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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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))	

MOTION FOR CLARIFICATION OF MEMORANDUM AND ORDER CLI-02-17

I. INTRODUCTION

On July 23, 2002, the Nuclear Regulatory Commission ("Commission") issued a Memorandum and Order, CLI-02-17, addressing one portion of the February 4, 2002 appeal filed in this matter by Duke Energy Corporation ("Duke").¹ In that decision, the Commission affirmed in part an earlier decision by the Atomic Safety and Licensing Board ("Licensing Board"), LBP-02-04, 55 NRC 49 (2002), that admitted one contention challenging the adequacy of Duke's Severe Accident Mitigation Alternatives ("SAMA") analysis included in the Environmental Reports for the McGuire Nuclear Station and Catawba Nuclear Station joint license renewal application. The admitted contention, Consolidated Contention 2, is based upon the Sandia Laboratories study of early containment failure probabilities (given core damage) for Westinghouse plants with ice condenser containments, reported in NUREG/CR-6427.²

¹ Another portion of Duke's appeal was previously addressed by the Commission in an April 12, 2002 Memorandum and Order, CLI-02-14.

² See NUREG/CR-6427/SAND99-2253, "Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments" (April 2000) (the "Sandia study").

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SECY-02

Significantly, in affirming the admission of Consolidated Contention 2, the Commission also limited that contention: “We conclude, therefore, that the petitioners’ contention is admissible, but only insofar as it raises the question whether the values from the Sandia study should have been utilized in the McGuire and Catawba analyses of mitigation alternatives for hydrogen control during station blackout.” CLI-02-17, slip op. at 17.³

Herein, Duke respectfully requests clarification of two aspects of CLI-02-17. First, Duke requests that the Commission clarify a characterization of the Sandia study set forth in CLI-02-17 that does not appear to be technically accurate. Second, Duke requests clarification of the Commission’s intent regarding the scope of the admitted Contention 2 and how that scope relates to the issue of mootness as previously raised by Duke. Each of these issues is discussed below.

II. DISCUSSION

a. Characterization of Sandia Study in CLI-02-17

In CLI-02-17, the Commission found the Petitioners’ basis for Consolidated Contention 2 sufficient to “raise a question about the adequacy of the probability figures used in Duke’s SAMA analyses, namely, whether they should have incorporated or otherwise acknowledged information from the Sandia study.” CLI-02-17, slip op. at 9. The Commission found this to be so because, among other things, “[t]he Sandia study went on *to find* significantly higher station blackout frequencies and consequently, higher probabilities of containment failure, particularly for the McGuire station” — in contrast to earlier cost-benefit studies. *Id.* (emphasis

³ In CLI-02-17, the Commission also reversed LBP-02-04 insofar as Consolidated Contention 2, as admitted by the Licensing Board, contained a second basis relating to Duke’s failure to include as a SAMA the installation of a dedicated transmission line from an adjacent hydroelectric station. Slip op. at 14-17. That aspect of CLI-02-17 is not addressed in this Motion.

added). Duke seeks clarification of this point because it does not correctly characterize the findings of the Sandia study and may, based upon a subsequent telephone prehearing conference with the Licensing Board, be misconstrued as a definitive factual finding of the Commission regarding the Sandia study. As the parties proceed to consider Consolidated Contention 2, this misconstruction could prove pivotal to the Licensing Board's treatment of this admitted contention — whether in the context of discovery, a motion for summary disposition, litigation, or settlement.

To clarify, the Sandia study was a simplified Level 2 probabilistic risk assessment (“PRA”) focusing on containment failure probabilities for certain plants, given core damages calculated in Level 1 assessments outside the scope of the study. The Sandia study simply incorporated core damage frequencies previously reported, such as those for the McGuire and Catawba stations in assessments submitted as part of the Individual Plant Examination (“IPE”) process.⁴ As a simplified Level 2 PRA, the Sandia study did not “*find*” higher station blackout frequencies than previously reported. Rather, it found higher early containment failure probabilities than previously reported, based upon the assumed core damage frequencies (previously calculated and reported in the IPE process).⁵

⁴ The content of the Sandia study may be ascertained on the face of the document. *See, e.g.,* Sandia study, NUREG/CR-6427 at xvii (“... using plant specific information (e.g., fragility and CDI frequencies) to the extent that information is available from the IPEs.”).

⁵ CLI-02-17 cites the acknowledgement of Duke counsel that “if the event frequencies used in the Sandia report had been used in Duke’s SAMA analysis, the calculated ‘benefits’ of implementing different particular SAMAs” would increase. Slip op. at 9-10. This statement is true. Significantly, the increased “benefits” would be due to the higher containment failure probabilities (*i.e.*, the “higher event frequencies”) of the simplified Level 2 PRA of the Sandia study versus containment failure probabilities utilized in Duke’s site-specific PRAs for McGuire and Catawba. The increase would not be due to higher station blackout frequencies from the Sandia study.

