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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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|---------------------------|---|--------------------------------------|
| 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'S MOTION FOR STAY AND INTERLOCUTORY
REVIEW OF THE LICENSING BOARD'S MARCH 1, 2002 ORDER
AUTHORIZING DISCOVERY AND ORDERING AN EVIDENTIARY HEARING
REGARDING MOX-RELATED ENVIRONMENTAL AND SAFETY ISSUES

Jared K. Heck
Counsel for NRC staff

March 11, 2002

ADAMS

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.788, the staff of the Nuclear Regulatory Commission (Staff) moves that the Commission stay the effect of the Order issued by the presiding Atomic Safety and Licensing Board (Board) on March 1, 2002 granting discovery and scheduling a hearing with respect to Nuclear Information and Resource Service's (NIRS) Contention 1.¹ The Staff believes that a stay is necessary to allow the Commission to meaningfully address the Staff's pending February 4, 2002 appeal regarding the admissibility of Contention 1 and to prevent irreparable harm to the Staff. In the event the Commission denies the Staff's pending appeal, the Staff requests, pursuant to 10 C.F.R. § 2.786(g)(1), that the Commission undertake interlocutory review of the Board's March 1st Order on the grounds that, for reasons more fully discussed below, it will cause immediate and irreparable impact on the staff and have a pervasive and unusual effect on the proceeding which, as a practical matter, will not be amenable to subsequent relief.²

¹ Order (Addressing Matters Discussed at February 12, 2002, Telephone Conference and Scheduling March 13, 2002, Telephone Conference) (March 1, 2002) (March 1st Order).

² See *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC __ (Slip op. at 2-3) (March 7, 2002).

BACKGROUND

On January 24, 2002, the Board in this proceeding issued a Memorandum and Order admitting NIRS Contention 1 to this license renewal proceeding.³ This contention, as rewritten by the Board, provides:

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.

On February 4, 2002, the Staff appealed the Board's January 24th Order, pursuant to 10 C.F.R. § 2.714a.⁴ Then, on March 1st, the Board entered an order authorizing discovery and an evidentiary hearing regarding environmental and safety issues related to the use of mixed-oxide fuel (MOX) at Catawba and McGuire.

In support of this motion, the Staff submits that (1) given the lack of any application for a license amendment or other relevant information regarding the use of MOX at Catawba and McGuire, the Commission should, prior to any discovery or evidentiary hearing on the matter, first resolve the issue of whether Contention 1 was properly admitted in order to avoid the unwarranted diversion of Staff resources from the timely review of this license renewal application; (2) the Board's March 1st Order is contrary to 10 C.F.R. §§ 51.71(d) and 51.104 insofar as it requires the Staff to present testimony and conclusions regarding the environmental impacts of MOX use on reactor systems notwithstanding that there has been no formal proposal to use MOX, and the Staff will not have published its final supplemental environmental impact statement (SEIS); (3)

³ Memorandum and Order (Ruling on Standing and Contentions), LBP-02-04, 55 NRC (January 24, 2002) (January 24th Order). The Memorandum and Order also admitted a second contention relating to Severe Accident Mitigation Alternatives (SAMAs).

⁴ NRC Staff's Notice of Appeal from LBP-02-04 (February 4, 2002). The Staff's position on the admissibility of Contention 1 is fully discussed in its brief on Appeal and will not be repeated here.

conducting an evidentiary hearing on the cumulative or synergistic impacts of MOX use at Catawba and McGuire without the benefit of site-specific data will likely result in findings by the Board regarding the environmental impacts of MOX use based upon an inadequate record and without meaningful participation from the Staff; and (4) a hearing regarding the impacts of MOX use may not be held before the final SEIS is issued pursuant to 10 C.F.R. § 51.104.

Accordingly, the Staff requests that the Commission stay the effect of the Board's March 1st Order granting discovery and an evidentiary hearing on Contention 1 until the Commission has resolved the Staff's February 4, 2002 appeal. In the event that the Commission denies its pending February 4, 2002 appeal, the Staff further requests interlocutory review of the Board's March 1st Order and a stay of that Order until the Commission resolves the issue of whether the Board may hold a hearing regarding the impacts of MOX use at Catawba and McGuire before the final SEIS is issued pursuant to 10 C.F.R. § 51.104.

