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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

February 11, 2003 (3:08PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	
)	Docket Nos. 50-369 - LR
DUKE ENERGY CORPORATION)	50-370 - LR
)	50-413 - LR
(McGuire Units 1 and 2, and)	50-414 - LR
Catawba Units 1 and 2))	

DUKE ENERGY CORPORATION'S RESPONSE TO ISSUES RAISED
BY THE LICENSING BOARD IN THE JANUARY 31, 2003
CONFERENCE CALL AND FEBRUARY 4, 2003 ORDER

I. INTRODUCTION

On January 31, 2003, the Atomic Safety and Licensing Board ("Licensing Board") held a conference call in this proceeding involving the application of Duke Energy Corporation ("Duke") to renew the NRC operating licenses for its McGuire Nuclear Station ("McGuire") and Catawba Nuclear Station ("Catawba"). The call was convened for the purpose of addressing "all issues arising out of the Commission's Memorandum and Order, CLI-02-28."¹ During the call, the Licensing Board dismissed as moot NIRS/BREDL Consolidated Contention 2.² The only matter remaining in this proceeding, therefore, is the question of the admissibility of the Intervenor's late-filed proposed amended contentions, submitted on May 10, 2002. The

¹ See "Order (Ruling on Motion for Extension and Scheduling Telephone Conference)," slip op. at 3 (Jan. 3, 2003). The Commission's Memorandum and Order, CLI-02-28, was issued in this proceeding on December 18, 2002.

² Consolidated Contention 2 was re-formulated from separate contentions proposed by the Blue Ridge Environmental Defense League ("BREDL") and the Nuclear Information and Resource Service ("NIRS") (collectively, "Intervenor's").

Licensing Board asked the parties to brief the following with respect to the admissibility question:

- 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, *see* CLI-02-28, slip op. at 17-18;
- 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 Intervenor in examining publicly available documentary material, *see* CLI-02-28, slip op. at 18-20, in light of any ambiguity and confusion surrounding certain issues, *see id.* at 16, and any related "scope" issues, *see id.* at 19;
- c. reasons for any departures from recognized NRC guidance documents with regard to any parts of the amended contention; and
- d. any other issues arising out of CLI-02-28 or that would otherwise be relevant.³

Duke's views on these matters are set forth below.

In brief, all of the Intervenor's proposed amended contentions are inadmissible because they are no longer viable in light of (1) the issuance of the NRC's license renewal final Supplemental Environmental Impact Statements ("SEISs") for McGuire and Catawba, and (2) the Commission's guidance in CLI-02-28. Consistent with CLI-02-28, the issues raised by the proposed contentions, as characterized by the Intervenor themselves, have been mooted or cured by the SEISs.

Additionally, and also consistent with CLI-02-28, the untimely filing of the Intervenor's proposed amended contentions cannot be justified. These issues could have been raised earlier had the Intervenor complied with their "ironclad obligation" to "examine the

³ *See* "Order (Ruling on Duke Motion to Dismiss, Setting Briefing Deadlines, and Scheduling Oral argument on Amended Contention 2)," slip op. at 2 (February 4, 2003).

publicly available documentary material” pertaining to McGuire and Catawba with “sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.” The Intervenor’s failure to meet this obligation has been repeatedly evidenced in this proceeding.

In response to the third issue raised by the Licensing Board, there is no justification at all, with respect to any of the proposed amended contentions, for any departures from recognized NRC guidance documents in an effort to provide a basis for the contentions. Finally, in response to the Licensing Board’s last issue, to the extent the proposed amended contentions raise new issues, with some unforeseen justification for late filing, the contentions still lack a basis sufficient to establish a genuine dispute on a material issue of fact. Accordingly, the proposed amended contentions must be rejected in total.

II. BACKGROUND

BREDL/NIRS Consolidated Contention 2 was a challenge to Duke’s original evaluations of Severe Accident Mitigation Alternatives (“SAMA”), submitted as part of the license renewal Environmental Reports (“ERs”) included with the application.⁴ These original SAMA evaluations utilized plant-specific information from Duke’s McGuire and Catawba Probabilistic Risk Assessments (“PRAs”) to assess the averted risk benefit of potential mitigation alternatives for postulated beyond-design-basis accidents. Consolidated Contention 2 was based entirely on the Sandia Laboratories Level 2 assessment of conditional early containment failure

⁴ Duke’s license renewal SAMA evaluations were originally submitted as Attachment K to the McGuire license renewal ER and Attachment H to the Catawba license renewal ER, both filed with the NRC on June 13, 2001.

probabilities, given core damage, for Westinghouse plants with ice condenser containments, as reported in NUREG/CR-6427.⁵

On January 31 and February 1, 2002, Duke submitted supplemental SAMA evaluations in response to NRC Staff Requests for Additional Information (“RAIs”). These supplemental SAMA evaluations specifically incorporated the Level 2 conditional containment failure probabilities from the Sandia study. Duke re-calculated the risk benefits of the relevant proposed mitigation alternatives, and compared those benefits to the estimated project costs. The NRC Staff has now relied upon and incorporated information from the supplemental SAMA evaluations in the draft⁶ and final⁷ SEISs for Catawba and McGuire.

