

RAS 4735

August 8, 2002

DOCKETED  
USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

August 13, 2002 (12:46PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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-LR  
50-370-LR  
50-413-LR  
50-414-LR

MOTION FOR RECONSIDERATION

I. INTRODUCTION

Based upon a review of the transcript of the telephone conference of July 29, 2002, Duke Energy Corporation ("Duke") herein requests the Atomic Safety and Licensing Board's reconsideration of certain procedural rulings during the call (*see* Tr. 1129-1133, 1139-1146) defining the future course for this proceeding.<sup>1</sup> As demonstrated herein, in the interest of efficiency, the Licensing Board should not proceed to set discovery on any matter in this proceeding until after it has determined precisely what issues remain in dispute with respect to Consolidated Contention 2. To accomplish this objective, the Licensing Board should clarify the

<sup>1</sup> Duke understands that the Licensing Board has not yet issued its order formalizing the directives established at the end of the conference call. However, in the interest of efficiency and timeliness, Duke is filing this Motion for Reconsideration in advance of the order. This Motion for Reconsideration is also being filed in parallel with Duke's "Motion for Clarification of Memorandum and Order CLI-02-17," filed with the Commission on August 2, 2002. This Motion for Reconsideration assumes no action by the Commission on the Motion for Clarification. To the extent that the Commission grants Duke's Motion for Clarification, this Motion for Reconsideration and any ruling thereon may be overcome by events.

Template = SECY-041

SECY-02

issue raised in the contention and address the continuing viability — or mootness — of that contention. It can do this by requiring the parties to address, in writing, and prior to discovery, the following two questions:

- What exactly are the values from NUREG/CR-6427<sup>2</sup> that Consolidated Contention 2 alleges should be included in the Severe Accident Mitigation Alternatives (“SAMA”) Analyses for McGuire and Catawba?
- Have these values been included in the supplemental SAMA analyses submitted by Duke and/or incorporated in the NRC Staff’s draft Supplemental Environmental Impact Statements (“SEIS”) for McGuire and Catawba?<sup>3</sup>

If the relevant values from NUREG/CR-6427 have been included in Duke’s supplemental SAMA analyses, Consolidated Contention 2 is moot and must be dismissed. If not, the remaining issue will be better defined for discovery and subsequent litigation (or settlement). This approach is further discussed below.

## II. DISCUSSION

### A. A Ruling on the Mootness Question Must Precede Discovery

The Commission has directed the Licensing Board to conduct this renewal proceeding in accordance with the guidance in the Commission’s referral Order, CLI-01-20.<sup>4</sup>

---

<sup>2</sup> 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”).

<sup>3</sup> See Draft NUREG-1437, Supplement 8, Generic Environmental Impact Statement for License Renewal of Nuclear Plants regarding McGuire Nuclear Station, Units 1 and 2 (May 2002), and Draft NUREG-1437, Supplement 9, Generic Environmental Impact Statement for License Renewal of Nuclear Plants regarding Catawba Nuclear Station, Units 1 and 2 (May 2002) (“Draft NUREG-1437, Supplements 8 and 9”).

<sup>4</sup> *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 215 (2001). On this point, the Commission also cited its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48

That guidance emphasizes throughout the Commission's objective "to ensure a fair, prompt, and efficient resolution of contested issues," and its expectation that the Licensing Board will "use the techniques specified in this [referral] Order and in the Commission's [1998] policy statement on the conduct of adjudicatory proceedings" to that end.<sup>5</sup> As the Commission reiterated in this referral Order, the efficient, effective resolution of issues "germane to the proposed actions under consideration" is also a primary focus of the Commission's 1998 Policy Statement, wherein (referring back to its 1981 policy statement on this same subject), the Commission stated:

Now, as then, the Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making . . . . [T]he opportunity for hearing should be a meaningful one that focuses on genuine issues and real disputes regarding agency actions subject to adjudication. By the same token, however, applicants for a license are also entitled to a prompt resolution of disputes concerning their applications.<sup>6</sup>

A procedure calling for a Licensing Board decision on the mootness of Consolidated Contention 2, before proceeding to discovery on Consolidated Contention 2, would be consistent with this Commission precedent. Moreover, making a determination on the mootness question a prerequisite for discovery on Consolidated Contention 2 would clearly further the Commission's stated goal of having licensing boards affirmatively narrow and refine the issues that require discovery.<sup>7</sup>

---

NRC 18 (1998), and its *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981). See 54 NRC at 215.

