RAS 6336 April 21, 2003

DOCKETED 04/22/03

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO INTERVENORS' REQUEST FOR REINSTATEMENT OF NIRS' CONTENTION REGARDING ENVIRONMENTAL IMPACTS OF MIXED OXIDE FUEL USE

INTRODUCTION

On April 11, 2003, Blue Ridge Environmental Defense League (BREDL) and Nuclear Information and Resource Service (NIRS) filed a request before the Atomic Safety and Licensing Board (Board) to reinstate a contention that was previously dismissed by the Commission in the instant proceeding. *See* "[BREDL] and [NIRS] Request for Reinstatement of NIRS Contention 1 Regarding Environmental Impacts of MOX Fuel Use" (Intervenors' Request) (April 11, 2003). For the reasons set forth below the staff of the Nuclear Regulatory Commission (Staff) hereby submits that the Intervenors' request should be denied.

BACKGROUND

On November 29, 2001, both NIRS and BREDL separately filed their supplemented and amended petitions to intervene in this license renewal proceeding. *See* "Contentions of Nuclear Information and Resource Service" (NIRS Contentions) (November 29, 2001); "Blue Ridge Environmental Defense League Submittal of Contentions in the Matter of the Renewal of Licenses for Duke Energy Corporation (DUKE) McGuire Nuclear Stations 1 and 2 (McGuire) and Catawba

Nuclear Stations 1 and 2 (Catawba)" (BREDL Contentions) (November 29, 2001). These supplements set forth the contentions that the Intervenors wished to have litigated in the proceeding. The Staff and Duke Energy Corporation (Duke or Applicant) filed responses to the petitioners' contentions on December 13, 2001. *See* "NRC Staff's Response to Contentions Filed by [NIRS] and [BREDL]" (Staff Response) (December 13, 2001); "Response of Duke Energy Corporation to Amended Petitions to Intervene Filed by [NIRS] and [BREDL]" (Duke Response) (December 13, 2001). Oral argument was heard by the Board on December 18 and 19, 2001, addressing the admissibility of contentions raised by NIRS and BREDL. On January 24, 2002, the Licensing Board issued an order admitting two contentions; a contention related to the use of mixed oxide fuel (MOX) and a contention challenging the Applicant's analysis of severe accident mitigation alternatives. Order (Ruling on Standing and Contentions), LBP-02-04, 55 NRC 49 (January 24, 2002).

Subsequently, on appeal from the Applicant and the Staff, the Commission reversed the Board's decision to admit the contention related to MOX. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294-97 (2002). At the time the Commission issued its decision, the Applicant had not submitted any proposals to irradiate MOX at Catawba or McGuire. *See id.* at 296. On February 27, 2003, however, the Applicant submitted a license amendment request to allow the irradiation of four lead assemblies (LAs) at Catawba or McGuire. *See* Letter from M.S. Tuckman to NRC, "Proposed Amendments to the Facility Operating License and Technical Specifications to Allow Insertion of [MOX] Fuel [LAs] and Request for Exemption from Certain Regulations in 10 CFR Part 50" (February 27, 2003). Based on the Applicant's amendment request, the Intervenors now seek to reinstate the environmental portion of the contention dismissed by the Commission. Intervenors' Request at 4-6.

DISCUSSION

In its decision reversing the Board's admission of the MOX contentions, the Commission unequivocally stated its opinion that contentions related to the irradiation of MOX at Catawba and McGuire are beyond the scope of this proceeding. *See* 55 NRC at 297. Specifically, the Commission stated that the issue was not ripe for the Agency's review and that it was independent of license renewal. *See id.* at 296-97. In its decision, the Commission made clear that it did not see any "'interdependence' *at all* between Duke's license renewal application and any potential fuel-related amendment application." *Id.* at 297 (emphasis in original). The Intervenors, however, claim that recent events should cause the board to reconsider the bases for the Commission's decision in CLI-02-14 and reinstate the environmental portion of the dismissed contentions. *See* Intervenors' Request at 4.[1]

1. To the Extent that Intervenors' Request Can Be Interpreted as a Late-Filed Contention, It Fails to Satisfy the Late-Filing Criteria.

The Intervenors claim that their request meets the Commission's requirements for admission of late-filed contentions. Intervenors' Request at 8-9. The Staff disagrees. The Commission's regulations provide that late-filed contentions may only be admitted after a balancing of five factors:

> (i) Good cause, if any, for failure to file on time.
>
> (ii) The availability of other means whereby the petitioner's interest will be protected.
>
> (iii) The extent to which the petitioner's participation may reasonably be expected to assist in the development of a sound record.
>
> (iv) The extent to which the petitioner's interest will be represented by existing parties.