On May 20, 2002, the Intervenors filed a series of proposed, late-filed contentions purportedly amending the previously admitted Consolidated Contention 2.⁸ Duke opposed admission of the proposed amended contentions in two separate filings. *See* “Response of Duke Energy Corporation to Proposed Late-Filed Contentions” (June 10, 2002) (“Duke’s June 10 Response”) and “Response of Duke Energy Corporation to July 15, 2002 Licensing Board

⁵ *See* NUREG/CR-6427/SAND99-2253, “Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments” (April 2000).

⁶ *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 Section 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 Section 5.2.

⁷ *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) at Section 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 Section 5.2.

⁸ *See* “Blue Ridge Environmental Defense League’s and Nuclear Information and Resource Service’s Amended Contention 2” (May 20, 2002) (“Proposed Amended Contentions”).

Order” (July 22, 2002) (“Duke’s July 22 Response”). Duke argued that, in proposing these contentions, the Intervenors had either exceeded the scope of Consolidated Contention 2 and failed to meet the late-filing standards of 10 C.F.R. § 2.714(a)(1), or otherwise failed to demonstrate, with basis, the existence of a genuine issue within the scope of the proceeding that would be admissible under 10 C.F.R. § 2.714(b).

On December 18, 2002, the Commission issued Memorandum and Order, CLI-02-28, in this proceeding. The issuance of CLI-02-28 triggered Duke’s December 23, 2002, motion to dismiss Consolidated Contention 2. No party opposed Duke’s motion. The Licensing Board dismissed Consolidated Contention 2 during the January 31, 2003 conference call, and subsequently confirmed that dismissal in its February 4, 2003 Order.⁹ Thus, the only matter remaining in this proceeding is the question of the admissibility of Intervenors’ eight proposed amended contentions.

III. DISCUSSION

A. The Proposed Amended Contentions Are Not Viable in Light of the Commission’s Decision in CLI-02-28 and the NRC Staff’s SEISs

In light of the Commission’s decision in CLI-02-28, and the NRC Staff’s issuance of the final SEISs, the proposed amended contentions are not viable — they do not raise any genuine dispute on a material issue of law or fact and fail to identify any further relief available in this license renewal proceeding. In effect, like Consolidated Contention 2 from which they sprang, the proposed amended contentions have been mooted. The proposed amended contentions must therefore be rejected in total.

⁹ See February 4, 2003 Order (slip op. at 1).

The eight proposed amended contentions were filed to address Duke's January 31 and February 1, 2002, responses to the NRC Staff's RAIs regarding the McGuire and Catawba SAMA evaluations, respectively. In the RAI responses Duke had provided a re-evaluation of the cost-benefit assessments of SAMAs directed at the issue of containment failure in a station blackout ("SBO") scenario, as identified in NUREG/CR-6427. The RAI responses utilized the NUREG/CR-6427 conditional containment failure probabilities as the Level 2 input in the SAMA supplemental evaluations to reconsider the averted risk or benefit values for mitigation alternatives directed at the scenario of concern. Those mitigation alternatives included measures such as installing ac-independent back-up power to the plants' hydrogen igniters and/or air-return fans. The proposed amended contentions were focused on demonstrating why Consolidated Contention 2 was not moot.

As stated by the Intervenors themselves at the time, the proposed amended contentions were intended to focus on the issue of the value (or averted risk benefit) of a SAMA to address the containment failure vulnerability highlighted by NUREG/CR-6427. The Intervenors wrote that: "The only change the Intervenors intend to make to the contention [*i.e.*, to the original admitted Consolidated Contention 2] is to provide specific information about the deficiencies in Duke's discussion of NUREG/CR-6427 and the dedicated line alternative."¹⁰ See Proposed Amended Contentions, at 3. Necessarily, therefore, by the Intervenors' own characterization, the proposed amended contentions were limited to the Sandia issue and the

¹⁰ The dedicated transmission line was not addressed further in the proposed amended contentions. That issue has since been dismissed by the Commission. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-02-17, ___ NRC ___, slip op. at 14-17 (July 23, 2002).

related RAI responses, and sought further evaluation and discussion of the mitigation alternatives related to powering the hydrogen control system in an SBO event.

Given that the amended contentions were offered solely to challenge the supplemental SAMA evaluations of the issue of early containment failure in an SBO scenario, the amended contentions are now moot for the same reason Consolidated Contention 2 is moot. The SAMA issue of concern has now been addressed in the Staff's final SEISs in a way fully compatible with the Intervenor's objectives in the proposed contentions (*i.e.*, the contentions "have been cured"). The NRC Staff has concluded that, given uncertainties and sensitivities, if only a subset of hydrogen igniters needs to be powered during an SBO, a less expensive SAMA "is within the range of averted risk benefits and would warrant further consideration." *See* McGuire SEIS, at 5-30; Catawba SEIS, at 5-28 - 5-29. However, as stated in the SEISs, that SAMA identified as potentially cost-beneficial does not relate to the question of adequately managing the effects of equipment aging. *Id.* Therefore, the SAMA evaluations required for license renewal are complete with respect to this issue. The ultimate questions of whether a SAMA related to hydrogen control in an SBO is cost-beneficial, and whether changes to the Part 50 current licensing basis ("CLB") should be required for McGuire, Catawba, or other affected plants, are matters being examined in connection with the NRC's resolution of Generic Safety Issue ("GSI-189"). *Id.* The maximum relief possible on this issue in a license renewal proceeding has been granted.

