

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 RESPONSE
TO INTERVENORS' BRIEF FILED PURSUANT TO
LICENSING BOARD ORDER OF FEBRUARY 4, 2003

INTRODUCTION

On February 4, 2003, the Atomic Safety and Licensing Board (Board) issued an Order instructing the parties to brief certain issues and to file responses to the briefs filed by other parties (Order). The staff of the Nuclear Regulatory Commission (Staff) herein submits its response to the brief¹ filed by the Blue Ridge Environmental Defense League (BREDL) and Nuclear Information and Resource Service (NIRS) (collectively, "Intervenors").

DISCUSSION

A. The Intervenors Have Failed to Demonstrate That Amended Contention 2 Remains Viable, in Light of CLI-02-28 and Subsequent Publication of the Staff's Environmental Analyses.

The Intervenors' Brief contains little that is new or persuasive, and fails to demonstrate that Amended Contention 2, consisting of eight separate proposed contentions, is still viable. For example, the Intervenors argue that Proposed Contention 1 remains viable because the Supplemental Environmental Impact Statements (SEISs) for McGuire Nuclear Station and Catawba

¹ See BREDL and NIRS' Response to ASLB Questions Regarding Admissibility of Amended Contention 2, filed February 7, 2003 (Intervenors' Brief).

Nuclear Station² “do not explicitly consider the question of whether the option of license renewal should be preserved or abandoned” See Intervenors’ Brief at 7-8. However, as the Staff pointed out in its February 7, 2003 response to the Board’s Order, Proposed Contention 1 never challenged the Staff’s findings in the SEISs.³ In fact, Proposed Contention 1 is a contention of omission and, as stated by the Commission, the Intervenors had an obligation to update their contention in light of the Staff’s analysis of the no-action alternative in the SEISs. See CLI-02-28, slip op. at 14. Therefore, Proposed Contention 1 is not viable because it fails to address the Staff’s analysis of the no-action alternative in the SEISs, and the Intervenors have never challenged that analysis.

The Intervenors also argue, for the first time, that the Staff failed to consider “new information regarding the vulnerability of ice condenser containments.” Intervenors’ Brief at 8. However, as the Commission stated in CLI-02-28, the only new information relevant to severe accident mitigation alternatives (SAMAs) presented in NUREG/CR-6427⁴ was a delineation of the conditional containment failure probabilities (CCFPs) found by the study. See CLI-02-28, slip op. at 9. Since the Staff used CCFPs from that study when conducting the SEISs’ SAMA analysis, it is clear that the Staff considered the relevant new information that was presented in NUREG/CR-6427. See SEISs at Section 5. Consequently, the Intervenors’ allegation that the Staff did not consider relevant new information in that report is without merit.

² See 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); 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).

³ See NRC Staff’s Brief in Response to Licensing Board Order of February 4, 2003, filed February 7, 2003 (Staff’s Brief) at 6; see *also* BREDL and NIRS’s Amended Contention 2 at 4.

⁴ NUREG/CR-6427, “Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments.” (April 2000) (NUREG/CR-6427).

The Intervenor also argue that Proposed Contention 2 continues to be viable on the grounds that publication of the SEISs did not cure their concern that the Applicant's probabilistic risk assessments (PRAs) have not been published. See Intervenor's Brief at 8. As the Staff has stated before, since the Intervenor have never specified any reason why the publicly available information or the published analyses are incorrect, this argument essentially constitutes a request for information, rather than a contention. See Staff's Brief at 6. Furthermore, once the Staff published its SAMA analysis, the Intervenor never raised concerns relating to the SEISs. As the Commission made clear in CLI-02-28, the Staff's SAMA analysis differed from that performed by the Applicant. See CLI-02-28, slip op. at 17-18 ("The SEISs often go a step further, providing additional information, analysis, and reaching some conclusions different from Duke's."). The Intervenor failed to raise any concerns relating to these analyses in a timely fashion, and instead waited until they filed their brief in response to the Board's February 4, 2003 Order to challenge the SEISs' conclusions.⁵ These untimely challenges were never included as part of Amended Contention 2 and cannot properly be relied upon to sustain the viability of that contention.

The Intervenor then argue that the deficiencies complained of in Proposed Contentions 3, 4, and 5 remain viable because the Staff "relied unquestioningly on Duke's PRA." Intervenor's Brief at 9. This statement is incorrect. In fact, the Staff questioned the Applicant regarding its use of a lower core damage frequency (CDF) and performed an independent analysis of the information relating to CDF provided by the Applicant in response to the Staff's request for additional information. See Final SEISs at §5.2.2.2. Additionally, the Staff performed an independent

⁵ The Intervenor state that Duke's failure to publish its PRA "has not been addressed by the publication of the SEISs for Catawba and McGuire By making key decisions that are fundamentally based on secret information, the NRC has violated NEPA." See Intervenor's Brief at 8. This argument is without merit. The Staff's analyses and the information relied upon are documented in the SEISs and the relevant information the Staff has relied on is in the public docket. To the extent that any information or underlying calculations were not submitted by the Applicant to the NRC in support of its PRA, that information could not have been relied upon by the Staff.

analysis of the Applicant's SAMA evaluation and reached different conclusions than the Applicant concerning SAMAs. See Final SEISs at §5.2.6.2. The Intervenors, however, failed to challenge the Staff's analysis and conclusions prior to their filing on February 7, 2003. Therefore, by failing to address the final agency document prepared to satisfy the NRC's NEPA responsibilities, the Intervenors have rendered their contentions nonviable. Cf. CLI-02-28, slip op. at 7.

