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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

December 30, 2002 (11:04AM)

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

Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR

MOTION TO DISMISS CONSOLIDATED CONTENTION 2

I. INTRODUCTION

On December 18, 2002, the Nuclear Regulatory Commission ("Commission") issued a Memorandum and Order, CLI-02-28,¹ addressing: (1) a motion by Duke Energy Corporation ("Duke") that sought clarification of an earlier Commission Order, CLI-02-17; and (2) questions certified from the presiding Atomic Safety and Licensing Board ("Licensing Board") seeking guidance on matters relating to admitted Consolidated Contention 2.² Based on the Commission's conclusions and guidance regarding Consolidated Contention 2, as unequivocally reflected in CLI-02-28, Duke herein moves to dismiss Consolidated Contention 2 as moot.

¹ See *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-02-28, __ NRC __ (slip op. Dec. 18, 2002).

² Both the prior Duke motion and the Licensing Board's referral addressed aspects of the Commission's previous Order, CLI-02-17, 56 NRC __ (July 23, 2002), which affirmed in part and reversed in part LBP-02-04, 55 NRC 49 (2002), the Licensing Board decision admitting Consolidated Contention 2.

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II. DISCUSSION

A. The Commission's Decision Defines the Basis for Finding Mootness

Consolidated Contention 2 challenges the Severe Accident Mitigation Alternatives ("SAMA") analyses provided in the Environmental Reports prepared as part of the joint license renewal application for the McGuire and Catawba Nuclear Stations. As the Commission recognized, the proper scope of Consolidated Contention 2 has been the subject of "substantial disagreement" since the contention was re-formulated and admitted by the Licensing Board eleven months ago.³

As admitted and re-formulated, the contention reads as follows:

The Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents, in that it

- (a) fails to include information from NUREG/CR-6427 [the Sandia study], and
- (b) fails to include a severe accident mitigation alternative relating to Station Blackout-Caused Accidents, namely, a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.⁴

This contention was based entirely upon the Sandia Laboratories ("Sandia") study of early containment failure probabilities, given core damage, for Westinghouse plants with ice

³ The contention was re-formulated from separate contentions proposed by two petitioners, Blue Ridge Environmental Defense League ("BREDL") and Nuclear Information and Resource Service ("NIRS").

⁴ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 128 (2002). The Duke license renewal SAMA evaluations were originally submitted as Attachment K to the McGuire license renewal Environmental Report and Attachment H to the Catawba license renewal Environmental Report.

In CLI-02-17, the Commission dismissed that aspect of Consolidated Contention 2 set forth in paragraph (b), above.

condenser containments, as reported in NUREG/CR-6427.⁵ In affirming the Licensing Board's decision admitting Consolidated Contention 2, the Commission in CLI-02-17 concluded 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 26 (emphasis added). The Commission explained in CLI-02-28, however, that in CLI-02-17 it did not otherwise address the scope of the contention. CLI-02-28, slip op. at 4.

Duke has maintained for some time in this proceeding that this contention is moot. In CLI-02-28, the Commission clarified the contention further and therefore supported the mootness argument already raised by Duke. First, the Commission agreed with Duke and the NRC Staff that the Sandia study did not make any "fresh finding" on the issue of station blackout frequencies or core damage frequencies to be applied for McGuire or Catawba. *Id.* at 3-4. These matters are therefore beyond the scope of the contention. Second, the Commission further agreed with Duke and the NRC Staff that the relevant "values from the Sandia study" — the "values" that are at issue in the contention — are the conditional containment failure probabilities found by the study. *Id.* at 9. These are therefore the only "values" that are important when considering mootness.

In CLI-02-28 the Commission further emphasized that Consolidated Contention 2 was a "contention of omission." The contention asserts that Duke's SAMA analyses were deficient because they failed to discuss the Sandia values at all ("The Duke SAMA analysis is incomplete [because] . . . it fails to include information from NUREG/CR-6427 . . ."). Significantly, the contention did not assert any particular manner in which the Sandia values

⁵ See NUREG/CR-6427, "Assessment of the DCH [Direct Containment Heating] Issue for

should be used in the SAMA analyses. The Commission found the distinction to be a critical one:

There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the staff in a draft EIS, the contention is moot. Intervenors must timely file a new or amended contention that addresses the factors in § 2.714(b) in order to raise specific challenges regarding the new information.

CLI-02-28, slip op. at 14 (citations omitted).

Therefore, with these determinations as a basis, the Commission agreed with the NRC Staff that "the resolution of the originally-admitted 'BREDL/NIRS Contention 2 requires no more than a formal finding by the Board' that Duke in its supplemental analyses, or more importantly, the NRC staff in the draft [Supplemental Environmental Impact Statements], 'has in fact utilized, incorporated, or addressed the CCFPs [conditional containment failure probabilities] of the Sandia Study.'" *Id.* at 16.