[1] The Intervenors do not attempt to reinstate aspects of their contention related to safety. *See* Intervenors' Request at 4 n.2.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1)(i)-(v), (b)(1). The first factor, whether good cause exists to allow the late-filed contentions, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). In evaluating the remaining lateness factors, two factors -- the availability of other means to protect the petitioner's interest and the ability of other parties to represent the petitioner's interest -- are less important than the other factors, and are therefore entitled to less weight. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74-75 (1992). With respect to the third factor (the potential contribution to the development of a sound record), petitioners must provide a "real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) LBP-98-7, 47 NRC 142, 208-09 (1998). Stated differently, the petitioner must "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986). As the party seeking admission of its late-filed contentions, the Intervenors bear the burden of showing that a balancing of the five factors weighs in favor of admitting the late-filed contention. *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

In the instant case, while there may be good cause for the late filing and the Intervenors may best be able to represent their interests, the other late-filing factors weigh against admitting this contention. First, there are other means whereby the petitioner's interest will be protected. The full scale use of MOX at Catawba and McGuire, similar to irradiation of LAs, cannot occur prior to a request for a license amendment. If such an amendment were submitted, there would be an

opportunity to participate in a hearing. Second, the Intervenors have failed to show their participation may reasonably be expected to assist in the development of a sound record. Intervenors merely state that Dr. Lyman would provide testimony based on the original contentions filed in this proceeding. *See* Intervenors' Request at 9. The Intervenors, however, reference back to the safety-related MOX contention, which they specifically asserted that they have abandoned. *See id.* (directing the Board to NIRS Contention 1.1.1). Moreover, their reference back to NIRS Contention 1.2.4, the MOX environmental contention, fails to meet the third late-filing requirement. In Contention 1.2.4, NIRS merely makes bald assertions without any basis or clear definition of what their expert would be adding to the development of a sound record. Last, Intervenors have failed to show that admitting this contention would not broaden the issues or delay the proceeding. The Commission, in CLI-02-14, clearly expressed that MOX is beyond the scope of this proceeding. *See* 55 NRC 297-98; *see also infra* pp. 7-8. Adding such a contention would greatly expand the current scope and unnecessarily lengthen this proceeding. Therefore, if the Board were to interpret the Intervenors' request as a late-filed contention, the contention should not be admitted because it fails to meet the late-filing criteria.

2. The Issue Raised by the Intervenors is not Ripe for Litigation.

First, the Intervenors' argue that the recently submitted license amendment request to irradiate four MOX LAs will lead to the use of batch quantities of MOX at the reactors. *See id.* at 5-6. They claim that the requested amendment "constitutes the first concrete step toward full use of MOX fuel in the reactors." *Id.* at 5. Thus, as they have done in the past, the Intervenors appear to be attempting to litigate the full scale use of MOX at Catawba and McGuire prior to receipt of a license amendment request to conduct such an activity. The Commission specifically rejected this contention in the past and the Intervenors' current arguments do not present any new evidence that this issue is now ripe for the Commission's review.

In CLI-02-14, the Commission held that the MOX issue failed the "ripeness" test because an application for use of MOX was "simply too inchoate to rise to the level of a 'proposal' within the meaning of *Kleppe* and its progeny." 55 NRC at 296 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)). In reaching its decision, the Commission, citing the Applicant's filing, reasoned that using MOX at Catawba and McGuire was dependent on some uncertain events. *Id.* The Commission stated that some of these uncertainties included: "'actions by the U.S. Department of Energy, including the consummation of certain international agreements, the outcome of the current licensing proceeding for the proposed MOX fuel fabrication facility in South Carolina, and plutonium disposition activities in Russia.'" *Id.* (quoting Applicant's filings).

In their Request, the Intervenors do not provide any new information that would call into question the bases for the Commission's decision regarding the ripeness of the MOX use issue. To the best of the Staff's knowledge, the uncertainties cited by the Commission as reasons to reject the previous contention continue to exist. Thus, the Commission's prior decision continues to be valid. The Intervenors, however, make the bald assertion that the Applicant's request to irradiate four LAs necessarily would require a review of full-scale use of MOX. *See* Intervenors' Request at 5. Nevertheless, they do not address how the remaining uncertainties (on which the Commission relied in its decision) are affected by the recently filed amendment request. Furthermore, the Intervenors' position contradicts the Commission's view of the proposal requirement. As the Commission clearly stated in CLI-02-14, the Staff would "have a very difficult time analyzing the environmental effects of a 'merely contemplated' license application that [it] has never seen ... ." 55 NRC at 295. Presently, the Staff has before it an amendment request for the irradiation of four MOX LAs, not full scale use of MOX (which would be subject to a separate license amendment request). Therefore, in light of CLI-02-14, the Staff would only be required to analyze the impacts of full scale MOX use once Duke applies for a license amendment that would

actually allow it to perform that activity. Such an analysis would be performed in support of a specific amendment request, not, as discussed below, associated with the license renewal review.

