

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station
Units 1 and 2)

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Docket Nos. 50-413-OLA
50-414-OLA

NRC STAFF'S BRIEF IN SUPPORT OF DUKE ENERGY CORPORATION'S APPEAL
FROM THE ATOMIC SAFETY AND LICENSING BOARD'S MEMORANDUM
AND ORDER LBP-04-04 (RULING ON STANDING AND CONTENTIONS)

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE ISSUES 3

LEGAL STANDARDS 5

 I. Legal Standard for Commission Review of a Licensing Board Order
 Admitting Contentions 5

 II. Legal Standard for the Admission of Contentions 5

 III. Legal Standard for the Admission of Late-filed Contentions 6

 IV. Legal Standard for Reframing Contentions 8

DISCUSSION 8

 I. The Board Erred in Admitting Reframed Contentions I and II 8

 A. The Board Erred in Admitting BREDL Safety Contentions 1 and 2 9

 1. The Board Erred in Admitting BREDL Contention 1 Because it
 Fails to Meet the Standard for Admissibility Under
 10 C.F.R. § 2.714(b)(2) 9

 2. The Board Erred in Admitting BREDL Contention 2 Because it
 Fails to Meet the Standard for Admissibility Under
 10 C.F.R. § 2.714(b)(2) 10

 B. The Board Erred in Admitting BREDL Environmental Contentions 6 and 7 12

 1. The Board Erred in Admitting BREDL Contention 6 Because it Fails
 to Meet the Standard for Admissibility Under
 10 C.F.R. § 2.714(b)(2) 12

 2. The Board Erred in Admitting BREDL Contention 7 to the Extent
 That the Contention Seeks to Have Duke Prepare a PRA 14

 C. The Licensing Board Erred in Admitting BREDL Late-filed
 Contentions 10, 11, and 12 Because They Are Untimely and
 Do Not Meet the Requirements of 10 C.F.R. § 2.714(b)(2) 15

 1. The Board Erred in Admitting BREDL's Late-Filed
 Contentions 10, 11, and 12 Because the Contentions are Late
 Without Cause 15

 2. The Board Erred in Admitting BREDL's Late-Filed
 Contention 10 Because the Contention Does Not
 Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2) 17

 3. The Board Erred in Admitting BREDL's Late-Filed
 Contention 11 Because the Contention Does Not
 Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2) 18

 4. The Board Erred in Admitting BREDL's Late-Filed
 Contention 12 Because the Contention Does Not
 Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2) 19

 II. In Reframing Contentions I And II, The Board Exceeded Its Authority by Expanding
 The Scope of The Original Contentions and Drafting Vague Reframed
 Contentions 20

A. Contention I Should Not Have Been Admitted Because it is Vague and Overly Broad	22
1. The statement that the LAR is inadequate because Duke has failed to account for known differences in MOX and LEU fuel behavior is vague and overly broad	22
2. The statement that the LAR is inadequate because Duke has failed to account for recent information about possible differences in MOX and LEU fuel behavior is vague and overly broad	24
3. The statement that the LAR is inadequate because Duke has failed to account for the impact of known differences on LOCAs is vague and overly broad	24
4. The statement that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences on LOCAs is vague and overly broad	25
5. The statements that the LAR is inadequate because Duke has failed to account for the impact of known differences on the DBA analysis for Catawba, and that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences on the DBA analysis for Catawba are vague and overly broad	25
B. Contention II Should Not Have Been Admitted Because it is Vague and Overly Broad	26
1. The statement that the LAR is inadequate because Duke has failed to account for known differences in MOX and LEU fuel behavior on the potential for releases from Catawba in the event of a core disruptive accident is vague and overly broad	26
2. The statement that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences in MOX and LEU fuel behavior on the potential for releases from Catawba in the event of a core disruptive accident is vague and overly broad	27
3. The statement that the LAR is inadequate because Duke has failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba is vague and overly broad	27
III. The Board Erred in Admitting Contention III, Which Is Overly Broad and Is Based on a Contention That Is Not Admissible	28
CONCLUSION	29

TABLE OF AUTHORITIES

Nuclear Regulatory Commission Cases

Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991) 8

Balt. Gas and Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325 (1998). 7

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241 (1986) 6, 7, 16

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001) 5, 6, 8, 20

Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) 20

Duke Energy Corp. (Catawba Units 1 and 2), LBP-04-04, 59 NRC __ (Mar. 5, 2004) . . . *passim*

Duke Energy Corp. (McGuire Nuclear Station Units 1 and 2, Catawba Nuclear Station Units 1 and 2), CLI-02-28, 56 NRC 373 (2002) 7, 17

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC __ (Dec. 9, 2003), slip op. at 11. 7

Duke, Cogema, Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 430 (2001) 13

Fla. Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-603, 12 NRC 30 (1980) 11

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5 (1989) 4, 8, 21

Pac. Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 5 NRC 317 (2002) 6

Phila. Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13 (1974) 6

Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226 (2000) 16

Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1 (2001) 7

Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395 (1990) . . 21

<i>Sequoyah Fuels Corp.</i> (Gore, Oklahoma Site Decommissioning) CLI-01-02, 53 NRC 9 (2001)	5
<i>State of New Jersey</i> (Department of Law and Public Safety), CLI-93-25, 83 NRC 289 (1993) .	6
<i>Statement of Policy on Conduct of Adjudicatory Proceedings</i> , CLI-98-12, 48 NRC 18 (1998)	6, 21
<i>Tex. Util. Elec. Co.</i> (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62 (1992)	7
<i>Vt. Yankee Nuclear Power Corp.</i> (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987)	5
<i>Yankee Atomic Electric Co.</i> (Yankee Rowe Nuclear Power Station), LBP-96-15, 44 NRC 8 (1996)	4, 8, 21
<u>Regulations</u>	
10 C.F.R. § 2.714	<i>passim</i>
10 C.F.R. § 2.714a	1, 4
10 C.F.R. § 50.2	27
10 C.F.R. § 50.57(a)	10
10 C.F.R. § 50.92(a)	10
10 C.F.R. § 51.45	12, 13, 14, 29
10 C.F.R. Part 51, App. A	28, 29
40 C.F.R. § 1502	29
Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (1989)	8

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a)¹, the staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in support of Duke Energy Corporation's (Duke) March 15, 2004,² appeal from the Memorandum and Order of the Atomic Safety and Licensing Board (Board) in this matter. In the Memorandum and Order, the Board consolidated several contentions submitted by petitioner Blue Ridge Environmental Defense League (BREDL) and reframed them into three contentions that were then admitted.³ Duke appealed. The Staff herein files this response to Duke's Appeal. As

¹ The citation to 10 C.F.R. § 2.714 is to the regulation in effect prior to the recent revision of the NRC's Rules of Practice in 10 C.F.R. Part 2, which became effective February 13, 2004. Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply, and the former sections are referenced throughout this brief.

