

September 15, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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

NRC STAFF'S ANSWER TO NUCLEAR INFORMATION AND RESOURCE SERVICE  
AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S PETITIONS  
FOR LEAVE TO INTERVENE AND REQUESTS FOR HEARING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714(c), the staff of the Nuclear Regulatory Commission (Staff) hereby responds to the petitions for leave to intervene and requests for hearing (Petitions) filed by the Nuclear Information and Resource Service (NIRS) and the Blue Ridge Environmental Defense League (BREDL) (collectively, Petitioners), filed on August 25, 2003. The Staff herein addresses Petitioners' standing to intervene. For the reasons set forth below, the Staff does not object to Petitioners' standing to intervene in this matter.

BACKGROUND

On February 27, 2003, Duke Energy Corporation (Duke) submitted a proposal to amend its operating licenses and technical specifications for McGuire Nuclear Station, Units 1 and 2 (McGuire), and Catawba Nuclear Station, Units 1 and 2 (Catawba). 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) (hereinafter License Amendment Request or LAR). Duke requested that the NRC approve the LAR and allow the insertion of a total of four Mixed Oxide

(MOX) fuel lead test assemblies (LAs) at either plant, as well as grant exemptions from certain regulations pursuant to 10 C.F.R § 50.12.

On July 25, 2003, the Staff issued a "Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing." See 68 Fed. Reg. 44,107 (2003). In that notice, the Staff stated it was considering Duke's LAR and invited interested persons to file requests for a hearing and petitions to intervene in the proceeding. See *id.* at 44,107. In response to the Notice, NIRS and BREDL filed separate petitions requesting a hearing and seeking to intervene in the license amendment proceeding. As set forth below, NIRS and BREDL have met the standing requirements of 10 C.F.R. § 2.714(a).

## DISCUSSION

### A. Legal Requirements for Intervention

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that they have standing to do so. See Section 189a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a) (AEA or Act). To establish standing, the petitioner "shall set forth with particularity [his] interest. . . in the proceeding, [and] how [his] interest may be affected by the results of the proceeding, including the reasons why [he] should be permitted to intervene, with particular reference to the factors set forth in [§ 2.714(d)(1)]." 10 C.F.R. § 2.714(a)(2). In addition, the petitioner must advance a "specific aspect or aspects of the subject matter of the proceeding as to which [he] wishes to intervene," *id.*, and at least one admissible contention. 10 C.F.R. § 2.714(b).

In order to establish the requisite interest for standing, the petitioner<sup>1</sup> must demonstrate that the proposed action will cause "injury in fact" to the petitioner's interest, and that the injury is

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<sup>1</sup> The petitioner, whether an individual or an organization, must establish the requisite interest for standing. See *Private Fuel Storage, L.L.C.*, (Independent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

arguably within the "zone of interests" protected by the statutes governing the proceeding. See, e.g., *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 & 2), CLI-93-16, 38 NRC 25, 32 (1993) (Vogtle). In Commission proceedings, the injury must fall within the "zone of interests" sought to be protected by the AEA or the National Environmental Policy Act (NEPA). *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 6 (1998).

To establish injury in fact, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998), citing *Steele Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998); *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle*, 38 NRC at 32. It must be likely, rather than speculative, that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Sequoyah Fuels Corp. & Gen. Atomic* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in fact for standing; while this stake need not be a "substantial" one, it must be "actual," "direct" or "genuine." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979), *aff'd*, ALAB-549, 9 NRC 644 (1979). An abstract, hypothetical injury is insufficient to establish standing to intervene. *International Uranium Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117-18 (1998).

In order for an organization to establish standing, it must either demonstrate standing in its own right or claim standing through one or more individual members who have standing. *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). Thus, an organization may meet the injury-in-fact test either (1) by showing an effect upon its

organizational interests, or (2) by showing that at least one of its members would suffer injury as a result of the challenged action, sufficient to confer upon it "derivative" or "representational" standing. *South Texas*, 9 NRC at 447-48.

Where the organization relies upon the interests of its members to confer standing upon it, the organization must show that at least one member who would possess standing in his individual capacity has authorized the organization to represent him. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 31 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 115. The alleged injury-in-fact to the member must fall within the purposes of the organization. *Private Fuel Storage*, 48 NRC at 33-34.

