

RAS 7725

UNITED STATES OF AMERICA
 NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 05/06/04
SERVED 05/06/04

Before Administrative Judges:

Ann Marshall Young, Chair
 Anthony J. Baratta
 Thomas S. Elleman

In the Matter of	Docket No's. 50-413-OLA, 50-414-OLA
DUKE ENERGY CORPORATION	ASLBP No. 03-815-03-OLA
(Catawba Nuclear Station, Units 1 and 2)	May 6, 2004

MEMORANDUM and ORDER

(Ruling on Motion to Dismiss Non-Security-Related Contention III)

Duke Energy Corporation (Duke) has filed a motion in this proceeding,¹ asking the Licensing Board to dismiss Contention III, admitted by the Board in LBP-04-04, based upon grounds of mootness. [Duke]'s Motion to Dismiss Contention III (Mar. 15, 2004) [hereinafter Duke Motion]; see LBP-04-04, 59 NRC ____ (2004). Intervenor Blue Ridge Environmental Defense League (BREDL) opposes Duke's motion; the NRC Staff states it does not oppose the motion. [BREDL]'s Opposition to [Duke]'s Motion to Dismiss Contention III (Mar. 25, 2004) [hereinafter BREDL Opposition]; [NRC] Staff's Response to [Duke]'s Motion to Dismiss Contention III (Mar. 30, 2004) [hereinafter Staff Response]. For the reasons stated herein, we grant Duke's motion and dismiss Contention III.

¹This proceeding involves Duke's February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies (LTAs) at the station. By Memorandum and Order dated March 5, 2003, Petitioner Blue Ridge Environmental Defense League (BREDL) was admitted as a party in the proceeding, after having filed a petition to intervene and request for hearing in response to a July 2003 Federal Register notice concerning this application. See LBP-04-04, 59 NRC ____ (2004); 68 Fed. Reg. 44,107 (July 25, 2003). Additional background on this proceeding is provided in LBP-04-04, as well as in an April 12, 2004, Memorandum and Order (Ruling on Security-Related Contentions), which was, when issued, sealed as Safeguards Information, but a redacted version of which will be published in the near future.

In LBP-04-04, the Board denied in part and admitted in part BREDL's Contention 5, which asserted that Duke's Environmental Report (ER) was "deficient because it fails to consider alternative nuclear power plants for testing and batch MOX fuel use, other than Catawba and McGuire." See LBP-04-04, slip op. at 48, 50-51. We found that we had no jurisdiction to consider in this proceeding alternatives not within the control of Duke, but admitted the contention to the extent of requiring analysis of the alternative of using the Oconee plant, "at least to the extent required for a 'brief discussion' under 10 C.F.R. § 51.30(a)." *Id.*, slip op. at 50-51. We renumbered and reframed the contention as follows:

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

Id. at 51. We noted that, "[w]ithin this context, we will permit BREDL and the other parties to present evidence relating to the comparative safety, practicability, and appropriateness of using the MOX lead test assemblies at Catawba and Oconee." *Id.*

In support of its motion, Duke argues that it has now provided the "brief discussion under 10 C.F.R. § 51.30(a)," in a March 1, 2004, response to a Staff Request for Additional Information (RAI). Duke Motion at 1-2. In support of its argument Duke cites case law and Council on Environmental Quality regulations for the principles that a NEPA alternatives analysis is, among other things, governed by a "rule of reason"; does not require consideration of alternatives that are "deemed only remote and speculative possibilities"; and requires discussion only of alternatives that are "feasible." *Id.* at 3, 4. Duke argues that it "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." *Id.* at 3. Characterizing the contention as a "contention of omission," Duke asserts that it has, in its March 1 RAI response, "explained the basis for concluding that Oconee is not available or appropriate for a

MOX fuel lead assembly program,” and thereby addressed any “omission” in its ER, thus rendering moot Contention III. *Id.* at 4.

The NRC Staff agrees with Duke’s assertion that Contention III “is moot because the answer to the Staff’s RAI provided a discussion of Oconee sufficient to meet the requirements of [LBP-04-04], and 10 C.F.R. § 51.30(a).” Staff Response at 1-2.

In opposition, BREDL argues that Duke’s RAI response is “fundamentally inadequate to satisfy the requirement for consideration of Oconee as an alternative,” because its analysis is “based on the assumption that ‘batch’ use of plutonium fuel will be carried out only at Catawba.” BREDL Opposition at 1. “Having made this assumption,” BREDL states, “the RAI response reaches the unsurprising, indeed inevitable, conclusion that it is appropriate to test the fuel at the same plant where ultimately it will be used in batch quantities.” *Id.* at 1-2. BREDL asserts that Duke “completely misses the point” of the contention at issue, which, BREDL explains, is that:

in light of new information regarding the hazards of operating nuclear plants with ice condenser containments, it is appropriate to consider batch use of MOX fuel at another nuclear power plant under Duke’s control, *i.e.*, Oconee, as an alternative for mitigating or avoiding the impacts of accidents.

