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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)

January 23, 2003

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND
NUCLEAR INFORMATION AND RESOURCE SERVICE'S RESPONSE TO
DUKE ENERGY CORPORATION'S MOTION TO DISMISS CONTENTION 2****I. 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 to Dismiss Consolidated Contention 2 (December 23, 2002) (hereinafter "Motion to Dismiss"). The motion is based on "conclusions and guidance" provided in CLI-02-28, a Memorandum and Order issued by the Commission on December 18, 2002. Motion to Dismiss at 1. Intervenors believe that CLI-02-28 unlawfully constricts the scope of Consolidated Contention 2, and makes a mockery of the Commission's hearing process. Nevertheless, it appears that under the holding of CLI-02-28, the Atomic Safety and Licensing Board ("ASLB") is constrained to dismiss the contention. The ASLB is now left to consider the admissibility of Amended Contention 2.

II. BACKGROUND

On November 29, 2001, BREDL and NIRS submitted contentions challenging the adequacy of Duke's license renewal applications for the Catawba and McGuire nuclear

power plants.¹ Among their contentions, BREDL Contention 4 asserted, *inter alia*, that Duke's Severe Accident Mitigation Alternative ("SAMA") analysis is incomplete because it fails to incorporate new and extensive information regarding ice condenser vulnerabilities, particularly the findings of a recent report by Sandia National Laboratories, NUREG/CR-6427, Assessment of the DCH [Direct Containment Heating] Issue for Plants With Ice Condenser Containments (April 2000) (hereinafter "NUREG/CR-6427" or "Sandia Study"). NIRS Contention 1.1.4 asserted that Duke's license renewal application failed to mention NUREG/CR-6427, or to provide an analysis of the findings of NUREG/CR-6427, with respect to the four McGuire and Catawba reactors. NIRS Contention 1.1.5 also contended that Duke had not considered a SAMA of providing a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

On January 24, 2002, in LBP-02-04, a Memorandum and Order (Ruling on Standing and Contentions), the ASLB ruled, *inter alia*, that:

BREDL and NIRS have provided a sufficient, reasonably specific explanation of the bases of their contentions to meet the requirement of section 2.714(b)(2)(ii), as well as sufficient expert opinion, facts, and references to sources and documents to support the contentions under section 2.714(b)(2)(iii) to show that a genuine dispute exists with regard to the material facts of whether and to what extent Duke's SAMA analysis should take into account the calculations and values referenced in NUREG/CR-6427 and include the alternative of a separate dedicated line as described below.

Id., 55 NRC 49, 127 (2002).

¹ Blue Ridge Environmental Defense League Submittal of Contentions in the Matter of the Renewal of Licenses for Duke Energy Corporation, Etc. (November 29, 2001); Contentions of Nuclear Information and Resource Service (November 29, 2001).

Accordingly, the ASLB partially admitted BREDL Contention 4 and NIRS Contentions 1.1.4 and 1.1.5 with respect to the adequacy of the SAMA, consolidated them as Consolidated Contention 2, and reworded the contention 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, 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.

Id., 55 NRC at 128. Duke appealed the ruling.

In RAI responses submitted in January and February of 2002, Duke took into account the conditional containment failure value of NUREG/CR-6427. However, it did so in a manner that cancelled the overall significance of incorporating that value. Duke accomplished this by using a lower value for station blackout ("SBO") probability than had been used in NUREG/CR-6427. As a result, Duke's estimate of the overall probability of containment failure was lower than the estimate in NUREG/CR-6427. Duke did not fully explain the basis for this different assumption, or divulge the underlying assumptions. In fact, Duke refused to release the document that could assist the Intervenors in verifying the reasonableness of Duke's substitute assumption, the current version of Duke's probabilistic risk assessment ("PRA").

While the appeal was pending, the ASLB proceeded with its oversight of the litigation of Consolidated Contention 2, holding several telephone conferences with the parties. These teleconferences revealed that the parties were in basic disagreement regarding the scope of Consolidated Contention 2. Duke took the position that the only "value" of NUREG/CR-6427 that needs to be taken into consideration in its SAMA analysis is the conditional containment failure value. Having taken that value into

account in RAI responses submitted in January and February 2002, Duke believed it had mooted the contention. The Intervenor argued that there are other “values” in NUREG/CR-6427, besides conditional containment failure probability, that should be taken into account. Moreover, Intervenor believed that the adequacy with which Duke takes these values into account is at issue, not just whether certain numbers from NUREG/CR-6427 were plugged into Duke’s SAMA analysis.

