RAS 5821

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	Docket No's. 50-369-LR, 50-370-LR, 50-413-LR, and 50-414-LR
DUKE ENERGY CORPORATION	ASLBP No. 02-794-01-LR
(McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2)	February 12, 2003

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S AND NUCLEAR INFORMATION AND RESOURCE SERVICE'S REPLY TO RESPONSES BY DUKE POWER CORPORATION AND NRC STAFF 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 reply to the responses filed by Duke Power Corporation ("Duke") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff to various questions by the ASLB relating to the admissibility of Amended Contention 2 (Ice Condensers and Station Blackout Risks).[1] Their responses fail to demonstrate that BREDL's and NIRS's Amended Contention 2 is moot or untimely.

II. DISCUSSION

[1] Duke Energy Corporation's Response to Issues Raised by the Licensing Board in the January 31, 2003 Conference Call and February 4, 2003 Order (February 7, 2003) (hereinafter "Duke's Response"); NRC Staff's Brief in Response to Licensing Board Order of February 4, 2003 (February 7, 2003) (hereinafter "NRC Staff's Response"). In these pleadings, Duke and the NRC Staff responded to Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Response to ASLB Questions Regarding Admissibility of Amended Contention 2 (February 7, 2003) (hereinafter "Intervenors' Response").

A. Amended Contention 2 Is Not Moot.

Duke argues that as a general matter, Amended Contention 2 is moot, because the Supplemental Environmental Impact Statements ("SEISs") for Catawba and McGuire[2] have concluded that, "given the 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.'" Duke Response at 7. Accordingly, Duke argues, the "maximum relief possible on this issue in a license renewal has been granted." *Id* As Duke effectively concedes, however, the NRC is not committed to the Severe Accident Mitigation Alternative ("SAMA") of providing backup power for hydrogen igniters. Instead, as noted by Duke, the NRC considers that the measure is "potentially" cost-beneficial, *i.e,* it "appears to be" cost-beneficial. *Id.* at 8. As discussed in Intervenors' Response at 7, the NRC has not reached a conclusion about the relative value of providing backup power for hydrogen igniters, or committed to it as a mandatory mitigative measure; thus, the concerns raised by Amended Contention 2 are not resolved. Moreover, as Duke also concedes, litigation of the issues raised by Amended Contention 2 "may lead to some different views on the risk benefits of SAMAs related to the events in question." Duke Response at 9. In other words, a more rigorous, disciplined, and well-supported evaluation of accident risks at Catawba and McGuire, as sought by Intervenors, could result in a firm decision by NRC to require backup power to hydrogen igniters or some other SAMA, as opposed to a mere recommendation.[3] Thus, contrary

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[2] NUREG-1437, 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) (December 2002).

[3] As the Commission recognized in CLI-02-28 its December 18, 2002, Memorandum and Order, NEPA "'does not mandate the *particular decisions* an agency must reach,' only the 'process the agency must follow while reaching its decisions.'" *Id.* at 22 note 77 (emphasis in

to Duke's argument, a more thorough and better-supported discussion of the environmental impacts of severe accidents at Catawba and McGuire could lead to concrete results. Even if a more thorough and better-supported discussion of these environmental impacts did *not* lead to concrete results, however, NEPA recognizes that there is value in the disclosures themselves. As discussed in Intervenors' Response at 8, these disclosures make an agency accountable for its actions. While the agency is permitted to make unwise decisions, it is not permitted to hide the facts which show its decision to be unwise.

Duke also argues that Intervenors are precluded from litigating any issues relating to ac-powered hydrogen igniters because the SAMA does not relate to the question of adequately managing the effects of equipment aging. Duke Response at 7, 11. Duke appears to be arguing that NEPA and NRC's Part 51 regulations only require consideration of SAMAs that relate to age management. This argument is in error. Duke's and the NRC's obligation to consider the risks of ice condenser containment failure fall under the category of "new and significant information" that must be considered in an Environmental Report ("ER") and EIS for license renewal. *See* 10 C.F.R. §§ 51.53(c)(3)(iv), 51.95(c)(4). These provisions are meant to fulfill the NRC's "continuing duty," under the National Environmental Policy Act ("NEPA"), to gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1023-24 (9th Cir. 1980), citing 42 U.S.C. § 4332(2)(A), (B). *See also Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 558 (9th Cir. 2000) ("[w]hen new information comes to light the agency must consider it, evaluate it, and

