

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

NRC STAFF'S ANSWER TO  
APPLICANT'S MOTION TO DISMISS CONSOLIDATED CONTENTION 2

INTRODUCTION

On December 23, 2002, the applicant, Duke Energy Corporation (Duke), filed its "Motion to Dismiss Consolidated Contention 2" (Motion to Dismiss) with the Atomic Safety and Licensing Board (Board) in this proceeding. Duke's Motion to Dismiss sets forth Duke's arguments in favor of dismissing BREDL/NIRS Contention 2 as moot. The staff of the Nuclear Regulatory Commission (Staff) hereby submits its answer in support of Duke's Motion to Dismiss.

BACKGROUND

BREDL/NIRS Contention 2, as admitted, challenges the completeness of Duke's severe accident mitigation alternatives (SAMA) analysis in its license renewal application. Contention 2 cites the omission of any reference to NUREG/CR-6427, "Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments," (Sandia, April 2000).<sup>1</sup> At the time the contention was initially admitted by the Board, see *Duke Energy Corp.* (McGuire

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<sup>1</sup>Hereafter, the Staff refers to NUREG/CR-6427 as "the Sandia study."

Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC 49 (2002), Duke had not addressed the findings of the Sandia study in its application.

After the Board admitted BREDL/NIRS Contention 2, Duke submitted a supplemental SAMA analysis that incorporated analysis from the Sandia study.<sup>2</sup> This information was used by the Staff in the preparation of its draft and final supplemental environmental impact statements (SEISs) for Catawba and McGuire, which show the range of risk reduction and estimated benefits achievable using, among other data, the Sandia study.<sup>3</sup> Subsequently, as a result of disagreement among the parties and the Board regarding interpretation of the Commission's decision in CLI-02-17, Duke filed a motion with the Commission seeking clarification of the Commission's order. See Motion for Clarification of Memorandum and Order CLI-02-17 (Motion for Clarification). In response to Duke's motion and a Certified Question by the Board, the Commission issued CLI-02-28, wherein the Commission remanded the issue of mootness to the Board with guidance on how to address the issue. Duke subsequently filed its Motion to Dismiss, which is the subject of the instant Staff answer.

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<sup>2</sup>See Letter from M.S. Tuckman to NRC, "Response to Requests for Additional Information in Support of the Staff Review of the Application to Renew the Facility Operating Licenses of McGuire Nuclear Station, Units 1 & 2 and Catawba Nuclear Station, Units 1 & 2" at 8 (January 31, 2002); Letter from M.S. Tuckman to NRC, "Response to Requests for Additional Information in Support of the Staff Review of the Application to Renew the Facility Operating Licenses of McGuire Nuclear Station, Units 1 & 2 and Catawba Nuclear Station, Units 1 & 2" at 7 (February 1, 2002).

<sup>3</sup>See NUREG-1437, Supplement 8, "[Draft] Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding McGuire Nuclear Station, Units 1 and 2," (May 2002) at § 5.2; NUREG-1437, Supplement 9, "[Draft] Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Catawba Nuclear Station, Units 1 and 2," (May 2002) at § 5.2, Table 5-7; NUREG-1437, Supplement 8, "[Final] Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding McGuire Nuclear Station, Units 1 and 2" (December 2002) at § 5.2; NUREG-1437, Supplement 9, "[Final] Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Catawba Nuclear Station, Units 1 and 2" (December 2002) at § 5.2.

DISCUSSION

In its Motion to Dismiss, Duke argues, as it has before, that Contention 2 should be dismissed because the claims contained therein have become moot. See Motion to Dismiss at 1. Duke states that the basic claim underlying Contention 2 (that NUREG/CR-6427 was not addressed by Duke in its environmental report) is contradicted by the current record of this proceeding. See *id.* at 6-7. Duke asserts in its motion that the Board should dismiss Contention 2 because the contention merely alleged the omission of certain information, which has subsequently become part of the record. Thus, there is no controversy between the parties for the Board to resolve. See *id.* at 8-9 (citing *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2)*, CLI-02-28, slip op. at 14 (Dec. 18, 2002) for the proposition that once a contention of omission is satisfied it is appropriate to dismiss the contention as moot). The Staff agrees.

In the Staff's view, the Board should grant the Motion to Dismiss, particularly in light of the Commission's decision in CLI-02-28. In that decision, the Commission, while ruling on the motion filed by Duke seeking clarification of CLI-02-17 and on the certified question raised by the Board, ordered the Board to, among other things, determine "whether the draft SEISs render [Contention 2] moot." See CLI-02-28, slip op. at 23. In order to assist the parties and resolve the certified question and the motion for clarification then before it, the Commission addressed its understanding of Contention 2 in CLI-02-28, leaving open only the issues it remanded to the Board for resolution. Therefore, it is important that the Board consider and follow the Commission's reasoning<sup>4</sup> in ruling on Duke's motion.

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<sup>4</sup>In its reasoning the Commission makes very clear that it never intended to expand the scope of Contention 2 and that any interpretation otherwise is a misreading of its decision. See CLI-02-28, slip op. at 4-6.

In CLI-02-28, the Commission quite clearly found that Contention 2 is a “contention of omission.” See *id.* at 13. Moreover, the Commission made clear that the issue raised by Contention 2 was solely “Duke’s failure to discuss the Sandia study at all.” *Id.* The Commission went on to state that “[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, the contention is moot.” *Id.* at 14 (citing *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20, 30 (2002)). The Commission, however, did not rule on whether, given the current record, the Contention is moot. Nevertheless, the Commission did state that “[i]f, as appears to be the case, the draft SEISs now acknowledge the relevant findings, then the original contention is moot.” See *id.* at 7. Therefore, as the Commission noted, what is required of the Board is merely “a formal finding that ... the NRC staff [in the SEISs] ... has addressed the Sandia study.” *Id.* at 16 (quoting Staff’s Response to Applicant’s Motion for Clarification of Memorandum and Order CLI-02-17 (Aug. 12, 2002) at 8).

The Staff agrees with Duke that Contention 2 is now moot. The Staff has now issued both the draft and final supplemental environmental impact statements for the Catawba and McGuire Plants. The documents address the Sandia study and the data contained therein.<sup>5</sup>

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<sup>5</sup>See, e.g., NUREG-1437, Supplement 8, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 8, Regarding McGuire Nuclear Station, Units 1 and 2” (December 2002) at § 5.2; NUREG-1437, Supplement 9, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 8, Regarding Catawba Nuclear Station, Units 1 and 2” (December 2002) at § 5.2; NUREG-1437, Supplement 8, “[Draft] Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Supplement 8, Regarding McGuire Nuclear Station, Units 1 and 2” (May 2002) at § 5.2.

Therefore, these documents, on their face, cure any deficiencies alleged by Contention 2. Thus, in light of the inclusion of this information in the Staff's documents, Contention 2 should be dismissed.

CONCLUSION

For the reasons stated above, the Applicant's Motion to Dismiss should be granted.

Respectfully submitted,

***/RA/***

Antonio Fernández, Esq.  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 23rd day of January, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO APPLICANT'S MOTION TO DISMISS CONSOLIDATED CONTENTION 2" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (\*), by deposit in the Nuclear Regulatory Commission's internal mail system; as indicated by two asterisks (\*\*), by electronic mail, this 23<sup>rd</sup> day of January, 2003.

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