

November 14, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
DUKE ENERGY CORPORATION)
)
(McGuire Nuclear Station,)
Units 1 and 2,)
Catawba Nuclear Station,)
Units 1 and 2))

Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR

DUKE ENERGY CORPORATION'S OPPOSITION TO
PETITION FOR REVIEW OF LBP-03-17

I. INTRODUCTION

Duke Energy Corporation ("Duke") herein responds in opposition to the petition for review filed on November 4, 2003, by Blue Ridge Environmental Defense League ("BREDL").¹ BREDL is seeking review of a decision of the Atomic Safety and Licensing Board ("Licensing Board"), LBP-03-17, issued in this matter on October 2, 2003. In LBP-03-17, the Licensing Board ruled — in accordance with 10 C.F.R. § 2.714(a) — that none of the eight subparts of BREDL's late-filed proposed Amended Contention 2, all challenging the adequacy of Duke's evaluations of the issue of Severe Accident Mitigation Alternatives ("SAMAs"), was admissible.² In its Petition, BREDL seeks a reversal with respect to three of the subparts. As

¹ "Blue Ridge Environmental Defense League's Petition for Review of LBP-03-17" (November 4, 2003) ("BREDL Petition").

² On October 7, 2003, in an Addendum to LBP-03-17, one member of the Licensing Board issued a separate opinion concurring in part and dissenting in part with the majority decision.

discussed below, BREDL's filing is untimely. Moreover, the Licensing Board was entirely correct in finding the three subparts to be inadmissible.³

II. DISCUSSION

A. The Appeal Is Not Timely

BREDL styles its filing as a petition for review pursuant to 10 C.F.R. § 2.786(b). The Petition, however, seeks review of a Licensing Board decision finding *all remaining* proposed late-filed contentions in this matter to be inadmissible. The effect of the decision is to deny BREDL any further participation in this proceeding and to obviate any hearing in this case. (LBP-03-17 is not a partial initial decision ruling on admitted contentions.) As such, any appeal from LBP-03-17 would be pursuant to 10 C.F.R. § 2.714a(b). Section 2.714a(a) further specifies that, to be timely, an appeal is due within 10 days after service of the Licensing Board's order. In this case, the relevant order was issued on October 2, 2003. An appeal on the issue of admissibility, on November 4, 2003, is out of time and must be dismissed.⁴

³ Since BREDL has characterized its appeal as a petition for review under 10 C.F.R. § 2.786, Duke in this response has abided with the page restrictions of 10 C.F.R. § 2.786(b)(3). Duke has, however, previously addressed the issues related to admissibility of proposed Amended Contention 2 on several occasions. *See* "Response of Duke Energy Corporation to Proposed Late-Filed Contentions" (June 10, 2002); "Response of Duke Energy Corporation to July 15, 2002 Licensing Board Order" (July 22, 2002); "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); "Duke Energy Corporation's Reply to Intervenors' Response to Issues Raised by the Licensing Board" (February 12, 2003). In addition, these issues were discussed at length at the oral prehearing conference held on March 18, 2003. Tr. 1208-1476.

⁴ Even if the time for an appeal were determined to run from the date of the Addendum to LBP-03-17, issued on October 7, 2003, the present appeal would be untimely. In any event, the October 7 date should not be considered the operative date. The order of the Licensing Board (majority) legally disposing of all proposed contentions — and therefore giving rise to an appeal under 10 C.F.R. § 2.714a — was the October 2 order.

B. The Commission Should Not Grant Review

BREDL maintains that the Commission should take review of LBP-03-17 because the decision “is based on legal and factual errors, and because it raises substantial issues of policy and discretion.” Petition, at 4. In fact, however, BREDL points to no factual errors. Moreover, BREDL does not in any way support its assertion that the matters raised in the appeal — concerning the admissibility of three subparts of one very narrow SAMA contention — are substantial issues of policy and discretion. The petition, therefore, is in reality no more than an argument that the Licensing Board erred as a matter of law in applying the admissibility criteria of 10 C.F.R. § 2.714(b)(2) and in rejecting the three proposed contentions. The Licensing Board majority, however, did not err in its decision.

