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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

Docket No's. 50-369-LR, 50-370-LR,
50-413-LR, and 50-414-LR

DUKE ENERGY CORPORATION

ASLBP No. 02-794-01-LR

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

July 20, 2002

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND
NUCLEAR INFORMATION AND RESOURCE SERVICE'S
CONCISE WRITTEN FILING IN RESPONSE TO ORDER OF JULY 15, 2002**

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's") July 15, 2002, Order (Addressing the Reconvening of Telephone Conference on Late-Filed Amendments to Petitioners' Contention 2 and Matters to be Addressed Prior to and at Conference), Intervenors Blue Ridge Environmental Defense League ("BREDL) and Nuclear Information and Resource Service ("NIRS") hereby submit this filing. As required by the Order, this filing concisely addresses matters raised by the ASLB's Order, including legal issues raised in Duke Energy Corporation's ("Duke's") and the Nuclear Regulatory Commission ("NRC") Staff's responses to Amended Contention 2.¹

1. Relevance of GSI-189

The ASLB has asked the parties to address the relevance of GSI-189 in this proceeding, in light of the Commission's Memorandum and Order in the matter of *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999) (hereinafter "Oconee") and any other pertinent authority. In the *Oconee* case, the Commission upheld the

¹ See Response of Duke Energy Corporation to Proposed Late-Filed Contentions (June 10, 2002) (hereinafter "Duke Response"); NRC Staff's Answer to Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Amended Contention 2 (June 10, 2002) (hereinafter "Staff Response").

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application of a longstanding NRC policy that “Licensing Boards ‘should not accept in individual licensing proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission.’”²

Oconee is not applicable here, because it concerned a contention whose legal *and* factual subject matter were identical to the subject of a pending rulemaking. In *Oconee*, the contention at issue challenged the failure of Duke Energy’s environmental report to address, *inter alia*, the environmental impacts spent fuel transportation. 49 NRC at 343. The Commission upheld the ASLB’s refusal to admit the contention, on the ground that this very issue was the subject of a pending rulemaking. 49 NRC at 345.³ Thus, the legal subject matter of the contention and the

² 49 NRC at 345, quoting *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85 (1974) (hereinafter “*Douglas Point*”); and citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985) (hereinafter “*Catawba*”); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998) (hereinafter “*Private Fuel Storage*”).

³ Similarly, in the *Catawba* case cited in *Oconee*, the Appeal Board affirmed the ASLB’s rejection of a contention asking for consideration of the risks of a hydrogen explosion, on the ground that the hydrogen explosion issue was the basis of a pending rulemaking. 22 NRC at 85-86. The legal context of the pending rulemaking obviously was safety based, because it ultimately resulted in a new safety regulation, 10 C.F.R. § 50.44 (c)(3). See 22 NRC at 86 and note 141. There is no indication, either in the *Catawba* Appeal Board decision or the Licensing Board decision below, that the contention made any environmental claims under the National Environmental Policy Act (“NEPA”). See 22 NRC at 85 and note 135; LBP-82-16, 15 NRC 566, 584 (1982). Instead, it appears that the petitioner was following guidance in *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-16, 11 NRC 674 (1980), for the raising of safety contentions on the hydrogen control issue. *Id.*

Douglas Point, also cited in *Oconee*, involved the slightly different legal question of whether a NEPA contention regarding the environmental impacts of the uranium fuel cycle could raise a challenge to the factual basis for a previously established NEPA rule. The Appeal Board found that that was the petitioner’s only recourse was to ask the Commission to change the rule. It is notable, however, that the legal subject matter of the contention was identical to the legal subject matter of the rule.

The language of the *Private Fuel Storage* decision that is cited in the *Oconee* case is dicta, and therefore not helpful here.

rulemaking were one and the same. Under the circumstances, the Commission referred the petitioner to the rulemaking for resolution of its concerns.

Here, in contrast, there is no comparable sameness between the legal subject of the contention and the rulemaking. Intervenors have raised a *NEPA* contention whose factual subject matter happens to be the subject of an upcoming *safety-related* rulemaking. The legal subject matter of the rulemaking will not be an evaluation of environmental factors under NEPA, but whether to impose a safety regulation under the Atomic Energy Act. Thus, while the factual issues in the contention and the regulation may overlap, it does not appear that the rulemaking will be designed to resolve the Intervenors' NEPA concerns.⁴

It does seem likely that factual information developed in the rulemaking will assist in the resolution of the Intervenors' concerns, because the analytical processes involved are similar and rely on the same facts. For instance, it appears that the NRC intends to apply the cost-benefit provisions of the backfit rule, 10 C.F.R. § 50.109(a)(3).⁵ The process of calculating and weighing costs and benefits will be somewhat similar in both cases. It would be foolish to disregard facts developed in a safety proceeding that may well apply in a NEPA proceeding. *See Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975).

