

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
PETITION FOR REVIEW OF LBP-03-17

INTRODUCTION

The Nuclear Regulatory Commission staff (Staff) hereby files its opposition to Blue Ridge Nuclear Defense League's (BREDL) Petition for Review of LBP-03-17. As discussed below, BREDL's petition is without merit in that the Atomic Safety and Licensing Board (Board) did not commit error in rejecting Amended Contention 2.

BACKGROUND

This matter arises from the application for license renewal filed by Duke Energy Corporation (Duke), to renew the operating licenses for the McGuire Nuclear Station, Units 1 and 2 (McGuire) and the Catawba Nuclear Station, Units 1 and 2 (Catawba).¹ On January 4, 2002, the Board admitted BREDL's Contention 2, which dealt with the treatment of severe accident mitigation alternatives (SAMAs) in Duke's Environmental Report (ER).² On July 23, 2002, the Commission, relying on Duke's omission of any reference to NUREG/CR-6427, "Assessment of the DCH issue

¹Application to Renew the Operating Licenses of McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2, June 13, 2001 (License Renewal Application or LRA).

² LBP-02-04, 55 NRC 49 (2002).

for Plants with Ice Condenser Containments," (April 2000) (Sandia Study) in its SAMA analysis, found the contention to be admissible as to whether information from the Sandia study, should have been used or addressed in Duke's SAMA analysis.³ In its opinion, the Commission noted that the Staff's Supplemental Environmental Impact Statement (SEIS) had applied the information in the Sandia Study in the analysis of SAMAs, thus concluding that "the draft SEISs may -- indeed largely appear to -- render moot the contention's first concern: the SAMA analysis's 'fail[ure] to include information from [the Sandia study].'" CLI-02-17, 56 NRC at 11.

On December 18, 2002, in response to a motion for clarification of its decision in CLI-02-17 and a Certified Question from the Board, the Commission issued an Opinion clarifying its prior opinion and giving guidance to the Board regarding further action on the SAMA contention.⁴ In CLI-02-28, the Commission clarified that the Sandia study made no new findings as to station blackout (SBO) frequency, merely plugging in previously available data regarding SBO. 56 NRC at 375. The Commission also confirmed that it had not expanded the scope of Contention 2 in CLI-02-17. *Id.* at 376-78. The Commission emphasized that it saw no purpose

in returning to the question whether the earlier Environmental Reports should have considered the Sandia estimates, a matter that went to the sufficiency of the admitted contention, to be sure, but that now has been superseded by the draft SEIS's actual use of Sandia containment failure probabilities. . . . The Board's current focus, then, should be on the latest SAMA analyses -- those found in the draft SEISs -- not Duke's original SAMA analyses in the Environmental Reports.

Id. at 378 (emphasis in original). The Commission provided the Board with direction regarding consideration of the admissibility of the amended contention. *Id.* at 385-88. First, the Commission said that the issuance of the draft SEISs seemed to resolve BREDL's concern regarding return fans. Therefore, there was no point in focusing on Duke's ER, when the draft SEISs provided "a more recent and often more thorough discussion of relevant issues." *Id.* at 385 (footnote omitted).

³ CLI-02-17, 56 NRC 1, 6-11 (2002).

⁴ CLI-02-28, 56 NRC 373 (2002).

Second, the Commission noted that the amended contention must be based on data and conclusions that are significantly different from those in the ER. *Id.* Also, the amended contention cannot “insert numerous discrete new claims that should have been raised earlier.” *Id.* at 386. Third, as to BREDL’s claim that Duke’s entire probabilistic risk assessment (PRA) must be made available, the Commission reminded the Board that anticipatory contentions are barred and that petitioners cannot file vague contentions and try to flesh them out through later discovery. *Id.* at 387 (footnotes and citations omitted). Finally, the Commission stated that, with regard to implementation of SAMAs, “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.

On October 2, 2003, a majority of the Board issued a memorandum and order denying admission of proposed Amended Contention 2.⁵ On October 7, 2003, the remaining Board member filed an opinion concurring in part and dissenting in part.⁶ On October 16, 2003, the Board issued a memorandum and order denying reinstatement of Contention 1, relating to the use of MOX and terminating the proceeding.⁷ BREDL filed its petition for review on November 4, 2003.

⁵ LBP-03-17, 58 NRC ____ (October 2, 2003).

⁶ Addendum to LBP-03-17, 58 NRC ____ (October 7, 2003).

⁷ Memorandum And Order (Ruling on Intervenors’ Request for Reinstatement of Contention 1), LBP-03-19 (October 16, 2003).