1. All Three Subparts Were Correctly Rejected

The Licensing Board correctly rejected Subparts 2, 5, and 8 of Amended Contention 2 for a variety of reasons discussed further below. The Licensing Board’s reasons were patently correct and its analysis was entirely consistent with the guidance provided by the Commission in its December 18, 2002 decision in this matter.⁵ However, there is an additional overriding reason that *all subparts* of Amended Contention 2 should have been rejected. The proposed contentions were no longer viable given the NRC Staff’s conclusions in the license renewal final Supplemental Environmental Impact Statements (“SEISs”).⁶ The issues raised by

⁵ See *Duke Energy Co.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002).

⁶ See NUREG-1437, Supplement 8, “Final Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding McGuire Nuclear Station, Units 1 and 2” (Dec. 2002) (“McGuire SEIS”), Section 5.2; NUREG-1437, Supplement 9, “Final Generic Environmental Impact Statement for License Renewal of Nuclear Plants Regarding Catawba Nuclear Station, Units 1 and 2” (Dec. 2002) (“Catawba SEIS”), Section 5.2.

BREDL could lead to no further relief *in a license renewal proceeding*,⁷ and therefore are not admissible under 10 C.F.R. § 2.714(d)(2)(ii).

The original Consolidated Contention 2 in this case focused on the adequacy of Duke's SAMA evaluations with respect to one particular scenario — potential early containment failure in a station blackout (“SBO”) event. As explained in CLI-02-28, Consolidated Contention 2 was a contention of omission, asserting that Duke's original SAMA evaluations did not consider data relevant to this scenario from an NRC contractor report, NUREG/CR-6427. That omission was rectified by Duke's responses to Staff Requests for Additional Information (“RAIs”), and the Licensing Board ultimately dismissed the contention as moot.⁸ Amended Contention 2 was purported to be a challenge to the adequacy of Duke's evaluations in the RAI responses of the scenario of concern — that is, to provide specific information about deficiencies in Duke's discussion of the contractor data in the RAI responses.⁹ Amended Contention 2 specifically sought further “discussion” and “disclosure” of evaluations of the mitigation alternatives related to powering the hydrogen control system in an SBO event. However, further discussions and evaluations — in the SAMA context — were obviated by the SEISs.

The NRC Staff concluded in the final SEISs that, given 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.” See McGuire SEIS; at 5-30; Catawba SEIS, at 5-28 - 5-29. As stated in the

⁷ This is discussed in detail in Duke's February 7, 2003 filing on the admissibility of Amended Contention 2, at 5-12.

⁸ “Order (Ruling on Duke Motion to Dismiss, Setting Briefing Deadlines, and Scheduling Oral Arguments on Amended Contention 2),” February 4, 2003.

⁹ See “Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Amended Contention 2” (May 20, 2002), at 3.

SEISs, that SAMA identified as potentially cost-beneficial does not relate to the question of adequately managing the effects of equipment aging. *Id.* Therefore, the SAMA evaluations required for license renewal were complete. The ultimate question of whether a SAMA related to hydrogen control in an SBO in fact is cost-beneficial, and whether changes to the Part 50 current licensing basis (“CLB”) should be required for McGuire, Catawba, or other affected plants, are matters now being examined in connection with the NRC’s resolution of Generic Safety Issue (“GSI”) 189.¹⁰ *Id.* The maximum relief possible on this issue *in a license renewal proceeding* has been granted.¹¹ While the subparts of Amended Contention 2 all seek further “discussion” and “disclosure” related to this narrow SAMA question, such discussion and disclosure are no longer necessary or meaningful in the context of a *license renewal* SAMA review.¹² The NRC is, however, providing an ongoing forum in connection with GSI-189. Public participation also would be available in connection with any Part 50 rulemaking.

¹⁰ GSI-189, “Susceptibility of Ice Condenser and Mark III Containments to Early Failure from Hydrogen Combustion during a Severe Accident.”

¹¹ As the Commission itself observed in CLI-02-28, given the conclusion in the SEISs that a SAMA related to ac-independent back-up power appears to be cost-beneficial, “it is unclear what additional result or remedy would prove meaningful to the Intervenor.” CLI-02-28, 56 NRC at 388 (footnote omitted). The Commission there further emphasized that “the ultimate agency decision on whether *to require* facilities with ice condenser containments to implement any particular SAMA will fall under a Part 50 current licensing basis review.” *Id.* at 388, n. 77 (emphasis in original). This latter point reflects one of the NRC’s fundamental principles of license renewal. *See* “Nuclear Power Plant License Renewal; Revisions” (final rule), 60 Fed. Reg. 22,461, 22,463-64 (May 8, 1995).