B. The Record on the Docket Supports a Finding of Mootness

As discussed by the Commission, Consolidated Contention 2 was based on Duke's SAMA evaluations originally submitted as part of the license renewal application. Those evaluations utilized plant-specific information, based on the McGuire and Catawba Probabilistic Risk Assessments ("PRAs"), in order to perform plant-specific evaluations of the risk-benefit of potential mitigation alternatives. After Consolidated Contention 2 was admitted in this proceeding, Duke submitted to the NRC revised SAMA analyses in response to Requests for

Plants with Ice Condenser Containments" (April 2000).

Additional Information ("RAIs") from the NRC Staff.⁶ These supplemental SAMA analyses specifically incorporated the relevant conditional containment failure probabilities from the Sandia study. That is, Duke incorporated into the McGuire and Catawba SAMA evaluations the specific conditional containment failure probabilities for station blackout ("SBO") sequences, as reported in NUREG/CR-6427.⁷ Duke then re-calculated the risk-benefits of the relevant proposed mitigation alternatives, to be compared to the estimated project costs in the SAMA evaluations.

Thus, although it had fully addressed the scenario of concern of NUREG/CR-6427 in its original SAMA evaluations based on what it viewed as appropriate data, Duke specifically incorporated the relevant conditional containment failure probabilities from NUREG/CR-6427 in supplemental SAMA evaluations and documented this alternative calculation of the revised potential for reduction in offsite exposure from the relevant mitigation alternatives. In this way, Duke provided the NRC Staff with a range of potential risk-benefit values for the mitigation alternatives reviewed, with the range defined by the assumptions.

⁶ The NRC Staff issued its RAIs to Duke in letters dated November 21, 2001 and December 10, 2001. (There was one RAI letter for McGuire and one for Catawba.) Duke's supplemental SAMA evaluations were submitted in Duke's RAI responses of January 31, 2002 (for McGuire) and February 1, 2002 (for Catawba). These responses were forwarded to the Licensing Board and parties on February 1, 2002. Additional information subsequently submitted by Duke to the NRC was forwarded to the licensing Board and parties on March 20, 2002.

⁷ NUREG/CR-6427 is a simplified Level 2 probabilistic analysis. Notwithstanding that simplicity, in the Level 2 analysis for the supplemental SAMA evaluations Duke modified entries in the release category matrix to force early containment failure probability to be equivalent to the NUREG/CR-6427 value. By adopting the Sandia values, the supplemental SAMA evaluations also implicitly adopted all of the conservative Sandia assumptions regarding hydrogen generation and combustion phenomenon in an accident.

Importantly, as recognized by the Commission in CLI-02-28, the NRC Staff has addressed this SAMA issue in the draft license renewal-related Supplemental Environmental Impact Statements (“SEISs”) issued for McGuire and Catawba.⁸ In the draft SEISs, the NRC Staff specifically addressed Duke’s supplemental SAMA evaluations that were based upon “a containment response consistent with the findings in NUREG/CR-6427.” See McGuire draft SEIS, at 5-27; Catawba draft SEIS, at 5-26. The Staff concluded — based upon Duke’s original and supplemental input — that, under certain assumptions, proposed mitigation alternatives related to hydrogen control in station blackout sequences (e.g., supplying backup power to the existing hydrogen igniters from an independent source) *may* be cost-beneficial. The NRC Staff therefore has taken the position in the SEISs that the issue of whether plant modifications should be made (and, if so, the nature of any such modifications or procedure changes to mitigate these postulated severe accidents) is being properly considered in connection with the agency’s resolution of Generic Safety Issue (“GSI”) 189. McGuire draft SEIS at 5-29; Catawba draft SEIS at 5-28 (“The need for plant design and procedural changes will be resolved as part of GSI-189 and addressed for Catawba and other ice-condenser plants as a current operating license issue.”).⁹

On the NRC docket for both McGuire and Catawba, Duke has agreed with the draft SEIS conclusion in that, depending on the design requirements adopted for the modification

⁸ See Draft NUREG-1437, Supp. 8, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding McGuire Nuclear Station, Units 1 and 2” (May 2002) (“McGuire draft SEIS”), at 5-4, *et seq.*; Draft NUREG-1437, Supp. 9, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Catawba Nuclear Station, Units 1 and 2”) (May 2002) (“Catawba draft SEIS”), at 5-4, *et seq.* The final SEISs are due to be published by the NRC Staff next month.

⁹ Thus, the issue of whether a change to the current licensing bases of the plants will be required is being examined by the NRC as a current operating reactor issue.