² Notice of Appeal of Duke Energy Corporation from the Atomic Safety and Licensing Board's Memorandum and Order LBP-04-04 (Ruling on Standing and Contentions) (Mar. 15, 2004) and Memorandum of Law in Support of Duke Energy Corporation's Appeal from the Atomic Safety and Licensing Board's Memorandum and Order LBP-04-04 (Ruling on Standing and Contentions) (Mar. 15, 2004). (Duke's Appeal).

³ *Duke Energy Corp.* (Catawba Units 1 and 2), LBP-04-04, 59 NRC __ (Mar. 5, 2004) (Order). The Licensing Board order also denied admission of five proposed contentions offered by the Nuclear Information and Resource Service, as well as denying admission of four other
(continued...)

more fully discussed below, the staff opposes the admission of all three contentions that were redrafted by the Board because the contentions are vague, do not meet the standards for admission in 10 C.F.R. § 2.714, and amount to an unauthorized broadening of the scope of the original contentions filed by BREDL. The Staff also asserts that the contentions proffered by BREDL were inadmissible.⁴ The Staff supports Duke's appeal and respectfully requests that the Commission reverse the Board's order reformulating and admitting the contentions and, accordingly requests that Contentions 1, 2, 5, 6, 7 (except to the extent that it challenges the technical merits of Duke's conclusions relating to severe accident environmental impacts), 10, 11, and 12 should be dismissed.⁵

STATEMENT OF THE CASE

This proceeding concerns a license amendment request (LAR) for Catawba Nuclear Station (Catawba), filed by Duke on February 27, 2003, which would authorize the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) at Catawba. On August 25, 2003, BREDL filed a petition requesting a hearing and seeking to intervene in the license amendment proceeding.⁶ On October 21, 2003, BREDL filed a supplement to its petition to intervene containing

³(...continued)
BREDL contentions.

⁴ As argued before the Licensing Board, the Staff concedes that BREDL's original Contention 7 is admissible to the extent that it challenges the technical merits of Duke's conclusions relating to severe accident environmental impacts.

⁵ The Staff also supports Duke's request that the Commission review Duke's appeal on an expedited schedule. The Board has ordered that discovery in this case commence while the Commission considers this appeal. However, the Staff and Duke both contend that the vague language of the admitted contentions will complicate and delay the discovery process.

⁶ Blue Ridge Environmental Defense League's Request and Petition to Intervene (Aug. 25, 2003) (BREDL Petition).

proposed contentions.⁷ The Staff filed its response to BREDL's contentions on November 10, 2003.⁸ Oral argument on the proposed contentions was held December 3 and 4, 2003. On December 2, 2003, BREDL filed its second supplemental petition, containing late-filed contentions.⁹ The Staff filed its response to BREDL's late-filed contentions on December 24, 2003.¹⁰ Oral argument on the late-filed contentions was heard on January 15, 2004. On March 5, 2004, the Board issued its Memorandum and Order, LBP-04-04, ruling that portions of eight of BREDL's contentions are admissible and reframing the admissible portions into three admitted contentions.

STATEMENT OF THE ISSUES

The Board erred in reframing and admitting the three consolidated contentions. At issue are BREDL Contentions 1, 2, 5, 6, 7, 10, 11, and 12, all of which were accepted, either in whole or in part, by the Board; and reframed Contentions I, II, and III, drafted by the Board.¹¹ The Board found that "significant portions . . . of BREDL Contentions 1, 2, 6, 7, 10, 11, and 12 meet the

⁷ Blue Ridge Environmental Defense League's Supplemental Petition to Intervene (Oct. 21, 2003) (BREDL Contentions).

⁸ NRC Staff's Response to (1) Blue Ridge Environmental Defense League's Supplemental Petition to Intervene and (2) Nuclear Information and Resource Service's Contentions) (Nov. 10, 2003) (Staff's Response to Contentions). Duke also filed an opposition to the admission of the contentions. See Answer of Duke Energy Corporation to the "Blue Ridge Environmental Defense League's Supplemental Petition to Intervene" and the "Contentions of Nuclear Information and Resource Service" (Nov. 11, 2003).

⁹ Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene (Dec. 2, 2003) (BREDL Late-Filed Contentions).

¹⁰ NRC Staff Opposition to BREDL's Second Supplemental Petition to Intervene (Dec. 24, 2003) (Staff's Response to Late-Filed Contentions). Duke also opposed the admission of BREDL's late-filed contentions. Answer of Duke Energy Corporation to the Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene (Dec. 23, 2003) (Duke Supplemental Answer).

¹¹ BREDL Contentions 3, 4, 9, and 13, and NIRS Contentions 1, 2, 3, 4, and 5 were rejected in their entirety.

general contention admissibility standards of 10 C.F.R § 2.714 (b), (d).” Order at 41. The Board stated that it had defined the portions of the admitted contentions that met admissibility standards. *Id.* It then consolidated and reframed the portions of BREDL’s contentions it concluded were admissible, pursuant to 10 C.F.R. § 2.714(f)(1), (3). *Id.* The Board stated that they “den[ie]d all portions [of BREDL’s original contentions] not included within the contentions so reframed.” *Id.* at 42.¹²

In admitting Contentions I, II, and III, the Board made several errors. First, as argued before the Board, the original contentions submitted by BREDL, which the Board indicated it was consolidating and clarifying by reframing, were, except in very limited part, inadmissible in the first instance.¹³ Second, late-filed contentions 10, 11, and 12 do not satisfy the criteria for admitting late-filed contentions. Third, the Board’s reframed contentions are vague and fail to clarify the issues in the case, as intended by 10 C.F.R. § 2.714(f), the regulation granting the Board the authority to reframe admitted contentions. *See Yankee Atomic Elec. Co.* (Yankee-Rowe Nuclear Power Station), LBP-96-15, 44 NRC 8, 22 (1996). Fourth, the Board also exceeded its authority under 10 C.F.R. § 2.714(f) by admitting reframed contentions that are substantially broader in scope than the contentions proposed by the petitioner. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 33 (1989).

¹² On March 18, 2004, after oral argument on BREDL’s proposed security contentions the Board Chair read a statement attempting to clarify the scope of the reframed contentions. The Board stated that its “reframing of the original issues in the original contentions . . . should not be taken to expand the issues presented in the original issues in any way.” Tr. at 1508 (Safeguards Information). The Board further stated that the reframed contentions “should be taken to mean what they say, no more and no less.” *Id.* at 1509. However, the new contentions contain language expanding the scope of BREDL’s proposed contentions, as discussed further below.

¹³ Contention 7 is admissible to the extent that it challenges the technical merits of Duke’s severe accident environmental impact conclusions.

LEGAL STANDARDS

I. Legal Standard for Commission Review of a Licensing Board Order Admitting Contentions

Licensing board orders, such as orders admitting or denying contentions, may be appealed to the Commission under 10 C.F.R. § 2.714a. Section 2.714a(c) states that “[a]n order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question of whether the petition and/or the request for a hearing should have been wholly denied.” Under 10 C.F.R. § 2.714a(a), any party may file a brief in support of an appeal. The standard of review applied by the Commission is whether contentions were properly admitted and a hearing was properly granted. See *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 26-27 (1987). The Commission may consider all the points of error raised on appeal in addition to considering whether the petition should have been wholly denied. See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning) CLI-01-02, 53 NRC 9, 19 (2001); *Vermont Yankee*, ALAB-869, 26 NRC at 25-27.

