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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DUKE ENERGY CORPORATION

(McGuire Nuclear Station, Units 1 and 2,
Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-369-LR, 50-370-LR,
50-413-LR, and 50-414-LR

ASLBP No. 02-794-01-LR

February 7, 2003

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND
NUCLEAR INFORMATION AND RESOURCE SERVICE'S
RESPONSE TO ASLB QUESTIONS REGARDING ADMISSIBILITY OF
AMENDED CONTENTION 2**

I. INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's) February 4, 2003, Order (Ruling on Duke Motion to Dismiss, Setting Briefing Deadlines, and Scheduling Oral Argument on Amended Contention 2), Intervenors Blue Ridge Environmental Defense League ("BREDL) and Nuclear Information and Resource Service ("NIRS") hereby submit this response to various questions by the Atomic Safety and Licensing Board ("ASLB") relating to the admissibility of Amended Contention 2 (Ice Condensers and Station Blackout Risks). As discussed below, Amended Contention 2 raises timely and relevant issues regarding the adequacy with which Duke Power Corporation ("Duke") has taken into consideration information about accident risks posed by nuclear plants with ice condenser containments in NUREG/CR-6427. Moreover, these issues have not been mooted by the issuance of Supplemental Environmental Impact Statements ("SEISs") for the Catawba and McGuire plants.

II. BACKGROUND

On November 29, 2001, BREDL and NIRS submitted contentions challenging the adequacy of Duke Energy Corporation's ("Duke's") license renewal application.¹ Among their contentions, BREDL Contention 4 asserted, *inter alia*, that Duke's Severe Accident Mitigation Alternatives ("SAMA") analysis is incomplete because it fails to incorporate new and extensive information regarding ice condenser vulnerabilities, particularly the findings of a recent report by Sandia National Laboratories, NUREG/CR-6427, Assessment of the DCH [Direct Containment Heating] Issue for Plants With Ice Condenser Containments (April 2000). NIRS Contention 1.1.4 asserted that Duke's license renewal application failed to mention NUREG/CR-6427, or to provide an analysis of the findings of NUREG/CR-6427, with respect to the four McGuire and Catawba reactors. NIRS Contention 1.1.5 also contended that Duke had not considered a SAMA of providing a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

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

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

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

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

Accordingly, the ASLB partially admitted BREDL Contention 4 and NIRS Contentions 1.1.4 and 1.1.5 with respect to the adequacy of the SAMA, renamed it “Consolidated Contention 2,” and reworded it as follows:

The Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents, in that it

- (a) fails to include information from NUREG/CR-6427, and
- (b) fails to include a severe accident mitigation alternative relating to Station Blackout-Caused Accidents, namely, a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

Id., 55 NRC at 128. The Commission later rejected the second part of the contention in CLI-02-17 (July 23, 2002).

On January 31 and February 1, 2002, Duke provided the NRC Staff with two responses to Request for Additional Information (“RAI Responses”), which addressed, for the first time, NUREG/CR-6427 and the costs and benefits of a dedicated power line.² The January 31 RAI Response addressed the NRC’s RAI with respect to McGuire, and the February 1 RAI Response answers the same questions with respect to Catawba. In the RAI responses submitted in January and February of 2002, Duke took into account the conditional containment failure value of NUREG/CR-6427. However, it did so in a manner that cancelled the overall significance of incorporating that value. Duke accomplished this by using a lower value for station blackout (“SBO”) probability than had been used in NUREG/CR-6427. As a result, Duke’s estimate of the overall probability of containment failure was lower than the estimate in NUREG/CR-6427.

² Letter from M.S. Tuckman to U.S. NRC, re: Response to Request 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 (January 31, 2002) (“January 1 RAI Response”); Letter from M.S. Tuckman to U.S. NRC, re: Response to Request 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 (February 1, 2002) (“February 1 RAI Response”).

Duke did not fully explain the basis for this different assumption, or divulge the underlying assumptions. In fact, Duke refused to release the document that could assist the Intervenor in verifying the reasonableness of Duke's substitute assumption, the current version of Duke's probabilistic risk assessment ("PRA").

On May 20, 2002, based on the information provided in the RAI responses, BREDL and NIRS amended Contention 2.³ Amended Contention 2 described the extent to which Duke's RAI responses fail to demonstrate adequate consideration of NUREG/CR-6427, and therefore failed to satisfy the requirement of the National Environmental Policy Act ("NEPA") for a "hard look" at the environmental factors affecting its decision. *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985).

In May of 2002, the NRC Staff issued draft SEISs for license renewal for the Catawba and McGuire nuclear plants.⁴ In considering NUREG/CR-6427, these Draft SEISs both incorporated the lower SBO frequencies that had been used by Duke in its RAI responses. See Section 5.2.2 of Supplements 8 and 9.

