RAS 7491

March 15, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

DUKE ENERGY CORPORATION'S MOTION TO DISMISS CONTENTION III

I. INTRODUCTION

In its "Memorandum and Order (Ruling on Standing and Contentions)" of March 5, 2004 ("Memorandum and Order"), the Atomic Safety and Licensing Board ("Licensing Board") admitted three re-formulated contentions based on the proposed contentions filed by Blue Ridge Environmental Defense League ("BREDL"). In particular, the Licensing Board reframed and renumbered BREDL's proposed Contention 5 as admitted Contention III. The admitted contention reads:

> The Environmental Report is deficient because it fails to consider Oconee [Nuclear Station] as an alternative for . . . [Mixed Oxide ("MOX") lead assemblies].

The Licensing Board, in its Memorandum and Order, suggested that this "alternatives" issue might only be considered "to the extent required for a 'brief discussion' under 10 C.F.R. § 51.30(a)." Memorandum and Order, at 51. Duke Energy Corporation ("Duke") herein moves to dismiss Contention III as moot. The "brief discussion" sought in the

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contention has been provided by Duke in a response to a Request for Additional Information ("RAI") submitted to the Nuclear Regulatory Commission ("NRC") Staff on March 1, 2004.[1]

II. DISCUSSION

As discussed in the Licensing Board's Memorandum and Order, BREDL's proposed Contention 5 broadly asserted that Duke's Environmental Report ("ER") was deficient because it failed to consider alternative nuclear power plants, other than the Catawba and McGuire Nuclear Stations, for lead assemblies and possible batch use of MOX fuel.[2] BREDL sought a comparative assessment of the public health and environmental risks of use of the MOX fuel assemblies at other nuclear plants, including non-Duke plants. The Licensing Board correctly concluded that it does "not have jurisdiction to consider in this proceeding alternatives not within the control of Duke," and rejected the proposed contention "to this extent." Memorandum and Order, at 50. The Licensing Board limited Contention III to the alternative of Duke's Oconee Nuclear Station ("Oconee").[3]

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1 Duke has challenged the Licensing Board's decision to admit Contention III in an appeal filed with the Commission on March 15, 2004, in accordance with 10 C.F.R. § 2.714a(c). By filing this motion to dismiss Duke does not in any way concede the admissibility of the contention. Rather, even assuming that the contention was properly admitted, Contention III is moot.

2 As originally submitted, BREDL's proposed Contention 5 did not refer to Duke's Oconee Nuclear Station, but merely asserted that "alternative" nuclear plants "other than Catawba and McGuire" should be considered "for testing and batch MOX fuel use." *See* Blue Ridge Environmental Defense League's Supplemental Petition to Intervene," October 21, 2003, at 12. BREDL argued that this information compelled a re-evaluation of conclusions in DOE's Surplus Plutonium Disposition Environmental Impact Statement. Until oral argument, BREDL's proposed contention did *not* specifically propose that Duke consider use of Oconee for MOX fuel use.

3 Based on the text of reframed Contention III, the Licensing Board, at least implicitly, also correctly rejected any aspect of BREDL Contention 5 that was directed at alternative plants for *batch use* of MOX fuel assemblies.

The National Environmental Policy Act ("NEPA") requirement that federal agencies consider alternatives to a proposed action in an environmental review is not unlimited. The scope of the NEPA alternatives analysis is governed by a "rule of reason." The agency's analysis need not consider the environmental effects of alternatives that are "deemed only remote and speculative possibilities." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 551 (1978); *La. Energy Servs.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998). Similarly, the Commission has held that under NEPA:

> Agencies need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action. *Citizens Against Burlington v. Busey,* 938 F.2d 190, 195 (D.C. Cir.), *cert. denied,* 502 U.S. 994 (1991). 'When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.' *Id. (citing City of Angoon v. Hodel,* 803 F.2d 1016, 1021 (9th Cir. 1986), *(per curiam), cert. denied,* 484 U.S. 870 (1987).)