Id. at 2. It is therefore inappropriate, BREDL argues, for Duke to “limit its factual analysis of the suitability of Oconee as an alternative to the question of whether Oconee would be an appropriate location to test fuel that ultimately will be used at Catawba.” *Id.* Duke’s analysis *should have addressed*, according to BREDL, “in addition, the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel.” *Id.*

Although its argument has some logic, BREDL’s analysis is flawed on two points. First, Duke’s RAI response does, contrary to BREDL’s suggestion, include at least the bare statement that Catawba is “very similar in design to European reactors that have amassed decades of experience using reactor grade MOX fuel.” Letter from H.B. Barron to NRC

(March 1, 2004), Attachment 1, MOX Fuel Lead Assembly License Amendment Request, Environmental Review - Response to NRC Request for Additional Information [hereinafter Duke RAI response], at 1-2. To be sure, BREDL is correct that Duke's RAI response does rely prominently on the argument that using the lead test assemblies at Oconee is inappropriate because any future batch use is planned to be at Catawba and McGuire. But this is not Duke's exclusive response to the RAI. It does address, albeit minimally, through the above-quoted statement, "the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel." In addition, its response includes a statement that Duke knows of no "technical reason that MOX fuel could not be used safely at Oconee." *Id.* at 2.

Second, under the Commission's "contention of omission" doctrine, BREDL should have filed an amended contention, in which it could have made its arguments that Duke's RAI response is *inadequate* in its analysis of "the question of whether Oconee would be a more suitable alternative for batch use of plutonium fuel." Indeed, in a March 16 telephone conference, BREDL was counseled that the contention in question "does generally fit the Commission's approach to contentions of omission, so it might be best to just move forward with filing a new contention by March 30." Tr. 1230. No such amended contention has, however, been filed.

The Commission discussed its "contention of omission" doctrine in another proceeding in which Duke, BREDL, and the Staff were also involved, that on Duke's license renewal application. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002). In CLI-02-28, the Commission considered whether a BREDL contention challenging Duke's failure to address a Sandia National Laboratories study in its environmental report was rendered moot by Duke's subsequent revision of its analysis to acknowledge the Sandia study. *Id.* at 378-81. In its decision the Commission noted:

There is, in short, a difference between contentions that merely allege an “omission” of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft [environmental impact statement], the contention is moot.

Id. at 382-83. Because the Commission found the intervenors’ contention to be one of omission, rather than one that substantively challenged the “specific deficiencies in the way the study was used,” it concluded that the appropriate means for the intervenors’ “new challenge” was an amended contention. *Id.* at 383, 382.

In the instant proceeding, BREDL’s original contention regarding alternatives challenged Duke’s failure to discuss other plants as alternatives to Catawba in its ER, rather than the substance of any then-existing Duke or Staff evaluation of such alternatives. We admitted the contention to the extent that it encompassed the argument that Duke’s environmental report “fail[ed] to consider Oconee,” a plant under Duke’s control, “as an alternative for the MOX LTAs,” having found that we did not have jurisdiction to consider in this proceeding other alternatives not under Duke’s control. LBP-04-04, 59 NRC ____ (2004), slip op. at 50-51. Therefore, under the “contention of omission” doctrine, BREDL should have, following Duke’s March 1 RAI response, filed an amended contention if it wished to challenge the merits and adequacy of Duke’s assessment of the technical feasibility, practicality, and comparative safety of Oconee as an alternative site for the MOX LTAs. Given that Duke’s RAI response does address the alleged failure, or “omission,” in question — even if minimally, particularly with regard to the safety issues asserted by BREDL — we must under this doctrine grant Duke’s motion to dismiss Contention III.

We make this ruling in full recognition of the somewhat facile aspect of Duke’s RAI response rationale for excluding Oconee as a technically feasible or practical alternative for MOX LTA irradiation, on the basis that Oconee was neither proposed to nor selected by the

Department of Energy as a facility to irradiate batch quantities of MOX fuel. See Duke RAI Response at 1-2. We note in this regard, however, that should Duke submit a license amendment request seeking approval of plans to use batch quantity MOX fuel in Catawba and/or McGuire, a petitioner would have the right to submit a contention challenging any failure to address, or alleged inadequacy in addressing, the technical feasibility, practicality, and comparative safety of Oconee as an alternative site for proposed "batch" use of MOX fuel.² And, assuming any such contention meets the contention admissibility criteria, the circumstance that the LTAs were tested in the Catawba plant should not be considered a valid ground for excluding such a contention.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 6, 2004³

²This is in keeping with Duke's consistently maintained position herein that there is no relationship between this proceeding and any proceeding relating to future "batch use" of MOX and thus no issues relating to the latter should be considered in this proceeding, thereby leaving open for argument in any subsequent "batch use" proceeding any and all issues, including issues under NEPA. See, e.g., Duke Motion at 2 n.3.

³Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO DISMISS NON-SECURITY RELATED CONTENTION III) (LBP-04-07) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of May 2004