RAS 5708 February 7, 2003

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 BRIEF
IN RESPONSE TO LICENSING BOARD ORDER OF FEBRUARY 4, 2003

INTRODUCTION

On February 4, 2003, the Atomic Safety and Licensing Board (Board) issued an order dismissing BREDL/NIRS (Intervenors) Contention 2 and instructing the parties to brief certain issues (Order). The staff of the Nuclear Regulatory Commission (Staff) hereby submits its brief in response to the Board's order.

BACKGROUND

The Intervenors' Contention 2, as admitted, challenged the completeness of Duke's (Applicant) severe accident mitigation alternatives (SAMA) analysis in its license renewal application. Contention 2 cited 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).[1] At the time the contention was initially admitted by the Board, the Applicant had not addressed the findings of the Sandia study in its application. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC 49 (2002).

[1]Hereafter, the Staff refers to NUREG/CR-6427 as "the Sandia study."

After the Board admitted the Intervenors' Contention 2, the Applicant submitted supplemental SAMA analyses that incorporated analysis from the Sandia study.[2] 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 conditional containment failure probabilities from the Sandia study.[3] After the Staff issued its draft SEISs, the Intervenors filed their "Amended Contention 2," which contained eight sub-parts, which we in turn address as separate contentions. BREDL and NIRS's Amended Contention 2 (May 20, 2002) ("Amended Contention").[4] On August 2, 2002, as a result of disagreement among the parties and the Board regarding interpretation of the Commission's decision in CLI-02-17, the Applicant filed a motion with the Commission seeking clarification of the Commission's order. *See* Motion for Clarification of Memorandum and Order CLI-02-17 (August 2, 2002) ("Motion for Clarification"). In response to the Applicant's motion and a Certified Question by the Board, the Commission issued CLI-02-28,

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[2]*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).

[3]*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 (hereinafter referred to as "draft SEISs" or "final SEISs" as appropriate).

[4]The Intervenors later withdrew the Amended Contention based on a misunderstanding of CLI-02-18. Tr. 1118.

wherein the Commission remanded to the Board a determination on the mootness of Consolidated Contention 2 and reinstated consideration of Amended Contention 2. *See* CLI-02-28 at 23. On February 4, 2003, the Board dismissed the contention pursuant to a motion to dismiss filed by the Applicant. In the order dismissing the Contention, the Board ordered all parties to brief the following issues:

> a) mootness and/or viability of the various parts of the amended contention in light of CLI-02-28, and, as indicated therein, whether any issues may have been cured by the Staff's draft and final SEISs;
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> b) whether the various parts of the amended contention were timely filed or could have been raised earlier with "sufficient care" on the part of the Intervenors in examining publicly available documentary material, in light of any ambiguity and confusion surrounding certain issues, and any related "scope" issues;
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> c) reasons for any departures from recognized NRC guidance documents with regard to any parts of the amended contention; and
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> d) any other issues arising out of CLI-02-28 or that would otherwise be relevant.

See Order at 2 (citations omitted). This brief reflects the Staff's response to the Board's questions.

DISCUSSION

A. IN LIGHT OF CLI-02-28, AND ISSUANCE OF THE STAFF'S DRAFT AND FINAL SEISs, SOME OF THE INTERVENORS' CONTENTIONS ARE NO LONGER VIABLE.

At the outset, it is important to briefly describe the findings made by the Commission in CLI-02-28. The Commission, in its decision, discussed the Intervenors' Amended Contention at length. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-02-28, slip op. at 16-23 (Dec. 18, 2002). The Commission began its discussion by reinstating the Intervenors' Amended Contention; however, the Commission did not resolve the timeliness[5] and admissibility issues of the Intervenors' Amended Contention and

[5]The Commission stated: "[w]e recognize that because of ambiguous Board statements made in the course of the proceeding and apparent widespread confusion over the original contention's scope, the Intervenors *may* have had good cause to believe that filing an amended contention was unnecessary. That goes to the timeliness of their amended contention, a (continued...)

remanded resolution of these issues to the Board. *See id.* at 16-17 (reasoning that the contention should be reinstated because the Intervenors withdrew their contention based on "the Board's mistaken assumptions about what the Commission held in CLI-02-17"). The Commission then offered some observations relating to the Amended Contention, as guidance to the parties and the Licensing Board.