In Proposed Contention 8, the Intervenors challenged the Applicant's assertion that air return fans were essential for hydrogen igniters to function and agreed with the Staff's conclusion that it was not clear that the air return fans were necessary. See Amended Contention 2 at 17. In their brief, however, the Intervenors raise a new and untimely claim that their issues have not been resolved by issuance of the SEISs because "the NRC has not reached a firm conclusion about whether hydrogen igniters are justified." Intervenors' Brief at 7. However, the Intervenors did not address the late-filing standard set out in 10 C.F.R. 2.714(a)(1) and failed to state why their new claim should be admitted at this late date. Therefore, the Intervenors's argument regarding the Staff's conclusions is untimely.

Further, since the Staff concluded that the SAMA was cost beneficial, "it is unclear what additional result or remedy would prove meaningful to the Intervenors." CLI-02-28, slip op. at 22. As the Commission made clear, the final "decision on whether *to require* facilities with ice condenser containments to implement any particular SAMA will fall under a Part 50 current licensing basis review." *Id.* at 22 n.77. In light of (a) the Staff's conclusion regarding the use of hydrogen igniters at Catawba and McGuire, and (b) the Commission's unequivocal statement that the decision whether to implement a particular SAMA would not be made as part of the Part 54 license renewal process, the Intervenors have no valid basis to assert that their concerns have not been addressed.

Additionally, the Intervenors have failed to demonstrate that a genuine dispute as to any material issues of law or fact remain regarding the SAMA analysis. See 10 C.F.R. §2.714(b)(2)(iii). In Amended Contention 2, the Intervenors failed to state what relief could be granted to them. See Staff's Answer to BREDL and NIRS Amended Contention 2 at 11-25. In particular, the Intervenors failed to address how the Staff's finding of a cost-beneficial SAMA regarding hydrogen igniters affected their concerns.

For the reasons set forth above and in the Staff's Brief of February 7, 2003, the Intervenors have failed to demonstrate that Amended Contention 2 and subparts are viable.

B. The Intervenors Failed to Demonstrate That Amended Contention 2 Was Timely Filed.

The Intervenors fail to show how Amended Contention 2 is based on new information that would make it timely. Amended Contention 2 could have been filed by the Intervenors when contentions were originally due in November 2001, based on information that was publicly available at that time. It is well established that a person who seeks to intervene in an NRC adjudicatory proceeding "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." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). The Intervenors argue that they did satisfy their "ironclad obligation" when they "review[ed] Duke's original licensing documents when those documents were filed." Intervenors' Brief at 9. However, the Intervenors' "ironclad obligation" is not only to examine the application, but to examine all publicly available information in a timely manner. A mere review of the license renewal application (LRA) does not come close to meeting the obligation. For instance, the IPE,⁶ the IPEEE,⁷ the Staff's evaluation of the IPE, and the Staff's

⁶ See Letter from H.B. Tucker to U.S. Nuclear Regulatory Commission, "McGuire Nuclear
(continued...)"

evaluation of the IPEEE⁸ were all publicly available when the application was filed and could have supported the filing of a timely contention at that time.

The Intervenor contend that Proposed Contentions 1 through 8 raise questions regarding the manner in which NUREG/CR-6427 was considered by the Applicant. But, as noted by the Commission in CLI-02-28, "the amended contention seemingly attempts to insert numerous discrete new claims that arguably might have been raised earlier, or that have little to do with the Sandia study." CLI-02-28, slip op. at 19; see *also* Staff's Brief at 5. As previously stated by the Staff in its response to Intervenor's Amended Contention 2 and again in its response to the Board's Order of February 4, 2003, this information was in the LRA and the PRAs which were available at the time original contentions were due.⁹ Therefore, if the Intervenor had concerns with respect

⁶(...continued)

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)

⁷ 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).

⁸ 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).

⁹ See NRC Staff's Answer to BREDL/NIRS Amended Contention 2 at 10-25; Staff's Brief at 8-15; see *also*, Applicant's Brief at 14-15.

to the adequacy of the Applicant's analysis, they had a duty to raise those concerns when the original contentions were due.

As observed by the Commission in CLI-02-28, "the only new information in the Sandia study that is relevant to Duke's SAMA analysis consists of conditional containment failure probabilities found by the study." CLI-02-28, slip op. at 9. However, with respect to station blackout (SBO) frequency, no new information and no new findings were revealed by NUREG/CR-6427. *Id.* The Intervenor could have raised a specific claim about SBO frequency, related issues in core damage frequency profile for McGuire and Catawba, or the Applicant's use of the PRA revision 2 based upon the information in the environmental reports (ERs) at the time original contentions were due. *Id.* at 11. Having failed to raise these concerns in a timely manner, they may not inject these late-filed concerns now, into their previously filed contentions.

In sum, when the Intervenor invoked their right to participate in this proceeding relating to the license renewal of Catawba and McGuire, they voluntarily accepted the obligations that attach to such participation. As part of those obligations, they were required to search the publicly available documents with sufficient care to enable them to uncover any information that was of concern to them and that could serve as a basis for contentions. The Staff respectfully submits that the Intervenor here have clearly failed to meet this obligation.

CONCLUSION

For the reasons set forth above and in the Staff's Brief of February 7, 2003, the Staff respectfully submits that Amended Contention 2 is not viable and was not timely filed. Accordingly, Amended Contention 2 is inadmissible for litigation in this proceeding.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 12th day of February, 2003

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO BRIEFS FILED PURSUANT TO LICENSING BOARD ORDER OF FEBRUARY 4, 2003" 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 12th day of February, 2003.

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