While this characterization may appear to raise a minor factual matter, Duke believes that clarification is essential to avoid the Commission's statement in CLI-02-17 from being construed as a preclusive finding of the Commission by the Licensing Board in the proceeding below. During the prehearing conference call of July 29, 2002, some disagreement between the Licensing Board members themselves regarding this point was discussed, as well as the implications of that disagreement. Tr. 1093-1096. The point in the Commission's decision was used specifically as a basis to cut off Duke's argument on the limited scope of the contention based upon the limited scope of the Sandia findings. Tr. 1091-1093; 1129. At least two judges invited Duke to consider seeking recourse or clarification from the Commission on the characterization of the Sandia study and/or the scope of the contention. Tr. 1093, 1129.

Accordingly, Duke requests that the Commission clarify its statement in CLI-02-17 such that the inaccurate characterization of the Sandia study described above does not become the "law" of the case or a final finding of fact. Such a Commission clarification may well assist in defining the scope of the contention for purposes of discovery, summary disposition (including mootness), or litigation.

b. Clarification of Admitted Issue/Relationship to Mootness Argument

In affirming the Licensing Board's decision admitting that aspect of the SAMA contention related to the Sandia study, the Commission characterized the admitted Consolidated Contention 2 in several different ways, including the following:

- "This contention raises a question about whether information from the Sandia study should have been utilized or otherwise addressed in Duke's SAMA analysis." CLI-02-17, slip op. at 10. See also pp. 5-6.
- "But the Board nonetheless found that a sufficient question had been raised about the SAMA analyses' failure to address or otherwise acknowledge results from the Sandia study. Whether the SAMA analysis in fact should have addressed the study was a question for the

merits, the Board held. We cannot say that the Board's view is unreasonable. It did not resolve the merits questions whether the Sandia study's assumptions reflected better estimates than Duke's or whether Duke's SAMA analysis should have addressed the study. . . . In short, the Board merely found that a sufficient genuine dispute existed on whether the SAMAs should have applied the containment failure probability estimates from the Sandia study . . ." *Id.* at 11-12.

- Duke's argument at the prehearing conference and on appeal "does not resolve the basic question ultimately raised by the contention: the possibility that the overall cost-benefit assessment was skewed or incomplete because of a failure to include — or at least acknowledge and discount — the higher event frequencies from the Sandia study." *Id.* at 12.
- "We conclude, therefore, that the Petitioners' contention is admissible, but only insofar as it raises the question whether the values from the Sandia study should have been utilized in the McGuire and Catawba analysis of mitigation alternatives for hydrogen control during station blackout." *Id.* at 17.

Of these, the last appears to be the most definitive because it appears in the Commission's summary conclusion.⁶

Nonetheless, having characterized the admitted issue in several ways, the Commission also acknowledged an important development subsequent to the framing of the contention and its admission by the Licensing Board — Duke's supplemental SAMA analyses submitted to the NRC in early 2002 that specifically incorporated the higher containment failure probabilities postulated in the Sandia study. As expected, this additional analysis produced larger calculated benefits from proposed mitigation alternatives directed at hydrogen control.

⁶ In addition to varying the formulation of the contention, the Commission also variously characterized the Sandia data that is in issue in Consolidated Contention 2. In the above quotes from CLI-02-17, the Sandia data is described as "information," "results from the Sandia study," the "study's assumptions," "containment failure probability estimates," "higher event frequencies," and "values from the Sandia study." A precise characterization of the NUREG data to be considered as "containment failure probabilities" or "containment failure probability estimates" would significantly assist in clarifying the admitted issue.

These results, reflected in the NRC Staff's May, 2002 draft Supplemental Environmental Impact Statements ("SEIS") (Draft NUREG-1437, Supplements 8 and 9), support a conservative conclusion by the NRC Staff that particular SAMAs on this point may be cost-beneficial. This latter issue is, of course, not a Part 54 license renewal issue; it is a Part 50 current licensing basis ("CLB") issue that is now being evaluated by the NRC Staff under Generic Safety Issue 189 ("GSI-189"). The Commission recognized in its decision that the draft SEISs (based on Duke's revised SAMA analyses) "may — indeed largely appear to — render moot the contention's first concern: the SAMA analysis's 'fail[ure] to include information from [the Sandia study].'" *Id.* at 14. This mootness question was a determination the Commission left for the Licensing Board.

With the Commission decision in hand during the recent prehearing conference call, the Licensing Board members articulated their views concerning the scope of the admitted Consolidated Contention 2. The Licensing Board members referenced the Commission's decision in CLI-02-17 and, specifically, the Commission's various characterizations of the issue admitted for adjudication in this proceeding. Specifically, certain Licensing Board members indicated their belief that the admitted contention, among other things, now raises the question of which SAMA analysis is "better" — the original Duke submittal or the revised version that incorporated the Sandia Level 2 data. *See, e.g.*, Tr. 1069-1071; 1094-1095; 1101-1103, 1105; 1109; 1116-1119; 1122-1126. The perceived scope of Consolidated Contention 2, therefore, appears to be confusing the question of what it would take to moot the contention. This confusion has led to a Licensing Board determination to move forward with discovery on the admitted contention, and apparently address mootness and merits arguments in later summary disposition motions.