II. Legal Standard for the Admission of Contentions

The basic standard for admissibility of contentions is outlined in 10 C.F.R. § 2.714. A contention must consist of (1) a specific statement of the issues raised or controverted, (2) a brief explanation of the bases for the contention, (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at hearing, and (4) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714 (b)(2). It is not enough for a petitioner to “submit ‘bald or conclusory allegation(s)’ of a dispute with the applicant.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). There must be a specific factual or legal basis for the contention. *Id.* at 359. The petitioner has the burden of formulating the contention and providing the

information necessary to satisfy the basis requirement. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). “[P]residing officers may not admit open-ended or ill-defined contentions lacking in specificity or basis.” *Millstone*, CLI-01-24, 54 NRC at 359. Contentions must contain specific information in order to ensure that contentions submitted by petitioners are based on “more than speculation” and to ensure that the Board can avoid lengthy hearing delays caused by the need to sift through “poorly defined or supported contentions.” *Id.* at 358; *see also Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974).

III. Legal Standard for the Admission of Late-filed Contentions

The Commission’s regulations provide that proposed late-filed contentions may only be admitted after a balancing of five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner’s interest will be protected.
- (iii) The extent to which the petitioner’s participation may reasonably be expected to assist in the development of a sound record.
- (iv) The extent to which the petitioner’s interest will be represented by existing parties.
- (v) The extent to which the petitioner’s participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1)(i)-(v). The first factor is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 83 NRC 289, 295 (1993). If the petitioner fails to satisfy the first factor, he or she must make a compelling showing that the remaining four factors warrant admission of the late-filed contentions. *New Jersey*, CLI-93-25, 83 NRC at 295; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986); *see also Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 348 (2002) (Petitioner must show “strong countervailing

reasons that override the lack of good cause.”). The burden of showing that a balancing of the five factors weighs in favor of admitting the late-filed contentions rests on the party seeking admission of late-filed contention, in this case, BREDL. *See Balt. Gas and Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

Two of the five lateness factors -- the availability of other means to protect the petitioner’s interest and the ability of other parties to represent the petitioner’s interest -- are less important than the other factors and are therefore entitled to less weight. *Tex. Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 29 (1992). With respect to the third factor the petitioner must “set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony.” *Braidwood*, 23 NRC at 246.

As the Commission recently stated, “NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC ____ (Dec. 9, 2003), slip op. at 11. The Commission went on to state that “there would be no end to NRC licensing proceedings if the petitioners could disregard our timeliness requirements every time he or she ‘realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset.” *Id.* at 11-12 (citations omitted). Thus, parties have “an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment.” *Id.* at 12.¹⁴

¹⁴ *See, e.g., Duke Energy Corp.* (McGuire Nuclear Station Units 1 & 2, Catawba Nuclear Station Units 1 & 2), CLI-02-28, 56 NRC 323, 386 (2002)(late-filed contentions must be based on “new information not previously available”); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001) (the regulations specify that impermissibly late contentions “will not be entertained”).

In addition to making the showing required by 10 C.F.R. § 2.714(b)(1), the party seeking admission of its late-filed contentions must show that the late-filed contentions meet the requirements of 10 C.F.R. § 2.714(d)(2), which requires that the contentions satisfy the admissibility requirements of 10 C.F.R. § 2.714(b)(2). The failure of a petitioner proposing a late-filed contention to comply with any one of these requirements is grounds for dismissing the proposed late-filed contention. 10 C.F.R. § 2.714(d)(2)(i); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); see Rules of Practice for Domestic Licensing Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (1989).

IV. Legal Standard for Reframing Contentions

Pursuant to its authority, a licensing board may reframe contentions that are otherwise admissible. 10 C.F.R. § 2.714(f). However, a licensing board cannot attempt to make otherwise inadmissible contentions admissible by reframing them. *Millstone*, CLI-01-24, 54 NRC at 362. Otherwise admissible contentions must be reframed only if it is necessary to clarify the issues. *Yankee-Rowe*, LBP-96-15, 44 NRC at 22. Finally, a reframed contention must not be broader in scope than the original admissible contention. *Shoreham*, LBP-89-1, 29 NRC at 33.

DISCUSSION

I. The Board Erred in Admitting Reframed Contentions I and II

Reframed Contentions I and II are based on "significant portions of" BREDL Contentions 1, 2, 6, 7, 10, 11, and 12. Order at 41. The Board erred in several respects in reframing BREDL's contentions and admitting Contentions I and II. First, the original contentions proposed by BREDL are inadmissible. Contentions reformulating otherwise inadmissible contentions are also inadmissible. *Millstone*, CLI-01-24, 54 NRC at 362. Second, Contentions I and II are vague and non-specific and, thus, do not meet the requirements of

10 C.F.R. § 2.714(b)(2). Third, they expand the scope of BREDL's proposed contentions and, thus, the Board exceeded its authority in so-reframing the contentions. Fourth, although the Board states that it found some portions of BREDL's Contentions 1, 2, 6, 7, 10, 11, and 12 admissible, the Board failed to identify those portions that are admissible and those portions that are inadmissible. Order at 41-42.

A. The Board Erred in Admitting BREDL Safety Contentions 1 and 2

The Board erred in admitting BREDL Contentions 1 and 2. Neither Contention 1 nor Contention 2, both proposed in BREDL's Supplemental Petition to Intervene, is admissible under the standards of 10 C.F.R. § 2.714(b)(2). Both contentions are lacking proper basis and fail to state genuine disputes as to material issues of law or fact. Further, the Board's Memorandum and Order fails to identify any proper basis for admitting any of BREDL's proposed contentions. Finally, the reasoning that the Board does provide is insufficient.

1. The Board Erred in Admitting BREDL Contention 1 Because it Fails to Meet the Standard for Admissibility Under 10 C.F.R. § 2.714(b)(2)

BREDL Contention 1 stated that "Duke's risk impact analysis is inadequate, because it presents the results of its analysis in qualitative terms only." BREDL Contentions at 4. As basis for this contention, BREDL argued that because the analysis was based on Duke's PRA, which is a quantitative analysis, the results of the analysis must be reported quantitatively. *Id.* According to BREDL, Duke "provides only qualitative arguments for its claim that the probability of a severe accident will not significantly increase." *Id.* Further, BREDL contended that Duke must calculate changes in core damage frequency (CDF) and Large Early Release Frequency (LERF) related to the license amendment. *Id.*

The staff argued before the Board that this contention is inadmissible because the risk analysis proposed by BREDL is not required. Staff's Response to Contentions at 6. The license amendment requested by Duke is not risk-informed; it falls under the NRC's traditional engineering

(deterministic) criteria and regulations. *Id.* Although some risk information has been presented by Duke in the LAR, the Staff's decision will not be based on the risk information. Staff's Response to Contentions at 7. Therefore, the staff argued, risk information, including any information on CDF and LERF, was not required to be included in the license amendment. *Id.* at 7.

