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ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| DUKE ENERGY CORPORATION | ) | Docket Nos. 50-413 OLA |
| | ) | 50-414 OLA |
| (Catawba Nuclear Station, Units 1 and 2) | ) | |
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# DUKE ENERGY CORPORATION'S REPLY TO RESPONSES TO BOARD QUESTIONS

## I. INTRODUCTION

At the prehearing conference on December 3 and 4, 2003, the Atomic Safety and Licensing Board ("Licensing Board") requested responses from designated parties regarding a number of issues. In accordance with the schedule agreed to by the parties and adopted by the Licensing Board,[1] the Blue Ridge Environmental Defense League ("BREDL") and the Nuclear Regulatory Commission ("NRC") Staff filed responses to their questions on December 12,

[1] The schedule was subsequently memorialized in the Licensing Board's written "Order (Regarding Deadlines and Scheduling Issues)" of December 15, 2003.



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2003.[2] In accordance with the established schedule, Duke Energy Corporation ("Duke Energy") herein replies to certain of the responses.[3]

## II. DISCUSSION

Item 2(a): Duke's Proposed Withdrawal of Section 3.8 of the License Amendment Request

At the prehearing conference, Duke Energy proposed to withdraw Section 3.8 of the License Amendment Request ("LAR") if such withdrawal would effectively moot several of BREDL's proposed contentions challenging the sufficiency of the discussion of severe accident risk in that LAR section. Tr. 232 (Repka).[4] In its response, BREDL has declined this offer. Therefore, Duke Energy will not withdraw Section 3.8. No further discussion of this item is necessary.

Duke Energy's position remains that Section 3.8 was not required to be included in the LAR because the application is not one for a risk-informed licensing basis change. BREDL, repeating the position it adopted at the prehearing conference, now argues that "quantitative risk analysis in this case is warranted under the guidance in Regulatory Guide 1.174." BREDL Response, at 4. However, there is insufficient basis in the relevant proposed contentions (BREDL Contentions 1 to 3) to demonstrate that there is a genuine dispute with

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2 "Blue Ridge Environmental Defense League's Response to Board Questions" (December 12, 2003) ("BREDL Response"); NRC Staff's Response to Board's Questions Regarding Executive Order 12114" (December 12, 2003) ("Staff Response").

3 In accordance with the schedule, Duke Energy's reply to one BREDL response — designated as item 2(c) in the Licensing Board's Order of December 15, 2003 — will be included in the response to Supplemental BREDL Contention 13, due December 26, 2003.

4 Duke Energy's offer was made in response to BREDL's suggestion that, as one possible form of relief for these contentions, Section 3.8 could be stricken from the application. Tr. 229 (Curran).

respect to the risk assessment that Duke submitted. Similarly, there is insufficient basis in the proposed contentions to demonstrate that a risk assessment is required to support the application, over and above the traditional deterministic safety evaluation provided in Section 3.7 of the application. The NRC Staff has specifically taken the position that risk information is not required for this LAR. Tr. 152 (Fernandez). And, as discussed at length at the prehearing conference, none of the bases offered for the contentions establishes meaningful changes in risk significance introduced by the four MOX fuel lead assemblies themselves. Accordingly, notwithstanding BREDL's decision to decline Duke Energy's offer, the proposed contentions challenging Section 3.8 should not be admitted.

Item 2(b): Applicability of Council on Environmental Quality Regulations

Council on Environmental Quality ("CEQ") regulations address agency implementation of the National Environmental Policy Act ("NEPA"). As Duke Energy stated at the prehearing conference (Tr. 371 (Repka)), *Limerick Ecology Action v. U.S. Nuclear Regulatory Comm'n.*, 869 F. 2d 719, 743 (3d Cir. 1989), clearly states that "CEQ guidelines are not binding on an agency to the extent that the agency has not expressly adopted them." The Commission has not adopted, anywhere in 10 C.F.R. Part 51, the definition of "connected actions" articulated in CEQ regulations at 40 C.F.R. § 1508.25(a)(1). Therefore, the CEQ regulation is not binding on the NRC. Putting aside any deference that may be afforded to a CEQ definition, the Commission itself articulated its own approach to evaluating whether NEPA reviews are "connected" in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 195 (2002). This