Duke seeks clarification of the issue to be addressed in the renewal proceeding, and specifically of the characterization of the admitted Consolidated Contention 2 as it relates to the mootness question. This clarification is necessary because the Licensing Board is basing its views of the contention's scope specifically on a reading of CLI-02-17. The Licensing Board does not appear to believe that it can resolve the mootness question based only on the fact of Duke's supplemental SAMA analysis because it must also determine which SAMA analysis is "better." In contrast, CLI-02-17 appears to Duke to correctly call for a decision on the mootness of the contention, in light of the submission of the revised SAMA analyses and the designation of GSI-189, prior to discovery and a determination on the "merits" of the contention.⁷

Given that Duke has submitted revised SAMA analyses incorporating the containment failure probabilities in question from the Sandia study (*see* Tr. 1103-1104), and that the NRC Staff has decided to evaluate the resultant potential CLB changes in the context of the Part 50 process, determining whether Duke "should have" submitted analyses based on the Sandia containment failure probabilities in the first place is unnecessary. Likewise, determining which analysis of potential SAMA benefits is "better" is unnecessary. *See* Tr. 1111; 1132. Both versions have been submitted by Duke. The most relief possible in this proceeding — turning

⁷ The doctrine of mootness generally renders a claim or case moot "when the issues are no longer 'live,' or the parties lack a cognizable interest in the outcome." *Texas Util. Electric Co. (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-10, 37 NRC 192, 200 (1993). The mootness doctrine "applies to all stages of review, not merely to the time when a petition is filed." *Id.* Judicial determinations of mootness are appropriate when the claim ripens — not after the claim has been (perhaps needlessly) adjudicated. Indeed, considerations of judicial economy and efficiency, as well as the desirability of conserving the parties' time and resources, underlie the mootness doctrine. *See, e.g., Air Line Pilots Assoc., Int'l v. UAL Corp.*, 897 F.2d 1394, 1396-97 (7th Cir. 1990); *see generally* Wright, Miller, and Cooper, *Federal Practice and Procedure*, §§ 3533.1, 3533.3 (1984). These factors all argue in favor of ruling on the mootness issue before proceeding further with Consolidated Contention 2.

the issue over for review of potential Part 50 CLB changes — has, in effect, been granted by the NRC Staff. Further, the prospect of litigation of which SAMA analysis is “better” — either one based on Duke’s original data, one based on the Sandia containment failure probabilities, or potentially one identified in some other data not yet identified — raises the specter of litigation in an individual license renewal hearing of the fundamental generic issue in GSI-189. We do not believe that the Commission intended this result.

Given the ambiguity in the Commission’s decision regarding the scope of the admitted issue (as evidenced by the Licensing Board’s recent comments), and the relationship of the admitted issue to the question of mootness, Duke seeks clarification of CLI-02-17 such that the Commission intent is clear in the following respects: (1) that the question of mootness should be resolved — by summary disposition or otherwise — *prior* to discovery and consideration of the merits of the admitted contention; (2) that the scope of the admitted contention encompasses only the issue of whether Sandia *containment failure probabilities* should be used in the SAMA analyses; (3) that the admitted contention does not encompass other postulated data or approaches claimed to be “better;” (4) that mootness can be determined by assessing whether or not the containment performance probabilities from the Sandia study have been included in Duke’s *revised* SAMA analyses for McGuire and Catawba (and does not turn on whether the Intervenors can raise new arguments that some other approach or data is “better” than Duke’s); and (5) that the issue of whether Sandia containment performance probabilities should be incorporated in the SAMA analyses arises *only if* the contention is not moot; *i.e.*, if in some respect the Sandia containment performance probabilities *have not already been incorporated in*

the revised SAMA assessments provided by Duke.⁸ Clarification on these matters and the analytical approach would greatly assist in the efficient conduct of the proceeding below.⁹

⁸ Previously, the Intervenor submitted proposed amended contentions that were purported to demonstrate how Consolidated Contention 2 was not moot, and that the Sandia study had not been addressed by Duke's additional submittals. The amended contentions, however, raised matters ranging well beyond whether the Sandia Level 2 data had been incorporated in Duke's license renewal submittals. Duke argued these matters in response to the proposed amended contentions. Those proposed contentions, however, have now been withdrawn. Tr. 1131-1132; 1143. A ruling on the amended contentions would have been one means to get to the core mootness issue: *i.e.*, whether there is some aspect of the Sandia study data that has not been incorporated in the revised SAMA analyses.

⁹ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 217 (2001).

III. CONCLUSION

For the reasons discussed above, Duke seeks clarification of the two points in CLI-02-17 identified above.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is underlined with a single horizontal line.

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Dated in Washington, D.C.
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