The Board does not identify which portions of BREDL Contention 1 are admitted. The Board only states that it is "not inclined to exclude completely any evidence related to risk, within reasonable and practical limits." Order at 40. As support for this statement, the Board cites to the fact that "Duke itself has used probabilistic risk analysis to its benefit." *Id.* The Board, however, ignores two important facts related to the probabilistic risk analysis. First, and most significantly, no PRA is required for the license amendment at issue in the proceeding. See 10 C.F.R. § 50.92(a); 10 C.F.R. § 50.57(a). Second, the Board indicated that questioning the adequacy of Duke's risk analysis is a proper basis for a contention because Duke raised risk analysis information in the LAR. Order at 40. However, Duke offered to withdraw the section of the license amendment including the risk analysis information, negating any benefit Duke might derive from including the information. Duke's Appeal at 9. In light of the fact that the regulations do not require a PRA to be prepared, BREDL's argument that the LAR is deficient fails to provide an adequate legal basis. For the above reasons, BREDL Contention 1 is inadmissible and the Board erred in admitting and reframing the contention.

2. The Board Erred in Admitting BREDL Contention 2 Because it Fails to Meet the Standard for Admissibility Under 10 C.F.R. § 2.714(b)(2)

BREDL Contention 2, a safety contention, asserted that "Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant." BREDL Contentions at 5. As a basis for its contention, BREDL argued that Duke made mistakes in its LAR when it described the consequences of severe accidents. See *id.* at 5-6.

Further, BREDL asserted that the risk impacts of MOX fuel use cannot be evaluated because of an alleged deficiency in Regulatory Guide 1.174 (RG 1.174). *See id.* at 6.

The Staff argued that this contention was inadmissible because it failed to address any issues material to the proceeding, as required by 10 C.F.R. § 2.714(b)(2)(iii). *See Staff's Response to Contentions* at 8. BREDL's arguments related to severe accident consequences, but NRC precedent reflects that licensees need not design against events which are beyond the facility's design basis. *See Fla. Power and Light Co. (St. Lucie Nuclear Power Plant, Unit 2), ALAB-603, 12 NRC 30, 45 (1980)*. Therefore, BREDL's contention is inadmissible. Finally, the Staff argued that BREDL's reliance on RG 1.174 was misguided. This is because RG 1.174 is only relevant to "risk-informed" amendments, not to amendments analyzed under traditional deterministic standards like the proposed amendment at issue. Accordingly, RG 1.174 is irrelevant to this proceeding.

As with Contention 1, it is difficult to discern which portion of Contention 2 the Board found admissible. The Board states that it did "not find any 'incompleteness' of guidance on use of RG 1.174 to support BREDL's contention that it is impossible to evaluate fully the risk impact of the proposed project." Order at 40. Therefore, it appears that Contention 2 is inadmissible to the extent that it relies on any alleged deficiency in RG 1.174. In regard to the remainder of Contention 2, the Board merely states that "BREDL sets forth several areas of quite specific facts, related to the issue of the significance of the severe accident consequences associated with the proposed MOX LTA use," without identifying which areas of facts are admissible. *Id.* NRC precedent reflects that licensees are not required to design against events which are beyond the facility's design basis. *See St. Lucie, ALAB-603, 12 NRC at 45*. Also, both Contentions 1 and 2 challenge Duke's risk assessment, essentially asserting that Duke must meet the criteria for risk-informed amendments, when, as discussed above, risk assessment is not required of the licensee. Therefore, the Board erred in admitting BREDL Contention 2.

B. The Board Erred in Admitting BREDL Environmental Contentions 6 and 7.

As is the case with Contentions 1 and 2, the Board, in its extremely brief discussion of the admissibility of Contentions 6 and 7, failed to identify any proper basis for admitting any part of Contention 6 or for admitting Contention 7 in whole. Neither Contention 7, to the extent that it would require Duke to prepare a probabilistic risk assessment, nor Contention 6 meets the standards for admissibility under 10 C.F.R. § 2.714(b)(2). Therefore, the Board erred in admitting Contention 6 and Contention 7.¹⁵

1. The Board Erred in Admitting BREDL Contention 6 Because it Fails to Meet the Standard for Admissibility Under 10 C.F.R. § 2.714(b)(2)

BREDL's Contention 6 relates to Duke's environmental report, and stated that Duke failed to "provide quantitative support for its assertion that the consequences of a severe accident involving use of LTA MOX fuel assemblies will increase 0.3% at most." BREDL Contentions at 13. As basis for this contention, BREDL argued that, although Duke's assertion was "obviously based on probabilistic risk calculations," Duke only supported this claim with qualitative arguments. *Id.* In addition, BREDL claimed that Duke did not attempt to calculate the difference in CDF and LERF when it should have. *Id.* Finally, BREDL claimed that Duke violated the provisions of 10 C.F.R. § 51.45(c), which BREDL argued requires a licensee to quantify factors considered to the extent possible, by only providing qualitative data when quantitative data were also available. *Id.*

In its response, the Staff argued that this contention was inadmissible because BREDL did not provide sufficient basis for the claim that the environmental report is deficient. See Staff's Response to Contentions at 16-18. BREDL cited to 10 C.F.R. § 51.45(c), but the regulation does not require unnecessary details to be included in the Environmental Report, nor does it require the

¹⁵ The Staff concedes that Contention 7 is admissible to the extent that it challenges the technical merit of Duke's conclusions relating to the environmental impact of severe accidents.

preparation of a PRA, which is essentially what BREDL demanded. Simply stated, the NRC regulations applicable to this license amendment do not require the preparation of a PRA as part of the environmental analysis. BREDL also failed to provide any facts or expert opinion to support its claim that there would be changes to CDF or LERF. Finally, the Staff noted that, while BREDL complained of the absence of quantitative data in the LAR, BREDL failed to acknowledge the quantitative data that does appear in the LAR environmental report and related documents.

Id. at 17.

Regarding Contention 6, the Board found that BREDL “presented sufficient basis, facts and expert opinion to demonstrate a genuine dispute on these issues—one factual, one a combined legal/factual issue—which are clearly material to the proposal before” the Board. Order at 40. In reframed Contention II, the Board also states that “Duke has . . . failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba, as required by NEPA.” The Board cites to 10 C.F.R. § 51.45(c) to support the need for Duke to provide “a full description of core inventory, release fractions, consequence modeling, techniques used, and a full accounting of uncertainties.” BREDL Contentions at 14. However, 10 C.F.R. § 51.45(c) does not mandate that the applicant’s environmental report contain an analysis as detailed as the analysis called for in BREDL’s proposed Contention 6 and in the Board’s Order. See *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 430, 447 (2001). In its LAR, Duke has submitted all the information required by the regulations. BREDL’s contentions, however, assume a regulatory requirement that exceeds the actual requirement of 10 C.F.R. § 51.45(c).. Therefore, the Board’s contention is inadmissible and the Board erred in admitting any part of BREDL Contention 6. Thus their decision should be overturned.

