

January 7, 2003 (2:54PM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter ofDocket 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)December 31, 2002

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND
NUCLEAR INFORMATION AND RESOURCE SERVICE'S MOTION FOR AN
EXTENSION OF TIME TO RESPOND TO DUKE ENERGY CORPORATION'S
MOTION TO DISMISS CONTENTION 2**

Intervenors Blue Ridge Environmental Defense League ("BREDL") and Nuclear Information and Resource Service ("NIRS") hereby request an extension of time to respond to Duke Energy Corporation's ("Duke's") Motion to Dismiss Consolidated Contention 2 (December 23, 2002) (hereinafter "Motion to Dismiss"). Intervenors seek an extension of time until January 23, 2003, in order to allow them sufficient time to file their response.¹

In support of their motion, Intervenors submit the following:

1. Intervenors' counsel has not had an opportunity to discuss the Motion to Dismiss with her clients. Intervenors' counsel was out of the office for the Christmas holidays when the Motion to Dismiss was filed, and therefore did not see it until she returned to work on December 30, 2002. At that point, she was unable to contact the

¹ If Duke's Motion to Dismiss is treated as an ordinary motion, 10 C.F.R. § 2.730 provides that Intervenors' response would be due on January 2, 2003. If the motion is treated as a summary disposition motion, as suggested below, 10 C.F.R. § 2.749 provides that the response would be due on January 13, 2002.

directors of lead intervenor BREDL about the motion, because they had gone out of town for the holidays. It is her understanding that they will return sometime around January 6.

2. As Duke states at page 1 of the Motion to Dismiss, the motion is based on “conclusions and guidance” provided in CLI-02-28, which was issued by the Commission on December 18, 2002. While CLI-02-28 suggests that Consolidated Contention 2 has been mooted by Duke’s submission of information regarding conditional containment failure probabilities, and by consideration of that information in the draft Supplemental Environmental Impact Statements for Catawaba and McGuire, CLI-02-28 does not make a ruling that the contention is moot. Instead, the Commission advises that a summary disposition motion, based on available “evidence” would be the appropriate vehicle for disposing of the contention. *Id.*, slip op. at 16.

Contrary to the Commission’s guidance, Duke filed a motion to dismiss Consolidated Contention 2. Yet, Duke’s motion essentially functions as a summary disposition motion. Like a summary disposition motion, Duke’s Motion to Dismiss seeks a determination regarding the veracity of a factual allegation: whether

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.’

Motion to Dismiss at 4, quoting CLI-02-28, slip op. at 4. In contrast, a motion to dismiss generally must accept the allegations of a complaint and show that the law entitles the defendant to relief, under any set of facts that may be demonstrated by the plaintiff. *See Wolman v. Tose*, 467 F.2d 29, 35 (4th Cir. 1972).

3. Duke’s factual assertions are of a technical nature. In order to make an adequate response regarding the veracity of these assertions, Intervenors require the

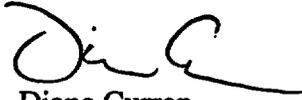
assistance of Dr. Edwin Lyman, their expert regarding Consolidated Contention 2. Dr. Lyman is currently out of the office on personal leave. Although he will be back in his office briefly on January 2 and 3, several weeks ago he informed counsel for Intervenors that he would be unavailable for consultation on those dates because he will be preparing for a trip to Europe in which he is to attend a session of the World Parliament. Dr. Lyman will leave for Europe on January 6, and will return on January 15. An extension of time until January 23 will allow Dr. Lyman a reasonable period of time to review CLI-02-28 and the Motion to Dismiss, and to consult with Intervenors about their response.

4. Intervenors respectfully submit that because Duke's motion is in the nature of a summary disposition motion, it should be treated as such for purposes of determining the reasonableness of the length of the extension requested by Intervenors. Under the Commission's regulations at 10 C.F.R. § 2.749(a), a period of 20 days is allowed for a response to a summary disposition motion. Under that regulation, Intervenors' response to Duke's motion would be due on January 13. In order to accommodate the Intervenors' holiday schedules and Dr. Lyman's travel schedule, Intervenors have requested only a ten-day extension of this period.

For the foregoing reasons, Intervenors request that the Board grant an extension until January 23, 2002, to respond to Duke's Motion to Dismiss.²

² Counsel for Intervenors attempted to obtain Duke's consent to the requested extension in advance, but was informed that Duke wishes to await the filing of a written motion before taking a position. Counsel for Intervenors was unable to reach counsel for the NRC Staff.

Respectfully submitted,



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December 31, 2002

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2002, copies of Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Motion For An Extension Of Time To Respond To Duke Energy Corporation's Motion To Dismiss Contention 2 were served on the following by e-mail and/or first-class mail, as indicated below:

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