In CLI-02-28, the Commission observed that, in light of the Staff's issuance of the draft SEISs, there is no point any longer in focusing on Duke's RAI responses, because "many of the concerns in the amended contention may have been cured by the [NRC] Staff's SAMA analyses, found in the draft SEISs." CLI-02-28, at 18. The NRC Staff has now issued

the final SEISs. The final SEISs resolve any proposed contention focused on the SAMA evaluations of the NUREG/CR-6427 issue. As the Commission observed, given the conclusion that a SAMA related to ac-independent back-up power appears to be cost-beneficial, “it is unclear what additional result or remedy would prove meaningful to the intervenors.” *Id.* at 22 (footnote omitted). Indeed, because all of the proposed amended contentions were by definition a clarification of Consolidated Contention 2 addressing the NUREG/CR-6427 issue, no further relief is available in this proceeding and the proposed amended contentions all must be dismissed. *See* 10 C.F.R. § 2.714(d)(2).

As Duke has discussed in prior responses to the proposed amended contentions, the Intervenor may not in this proceeding litigate any further the issue of the resolution of GSI-189. *See* Duke’s June 10 Response, at 6-13. GSI-189 does not involve any equipment aging issue within the scope of a Part 54 license renewal review, and the proposed amended contentions do not assert otherwise. GSI-189 is being examined as a present-day CLB issue. The strict dichotomy between license renewal and current Part 50 issues is one of the fundamental principles of license renewal.¹¹ This fundamental principle is reflected in the Commission’s recent decision. *See* CLI-02-28, at 22, fn 77 (where the Commission emphasized that “the ultimate agency 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”) (emphasis in original). Therefore, any further evaluation in this proceeding of the SAMAs directed at the NUREG/CR-6427 scenario is unwarranted and inappropriate. This

¹¹ *See* “Nuclear Power Plant License Renewal; Revisions” (final rule), 60 Fed. Reg. 22,461, 22,463-64 (May 8, 1995).

conclusion is unaffected by the fact that the issue was first raised in connection with the SAMA evaluations. *See* Duke's July 22 Response, at 8-17.

Intervenors insinuate that further relief is required in this license renewal proceeding under the National Environmental Policy Act ("NEPA"), and that the relief required is further public discussion of the detailed issues involved in the evaluation of the mitigation alternatives related to NUREG/CR-6427. However, further discussion in this license renewal proceeding cannot be justified where there can be no further relief on the very issue to be discussed. Any further discussion elicited by the proposed amended contentions would merely revolve around the details of the cost-benefit assessment of the mitigation alternatives — where the NRC Staff has already found a lower cost alternative to be potentially cost-beneficial. Such discussions are now unnecessary given the conclusions of the SEISs. A license renewal adjudicatory proceeding is not an academic forum.¹²

As one possible issue for such further discussion, proposed amended Contention 3 points to the SBO frequency, or perhaps the SBO contribution to core damage frequency, utilized in Duke's SAMA evaluations. The SBO contribution to core damage frequency is a Level 1 input to the SAMA evaluations. However, while further discussion of this issue may lead to some different views on the risk benefit of SAMAs related to the events in question, those discussions cannot lead to any better result for the Intervenors. Discussions, merely for the sake of discussion, cannot be relief available in this proceeding.

Similar requests for further discussion of issues surrounding the cost-benefit evaluation of the alternatives for providing power to the hydrogen control system appear to be

¹² Stated another way, there is no reason in this forum to discuss the validity of the Staff's conclusions in the SEISs that a SAMA is cost-beneficial, or even the degree of the risk benefit offered by those mitigation alternatives.

inherent in proposed amended Contention 2 (requesting publication and discussion of the Duke PRAs), proposed amended Contention 4 (related to “departures” or differences between the original SAMA evaluations utilizing PRA Level 2 values and the supplemental SAMA evaluations utilizing NUREG/CR-6427 Level 2 values), proposed amended Contention 6 (focusing on the Level 3 model used in the SAMA evaluations), and proposed amended Contentions 5 and 7 (addressing uncertainties and peer review related to the PRAs). Here again, any such discussions cannot lead to any better result for the Intervenor than that already given by the SEISs with respect to the relevant mitigation alternatives.

The Intervenor has argued that NEPA requires a “hard look” at relevant environmental issues. However, the NEPA “hard look” has limits. In *Natural Resources Defense Council v. Morton*, the court stated that:

So long as the officials and agencies have taken the “hard look” at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken.¹³

In the present case, the NRC Staff, as documented in the SEISs, has taken the requisite “hard look.” The NRC has fully considered the SAMA issue as relevant for license renewal, as required by 10 C.F.R. § 51.53(c)(3)(ii)(L). Thus, the argument that further public discussions are somehow required under NEPA is specious.

Specifically, the Commission has previously found, as a generic matter, that the environmental impacts of postulated severe accidents are “small.” See 10 C.F.R. Part 51, Appendix B, Subpart A, Table B-1. The Commission’s regulations require only that alternatives to mitigate severe accidents be *considered* for plants, such as McGuire and Catawba, where the

¹³ *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

NRC has not previously evaluated such alternatives in an environmental impact statement.¹⁴ The NEPA evaluation of the SAMA issue need be no more than to that level necessary to allow an informed decision on the topic in the context of license renewal. For license renewal, the relevant issues are whether any SAMA is potentially cost-beneficial and, if so, whether that SAMA involves equipment aging relevant to the period of extended operation. *See* CLI-02-28, at 22, fn. 77. Duke's SAMA evaluations and the SEISs have been reasonable, responsible evaluations of precisely these issues. The SEISs conclude that one lower cost SAMA is cost-beneficial under certain assumptions, but that SAMA does not relate to equipment aging and need not be implemented as part of license renewal. Further analysis or evaluation is not required in order to meet either NEPA or 10 C.F.R. Part 51, particularly where the NRC is now considering possible CLB changes. *See also* Duke's July 22 Response, at 11.