2. The Board Erred in Admitting BREDL Contention 7 to the Extent hat the Contention Seeks to Have Duke Prepare a PRA

Contention 7 argued that Duke “failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant.” BREDL Contentions at 14. As basis for this Contention, BREDL claimed that Duke appeared to rely on the Department of Energy’s Surplus Plutonium Disposition Environmental Impact Statement (SPDEIS) analysis for a core containing 40 percent MOX fuel and rescaled the SPDEIS analysis for a core containing one percent MOX fuel (as called for in the LAR). *Id.* BREDL contended that Duke’s attempt to scale the SPDEIS was incorrect and therefore Duke’s conclusion was incorrect. *Id.* According to BREDL, in order to make a correct assessment, Duke must complete its own PRA. *Id.*

Duke, for its part, acceded at oral argument that its scaling was incorrect and that linear scaling would be more appropriate. See Tr. at 108-09. The Staff argued that, to the extent that Contention 7 sought to require a PRA from Duke, it is inadmissible. Staff’s Response to Contentions at 18-19. BREDL failed to identify any requirement that Duke generate a PRA. Pursuant to 10 C.F.R. § 51.45(c), quantitative analyses in support of Environmental Reports are not required and are to be done only to the extent practicable. However, to the extent that Contention 7 challenged the technical merits of Duke’s conclusions relating to severe accident environmental impacts, the staff concedes that it meets the requirements of 10 C.F.R. § 2.714(b)(2) and is admissible. See Staff’s Response to Contentions at 18.

It is not clear whether the Board, in reframing this contention, limited its admission of Contention 7 to the technical merits of Duke’s conclusions on severe accident environmental impacts. The Board states that “*at least* that part of Contention 7 that challenges the technical merit of Duke’s conclusions relating to severe accident environmental impacts is admissible.” Order at 40 (emphasis added). The Board, however, does not establish whether more of

Contention 7 is admissible, and, if so, what basis would support admission of Contention 7. Therefore, to the extent that the Board admitted more than the portion of Contention 7 challenging the technical merit of Duke's severe accident environmental impact conclusions, the Board is in error.

C. The Licensing Board Erred in Admitting BREDL Late-filed Contentions 10, 11, and 12 Because They Are Untimely and Do Not Meet the Requirements of 10 C.F.R. § 2.714(b)(2).

In order to admit late-filed Contentions, the petitioner must meet two burdens. First, the petitioner must prove that the balance of the five factors listed in 10 C.F.R. § 2.714(a)(1) weighs in its favor.¹⁶ Also, the petitioner must show that the late-filed Contention meets the admissibility requirements of 10 C.F.R. § 2.714(b)(2). BREDL has failed to meet these burdens. Therefore, in admitting any part of late-filed Contentions 10, 11, and 12, the Board erred and its decision should be overturned.

1. The Board Erred in Admitting BREDL's Late-Filed Contentions 10, 11, and 12 Because the Contentions are Late Without Cause

BREDL asserted that Contentions 10, 11, and 12 met the five factors that must be balanced in admitting late-filed contentions. In arguing that it had good cause for filing late, BREDL cited an October 23, 2003, presentation by the Institut de Radioprotection et de Surete Nucleaire (IRSN), to the NRC, recommending that the IRSN be retained to conduct tests on MOX fuel performance. BREDL Late-Filed Contentions at 3. BREDL claimed that it first became aware of the issues presented in the late-filed after this presentation. *Id.* at 11. BREDL also argued that the balance of the four other elements weighs in its favor because BREDL had no other means of protecting its interests; the addition of the late-filed contentions would assist in the development of a sound record, especially through the testimony of their technical consultant, Dr. Lyman; there were no other parties who could represent BREDL in the proceeding; and any broadening of the issues due

¹⁶ See discussion of late filed admission criteria at *supra* at 6.

to admitting the contentions would not be unreasonable because the contentions were filed early in the proceeding. *Id.*

In its response, the Staff argued that BREDL failed to meet the most important requirement — showing good cause for the lateness of the contentions. Staff’s Response to Late-Filed Contentions at 6-8. As demonstrated below, in the Staff’s and Licensee’s responses to the late-filed contentions and at oral argument, the issues raised by BREDL had long been in the public domain when the contentions were filed, and BREDL should have been aware of them long before the late-filed contentions were proposed. *Id.* at 6; see also Duke Supplemental Answer at 6-9. In fact, the issues were first presented by IRSN in October of 2001, at a conference at which BREDL’s own expert, Dr. Lyman, is listed as an attendee. *Id.* The Staff argued further that the other four factors pertinent to late filings did not outweigh the untimeliness, and that BREDL had not made a “compelling” showing as to those remaining factors. *Id.* at 7. For factor three, BREDL had not set out “with as much particularity as possible” the issues it intends to raise or its witness’s proposed testimony on the issues; nor has it established Dr. Lyman as an expert. *Id.* (citing *Braidwood*, CLI-86-8, 23 NRC at 246). As to factor five, BREDL conceded that admitting Contention 10 will broaden the issues and delay the proceedings. *Id.* Thus, these two factors weighed against admitting the late-filed contentions. The staff conceded that factors two and four weighed in BREDL’s favor, but they are the least important of the factors and therefore could not outweigh the lack of good cause for the late filing. See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-28, 52 NRC 226, 238-39 (2000).

The Board erroneously found that BREDL had met its burden in showing good cause for late filing, citing the fact that BREDL might have had difficulty in finding the issues before the IRSN’s presentation was made available by the agency. Order at 37-38. This reasoning ignores the fact that the issues raised were first made available in the Agencywide Documents Access and Management System (ADAMS) as early as 2001, and the strong evidence that BREDL’s expert

should have been aware of the issues in 2001. The Board's statement is inconsistent with the Commission's clear precedent, which states that a petitioner has an "iron-clad obligation" to examine the public record for information that could support a Contention. See *McGuire*, CLI-02-28, 56 NRC at 386 (footnote omitted). The Board concedes that factor five weighs against BREDL, but ultimately states that since the other four factors are in BREDL's favor, BREDL showed good cause for its late-filing. Order at 38-39. However, since the Board erred in finding that BREDL had satisfied the first factor (the most important of the five), the Board erred in finding that late-filed Contentions 10, 11, and 12 are admissible.