In addition to the traditional standing requirements, standing can be based on a petitioner's proximity to the facility at issue. *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 23 (2002). The presumption that "a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity," *id.*, quoting *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff'd on other grounds*, CLI-01-17, 54 NRC 3 (2001), generally applies to petitioners in construction permit and operating license proceedings who live within 50 miles of a reactor. *Sequoyah Fuels*, 40 NRC at 75 n. 22. In license amendment proceedings, however, a petitioner's standing cannot be based solely on his residence "unless the proposed action quite 'obvious[ly]' entails an increased potential for offsite consequences." *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191 (1999), *pet. for review denied sub nom. Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000). Whether the petitioner in a license amendment proceeding has demonstrated a "plausible chain of causation" linking a distinct harm or threat to himself to offsite consequences from the proposed license amendments, *see*

*Zion*, 49 NRC at 192, must be determined on a case-by-case basis by "examining the significance of the radioactive source [of the proposed action] in relation to the distance involved and the type of action proposed." *Sequoyah*, 56 NRC at 26 (citing *Georgia Tech*, 42 NRC at 116-17).

B. Petitioners' Standing to Intervene

1. NIRS

NIRS has alleged that it has established representational standing to intervene in this proceeding by demonstrating an injury in fact to several members of the organization and identifying aspects within the scope of the proceeding. NIRS has raised concerns that its members reside within the immediate area of both plants and, due to unsafe operation of the plants and risks posed to the environment by using MOX LAs, their health and welfare will be impacted by the license amendment. Petition at 2-3. As discussed below, NIRS has established standing.

In order to obtain representational standing NIRS must demonstrate, *inter alia*, that its members would otherwise have standing to participate in their own right and that at least one of its members has authorized it to represent the member's interests. Here, NIRS filed seven affidavits in support of its petition. Five of the affiants claim standing based on their proximity to the reactors as well as the transportation route of the MOX fuel. The remaining two affiants claim standing based only on their closeness to a possible transportation route. *Patrie Aff.* at 1-2; *Boniske Aff.* at 1-2. All seven affiants authorized NIRS to represent their interests in this matter. *See, e.g., Koppers Aff.* at 1.

The Staff submits that only the affidavits alleging proximity to the reactor sites support NIRS' request for standing. Kathryn Koppers stated that she resides in Midland, North Carolina, which is within forty miles of the McGuire and Catawba reactors. *Koppers Aff.* at 1. Sherry Lorenz maintained that she resides in Tega Cay, South Carolina, and thus lives within forty miles of both plants. *Lorenz Aff.* at 1. Gregg Jocoy, who asserted that he lives in Fort Mill, South Carolina, with his wife Nancy, stated that they reside within forty miles of the reactors. *G. Jocoy*

Aff. at 1. W. Gray Newman, Jr., stated that he lives in Charlotte, North Carolina, which is also within forty miles of both plants. Newman Aff. at 1. Finally, Nancy Jocoy stated that she lives in Fort Mill, South Carolina, which is 10 miles from Catawba and 50 miles from McGuire. N. Jocoy Aff. At 1-2. The affiants all state that they reside within forty miles of the reactor sites, except for Nancy Jocoy, who avers that she resides within 10 miles of the Catawba reactors and within 50 miles of the McGuire reactors. N. Jocoy Aff. at 1-2. They further assert that their health and safety, as well as that of their immediate families, "would be adversely impacted by potential for increased radioactive releases from changes in operations, wastes generated, and any accident which becomes more likely with changes in reactor operations." *See e.g.*, N. Jocoy Aff. at 2. They stated that the "air, drinking water, bodies and property are all at risk" and "would be irreparably damaged in the event of a nuclear accident or other event." *See e.g.*, Koppers Aff. at 1-2. The Staff does not object to NIRS intervening based on these affidavits.

To the extent that the affidavits attempt to establish injury due to the shipment of unirradiated MOX fuel to the reactor sites, the Staff submits that the assertions are far too speculative to afford standing. *Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413, 434 (2002).

