RAS 5800

February 12, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DUKE ENERGY CORPORATION'S REPLY TO INTERVENORS' RESPONSE TO ISSUES RAISED BY THE LICENSING BOARD

I. INTRODUCTION

On February 7, 2003, the Intervenors in this proceeding filed their response to the issues identified by the Atomic Safety and Licensing Board ("Licensing Board") regarding the pending proposed amended contentions.[1] In accordance with the Licensing Board's Order of February 4, 2003,[2] Duke Energy Corporation ("Duke") herein replies to the Intervenors' Response. As discussed further below, Intervenors' Response provides no new information or arguments that would support admissibility of the proposed amended contentions. For the

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1 "Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Response to ASLB Questions Regarding Admissibility of Amended Contention 2," dated February 7, 2003 ("Intervenors' Response").

2 "Order (Ruling on Duke Motion to Dismiss, Setting Briefing Deadlines, and Scheduling Oral Argument on Amended Contention 2)," dated February 4, 2003 ("Scheduling Order").

reasons discussed previously by Duke,[3] and by the NRC Staff,[4] the proposed amended contentions must be rejected.

II. DISCUSSION

The Intervenors' Response does not compel or necessitate a recitation of the arguments already presented by Duke on the four issues identified by the Licensing Board in its Scheduling Order. Duke's prior arguments, augmented by the NRC Staff's observations and conclusions, continue to apply. Duke also replies below to discrete points made in the Intervenors' Response.

A. Viability of the Proposed Amended Contentions

As discussed previously, the proposed amended contentions are no longer viable in light of the Commission's decision in CLI-02-28[5] and the NRC Staff's issuance of the final Supplemental Environmental Impact Statements ("SEISs") for McGuire and Catawba. This conclusion specifically applies to *all* of the proposed amended contentions because *all* of the proposed amended contentions have been characterized by the Intervenors themselves as focused on only one scenario: an early containment failure in a station blackout ("SBO") event as identified in NUREG/CR-6427.[6] The final SEISs resolve the issue of Severe Accident

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3 *See* "Duke Energy Corporation's Response to Issues Raised by the Licensing Board in the January 31, 2003 Conference Call and February 4, 2003 Order," dated February 7, 2003 ("Duke's Response"). Duke also previously responded to the proposed amended contentions on June 10, 2002 ("Duke's June 10 Response") and July 22, 2002.

4 *See* "NRC Staff's Brief in Response to Licensing Board Order of February 4, 2003," dated February 7, 2003 ("NRC Staff Response").

5 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC ___ (December 18, 2002) ("CLI-02-28").

6 As addressed previously by Duke, this characterization was first stated very clearly on page 3 of the proposed amended contentions, "Blue Ridge Environmental Defense

Mitigation Alternatives ("SAMAs") for this scenario, by clearly and specifically providing the maximum relief available to the Intervenors in the context of a license renewal proceeding.

The NRC Staff in its response suggests that only "some" of the proposed amended contentions (specifically, proposed amended Contentions 1, 2, 3, 4, and 8, and part of Contention 5) are no longer viable for this reason. The Staff's limitation on the viability argument appears to be premised on the fact that the remaining proposed amended contentions (proposed amended Contentions 6, 7, and part of Contention 5) raise issues beyond the scenario in NUREG/CR-6427 and the SAMA of concern in the original Consolidated Contention 2. It is certainly true that these three contentions can be read this way — to challenge either Duke's Probabilistic Risk Assessments ("PRAs") in their entirety or the SAMA methodology generally. Such challenges would apply for *any and all* SAMAs considered in the original SAMA evaluations. (Both the NRC Staff and Duke agree that, to the extent the proposed amended contentions are read this way, they are late without good cause or any other basis to justify a late-filed contention. See both Duke's and the NRC Staff's discussions of the second Licensing Board issue.) Duke's point remains, however, that if the contentions are construed more narrowly *consistent with the Intervenors' own characterization,* those contentions are limited to the Sandia study and the issue of mitigation alternatives related to powering the hydrogen control system in an SBO event. *See* Duke's Response, at 6-7. The proposed amended contentions specifically alleged problems with the PRA or SAMA evaluation models only to the extent those problems might skew the conclusions for the specific SAMAs related to SBO events and early containment failure. That specific issue has been resolved in the SEISs.