DISCUSSION

1. The Commission Should Not Grant Review; The Board's Decision Denying Admission of Amended Contention 2 was Correct⁸

BREDL asserts that the Board erred in that its decision is based on legal and factual errors and that the decision raises "substantial issues of policy and discretion." BREDL Petition at 4. The petition, however, fails to substantiate these claims. BREDL appeals only the decisions relating to Subparts 2, 5 and 8 of proposed Amended Contention 2. The Staff submits that Subparts 2 and 5 were untimely filed before the Board, and were properly rejected on that basis alone. Both of the Subparts related to alleged omissions that were apparent in the ER, which was filed on June 21, 2001.⁹ No reasonable excuse, that is, no good cause, was offered by BREDL for the late filing of Subparts 2 and 5 eleven months after the ER had been issued.

⁸ The Staff notes that BREDL erroneously filed its petition for review pursuant to 10 C.F.R. § 2.786. Although the Board, in its October 16, 2003 Order terminating the proceeding, cited section 2.786 as the appropriate vehicle for appeal, the Staff submits that the Board was mistaken. The use of section 2.786 is not appropriate in this case because that section is applicable to petitions for review where a decision addressing a merits issue has been made by a Board. Here, the October 2, 2003 decision being appealed by BREDL and the October 16, 2003 decision terminating the proceeding relate to the admission of contentions. Therefore, the appropriate section is 2.714a, which gives the petitioner an appeal of right to the Commission in the event its petition for intervention\request for hearing is wholly denied. While section 2.786(b)(1) provides a fifteen day time limit after service to request review of "a full or partial initial decision . . .," section 2.714a provides a ten day time limit to appeal from the denial of a petition to intervene\ request for hearing. In the instant case, the decision denying admission of contentions was served on October 2, 2003, and the decision terminating the proceeding was served on October 16, 2003. Thus, BREDL should have filed its appeal by October 31, 2003 (10 days, plus 5 days permitted under section 2.710 for service by mail), at the very latest. See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 201-02 (1998). Therefore, BREDL's petition is untimely.

⁹ BREDL's stated reason why the late filing of Subpart 5 of the Amended Contention should be excused, that it did not consider an uncertainty analysis to be necessary until it read Duke's answers to the Staff's RAIs, is not reasonable and does not demonstrate good cause. In this regard, BREDL had stated its belief that an uncertainty analysis would be performed. See BREDL's Petition at 8, n. 12 (explaining that the original contention 2 challenged the failure to take NUREG/CR-6427 into account in the ER and it was reasonable to assume that Duke would perform an uncertainty analysis in evaluating the NUREG).

The Board's decision comports with Commission requirements for admission of contentions and assures "that NRC hearings 'serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.'" *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC ___, slip op. at 8 (footnote and citation omitted). In this case, the proposed amended contention did not offer timely, genuine, substantive issues for litigation and was properly rejected by the majority of the Board. Therefore, the Commission should not grant review of the Board's decision denying admission of the amended contention.

a. The Board was correct in denying admission of Subpart 2

Amended Contention, Subpart 2, alleges that Duke did not support its SAMA analysis by publication of its PRA. The Board rejected this subpart because it is in the nature of a discovery dispute, there is no requirement that Duke publish its entire PRA, and much of the PRA has been published. BREDL argues that this is not a discovery dispute, but one of public disclosure under the National Environmental Policy Act (NEPA). BREDL Petition at 5.

NEPA's "hard look" requirement relates to the NRC's obligations. See NEPA, §§ 101, 102, 42 U.S.C. §§ 4331, 4332. There is no such requirement for Duke. As Duke points out in its opposition to BREDL's petition for review,¹⁰ NEPA mandates a process, not a particular outcome. Duke Opposition at 6-7. In fulfilling its obligation to take a hard look, the Staff: reviewed Duke's ER; asked for, and received, more information via a Request for Additional Information (RAI) and Duke's responses thereto; and performed its own analysis of Duke's SAMAs. As a result of its review and analysis, all of which are disclosed in the SEIS, the Staff reached different conclusions than Duke.¹¹ The Staff fulfilled its obligation under NEPA. Thus, BREDL's claim must fail.

¹⁰ Duke Energy Corporation's Opposition to Petition for Review of LBP-03-17 (Duke's Opposition), November 14, 2002.

¹¹ See NUREG-1437, Supplement 8, Final Generic Environmental Impact Statement for (continued...)