<sup>5</sup> *Id.*, 54 NRC at 215.

<sup>6</sup> *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 19; see also p. 25.

<sup>7</sup> See *Duke Energy Corp.*, 54 NRC at 214 ("The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery . . . .") (emphasis added); see also *Statement of Policy on Conduct of Adjudicatory Proceedings* 48 NRC at 24 ("The

The doctrine of mootness, which derives in part from the “case” or “controversy” requirement of Article III of the Constitution, generally renders a claim or case moot “when the issues are no longer ‘live,’ or the parties lack a cognizable interest in the outcome.”<sup>8</sup> Put differently, unless “the relief sought would, if granted, make a difference to the legal interests of the parties (as distinct from their psyches, which might remain deeply engaged with the merits of the litigation),” the claim or the case is moot.<sup>9</sup> The mootness doctrine may be applied during any phase of a proceeding when it becomes applicable.<sup>10</sup> Indeed, no useful purpose would be served by deferring such a ruling until after the Intervenors have been allowed to conduct discovery on a contention whose precise scope and viability is still actively disputed. Considerations of judicial economy and efficiency, as well as the desirability of conserving the time and resources of the Licensing Board and the parties, underlie the mootness doctrine.<sup>11</sup> These considerations all favor a ruling on the mootness issue before proceeding further with Consolidated Contention 2.

In sum, the Commission and its licensing boards and presiding officers have sufficient latitude under existing NRC policy and procedures to “instill discipline in the hearing

---

licensing boards should also consider requiring the parties to specify the issues for which discovery is necessary, if this may narrow the issues requiring discovery.”). If any aspect of Consolidated Contention 2 is found to be moot, then the scope of the remaining contention — and the associated scope of discovery on the contention — will be narrowed accordingly.

<sup>8</sup> *Texas Util. Electric Co. (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-10, 37 NRC 192, 200 (1993).

<sup>9</sup> *See Air Line Pilots Assoc., International v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990), *citing North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

<sup>10</sup> *Texas Util. Electric Co.*, 37 NRC at 200 (The mootness doctrine “applies to all stages of review, not merely to the time when a petition is filed.”).

<sup>11</sup> *See, e.g., Airline Pilots Assoc.*, 897 F.2d at 1396-97. *See also* Wright, Miller, and Cooper, *Federal Practice and Procedure*, §§ 3533.1, 3533.3 (1984).

process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings.”<sup>12</sup> As a prerequisite to any discovery, a ruling on the mootness question is required to determine the threshold issue of whether any viable issue now remains for adjudication with respect to Consolidated Contention 2. If the contention is not moot, then the Board’s ruling would serve to better hone and define any question that remains to be litigated. Such a disciplined approach will facilitate efficient, effective decisionmaking in this proceeding.

B. The Proposed Approach to Determine the Mootness Question

The admitted contention in this matter, Consolidated Contention 2, is based entirely 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. In affirming the Licensing Board’s prior decision admitting Consolidated Contention 2, the Commission in CLI-02-17 specifically limited the contention as follows: “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 (emphasis added).

As Duke has discussed elsewhere, the Sandia study was a simplified Level 2 probabilistic risk assessment (“PRA”) calculating *containment failure probabilities* for certain plants, given core damages calculated in Level 1 assessments outside the scope of the study. The Sandia study incorporated core damage frequencies previously reported, such as those for the McGuire and Catawba stations in assessments submitted by Duke as part of the Individual Plant Examination (“IPE”) process. As a simplified Level 2 PRA, the Sandia study then found higher

---

<sup>12</sup> *Statement of Policy on Conduct of Adjudicatory Proceedings*, 48 NRC at 19.

early containment failure probabilities than previously reported, based upon the assumed core damage frequencies (previously calculated and reported in the IPE process).

