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OFFICE OF SECRETARY RULEMAKINGS AND ADJUDICATIONS STAFF

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

DUKE ENERGY CORPORATION

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

(Catawba Nuclear Station, Units 1 and 2)

DUKE ENERGY CORPORATION'S RESPONSE TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S LATE-FILED_SECURITY CONTENTION 6

I. INTRODUCTION

On September 17, 2004, Blue Ridge Environmental Defense League ("BREDL")

submitted a proposed late-filed contention, herein referred to as Security Contention 6, asserting that "the definition of radiological sabotage used in the procedures unlawfully lowers the level of rigor for protection of the Catawba nuclear power plant against radiological sabotage, in violation of NRC requirements."¹ This late-filed contention was based on language in an implementing procedure for the Catawba Nuclear Station ("Catawba"): Procedure SP #213 entitled Armed Responder Revision 13, dated April 29, 2004, to which BREDL had been given access during discovery. BREDL alleges that "to the extent that Duke relies on the existing security plan for protection of Mixed Oxide ("MOX") fuel from sabotage, theft or diversion, it is inadequate to protect public health and safety and the common defense and security."²

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¹ Blue Ridge Environmental Defense League's Late-Filed Contention 6 on Duke's Security Plan Submittal (September 17, 2004) at 1 ("BREDL Filing").

² *Id.* (footnote omitted).

Duke opposes admission of this late-filed contention as failing to demonstrate a genuine dispute within the scope of this proceeding and failing to meet the standards for the admission of a late-filed contention.

II. <u>DISCUSSION</u>

A. The Contention Is Not Admissible In This Proceeding

As with any proposed contention, BREDL's proposed Contention 6 must be assessed against the Commission's rules on the admissibility of proposed contentions. See 10 C.F.R. §§ 2.714(b)(2) and (d)(2). In particular, a proposed contention must have a basis that is "sufficient" 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)(iii). A contention also cannot be admissible if it "would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii). Here, the proposed contention fails to establish a genuine dispute, fails to identify an issue material to physical protection of MOX fuel assemblies for theft or diversion, and would not be of consequence in this proceeding. It is not an issue that should be addressed in this forum.

In essence, this contention is based on a single sentence in a Catawba security implementing procedure which generally identifies the primary mission of the Catawba Nuclear Site Security force as the protection of the station generating facilities and to prevent radiological sabotage at the site as measured "by Title 10, Part 100 of the U.S. Code of Federal Regulations." BREDL's entire argument in Contention 6 is that this statement reduces the protection of the plant against radiological sabotage and somehow "reduces the level of protection against theft of MOX fuel." BREDL Filing, at 4. The contention and basis argue that, in judging a security plan's effectiveness, the standard should be the prevention of core damage rather than preventing doses in excess of Part 100 limits.

First, this proposed contention is based on a faulty premise. It ascribes too much to one sentence in a procedure and, as a result, fails to demonstrate a genuine dispute with Duke. A knowledgeable representative of Duke has already explained on the record before this Licensing Board that Duke's basis for the design of its physical security program at Catawba is the prevention of core damage.³ The Affidavit of Michael T. Cash is attached which provides even further explanation of the issue.

Mr. Cash's affidavit makes it clear that Duke has consistently used prevention of core damage as the key criterion in the development of its security plan and protective strategy, including appropriate protection of targets in target sets.⁴ Notwithstanding any ambiguity in the language cited by BREDL from an implementing procedure focused on the deployment of armed responders, there is no actual ambiguity in Duke's methodology in developing the security plan. The procedure language cited in the contention has no actual impact on the determination of targets or target sites. Accordingly, BREDL has provided a basis that is simply insufficient to spawn a new contention.

Second, despite the assertions of BREDL, Contention 6 relates to radiological sabotage rather than protection of MOX fuel from theft or diversion. The protection of the Catawba facility against radiological sabotage is not at issue in this proceeding. The presence of four MOX lead assemblies prior to irradiation does not affect any aspect of the security plan and procedure in place for addressing potential radiological sabotage. Further, protection against radiological sabotage was the subject of post-9/11 Commission orders. As the Commission has stated and as has been oft quoted in this proceeding:

4 *Id.*

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³ Tr. 3254, lines 3-9.

All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That's not at issue in this MOX license amendment case.⁵

If BREDL believes that Duke is not complying with the security orders, its remedy is not before this Licensing Board, but elsewhere through the NRC's inspection/enforcement program.