DISCUSSION

On January 24, 2002 the Board issued a Memorandum and Order admitting NIRS Contention 1 relating to the possible future use of MOX at McGuire and Catawba. Pursuant to 10 C.F.R. § 2.714a(c), the NRC Staff filed an appeal from the Order on February 4, 2002.

On March 1, 2002 the Board issued an Order memorializing a February 12, 2002 telephone conference call that authorized discovery beginning on March 15, 2002 and scheduled a hearing on issues presented by Contention 1 for the week of July 15, 2002. March 1st Order at 1-2.⁵

According to the March 1st Order, evidence may be presented at the hearing that is relevant to whether the use of MOX fuel at Catawba and McGuire warrants consideration in the license renewal process because:

⁵ The Board's March 1, 2002 Order does not address discovery or an evidentiary hearing on the SAMA contention. Therefore, it is not an issue in this motion.

(A) it is sufficiently concrete, certain, probable, reasonably foreseeable or otherwise definite enough under appropriate case law standards to warrant consideration; and

(B) its impact will be “cumulative or synergistic,” so “interdependent that it would be unwise or irrational” to proceed with the license renewal proceeding without considering it, or otherwise appropriately connected or related under appropriate case law standards to license renewal aging and environmental issues in this proceeding so as to warrant such consideration.

March 1st Order at 2. The Order also authorizes discovery with regard to these issues. *Id.* The Board’s decision to proceed in this manner despite the Staff’s pending appeal to the Commission regarding the admissibility of Contention 1 was based on the interest in efficient handling of the case. Official Transcript of Proceedings (Telephone Conference) at 661 (February 12, 2002) (Tr).

During the February 12, 2002 telephone conference call upon which the March 1st Order was based, the Staff objected to going forward with an evidentiary hearing on “anything beyond eliciting evidence regarding whether a proposal [to use MOX] currently exists.” *Id.* at 681. The Staff made clear that if the Board chose to proceed with respect to the impacts from burning MOX fuel in a reactor core, there could be no discovery of the Staff. *Id.* at 677. Although the Board stated that it was not seeking discovery from the Staff, *id.*, the portion of the Board’s March 1, 2002 Order granting discovery applies broadly to “the parties” and nowhere excludes the Staff from its discovery requirements. See March 1st Order.

Duke Energy Corporation currently does not have a proposal before the Commission regarding the use MOX at Catawba or McGuire. Neither plant is licensed to use MOX fuel and no license amendment application to use MOX has been submitted. Whether MOX will, in fact, ever be loaded into the reactors at Catawba and McGuire is currently unknown.

A. The Board's March 1, 2002 Order Granting Discovery Against the Staff and Scheduling an Evidentiary Hearing on MOX-Related Environmental and Aging Issues Warrants the Entry of a Stay Under 10 C.F.R. § 2.788(e)

Filing an appeal or request for interlocutory review does not, in and of itself, stay the effect of a disputed ruling. See 10 C.F.R. § 2.730(g); cf. 10 C.F.R. § 2.786(f). Rather, a stay request must be filed, and is to be considered under the following criteria, set forth in 10 C.F.R. § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.⁶

1. The Staff is Likely to Prevail on the Merits of its February 4, 2002 Appeal of the Board's Memorandum and Order Admitting Contentions

As more fully set forth in its February 4th Appeal, the Staff has shown that the Board, in admitting Contention 1, committed several substantive errors of law. First, the Board impermissibly rewrote the contentions proffered by NIRS, expanding their scope in the process. The Commission has repeatedly stated that it is the petitioner's responsibility to phrase its contentions, not the Board's. See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station Units 2 and 3), CLI-01-24, 54 NRC ___, slip op. at 19, n.10 (2001), *reconsideration denied* CLI-02-01, 55 NRC ___ (2002). See also *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Second, the Board misinterpreted the meaning of "current licensing basis" (CLB) in its decision to admit Contention 1. By concluding that the possible future use of MOX at Catawba and McGuire can be considered part of the CLB in license renewal, the Board misapplied clear regulatory definitions and ignored explicit Commission guidance regarding the scope of