Commission decision stands as the operative NRC standard applicable to evaluating the premise for proposed BREDL Contention 4.[5]

BREDL in its response to this item generally confirms Duke's point regarding the non-binding nature of CEQ regulations, and largely appears to argue only that deference be given to the CEQ definition. ("40 C.F.R. § 1508.25(a) is entitled to substantial deference by the NRC." BREDL Response, at 3.) BREDL does not directly dispute the *Limerick* quote nor does it show where the Commission specifically adopted the CEQ definition such that the definition would be binding on the NRC. BREDL instead inexplicably turns the *Limerick* test around in suggesting only that the CEQ guideline "was not disavowed by the Commission when it promulgated its own set of NEPA regulations [Part 51]." BREDL Response, at 3. BREDL also does not explain how the *McGuire/Catawba* precedent, which establishes a standard directly on point, could be ignored.

Other than "broad deference" cases, BREDL cites only the Commission rulemaking Statement of Considerations for Part 51. Even using this as guidance, it is clear that a CEQ guideline for evaluating the scope of NEPA reviews to avoid segmentation concerns would be non-binding according to the Commission. In full context, that Statement of Considerations explains that the NRC's Part 51 regulations were specifically developed "to take account of the regulations of the [CEQ] implementing the procedural provisions of NEPA voluntarily." 49 Fed. Reg. 9352 (1984). In other words, the Part 51 regulations already incorporate CEQ requirements to the extent the NRC intended. Section 1508.25 is *not* specifically discussed in the Statement of Considerations and nothing therein evidences any

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[5] Of course, as Duke Energy noted at oral argument, this is also not a case of improper "segmentation," where broader or cumulative actions have not been addressed. *See, e.g.,*

Commission intent to adopt that particular standard. As noted by BREDL, the Commission also stated its view that:

> . . . as a matter of law, the NRC as an independent regulatory agency can be bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.

*Id.* The CEQ rule at issue would certainly have "a substantive impact on the way in which the Commission performs its regulatory functions." Therefore, the NRC cannot be bound by such a regulation.

BREDL characterizes the regulation as "procedural." BREDL Response, at 3. All NEPA regulations are in some sense procedural, and this one is no exception.[6] However, BREDL's logic would lead to the unreasonable conclusion that all CEQ regulations would bind the NRC. The exception in the Commission's statement would swallow the rule. Accordingly, the reference in the Statement of Considerations to "procedural or ministerial" regulations should be read as referring to purely administrative (or ministerial) matters. A CEQ regulation such as Section 1508.25 that would define the sequence and scope of NRC environmental reviews must be regarded as a non-binding substantive NEPA regulation.

In sum, 40 C.F.R. § 1508.25 has no weight in this proceeding. Neither the regulation nor an analogue was adopted by the NRC in 10 C.F.R. Part 51. Section 1508.25 is a substantive NEPA regulation that is not binding on the NRC. Instead, the Commission adopted

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Tr. 376-379. It is a case of proper "tiering" under NEPA in which the broader program and all related impacts *have been* extensively addressed elsewhere.

6 Even in the Statement of Considerations for Part 51, the Commission indicated that it was implementing the "procedural provisions of NEPA."

specific evaluation criteria appropriate for this case in its *McGuire/Catawba* decision, and those criteria should be applied.

