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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

REPLY OF DUKE ENERGY CORPORATION TO NUCLEAR INFORMATION AND RESOURCE SERVICE AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE BRIEFS IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-02-06

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I. INTRODUCTION

Duke Energy Corporation ("Duke") herein replies to the February 27, 2002, briefs filed by the Nuclear Information and Resource Service ("NIRS") and the Blue Ridge Environmental Defense League ("BREDL") (collectively, "Petitioners") in this proceeding.[1] The Petitioners' briefs, along with those of Duke and the Nuclear Regulatory Commission ("NRC") Staff, responded to the February 6, 2002, Memorandum and Order of the Commission which accepted certification of an issue relating to risks from acts of terrorism.[2] As discussed below, Duke maintains that the National Environmental Policy Act of 1969, as amended, 42

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1 *See* "Nuclear Information and Resource Service Brief in Response to CLI-02-06 Regarding Admissibility of NEPA Issues Relating to Terrorism and Sabotage" (February 27, 2002) ("NIRS Brief") and the February 27, 2002, multi-part submittal of the Blue Ridge Environmental Defense League ("BREDL Brief").

2 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC __ (slip op., Feb. 6, 2002).

U.S.C. § 4321 *et seq.* ("NEPA"), does not require an environmental impact statement ("EIS") to consider the risk of intentional malevolent acts against nuclear power reactors, particularly in the context of a license renewal application.

II. ARGUMENT

In the interest of efficiency, Duke hereby incorporates by reference its prior detailed discussion of the ongoing NRC licensing proceeding concerning Duke's application to renew the operating licenses for the McGuire Nuclear Station and Catawba Nuclear Station, as well as the issue posed by the Commission in CLI-02-06.[3] In this reply, Duke addresses only the Petitioners' fundamental concerns and claims, as presented in their briefs; namely, that the risk of potential terrorist attacks against individual commercial nuclear plants must be evaluated on a case-by-case basis under NEPA. As demonstrated below, the arguments made by Petitioners are not only unresponsive to the legal issue posed by the Commission, but also without merit.

A. The NRC Is Addressing Heightened Plant Security Concerns and Need Not Analyze Plant-Specific Environmental Impacts of Malevolent Acts Under NEPA

The Petitioners' briefs to the Commission do not argue NEPA law as much as they argue that, post-September 11, there is a threat to commercial nuclear plants from terrorists. NIRS refers to "overwhelming evidence that malevolent and highly destructive acts against U.S. facilities are credible and must be taken seriously." (NIRS Brief, at 3; *see also* 16-18.) BREDL, for its part, devotes virtually all of its brief to a discussion of the perceived threat to nuclear plants, spent nuclear fuel storage facilities, shipments of radioactive waste, and shipments of mixed oxide ("MOX") fuel. (*See* BREDL Brief, Parts 1, 3A, 3B, 3C, 4B, 4C.)

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[3] *See* "Brief of Duke Energy Corporation in Response to Commission Memorandum and Order CLI-02-06" (February 27, 2002) ("Duke's Brief").

Duke does not dispute the existence of a generalized threat of terrorist attacks against the interests of the United States, domestically and abroad. Duke also understands and agrees that the events of September 11 triggered the need for the Commission to re-evaluate applicable security measures at power reactors. Indeed, since that time, the entire Federal government has mobilized and taken unprecedented action to address the threat of which Petitioners are so acutely aware. Even NIRS acknowledges that "[p]rotecting nuclear facilities against terrorist attacks has been an overriding preoccupation of the NRC since September 11, and continues today." (NIRS Brief, at 3.)[4]

Yet despite this recognition of the NRC's ongoing efforts, Petitioners convey the impression that if the risk of intentional malevolent acts against nuclear power plants is not analyzed under NEPA, then it will go unheeded. The Petitioners' position is internally inconsistent, citing the NRC's "preoccupation" with security, yet acting as if the issue is being ignored. The Commission's ongoing efforts to confront and respond to current security and terrorism issues indeed have been properly implemented outside of the framework of NEPA. The purpose of those initiatives is to minimize the threat of malevolent attacks at any particular commercial nuclear plant. Thus, the focus on hypothetical consequences is misplaced. There is no need to stretch NEPA beyond its clear environmental purpose to reach these security and military matters.

Stated differently, there is no reason to overlay plant-specific NEPA evaluations onto the ongoing national and international initiatives, including assessments of the threat and responses to the threat. In enacting NEPA, Congress declared that "[i]n order to carry out the

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[4] For example, the February 25, 2002, Commission Order — which was immediately effective — modifies the current operating licenses for all power reactors to require compliance with specified interim safeguards and security compensatory measures.

policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, *consistent with other essential considerations of national policy*, to improve and coordinate Federal plans, functions, programs, and resources . . . ." 42 U.S.C. § 4331(b)(emphasis added). NEPA itself therefore presupposes an understanding and integration of "other essential considerations of national policy." Given the ongoing Federal efforts, including the Commission's program to upgrade security at nuclear plants, there is no need to force-fit these issues of national security into the context of plant-specific NEPA evaluations of NRC licensing actions. Contrary to Petitioners' assertions, the issue will not go unheeded.