First, the Commission discussed the nature of the reinstated contentions and observed that most of them seemed to be tied to the Applicant's responses to Staff's request for additional information (RAIs). *Id.* at 17-18. Further, the Commission mentioned that the Intervenors raised few issues related to the draft SEISs, which had been issued before the Amended Contention was filed. *Id.* The Commission noted that perhaps the Intervenors should have focused on the information available in the draft SEISs, since they "provide a more recent and often more thorough discussion of relevant issues." *Id.* at 18. Most significantly, the Commission stated that some of the issues raised by the Intervenors appeared to have been cured by the Staff's issuance of the SEISs. *See id.* (citing the use of return fans to provide effective hydrogen control as an instance where the Staff's documents resolved the Intervenors' concerns).

Second, the Commission discussed some general concepts related to contentions, as applicable to the Amended Contention. *See id.* at 19. For example, the Commission began by observing that when a NEPA contention is amended, "it must rest on data or conclusions that 'differ significantly' from the ER." *Id.* at 18-19. Further, an intervenor cannot use the amendment to raise issues that "could have been raised previously." *See id.* at 19; *see also infra* at 15 (suggesting that Intervenors' arguments should have been raised in their original set of contentions). Also, the

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[5](...continued)
determination we leave for the Board on remand." CLI-02-28 at 16 (emphasis added). Nevertheless, the Intervenors' untimeliness arose prior to any confusion. As explained more fully below, the Intervenors' Amended Contention document does not present any arguments that could not have been filed along with their initial contentions or that remain viable in light of the Staff's discussion in the SEISs.

Commission observed that, although Intervenors alleged that their intent was to "provide specific information about the deficiencies in Duke's discussion of [the Sandia Study]," they nevertheless seemingly attempted to "insert numerous discrete new claims that arguably might have been raised earlier, or that have little to do with the Sandia study." *Id.* The Commission ended by recalling the Intervenors' "ironclad obligation" to examine the public record and the prohibition on changing the scope of a contention as litigation progresses. *See id.* at 19-20.

Third, the Commission summarily observed that there are several disputes regarding access to the Applicant's probabilistic risk assessments (PRAs). *See id.* at 20-21. After discussing the objections raised by the Staff and the Applicant[6], the Commission instructed the Board to consider the Staff and Applicant's objections to the Intervenors' claims that they cannot assess the adequacy of the SAMA analysis without access to the PRAs. *Id.* at 21. The Commission then went on to remind the Board of the contention rule's proscription on "anticipatory" contentions. *Id.*

Lastly, the Commission concluded by observing that, because of the SEISs' conclusions that the SAMA is cost beneficial, "it is unclear what additional result or remedy would prove meaningful to the Intervenors," particularly when the original contention merely sought to have the Applicant consider such an option. *Id.* at 22.

Pursuant to the Board's Order, and in light of the discussion above, the Staff has had the opportunity to revisit the claims asserted by the Intervenors in their Amended Contention. As we have stated before, all of the proffered contentions should be dismissed.[7] *See* Staff Answer at 25.

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[6]As outlined by the Commission, the Staff and Applicant argued that the Intervenors had not demonstrated why the publicly available information was insufficient to ensure reliability of the PRAs, why the Intervenors' need to access the full PRAs was not articulated from the outset and that the PRAs' absence from the application was evident from the outset . *See id.* at 21.

[7]The Staff filed a response to the Intervenors Amended Contention 2 filing on June 10, 2002 (Staff Answer). In that filing the Staff addressed several issues pertinent to the late filed contention standard as applicable to Amended Contention 2. The instant brief, however, solely addresses the issues raised by the Board in its Order of February 4, 2003.

As we explain below, the contentions contained within the Amended Contention are either without basis, untimely filed or are no longer viable because of subsequent issuance of the SEISs. In regard to Contentions 1, 2, 3, 4, and 8, the issuance of the SEISs and the concomitant failure of the Intervenors to update their contentions to address the Staff's findings makes those contentions no longer viable.