The Intervenor's argument for further public discussion also does not support inflating the SAMA evaluation, and the process under NEPA for license renewal, to the equivalent of a Part 50, CLB revision process. Indeed, under NEPA, the NRC's Part 51 regulations provide a process for full discussion of material environmental issues, including the relevant SAMA issues. This process for McGuire and Catawba included meetings near the location of the plant sites, at which the Intervenor was free to provide input.¹⁵ Moreover, the

¹⁴ *See* "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses" (final rule), 61 Fed. Reg. 28,467, 28,481-82 (June 5, 1996) (the Commission described the scope of the license renewal SAMA review as merely "determin[ing] whether [the applicant's SAMA analysis] constitutes a reasonable consideration of [SAMAs]").

¹⁵ As part of the NEPA scoping process conducted in connection with the McGuire and Catawba license renewal application, the NRC held public scoping meetings. Government agencies, local organizations, and individuals were invited to participate in the scoping process by providing oral comments at the meetings and/or by submitting written comments. At the September 25, 2001 public scoping meetings for McGuire, the individuals presenting comments included Mr. Lou Zeller and Mr. Don Moniak, both of whom listed their affiliation with BREDL. Both of these individuals spoke at both the

Part 50 process related to GSI-189 will involve appropriate opportunities for public discussion and input. Indeed, NIRS has already provided input to the Advisory Committee on Reactor Safeguards (“ACRS”) on the GSI-189 issue.¹⁶ A Part 54 adjudicatory hearing must focus on genuine issues in dispute that are material to the license renewal decision. It is not the forum for further exploration of the SAMA issues or the GSI-189 issues. Neither NEPA nor Part 51 requires any further discussions, much less litigation, of the issues raised in the proposed amended contentions.

In sum, all of the proposed amended contentions were, by the Intervenor’s own definition, focused on whether there is a cost-beneficial SAMA related to the issue of early containment failure in an SBO event, as identified in NUREG/CR-6427. This issue has been resolved in the SEISs. The appropriate Part 50 process has been initiated. It would serve no purpose to litigate in this renewal proceeding the degree of the averted costs or risk benefits, the assumptions that form the basis for the conclusions in the SEISs, or the ultimate generic CLB resolution — nor would such litigation be permissible under the regulations. No further relief is available in this proceeding and all of the proposed amended contentions are moot.

afternoon and evening sessions of the public meeting. *See* NUREG-1437, Supp. 8, Appendix A, pp. A-1 -- A-3. Similarly, at the October 23, 2002 public scoping meetings for Catawba, the individuals who provided comments included Mr. Lou Zeller, Ms. Janet Zeller, and Mr. Don Moniak, all three of whom listed their affiliation with BREDL. Each of these individuals spoke at both sessions of the public meeting. *See* NUREG-1437, Supp. 9, Appendix A, pp. A-1 -- A-3.

¹⁶ Letter, Paul Gunter, Director, Nuclear Information and Resource Service, to Secretary, U.S. Nuclear Regulatory Commission, “Comments of Nuclear Information Resource Service on the Proposed Rule for Combustible Gas Control in Containment,” dated October 15, 2002.

B. The Commission's Decision Supports the Conclusion that the Proposed Amended Contentions Are Late-Filed Without Good Cause

As discussed above, to the extent the proposed amended contentions were focused on the supplemental evaluations of the issue raised by NUREG/CR-6427, as indeed the Intervenor proclaimed them to be, the proposed amended contentions are no longer viable. However, Duke recognizes, as it did in its prior responses to these proposed contentions, that the amended contentions actually appear to be based on matters beyond the scope of the RAI responses, and appear to seek relief unrelated to the SAMA evaluations relevant to the NUREG/CR-6427 scenario. For example, the proposed amended contentions could be construed to challenge matters beyond the incorporation of the conditional early containment failure probabilities from NUREG/CR-6427 in the Level 2 analysis of the SAMAs related to containment failure in an SBO, and to raise issues that apply to the evaluation of any mitigation alternative for any severe accident considered in the original SAMA evaluation.¹⁷ To the extent this is true, for reasons previously argued by Duke and as further supported by guidance from the Commission in CLI-02-28, the proposed amended contentions fail because they are late without good cause in accordance with 10 C.F.R. § 2.714(a).

The Commission in CLI-02-28 confirmed the view previously expressed by Duke, stating that “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, at 19. The Commission stressed a hearing petitioner’s “ironclad obligation

¹⁷ For example, the proposed amended Contention 1 challenges the original Environmental Report with respect to the “no action” alternative. Proposed amended Contentions 2, 5, and 7 challenge the PRA itself (regarding its availability, its treatment of uncertainties, and the peer review). Proposed amended Contention 6 challenges the Level 3 model used for all of the SAMA evaluations. *See, e.g.,* Duke’s June 10 Response, at 6-16.