B. Petitioners Have Failed to Show that NEPA Requires Consideration of Intentional Malevolent Acts

Petitioners also have failed to specifically demonstrate how NEPA requires the NRC to evaluate the environmental impacts of malevolent acts in plant-specific licensing proceedings. Both the NIRS and BREDL briefs are unresponsive to the very issue posed by the Commission in CLI-02-06. Petitioners do not rebut the conclusions that: (1) 10 C.F.R. § 50.13 precludes consideration of the impacts at issue under NEPA; and (2) NEPA's "rule of reason" does not mandate consideration of unquantifiable and unpredictable malevolent acts not proximately caused by a federal action.

With respect to the question that the parties were asked by the Commission to address (*i.e.*, whether NEPA requires consideration of intentional malevolent acts in NRC licensing proceedings), BREDL's Brief is completely unresponsive. It fails to acknowledge the legal question posed by the Commission, much less address the merits of that issue. Rather, BREDL uses its submittal as an opportunity to restate its position on a number of extraneous topics (a few of which relate generally to NEPA, most of which do not) previously mentioned in its proposed contentions or in other filings in this proceeding. It has failed to make any showing

whatsoever that NEPA requires consideration of intentional terrorist acts in NRC license proceedings.

NIRS's Brief is also not helpful on the legal issue. NIRS devotes two lines of its 21-page brief to inform the Commission that it "agrees with" and incorporates by reference the arguments of Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("CCAM/CAM"), the intervenor in the Millstone licensing proceeding. (NIRS Brief, at 3.) NIRS fails to make any substantive arguments of its own demonstrating why NEPA requires consideration of intentional terrorist acts and/or sabotage in NRC license proceedings. Moreover, the CCAM/CAM arguments are legally unsupportable for the reasons discussed in Duke's Brief. CCAM/CAM ignore the importance of 10 C.F.R. § 50.13 and stretch the NEPA "rule of reason" to an untenable degree.[5]

Section 50.13 provides that applicants and licensees are not required to design and build their facilities to withstand the effects of "attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person. . . ." 10 C.F.R. § 50.13. This regulation reflects a dividing line that can and must apply to defining the proper scope of a NEPA evaluation as well as the scope of a public safety and security review. CCAM/CAM are wrong in concluding that Section 50.13 "does not automatically exclude the impacts of destructive acts of malice by an enemy of the United States from the category of environmental impacts that must be considered in an EIS." (CCAM/CAM Brief, at 13.) For all the reasons discussed in Duke's Brief, the Commission should adhere to the

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[5] Duke only summarizes here the reply of Dominion Nuclear Connecticut, Inc. to the CCAM/CAM brief. For a more detailed discussion, see "Reply of Dominion Nuclear Connecticut, Inc. to Connecticut Coalition Against Millstone and Long Island Coalition Brief in Response to CLI-02-05" (March 12, 2002), Dkt. No. 50-423-LA-3, ASLBP No. 00-771-01-LA-R. Nonetheless, CCAM/CAM do not brief the reasons unique to a license

longstanding precedent of *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), finding that 10 C.F.R. § 50.13 limits the scope of the agency's NEPA responsibilities as well as the scope of its safety reviews. Section 50.13 is more than a "design basis" requirement. It reflects, and enacts into law, an appropriate demarcation line. Neither safety reviews nor NEPA reviews need venture through the proverbial rabbit hole into a realm where resources are expended addressing the environmental consequences of terrorism and warfare. The inherent policy choice is that the resources devoted to such an effort would be better dedicated to preventing terrorist and enemy threats — which of course is exactly what the NRC and the government are now doing.

In addition to underestimating the significance of Section 50.13 and its interrelationship with Section 102 of NEPA, NIRS (by relying on CCAM/CAM) stretches the NEPA "rule of reason" beyond "reasonable" bounds. As discussed in Duke's Brief, to be within the scope of NEPA there must be a close causal relationship between potential environmental effects and the proposed Federal licensing action at issue. (Duke's Brief, at 16-17.) In this case, the consequences of intentional malevolent acts cannot reasonably be viewed as being proximately linked to the issuance of renewed McGuire and Catawba operating licenses. Protection against terrorist threats, and against any hypothetical environmental impacts of those threats, is a current and continuing process that is not uniquely created by or related to license renewal.