Regarding the first question posed on page 2, above, the content of the Sandia study is not, in reality, a matter subject to dispute. The document is what it is, and the relevant values may be ascertained on the face of the document. For example, in discussing “Quantification of the Probabilistic Framework,” the authors of the Sandia study noted that detailed, *site-specific*, credible Level 1 and Level 2 probabilistic analyses are “outside the scope of the current assessment . . . .” The report explains that the study therefore used a simplified “practical approach” for assessing *early containment failure* for ice condenser plants. This approach involved developing a simplified version of the NUREG-1150 event tree that acts on a core damage initiator as a class (*e.g.*, LOCAs), benchmarking the simplified tree against NUREG-1150 results for Sequoyah, updating specific quantifications in the simplified tree if justified by “significant new work” since completion of NUREG-1150, and then “using the simplified logic tree to evaluate, in a consistent manner, *the early containment failure probabilities* for all ice condensers” using plant-specific Level 1 information (*e.g.*, fragility and core damage frequencies) available from the IPEs. *See* Sandia study, NUREG/CR-6427, at 29 (emphasis added).<sup>13</sup>

However, recognizing that CLI-02-17 may have introduced some confusion as to the relevant values from the Sandia study (Tr. 1091-1096), and absent any Commission

---

<sup>13</sup> *See also* Sandia study, NUREG/CR-6427, at 125, where it is “recommended that the insights of this study be factored into more complete Level II analyses for each significant plant damage state and that the evaluation of early containment failure be evaluated not only for internal events, but also for external events, . . . [etc.]”

clarification on the point, defining exactly the relevant values in the Sandia study is crucial to defining the scope of Consolidated Contention 2 and ultimately to determining whether the contention is moot. In other words, whether or not “the values from the Sandia study” should have been utilized in the SAMA analyses is a question that turns on a threshold agreement or determination as to precisely what those “values” are.

To address this first question, no discovery is necessary. All parties have a copy of the Sandia study, as does the Licensing Board. The parties and their experts can assess exactly what values are presented in the document. The Intervenors, in particular, should be required to address any disagreement with the conclusion that the Sandia study is a Level 2 PRA presenting *containment failure probabilities* based on previously published core damage frequencies. The Licensing Board can then definitively determine what the Sandia study presents, *i.e.*, the nature of the “information” or “values” from the study that are of relevance to Consolidated Contention 2.

As discussed elsewhere, Duke has submitted revised SAMA analyses specifically incorporating the containment failure probabilities in question from the Sandia study (*see* Tr. 1103-1104). The NRC Staff has concluded that a SAMA related to hydrogen control in a station blackout event may be cost-beneficial under certain assumptions. Accordingly, determining whether Duke “should have” submitted analyses based on the Sandia containment failure probabilities in the first place is unnecessary. Both versions have been submitted by Duke. The most relief possible in this proceeding — turning the issue over for review of potential Part 50 current licensing basis changes under the topic of Generic Safety Issue 189 (“GSI-189”) — has, in effect, been granted by the NRC Staff. On this basis, the issue is moot. However, the second question to be addressed at the threshold (*see* page 2, above), would allow the parties to

articulate their views on whether the relevant values from the Sandia study have indeed been incorporated in Duke's supplemental SAMA analyses. Like the first question above, no prior discovery is needed on this issue. All parties were previously provided with Duke's supplemental SAMA analyses as well as the NRC Staff's draft SEISs.

Further discovery and litigation on Consolidated Contention 2 is necessary only if the Intervenors can establish that some specific and relevant values from the Sandia study exist that have not already been incorporated in the revised SAMA assessments provided by Duke or reflected in the draft SEISs. Only then would the contention focus on whether such information "should have been utilized," as suggested by CLI-02-17.