Contention 1 alleged a deficiency based on a perceived lack of an analysis of an alternative of not renewing the reactors' licenses. *See* Amended Contention at 4. As bases for its contention, the Intervenors relied on the Applicant's Environmental Report (ER) and its responses to RAIs. *Id.* The Intervenors, however, never addressed the draft SEISs. The SEISs contain a discussion of the "No-Action Alternative," i.e., not renewing the Applicant's licenses. *See* SEISs at Section 8.1. Nevertheless, the Intervenors did not question the adequacy or sufficiency of that analysis. Consequently, similar to the example of air return fans cited by the Commission in CLI-02-28, the Intervenors contention is no longer viable. *See* CLI-02-28 at 18.

Contention 2 complained that the Applicant's PRA was not publicly available. This contention is not a viable contention. The contention merely articulates a request for information from the applicant—akin to a discovery request, rather than asserting a contention. As discussed in detail below, the lack of a PRA as part of the application was apparent from the day the application was filed with the Commission. *See* Issue b, *infra*. Therefore, the Intervenors cannot now argue that they need, in essence, to perform further discovery so that they can craft a contention. The Commission specifically instructed the Board to be wary of the technique that the Intervenors are employing. *See* CLI-02-28 at 2. In CLI-02-28, the Commission emphasized that the "contention rule [bars] 'anticipatory' contentions, where petitioners ... 'simply desire more time and more ... information to determine [if] they even have a genuine material dispute for litigation.'" *See id.* (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982)). Therefore, the Board should not allow the Intervenors to embark on a "fishing

expedition" in search of a contention. Moreover, the allegations contained in Contention 2 are no longer viable, given the publication of the Staff's analysis of the SAMA issue. As the Commission also stated in CLI-02-28, the Intervenors should focus on the SEISs. The Intervenors, however, do not challenge the Staff's analysis relating to the SAMAs. Therefore, the contention is no longer viable.

Contention 3 challenged the Applicant's RAI responses regarding Station Black Out frequencies. *See* Amended Contention at 7. The Intervenors, however, again failed to raise any issues regarding the Staff's treatment of this issue in the SEISs. By solely relying on a challenge to the Applicant's response to the RAIs, and failing to address the most "recent and ... more thorough discussion of relevant issues"[8] relating to their contention, the Intervenors have made their contention no longer viable.

Contention 4 challenged the failure to use assumptions from the Sandia study. In essence, the Contention repeated the claims that the Intervenors had previously asserted in Consolidated Contention 2. Similar to the contentions discussed above, the Intervenors failed to address the Staff's subsequent treatment of their concerns in the SEISs. The SEISs squarely address the findings from the Sandia study and incorporate the relevant values relating to conditional containment failure probabilities into their analysis. Therefore, in light of the Intervenors' failure to challenge the Staff's analysis and incorporation of the relevant Sandia study data, the Intervenors have made their contention nonviable. *See* CLI-02-28 at 18, 21-22. Moreover, the Staff's issuance of the SEISs cured the issues challenged by the Intervenors.

Contention 5, as we state below, is not admissible. As we explain, the Intervenors could have raised the issues they complain of at the outset of this proceeding. In addition, with regard to basis a of their Contention, the SEISs make their Contention, as supported by that basis, no

[8]CLI-02-28 at 18 (explaining the reasons why the Intervenors should have focused on the Staff's documents addressing their concerns).

longer viable. In Contention 5, the Intervenors alleged that the Applicant's analysis was inadequate because it did not sufficiently characterize uncertainties. The Intervenors, however, failed to challenge the Staff's treatment of this issue in the SEISs. Therefore, the Intervenors again did not address the most complete updated information related to uncertainties—the SEISs.

Contention 8 argued that the Applicant had failed to justify its conclusion that air return fans were necessary for hydrogen igniters to work appropriately. In their pleading, however, the Intervenors implicitly acknowledged that the defect that they complained of had been cured by the Staff's analysis in the draft SEISs. Particularly, they stated that they agreed with the Staff's conclusions in the SEISs that "it is not clear that operation of an air-return fan is necessary." *See* Amended Contention 2 at 17.

