

March 25, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of

DUKE ENERGY CORPORATION

Docket No's. 50-413-OLA, OFFICE OF SECRETARY
50-414-OLA RULEMAKINGS AND
ADJUDICATIONS STAFF

(Catawba Nuclear Station, Units 1 and 2)

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
RESPONSE TO DUKE'S APPEAL OF LBP-04-04**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a, Blue Ridge Environmental Defense League ("BREDL") hereby responds to Duke Energy Corporation's ("Duke's") appeal of LBP-04-04, the Atomic Safety and Licensing Board's ("ASLB's") Memorandum and Order (Ruling on Standing and Contentions) (March 5, 2004).¹ As demonstrated below, Duke has failed to demonstrate that the ASLB erred in admitting reframed Contentions I, II, and III. Moreover, Duke improperly seeks to disturb case management decisions committed to the sound discretion of the ASLB.

II. FACTUAL BACKGROUND

On February 27, 2003, Duke filed a license amendment request ("LAR") seeking approval to test plutonium "MOX" fuel assemblies at the Catawba and McGuire nuclear power plants. Duke subsequently amended the application to refer only to the Catawba nuclear station.

¹ Notice of Appeal of Duke Energy Corporation from Atomic Safety and Licensing Board Memorandum and Order LBP-04-04 (Ruling on Standing and Contentions (March 15, 2004); Memorandum of Law in Support of Duke Energy Corporation's Appeal From the Atomic Safety and Licensing Board Memorandum and Order LBP-04-04 (Ruling on Standing and Contentions (March 15, 2004) (hereinafter "Duke Memorandum").

BREDL requested a hearing and submitted thirteen safety and environmental contentions. Blue Ridge Environmental Defense League Supplemental Petition to Intervene (October 21, 2003); Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene (December 2, 2003). Duke and the NRC Staff both filed written responses. 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' (November 11, 2003); 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 (November 10, 2003); Answer of Duke Energy Corporation to the Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene (December 23, 2003); NRC Staff's Opposition to BREDL's Second Supplemental Petition to Intervene (December 24, 2003).

In addition, the ASLB held three full days of oral argument on the contentions, on December 3 and 4, 2003; and on January 15, 2004. During these oral arguments, all parties were given exhaustive opportunities to present their arguments regarding the admissibility of the contentions, and the ASLB also questioned the parties extensively regarding their positions.

In LBP-04-04, the ASLB admitted portions of seven contentions raising safety and environmental issues regarding Duke's analysis of accident potential and consequences (Contentions, 1, 2, 6, 7, 10, 11, and 12), and consolidated and reframed them in Contentions I and II:

Contention I: 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.

Contention II: 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.

Id., slip op. at 39-42.

The ASLB also admitted BREDL Contention 5, which challenged Duke's failure to consider alternatives, although it limited the consideration of alternatives to those within Duke's control. *Id.*, slip op. at 50-51. The ASLB renumbered the contention as III, and reworded it as follows:

Contention III: The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.

Id., slip op. at 50-51.

II. ARGUMENT

A. This Appeal Should be Held in Abeyance Pending Issuance of ASLB Decision on Security Contentions.

Under the "express provisions" of 10 C.F.R. § 2.714a:

a party may appeal from the acceptance or rejection of contentions(s) at the threshold if, but only if, such acceptance or rejection controlled the Licensing Board's disposition of the petition for intervention advancing the contention(s).

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987). In this case, Duke has not demonstrated that resolution of this appeal in Duke's favor will result in dismissal of BREDL's entire hearing request. This is because BREDL has a number of security-related contentions pending before the ASLB. The ASLB is expected to rule on the contentions shortly.

Until the ASLB issues its ruling and Duke appeals the admission of any contentions that the ASLB may allow, it is premature to consider this appeal. Although Duke has opposed the admission of all of the security contentions, it should not be presumed that Duke will appeal the ASLB's decision automatically, without evaluating the reasonableness of the basis for the decision. Therefore, in order to be consistent with the purpose of 10 C.F.R. § 2.714a, the Commission should stay its consideration of this appeal until such time as Duke may appeal any decision the ASLB may issue admitting BREDL's security-related contentions.