⁶See *PFS*, CLI-02-08, slip op. at 2-3.

license renewal. See 10 C.F.R. §§ 54.3, 54.29(a); *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001) (stating that the CLB includes only those requirements “applicable to a specific plant that are in effect at the time of the license renewal application.”). Finally, by admitting the contention regarding possible MOX-related environmental impacts, the Board impermissibly expanded the scope of the license renewal proceeding. While the Commission’s regulations and the National Environmental Policy Act clearly require environmental review of “proposed actions,” there is currently no concrete proposal before the Commission that could be meaningfully evaluated. Moreover, there is no apparent dependency of the licensing action in fact pending -- license renewal -- on any prospective use of MOX at these facilities such that consideration of the latter at this time might even arguably be justified. Consequently, the Board’s Order is beyond the scope of this license renewal proceeding. See 10 C.F.R. § 51.71(d); *Kleppe v. Sierra Club*, 427 U.S. 390, 406, 410 n. 20 (1976). For the above reasons, as more fully described in the Staff’s Brief in Support of Appeal From LBP-02-04 (February 4, 2002), the Staff is likely to prevail on the merits of its pending appeal.

2. Entry of a Stay is Necessary to Prevent Irreparable Harm to the Staff

The Board’s March 1st Order granting discovery and an evidentiary hearing regarding MOX-related issues effectively abrogates the intent of 10 C.F.R. § 51.104, which provides that “the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA . . . until the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.” Requiring the Staff to participate in an evidentiary hearing into environmental impacts therefore is contrary to an explicit Commission regulation and threatens immediate and irreparable harm to the Staff’s ability to carefully and thoroughly analyze such issues based on meaningful scientific data.

The Board's March 1st Order threatens irreparable harm to the Staff because there is currently no proposal to use MOX before the Staff and no site-specific environmental or technical data upon which the Staff may base its responses to discovery requests. The Board's Order requires the Staff to either engage in a hypothetical analysis of MOX-related environmental and aging impacts contrary to Commission policy and practice or be effectively denied a voice in the evidentiary hearing scheduled for the week of July 15, 2002.⁷ Without a stay, the Staff will potentially be subject to Board findings regarding the environmental impacts of MOX use at Catawba and McGuire without the opportunity to provide meaningful analysis in the hearing process.

If the Commission resolves the Staff's pending February 4, 2002 appeal by dismissing Contention 1, the harm threatened by the Board's March 1st Order will not materialize and these issues will become moot. If the Commission denies the Staff's appeal, however, the issue of whether to proceed with an evidentiary hearing regarding the facility-specific environmental impacts of MOX use at Catawba and McGuire prior to the issuance of the Staff's final SEIS will remain, and the Staff will face the same irreparable harm. Therefore, in the event it denies the Staff's pending February 4, 2002 appeal, the Staff requests that the Commission enter a stay of any evidentiary hearing regarding the impacts of MOX use at Catawba and McGuire until it determines whether such impacts can be addressed by the Staff prior to issuance of its final SEIS under 10 C.F.R. § 51.104.

3. Granting a Stay Will Not Harm Other Parties to this Proceeding

If the Commission should deny the Staff's appeal and uphold the decision of the Board admitting the MOX contention, NIRS and the Blue Ridge Environmental Defense League (BREDL)

⁷ During the telephone conference, in response to Staff counsel's statement that the Staff could not address, *inter alia*, the cumulative impacts of MOX use, a Board member stated that "[t]o the degree any party chose not to present any evidence or argument on an issue, then obviously you'd be subjecting yourself to not having your point of view considered to that degree." Tr. at 677.

will still have an opportunity for discovery and an evidentiary hearing on Contention 1, albeit at a later time. Furthermore, immediate Commission review could serve to narrow the issues that must be addressed in the proceeding, thus resulting in a more timely completion of the proceeding.

