

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)	)	

NRC STAFF'S REPLY TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S  
RESPONSE TO THE COMMISSION'S APRIL 21, 2004 ORDER

INTRODUCTION

In an order issued on April 21, 2004, the Commission provided the parties an opportunity to file briefs addressing the admissibility of the Blue Ridge Environmental Defense League's (BREDL) Security Contention 1. *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-11, 59 NRC \_\_, slip op. at 7. Additionally, the Commission invited the parties to address what the presiding Atomic Safety and Licensing Board (Board) characterized as "several pertinent related questions." *Id.* On May 5, 2004, BREDL filed its brief in response to CLI-04-11.<sup>1</sup> In its Order, the Commission also invited the parties to submit reply briefs if they wished to do so. *Id.* The Nuclear Regulatory Commission Staff (Staff) herein files its reply to BREDL's Response. For the reasons discussed below, in addition to those discussed in the Staff's May 5, 2004 Response, the Commission should rule that Security Contention 1 is inadmissible and that the additional issues identified by the Board are inapposite to this proceeding.

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<sup>1</sup> Blue Ridge Environmental Defense League's Brief in Response to CLI-04-11, Regarding Admissibility of BREDL Security Contention 1; and Request for Reconsideration of CLI-04-06, May 5, 2004 (BREDL's Response). The Staff also filed a response to the Commission's Order on May 5. NRC Staff's Response to the Commission's April 21, 2004 Order Relating to Certified Question Regarding BREDL Security Contention 1, May 5, 2004 (Staff Response).

## DISCUSSION

Most of the arguments raised in BREDL's Response are addressed in the Staff Response. However, BREDL raised two issues not addressed in the Staff Response that are addressed below.

BREDL asserts that it has raised a "genuine dispute regarding whether the Commission has elevated the general security standard for Category I facilities by revising the design basis threat, such that compliance with the NRC's promulgated regulations is not sufficient to satisfy the no undue risk standard." BREDL's Response at 6-7. BREDL argues that, in addition to a determination that the facility complies with all applicable NRC regulations, there must be a determination that the facility poses no undue risk to public health, safety, and security. BREDL's Response at 6.

BREDL is not correct. BREDL's reliance on *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003 (1973), *aff'd* CLI-74-2, 7 AEC 2 (1974), *aff'd subnom. Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975) to support its assertion is misplaced. *Maine Yankee* does state that "in some circumstances, compliance with the promulgated regulations might not be sufficient." *Id* at 1010. Immediately after this statement, however, the Appeal Board cites an instance of a situation in which it may be necessary to look beyond the regulations to determine whether health and safety will be sufficiently protected. That is a situation in which "*there are no . . . Commission regulations* which specifically define the criteria for evaluating" whether the licensee will be able to protect the health and safety of the public. *Id.* (emphasis supplied). This is the only instance cited by the Board of a situation in which it is necessary to look beyond a licensee's compliance with NRC regulations to determine separately whether health and safety will be adequately protected. *Id.* Thus, the Appeal Board in *Maine Yankee* was of the view that the NRC will look beyond the regulations to evaluate the adequacy of protection of the public health and safety in the rare circumstance – not applicable

here – in which no regulations exist to evaluate whether the public health and safety is protected. Further, although BREDL cites *Maine Yankee* for the proposition that a Board should look beyond the regulations to evaluate whether the licensee will adequately protect the public health and safety, the Appeal Board in *Maine Yankee* in fact declined to do so. *Id.* Accordingly, BREDL’s cite to *Maine Yankee* is inapposite.

Of greater significance than the Board’s view in *Maine Yankee* is that the Commission has held that compliance with applicable NRC regulations, by definition, ensures that public health and safety are adequately protected.<sup>2</sup> *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-07, 58 NRC 1, 7 (2003). Thus, the Commission has not adopted BREDL’s view that compliance with NRC regulations is insufficient basis to ensure that the public health and safety are protected. Further, NRC regulations must be accepted on their face, and contentions cannot advocate stricter requirements than those reflected in the regulations. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); *see also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 170 (1995); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987). Therefore, BREDL cannot support admitting security Contention 1 based on the view that licensee compliance with NRC regulations is insufficient.

Finally, BREDL’s Response cites a brief filed in the D.C. Circuit by the NRC in *Public Citizen v. NRC* (No. 03-1181) to support its assertion that “new orders [post-9/11] are more specific than NRC regulations,” and that Contention 1 raises a genuine dispute regarding what level of compliance with NRC regulations is reasonably sufficient in this case. *See* BREDL Response at 7 n. 4. There is no doubt that licensees must comply with both NRC regulations and duly

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<sup>2</sup> A fair reading of this principle is that it refers not only to “regulations” but to any applicable Commission orders. As explained in the Staff Response, Security Contention 1 is linked to post-9/11 NRC orders that were issued to individual Category 1 facilities and do not apply to Catawba. Staff Response at 4.

authorized NRC orders. However, this does not support the admissibility of Security Contention 1 (referring specifically to orders issued by the NRC to Category 1 facilities post-9/11) in the instant proceeding. As reflected in the Staff Response, such orders were not directed to Catawba and, as found by the Commission in *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62 (2004), such orders are not relevant to this proceeding. See Staff Response at 4; *Catawba*, CLI-04-06, 59 NRC at 72.

CONCLUSION

For the foregoing reasons, and those stated in the Staff Response, the Commission should rule that Security Contention I is inadmissible and that the additional issues identified by the Board are inapposite to this proceeding.

Respectfully submitted,

***/RA/***

Margaret J. Bupp  
Counsel for NRC Staff

Dated in Rockville, Maryland  
this 12th day of May 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S RESPONSE TO THE COMMISSION'S APRIL 21, 2004 ORDER" 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 12th day of May, 2003.

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