⁴ Because no proposed rule on GSI-189 has yet issued, it is not possible to say with any certainty what legal issues will be addressed in the rulemaking. However, it seems reasonable to predict that the rulemaking will be based purely on safety regulation under the Atomic Energy Act, since recent NRC correspondence regarding GSI 189 and the need for a proposed rule does not refer to NEPA.

⁵ *See* letter from George E. Apostolakis, Chairman, ACRS, to William D. Travers, NRC Executive Director for Operations, re: Recommendations Proposed by the Office of Nuclear Regulatory Research for Resolving Generic Safety Issue-189, "Susceptibility of Ice Condenser and Mark III Containments to Early Failure from Hydrogen Combustion During a Severe Accident" (June 17, 2002) (hereinafter "ACRS Letter").

Nevertheless, it is important to recognize that the legal standard established by the backfit rule is *different* from NEPA standards. Under the backfit rule, a proposed modification that falls into the category of backfits not deemed essential to protect health and safety may not be imposed unless “there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and . . . the direct and indirect costs of implementation for that facility are justified in view of this increased protection.” 10 C.F.R § 50.109(a)(3). In contrast, NEPA requires consideration of alternatives under a rule of reasonableness. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834, 836-37 (D.C. Cir. 1972). An EIS must discuss an array of reasonable alternatives, not just one that offers a “substantial increase” in public health and safety. The purposes of NEPA and safety analyses are also quite different. The purpose of a safety-related rulemaking is to focus on a single option for improving safety and to justify it. The purpose of NEPA is to publicly disclose the agency’s consideration of the risks of a proposed action and a set of reasonably available measures to avoid or mitigate the risks. Finally, it is possible that the NRC will decide not to impose any measures related to GS-189 because it believes they are not justified under the backfit rule. This would not relieve the agency of its independent disclosure obligations under NEPA.

2. Relevance of station blackout rule

The ASLB has asked the parties to address whether the fact that the station blackout provisions in NRC regulations are part of the current licensing basis (“CLB”) precludes their consideration in a severe accident mitigation alternative (SAMA) analysis contention. The Third Circuit Court of Appeals effectively answered this question in *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989), when it held that issues that are excluded from consideration

under the NRC's safety requirements are not necessarily excluded from consideration under NEPA. Thus, the fact that a measure is included in the CLB does not mean it is automatically insulated from scrutiny in a NEPA analysis.

3. Arguments by Duke and Staff

The ASLB asked the Intervenors to respond to legal arguments made by Duke and the Staff. To the extent that the parties' arguments have not already been addressed above, the Intervenors address them below.

a. NEPA "hard look" doctrine

The ASLB asked BREDL and NIRS to address legal arguments made by Duke and the Staff relating to the "hard look" doctrine. NEPA's requirement that agencies must take a "hard look" at environmental impacts of proposed decisions is well-established. *See Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985) (in reviewing NEPA-related decisions, "courts must determine that this decision accords with traditional norms of reasoned decisionmaking and that agency has taken the 'hard look' required by NEPA"); *Sierra Club v. Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983) (court must insure that the agency took a "hard look" at the environmental consequences of its decision).

The Courts have also held that NEPA is an "environmental full disclosure law." *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-96-25, 44 NRC 331, 341 (1995), *affirmed in part and reversed in part on other grounds*, CLI-98-3, 47 NRC 77 (1998) (hereinafter "*Claiborne*").⁶ In addition to providing sufficient environmental information to

⁶ *See also* the following cases cited in *Claiborne*, 44 NRC at 341: *Minnesota PIRG v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973); *Alabama ex. Rel. Baxley v. Corps of Engineers*, 411 F.Supp. 1261, 1267 (N.D. Ala. 1976).

federal decisionmakers, an EIS must set forth “sufficient information for the general public to make an informed evaluation.” *Sierra Club v. U.S. Army Corps of Engineers*, 701 F.2d 1011, 1029 (2nd Cir. 1983). The responsibility to disclose relevant information is rigorous, and thus a “detailed” statement is required. *Claiborne, supra*, 44 NRC at 341. The requirement for a detailed statement “helps insure the integrity of the process of decision by precluding stubborn problems or serious criticisms from being swept under the rug.” *Claiborne*, 44 NRC at 341, quoting *Silva v. Lynn*, 482 F.2d at 1285.