Third, Contention 6 does not provide any meaningful link to what is at issue in this proceeding: theft or diversion of MOX fuel assemblies. BREDL has been given access to the detailed procedures which comprise the defensive strategy for protection against theft and diversion. The question of the adequacy of the specific arrangements for prevention of theft or diversion of MOX fuel, (*e.g.*, the number of armed responders, armament, locations, strategy, etc.) is independent of any question regarding adequacy of the protection scheme for radiological sabotage. The theoretical use of radiological sabotage as a diversion to the armed responders relates to whether responders would pay less attention to their duties to protect the MOX assemblies against theft. Whether the sabotage security plan is based on preventing core damage versus Part 100 doses is irrelevant to a diversion. Whether a diversion is successful in producing radiological sabotage is beyond the scope of this proceeding. Thus, no appropriate issue within the scope of the proceeding has been identified.

At bottom, BREDL's filing does not demonstrate an issue appropriate for hearing. The filing has caused Duke and the Nuclear Regulatory Commission ("NRC") Staff to file written replies, will potentially require oral argument, and will necessitate the issuance of a decision by the Atomic Safety and Licensing Board ("Licensing Board"). The effect is to divert significant resources from timely completing this hearing. This matter is one that could easily

⁵ CLI-04-6, 59 NRC 62, 73.

have been addressed by an informal exchange among the parties or by an interrogatory and response. Moreover, it has already been clarified and resolved on the record. The proposed contention should be summarily rejected.

B. BREDL Has Failed To Satisfy The Standard For A Late-Filed Contention

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10 C.F.R. § 2.714(a) requires that five additional factors be weighed in deciding whether a late-filed contention be admitted:

- (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 developing 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.

Duke submits that, on balance, these factors require the denial of Security Contention 6.

With regard to the first factor, BREDL alleges that Security Contention 6 is "timely filed," reasoning that it "was filed within 30 days of the first date on which [its representatives] were able to review the document and within 32 days of August 16" (which is the day the document was first made available to BREDL.)⁶ Duke disputes that a 30-day period from the time BREDL examined the document until it filed its pleading represents a *de facto* acceptable standard for timeliness in this proceeding. While BREDL recites that counsel and

⁶ BREDL Filing at 6. While the pleading states that it is 31 days, this was corrected in an e-mail to the Board and parties dated September 20, 2004.

BREDL's expert "were out of town during the week of August 16"⁷ and were engaged in activities associated with this proceeding constantly thereafter, BREDL has not explained why it did not choose to raise this straightforward issue earlier, either in writing or at the September 1, 2004 conference to alert the parties to its position and at least its intent to file. Duke submits that, in this context, the lateness of the contention has not been justified. This proceeding is time-sensitive and has already consumed many months. It is simply not acceptable for any party to assume that it has 30 or more days to act and that other obligations (in this case or elsewhere) constitute good cause for delay.

With regard to the second factor, the availability of other means whereby the petitioner's interest will be protected, BREDL should properly direct its arguments to the NRC Staff or to the Commission in the context of the review of the overall new security plan developed in response to the Commission security orders. Thus, this criterion does not favor BREDL.

Duke submits that the third and fourth criteria, the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record⁸ and the extent to which the petitioners interest will be represented by existing parties, will be more than countered by the fifth criterion, the extent to which the petitioner's participation will broaden the issues or delay the proceeding. Following past form, it is likely that BREDL will demand several rounds of discovery into new areas, clearly resulting in delay of the proceeding — all for

" Id.

⁸ As previously discussed, because the proposed contention does not demonstrate an issue appropriate for hearing, if admitted, a sound record within the scope of matters before the Board will not be developed.

the sake of a contention which, even if proven, has no relevance to the theft or diversion of the MOX lead assemblies.

For these reasons, consideration of the lateness criteria contained in 10 C.F.R.

§ 2.714 does not support admission of the contention.

III. <u>CONCLUSION</u>

For the foregoing reasons, BREDL's late-filed Security Contention 6 should be

rejected.