2. The Board Erred in Admitting BREDL's Late-Filed Contention 10 Because the Contention Does Not Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2)

Late-filed Contention 10 asserted that "Duke's safety analysis for design-basis loss-of-coolant accidents (LOCAs) in Section 3.7 of the LTA license amendment application is inadequate because it fails to account for uncertainties in the technical understanding of the behavior of MOX fuel during LOCAs that may lead to significant deviations from low-enriched uranium (LEU) fuel behavior." BREDL Late-Filed Contentions at 3. As basis for this Contention, BREDL took issue with Duke's deterministic analysis of the effect of MOX LTAs on LOCAs. *Id.* BREDL also claimed, based on the IRSN presentation, that Duke needed to consider in its application that "the experimental database for MOX fuel performance is woefully inadequate." *Id.*

The Staff in its response argued that late-filed Contention 10 was inadmissible because BREDL made unsupported statements and conclusions lacking the factual basis required by 10 C.F.R. § 2.714. Staff's Response to BREDL Late-Filed Contentions at 8. Also, the Staff contended that, while BREDL relied almost solely on IRSN's desire to conduct research into the effect of MOX fuel, a research proposal is not a sufficient basis for admitting a contention because it does not identify a "material issue of law or fact," as required by 10 C.F.R. § 2.714(b). *Id.*

Regarding the admissibility of Contention 10, the Board stated that “in Contention . . . 10 . . . BREDL sets forth several areas of quite specific facts.” Order at 40. Yet, the Board does not identify these facts or how they relate to the amendment application under consideration. Nor does the Board identify which concerns raised by BREDL “do not rise to the level of genuine disputes.” Order at 39. Like BREDL, the Board focused on the IRSN presentation to provide a basis for admitting BREDL’s Contention “that Duke’s safety analysis is inadequate in its discussion of LOCAs.” However, the Board fails to acknowledge that the IRSN presentation was merely a research proposal. The fact that IRSN, a research organization, has proposed research in an area does not mean that there is any information of significance to the license amendment at issue to be discovered. Therefore, Contention 10 fails to present a material issue of law or fact, and, accordingly, the Board erred in admitting Contention 10.

3. The Board Erred in Admitting BREDL’s Late-Filed Contention 11 Because the Contention Does Not Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2)

Contention 11 argued that “Duke’s analysis of the impact of MOX LTAs on the probabilities and consequences of severe accidents [must] account for uncertainties in the technical understanding of the behavior of MOX fuel during severe accidents that may” differ from the behavior of LEU fuel. BREDL Late-File Contentions at 5. As basis for this Contention, BREDL cited Section 3.8 of Duke’s LAR, which discussed the risks associated with MOX use, but, according to BREDL, did not consider that the “experimental database for MOX fuel performance during severe accidents is woefully inadequate.” *Id.* BREDL again cited the IRSN presentation of October 23, 2003 regarding severe accidents. *Id.* BREDL requested that severe accident risk be fully analyzed in the LAR. *Id.* at 6.

Contention 11 states that Duke should have analyzed the risk of severe accidents. The Staff argued, however, that risk analysis is not a part of traditional deterministic analysis and therefore is not required to be submitted in support of a license amendment that is not

risk-informed. Staff's Response to Late-Filed Contentions at 10. Thus, the contention fails to address any issues material to this proceeding as required by 10 C.F.R. § 2.714(b)(2)(iii) and should be rejected. *Id.* at 10.

The Board found that, in Contention 11, BREDL set "forth several areas of quite specific facts" and also "provided sufficient support from the IRSN materials to render admissible its contention that . . . the LAR inadequately addresses the potential for releases and the potential environmental impact of both design basis and severe accidents." Order at 40. As with Contention 10, these findings fail to address the fact that, as a mere research proposal, the IRSN presentation cannot prove or support any of BREDL's contentions. Therefore, the Board erred in admitting Contention 11.

4. The Board Erred in Admitting BREDL's Late-Filed Contention 12 Because the Contention Does Not Satisfy the Requirements of 10 C.F.R. § 2.714(b)(2)

Contention 12 claimed that Duke failed to "consider the effects of MOX fuel characteristics on severe accident potential." BREDL Late-Filed Contentions at 6. BREDL stated the same basis for Contention 12 as for Contentions 10 and 11. *Id.* In addition, BREDL argued that, while neither environmental report cited by Duke discussed susceptibility of MOX fuel to slumping during LOCA or the adverse effect slumped fuel may have on Duke's ability to cool the core, Duke should have discussed these issues in an environmental report. *Id.*

The staff argued that Contention 12 is inadmissible because it is lacking the specificity and adequate basis required by the NRC's regulations and fails to demonstrate a genuine dispute as to a material issue. Staff's Response to Late-Filed Contentions at 11. In addition, the Staff contended that BREDL provided no facts to support its claim that fuel slumping is likely to occur in the LTAs or that cooling of the core would be prevented if slumping did occur in the four LTAs. *Id.*

The Board's sole statement on the admissibility of Contention 12 was that BREDL "provided sufficient support from the IRSN materials to render admissible its Contention . . . that the LAR inadequately addresses . . . the potential environmental impact of both design basis and severe accidents." Order at 40. As with Contentions 10 and 11, this statement fails to acknowledge that the IRSN presentation was merely a research proposal that does not provide factual support for or against the assertion that more research is needed on the environmental impacts associated with MOX fuel. Therefore, the Board erred in admitting Contention 12.

II. In Reframing Contentions I And II, The Board Exceeded Its Authority by Expanding The Scope of The Original Contentions And Drafting Vague Reframed Contentions.

The Board asserts that it reframed BREDL's contentions pursuant to its authority under 10 C.F.R. § 2.714(f)(1), (3). The regulation states that:

An order permitting intervention and/or directing a hearing may be conditioned on such terms as the . . . designated atomic safety and licensing board may direct in the interests of (1) restricting irrelevant, duplicative, or repetitive evidence and argument [and] (3) retaining authority to determine priorities and control the compass of the hearing.

Id. In the instant case, the board has gone beyond its regulatory authority.

The "contention rule is 'strict by design' [and] insists upon 'some reasonably specific factual or legal basis' for a petitioner's allegations." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (citing *Millstone*, CLI-01-24, 54 NRC at 358-59.). This requirement must be met by BREDL because "*it is a 'contention's proponent, not the licensing board, [that] is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of the contentions.*" *Millstone*, CLI-01-24, 54 NRC at 362, n. 10 (emphasis supplied) (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22.).

If the Board chooses to reframe contentions, it may do so only within its regulatory authority. The Board must only use its discretion to reframe contentions in order to clarify and consolidate

the issues. *Yankee*, LBP-96-15, 44 NRC at 22. Just as a petitioner cannot pose vague, imprecise contentions that must be clarified during discovery, the Board, if it chooses to reframe the petitioner's contentions, must present clear, precise contentions. See *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426-27 (1990). Further, the Board cannot "consolidate [contentions] if to do so would expand the scope of the hearing substantially [or if] their consolidation [would] require [the defendant] to mount a defense that is substantially different or expanded from that which would be required by" the original contentions. *Shoreham*, LBP-89-1, 29 NRC at 33.