4. The Public Interest Favors Entry of a Stay

The interests of adjudicatory efficiency require that the discovery process not be employed unnecessarily, and staying further proceedings regarding Contention 1 until the Commission has resolved the Staff's pending February 4, 2002 appeal will avoid the risk of a wasteful foray into the hypothetical impacts of MOX use at Catawba and McGuire. A stay will also provide the Commission time to provide the Board, the public, and potential license renewal applicants with important guidance regarding the precise scope of license renewal proceedings, should it choose to do so. Furthermore, the public's interest is best served when the Commission and its Licensing Boards consistently apply regulations that have been subject to notice and comment procedures.

B. Interlocutory Review of the Board's Order is Appropriate Because the Order Threatens Irreparable Harm to the Staff and Will Have a Pervasive and Unusual Effect on Current License Renewal Proceedings

Interlocutory review is appropriate "where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), *citing* 10 C.F.R. § 2.786(g); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). *See also PFS*, CLI-02-08, 55 NRC__ (2002). If the Commission denies the Staff's pending appeal and determines that a proposal to use MOX currently exists before the agency, the Board's March 1st Order, if it remains in effect, would have the unusual effect of either having a hearing without meaningful participation by the Staff or forcing the Staff to testify regarding the possible environmental impacts of MOX use and its effects on plant aging without the benefit of site-specific data. Site-specific

data regarding these effects is unavailable because the Staff has currently has no proposal for the use of MOX at Catawba and McGuire before it. Requiring the Staff to testify regarding technical and environmental issues without having a concrete technical basis for doing so and prior to completion of its final SEIS is contrary to the regulatory scheme established by 10 C.F.R. §§ 51.71(d) and 51.104.

The Board's Order granting discovery and an evidentiary hearing regarding MOX-related issues effectively abrogates the intent of 10 C.F.R. § 51.104, which provides that "the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA . . . until the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public." *See also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 & 2), ALAB-785, 20 NRC 848, 863-64 (1984) ("Thus, in the usual case, environmental hearings await the preparation and circulation of the staff's FES."). Moreover, requiring the Staff to participate in discovery into environmental impacts threatens immediate and irreparable harm to the Staff's ability to carefully and thoroughly analyze such issues based on meaningful scientific data.⁸ It would require the Staff to evaluate the effects of the use of MOX on the aging of systems, structures and components, as well as the environmental impacts, without the necessary technical information that would be supplied by a facility-specific request for a license amendment.⁹ The

⁸ Because the record in this proceeding already contains the facts necessary to determine whether a proposal to use MOX is currently before the NRC, the Commission may resolve the issue as a matter of law. Discovery and an evidentiary hearing regarding this issue, as required by the Board's March 1st Order, would yield no further evidence useful to the resolution of the matter.

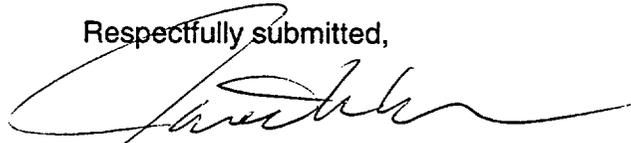
⁹ As argued before the Board below, whether a proposal exists is a threshold question under NEPA. Official Transcript at 681. Before the agency may consider the cumulative impacts of a particular action, it must first find that a proposal for that action exists. *See Kleppe v. Sierra Club*, 427 U.S. 390, 401 (1976) (establishing that an agency's NEPA obligations arise only after a proposal is before the agency). If the Commission requires the Staff to perform a cumulative impacts analysis prior to having an actual proposal for the use of MOX at Catawba and McGuire

Board's Order is also contrary to the Commission's Referral Order in this proceeding, which prohibits formal discovery against the Staff regarding its safety and environmental review until after the issuance of the final Safety Evaluation Report and the final SEIS. Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel, CLI-01-20, 54 NRC__, slip op. at 4;¹⁰ see also NRC Staff's Brief in Support of Appeal From LBP-02-04 at 12 n.19.

