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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL  
WASHINGTON, D.C. 20555-0001

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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

MEMORANDUM TO: Chairman Diaz  
Commissioner McGaffigan  
Commissioner Merrifield

SERVED September 12, 2003

FROM: G. Paul Boliwerk, III *G. Paul Boliwerk, III*  
Chief Administrative Judge

Docket No. 50-369/370/413/414-LR

SUBJECT: RESPONSE TO SEPTEMBER 8, 2003 COMMISSION MEMORANDUM  
AND ORDER (CLI-03-11)

In a September 8, 2003 memorandum and order (CLI-03-11), the Commission has requested an explanation regarding the timing of the resolution of the contested issues in the Duke Energy Corporation proceeding, specifically a SAMA (or severe accident mitigation alternative) contention that was the subject of a Commission remand in mid-December 2002 (CLI-02-28) and a mid-April 2003 intervenor request to reinstate a previously-dismissed contention on the environmental impacts of mixed oxide (MOX) fuel. In its September 8 directive, the Commission requested that within three business days it be provided with an explanation for the delay in resolving these matters and an explanation as to the measures the Board will take to restore the proceeding to the original schedule reflected in the Commission's initial referral order (CLI-01-20).

The Board Chairman for this proceeding currently is out of the office, but will return shortly and can convene the Board to provide the Commission with an explanation regarding future scheduling. As to the reasons for the delay, because they involve matters of Licensing Board Panel administration for which I am responsible, I feel it is appropriate to apprise the Commission directly regarding the somewhat unusual circumstances surrounding this proceeding that have played a significant role in the recent delay about which the Commission has expressed a concern.

By way of background, I would note that Licensing Boards such as the one that is conducting this proceeding generally consist of three members, a legal administrative judge, who is also the Board Chairman, and two technical administrative judges. It is not overstated to say that the history of the Licensing Board Panel demonstrates that in the vast majority of its cases, licensing board decisions are unanimous. Given, however, that reasonable individuals can and do differ, this is not always the case. And in such instances, to the degree it is necessary, the Licensing Board Panel endeavors to provide the technical member or members of a Board who are in disagreement with the legal member access to independent legal advice, generally from the Panel's Chief Counsel.

In this proceeding, despite the best efforts of all the Board members over the past several months to find a common ground on the matters in controversy, one or more of the technical members is not in agreement with the legal member. When, at the end of June 2003, the Board's last attempt at having the parties reach a settlement was not successful, a request was

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made for a legal advisor. Unfortunately, the Panel was then in the process, albeit the final stages, of hiring a new Chief Counsel to replace the prior holder of that position who retired in January 2003. Because we did not anticipate that the new Chief Counsel would be with the Panel until late summer (and indeed, he just joined the Panel last week), an attempt was made to find a substitute legal advisor. Initially, a part-time legal judge was recruited to provide this help. Unfortunately, in mid-July he decided that other commitments made it impossible for him to continue to serve in that role. At that juncture, constraints for other part-time legal members made it apparent the advisor role would have to be filled by one of the Panel's full-time legal members. The member whose schedule made him available for this duty began working on the matter in late July; however, because of a pre-existing commitment out of the office in early August and an subsequent unexpected illness that kept him out of the office for an additional period, he was not able to resume his efforts until late August. Since that time, he has been serving in the role of legal advisor and has been of material aid in providing assistance that should allow for issuance of a Board decision or decisions in this proceeding in the near term.

It is unfortunate that this somewhat unusual confluence of administrative complications, in conjunction with the Board's natural reluctance to reveal details regarding the status of its deliberative process, has caused this matter to linger unexplained to the extent that the Commission found it necessary to issue its September 8 directive. It does, however, provide a valuable lesson for the Panel and licensing boards/presiding officers about the need to communicate the causes of delay as fully as possible within the confidentiality strictures that apply to the judicial decisionmaking process.

I will leave it to the Commission to determine whether this memorandum should be placed on the public record of the Duke Energy Corporation proceeding.

cc: J. Cordes, OGC/OCAA

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM FROM G. PAUL BOLLWERK, III TO THE COMMISSION RESPONDING TO CLI-03-11 have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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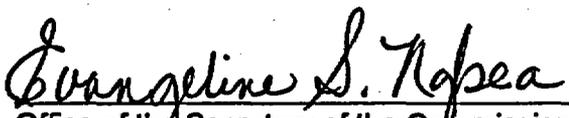
Docket Nos. 50-369/370/413/414-LR  
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TO THE COMMISSION RESPONDING TO CLI-03-11

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Dated at Rockville, Maryland,  
this 12<sup>th</sup> day of September 2003