This proposed approach is consistent with the Commission's recent Order in this proceeding and with the Commission's stated expectations on efficient licensing proceedings. The Commission recognized in CLI-02-17 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. Entirely consistent with this direction, and in the interest of efficiency, the Licensing Board should proceed to determine the mootness question prior to discovery.

In sum, Duke seeks Licensing Board reconsideration of the procedure to be followed in this proceeding regarding Consolidated Contention 2. Duke proposes that the Licensing Board solicit written filings from the parties, with affidavits if necessary, that: (a) state with specificity the values in the Sandia study that purportedly should have been utilized in the license renewal SAMA analyses for McGuire and Catawba (and the basis therefor), and (b) address whether those values have been incorporated in the supplemental SAMA analyses



provided by Duke and/or in the Staff's draft SEISs. If the relevant Sandia values have been incorporated, then Consolidated Contention 2 is moot and must be dismissed. If not, the parties can proceed, following discovery, to address whether such unincorporated values "should have been utilized."

### III. CONCLUSION

For the reasons discussed above, Duke seeks Licensing Board reconsideration of the procedures established at the end of the telephone conference of July 29, 2002. Prior to any discovery, the Licensing Board should clarify the issue and resolve the mootness question by adopting the procedure outlined above.

Respectfully submitted,



David A. Repka  
Anne W. Cottingham  
WINSTON & STRAWN  
1400 L Street, NW  
Washington, D.C. 20005-3502  
(202) 371-5726

Lisa F. Vaughn  
DUKE ENERGY CORPORATION  
526 South Church Street  
Mail Code: EC11X - 1131  
Charlotte, N.C. 28202-1802

ATTORNEYS FOR DUKE ENERGY  
CORPORATION

Dated in Washington, D.C.  
this 8th day of August 2002

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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, and	)	50-414-LR
Catawba Nuclear Station,	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION FOR RECONSIDERATION" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 8th day of August, 2002. Additional e-mail service, designated by \*\*, has been made this same day, as shown below.

Ann Marshall Young, Chairman \*\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: amy@nrc.gov)

Lester S. Rubenstein \*\*  
Administrative Judge  
4760 East Country Villa Drive  
Tucson, Arizona 85718  
(e-mail: lesrrr@msn.com)

Dr. Charles N. Kelber \*\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: cnk@nrc.gov)

Office of the Secretary \*\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
Attn: Rulemakings and Adjudications Staff  
(original + two copies)  
(e-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Susan L. Uttal, Esq. \*\*  
Jared K. Heck, Esq. \*\*  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(e-mail: slu@nrc.gov)  
(e-mail: jkh3@nrc.gov)

Mary Olson \*\*  
Director of the Southeast Office  
Nuclear Information and Resource Service  
729 Haywood Road, 1-A  
P.O. Box 7586  
Asheville, NC 28802  
(e-mail: nirs.se@mindspring.com)

Paul Gunter \*\*  
Nuclear Information and Resource Service  
1424 16th Street, NW  
Washington, DC 20026  
(e-mail: pgunter@nirs.org)

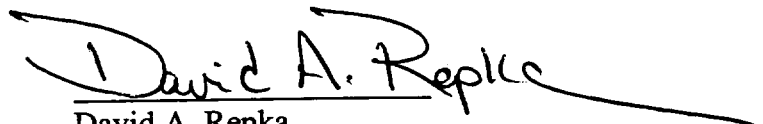
Diane Curran \*\*  
Harmon, Curran, Spielberg &  
Eisenberg, LLP  
1726 M Street, N.W.  
Suite 600  
Washington, DC 20036  
(e-mail: dcurran@harmoncurran.com)

Raju Goyal \*\*  
Law Clerk  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: RXG5@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)

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

Jesse Riley \*\*  
854 Henley Place  
Charlotte, NC 28207  
(e-mail: jlr2020@aol.com)

  
David A. Repka  
Counsel for Duke Energy Corporation