B. THE INTERVENORS FAILED TO MEET THEIR "IRONCLAD" DUTY TO EXAMINE THE PUBLIC DOCKET WITH SUFFICIENT CARE.

In 1989, the Nuclear Regulatory Commission amended its Rules of Practice to improve the hearing process. Statement of Considerations, *Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process*, *Final Rule*, 54 Fed. Reg. 33,168 (Aug. 11, 1989) *as corrected*, 54 Fed. Reg. 39,728 (Sept. 28, 1989). The amendments initially were developed by the Regulatory Reform Task Force and addressed specific aspects of the hearing process including admission of contentions. *Id.*[9] According to the Statement of Considerations, the 1989 amendments to 10 C.F.R. § 2.714, Intervention, raised "the threshold for the admission of contentions to require the proponent of the contention to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact." *Id.*

Under the heightened pleading standards, contentions must "consist of a specific statement of the issue of law or fact to be raised or controverted," must detail the alleged facts or opinion on

[9]Additional information on the background of this rulemaking, including details about the Regulatory Reform Task Force, is set forth in the preamble of the proposed rule. 51 Fed. Reg. 24,365-366 (1986).

which the petitioner intends to rely, and shows "that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2). Additionally, issues arising under NEPA must be based on the applicant's environmental report. *Id.*

The amended rule, as explained by the Commission in the Statement of Considerations, requires an intervenor:

> to provide a concise statement of the alleged facts or expert opinion which support the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the intervenor is aware and on which the intervenor intends to rely in establishing the validity of its contention. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.
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> In addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant or the licensee on a material issue of law or fact. This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view. Where the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient for the intervenor to explain why the application is deficient.

54 Fed. Reg. at 33,170; *see also*, *Louisiana Energy Service* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991).

The Commission noted that the 1989 amendments to 10 C.F.R. § 2.714 did not substantially depart from existing practice at that time. 54 *Fed. Reg.* 33, 170. Consistent with agency practice prior to the 1989 rulemaking,

> [A]n intervention petitioner has an *ironclad obligation* to examine the publicly available documentary material pertaining to the facility in question with *sufficient care* to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor [10 C.F.R.] § 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff.

Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982) (*Catawba*, ALAB-687), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983) (emphasis added); *see also, Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)(adding that there is an "ironclad obligation" to examine the application, and other publicly available documents).

As stated in the Statement of Considerations, "admitted intervenors will continue to be able to use discovery to develop the facts necessary to support its case. However, the rule will require that before a contention is admitted the intervenor have some factual basis for its position and that there exists a genuine dispute between it and the applicant." 54 Fed. Reg. 33,171. However, the amended rule, while not calling upon the intervenor to make its case at the time contentions are filed, does preclude the admission of contentions where the intervenor has no supporting facts for its position. *Id.* Likewise, the rule prevents the intervenor from using discovery or cross-examination as a fishing expedition. *Id.* [10]

In addition to meeting the requirements of 10 C.F.R. § 2.714(b)(2), a contention must be timely. The admission of a late-filed contention is governed by the five-factor test set forth in 10 C.F.R. § 2.714(a)(1).[11] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19,

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[10]This requirement is consistent with and supported by federal case law. In *Connecticut Bankers Association v. Board of Governors*, the Circuit Court stated that "a protestant does not become entitled to an evidentiary hearing merely on request or on a bald or conclusory allegation that such a dispute exists. The protestant must make a minimal showing that material facts are in dispute thereby demonstrating that an 'inquiry in depth' is appropriate." 627 F.2d 245, 251 (D.C. Cir. 1980).

[11]10 C.F.R. § 2.714(a)(1) states, in part, that "nontimely filings will not be entertained by the Commission, the presiding officer of the Atomic Safety Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

(i) Good cause, if any, for failure to file on time.
(ii) The availability of other means whereby the petitioner's interest will be protected.
(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(continued...)