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Respectfully submitted,

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ATTORNEYS FOR DUKE ENERGY CORPORATION

Dated in Washington, District of Columbia this 27th day of September, 2004

September 27, 2004

UNITED STATES OF AMERICA NUCLEAR REGULATORY COMMISSION

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AFFIDAVIT OF MICHAEL T. CASH

Michael T. Cash hereby declares under penalty of perjury that the following statements are true and correct of his own knowledge, information and belief:

1. For approximately 19 years, I have been employed at Duke Energy Corporation (Duke) in areas involving the Catawba, McGuire and Oconee Nuclear Stations. I currently hold the title of Consulting Engineer in the Nuclear Generation Department. I am degreed as a nuclear engineer, and I have been through senior reactor operator certification training (TNC) at Duke. During my employment at Duke, I have worked in a number of engineering and regulatory affairs roles, including the roles of Nuclear Engineering Manager, Regulatory Compliance Manager, Safety Review Group Manager, and Manager of Regulatory and Industry Affairs. As Manager of Regulatory and Industry Affairs, I was responsible for the oversight of the corporate support for the nuclear security function at all three of Duke's nuclear stations.

2. As manager of Regulatory Compliance, I was responsible for assisting in the interpretation of and compliance with regulations and regulatory guidance at McGuire Nuclear Station, including the security regulations in 10 CFR Part 73. During this time period (1997 to 1998), I coordinated a review of the "target sets" developed for McGuire Nuclear Station. That review involved members of plant security staff and an engineer from the probabilistic risk assessment (PRA) organization within Duke. The PRA engineer had been licensed as a senior reactor operator at McGuire Nuclear Station, and provided an Operations perspective for this review. The scope of the review included the methodology for determining the "target sets," the reasonableness of the "target sets," and the sufficiency of the documentation. The methods used were based on fault tree analysis for core damage.

3. In this methodology a "target set" is defined as a set of targets (equipment or systems) where core damage will result if all of the individual targets are destroyed. The reference to core damage is not qualified or measured by the magnitude of radiation release, such as Part 100 criteria. The methodology does not evaluate the radioactive release or the ability to mitigate such a release.

4. In 2001, a similar expert panel review was conducted for the radiological sabotage "target sets" at Catawba Nuclear Station. The panel included Operations, Engineering, Security and PRA expertise. The PRA engineer on the Catawba expert panel was the same as the one who participated in the McGuire review that I coordinated. The methods used to develop the "target sets" for Catawba are also based on a fault tree analysis for core damage frequency. The "target sets" were reviewed to determine that the protective strategy as expressed in the armed responder procedure is sufficient to protect against core damage. In this regard, the success criteria for protecting against radiological sabotage was (and is) the ability of the physical security plan to prevent core damage.

5. The current armed responder procedure (SP 213) provides for a denial strategy which provides for an exclusionary defense that protects all of the radiological sabotage "target sets" with defense in depth. The operative sections of the procedure describe the individual actions, locations, and responses to achieve this performance objective. Section 3.1.1 of the procedure, as referenced by BREDL in the late-filed security Contention 6, is a non-operative section of the procedure in that it does not direct any action. The success criteria for radiological sabotage discussed in Section 3.1.1 does not change the fact that the procedure is developed for the prevention of core damage. Section 3.1.1 does properly reflect an overall public health and safety goal that has been discussed in the security literature in the event that a "target set" is destroyed. The literature, as noted by BREDL, indicates that a nuclear plant integrated response (Security, Emergency Planning, Operations) should prevent releases that exceed Part 100 limits. This is not a radiological sabotage security performance acceptance criteria, but a more global objective for the entire site organization.

6. It is clear that the author of SP 213 properly documented the protective strategy to prevent core damage. It is not clear whether the statement in Section 3.1.1 was an attempt to reflect the overall goal of emergency planning, operations and security in event a "target set" is destroyed. Regardless, the statement in the section will be corrected to better reflect the actual performance objective of the specific procedure; this change will be promptly entered into the Duke corrective action program. There are no other changes necessary to correct this oversight because, as noted

above, the operative sections of the procedure accomplish the correct performance objective of preventing core damage.

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Michael T. Cash

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Energy Corporation's Response to Blue Ridge Environmental Defense League's Late-Filed Security Contention 6" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 27th day of September, 2004. Additional e-mail service, designated by *, has been made this same day, as shown below.

Ann Marshall Young, Chairman* Administrative Judge Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Washington, DC 20555-0001 (e-mail: AMY@nrc.gov)

Thomas S. Elleman* Administrative Judge 5207 Creedmoor Road, #101 Raleigh, NC 27612 (e-mail: elleman@eos.ncsu.edu)

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Office of the Secretary* U.S. Nuclear Regulatory Commission Washington, DC 20555 Attn: Rulemakings and Adjudications Staff (original + two copies) (e-mail: HEARINGDOCKET@nrc.gov)

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