Further, a NEPA "rule of reason" has been specifically applied in *Limerick Ecology Action v. United States Nuclear Regulatory Comm'n,* 869 F.2d 719, 729 (3d Cir. 1989), to preclude consideration of the risk of this type of externally-driven event because such events

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renewal case that security issues do not need to be addressed in this proceeding for McGuire and Catawba.

are neither quantifiable or predictable. NIRS asserts (NIRS Brief, at 12) that "[t]he fact that the likelihood of an impact may not be easily quantifiable is not an excuse for failing to address it in an EIS." However, the NRC and Council on Environmental Quality ("CEQ") provisions cited by NIRS in this context do not support its argument on the threshold issue of whether NEPA requires consideration of intentional malevolent acts. Specifically, both 10 C.F.R. § 51.71 and 40 C.F.R. § 1502.22 address the content of the agency's EIS. Thus, neither comes into play until there has been a determination that NEPA applies. By contrast, in the instant case there has been no such determination that NEPA requires an analysis of the impact of terrorist acts. As a result, NIRS's reliance on these regulations is inapposite.

C. The Licensing Board's Denial of Proposed Contention 1.1.2 Was Proper and In Accordance With Law

NIRS devotes a substantial portion of its brief to arguments that the NRC Atomic Safety and Licensing Board ("Licensing Board") in this renewal proceeding erred in denying "portions" of NIRS proposed contention 1.1.2, as well as proposed contentions 1.1.4 and 1.1.5. (NIRS Brief, at 14-21.) To the extent that NIRS is using its brief to the Commission as a vehicle to appeal the Licensing Board's rejection or partial rejection of proposed contentions that are unrelated to the current terrorist threat, NIRS's appeal is interlocutory and is not properly before the Commission. *See* 10 C.F.R. §§ 2.714a, 2.730(f). To the extent NIRS is arguing that terrorist issues are "new information" within the scope of NEPA, that argument ignores the operative limits on the scope of a NEPA license renewal review.

NIRS asserts that proposed contention 1.1.2 raises "'new information' regarding 'changed circumstances' that could have a significant effect on the environmental impacts of license renewal for the McGuire and Catawba nuclear plants," and that this contention should therefore have been admitted. (NIRS Brief, at 18.) However, as discussed in Duke's Brief, the

Commission was specific in its decision in the past not to address security matters in a license renewal context. Contrary to NIRS's assertions (*id.*, at 16-18), and for the reasons already discussed, it would be wrong to conclude that the consequences of terrorist attacks are a valid NEPA issue. In any event, however, this is not "new information" that must be addressed in a plant-specific license renewal review.[6] Security concerns are generic, current-day issues. Post-September 11 security concerns are not unique to McGuire/Catawba or to the proposed period of extended operation.[7]

Consistent with Commission precedent, the proper vehicles for addressing the generic threat of terrorism at nuclear plants are (1) as a current and generic regulatory matter through the Commission's ongoing regulatory processes; and (2) in a petition for rulemaking

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[6] Although NIRS cites *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989) in connection with its claim that contention 1.1.2 raised "new information," this decision does nothing to further NIRS's argument. In *Marsh*, the Court upheld as neither arbitrary nor capricious the decision of the Army Corps of Engineers not to prepare a second supplemental EIS for the Elk Creek Dam project in response to new information, based on the opinions of both independent experts and Corps experts who discounted the significance of the new information. 490 U.S. at 369. The determination of "significance" was an issue of fact requiring a high level of technical expertise, for which it was proper to defer to the informed discretion of the Federal agency. *Id.*, at 377. *Marsh* supports the proposition that, when new information comes to light, the application of the "rule of reason" to determine whether or not an EIS should be supplemented "turns on the value of the new information to the still pending decisionmaking process." *Id.*, at 374. *Marsh* does not support the assertion that the events of 9/11 constitute "new information" under NEPA, or that NEPA requires analysis of terrorist attacks as part of NRC license renewal.

[7] NIRS's specific suggestion (NIRS Brief, at 13-14) that Duke should supplement its existing license renewal Environmental Reports to consider "new and significant" information stemming from the events of September 11, 2001 fails. The reference to Section 51.53(c)(3)(iv) (environmental reports must contain "new and significant information regarding the environmental impacts of license renewal of which the applicant is aware") does not further NIRS's case because the supposedly "new" information about the 9/11 terrorist attacks is not linked in any way to the "impacts of license renewal." Similarly, NIRS's citation to Section 51.95(c)(3) is not helpful. The requirement to consider any "significant new information relevant to the proposed action" does not encompass the terrorist issue because, as demonstrated in Duke's Brief, those attacks are not "relevant to" the license renewal action. Duke is presently licensed to operate the McGuire and Catawba units for 40 years and can do so without license

under 10 C.F.R. § 2.802, not litigation in an individual license renewal docket. In this site-specific proceeding, security concerns can only be litigated upon a successful showing under 10 C.F.R. § 2.758 of "special circumstances" (*i.e.*, a site-specific security concern unique to McGuire and Catawba). No Section 2.758 petition has ever been filed and no site-specific special circumstances have been shown to exist.[8]