Item 2(d): NEPA Case Law Regarding Alternatives

This item relates to BREDL Contention 5, in which BREDL argues that the LAR Environmental Report must address alternative reactors to Catawba for the MOX fuel lead assembly demonstration. The point of BREDL's response to this item is that the purpose of *Duke's* application must be re-defined broadly, such that the range of alternatives to be considered also must be viewed broadly, bringing into the scope of alternatives additional reactors that are not available to either Duke or DOE. BREDL Response, at 6. BREDL argues that the purpose of Duke's application is the same as *DOE's* broader purpose — that is, the purpose of the plutonium disposition program in its entirety, as defined by DOE in the 1999 Surplus Plutonium Disposition Final Environmental Impact Statement ("SPDEIS"). *Id.* BREDL believes this to reflect an appropriate delineation of the purpose of the proposed amendment, in contrast to Duke's "absurdly narrow re-casting of the purpose" of the proffered action. *Id.* at 7. Based on this broad definition of the purpose, BREDL would require Duke (and the NRC) to revisit DOE's evaluation in the SPDEIS and consider the "entire range of U.S. commercial reactors," specifically including plants that do not employ ice condenser containments. *Id.*

BREDL's response does not add anything to the discussion of this issue at the prehearing conference. BREDL does not cite a single new case — that is, beyond those cited by Duke and the NRC Staff (which it tries to distinguish) — and none that affirmatively supports its reading of the situation. BREDL's argument was and remains legally baseless and factually unfounded. The case law simply does not support re-defining the purpose of Duke's license amendment to encompass the entire DOE plutonium disposition program. Furthermore,

BREDL's factual premise that "DOE may choose from the entire range of U.S. commercial reactors" (BREDL Response, at 7) is simply untrue. DOE is well beyond its request for proposals related to plutonium disposition by use of MOX fuel. Those proposals included proposed mission reactors, and DOE has made its selection. The "entire range" of commercial reactors has never been available to DOE, and is certainly *not* now available to DOE, much less to Duke.[7]

There is no dispute that the scope of alternatives to be considered is governed by a "rule of reason." *See, e.g., Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Nor is there any dispute that the scope of alternatives reasonably considered follows from the purpose or objective of the specific proposal. *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986). The Court in *Citizens Against Burlington* also observed that it would "uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable . . . ." 938 F.2d at 196. BREDL, quite simply, is arguing for an unreasonable statement of objective in an attempt to vastly (and unrealistically) expand the scope of purported alternatives. However, Duke's LAR is exactly what it purports to be — an application for a four assembly MOX fuel demonstration program at Catawba. It is not the entire DOE plutonium disposition program. The scope of Duke's alternatives must be considered in light of Duke's

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7 BREDL's attempt to re-define the scope of alternatives by re-defining the purpose of Duke's proposal would force the NRC — in connection with each application related to plutonium disposition that it must consider — to re-visit issues already addressed and decisions already made by DOE. In the case of NRC licensing of the MOX fuel fabrication facility, the Licensing Board rejected a contention that alternatives for locating the facility elsewhere or alternative methods for disposing of weapons-grade plutonium must be considered, because those matters were beyond the scope of the proceeding. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 470 (2001).

objective: a lead assembly demonstration program to support possible batch use of MOX fuel at Catawba or McGuire.

In *Citizens Against Burlington,* the Court upheld the scope and discussion of alternatives considered by the agency. In connection with a plan to expand an airport, the agency was not required to evaluate alternatives involving siting and building other airports. *Id.* at 197-198. The Court noted that even CEQ regulations oblige agencies to discuss only alternatives that are "feasible." 938 F.2d at 195. BREDL argues only that this is not a case like *Citizens Against Burlington* "where the range of alternatives was circumscribed by what was reasonable or feasible for the applicant." BREDL Response, at 6. However, there is no good reason given for that assertion. The range of alternatives is *always* limited by what is reasonable or feasible for the applicant,[8] and this case is no different. As discussed at the prehearing conference, Oconee Station has never been part of the Duke-Cogema-Stone & Webster ("DCS") proposal/contract with DOE and is not a feasible alternative for lead assemblies. Tr. 450, 460-62. A MOX fuel demonstration program at Oconee would not support the two mission reactors (McGuire and Catawba) designated under the DOE contract.[9] Non-Duke commercial reactors not selected by DOE (for the most part, because they were never offered) are also certainly not reasonable alternatives for Duke. The "entire range" of commercial reactors is simply not available.

BREDL also summarily waves off the *City of Angoon* case because in that case, it asserts, "the range of alternatives was pre-determined by a conveyance of land by the U.S.