As the Staff has previously pointed out, BREDL has failed to demonstrate why it needs Duke's full PRA in order to prepare contentions. BREDL has pointed to what it considers to be gaps that would be filled if Duke released its PRA,¹² but it has never explained why the information is needed. Nor has it explained why the information that has been released is insufficient.¹³ BREDL's demand that the entire PRA be made available is nothing more than an attempt to require discovery at the contention stage in order to be able to frame further contentions. As the Commission reminded the Board in CLI-02-28, "our 1989 contention rule revisions bar 'anticipatory' contentions, where petitioners have only 'what amounts to generalized suspicions, hoping to substantiate them later,' or 'simply desire more time and more . . . information to determine [if] they even have a genuine material dispute for litigation.'" CLI-02-28, 56 NRC at 387. Therefore, on that basis alone, Subpart 2 must fail.

The Board found Subpart 2 inadmissible on additional grounds. The Board held that there is no requirement that the PRA be published, either under NEPA or the AEA. LBP-03-17, slip op. at 12. Therefore, to the extent that BREDL is claiming that publication is required, Subpart 2 is without basis.

In addition, BREDL's claim that the Board erred in partially basing its decision on the fact that many portions of Duke's PRA had, in fact, been published, is without basis. Contrary to BREDL's claim that the Board ruled on the merits of the contention, the Board was merely

¹¹(...continued)

License Renewal of Nuclear Plants Regarding McGuire Nuclear Station, Units 1 and 2, (December 2002), 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, (December 2002), Section 5.2.

¹² LBP-03-17, 58 NRC ____ (2003), slip op. at 10.

¹³ During the telephonic oral argument on BREDL's motion for admission of Amended Contention 2, it was not clear that BREDL's witness had availed himself of the opportunity to read the portions of the PRA that had been released to the public prior to submission of the proposed amended contention. See Transcript of July 10, 2002, telephone conference, p. 988.

demonstrating the fact that subpart 2 contained factual errors, in that it did not acknowledge the information that was available and did not explain why the available information was insufficient.

Finally, although not relied upon by the Board in reaching its decision, there is an additional reason why Subpart 2 was correctly rejected. The fact that Duke's entire PRA had not been made public was apparent from the date the license renewal application was filed in June of 2001. The contention should have been raised months before the amended contention was filed in May of 2002.¹⁴ BREDL did not offer a credible excuse why this issue was not raised earlier. Therefore, the Board was correct in rejecting Subpart 2.

b. The Board was correct in denying admission of Subpart 5

Subpart 5 alleges that Duke failed to take adequate account of uncertainties in its analysis in that it did not perform uncertainty analyses and, where it did perform such analyses, they were inadequate. BREDL states that the Board's decision rejecting Subpart 5 of Amended Contention 2 was in error. The Board rejected Subpart 5 because there is no NRC requirement for uncertainty analyses, finding, in addition, that Duke satisfied NRC guidance regarding such analyses. The Board also found that the subpart was filed late without good cause and should have been filed with the original contentions because it was based on the contents of the ER filed on June 21, 2001. LBP-03-17, slip op. at 19-20. Regarding the complaint that any uncertainty analyses done were inadequate, the Board determined that BREDL had provided no valid basis for that portion of the subpart and had, in addition, "presented a misleading treatment of Duke's responses to RAI 2." *Id.* at 21. BREDL alleges that the Board's decision is inconsistent with the "hard look" requirement of NEPA and the requirement in 10 C.F.R. § 51.71(d) that a draft EIS quantify the factors considered to the "fullest extent practicable." BREDL Petition at 7. BREDL also states that the Board erred in that it made a merits determination.

¹⁴ See NRC Staff's Answer to Blue Ridge Environmental Defense League's and Nuclear Information and Resource Service's Amended Contention 2, June 10, 2002, at 15.

The Staff submits that BREDL's grounds for appeal are without merit. The reason stated by the Board for rejecting the subpart was correct: there is no regulatory requirement that an uncertainty analysis be performed. LBP-03-17, slip op. at 19. Neither NEPA nor 10 C.F.R. Part 51 contain such a requirement. Again, the NEPA "hard look" requirement is an obligation placed upon the NRC, not the applicant. BREDL relies on NRC Staff guidance¹⁵ in support of its argument that uncertainty analyses should have been prepared. But this reliance is misplaced. There is no such requirement in the draft document cited by BREDL.¹⁶ In any event, Staff guidance documents provide just that -- guidance -- and do not create legally binding requirements. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001).