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 would serve as a foundation for a specific contention.” *Id.* The Commission’s observation underscores the burden on the Intervenors to justify the late filing of any new, free-ranging issues. In a prior conference call in this proceeding, the Licensing Board indicated its inclination to find no good cause for late filing of those parts of the proposed amended contentions outside the scope of Consolidated Contention 2 and outside the scope of the RAI responses (without identifying or limiting what those parts were). Tr. 1072-73 (July 29, 2002). The Licensing Board should now rule on these amended contentions consistent with its earlier inclination, and find that the proposed amended contentions are late-filed with no good cause. *See also* Duke’s June 10 Response, at 16-18.

Duke will not repeat here all of its earlier arguments on timeliness, including its detailed, issue-by-issue arguments. *See* Duke’s June 10 Response, at 18-53. However, as a general matter, timeliness and good cause must be considered in light of the Commission’s clear standard for a petitioner’s obligation and the substantial information publicly available long before the filing of the proposed amended contentions in May 2002. Substantial information on the Duke SAMA evaluations and the McGuire and Catawba PRAs was available at the time the original license renewal application and Environmental Reports were filed, and even before. As an example, the Duke SAMA evaluations in the Environmental Reports submitted in the June 2001 application provided fulsome descriptions of the approach used in the evaluations and the results calculated. The proposed amended contentions all raise issues that could have been raised based on those descriptions. Furthermore, the Intervenors, while constantly clamoring for access to the Duke PRA’s, have never given any indication that they have ever even looked for

information on the PRAs that was available, much less reviewed that information with any “care.” *See, e.g.*, Tr. 980-85 (July 10, 2002).

Focusing on the PRA argument, the McGuire and Catawba ERs both included a Section 8.0, “References,” specifically pointing to some of the previously available information on the PRA.¹⁸ These References include the McGuire and Catawba Individual Plant Examination (“IPE”) submittals (November 1991 for McGuire, September 1992 for Catawba), the Individual Plant Examination of External Events (“IPEEE”) submittals (June 1994 for both McGuire and Catawba), and the NRC’s evaluations closing out the IPEs and IPEEEs for McGuire and Catawba. The McGuire References also included Duke’s March 19, 1998 submittal to the NRC of the McGuire Nuclear Station PRA Revision 2 Summary Report (December 1997). Duke submitted the Catawba PRA Revision 2 Summary Report (January 1998) to the NRC on February 25, 1998. That submittal is referenced in correspondence of April 8, 2001, to the NRC on the Catawba PRA Revision 2b, which correspondence is cited in the ER, Section 8.0 References.¹⁹ In this light, the Intervenor’s complaints are superficial; their

¹⁸ Counsel for Duke also wrote a letter to the representatives of NIRS and BREDL in April 2002, specifically pointing out these references.

¹⁹ The PRA Summary Reports for both McGuire and Catawba are, contrary to any impression that might be given by the title, substantial documents (almost 2 inches thick, double-sided). To use the McGuire report as an example, Chapter 3.0 of that report provides 35 pages of discussion, plus tables, describing the development of the Level 1 core damage frequency assessments. An SBO event involves a loss of offsite power to the Station (a “LOOP”) and a failure of both emergency diesel generators. Therefore, as potentially relevant to any issue related to Duke’s calculation of SBO contribution to core damage frequency, initiating event frequencies related to a LOOP are listed on page 3.5. Equipment reliability data, including diesel generator data, is provided in Table 3.1.1-1. Specific diesel generator failure rates are listed in Table 3.1.5-1 (page 6 of 6) and system model summaries, related to failure probabilities, are included in Appendix A (including the diesel generator system at A.10). Accordingly, as just one example, there was ample information available at the time the license renewal application was submitted to provide a foundation for any proposed contention that might have challenged Duke’s plant-specific Level 1 models or data.

challenges in the proposed amended contentions are simply late, for no good reason. (Whether there is any basis provided by the Intervenors for a challenge to Duke's PRA data or models is a wholly separate question, addressed further below.)²⁰

The "ironclad obligation" cited by the Commission is not a new standard. As long ago as 1982, an NRC Atomic Safety and Licensing Appeal Board articulated the same obligation in addressing the admissibility of certain contentions raised in the *Catawba* operating license proceeding.²¹ The Appeal Board recalled its previous rejection (a decade earlier) of an argument that a petitioner could not formulate specific contentions until they had access to discovery, and emphasized the availability of "abundant" information about a nuclear facility (including at least the safety analysis report and environmental reports) when an application is filed that could be the source of information for a contention.²² On review, the Commission in *Catawba* went even further. The Commission emphasized that "an intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material," including the application. *Catawba*, CLI-83-19, 17 NRC at 1048. It further found that even the "institutional unavailability of a licensing-related

²⁰ Diesel generator failure information, or even loss of offsite power information, would also be publicly available, industry-wide, in Licensee Event Reports filed pursuant to 10 C.F.R. § 50.73.

²¹ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467-68 (1982), *vacated in part*, CLI-83-19, 17 NRC 1041, 1047 (1983).