3. The Environmental Impacts of Using MOX are Unrelated to License Renewal.

The Intervenors further argue that the "nexus" test applied by the Commission in CLI-02-14 is now satisfied. Whereas the Commission held that license renewal could go forward without use of MOX, the Intervenors now argue that, as a result of the decision by the Department of Energy (DOE) to pursue the MOX disposition option exclusively, MOX and license renewal have become interrelated. *See* Intervenors' Request at 6-8. The basis for the Intervenors' claim is that, according to their calculations, Catawba and McGuire would not be able to consume the fuel that would be generated by the MOX fuel fabrication facility prior to the period of extended operation. *See id.* at 6-7, 8 n.7. Further, the Intervenors claim that Catawba and McGuire are the only reactors that have been identified by the DOE as candidates for the MOX program. *Id*. at 6-7. Therefore, according to the Intervenors, renewal of their licenses is integral to the MOX program. *Id.*

In CLI-02-14, the Commission adopted the "nexus" test created by the Court of Appeals for the Fourth Circuit and ruled that it saw "no 'interdependence' *at all*" between license renewal and MOX use. *See* 55 NRC at 297-98 (citing *Webb v. Gorsuch*, 699 F.2d 157 (4th Cir. 1983)). The Commission, reasoned that "an agency must consider the impact of other proposed projects 'only if the projects are so interdependent that it would be unwise or irrational to complete one without the other.'" *Id.* at 297 (quoting *Webb*, 699 F.2d at 161). The Commission further stated that "license renewal obviously can go forward without reference to the MOX issue." *Id.* The Intervenors now claim, however, that because MOX is the sole means to dispose of surplus plutonium, license renewal of Catawba and McGuire is essential to accomplish the government's mission.

The Intervenors' argument fails to take account of several salient facts. First, the DOE could easily contract, as it did here, with other commercial nuclear power reactors to use the fuel built in the, as of yet unlicenced, MOX fuel fabrication facility. Second, the Applicant is currently seeking authority to irradiate four MOX LAs and it is not clear that a request for full-scale use of MOX is inevitable. *See* 55 NRC at 297 ("The Catawba and McGuire plants could operate throughout their current licensing term plus an additional 20-year renewal term ... without using MOX fuel ...."). Third, as the Commission pointed out, Catawba and McGuire could use MOX prior to the period of extended operation, "regardless of whether Duke had sought any license renewals." *Id.* Thus, the Intervenors' argument that DOE's decision to solely rely on MOX as its method for disposing of plutonium inextricably links MOX and license renewal is specious. The Commission made it clear that it saw MOX and license renewal as "separate questions" and the Intervenors' have not provided any information that should call that finding into question.

CONCLUSION

For the reasons stated above, and in light of the Commission's decision in CLI-02-14, the Intervenors' Request to Reinstate their MOX environmental contention should be denied.

Respectfully submitted,

/RA/
Antonio Fernández
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 21st day of April, 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 "NRC STAFF'S RESPONSE TO INTERVENORS' REQUEST FOR REINSTATEMENT OF NIRS' CONTENTION REGARDING ENVIRONMENTAL IMPACTS OF MIXED OXIDE FUEL USE" have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; as indicated by two asterisks (**), by electronic mail, this 21st day of April, 2003.

Ann Marshall Young, Chair** *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
(E-mail: AMY@nrc.gov)

Charles N. Kelber** *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
(E-mail: CNK@nrc.gov)

Office of Commission Appellate Adjudication** *
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555

Paul Gunter**
Nuclear Information and Resource Service
1424 16th St. N.W.
Suite 404
Washington, D.C. 20026
(E-mail: pgunter@nirs.org)

Lester S. Rubenstein** *
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555
(E-mail: Lesrrr@msn.com)

Office of the Secretary** *
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Diane Curran, Esq.**
Harmon, Curran, Spielberg & Eisenberg
1726 M Street, N.W., Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

Mary Olson**
Southeast Director of NIRS
P.O. Box 7586
Asheville, NC 20882
(E-mail: nirs.se@mindspring.com)

Mr. Lou Zeller
Ms. Janet Zeller**
P.O. Box 88
Blue Ridge Environmental Defense League
Glendale Springs, N.C. 28629
(E-mail: BREDL@skybest.com)

Lisa F. Vaughn, Esq.**
Legal Dept.
Duke Energy Corporation
426 S. Church Street (EC11X)
Charlotte, NC 28201-1006
(E-mail: lfVaughn@duke-energy.com)

Atomic Safety and Licensing Board Panel*
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Donald J. Moniak**
P.O. Box 3487
Blue Ridge Environmental Defense League
Aiken, S.C. 29802
(E-mail: donmoniak@earthlink.net)

David A. Repka, Esq.**
Anne W. Cottingham, Esq.**
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005-3502
(E-mail: drepka@winston.com
acotting@winston.com)

/RA/

Antonio Fernández
Counsel for NRC Staff