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original), quoting *Committee to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 448 (10th Cir. 1996), citing *Robertson v. Methow Valley,* 490 U.S. 332, 350 (1989). These cases hold that a court cannot dictate to the NRC the content of its decision on whether to require implementation of a particular SAMA as part of its licensing decision. They do not excuse the agency from making a reasoned and fully-informed decision in the first instance.

make a reasoned determination whether it is of such significance as to require implementation of formal NEPA filing procedures"); *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989) (where aspects of a proposed action are addressed by a previously prepared EIS, a new EIS must be issued if there remains "major federal action" to occur, and if there is new information showing that the remaining action will affect the quality of the human environment "in a significant manner or to a significant extent not already considered.") If information is new, significant, and relevant to the proposed licensing action, it must be considered in the SEIS. It cannot be excluded from consideration merely because the NRC has decided that it also relates to the current operation.

It is also important to note that no decisions have been made in the GSI-189 proceeding. It is possible that the NRC will decide not to impose a requirement for ac-powered hydrogen igniters, in which case the discussion of backup power to hydrogen igniters as a SAMA will become all the more important. In any event, even if the NRC decided to require hydrogen igniters with backup power as a safety requirement, this would not excuse the NRC from its obligation under NEPA to provide an EIS that takes a hard look at the risks of a serious accident at Catawba and McGuire, to evaluate the effectiveness of mitigative measures such as hydrogen igniters. This obligation is independent of any obligation that Duke may have to install ac-powered hydrogen igniters under NRC safety regulations.

B. Amended Contention 2 is Timely.

Duke argues that much of Amended Contention 2 could have been filed at the outset of the case because "[s]ubstantial information on the Duke SAMA evaluations and the McGuire and Catawba PRAs" was available at the time. Duke Response at 14. *See also* NRC Staff Response at 12-13. In making this argument, however, Duke ignores the fact that its

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. Nor did Duke's PRA address the information in NUREG/CR-6427. Intervenors challenged Duke's failure to consider NUREG/CR-6427 in Consolidated Contention 2. Intervenors were not required to file an anticipatory contention that foresaw the manner in which Duke eventually would consider the study.

Moreover, Duke overstates the amount of information it has provided on the public record. The only information that is publicly available consists of (1) the IPE and IPEEE from the early to mid-1990's and (2) a "Summary Report" of Revision 2 of the PRA, which was completed in the late 1990's. *Id.* As described in a July 10, 2002, teleconference by Duncan Brewer, Duke's Manager of the Severe Accident Analysis Group, the Summary Report did not include "a lot of" proprietary information. Tr. at 990. BREDL's expert, Dr. Lyman, also observed that "[s]ome of the summary information that has been provided by Duke is generally simply numerical results and it is very difficult to establish the entire reasoning behind some of the numerical results that are produced." *Id* at 991. Dr. Lyman further explained the importance of details in the PRA as follows:

> To the extent the definition and the accurate calculation of what the station blackout frequency is is of great importance. Therefore that has to be documented extremely carefully and explained to the public in enough detail so that the public can understand it. A reduction of the station blackout frequency using a qualitative argument about improving diesel generator liability is fine but we just want to see the documentations for that because we understand how severe this accident can be.

Tr. at 1005-6.

Finally, the NRC Staff argues that Intervenors have impermissibly submitted a baseless contention, with the hope of supporting it later through discovery. NRC Staff Response at 10. This argument is incorrect. Failure to adequately disclosure the basis for a NEPA decision is a legitimate claim under NEPA. In this case, Duke has withheld critical information that supports its own NEPA analysis. In turn, the NRC has relied on that secret information in its SEISs for Catawba and McGuire. Amended Contention 2 provides both legal and factual reasons why Duke should be required to disclose the analyses that underly its evaluation of SAMAs.

III. 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 12, 2003, copies of Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Reply to Duke Corporation's and NRC Staff'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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