). The term *Current Licensing Basis* is a far more difficult legal and technical concept than the provisions of NEPA. On February 1, 2002, the NRC issued the Amendment No. 201 to the McGuire 1 nuclear reactor operating license and Amendment No. 182 for McGuire 2. This equates to an average rate of approximately 10 license amendments per year, and when added to “relief requests” and exemptions, illustrates how difficult it is for anyone to really define what the actual *Current Licensing Basis* for any nuclear power plant entails.

9. The fact remains that Duke Energy, as a partner in the consortium Duke Cogema Stone and Webster, LLC, is contractually obligated to the Federal Government to apply for a license amendment to irradiate 25-34 Metric Tonnes of plutonium<sup>2</sup> at Catawba and McGuire NPPs by early 2004. If Duke had not filed for and received an exemption to relicensing rules shortly after it obtained this contract in March 1999, the plutonium/MOX fuel issue would clearly have been within the Current Licensing Basis for Catawba 1 and 2 and McGuire 2.

Respectfully submitted,



Don Moniak  
Blue Ridge Environmental Defense League  
dated February 14, 2001 in Aiken, SC

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<sup>2</sup> Within approximately 1200 to 1400 Metric Tonnes of plutonium/mixed oxide fuel composed of weapons-grade military origin plutonium.

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NUCLEAR REGULATORY COMMISSION

BEFORE THE Commissioners

In the Matter of \_\_\_\_\_ )

DUKE ENERGY CORPORATION )

(McGuire Nuclear Station, )  
Units 1 and 2, and )  
Catawba Nuclear Station )  
Units 1 and 2) )

) Docket Nos. 50-369, 370, 413 and 414

CERTIFICATE OF SERVICE

I hereby certify that copies of the following documents

1. **Blue Ridge Environmental Defense League (BREDL) response to NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-02-04 and MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DUKE ENERGY CORPORATION FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER LBP-02-04 (RULING ON STANDING AND CONTENTIONS)**
2. **Blue Ridge Environmental Defense League (BREDL) response, in regard to NIRS MOX Contention, to NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-02-04 and MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DUKE ENERGY CORPORATION FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER LBP-02-04 (RULING ON STANDING AND CONTENTIONS)**

In the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, the 15<sup>th</sup> day of February, 2002, as well as by e-mail on the 14<sup>th</sup>.

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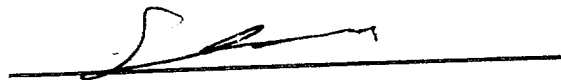
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This 16<sup>th</sup> Day of ~~November~~, 2001  
February