Throughout much of 2002, the parties were engaged in a dispute over the scope of Consolidated Contention 2. Intervenor took the position that, as per the ASLB's ruling in LBP-02-04, the scope of the contention included the "extent" to which Duke had considered NUREG/CR-6427, *i.e.*, the adequacy of the analysis. See LBP-02-04, 55 NRC at 127. Duke and the Staff argued that the contention encompassed only the issue of whether Duke had considered

³ Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Amended Contention 2 (hereinafter "Amended Contention 2").

⁴ Draft Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 8 (Regarding McGuire Nuclear Station, Units 1 and 2), and Supplement 9 (Regarding Catawba Nuclear Station, Units 1 and 2). The NRC issued final versions of the SEISs in December 2002.

NUREG/CR-6427, not how. Both Duke and the ASLB sought guidance from the Commission on the matter. On December 18, 2002, the Commission issued CLI-02-28, ruling that the scope of the contention, as framed by Intervenors, was extremely narrow:

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

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

In CLI-02-28, the Commission also raised several questions about Amended Contention 2, *i.e.*, whether Amended Contention 2 or some part of it had been mooted by the issuance of the SEISs for Catawba and McGuire [*id.*, slip op. at 17-18], and whether issues raised by Amended Contention 2 could have been raised earlier. *Id.*, slip op. at 16. The Commission left the disposition of these questions to the sound discretion of the ASLB. *Id.* at 21.

In its Order of February 4, 2003, the ASLB granted a motion by Duke to dismiss the original Consolidated Contention 2. The ASLB also established a series of steps for considering the admissibility of Amended Contention 2, including this briefing and an oral argument on February 18, 2003.

III. DISCUSSION

As directed by the Order, Intervenors address the following issues below:

- 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 Intervenors 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.

Order at 2.

A. Mootness/Viability of Amended Contention 2

In CLI-02-28, the Commission suggests that some of the issues raised by Amended Contention 2 may have been resolved by the issuance of the SEISs for Duke and McGuire. *Id.*, slip op. at 17-18. As an example, the Commission cites Intervenor’s claim that Duke’s RAI Responses fail to justify Duke’s conclusion that “return fans are essential in order to ensure the effectiveness of hydrogen igniters.” *Id.* at 17, citing Amended Contention 2 at 17.

Intervenor’s do not believe this issue has been mooted by the issuance of the SEISs, because the SEISs only suggest, rather than conclude, that hydrogen igniters may be cost-effective. Moreover, the SEISs stop short of requiring the use of hydrogen igniters as a mitigative measure in the NRC’s NEPA decision. This can be seen in the language of the Final SEIS for the McGuire Plant.⁵ In Section 5.2.7, which presents the “Conclusions” of Chapter 5, entitled “Environmental Impacts of Postulated Accidents,” the NRC states:

Based on its review of SAMAs for McGuire, the staff concurs that none of the candidate SAMAs are cost-beneficial with the possible exception of one SAMA related to hydrogen control in SBO events. This conclusion is consistent with the low level of risk indicated in the McGuire PRA and the fact that Duke has already implemented numerous plant improvements identified from previous plant-specific risk studies. Duke’s position is that SAMAs that provide hydrogen control in SBO events are not cost-effective because back-up power would also need to be supplied to the air-return fans from ac-independent power sources in order to ensure mixing of the containment atmosphere; the cost of powering both the igniters and the air-return fans would exceed the expected benefit.

⁵ NUREG-1437, Supplement 8, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding McGuire Nuclear Station, Units 1 and 2, Final Report (December 2002).

However, based on available technical information, *it is not clear* that operation of an air return fan is necessary to provide effective hydrogen control. If only the igniters need to be powered during SBO, a less-expensive option of powering a subset of igniters from a back-up generator, addressed by Duke in responses to RAIs (Duke 2002a; NRC 2002a); is within the range of averted risk benefits and *would warrant further consideration*. *Even if* air-return fans are judged to be necessary to ensure effective hydrogen control in SBOs, the results of sensitivity studies *suggest* that this combined SAMA might also be cost-beneficial.

The staff concludes that one of the SAMAs related to hydrogen control in SBO sequences (supplying existing hydrogen igniters with back-up power from an independent power source during SBO events) is cost-beneficial *under certain assumptions, which are being examined* in connection with resolution of GSI-189.