League's and Nuclear Information and Resource Service's Amended Contention 2" (May 20, 2002).

In their response, the Intervenors say nothing to suggest that the scope of the proposed amended contentions is any broader than the SAMAs related to NUREG/CR-6427. Indeed, the Intervenors' Response reiterates (at 11): "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." With this clear scope, articulated by the Intervenors themselves, the proposed amended contentions have been resolved by the SEISs as discussed below.

In their Response the Intervenors focus only on questioning the "finality" of the SEISs and the NRC Staff's conclusion that one of the SAMAs related to hydrogen control (*i.e.,* supplying back-up power to the hydrogen igniters from an independent source) is cost-beneficial under certain assumptions. This argument completely misses the mark and demonstrates the Intervenors' failure to recognize the clear limits of this license renewal proceeding as imposed by NRC regulations and the delegation order in this case.

The NRC Staff's conclusion in the SEISs is indeed "final" — with respect to that which is germane to license renewal and this proceeding. As reflected in the SEISs, in language quoted in Intervenors' Response:

> The [NRC] 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 [Generic Safety Issue 189 ("GSI-189")].[7]

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[7] NUREG-1437, Supplement 8, "Final Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding McGuire Nuclear Station, Units 1 and 2" (December 2002), at 5-30. Similar language appears in the SEIS for the Catawba Station.

Importantly, in language omitted from Intervenors' quote, the NRC Staff further *concluded* that:

> [T]his SAMA does not relate to adequately managing the effects of aging during the period of extended operation. Therefore, it need not be implemented as part of license renewal pursuant to 10 CFR Part 54. The need for plant design and procedural changes will be resolved as part of GSI-189 and addressed for McGuire and all other ice condenser plants as a current operating license issue.[8]

The NRC Staff, and indeed the Commission, have not concluded their work on GSI-189 and the issue of whether current licensing basis changes should be required. However, as Duke has discussed at length previously, that Part 50 issue does not relate to equipment aging and is beyond the scope of this Part 54 license renewal proceeding. The Intervenors' demand for "a firm conclusion and adoption of hydrogen igniters as a mitigative measure" or "some other regulatory action imposing the use of hydrogen igniters" (Intervenors' Response, at 7) simply exceeds that relief which is available in this proceeding. The proposed amended contentions must be dismissed precisely because no further relief is available. *See* 10 C.F.R. § 2.174(d)(2).[9]

Other arguments made by Intervenors in response to the first issue raised by the Licensing Board are equally lacking. The Intervenors' argument regarding proposed amended Contention 1 actually acknowledges that the SEISs already discuss the no-action alternative. Intervenors' Response, at 7. The argument that the SEISs need to somehow discuss whether the license renewal option should be preserved in light of the "vulnerability of ice condenser containments" (*id.*, at 7-8) ignores the National Environmental Policy Act ("NEPA") regulations

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8 *Id.*

9 *See also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999), *citing* 54 Fed. Reg. 33,168, at 33,172 (Aug. 11, 1989) (a disputed issue is "material" only if its resolution would "make a difference in the outcome of the licensing proceeding").

in Part 51, ignores the SEIS discussion of SAMAs, ignores the existence of GSI-189, and otherwise fails to demonstrate any regulatory basis for the requested discussion.