17 NRC 1041, 1045 (1983). The Commission expects petitioners to examine all available information "at the earliest possible time to identify the potential basis for contentions and preserve their admissibility." *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999) *citing Catawba*, *supra*, 17 at 1050. The burden lies with the petitioner to submit contentions meeting the Rules of Practice. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

In *Catawba*, *supra*, the Commission found that all five factors in 10 C.F.R. § 2.714(a)(1) should be applied in determining the admissibility of contentions that are filed late because they are based solely on information in institutionally unavailable licensing-related documents that were not required to be prepared or submitted early enough to provide a basis for the timely formulation of contentions. 17 NRC at 1045. Consequently, "[t]he institutional unavailability of a licensing-related document does not establish good cause for filing a contention late if information was publicly available early enough to provide the basis for the timely filing of that contention." *Id.*; *see also*, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112 (1983) The Commission stated that the application of the factors in 10 C.F.R. § 2.714(a)(1) strikes a reasonable balance between the basic principles of the public's hearing rights and its rights to an efficient and expeditious administrative process. *Id.* at 1050. "Taken together, these principles require intervenors to *diligently* uncover and apply all publicly available information to the prompt formulation of contentions. " *Id.* at 1048 (emphasis added).

For example, the Licensing Board in *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163 (1991), determined that the petitioners failed to analyze or take into account the information in the public record. *Long Island Lighting Company*

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[11](...continued)
(iv)The intent to which the petitioner's interest will be represented by existing parties.
(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163, 169, 176 (1991). Before the filing of contentions, the Board, recognizing that the petitioners did not have access to the licensee's security plan, deferred ruling on the petitioner's standing and permitted them to file contentions in accordance with Section 2.714(b)(2). *Id*. at 166. The Board advised petitioners that the unavailability of the security plan would be taken into account. *Id.* Thereafter, in filing the contentions, the petitioners stated that, because they did not have access to the security plan, they could not set forth their contentions with the particularity sought by Section 2.714(b)(2). *Id.* at 175. In response, the Board stated that, in deferring its earlier ruling, "it expected Petitioners to analyze available public information to establish at least a threshold basis for positing possible hazards to public health and safety . . .." *Id.* at 176.

The Intervenors did not use "sufficient care" to diligently examine the LRA and other publicly available documents "to uncover any information that could serve as the foundation for a contention." The Intervenor's duty to use sufficient care is an unwavering, "ironclad obligation" repeatedly endorsed by the Commission since it was first articulated in 1983. Late-filed Contentions 1, 2, 3, 5, 6, and 7 are based on information that was publicly available as of June 13, 2001 when the LRA was submitted to the NRC. Furthermore, the untimeliness of the Intervenors contentions should not be excused for good cause because of purported "ambiguous Board statements made in the course of the proceeding" as this "ironclad obligation" preceded any ambiguity by several months. CLI-02-28 at slip op. 16. Notwithstanding any ambiguous Board statements, the Intervenors did not, as expected by the Commission, examine all available information at the earliest possible time to identify the potential basis for contentions to preserve their admissibility. See *Catawba*, 17 NRC at 1050.

With regard to Contentions 2, 5, and 7, if the Intervenors had concerns with the PRA or the IPE and IPEEE, it was their "ironclad obligation" to have searched the publicly available documents where this information could be found. In 1991 and 1992, the Applicant submitted portions of its

PRA (relating to internal events) for review in response to Generic Letter 88-20, "Individual Plant Examination for Severe Accident Vulnerabilities" (November 23, 1988).[12] In 1994, the Applicant again submitted portions of its PRA (relating to external events) for review in response to Supplement 4 to Generic Letter 88-20, "Individual Plant Examination for Severe Accident Vulnerabilities" (June 28, 1991).[13],[14] All of these submittals and the Staff's reviews[15] are publicly available and could have been found if the Intervenors had looked. In fact, there is an admission by the Intervenors' expert witness, Dr. Ed Lyman, in the official record of the July 10, 2002 telephone conference, that he, and presumably the Intervenors, were unaware that these documents were part of the public record. Tr. at 981. It is clear that the Intervenors did not search

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[12] *See* Letter from H.B. Tucker to U.S. Nuclear Regulatory Commission, "McGuire Nuclear Station, Docket Nos: 50-370, Generic Letter 88-20," NUDOCS Accession No. 9111070233 (November 4, 1991); Letter from M.S. Tuckman to U.S. Nuclear Regulatory Commission, "Catawba Nuclear Station, Units 1 and 2, Docket Nos: 50-413 and 50-414, Individual Plant Examination (IPE) Submittal in Response to Generic Letter 88-20," NUDOCS Accession No. 9209240287 (September 10, 1992).

