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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

DUKE ENERGY CORPORATION

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

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

ASLBP No. 02-794-01-LR

August 15, 2002

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND
NUCLEAR INFORMATION AND RESOURCE SERVICE'S RESPONSE TO
DUKE ENERGY CORPORATION'S MOTION FOR RECONSIDERATION**

Introduction

Intervenors Blue Ridge Environmental Defense League ("BREDL) and Nuclear Information and Resource Service ("NIRS") hereby respond to Duke Energy Corporation's ("Duke's") Motion for Reconsideration (August 8, 2002). The motion seeks reconsideration of the Atomic Safety and Licensing Board's ("ASLB's") oral instructions in a July 29, 2002, telephone conference, that discovery should commence on Intervenors' Consolidated Contention 2. Duke requests that discovery not proceed until after the ASLB "has determined precisely what issues remain in dispute with respect to Consolidated Contention 2." Motion for Reconsideration at 1.

Background

Duke's Motion for Reconsideration concerns a dispute over the scope of Intervenors' Consolidated Contention 2, which states in relevant part that:

The Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents, in that it fails to include information from NUREG/CR-6427.¹

¹ The full cite to NUREG/CR-6427 is Assessment of the DCH [Direct Containment Heating] Issue for Plants With Ice Condenser Containments (April 2002).

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LBP-02-04, 55 NRC 49, 128 (2002). Recently, in response to an appeal by Duke, the Commission affirmed the admissibility of this portion of the contention. *See* CLI-02-17, Memorandum and Order (July 23, 2002).

While Duke's appeal was pending, the ASLB proceeded with its oversight of the litigation of Consolidated Contention 2, holding several telephone conferences with the parties. In these conferences, it became clear that Duke believes that the contention has been mooted by the inclusion of certain numerical values in NUREG/CR-6427 in its revised SAMA analysis, as indicated in recent RAI responses. In the most recent teleconference, held on July 29, 2002, Duke pressed the ASLB to resolve its mootness claim before proceeding to discovery. *See* tr. at 1119, 1121, 1127. The ASLB rejected Duke's argument, stating that it is the ASLB's preference to follow the guidance of CLI-02-17 and proceed with discovery, followed by summary disposition. *Id.* at 1081. The ASLB advised the parties that disputes about the scope of the contention during discovery could be worked out through objections to discovery and motions to compel, as well as the summary disposition process. Tr. at 1099, 1101.

Duke then filed a motion for clarification with the Commission, requesting, *inter alia*, that the Commission order the ASLB to resolve the question of mootness that Duke had raised, prior to the commencement of discovery. Motion for Clarification of Memorandum and Order CLI-02-17 (August 2, 2002). About a week later, Duke filed a motion for reconsideration with the ASLB, asking the ASLB to reconsider its oral instruction to commence discovery before resolving Duke's claim of mootness.

DISCUSSION

The Commission's regulations do not contain a standard for reconsideration of interlocutory procedural orders. However, general principles governing reconsideration of final ASLB and Commission decisions, as articulated in NRC case law, are also applicable to this situation. As the ASLB recognized in *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, LBP-94-31, 40 NRC 137, 139-40 (1994), "[g]enerally, when a tribunal decides an issue it is put to rest. This is necessary in order to avoid continuous argument between litigious parties about already resolved issues." Thus, the ASLB concluded, it is "sound law" that:

A motion for leave to reargue or rehear a motion will not be granted unless it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked or that there has been a misapprehension of the facts.

Id., 40 NRC at 140.

Duke's Motion for Reconsideration does not purport to either address or abide by this standard. Instead, it presents an eight-page reprise of arguments that Duke raised in the telephone conference of July 29, 2002. *See* tr. at 1119 ("[W]e think it's very important to define the scope of the proceeding up front because efficiently [sic] as we go into discovery, is better to have a common understanding of scope than it is to proceed without that.") *See also* tr. at 1121 and 1127. These arguments were based on efficiency, the same concept urged on the ASLB by Duke in its Motion for Reconsideration. Motion for Reconsideration at 1, 3-5. However, Duke advances no additional principle of law or decision that would control, or even shed new light on, the wisdom of the ASLB's decision to proceed with discovery followed by summary disposition.

In fact, the questions that Duke asks the ASLB to have the parties address in written filings, *see* Motion for Reconsideration at 8, could easily be posed in discovery. Moreover, Duke seems to overlook the fact that, even if the ASLB were to grant Duke the relief it requests and require that before discovery begins the parties must identify all of the numerical values in NUREG/CR-6427 that were not considered in Duke's supplemental SAMA analysis, the exercise still would not resolve the question of whether these values had been taken into account in a manner that is adequate. That is another question that can be asked in discovery, and that may be capable of resolution through summary disposition.²

Conclusion

Duke's Motion for Reconsideration, amounts to nothing more than an attempt to convince the ASLB to revisit questions it previously considered and come up with a different answer. This type of litigation unnecessarily exhausts the resources of the parties and impedes the progress of the proceeding, and must therefore be rejected.

Respectfully submitted



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² To its credit, Duke does not also ask the ASLB to reconsider the question of whether Consolidated Contention 2 incorporates the concept of adequacy, an issue that was squarely addressed in the July 29 telephone conference. Instead, Duke has raised the question to the Commission in its August 2 Motion for Clarification. Intervenors refer the ASLB to their August 12, 2002, response to Duke's motion for a discussion of the Intervenors' position on the issue of adequacy.

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2002, copies of Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Response to Duke Energy Corporation's Motion for Reconsideration were served on most of the following by e-mail and/or first-class mail, as indicated below:

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