The Intervenors' argument regarding proposed amended Contention 2 continues to complain about the "secrecy" of the Duke PRAs and continues to incant "hard look" rhetoric related to NEPA. Duke has fully addressed these issues previously. *See* Duke's Response, at 10-12 (regarding the NEPA "hard look") and 14-16 (regarding availability of the PRA). However, most fundamentally, the Intervenors ignore two points. First, they ignore that the SEISs have mooted any need to look at the PRA with respect to the specific SAMA issue related to NUREG/CR-6427. The Intervenors might quibble with Duke's PRA model, but in the present context, to what end? The SEISs already conclude that the fix the Intervenors demand is cost-beneficial under certain assumptions, and therefore must be evaluated in a Part 50 context for potential plant and procedure changes. Second, the Intervenors continue to ignore the difference between a contention and discovery. This is a distinction the Commission specifically highlighted in CLI-02-28. *See* CLI-02-28, at 21 ("[O]ur 1989 contention rule revisions bar 'anticipatory' contentions, where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later'"). The Intervenors' argument runs contrary to substantial NRC precedent placing the burden on a petitioner to examine the licensing documents and to frame and support a contention *prior to discovery*. *See* Duke's Response, at 16-19. The Intervenors have therefore completely failed to show that proposed amended Contention 2 is viable in any sense.

With respect to proposed amended Contentions 3, 4, 5, 6, and 7, the Intervenors argue in conclusory fashion that the contentions assert deficiencies in the PRA methodology and that Intervenors "are not aware that the Staff has corrected these deficiencies in the SEISs."

Intervenors' Response, at 9. This argument does not, in any way, respond to Duke's overall point that the proposed contentions are mooted by the SEISs, as discussed above. Discussion of any "deficiencies" in the SAMA methodology would not alter the conclusions of the SEISs in any way more favorable to Intervenors. Moreover, for reasons discussed herein under other headings, the Intervenors have not shown any legal or factual basis for any contention that there *are* deficiencies in either the Duke or NRC Staff SAMA methodologies. Duke's approach — relying on updated, plant-specific Level 3 PRAs — was entirely consistent with NRC regulations and established guidance documents. Therefore, these proposed contentions, like all of the others, are inadmissible.[10]

B. Timeliness of Proposed Amended Contentions

As discussed previously, any proposed amended contention that is construed to exceed the scope of "new" information in the RAI responses, or to raise matters that could have been raised previously based upon the license renewal application, environmental reports, and related docketed information, must be found to be untimely without good cause. Duke agrees with the NRC Staff's conclusion that proposed amended Contentions 1, 2, 3, 5, 6, and 7 fail for this reason alone. (Proposed amended Contentions 4 and 8 fail for other reasons discussed previously.) The Intervenors' Response woefully fails to demonstrate, in any affirmative fashion, how the Intervenors exercised "sufficient care" — or indeed any care at all — to uncover available information and frame a contention at the time the original proposed contentions were required to be filed.

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[10] With respect to the proposed amended contentions, Duke also notes — again — that Intervenors' renewed assertion in its Response (at 3), that Duke used "a lower value for station blackout . . . probability than had been used in NUREG/CR-6427" is simply not true. *See* Duke's Response, at 25, fn. 34 (explaining that Duke used a higher number because, unlike Sandia, Duke considered both internal and external events).

As anticipated in Duke's Response (at 19), the Intervenors now attempt to justify lateness based solely upon their misplaced reliance on prior Licensing Board indications regarding the scope of the original Consolidated Contention 2. Intervenors' Response, at 9-10. However, this argument does nothing to explain untimeliness in raising issues challenging the PRA and the SAMA methodology, where those issues clearly could have been raised in the initial proposed contentions based on the application itself and related docketed material. The opportunity and the obligation existed long before the April 29, 2002 telephone conference, or even before the initial order admitting Consolidated Contention 2.

Moreover, Duke completely disagrees with any assertion that ambiguity with respect to the scope of the original contention justifies broad-based challenges such as those embodied in proposed Contentions 3, 5, 6, and 7. There could be no reasonable basis for reliance on a belief that Consolidated Contention 2 included challenges to the PRAs themselves, to Level 1 inputs, or to Level 3 models. The sole basis for Consolidated Contention 2 was NUREG/CR-6427. But NUREG/CR-6427 did not utilize the updated Duke PRAs. It did not involve an independent Level 1 analysis. And, it did not involve *any* Level 3 analysis. In this context, it makes no sense to believe that Consolidated Contention 2 somehow, inherently, involved matters not even addressed in the NUREG. The Commission itself, in CLI-02-28, specifically emphasized that the amended contentions raise new matters "that have little to do with the Sandia study." CLI-020-28, at 19.