Id. at 5-29 – 5-30 (emphasis added). The italicized phrases in the quotation above express uncertainty and lack of finality, thus demonstrating that the NRC has not reached a firm conclusion about the question of whether hydrogen igniters are justified. In the absence of a firm conclusion and adoption of hydrogen igniters as a mitigative measure to be included in the NRC's NEPA decision, or some other regulatory action imposing the use of hydrogen igniters, this part of Amended Contention 2 has not been resolved.⁶

Moreover, no other parts of Amended Contention 2 are mooted by the issuance of the SEISs for the Catawba and McGuire plant. Subpart 1 of the contention asserts that the RAI Responses are deficient because they fail to consider whether, in light of new information, it would be unreasonable to preserve the option of license renewal. *See* Amended Contention 2 at 3, 10 C.F.R. § 51.95(c)(4). While the SEISs for Catawba and McGuire discuss the no-action alternative [*see* Section 8], they do not explicitly consider the question of whether the option of

⁶ It is Intervenor's understanding that the most recent action by the NRC Staff with respect to GSI-189 was to issue a Technical Assessment Summary that recommends taking further action to provide back-up to one train of hydrogen igniters in ice condenser and Mark III plants. Technical Assessment Summary for GSI-189: "Susceptibility of Ice Condenser and Mark III Containments to Early Failure from Hydrogen Combustion During a Severe Accident (December 17, 2002), ML023510187.

license renewal should be preserved or abandoned in light of new information regarding the vulnerability of ice condenser containments.

Subpart 2 of the contention challenges Duke's failure to publish its PRA in support of its SAMA analysis. Amended Contention 2 at 4-6. This concern has not been addressed by the publication of the SEISs for Catawba and McGuire. The SEISs rely, for their conclusions about the likelihood of accidents at the Catawba and McGuire plants, on PRA data and analyses that have never been disclosed to the public for review. This continuing secrecy defeats the three key purposes of the "detailed statement" required by NEPA. *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 341 (1996). The first purpose is to "compile a reviewable environmental record demonstrating the agency has made a good faith effort to consider the environmental values NEPA seeks to safeguard" and has taken a "hard look at the environmental consequences of its actions."⁷ The second purpose is to serve as an "environmental full disclosure law providing agency decisionmakers, as well as the President, the Congress, the CEQ, and the public the environmental cost-benefit information that Congress thought they should have about each qualifying federal action."⁸ Third, by forcing an agency to give up the details of its decisions, NEPA prevents "stubborn problems or serious criticism from being swept under the rug."⁹ By making key decisions that are fundamentally based on secret information, the NRC has violated NEPA. Thus, this part of Amended Contention 2 is not moot.

⁷ *Id.*, citing *Minnesota PIRG v. Butz*, 541 F.2d 1292, 1299 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *Silva v. Lynn*, 482 F.2d 1282, 1284 (1st Cir. 1973); *Monroe County Conservation Council v. Volpe*, 472 F.2d 693, 697-98 (2d Cir. 1972); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁸ *Id.*, citing *Minnesota PIRG*, 541 F.2d at 1299; *Trout Unlimited*, 509 F.2d at 1282; *Alabama ex rel. Baxley v. Corps of Engineers*, 411 F.Supp. 1261, 1267 (N.D. Ala. 1976); *Robertson*, 490 U.S. at 349.

⁹ *Id.*, citing *Silva*, 482 F.2d at 1285.

Subpart 3, 4, 5, and 7 relate to deficiencies in Duke's PRA methodology. These deficiencies are perpetuated in the SEISs, because the NRC relied unquestioningly on Duke's PRA. Subpart 6 of the contention relates to deficiencies in Duke's consequence analysis. Intervenor are not aware that the Staff has corrected these deficiencies in the SEISs for Catawba and McGuire.

B. Timeliness of Amended Contention 2

The ASLB has asked the parties to address the question of whether the various parts of Amended Contention 2 were timely filed or could have been raised earlier with "sufficient care" on the part of the Intervenor in examining publicly available documentary material. Order at 2, citing CLI-02-28, slip op. at 18-20. The Order also asks the parties to consider "any ambiguity and confusion surrounding certain issues," and any related "scope" issues. Order at 2, citing CLI-02-28, slip op. at 16, 19, respectively.

The Order raises two separate questions with regard to timeliness. The first question is whether the Intervenor should have submitted their contentions regarding Duke's RAI responses within 30 days of when those documents were filed. As Intervenor have previously stated, they did not do so because they reasonably relied on the ASLB's explicit statement in LBP-02-04 that the issue it was admitting for hearing was: "whether *and to what extent*, Duke's SAMA analysis should take into account the calculations and values referenced in NUREG/CR-6427." LBP-02-04, 55 NRC at 127 (emphasis added). Although the Commission later found that the scope of Consolidated Contention was narrower, Intervenor reasonably relied on the clear language of LBP-02-04. In making its ruling on this issue, Intervenor request that the ASLB consider the content of the April 29, 2002, teleconference with the parties, in which Intervenor explained their reliance on LBP-02-04 in some detail.