CONCLUSION

For the reasons set forth above, the Staff requests that the Commission stay the effect of the Board's March 1st Order until the Commission has resolved the Staff's February 4, 2002 appeal. In the event that the Commission denies its pending February 4, 2002 appeal, the Staff further requests interlocutory review of the Board's March 1st Order and a stay of that Order until the Commission resolves the issue of whether the Board may hold a hearing regarding the impacts of MOX use at Catawba and McGuire before the final SEIS is issued pursuant to 10 C.F.R. § 51.104.

Respectfully submitted,



Jared K. Heck
Counsel for NRC staff

before it, then the Staff will be forced to resolve a hypothetical situation. Therefore, the Commission should issue a stay pending its resolution of the proposal question. In the event that the Commission rules that, currently, there is a proposal before the Commission to use MOX at Catawba and McGuire, then the Commission should order the Board to follow 10 C.F.R. § 51.104 and delay discovery on this issue until the Staff issues the final SEIS.

¹⁰The Board may allow discovery against the Staff on safety issues before the final SER is issued only if doing so will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner. *Id.* No such discretion is afforded relative to environmental issues. *Id.* Allowing discovery in this instance will not serve to expedite the hearing since MOX-related issues are outside the scope of license renewal. See 10 C.F.R. §§ 51.71(d), 54.29(a).

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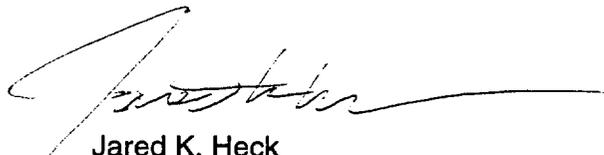
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NOTICE OF APPEARANCE

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

Name: Jared K. Heck
Address: Office of the General Counsel, 0-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Telephone Number: (301) 415-1623
Fax Number: (301) 415-3725
E-mail Address: jkh3@nrc.gov
Admissions: State of Iowa

Respectfully submitted,



Jared K. Heck
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of March, 2001

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR STAY AND INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S MARCH 1, 2002 ORDER AUTHORIZING DISCOVERY AND ORDERING AN EVIDENTIARY HEARING REGARDING MOX-RELATED ENVIRONMENTAL AND SAFETY ISSUES" and "NOTICE OF APPEARANCE" 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 11th day of March, 2001.

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

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

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Paul Gunter**
Nuclear Information and Resource Service
1424 16th St. N.W.
Suite 404
Washington, D.C. 20026
(E-mail: pgunter@nirs.org)

Lester S. Rubenstein** *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
(E-mail: Lesrrr@msn.com)

Office of the Secretary** *
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
(E-mail: HEARINGDOCKET@nrc.gov)

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

Mary Olson**
Southeast Director of NIRS
P.O. Box 7586
Asheville, NC 20882
(E-mail: nirs.se@mindspring.com)

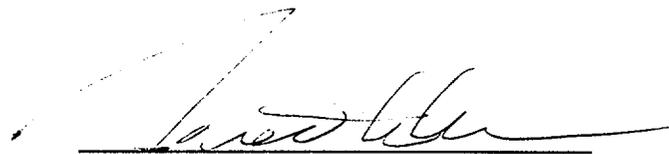
David A. Repka, Esq.**
Anne W. Cottingham, Esq.**
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005-3502
(E-mail: drepka@winston.com
acotting@winston.com)

Atomic Safety and Licensing Board Panel*
U.S. Nuclear Regulatory Commission
T-3F23
Washington, D.C. 20555

Lisa F. Vaughn, Esq.**
Legal Dept. (PBO5E)
Duke Energy Corporation
422 So. Church St.
Charlotte, NC 28201-1006
(E-mail: lfVaughn@duke-energy.com)

Jesse Riley
854 Henley Place
Charlotte, NC 28207
(E-mail: Jlr2020@aol.com)

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, SC 29802
(E-mail: donmoniak@earthlink.net)



Jared K. Heck
Counsel for NRC Staff