Here, the Board's effort to reframe the contentions has not clarified the issues. To the contrary, as discussed above, it is difficult to ascertain from the Order which portions of the original six contentions have been admitted and which portions have been dismissed. The Board touches on the admissibility of portions of BREDL's original contentions without clearly delineating which portions have been admitted for hearing. For example, the Order's discussion of which contentions are admissible begins by stating that BREDL Contentions 2, 10, and 11 set "forth several areas of quite specific facts, related to the issue of the significance of the severe accident consequences associated with" the application. Order at 40. From this statement, it is clear that the Board means to accept at least part of BREDL Contentions 2, 10, and 11; ultimately, however, it is unclear which parts are admitted. Similarly, the Board states that "*at least* that part of Contention 7 that challenges the technical merit of Duke's conclusions relating to severe accident environmental impacts is admissible," but does not state whether more (and which parts) of BREDL Contention 7 has been admitted. *Id.* (emphasis added). The Board also states that it is "not inclined to exclude completely any evidence related to risk, within reasonable and practical limits." *Id.* This statement appears to allude to BREDL Contention 1, but fails to provide meaningful guidance on what evidence related to risk is within the scope of the hearing.

Reframed Contentions I and II provide insufficient clarity on which issues have been admitted to the proceeding. In addition to the vague language of Contentions I and II, it appears that these new contentions significantly expand the scope of BREDL's original contentions. This is discussed in greater detail below.

A. Contention I Should Not Have Been Admitted Because it is Vague and Overly Broad

Contention I, a safety contention, states that the "LAR is inadequate because Duke has failed to account for differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs and on the DBA analysis for Catawba." Order at 41. First, Contention I is inadmissible because the contentions that it reframes are themselves inadmissible. In addition, even if any of BREDL's contentions were admissible, as written, Contention I significantly expands the scope of BREDL's original Contentions 1, 2, 10, and 11, on which Contention I is ostensibly based. Contention I also fails to clarify the issues presented by BREDL in its original contentions. Contention I states six different inadequacies in Duke's application. Each of these statements by the Board, as identified and discussed in detail below, is either vague or impermissibly expands the scope of BREDL's original contentions and, therefore, should not have been admitted.

1. The statement that the LAR is inadequate because Duke has failed to account for known differences in MOX and LEU fuel behavior is vague and overly broad

This contention, as redrafted by the Board, impermissibly expands the scope of BREDL's contentions. It is unclear precisely which BREDL contentions the Board intended to clarify and consolidate by drafting this statement. BREDL Contentions 10 and 11 discuss *uncertainties* regarding the difference in behavior between MOX and LEU fuel. Specifically, BREDL claims in Contention 10 that "the experimental database for MOX fuel performance during LOCAs is woefully inadequate," and in Contention 11 that there are "uncertainties in the technical understanding of

the behavior of MOX fuel during severe accidents.” BREDL Late-Filed Contentions at 3, 5. These claims are based on the information presented in IRSN’s research proposal. Contention I, however, cites *known* differences, and is not limited to the issues outlined in IRSN’s proposal. Thus, Contention I is beyond the scope of BREDL Contentions 10 and 11, which, as discussed above, were otherwise inadmissible in the first instance.

BREDL Contention 1, if otherwise admissible, would be a possible source for Contention I, but, again, the scope of Contention I is greater than the scope of BREDL Contention 1. BREDL Contention 1 states that “Duke’s risk impact analysis is inadequate, because it presents the results of its analysis in qualitative terms only.” BREDL Contentions at 4. In its basis for Contention 1, BREDL discusses the quantitative aspects of Duke’s probabilistic risk assessment that it claims should have been presented. *Id.* The basis also discusses the need for Duke to calculate the changes in CDF and LERF as a result of the proposed license amendment. *Id.* Contention I, however, as redrafted by the Board, would require Duke to account for *all* known differences in MOX and LEU fuel behavior. Therefore, this portion of Contention I broadens the scope of BREDL Contention 1. This portion of Contention I is also irrelevant to this license amendment proceeding because, while Contention I concerns risk analysis, the license amendment is not a risk-informed amendment, and the staff determination whether to grant the license amendment will not be based on risk analysis.

BREDL Contention 2, as discussed above, was inadmissible in the first instance because it, like Contention 1, calls for a risk assessment of severe accidents which is not required by NRC regulation applicable to the amendment at issue. In addition, even if Contention 2 were otherwise admissible, Contention I remains inadmissible because it impermissibly broadens the scope of BREDL Contention 2. BREDL Contention 2 states that by inappropriately using SPDEIS to estimate the increase in severe accident consequences, Duke has failed to support its claim that the increase in consequences associated with MOX LTA *loading* will not be significant. BREDL

Contentions at 5. As part of the basis for Contention 2, BREDL discusses research that Duke allegedly did not consider; the research alluded to by BREDL contradicts the SPDEIS. *Id.* at 5-6. This discussion, however, is limited in scope to research on accidents associated with loading. *Id.* On the other hand, Contention I, as redrafted by the Board, would include accidents associated with fuel states, whether while loading or at some other point. Therefore, this portion of Contention I expands the reframed contention beyond the scope of BREDL Contention 2.

Because the first portion of Contention I goes beyond the scope of BREDL proposed Contentions 1, 2, 10, and 11, the Board erred in reframing Contention I and its decision should be overturned.

2. The statement that the LAR is inadequate because Duke has failed to account for recent information about possible differences in MOX and LEU fuel behavior is vague and overly broad.

BREDL Contentions 10 and 11 state that there are inadequacies in the experimental database for MOX fuel performance during LOCAs and uncertainties regarding the behavior of MOX fuel during severe accidents. BREDL Late-Filed Contentions at 3, 5. However, while BREDL's contentions are limited to uncertainties about performance only during LOCAs and severe accidents, Contention I contains no such limitation, only a vague mention of "possible differences in . . . fuel behavior." Order at 41. Contention I, as redrafted by the Board, now requires Duke to account for differences in fuel behavior performance beyond LOCAs and severe accidents. Therefore, this portion of Contention I is also beyond the scope of BREDL's contentions. The Board erred in admitting it and should be overturned.

3. The statement that the LAR is inadequate because Duke has failed to account for the impact of known differences on LOCAs is vague and overly broad.

This portion of Contention I appears to be based on BREDL Contention 10. BREDL Contention 10 specifically mentions LOCAs, but, its discussion of LOCAs is limited to uncertainties about MOX fuel behavior during LOCAs raised by the IRSN research proposal. As a basis for this

contention, BREDL relies on IRSN's research proposal, which allegedly indicates that there are significant unknowns regarding the behavior of MOX fuel during LOCAs. BREDL Late-Filed Contentions at 3. In contrast, Contention I, as redrafted by the Board, requires consideration of known factors about the behavior of MOX fuel during LOCAs, and is not limited to the issues outlined in IRSN's research proposal. To the extent that Contention I requires a determination on Duke's analysis of all differences between MOX and LEU fuel behaviors during LOCAs, not just a determination on the differences identified by BREDL, it is an impermissible expansion of the scope of BREDL Contention 10. The Board erred in reframing this portion of Contention I.