The remaining two affiants, Lewis E. Patrie and Kate Boniske allege that they reside in Asheville, North Carolina and that they live in close proximity to Interstate 40 (Patrie Aff. at 1; Boniske Aff. at 1) and Interstate 26 (Boniske Aff. at 1). They claim that it is possible that irradiated MOX fuel could travel on one of those roads en route from the reactors to Oak Ridge National Laboratory and, if there is an accident or incident during transport, their health and safety and the environment could be adversely affected by radiation and vehicle exhaust. Patrie Aff. at 2; Boniske Aff. at 2. These claims do not confer standing on NIRS regarding transportation issues. First, the affiants have not established the required nexus between the licensing action and the claimed injury. "Mere geographical proximity to potential transportation routes is insufficient to confer

standing.” *Diablo Canyon*, 56 NRC at 434. Second, the allegations are speculative because they are based on the remote possibility that one or two assemblies may possibly be shipped on a road proximate to their homes and that an accident or other event may occur near their residence. See *Exxon Nuclear Co., Inc.* (Nuclear Fuel recovery and Recycling Center), LBP-77-59, 6 NRC 518, 520 (1977) (Licensing Board denied standing based on geographical proximity to transportation route because it was predicated on “the tenuous assumption that the spent fuel will be shipped by the named carrier and that an accident might occur in the area proximate to [petitioner’s] residence....”). Third, Asheville, North Carolina, is more than 100 miles away from both the McGuire and Catawba sites and thus the affiants cannot claim standing. *Diablo Canyon*, 56 NRC at 433 (Discussion distinguishing that case from *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61 (1996)). Therefore, NIRS cannot, on the basis of these affiants, establish standing based on proximity to potential transportation routes. Compare *Diablo Canyon*, 56 NRC at 434 with *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001).

In sum, NIRS has alleged both residential proximity to the site and concern with the potential for increased radioactive releases, as well as an increased risk of accidents, due to the use of MOX LAs. The combination of these factors establishes “injury in fact” within the “zone of interests” of the AEA and NEPA.<sup>2</sup>

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<sup>2</sup> Although the affiants assert that they will be harmed in the event of a nuclear accident or other release event, in the Staff’s view the affiants and NIRS have not established an obvious potential for offsite consequences due to the irradiation of MOX LAs that are distinguishable from the consequences of a release under the current operating license. While they do assert that they will be adversely impacted by increased radioactive releases from changes in the operation - they do not allege any facts to support the assertion that there will be an increased release due to the use of MOX.

## 2. BREDL

In its Petition, BREDL claimed to have representational standing to intervene in the instant proceeding based on the interests of Mr. Gregg Jocoy. As stated above, in order to assert representational standing based on the interests of one of its members, an organization must show that its member has standing to sue in his own right and that the member has authorized it to represent his interests. BREDL has satisfied both requirements through Mr. Jocoy's affidavit. In the affidavit, Mr. Jocoy asserts that he resides in close proximity to the plants and that, in the event of an accident, the MOX LAs may exacerbate consequences to his health and property. *Jocoy Aff.* at 1. Further, Mr. Jocoy authorizes BREDL to represent his interests in the instant proceeding. *Id.* Thus, BREDL has satisfied the aforementioned standard for representational standing to intervene. However, it is the Staff's position that Mr. Jocoy cannot authorize two organizations to represent him in this matter. Therefore, Mr. Jocoy must choose whether he wants NIRS or BREDL to represent his interests.<sup>3</sup>

### C. Petitioners' Aspects

Pursuant to 10 C.F.R. § 2.714(a)(2), a petitioner is required to state the "specific aspect or aspects of the subject matter of the proceeding" as to which it wishes to intervene. The purpose of this requirement is not to judge the admissibility of the issues, but to determine whether the Petitioners specified "proper aspects" for the license amendment proceeding. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-78-27, 8 NRC 275, 277-78 (1978). To be admissible, the subject matter of the aspects must be within the scope of the amendment application, *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 273, 282 (1991), or the scope of the proceeding, which is defined by the Notice of Opportunity for Hearing published in the Federal Register. *Florida Power & Light Co.*, 53 NRC at 151; *Northeast Nuclear Energy Co.*

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<sup>3</sup> If Mr. Jocoy chooses NIRS to represent his interests in the instant case, then BREDL could not establish standing.