¹² For example, similar to the Commission’s approach to the original contention (CLI-02-28, 56 NRC at 378), there is no reasonable purpose to further consider in license renewal whether a more detailed risk or cost analysis would lead to a more positive result with respect to whether a SAMA is cost-beneficial.

2. Subpart 2 Was Correctly Rejected

Subpart 2 is an argument that the SAMA evaluation is not complete because Duke has not published its plant-specific PRA. The Licensing Board found that the subpart is “indeed in the nature of a discovery dispute” and correctly observed that discovery is not available until a contention has been admitted. LBP-03-17, slip op. at 11. The Licensing Board also found that “NRC regulations do not require Duke to publish its entire PRA.” *Id.* at 12. Lacking a legal basis, the contention was properly rejected.¹³

BREDL argues that the contention is not a discovery request, but rather an issue of full “public disclosure” under the National Environmental Policy Act (“NEPA”). BREDL acknowledges that the NRC has no regulation requiring public disclosure of PRAs, but believes “such disclosure is reasonably required in order to satisfy the requirement of NEPA that an [environmental impact statement (EIS) or environmental report (ER)] must take a ‘hard look’ at the environmental consequences of agency decisions.” Petition, at 5. BREDL’s argument, however, simply pushes the oft-stated NEPA “hard look” language too far. NEPA and NRC regulations mandate a *process*, not disclosure in an ER of a plant-specific PRA or any other information on the scale asserted by BREDL in this subpart.

The Supreme Court in *Kleppe v. Sierra Club*¹⁴ articulated the “hard look” aspect of NEPA in stating that “[t]he only role for a court is to insure that the agency has taken a ‘hard look’ at environmental consequences; it cannot ‘interject itself within the area of discretion of the

¹³ In rejecting this subpart, the Licensing Board determined there was inadequate *basis* for the contention. In making this decision as part of an admissibility determination, the Licensing Board did not make an improper “merits” decision; rather, it met the Commission’s expectations previously established in this case. *See* CLI-02-14, 55 NRC 278, 292, n. 25 (2002).

¹⁴ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976) (internal citations omitted).

executive as to the choice of the action to be taken.” In *Louisiana Energy Services*,¹⁵ the Commission paraphrased the standard as follows:

The principal goals of an FEIS are twofold: to force agencies to take a ‘hard look’ at the environmental consequences of a proposed project, and, by making relevant analyses openly available, to permit the public a role in the agency’s decision-making process. . . . The EIS, then, should provide sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a ‘hard look’ at environmental factors and to make a reasoned decision.

In this case the NRC Staff followed precisely the process established by NRC regulations to assure an appropriate look at the SAMA question to the extent relevant to a license renewal application. In accordance with 10 C.F.R. § 51.53(c)(3)(ii)(L), Duke submitted “a consideration of alternatives to mitigate severe accidents” in its original ER. Duke later submitted additional information concerning the SAMA evaluations in response to the RAIs. The NRC Staff reviewed that information, performed its own analyses, and reached a conclusion that there *may be* a cost-beneficial CLB change to address the containment failure issue. The latter issue is now being addressed in the context of GSI-189. The SEISs include a discussion of the relevant issues (including Duke’s own differing views) and document the Staff’s decision. The Staff, therefore, has followed its NEPA process and thereby satisfied its obligation to take a “hard look” at the relevant issues. Reason does not support a contention that the SEISs must be supported by publication of a PRA — where NRC rules do not require such publication and do not require that licensees even maintain a PRA.

BREDL also maintains that “the only way to make a meaningful evaluation of the assertions in Duke’s RAI responses regarding its consideration of NUREG/CR-6427 is to evaluate the quantitative assumptions and data that went into the analysis.” Petition, at 6. This

¹⁵ *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-88 (1998) (internal citations omitted).

argument, however, is patently insufficient to justify Commission review. First, to the extent BREDL was challenging any PRA Level 1 inputs (such as SBO frequency), these inputs did not change in the RAI responses and the challenge was untimely.¹⁶ Second, as observed by the Licensing Board, ample information was available. LBP-03-17, slip op. at 12. Third, the RAI responses specifically incorporated the Level 2 conditional containment failure probabilities found by the study cited by BREDL. 56 NRC at 379. BREDL was always in a position to evaluate the assumptions and data from that publicly-available study — and to assess the various SAMA evaluations. In sum, the Licensing Board evaluated the timeliness of the proposed contention, conducted a disciplined examination of the basis as required by the NRC's contention rule, applied the proper threshold criteria, and correctly found the subpart to be inadmissible.