As the Intervenors noted in the July 10 teleconference, tr. at 972, NRC NEPA regulations contain provisions that give additional content to the “hard look” doctrine. For example, 10 C.F.R. § 51.45(c) requires that the analysis for environmental reports:

shall to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms. The environmental report should contain sufficient data to aid the Commission in its development of an independent analysis.

Thus, when quantitative information is available, it must be disclosed. Qualitative information may be relied on only where quantitative information is not available.⁷

Duke argued in its Response and in the July 10 teleconference that the Intervenors may not take issue with Duke’s failure to disclose its PRA, but must raise a dispute with some particular part of Duke’s NEPA analysis. Duke Response at Tr. at 22. According to Duke, the Intervenors have confused contentions and discovery. *Id.*

⁷ It is also relevant that the Commission is, to an increasing degree, relying on quantitative risk analysis for its regulatory decisions. Where the agency and licensees rely extensively on quantitative risk analysis, it is only fair that the public should have sufficient access to the information undergirding those analyses, in order to determine whether the analyses are being conducted with the level of rigor claimed, and also with prevailing standards for such studies. Mere qualitative results or summary information simply do not yield sufficient information to make such judgments.

This argument misses the point that one of NEPA's chief purposes is public disclosure of the bases for environmental decisions. If Duke's environmental analysis takes NUREG/CR-6427 into account in a manner that uses and relies on its PRA, then this automatically raises a question of whether the PRA must be disclosed in order to allow a meaningful evaluation of the project's environmental impacts. Intervenors' contention, which is supported by the expert opinion of Dr. Edwin Lyman, asserts that it is necessary to review the PRAs for Catawba and McGuire in order to evaluate whether Duke has taken adequate account of NUREG/CR-6427.

Duke argues that the partial information it has placed on the docket, including early PRAs and summaries of revisions, is sufficient. *See* statements by Duke's representative, Mr. Brewer, tr. at 984-85. There is considerable factual disagreement between the parties, however, regarding what level of detail is necessary to make an adequate evaluation of Duke's risk analysis. Tr. at 987-991. This demonstrates that the Intervenors have raised a genuine and material factual dispute that should be admitted for litigation under 10 C.F.R. § 2.714(b).⁸

b. Validity of Lyman Declaration. The Staff claims that the Declaration of Dr. Edwin S. Lyman, submitted by Intervenors in support of Amended Contention 2, fails to meet NRC requirements for a valid affidavit at 10 C.F.R. § 2.708(c). NRC Staff's Response at 10, note 11. The Staff appears to be unaware of a federal statute which allows the filing of a declaration in lieu of an affidavit in federal adjudicatory proceedings. 28 U.S.C. § 1746.

⁸ Similarly, there is considerable dispute between the parties regarding the need for disclosure of information regarding Duke's calculations of station blackout frequencies. Duke argues that this information is unnecessary because NUREG/CR-6427 uses the station blackout frequencies from Duke's PRAs. Intervenors submit that in order to understand Duke's SAMA, one has to have a complete understanding of Duke's calculated station blackout frequencies, because those frequencies determines what the risk from station blackout to the public is.

4. Comments on matters not previously addressed.

Finally, the ASLB provided the parties with an opportunity to address matters not previously addressed that relate to the current filings on Amended Contention 2. The Intervenors wish to take the opportunity to elaborate on the relationship between the “hard look” doctrine and subparts 5 (failure to take adequate account of uncertainties) and 7 (failure to submit PRA for peer review) of Amended Contention 2. Duke argues that there is “no regulatory basis” for these contentions. Duke Response at 36, 50. The legal basis for these contentions is the requirement for a “hard look” under NEPA’s rule of reason. *See* discussion above. As Intervenors demonstrate in the contentions, uncertainty analysis and peer review are standard requirements for a reliable risk analysis. In fact, the ACRS has pointed out that adequately rigorous consideration of uncertainties may tip the balance in the cost-benefit analysis conducted by the Staff for resolution of GSI-189. *See* ACRS Letter. The Intervenors have raised a significant and material dispute regarding the adequacy of Duke’s effort to take NUREG/CR-6427 into account in both of these contentions.

Respectfully submitted,



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July 20, 2002

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2002, copies of Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Concise Written Filing in Response to Order of July 15, 2002, were served on most of the following by e-mail, as indicated below; and that on July 22, 2002, they will also be served by first-class mail on all parties below:

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