Hydro Resources, Inc., CLI-01-4, 53 NRC 31, 55 (2001). In *Citizens Against Burlington,* the Court noted that even the guidelines of the Council on Environmental Quality ("CEQ") oblige agencies to discuss only alternatives that are "feasible." 938 F.2d at 195. Similarly, the lessons of the *City of Angoon* case are that: (1) the scope of alternatives reasonably considered follows from the purpose or objective of the proposal, 803 F.2d at 1021; and (2) to be considered, alternatives "must be ascertainable and reasonably within reach," *id* at 1021-22.

Given the limits of the NEPA requirement for an alternatives analysis, BREDL Contention III must be limited to the issue of whether a MOX fuel lead assembly program at Oconee would be "feasible" to support later batch use of MOX fuel at Catawba or McGuire. One cannot be required to address comparative safety or environmental consequences for alternatives that are not feasible and would not serve the purpose of the proposal at issue. In addressing Contention III in its Memorandum and Order, the Licensing Board acknowledged

that the contention would seem to require only a *de minimis* addition to the ER — the "brief discussion" specified under 10 C.F.R. § 51.30(a). Memorandum and Order, at 51. Accordingly, the contention is a contention of omission: a contention that the ER lacks the "brief discussion" to conclude that Oconee is not a "feasible" alternative for a lead assembly program.[4]

When Duke submitted the ER, it did not document the reasons why Oconee is not a feasible alternative. Subsequently, however, the NRC Staff identified the issue of Oconee as an alternative in a RAI. Duke responded to the RAI on March 1, 2004, and explained the basis for concluding that Oconee is not available or appropriate for a MOX fuel lead assembly program. A copy of the RAI response was served on the Licensing Board and parties under cover letter from Duke counsel dated March 11, 2004. Based on this RAI response, any "omission" in the ER (to the extent there ever was a material omission), has been addressed. Contention III is moot and must therefore be dismissed.

The mootness doctrine is well-established in NRC case law. *See Texas Util. Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993) (the mootness doctrine "applies at all stages of review," whenever it becomes applicable because a justiciable controversy no longer exists). The Commission has specifically stated that "[w]here a contention alleges the omission of particular information . . . and the information is later supplied by the applicant or considered by the [NRC] Staff in a draft [environmental review document], the contention is moot." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 383 (2002) (citations

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[4] In its Memorandum and Order, at 51, the Licensing Board included an inexplicably broad statement of the evidence it will permit on Contention III, including evidence on the comparative safety of the use of Oconee. However, this statement is overbroad; comparative safety of an alternative would not be an issue unless and until it could be

omitted).[5] In the present context, given Duke's RAI response, to the extent BREDL has any basis to challenge Duke's conclusion regarding the feasibility of Oconee as an alternative for lead assemblies, it would need to submit a new contention with specific basis and justify why that argument could not have been made previously.[6]

established that the alternative of Oconee is feasible to serve the purpose of the proposed action.

5 In the analogous context in the Duke license renewal proceeding for McGuire and Catawba, following the Commission's decision in CLI-02-28 the presiding licensing board dismissed a contention of omission related to the environmental reports in a February 4, 2003 unpublished order. *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-02-2, 55 NRC 20 (2002) (The licensing board dismissed a contention challenging the adequacy of the applicant's ER because the ER did not consider the impact of possible flooding on the intermodal cask transfer facility associated with the ISFSI. The board found that the Staff's subsequent draft EIS for the ISFSI did in fact analyze this hypothetical flooding event, mooting the contention); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-23, 54 NRC 163 (2001) (The licensing board dismissed a contention alleging that the applicant's ER was deficient because it did not discuss the disadvantages of the "no action" alternative. The board determined that this contention was moot because "the superceding DEIS includes a no-action alternative analysis that discusses both the advantages and disadvantages of the proposed course of action," including the matters specifically identified by the intervenors. 54 NRC at 171-72.)

6 Duke can imagine no possible justification as to why a substantive basis for a contention on the feasibility of Oconee to serve the purpose of the LAR could not have been submitted previously.

III. CONCLUSION

The Licensing Board should dismiss Contention III as moot.

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 15th day of March 2004

UNITED STATES OF AMERICA
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CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S MOTION TO DISMISS CONTENTION III" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 15th day of March, 2004. Additional e-mail service, designated by **, has been made on March 15, 2004, 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.**
Margaret J. Bupp, 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: mjb5@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