[13] *See* Letter from T.C. McMeekin to U.S. Nuclear Regulatory Commission, "McGuire Nuclear Station, Units 1 and 2, Docket Nos: 50-369 and 50-370, "Individual Plant Examination of External Events (IPEEE) Submittal," NUDOCS Accession No. 9406140326 (June 1, 1994); Letter from D.L. Rehn to U.S. Nuclear Regulatory Commission, "Catawba Nuclear Station, Units 1 and 2, Docket Nos." 50-413 and 50-414, Individual Plant Examination of External Events (IPEEE) Submittal," NUDOCS Accession No. 9406290060 (June 21, 1994).

[14] It was noted at the June 10, 2002 telephone conference that the Applicant submitted its entire PRA for both Catawba and McGuire. Tr. at 981-82. Further, a detailed summary of revisions and the results to the PRA was submitted by the Applicant. Tr. at 982-83.

[15] *See* Letter from Victor Nerses to T.C. McMeekin, "Staff Evaluation of the McGuire Nuclear Station, Units 1 and 2, Individual Plant Examination - Internal Events Only," NUDOCS Accession No. 94071102222 (June 30, 1994); Letter from Frank Rinaldi to H.B. Barron, "Review of McGuire Nuclear Station, Units 1 and 2 - Individual Plant Examination of External Events Submittal," NUDOCS Accession No. 9902230256 (February 16, 1999); Letter from Robert E. Martin to D.L. Rehn, "Safety Evaluation of Catawba Nuclear Station, Units 1 and 2, Individual Plant Examination (IPE) Submittal," NUDOCS Accession No. 9406130213 (June 17, 1994); Letter from Peter S. Tam to G.R. Peterson, "Catawba Nuclear Station - Review of Individual Plant Examination of External Events (IPEEE), NUDOCS Accession No. 9904160252 (April 12, 1999).

the available public documents or did so without the required sufficient care, because as the record shows, Dr. Lyman did not know that the PRA had been made available to the public. Tr. at 988.

Contentions 1, 3, and 6 could have been timely raised by the Intervenors based on the information contained in the Applicant's Environmental Report (ER) submitted with its LRA on June 13, 2001. Contention 1 alleges that the Applicant did not evaluate the alternative of not renewing the license. However, the Applicant did consider the non-renewal alternative in its ERs for both Catawba and McGuire. *See* Catawba Environmental Report, Chapters 6 and 7; McGuire Environmental Report, Chapter 6 and 7. If there was a problem with the discussion, the Intervenors should have raised it when the LRA was filed in order to be timely. The Intervenors assert in Contention 3 that the Applicant's RAI response does not support its conclusions regarding frequency of SBO and other events leading to core damage and containment rupture. In addition to lacking a factual basis, Contention 3 could have been raised at the beginning of this proceeding based on information in the ERs. In its ERs, the Applicant described a number of risk reduction measures and ongoing initiatives to further reduce risk associated with operations of Catawba and McGuire. *See* Catawba Environmental Report, Section 2.2, Table 2-1; McGuire Environmental Report, Section 2.2, Table 2-1. With regard to Contention 6, the lack of documentation regarding plume spreading parameters, the differences in consequence estimates for the Applicant's site-specific source term versus other source terms (such as RSEQ1), and the use of the 50-mile radius in the Applicant's dose calculations have all been evident since the filing of the LRA, yet the Intervenors failed to raise any timely contentions upon these bases. The Intervenor's "ironclad obligation" to review the public docket extends to the entire application. Intervenors here did not even begin to meet this obligation.