²² *Duke Power Co.*, ALAB-687, 16 NRC at 467-68. In this decision, the Appeal Board referred to earlier rulings in *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188 (1973), *affd.*, CLI-73-12, 6 AEC 241 (1973), *affd. sub nom. BPI v. AEC*, 502 F.2d 424 (D.C. Cir. 1974).

document does not establish good cause for filing a contention late if information was available early enough to provide the basis for the timely filing of that contention.” *Id.*²³

More recently, the Commission cited the “ironclad obligation” in affirming the Licensing Board’s rejection of a petitioner’s demands that they be granted at least an additional 90 days after the applicant’s response to NRC RAIs to submit proposed contentions relating to Duke’s *Oconee* license renewal application.²⁴ Here, after failing to examine the licensing documents and other available material with “sufficient care” to detect possible bases for a contention, and to offer their own basis for a challenge to the application, the petitioners had instead “come forward only with what amounts to generalized suspicions, hoping to substantiate them later as the NRC Staff conducts its own safety review.” *Oconee*, CLI-99-11, 49 NRC at 338. Such a fishing expedition, emphasized the Commission, is barred by the 1989 amendments to the contention rule in 10 C.F.R. Part 2, as well as by other precedent. *Id.*²⁵ The situation

²³ The Commission also found that, even if the unavailability of a licensing document supported a finding of “good cause” for late-filing, the remaining late-filing criteria of 10 C.F.R. § 2.714(a) must still be applied. *Id.* at 1046.

²⁴ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999) (“The Petitioners’ demand that initiation of the NRC hearing process await completion of NRC Staff reviews would turn our adjudicatory process on its head. Under our practice, a petitioner has an ‘ironclad obligation’ to examine the application, and other publicly available documents, with sufficient care to uncover any information that could serve as the foundation for a contention.”)

²⁵ In addition to its continuing references in NRC case law to the “ironclad obligation” of hearing petitioners, the NRC included an explicit reference to this standard in the 1989 amendments to 10 C.F.R. Part 2. See “Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process” (final rule), 54 Fed. Reg. 33,168, 33,170 (August 11, 1989).

presented in the *Oconee* decision parallels this proceeding, wherein Intervenors have pushed (prematurely) for discovery in an apparent effort to find support for proposed contentions.²⁶

In the present case, the Commission, in CLI-02-28, at 20-21, also cited *Oconee* and emphasized, as Duke has previously, the difference between pleading contentions and discovery. The Licensing Board should reject any attempts to justify lateness based on an alleged need for access to more information prior to framing a more-detailed contention — whether that information be a PRA, a summary report, or any other information that might later become available during discovery. The focus of a proposed contention must be on the application.²⁷ The burden to find a basis to challenge the application is the petitioner's burden. It is not the applicant's obligation, or even the NRC's, to assure that the petitioner — prior to discovery — has everything the petitioner might want in order to plead contentions. The “sufficient care” standard does not limit or qualify the petitioner's burden — it is not a standard of “due” care or “reasonable” care. Rather, the standard is results-oriented — it requires the

²⁶ See also *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146-47 (1993) (As the basis for its contention that the applicant's Environmental Report was inadequate, petitioner relied upon the fact that the NRC Staff had asked the applicant to provide additional analysis. This basis was deemed insufficient to establish a genuine issue of law or fact. Later, after the prehearing conference, the petitioner sought to amend its contention to challenge the sufficiency of the additional information that the applicant provided. The Commission agreed that the petitioner was remiss in failing to make this argument earlier, when it relied on the Staff's questions alone as the basis for the contention. The Commission cited petitioner's “ironclad obligation” to examine the publicly available information (here, the ER, the Staff's additional questions relating to the ER, and the information provided by the applicant in response) with sufficient care to uncover any information that could serve as the basis for a contention.); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313-14 (1999).

²⁷ See *Oconee*, CLI-99-11, 49 NRC at 338 (“[i]t is the license application, not the NRC Staff review, that is at issue in our adjudications”) (citations omitted).

petitioner to exercise whatever care is necessary or sufficient under the circumstances to support a proposed contention.

The Commission in CLI-02-28 flags one potential argument that the Intervenors might make on the lateness question. The Commission notes the confusion in this proceeding on the issue of the scope of the original Consolidated Contention 2, and suggests that the Intervenors may have believed that filing an amended contention was unnecessary to raise some of the matters now raised in the proposed amended contentions. CLI-02-28, at 16. Even this argument would be completely deficient. Given the information available on the SAMA evaluations and the PRAs at the time of the license renewal application (and even before), any challenge to the PRAs, the Level 1 inputs, the Level 3 models, or any other aspect of those analyses, could have and should have been articulated at the time proposed contentions were originally due in 2001. Moreover, there could be no reasonable belief that such broad-based challenges to the PRAs and the SAMA evaluations — *i.e.*, beyond the scope of the scenario raised in NUREG/CR-6427 and the mitigation alternatives to address that scenario — were somehow already within the scope of the original Consolidated Contention 2. (And, as is discussed above, if they were within scope, they are now moot.) Therefore, this argument cannot possibly supply good cause for late-filing.

In sum, the Licensing Board should apply the standard articulated by the Commission — the “ironclad obligation” long-recognized by NRC rules and precedent — and conclude, as the Board was previously inclined to do, that any proposed contentions beyond the scope of new information in the RAI responses and the scope of Consolidated Contention 2 cannot be admitted. There is no good cause for late-filing, and there has been no compelling

showing with respect to the other criteria for late-filed contentions set forth in 10 C.F.R. § 2.714(a). *See* Duke's June 10 Response, at 16-18.