The second question is whether the Intervenors could have raised the issues in Amended Contention 2 when they submitted their original contentions in November of 2001. This is the primary timeliness issue raised by CLI-02-28. Intervenors respond to the Commission's concerns below. They also request the ASLB to consider arguments presented in Intervenors' reply to Duke's and the NRC Staff's responses to Amended Contention 2, which specifically addressed arguments made by Duke and the Staff with respect to the timeliness of the contention.¹⁰

In CLI-02-28, the Commission states that Amended Contention 2 "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." *Id.*, slip op. at 19. In this regard, the Commission cites a hearing petitioner's "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."¹¹ In fact, Intervenors did satisfy their "ironclad obligation" to review Duke's original licensing documents when those documents were filed. Intervenors' initial review revealed that Duke's Environmental Report ("ER") contained no mention of NUREG/CR-6427, let alone a discussion as to how Duke planned to address the extensive and extremely significant information presented in NUREG/CR-6427 regarding the vulnerability of ice condenser containments to severe accidents. Intervenors duly filed a contention challenging this significant deficiency in the ER. Intervenors could not have foreseen the manner in which Duke would consider the study.

¹⁰ 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).

¹¹ *Id.*, citing Final Rule, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (August 11, 1989).

Moreover, the issues raised in Intervenors' Amended Contention 2 relate directly to NUREG/CR-6427. All of the contention's subparts raise questions about the manner in which Duke considered the basic issues raised by NUREG/CR-6427, i.e., the probability of ice condenser containment failure and the benefits of reducing SBO frequency and providing hydrogen control. For instance, Subpart 1 asserts that Duke's RAI responses are deficient because they fail to consider whether, in light of new information provided by NUREG/CR-6427, it would be unreasonable to preserve the option of license renewal. Subparts 2, 3 and 4 of Amended Contention 2 relate to the lack of adequate support for the RAI responses and assumptions used in Duke's SAMA analyses. These subparts seek disclosure of the supporting information that went into Duke's consideration of NUREG/CR-6427.¹² Subpart 5 relates to the adequacy of Duke's uncertainty analysis, which is central to the reliability of the analytical process by which Duke took NUREG/CR-6427 into account. Similarly, subpart 7 challenges the lack or quality of peer review, which also relates to the adequacy with which Duke took NUREG/CR-6427 into account. Subpart 6 relates to Duke's failure to use reasonably conservative values in calculating accident consequences. Because NUREG/CR-6427's accident probability estimates are relatively high, a nonconservative consequence analysis by Duke may significantly distort or mask overall risk estimates. These distorted risk estimates may, in turn,

¹² In CLI-02-28, the Commission cites a misleading argument by Duke that from the beginning of the case, there was enough information on the docket for Intervenors to perform an "independent assessment of the specific calculations and the specific issues' in the contention, and that intervenors 'could have taken the time to access publicly available information and assess it before the original proposed contentions were filed.'" *Id.*, slip op. at 20. As Intervenors have repeatedly stated, however, only some portions of Duke's PRA are on the public record. These consist of older parts of the PRA, as well as conclusory results from the more recent revision. Duke has never publicly disclosed its most recent revision to the PRA, on which it relies for its SAMA analysis. A PRA's results are only as good as the inputs and assumptions that go into it; thus, conclusory results are worth little to the Intervenors or to any other reviewer who wishes to have a meaningful understanding of Duke's SAMA analysis.

affect the consideration of alternatives or mitigative measures, whose implementation is suggested in NUREG/CR-6427. *See* Abstract at iv. Thus, the adequacy of Duke's consequence analysis is relevant and important to the manner in which Duke takes NUREG/CR-6427 into account. Similarly, by affecting the overall risk analysis, the adequacy of Duke's consideration of NUREG/CR-6427 has a bearing on the choice of mitigative measures, which is the subject of subpart 8.

C. Reasons for Departures from NRC Guidance

In Amended Contention 2, Intervenors presented a number of aspects in which Duke has failed to follow established NRC guidance for the conduct of probabilistic risk analysis. Intervenors are not privy to Duke's reasons for departing from this guidance, and therefore believe it is appropriate for Duke to address this question in the first instance.

D. Other issues

Intervenors have no other issues to raise with the ASLB at this time.

IV. CONCLUSION

For the foregoing reasons, the issues raised in Intervenors' Amended Contention 2 have not been mooted by the issuance of SEISs for the Catawba and McGuire plants. Moreover, the contention is timely. The ASLB should admit Amended Contention 2 for litigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2003, copies of Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Response to ASLB Questions Regarding Admissibility of Amended Contention 2 were served on the following by e-mail and/or first-class mail, as indicated below:

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