As set out above, the information upon which the Intervenors base their Contentions 1, 2, 3, 5, 6 and 7 has been evident since the LRA was filed, and they provide no justification that would warrant admission of these contentions over 11 months later. The Intervenors' "ironclad obligation"

extends beyond the application itself to all publicly available documents. *See* Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999) *id.* at 338. Using the information in the Applicant's ERs, the petitioners could have established "at least a threshold basis. . ." at the time contentions were due. *See Long Island Lighting Co.*, *supra*, 34 NRC at 176. "[I]t has long been a basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. *Oconee*, 49 NRC at 338-39 quoting *Catawba*, 17 NRC at 1048. The Intervenors clearly did not meet their obligation and their contentions should be dismissed as untimely.

As a final note, this very point was suggested by the Commission in its recent decision where it stated that "the amended contention seemingly attempts to insert numerous discrete new claims that arguably might have been raised earlier. . .." *See* CLI-02-28, slip op. at 19. As discussed above, these claims could have and are required to be raised earlier by the Intervenors.

C. STATE THE REASONS FOR ANY DEPARTURES FROM RECOGNIZED NRC GUIDANCE DOCUMENTS WITH REGARD TO ANY PARTS OF THE AMENDED CONTENTION

The Staff, reading the Board Order in conjunction with the Transcript, interprets this issue as pertaining to the Applicant. *See* Tr. 1202 (Judge Kelber stated "in preparing their environmental report, the Licensee had substantial regulatory guidance from a variety of documents, and I'd just like to know ... what circumstances indicate that that should be done."). Therefore, the Staff has not addressed this issue.

D. THE INTERVENORS' ARGUMENT THAT THEIR NEED TO REVIEW THE APPLICANT'S PRAs WAS NOT EVIDENT UNTIL SUBMISSION OF THE RAI RESPONSES IS WITHOUT MERIT.

In its Order, the Board requested that the parties address any other issues "that would otherwise be relevant." Order at 2. In response to the Board's Order the Staff herein addresses the arguments raised by the Intervenors in their Reply to the Responses from the Staff and Applicant. *See* Blue Ridge Environmental Defense League's and Nuclear Information and

Resource Service's Reply to Responses to Amended Contention 2 With Respect to the Issue of Timeliness (June 14, 2002) (Reply Brief). In their Reply Brief, the Intervenors argued that the Amended Contention 2 was timely. The Intervenors stated that their arguments were timely because they did not become aware of the deficiencies surrounding the Applicants PRAs until the Applicant updated its SAMA analysis in its response to RAIs. The Intervenors argue that they should be permitted to challenge the SAMA evaluations, as supplemented by the RAI responses, with respect to NUREG/CR-6427. This argument is untimely. Nothing in the Applicant's treatment of NUREG/CR-6427 with regard to its RAI responses is new information that would justify late filing. The later analysis done in response to the RAIs used the same bases and was carried out in the same way as the analysis in the environmental report submitted as part of the LRA. Therefore, the RAI responses, aside from including information from the Sandia study, did not involve a change in the documents that the Intervenors complain are inadequate.

CONCLUSION

For the reasons stated above, and in light of the Commission's decision in CLI-02-28, Amended Contention 2 is no longer viable.

Respectfully submitted,

/RA/
Antonio Fernández
Counsel for the NRC Staff

/RA/
Brooke G. Smith
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 7th day of February, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	Docket Nos. 50-336-LR
	)	50-370-LR
(McGuire Nuclear Station,	)	50-413-LR
Units 1 and 2,	)	50-414-LR
Catawba Nuclear Station,	)	
Units 1 and 2)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Admissions:	State of Maryland
Name of Party:	NRC Staff

Respectfully submitted,

/RA/
Brooke G. Smith
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of February, 2003

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(McGuire Nuclear Station,	)	50-413-LR
Units 1 and 2, and	)	50-414-LR
Catawba Nuclear Station	)	
Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO LICENSING BOARD ORDER OF FEBRUARY 4, 2003" and "NOTICE OF APPEARANCE" for Brooke G. Smith 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 7th day of February, 2003.

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