C. There Is No Reason For Any Departure from NRC Guidance Documents With Regard to Any of the Proposed Amended Contentions

The Licensing Board next questions whether there are any reasons to justify any departures from recognized NRC guidance documents when evaluating the admissibility of any parts of the proposed amended contentions. No such reasons exist — at least with respect to established regulatory guidance documents relevant to SAMA evaluations and risk assessments used in SAMA evaluations. Certainly the Intervenors, who bear the burden of supporting an admissible contention, have provided no basis for such a departure in their proposed amended contentions.

As discussed in Duke's June 10 Response, at 15-16, the information and analysis expected in a SAMA evaluation is discussed in Section 4.20 of NRC Regulatory Guide 4.2, Supplement 1, at 4.2-S-48 through 4.2-S-50.²⁸ Duke's SAMA evaluations (including both the original and the supplemental) provide the information and analysis expected. Moreover, Duke's SAMA evaluations, based on detailed plant-specific and updated PRAs, actually exceed NRC requirements. In promulgating its Part 51 requirement for license renewal, including the requirement for a SAMA evaluation, the Commission was clear that prior Level 1 and Level 2 IPE/IPEEE analyses would be adequate, and that the NRC would *not* require plant-specific Level 3 PRAs. *See* Fed. Reg. 28,467, 28,481 (June 5, 1996); 61 Fed. Reg. 66,537, 65,540 (December 18, 1996). In this context, there is no regulatory or factual basis to support deviating from

²⁸ *See* Regulatory Guide 4.2, Supplement 1, "Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses" (September 2000).

applicable guidance on SAMA evaluations or risk assessments in a way that would impose greater requirements than Part 51 imposes.

In its prior responses to the proposed amended contentions, Duke has addressed some specific arguments in which the Intervenors cited draft guidelines or inapplicable regulatory guidance documents. For example, in response to proposed amended Contention 5, Duke refuted the argument that a draft revision (DG-1110) to Regulatory Guide 1.174²⁹ should somehow require a further uncertainty analysis in the SAMA evaluations. See Duke's June 10 Response, at 36-38. Duke explained that this draft regulatory guidance related to making risk-informed licensing basis changes, that it is inapplicable to license renewal SAMA evaluations, and, moreover, that the appendix to the draft guidance relied upon by Intervenors has since been deleted. *Id.*, at 37, fn. 68. In contrast, Duke's SAMA evaluations included an assessment of uncertainties consistent with the established guidance in NUREG/BR-0184.³⁰ *Id.*, at 37. The Intervenors failed utterly to demonstrate how the SAMA evaluations were inadequate when compared to the actual, applicable and established regulatory guidance document. *Id.* at 38-39. Likewise, there is no justification for departing from the established guidance. (Furthermore, at this point, in light of the conclusions in the final SEISs, no further assessment of uncertainties in

²⁹ Draft Regulatory Guide DG-1110, "An Approach for Using Probabilistic Risk Assessment in Risk-Informed Decisions on Plant-Specific Changes to the Licensing Basis" (June 2001) ("DG-1110"). This guidance document was issued for comment as a proposed Revision 1 to Regulatory Guide 1.174. The regulatory guide addresses the use of PRA findings and risk insights in support of licensee requests for changes to a plant's licensing basis (*e.g.*, technical specification amendment applications). Reg. Guide 1.174 does not apply to the license renewal SAMA review because no change to the licensing basis is involved in a SAMA review.

³⁰ NUREG/BR-0184, "Regulatory Analysis Technical Evaluation Handbook," Section 5.4 (January 1997).

the SAMA results is necessary. The NRC has already initiated GSI-189 and is considering CLB changes. The proposed contention has been overtaken by events.)

The same answer to the Licensing Board's third question applies to proposed amended Contention 6. *See* Duke's June 10 Response, at 41-49. In that proposed contention, the Intervenors challenge the Level 3 models used in Duke's PRA and SAMA evaluations, seeking more "conservative" source terms and other more "conservative" assumptions in calculating offsite dose consequences of severe accidents. However, again, Duke's SAMA evaluations were consistent with the methodology in Regulatory Guide 4.2, Supplement 1, Section 4.20 and NUREG/BR-0184, Chapter 5. *Id.* at 47.

Moreover, as a general proposition, NUREG/BR-0184 reflects at least one important guideline related to quantification of attributes in a value and impact analysis — in quantifying attributes, it is preferable to use a "best estimate," "mean value," or "expected value," rather than a conservative value. NUREG/BR-0184, at 5.20. Indeed, the Commission has adopted the use of mean estimates for purposes of implementing the quantitative objectives of its own Safety Goal policy. *Id.*, Appendix D, at D.6. Similar guidance can be found in NUREG/BR-0058, Revision 2.³¹ A value-impact analysis based on cumulative, excessive conservatisms, as the Intervenors apparently desire, would provide no meaningful risk insights.³²

In sum, the Intervenors have failed to provide any foundation in the proposed amended contentions to support departures from well-established regulatory guidance related to SAMA evaluations and associated risk analyses. To the extent the proposed amended

³¹ NUREG/BR-0058, Rev. 2, "Regulatory Analysis Guidelines of the U.S. Nuclear Regulatory Commission, Final Report" (November 1995). *See, e.g.*, NUREG/BR-0058, at 19.

³² *See also* E. Paté-Cornell, "Risk and Uncertainty Analysis in Governmental Safety Decisions," *Risk Analysis*, Vol. 22, No. 3, at 633-34 (2002).

contentions seek such departures, or are based on such departures, the proposed contentions lack a sufficient technical or regulatory basis. Clearly, the Commission's requirement for a license renewal SAMA evaluation does not direct such departures or demand unduly burdensome, unnecessary, and meaningless studies.