(Millstone Nuclear Power Stations, Units 2 and 3), LBP-01-10, 53 NRC 273, 280 (2001); *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 206 (1993).

1. NIRS

NIRS advances at least one aspect in its pleading that is within the scope of the McGuire and Catawba license amendment proceeding to qualify as a valid aspect. NIRS' assertion that the radiological impacts on workers and the general public from the use of weapons grade MOX fuel during regular operations and due to accidents and an alleged change in the source term should be the subject of a hearing (Petition at 8), is an appropriate aspect. Other issues that appear to be appropriate aspects include: NIRS' assertion that a hearing on the issue of the use of LAs cannot be held separately from the issue of the use of batch quantities of MOX (Petition at 5-8); NIRS' assertion that "it is not clear what the source of the plutonium oxide for the LAs will be [and] how it will have been processed" (Petition at 4); the effects of the use of the four LAs on equipment aging during the period of extended operations from the proposed renewal of the operating license (Petition at 8); quality assurance and quality control problems that may arise due to an alleged lack of second or third party certification of the fuel (Petition at 9); validity of assumptions regarding the weapons-grade MOX fuel relating to the use of reactor-grade MOX in Europe (Petition at 9-10); and thermal issues relating to possible increased thermal output and conductivity in the core (Petition at 10). However, all of the above aspects are within the scope of this proceeding ONLY to the extent that they relate to the irradiation of the LAs. Any assertions relating to the future use of batch quantities of MOX fuel are outside the scope of this proceeding. Moreover, the remainder of the issues raised by NIRS are outside the scope of this proceeding and thus do not constitute valid aspects. Therefore, these concerns cannot constitute an aspect for the purpose of conferring standing and any proposed contentions relating to these concerns would be inadmissible in this proceeding.

In sum, NIRS has established standing to intervene in this license amendment proceeding through at least five of its members, by means of the affidavits of its members authorizing NIRS to petition for intervention. The affidavits and NIRS' Petition establish proximity to the reactor sites and raise concerns regarding the potential for increased radioactive releases, as well as an increased risk of accidents, due to the use of MOX LAs. In addition, NIRS has stated at least one aspect within the scope of the proceeding.

2. BREDL

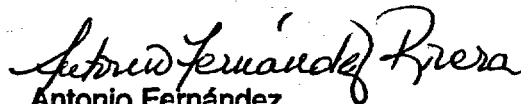
BREDL, like NIRS, advances at least one aspect within the scope of the instant proceeding. In its Petition, BREDL raises the issue of "[w]hether Duke's failure to submit security plan revisions for the proposed license amendment violates the Atomic Energy Act and NRC's implementing safety regulations." BREDL Petition at 4. Such a concern is appropriately within the scope of this proceeding. Therefore, BREDL has demonstrated its standing to intervene by articulating at least one aspect within the scope of this proceeding.


CONCLUSION

In consideration of the foregoing, the Staff does not object to Petitioners' standing. However, the Staff expects that Mr. Jocoy will choose which organization will represent him in this proceeding. Lastly, leave to intervene should not be granted unless the Petitioners submit at least one valid contention, pursuant to 10 C.F.R. § 2.714(b).

Respectfully submitted,

  
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Counsel for NRC Staff

  
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Counsel for NRC Staff

  
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Dated at Rockville, Maryland  
this 15th day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD PANEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO NUCLEAR INFORMATION AND RESOURCE SERVICE AND BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S PETITIONS FOR LEAVE TO INTERVENE AND REQUESTS FOR HEARING," "NOTICE OF APPEARANCE" of Susan Uttal, "NOTICE OF APPEARANCE" of Antonio Fernández, and "NOTICE OF APPEARANCE" of Kathleen Kannler in the above-captioned proceeding 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; with copies by e-mail as indicated by a double asterisk (\*\*), this 15<sup>th</sup> day of September, 2003.

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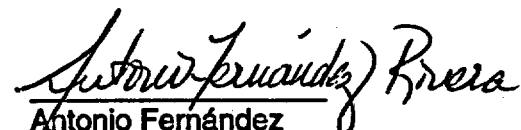
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