B. The ASLB Did Not Err in Admitting Contentions I and II.

Duke makes several general arguments in support of its bid to reverse the ASLB's admission of Contentions I and II in LBP-04-04. First, Duke argues that the ASLB "did not specifically delineate the admissible portions" of Contentions 1, 2, 6, 7, 10, 11, and 12. Duke Memorandum at 6. In its decision, the ASLB summarized the content of each contention, and Duke's and the NRC Staff's arguments in response. *Id.* at 19-25. At pages 39-42, the ASLB addressed the admissibility of the contentions as a group, identifying portions of the contentions that were inadmissible. Thus, the ASLB delineated the admissible portions of the contentions.

Moreover, it was well within the ASLB's discretionary authority to consolidate and restate the contentions. The ASLB reasonably found that there was a degree of overlap and common ground between the contentions, and efficiently consolidated them into two. As the Commission recognized in *International Uranium Corporation* (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002) (hereinafter "*White Mesa*"), in areas of case management, the Commission is "loathe to second guess the judgments of

[its] presiding officers,” who have “first-hand contact with and appreciation for all the circumstances surrounding a case.” The ASLB’s decision should not be disturbed except for an abuse of discretion, which Duke has not demonstrated. *Id.*²

Finally, even if Duke had demonstrated that the ASLB had abused its discretion by failing to adequately explain what portions of BREDL’s contentions were accepted and what portions were rejected, the appropriate remedy is a remand for further explanation, not reversal. *Id.* at 273, 276.

Duke next argues that the ASLB erred in admitting Contentions I and II, because the “source” contentions on which they are based “injected risk issues into the context of the safety review of a non-risk-informed amendment application.” Duke Memorandum at 6. This argument is misleading. Contentions I and II do not challenge Duke’s quantitative risk analysis in Section 3.8, or even use the term “risk.” Instead, Contention I addresses differences in MOX and LEU fuel behavior on loss of coolant accidents (“LOCAs”) and design basis accident (“DBA”) analysis³, and Contention II addresses Duke’s failure to address the impacts of differences in MOX and LEU fuel behavior in evaluating the consequences of severe accidents, under NRC safety and environmental regulations. LBP-04-04, slip op. at 41-42. While the ASLB stated that it is “not inclined

² For the same reason, the Commission should categorically reject Duke’s implicit request for review of the ASLB’s decision that BREDL was justified in late-filing its second set of contentions. Duke Memorandum at 23-24. Not only did Duke not raise the issue directly, but the determination involved a discretionary balancing test that is not subject to review absent an abuse of discretion. Moreover, as discussed at length in LBP-04-04, Duke’s apparent assumption that BREDL’s expert should have been expected to attend every conference that may have been held on MOX fuel behavior during the last five years is absurd. *Id.*, slip op. at 37-38. See also transcript of January 15, 2003, oral argument at 650-53.

³ BREDL agrees with Duke that the focus of the contention should be on LOCAs. See Duke Memorandum at 37. Thus, BREDL intends to limit its evidentiary presentation to LOCAs and DBA LOCA analysis.

to exclude completely any evidence related to risk, within reasonable and practical limits,” *id.*, slip op. at 40, that does not amount to a statement that the focus of the contentions is solely on Duke’s risk analysis in Section 3.8.⁴

Duke also argues that the ASLB erred in admitted Contentions I and II, because the contentions assert the need for a probabilistic risk assessment (“PRA”) “to support an environmental analysis where no such requirement exists.” Duke Memorandum at 6. This argument mischaracterizes Contention II, which asserts that Duke has failed to quantify, “to the maximum extent practicable,” the environmental impact factor relating to the use of plutonium fuel LTAs at Catawba. The question of what degree of quantitative analysis is practicable is factual, and can be answered in an evidentiary proceeding.⁵

⁴ Throughout its Memorandum, Duke confuses the question of “risk” with questions of accident potential and accident consequences. *See, e.g.*, Duke Memorandum at 9 (asserting that Contention 1 did not provide any basis to conclude that the amendment would change CDF, LERF, or public health risk); Duke Memorandum at 10 (“a risk assessment is not required by NRC regulations for this LAR”); Duke Memorandum at 11 (“fundamentally, all four bases proffered for BREDL contention 2 challenge a risk assessment that is not required by NRC regulations.”) The Commission should reject these attempts at obfuscation. Contentions I and II clearly recognize the distinction made in BREDL’s contentions between issues of accident potential, accident consequences, and accident risk. Yet, Duke continually confuses these distinctions. *See, e.g.*, Memorandum at 18, wherein Duke falsely characterizes BREDL Contention 6 as seeking a “full-blown risk assessment.” In reality, Contention 6 simply seeks documentary support for Duke’s demonstrably inadequate consequence analysis.