D. The Commission's Decision Also Confirms That Several of the Proposed Amended Contentions Lack a Basis Sufficient to Support Admission

The Commission's recent decision confirms that, to be admitted, the proposed amended contentions must not only remain viable given the conclusions of the SEISs, and be justified against the Commission's standards for late-filed contentions, but must also meet the clear basis and specificity requirements for *any* admissible contention. CLI-02-28, at 15. The Commission, citing several recent decisions, emphasized the purposes of the contention rule:

. . . (1) providing notice to the opposing party of the issues that will be litigated; (2) ensuring that at least a minimum factual or legal foundation exists for the different claims that have been alleged; and (3) ensuring there exists an actual "genuine dispute" with the applicant on a material issue of law or fact.

CLI-02-28, at 15; *see also* 10 C.F.R. § 2.714(b)(2)(iii). In its prior responses to the proposed amended contentions, Duke has already discussed for each of the contentions why there is no legal or factual basis for the claim made, and how the proposed contentions fail to identify and support a genuine dispute on a material issue. Those arguments certainly remain valid, and Duke will not repeat them here. Significantly, however, the lack of basis for several of the proposed amended contentions is specifically underscored by Commission guidance in CLI-02-28.

First, the Commission remarked, as discussed above, that "many of the concerns in the amended contention may have been cured by the staff's SAMA analyses, found in the draft SEIS." CLI-02-28, at 18. The one example given by the Commission is proposed amended Contention 8, arguing that Duke has failed to justify that the power to the air-return fans is

essential. Any basis that may have existed for that proposed amended contention has now vanished. In light of CLI-02-28 and the final SEISs, there is no genuine dispute on a material issue of law or fact.

Second, the Commission addressed the issue of whether the SBO frequency assumed in Duke's SAMA analysis was an issue within the scope of the original Consolidated Contention 2. It concluded that it was not. *Id.* at 12. The Commission's observations in this context support Duke's conclusion that even now, as reflected in proposed amended Contention 3, there is no support for an admissible issue on SBO frequency. The proposed contention lacks any basis on which to challenge the SBO frequency, or more aptly, the SBO contribution to core damage frequency, as used in Duke's Level 1 portion of its SAMA evaluations.

The Commission found that the original Consolidated Contention 2 did not challenge the specific SBO estimates used in the Duke SAMA evaluations. CLI-02-28, at 11. Importantly, in addressing that question, the Commission observed that NUREG/CR-6427 provided no new information and no new findings relevant to SBO frequency. *Id.* at 9. Therefore, NUREG/CR-6427 can provide no basis now to support a challenge to a Duke estimate of SBO contribution to core damage frequency. The Commission itself correctly recognized that the SBO-related Level 1 estimates utilized in both Duke's original and supplemental SAMA evaluations were obtained from the latest, revised Duke PRAs, as was explained in the original ERs. *Id.* at 10. This was entirely consistent with the observation in the Sandia study that the best way to assess the issues raised in the report would be through a detailed, plant-specific Level 1 and Level 2 analysis. *Id.*³³ Neither in the original contention nor

³³ Similar to the conclusion in Section III.C above, there is no justification for departing from this guidance in NUREG/CR-6427.

in the proposed amended contentions have the Intervenors ever provided any affirmative basis for challenging the use of plant-specific data. As the Commission noted, there has never been a claim that diesel generator improvements would not support an SBO frequency lower than was assumed several years earlier in the IPE. *Id.* at 10-11. Therefore, without NUREG/CR-6427 to rely upon, and absent any other substantive support, there is no basis whatsoever, as required by 10 C.F.R. § 2.714(b)(2), to support proposed amended Contention 3. The Intervenors may have “questions” or matters they would like to discuss, but questions and a desire for discussions do not constitute an affirmative basis for an admissible contention.³⁴

³⁴ Other issues raised in proposed amended Contention 3 were previously addressed in Duke’s June 10, 2002 Response, at 25-30. However, it should also be noted that the Intervenors’ focus on “station blackout frequency” causes them to miss an essential point. As discussed above, an assessment of SBO frequency must reflect data on diesel generator reliability as well as data related to loss of offsite power frequency. The Level 1 output in the PRA is the SBO contribution to core damage frequency. Unlike Sandia in NUREG/CR-6427, which utilized IPE data (*i.e.*, an assessment of internal events), Duke considered in its SAMA evaluations both internal and external events leading to an SBO. As a result, in the original and supplemental SAMA evaluations based on the PRAs, Duke actually utilized larger numbers for SBO contribution to core damage frequency than did the Sandia evaluations which were based on the more limited IPE data including internal events only.

IV. CONCLUSION

For the reasons discussed above, each of the Intervenor's proposed amended contentions must be dismissed.

Respectfully submitted,



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Dated in Washington, D.C.
this 7th day of February 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, and)	50-414-LR
Catawba Nuclear Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that copies of DUKE ENERGY CORPORATION'S RESPONSE TO ISSUES RAISED BY THE LICENSING BOARD IN THE JANUARY 31, 2003 CONFERENCE CALL AND FEBRUARY 4, 2003 ORDER in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 7th day of February, 2003. Additional e-mail service, designated by **, has been made this same day, as shown below.

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