As the Board concluded, BREDL did not demonstrate a valid basis for its conclusion that uncertainty analyses are required or that the analyses done by Duke were inadequate. In addition, the Board did not make a merits determination, but merely looked at BREDL's allegations with a critical eye, reviewed the documents cited by BREDL and the other parties, and determined that the contention was not sufficiently supported by the facts stated therein. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990) ("[B]oards must do more than uncritically accept a party's mere assertion that a particular document supplies the basis

¹⁵ BREDL cites NUREG/BR-0184, Regulatory Analysis Technical Evaluation Handbook (January 1997); Draft Regulatory Guide DG-1110, An Approach for Using Probabilistic Risk Assessment in Risk Informed Decisions on Plant-Specific Changes to the Licensing Basis (June 2001). BREDL Contentions at 7, n.10. BREDL also cites Final Policy Statement, Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities, Section II.B, 60 Fed. Reg. 42, 622 (Aug. 16, 1995). *Id.* at 7, n.11.

¹⁶ The Board discussed the various guidance documents offered by BREDL before concluding that "there is no NRC requirement for uncertainty analyses in the situation before us." LBP-03-17, slip op. at 18-19. The Board also found that Duke had, in fact, performed uncertainty analyses and had satisfied the applicable guidance. *Id.*

for its contention, without even reviewing the document . . .").¹⁷ But even if it was an improper merits determination, as discussed herein and in the Board's opinion, there are ample additional reasons to reject this subpart, as discussed herein.

Finally, the Board was correct in finding that the subpart was based on information available in the ER and was therefore, untimely without good cause. See footnote 7, *supra*.

c. The Board was correct in denying admission of Subpart 8

Subpart 8 contends that in assessing the SAMAs in its ER, Duke was unjustified in assuming that return fans were required to ensure that the hydrogen igniters were effective. LBP-03-17, slip op. at 28. BREDL, in challenging the Board's decision rejecting this subpart, argues that whether it is an aging issue is irrelevant to the contention, as it is based on NEPA, which requires consideration of "new, significant and relevant" information in the SEIS, whether it relates to an aging issue or not. BREDL Petition at 8-9. BREDL also states that the Board was incorrect in its characterization of the subpart. BREDL states that it is seeking adequate justification for the use of the return fans or elimination of the option from consideration in the ER and the EIS. *Id.* at 9. Finally, BREDL objects to the Board's finding that subpart 8 was moot, because the Staff was vague and equivocal regarding the SAMAs in the SEIS and asserts that the Staff cannot postpone the analysis until the resolution of GSI-189. *Id.* at 10.

None of the issues raised by BREDL require Commission review. First, as the Commission noted in CLI-02-28, regarding implementation of SAMAs and the pendency of Generic Safety Issue 189 (GSI-189), "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." CLI-02-28, 56 NRC at 388, n. 77. BREDL would have the Commission reverse itself and

¹⁷ The Appeal Board also stated that unless a contention and its bases are scrutinized, a board cannot determine whether the hearing process has been properly invoked, which is the purpose of the bases and specificity requirements. *Id.* at 48, n.26, *citing Philadelphia Electric Co. Peach Bottom Atomic Power Station, Units 2 and 3*, ALAB-216, 8 AEC 13, 20, *modified on other grounds*, CLI-74-32, 8 AEC 217 (1974).

find that GSI-189 must be resolved and the SAMAs must be implemented as part of the license renewal. Clearly, BREDL's request for review on this basis should be denied.

Second, whether BREDL was asking for justification for use of the fans or elimination of the fan option is not relevant. The fact of the matter is that the Staff reviewed Duke's ER and answers to RAI, and the data therein. The Staff then performed its own review of the potential SAMA and concluded that the return fans may not be necessary and found a potentially cost effective SAMA relating to the back-up power for the hydrogen igniters. BREDL is not entitled to any particular action by the Staff in NEPA matters, only to disclosure of information considered and the environmental effects of the decision. They have received that in the ER and answers to RAI, but more importantly, in the Staff's SEISs. Further action on the SAMAs is appropriately left to the Part 50 resolution of GSI-189.

The Staff submits that, although NEPA may require that the Staff document its review of alternatives, such as SAMAs, it does not oblige the NRC to implement those alternatives. Based upon the publication of the Staff's analysis in the SEISs, this contention is moot and the Board was correct in rejecting it.

CONCLUSION

Based upon the foregoing, the Licensing Board majority did not commit error in rejecting BREDL's proposed Amended Contention 2. Therefore, BREDL's Petition for Review of LBP-03-17 should be denied.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of November 2003.

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NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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DUKE ENERGY CORPORATION) Docket Nos. 50-369-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S PETITION FOR REVIEW OF LBP-03-17" 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; as indicated by two asterisks (**), by electronic mail, this 19th day of November, 2003.

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