NIRS argues that "the standard for determining whether new information is sufficient to warrant supplementation of an EIS is reasonableness, not whether it meets the standard in 10 C.F.R. § 2.758." (NIRS Brief, at 18.) However, NIRS provides no legal basis for this argument. The Licensing Board correctly applied the Commission's precedent in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001), regarding the procedures for raising allegedly "new and significant" environmental information. Section 2.758 must be followed. NIRS's assertion (*id.*, at 19-20) that there is no "regulation imposing this procedural requirement on petitioners who seek to raise significant new information in license renewal proceedings," ignores the regulation itself — which by its terms applies. This regulation comes into play precisely because NIRS's proposed contention challenges current NRC regulations.

NIRS argues that the Licensing Board's invocation of 10 C.F.R. § 2.758 in this instance violates NEPA. (NIRS Brief, at 20.) However, this is clearly not the case. Section 2.758 of the Commission's regulations was not designed as a "barrier to the consideration of new

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renewal. The security issues exist independent of license renewal and are being addressed today through normal NRC regulatory processes.

[8] The Licensing Board suggested that the Petitioners may have raised "new and significant information" on plant-specific environmental concerns which might form a basis for a rule waiver under 10 C.F.R. § 2.758. LBP-02-04, slip op. at 75. But re-visiting the list of Category 2 environmental issues to be addressed in a renewal application would require Commission action under Section 2.758. Neither petitioner requested such a waiver, or attempted to make the showing required under Section 2.758.

information," and it does not function as one. It does require petitioners who wish to challenge an NRC rule in an adjudicatory proceeding to make the requisite showing. *See* 10 C.F.R. § 2.758(b)-(e). Neither NIRS nor BREDL made any attempt to make such a showing. Moreover, the regulation also does not preclude a generic request under 10 C.F.R. § 2.802 for a new Part 51 Category 2 issue or designation.

NIRS in its brief (at 15) suggests that, while the risk may be general, an analysis of the "vulnerabilities of each particular plant, depending on its design and location" is needed. This may be so in the Commission's ongoing security review — but it is not so in the context of a license renewal Environmental Report. Moreover, NIRS has not shown any particular site-specific vulnerabilities that constitute "special circumstances." NIRS refers to the location of the Charlotte airport. (*Id.*, at 15-16). However, the location of the airport has not changed. NIRS's original contention addressed vulnerabilities perceived in ice condenser plants. However, the ice condenser system is part of the current licensing basis ("CLB") and, in any event, is not unique to McGuire and Catawba. And, to the extent NIRS raises MOX fuel-related issues, Duke maintains that these matters are beyond the scope of license renewal as discussed in its recent appeal to the Commission. Moreover, no linkage with any basis other than speculation has been made between potential terrorist targets and MOX fuel.

In the end, neither NIRS nor BREDL can refute Duke's argument that a security contention based on potential terrorist attacks — such as proposed NIRS contention 1.1.2 — cannot properly be considered in an NRC license renewal proceeding. The various factors (including NRC regulations in Part 54 and Part 51, the NRC's Generic Environmental Impact Statement on License Renewal, the Commission's delegation order in this case, NRC precedent in *Turkey Point*, and the Commission Statement of Policy on Conduct of Adjudicatory

Proceedings) that limit the scope of any NRC license renewal hearing are discussed in detail in Duke's Brief, at 23-30. NIRS's proposed contention challenges the Part 51 environmental review regulations applicable to license renewal applications and fails to demonstrate "special circumstances" under 10 C.F.R. § 2.758 justifying site-specific litigation. Generic regulatory processes are available and are being used to address evolving security threats. No matter how it is framed, NIRS's proposed contention 1.1.2 should be deemed inadmissible.

III. CONCLUSION

For the reasons discussed in Duke's Brief and above, NEPA does not require the NRC to consider the consequences of intentional malevolent acts against McGuire and Catawba in the context of a license renewal environmental review. Furthermore, plant security matters such as these are beyond the scope of a license renewal proceeding. The Commission should reject the proposed contentions raising these issues.

Respectfully submitted,

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Dated in Washington, D.C.
this 12th day of March 2002

March 12, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "REPLY OF DUKE ENERGY CORPORATION TO NUCLEAR INFORMATION AND RESOURCE SERVICE AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE BRIEFS IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-02-06" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 12th day of March 2002. Additional e-mail service, as indicated by asterisks (*) below, has been made this same day.

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