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8 *Citizens Against Burlington,* 938 F.2d at 195; *see also Carmel-by-the-Sea v. U.S. Dept. of Transp.,* 123 F.3d 1142, 1155 (9th Cir. 1997), *citing* 40 C.F.R. § 1502.14(a)-(c) ("The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones.")

9 No licensee that files an application for a plant-specific licensee amendment must consider the alternative of making the change at other plants.

Congress." BREDL Response, at 6-7. However, *City of Angoon* cannot be so easily dismissed. The essence of the holding in the case is that, to be considered, alternatives "must be ascertainable and reasonably within reach." 803 F.2d at 1021-22. The specific, factual reasons that an alternative dismissed in that case was not considered to be ascertainable or reasonably feasible, do not limit the general legal proposition. In *City of Angoon*, the alternative at issue was determined to be remote and speculative because it would require an exchange of land holdings that would be contingent on legislative action. Here, DOE has made a selection of a MOX fuel proposal with designated mission reactors. The proposed wide-ranging alternatives (the "entire range of U.S. commercial reactors") are remote and speculative because these reactors: 1) are not available to Duke; 2) are not under contract to DOE or DCS for plutonium disposition; and 3) have not been offered to or selected by DOE.[10] In sum, therefore, BREDL's argument fails to provide any further support as a basis for Contention 5.

Item 2(e): Applicability of Executive Order 12114 to NRC

In its response to this item, the NRC Staff addressed the Licensing Board's question regarding the applicability of Executive Order ("EO") 12114 to the NRC. The NRC Staff states that the EO, by its terms, does not apply to NRC export licenses unless the NRC action provides a foreign nation with a nuclear production or utilization facility [or nuclear waste management facility]. Staff Response, at 2. The Staff's reading of the exemption in Paragraph

10 In any event, DOE already broadly analyzed alternative commercial nuclear reactors in connection with its decisions, such as in the SPDEIS. See Duke Answer, at 39.

2-5(1)(v) of EO 12114 is exactly correct. DOE's pending export license application before the NRC related to material for fabrication of the lead assemblies is exempt from the order.[11]

Respectfully submitted,

David A. Repka
WINSTON & STRAWN, LLP
1400 L Street, NW
Washington, D.C. 20005-3502
(202) 371-5726

Lisa F. Vaughn
DUKE ENERGY CORPORATION
422 South Church Street
Mail Code: PB05E
Charlotte, N.C. 28201-1244

ATTORNEYS FOR DUKE ENERGY CORPORATION

Dated in Washington, District of Columbia
This 19th day of December 2003

[11] The issues of environmental impacts on the global commons implicated by EO 12114 are, in any event, beyond the scope of the present NRC licensing action — Duke's lead assembly LAR for Catawba. The issue has been addressed by DOE in its environmental reviews related to plutonium disposition, including in the Supplement Analysis of November 2003.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "DUKE ENERGY CORPORATION'S REPLY TO RESPONSES TO BOARD QUESTIONS" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 19th day of December, 2003. Additional e-mail service, designated by **, has been made on December 19, 2003, as shown below.

Ann Marshall Young, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AMY@nrc.gov)

Anthony J. Baratta**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AJB5@nrc.gov)

Dr. Thomas S. Elleman**
Administrative Judge
5207 Creedmoor Road, #101
Raleigh, NC 27612
(e-mail: elleman@eos.ncsu.edu)

Office of the Secretary**
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Rulemakings and Adjudications Staff
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate
Adjudication
Mail Stop O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Uttal, Esq.**
Antonio Fernandez, Esq.**
Kathleen A. Kannler, Esq.**
Office of the General Counsel, O-15D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: slu@nrc.gov)
(e-mail: axf2@nrc.gov)
(e-mail: kak1@nrc.gov)

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

Mary Olson**
Director, Southeast Office
Nuclear Information and Resource
Service
P.O. Box 7586
Asheville, NC 28802
(e-mail: nirs.se@mindspring.com)

David A. Repka
Counsel for Duke Energy Corporation



DC:337263.1