3. *Subpart 5 Was Correctly Rejected*

Subpart 5 asserted that Duke's SAMA evaluations were inadequate because they failed to take adequate account of uncertainties and their effect on the results of its analysis. BREDL again complains that this alleged failure constitutes a violation of the NEPA "hard look" requirement as well as NRC regulations (citing 10 C.F.R. § 51.71(d)) requiring that an EIS "quantify the various factors considered" to the "fullest extent practicable." Petition, at 7. Again, BREDL pushes the "hard look" rubric and the NRC's regulations too far.

First, the Licensing Board properly rejected this subpart for lack of any regulatory or legal basis — finding that "there is no NRC requirement for uncertainty analyses in the situation before us." LBP-03-17, slip op. at 19. This is clearly correct. The Licensing Board recited the various NRC guidance documents and found nothing to support the claim that a

¹⁶ See CLI-02-28, 56 NRC at 381 ("[T]hese SBO frequency-related arguments [in the amended contention] are new. They were not part of the original contention.").

SAMA evaluation must include a comprehensive quantitative uncertainty analysis. Broad references to “hard looks” and “public disclosure” do not change that fact.¹⁷

Second, the Licensing Board could have equally rejected this contention on other grounds. First, the contention was untimely without good cause. It was not based on any new information in Duke’s RAI responses, and BREDL never demonstrated how it met its obligation to timely uncover relevant information and timely raise issues.¹⁸ Additionally, this subpart provided no basis to challenge the uncertainty information that was available and no basis for a conclusion that a further uncertainty analysis would change the conclusion of the Staff in the SEISs — *i.e.*, that there may be a cost-beneficial SAMA — in any way that would provide BREDL any further relief in this license renewal proceeding.

4. Subpart 8 Was Correctly Rejected

Subpart 8 asserted that Duke’s SAMA evaluations were inadequate because Duke “assumed” that power to the air return fans, as well as power to the hydrogen igniters, would be necessary to safely resolve the GSI-189 concern. BREDL still objects to this as an “unjustified assumption” to “inappropriately inflate the cost of the mitigative measure of hydrogen ignition.” Petition, at 8. The Licensing Board clearly did not err in dismissing this contention. In CLI-02-28, the Commission itself suggested that this subpart “may have been cured” by the Staff’s SAMA evaluations. CLI-02-28, 56 NRC at 387-88. The fact is, the SEISs do not “assume” that

¹⁷ The Licensing Board also correctly found that Duke had indeed prepared certain qualitative and quantitative uncertainty analysis. LBP-03-17, slip op. at 18-20. It further observed that the Staff has published uncertainty data in connection with GSI-189 that should have mooted the contention. *Id.* at 20, n. 26. This was not a “merits” review as alleged by BREDL; it was a critical “basis” review as required by Commission rules.

¹⁸ This is discussed in Duke’s June 10, 2002 filing on the admissibility of Amended Contention 2, at 34. *See also* CLI-02-28, 56 NRC at 385-86 (“An amended NEPA contention is not an occasion to raise additional arguments that could have been raised previously”).

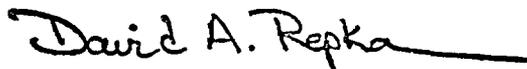
power to the return fans was necessary and found that a cost-beneficial SAMA may exist. McGuire SEIS, at 5-29 - 5-30; Catawba SEIS, at 5-28 - 5-29.

On appeal BREDL seeks further justification and clarification of a “misleading analysis in the ER.” Petition, at 9. However, there is nothing “misleading” about a SAMA evaluation where the assumptions and results are clearly presented. Moreover, the argument suggests that the ER is the last word. Clearly, it is not — as illustrated by the SEISs. The argument also suggests that the SAMA evaluation must, in effect, become the platform to fully address GSI-189 in detail. This also is not a plausible position. The SAMA evaluation has served its purpose. The CLB review in the Part 50 context will further develop the technical record, as needed. There is no reasonable basis on which to conclude that this larger process must be bootstrapped into the narrow and well-defined license renewal SAMA process.

III. CONCLUSION

For the reasons discussed above, the petition for review should be denied.

Respectfully submitted,



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Dated in Washington, District of Columbia
This 14th day of November 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S OPPOSITION TO PETITION FOR REVIEW OF LBP-03-17" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 14th day of November, 2003. Additional e-mail service, designated by **, has been made this same day, as shown below.

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