4. The statement that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences on LOCAs is vague and overly broad.

This portion of Contention I is very similar to BREDL Contention 10. Both are limited in scope to LOCAs and to unknown information about MOX fuel behavior during LOCAs. There is one important difference, however. In the basis for Contention 1, BREDL relies primarily on IRSN's proposals for tests. BREDL Late-Filed Contentions at 3-4. Contention I, however, concerns "recent information about possible differences. . . ." Order at 41. This phrase is vague and broader than the original Contention because the Board included "recent information" rather than solely BREDL's reliance on the IRSN proposals. As redrafted by the Board, the contention could include information well beyond IRSN's issues and proposals. Because of its vagueness, it is not possible to determine with reasonable precision what this portion of Contention I concerns. Therefore, the Board erred when it reframed it.

5. The statements that the LAR is inadequate because Duke has failed to account for the impact of known differences on the DBA analysis for Catawba, and that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences on the DBA analysis for Catawba are vague and overly broad.

LOCA design basis accidents are discussed in BREDL Contention 10. LOCAs, however, are only one of several types of design basis accidents identified by the regulations. None of

BREDL's original safety-related contentions focuses on DBAs other than LOCAs. Yet, Contention I, as redrafted by the Board, mentions DBAs in generic terms, presumably including all possible DBAs. Since LOCAs are the only DBAs included in BREDL's contentions, these portions of Contention I are beyond the scope of BREDL's original contentions.

B. Contention II Should Not Have Been Admitted Because it is Vague and Overly Broad.

Contention II states that

The LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba, as required by NEPA.

Order at 42. It is also impermissibly vague and expands the scope of BREDL's original contentions. Contention II identifies three separate inadequacies in the LAR, discussed individually below, each of which should not have been admitted.

1. The statement that the LAR is inadequate because Duke has failed to account for known differences in MOX and LEU fuel behavior on the potential for releases from Catawba in the event of a core disruptive accident is vague and overly broad

This portion of Contention II focuses on what the Board refers to as a "core disruptive accident." Order at 42. All NRC analyses (as well as analyses conducted by licensees for NRC licensing actions) are based on standardized terminology defined in the NRC's regulations and policy statements. See, e.g., 10 C.F.R. § 50.2. The term "core disruptive accident" is not defined in the NRC's regulations. The Board has used this phrase in the Order, but has not supplied a definition. Also, as discussed in the context of Contention I above, none of BREDL's original contentions; including environmental Contentions 6, 7, and 12, discuss *known* differences in the behaviors of MOX and LEU fuel. Contentions 6, 7, and 12, which are otherwise inadmissible, are all concerned with MOX fuel behaviors that potentially exist, but have not yet been observed. To

the extent that Contention II requires consideration of MOX fuel behaviors that are not raised by BREDL, it is beyond the scope of BREDL's environmental contentions. Therefore, this portion of Contention II must be dismissed because it relies on a vague, undefined term and, in effect, expands the scope of BREDL's proposed contentions.

2. The statement that the LAR is inadequate because Duke has failed to account for the impact of recent information about possible differences in MOX and LEU fuel behavior on the potential for releases from Catawba in the event of a core disruptive accident is vague and overly broad

This portion of Contention II is also impermissibly vague. As discussed above, core disruptive accident is not a defined term. Also, it is unclear whether the scope of "recent information about possible differences" is limited to the topics covered by the IRSN research proposals discussed in BREDL's contentions or the scope is expanded beyond BREDL's contentions. See BREDL Late-Filed Contentions at 3-6. Therefore, the Board erred in reframing this portion of Contention II.

3. The statement that the LAR is inadequate because Duke has failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs at Catawba is vague and overly broad

BREDL Contention 6 claims that Duke failed to provide quantitative information in support of assertions regarding environmental impacts. BREDL Contentions at 13. BREDL Contention 7 states that Duke has failed to support its claim that the increase in severe accident consequences associated with the MOX LTA loading will not be significant. BREDL Contentions at 14. Therefore this portion of Contention II appears to be within the scope of BREDL Contentions 6 and 7. However, for the reasons discussed above, those contentions are inadmissible.¹⁷ See *a/so* Staff's Response to Contentions at 16-19.

¹⁷ Except to the extent that Contention 7 challenges the technical merits of Duke's conclusions relating to severe accident environmental impacts.

III. The Board Erred in Admitting Contention III, Which Is Overly Broad and Is Based on a Contention That Is Not Admissible.

According to the Board, Contention III is based on BREDL Contention 5. Contention 5 alleged that the “Environmental Report is deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire.” BREDL Contentions at 10. In support of this statement, BREDL argued that new information indicating that Catawba is “particularly vulnerable to accidents, including containment breach . . . should be considered in a supplemental EIS.” *Id.* at 10-16.

The Staff argued below that Contention 5 is inadmissible, based on the fact that the alternatives BREDL wanted Duke to consider were outside the scope of the license amendment. Staff’s Response to Contentions at 13. Therefore, the alternatives are not material. Also, the staff argued that BREDL did not provide any authority for its assertion that Duke must explain why no alternatives were considered. *Id.* Finally, the staff contended that the Contention was inadmissible because the alternatives to be considered are not limited to the reactors owned or operated by Duke. *Id.* at 14. The Staff did state at oral argument that Oconee should have been addressed as an alternative. See Tr. at 456.

Contention III alleges that the “environmental report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.” Order at 51. To the extent that Contention III puts at issue whether or not Duke must consider Oconee as an alternative for MOX LTAs, it is within the scope of BREDL Contention 5. See BREDL Contentions at 12-13. The Board’s explanation for Contention III, however, states that the parties may “present evidence relating to the comparative safety, practicability, and appropriateness of using the MOX lead test assemblies at Catawba and Oconee.” Order at 51. This requires analysis that far exceeds the regulatory requirements. The only detailed discussion required by regulation is a discussion of the viable alternatives considered by the licensee. See 10 C.F.R. § 51.45; 10 C.F.R. Part 51, App. A, § 5.

Non-viable alternatives eliminated by the licensee need only be discussed in a “brief statement of the reasons why the alternatives were eliminated.” 10 C.F.R. Part 51, App. A, § 7; *see also* 40 C.F.R. § 1502 (Council on Environmental Quality regulations). Therefore, the Board should not have admitted Contention III.

CONCLUSION

Based upon the foregoing discussion, the Staff submits that the Board’s order admitting reframed Contentions I, II, and III should be overturned, and, accordingly requests that Contentions 1, 2, 5, 6, 7 except to the extent that it challenges the technical merits of Duke’s conclusions relating to severe accident environmental impacts, 10, 11, and 12 should be dismissed.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Date at Rockville, Maryland
This 25th day of March 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN SUPPORT OF DUKE ENERGY CORPORATION'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S MEMORANDUM AND ORDER LBP-04-04 (RULING ON STANDING AND CONTENTIONS) 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; and by e-mail as indicated by a double asterisk (**), this 25th day of March, 2004.

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