In May of 2002, the NRC Staff issued draft supplemental Environmental Impact Statements (“EIS’s”) for license renewal for the Catawba and McGuire nuclear plants.² In considering NUREG/CR-6427, these Draft Supplemental EIS’s both incorporated the lower SBO frequencies that had been used by Duke in its RAI responses. See Section 5.2.2 of Supplements 8 and 9.

On July 23, 2002, the Commission issued CLI-02-17. While the Commission rejected the second portion of Consolidated Contention 2, relating to the accident mitigation alternative of a dedicated transmission line, it affirmed the ASLB’s decision to admit the first portion of the contention. The Commission concluded that the ASLB reasonably found that “a sufficient question had been raised about the SAMA analyses’ failure to address or otherwise acknowledge results from the Sandia study.” CLI-02-17, slip op. at 11. The Commission characterized the “merits question” variously as “whether the Sandia study’s assumptions reflected better estimates than Duke’s or whether Duke’s SAMA analysis should have addressed the study,” and “whether the SAMAs should have applied the containment failure probability estimates from the

² Draft Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 8 (Regarding McGuire Nuclear Station, Units 1 and 2), and Supplement 9 (Regarding Catawba Nuclear Station, Units 1 and 2).

Sandia study, which would have resulted in larger 'benefits' being associated with the individual SAMAs." *Id.* at 11-12.

On July 29, 2002, the ASLB held a telephone conference with the parties, in which they discussed the parties' various disputes in light of the recently-issued CLI-02-17. The ASLB pointed out that CLI-02-17 indicates that the Commission views Consolidated Contention 2 as embracing the concept of the adequacy of Duke's consideration of the values in NUREG/CR-6427. Tr. at 1081-1084. The Chair of the ASLB also pointed out that CLI-02-17's statement at page 9, regarding the Sandia study's finding of a significantly higher station blackout frequency for the McGuire plant," supported the relevance of Duke's Level 1 PRA. Tr. at 1093. The Chair also indicated that it was the ASLB's inclination to follow the guidance of CLI-02-17 and proceed with discovery, followed by summary disposition. *Id.* at 1081. Based on the ASLB's statement of its view that the contention embraces the concept of adequacy of Duke's consideration of the values in NUREG/CR-6427, Intervenors conditionally withdrew an amended contention that they had submitted, detailing various aspects in which they consider Duke's revised SAMA analysis to be inadequate to consider the values of NUREG/CR-6427.

Duke then filed a motion for clarification with the Commission.³ In the first part of its motion, Duke asked for correction of a technical error in the CLI-02-17. Intervenors did not oppose this request for clarification. In the second part of its motion, Duke asked the Commission to "clarify" that "the scope of the admitted contention encompasses only the issue of whether Sandia *containment failure probabilities* should

³ Duke Energy Corporation's Motion for Clarification of Memorandum and Order CLI-02-17 (August 2, 2002).

be used in the SAMA analysis.” *Id.* at 8. (emphasis in original). By this, Duke appeared to mean conditional containment failure probabilities. In response, Intervenor argued that the language of LBP-02-04 and CLI-02-17 does not support this narrow interpretation, and thus there is no need for clarification.⁴ While the Commission was considering the motion for clarification, the ASLB certified two questions to the Commission:

- (1) whether the “values from NUREG/CR-6427 referred to by the Commission CLI-02-17 include only “conditional containment failure probabilities,” or encompass “overall containment failure probabilities;” and
- (2) whether resolution of Contention 2 requires any comparison of Duke’s containment failure probability estimates and those of NUREG/CR-6427, or evaluation of the adequacy of Duke’s SAMA analysis in light of NUREG/CR-6427.

Memorandum and Order (Certifying Question to the Commission) (August 28, 2002).

On December 18, 2002, the Commission issued CLI-02-28, ruling that the Licensing Board had “misinterpreted CLI-02-17 to broaden the scope of the admitted contention.” *Id.*, slip op. at 4. The Commission found that:

at bottom, the issue is whether the Intervenor’s original contention encompasses a challenge to the specific station blackout frequency used in Duke’s SAMA analyses.