The proposed amended contentions (if read broadly) have little to do with the Sandia study. The focus of any assessment of the timeliness of these broad claims cannot be on what the Intervenors *thought* was involved in Consolidated Contention 2; it must be on *when* Intervenors could timely have raised the "discrete new claims" embodied in the proposed

amended contentions. *Id.* Indeed, those broad claims should have been raised earlier, based on the renewal application and related materials. The Intervenors have not come close to demonstrating the necessary showing of care.

C. Departures From Established Regulatory Guidance

The Intervenors add no substance with respect to this third issue raised by the Licensing Board. The Intervenors assert only their belief — without basis — that there are "a number of aspects in which Duke has failed to follow established NRC guidance for the conduct of probabilistic risk analysis," and that they believe "it is appropriate for Duke to address this question in the first instance." Intervenors' Response, at 12. In a not-so-subtle fashion, the Intervenors are attempting to deflect their burden to Duke.

In its response, Duke has already fully responded to the Licensing Board's question, and will not repeat that response here. *See* Duke's Response, at 20-23. For their part, the Intervenors still refuse to recognize that, at this point in the proceeding, it is *their* burden to support an admissible contention. Duke, in its environmental reports and supplemental evaluations, in prior responses to the proposed contentions, and in its response to the Licensing Board's questions, has explained that its PRA and SAMA methodologies are entirely consistent with the regulations in 10 C.F.R. Part 51 and Part 54, as well as with established NRC regulatory guidance documents. Duke has not suggested departures from any regulations or guidance documents. It is the Intervenors who advocate such departures.[11] It is therefore the Intervenors'

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[11] Proposed amended Contention 6 is one glaring example illustrating how this is the case. *See* Duke's Response, at 22. Proposed amended Contention 6 argues with the source term estimates used in the SAMA evaluations. However, the NRC Staff in the draft SEISs had already found (at the time the amended contentions were proposed) that Duke's estimates were in reasonable agreement with estimates from NUREG-1150. *See* Duke's June 10 Response, at 44, fn. 79. The proposed contention also advocates calculating population doses in the SAMA evaluations for a region much greater than a

duty and burden to show how such departures could provide a basis for a genuine dispute with respect to a material issue for which relief is available in this proceeding. In addition to failing to show that their proposed contentions remain viable, and failing to show that they were late-filed with any good cause, the Intervenors have not presented any valid basis for contentions that advocate departing from the NRC regulations and established regulatory guidance.[12] The Intervenors therefore have not presented any valid basis for an admissible issue.

D. Any Other Issues

The Intervenors provided nothing further on this issue to which Duke can respond.

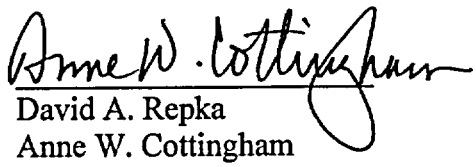
50-mile radius. NUREG/BR-0184 specifically provides that accident consequences should be measured over a 50-mile radius from the site. *See* Duke's June 10 Response, at 48, fn. 87.

12 With respect to evaluating the basis for a proposed contention, the NRC Atomic Safety and Licensing Appeal Board once observed that a licensing board must do more than uncritically accept a document offered, and must determine whether the document in fact says what is claimed and supports a contention. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989).

III. CONCLUSION

For all of the reasons previously discussed, and for the reasons discussed above, the proposed amended contentions are no longer viable, are untimely, and are otherwise lacking in basis. All of the proposed amended contentions are inadmissible and must be rejected.

Respectfully submitted,



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Dated in Washington, D.C.
this 12th day of February 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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	)	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 REPLY TO INTERVENORS' RESPONSE TO ISSUES RAISED BY THE LICENSING BOARD in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 12th day of February, 2003. Additional e-mail service, designated by **, has been made this same day, as shown below.

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