(e.g., power requirements, qualification requirements), there may be a cost-beneficial modification that provides sufficient alternative power during an SBO event to the hydrogen ignition system. Duke agreed to continue to evaluate the potential modifications to address the GSI-189 issue and to monitor the NRC Staff's resolution of that issue.¹⁰

Therefore, based on the additional Duke SAMA submittals, the NRC conclusions as set forth in license renewal licensing documents, and the ongoing evaluation of the current licensing basis issue in GSI-189 — all a matter of public record — Consolidated Contention 2 has been completely addressed. The contention of omission (*i.e.*, that the relevant conditional containment failure probabilities for SBO sequences from the Sandia study should be incorporated into the Duke license renewal SAMA evaluations) has been satisfied. Consolidated Contention 2 is now moot and should be resolved by the “formal finding” by the Licensing Board as directed by the Commission in CLI-02-28.¹¹

¹⁰ See the August 8, 2002 letter to NRC from Gary R. Peterson, Docket Nos. 50-413 and 50-414, “Severe Accident Mitigation Alternatives” (for Catawba), and the August 19, 2002 letter to NRC from H.B. Barron, Docket Nos. 50-369 and 50-370, “Severe Accident Mitigation Alternatives” (for McGuire).

¹¹ Contrary to earlier arguments before the Licensing Board, the Commission agreed with Duke in CLI-02-28 that:

As Duke argues, “determining whether Duke [in its Environmental Report] ‘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’ [Duke’s early analysis submitted in the Environmental Reports or Duke’s later analysis which takes into account the Sandia containment failure probability estimates] is unnecessary. Both versions have now been submitted by Duke.” And, most importantly, the staff explicitly has chosen to take into account the Sandia containment failure probability estimates in the draft SEISs.

CLI-02-28, slip op. at 6-7.

The doctrine of mootness derives, in part, from the “case” or “controversy” requirement of Article III of the Constitution and generally renders a claim or case moot “when the issues are no longer ‘live,’ or the parties lack a cognizable interest in the outcome.”¹² The mootness doctrine allows judicial recognition of the fact that circumstances may “shift during the course of litigation in a way that calls into question whether a concrete dispute between the parties exists any longer”¹³ The mootness doctrine may be applied during any phase of a proceeding when it becomes applicable,¹⁴ because considerations of judicial economy and efficiency underlie this doctrine.¹⁵

As the Commission recognized in CLI-02-28, ample NRC precedent exists for dismissal of admitted contentions on grounds of mootness “[w]here a contention alleges the omission of particular information . . . and the information is later supplied by the applicant or considered by the staff in a draft EIS” CLI-02-28, slip op. at 14. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20 (2002)* (The licensing board dismissed a contention challenging the adequacy of the applicant’s Environmental Report because of its failure to consider the impact of possible flooding on the intermodal cask transfer facility associated with the ISFSI. The board found that the Staff’s subsequent draft EIS for the ISFSI did in fact analyze this hypothetical flooding event, mooting

¹² *Texas Util. Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993).*

¹³ *Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), LBP-92-36, 36 NRC 366, 368, n. 7 (citations omitted).*

¹⁴ *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.”).

¹⁵ *See, e.g., Airline Pilots Assoc., 897 F.2d 1394, 1396-97. See also Wright, Miller, and Cooper, Federal Practice and Procedure, § 3533.1 (1984).*

the contention); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163 (2001) (The licensing board dismissed a contention alleging that the applicant's ER was deficient because it did not discuss the disadvantages of the "no action" alternative. The board determined that this contention was moot because "the superceding DEIS includes a no-action alternative analysis that discusses both the advantages and disadvantages of the proposed course of action," including the matters specifically identified by the intervenors. 54 NRC at 171-72.)¹⁶ For similar reasons, and consistent with the directions of the Commission in CLI-02-28, Consolidated Contention 2 should be dismissed.

III. CONCLUSION

For the reasons discussed above, Consolidated Contention 2 is moot. Accordingly, the contention should be dismissed. The pending proposed amended contentions, reinstated by the Commission for consideration by the Licensing Board, should be separately

¹⁶ *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-26, 54 NRC 199 (2001) (Discussion of range of reasonable siting alternatives for the proposed ISFSI in the NRC's draft EIS mooted a contention asserting that such an analysis was omitted from the applicant's ER.).

addressed by the Licensing Board and resolved in accordance with the findings and guidance provided by the Commission in CLI-02-28.¹⁷

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 23rd day of December 2002

¹⁷ By filings dated June 10, 2002, and July 22, 2002, Duke has previously responded to the proposed late-filed contentions. Duke addressed, among other things, their lack of timeliness (*i.e.*, the lack of any link to new information in RAI responses) and their lack of basis under 10 C.F.R. § 2.714(b). Duke believes its arguments to be consistent with the analytical approach and guidance offered in CLI-02-28 with respect to these amended contentions, and believes that it has amply demonstrated that the amended contentions should not be admitted.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION TO DISMISS CONSOLIDATED CONTENTION 2" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 23rd day of December, 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)


David A. Repka
Counsel for Duke Energy Corporation