Id., slip op. at 8. Noting that NUREG/CR-6427 had assumed “long-available station blackout frequency estimates” without questioning their accuracy, the Commission held that “[t]he only new information contained in the Sandia study that is relevant to Duke’s SAMA analysis consists of conditional containment failure probabilities found by the study.” *Id.*, slip op. at 9. The Commission found that if the Intervenor sought to

⁴ Blue Ridge Environmental Defense League’s and Nuclear Information and Resource Services’ Response to Duke Energy Corporation’s Motion for Clarification (August 12, 2002).

challenge the SBO frequency used by Duke in its SAMA analysis, “their contention should have made a particularized claim to that effect.” *Id.* at 10. According to the Commission:

The Intervenor’s original contention, by its own terms, challenged Duke’s failure to discuss the Sandia study at all. Once Duke redid its SAMA analyses to acknowledge the Sandia study, and certainly once the NRC staff discussed the study in its draft EIS, it was incumbent upon the Intervenor to amend their original contention to set forth with specificity any concern over Duke’s discussion of the Sandia information.

Id., slip op. at 13. The Commission also reinstated the amended version of Contention 2 that the Intervenor had conditionally withdrawn. *Id.*, slip op. at 17.

III. DISCUSSION

Duke’s Motion to Dismiss seeks 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.’

Motion to Dismiss at 4, quoting CLI-02-28, slip op. at 4. According to Duke, such a finding will be sufficient to support dismissal of the contention as moot.

Duke is correct that its RAI responses and the Supplemental EIS’s for Catawba and McGuire incorporate the conditional containment failure probabilities of the Sandia study. However, both the RAI responses and the supplemental EIS’s also use lower SBO frequencies than were used in NUREG/CR-6427, with the result that the supplemental EIS’s provide lower estimates of containment failure probability than would have been yielded by consistently using the values of NUREG/CR-6427. Moreover, the Staff provides no justification for using the lower values, other than to say they are more recent.

In any event, Duke is correct that CLI-02-28 give the ASLB no choice but to dismiss the contention. For the record, however, Intervenors respectfully submit that the Commission has unlawfully restricted the scope of Consolidated Contention 2, in a manner that makes a mockery of the Commission's procedures for considering the admissibility of contentions, and that also intrudes unreasonably on the domain of the ASLB. The language of Consolidated Contention 2, as reworded by the ASLB, plainly asserts that Duke's Environmental Report failed to take into account "information" from NUREG/CR-6427. Nothing in the language of Consolidated Contention 2, as reworded by the ASLB, restricted the scope of that "information" to conditional containment failure probabilities. Moreover, in admitting the contention, the ASLB specifically found that the Intervenors had raised a genuine and material dispute with respect to the question of "whether and to what extent Duke's SAMA analysis should take into account the calculations and values referenced in NUREG/CR-6427." Once again, nothing in this language restricted the scope of the contention to "calculations and values" relating solely to conditional containment failure probability.

Moreover, as the ASLB also recognized in admitting Consolidated Contention 2, the contention raised concerns regarding the adequacy of Duke's consideration of NUREG/CR-6427. In fact, in CLI-02-12, the Commission itself recognized that the contention presented the issue of adequacy, by characterizing the "merits question" as "whether the Sandia study's assumptions reflected better estimates than Duke's or whether Duke's SAMA analysis should have addressed the study." *Id.* at 11-12. As discussed above, the manner in which Duke considered NUREG/CR-6427 was completely inadequate because it essentially nullified the significance of the study.

Finally, the Commission's decision sets an absurdly low standard for what constitutes "consideration." Under CLI-02-28, for purposes of determining whether the public may be heard on important safety and environmental issues, "consideration" of an important NRC technical study can be achieved merely by mentioning it by name. Such a ruling mocks the hearing process and the members of the public who seek to use it to advance the protection of public health and safety and the environment.

IV. CONCLUSION

For the foregoing reasons, Intervenors submit that under the terms of CLI-02-28, the ASLB has no choice but to dismiss Consolidated Contention 2. However, Intervenors believe that the Commission's ruling is unlawful, and that it unduly interferes with the discretion of the ASLB. Intervenors request that the ASLB admit Amended Contention 2, which satisfies the Commission's admissibility and late-filing standards.

Respectfully submitted,



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January 23, 2003

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 Response 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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