⁵ The question of whether the applicant should prepare a PRA in the first place is not at issue here. Thus, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 448 (2001), cited in Duke’s Memorandum at 18, is inapposite. Nor does BREDL assert that environmental impacts should be represented in quantitative terms *per se*, as was the case with the contention that was rejected in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 296 (1998). Rather, the question presented here is the degree to which Duke is reasonably capable of quantifying the environmental impacts of the proposed license amendment.

Finally, Duke argues that Contentions I and II unlawfully “would require Duke to address purported design basis and beyond-design-basis issues based on no more than a vague, unfunded research proposal by a foreign research agency.” Duke Memorandum at 6. This amounts to an argument on the merits of the French research presented by BREDL in support of its contention. The ASLB could not, and did not, rule on the merits of BREDL’s contention, and the Commission should not accept Duke’s invitation to do so here. BREDL properly supported its contentions by presenting the results of the leading authority on use of plutonium MOX fuel, the French government.⁶ The ASLB properly found it adequate to support Contentions I and II.

Duke spends most of its Memorandum rehashing virtually all of the arguments that Duke made in its written responses to BREDL’s contentions, and in the oral arguments that were held on December 3 and 4, 2003, and January 15, 2004.⁷ BREDL has already responded to these arguments in exhaustive detail, as demonstrated in the

⁶ Duke argues that BREDL misrepresented the results of the IRSN presentation on which it relies, by claiming that MOX fuel relocation had been observed at a lower temperature than uranium fuel during design-basis LOCA conditions. Duke Memorandum at 27. Duke’s argument is incorrect and misleading in two respects. First, Duke is blatantly incorrect when it states that IRSN did not make a finding that fuel relocation could affect a design basis accident. *See* transcript of January 15, 2003, oral argument at 703-05.

Second, IRSN made clear that there was good reason to expect that M5-clad MOX fuel would have a greater tendency to relocate than non-M5-clad LEU fuel of the same burnup, thus increasing the non-conservatism in Appendix K that results from neglecting relocation effects. It can be inferred from the IRSN slides that the degree of fuel relocation during a design basis LOCA is a function of the size of the balloon. *See* Transcript of January 15, 2004, oral argument at 653, 662, 733, 734, 767. BREDL also discussed the fact that in approving the use of M5 cladding, the NRC never addressed the issue of fuel relocation. *Id.* at 694, 699.

⁷ For example, Duke repeats inappropriate merits-based arguments on the magnitude of the risk increase resulting from MOX LTA use. *See, e.g.* Duke Memorandum at 12. BREDL addressed these arguments in detail in the oral argument. *See, e.g.*, transcript of December 3, 2004, oral argument at 91-102, 281-83.

transcripts of the oral argument. Duke's Memorandum adds nothing to the arguments that it has already made, and therefore BREDL continues to rely on the statements that it made at the oral argument in defense of its contentions.

C. The ASLB Did Not Err In Admitting Contention III.

Duke argues that Contention III is inadmissible, because "the only viable alternative" to the proposal to test MOX fuel at Catawba, other than the no action alternative, is to test it at McGuire, which has already been considered. Duke Memorandum at 41. Duke incorrectly assumes that it is a foregone conclusion that the only plants at which batch use of MOX fuel can be used are Catawba and McGuire, and misses the point of BREDL's Contention 5, that in light of new information regarding the hazards of plants with ice condenser containments, it is appropriate to consider batch use of MOX fuel at other nuclear power plants. *See* BREDL Supplemental Petition to Intervene at 12-13. As it previously stated in the oral argument, BREDL accepts the limitation of alternatives to Oconee, a plant that is under Duke's control.

III. CONCLUSION

For the foregoing reasons, the Commission should reject Duke's appeal of LBP-04-04.

Respectfully submitted,



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March 25, 2004

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2004, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S RESPONSE TO DUKE'S APPEAL OF LBP-04-04 were served on the following by e-mail and/or first-class mail, as indicated below:

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