

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	Docket No. 50-413-OLA
	)	50-414-OLA
	)	
(Catawba Nuclear Station, Units 1 and 2)	)	

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NRC STAFF RESPONSE TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S  
PETITION FOR REVIEW OF NO SIGNIFICANT HAZARDS CONSIDERATION  
DETERMINATION AND REQUEST FOR IMMEDIATE ORDER

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Nathan R. Wildermann  
Counsel for NRC Staff

March 21, 2005

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INTRODUCTION

On March 9, 2005, the Blue Ridge Environmental Defense League (BREDL) filed a petition asking that the Commission undertake discretionary review of the NRC staff's (Staff) March 3, 2005 No Significant Hazards Consideration (NSHC) determination and issuance of license amendments and exemptions authorizing Duke Energy Corporation (Duke) to test four plutonium mixed oxide (MOX) lead test assemblies (LTAs) at the Catawba nuclear power plant.<sup>1</sup> In addition, BREDL seeks an order that Duke not be allowed to accept any shipment of plutonium MOX fuel pending a decision of the Atomic Safety and Licensing Board (Licensing Board) in this proceeding. *See id.* at 9-11. In its petition, BREDL alleges that the Staff's decision to issue the license amendments and the exemptions was unlawful because it was made before the Licensing Board issued a decision on BREDL's Security Contention 5. *See id.* at 6. Pursuant to 10 C.F.R. §§ 2.786(b)(3), 2.788(d) and 50.58, the Staff herein opposes BREDL's petition for expedited discretionary review

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<sup>1</sup> See BREDL's Petition for Expedited Discretionary Review on March 9, 2005 at 1. (BREDL Petition). BREDL's petition incorrectly cited 10 C.F.R. § 50.86(b)(6), which does not exist. Rather, as provided by 10 C.F.R. § 50.58(b)(6), the Commission may review, on its own initiative, a finding of no significant hazards.

and request for immediate order that Duke not accept any shipment of plutonium MOX fuel. The Staff submits that BREDL's petition is moot and should be dismissed.

#### BACKGROUND

The instant case arises out of Duke's February 27, 2003 license amendment request (LAR) for the Catawba nuclear power plant to permit the receipt, storage, and use of four MOX LTAs at its Catawba facility. As part of its LAR to irradiate MOX LTA's, on September 15, 2003, Duke submitted a supplement to its security plan and asked for exemptions from certain regulatory requirements in 10 C.F.R. Parts 11 and 73. These requirements would otherwise be triggered by the presence of formula quantities of strategic special nuclear material in the form of fresh, unirradiated MOX LTAs. In response to a notice of opportunity for hearing published in the *Federal Register* on July 25, 2003, BREDL submitted and litigated two contentions regarding Duke's license amendment request.

The first contention involved the adequacy of Duke's application to satisfy NRC safety regulations. An evidentiary hearing was held in 2004 and a decision by the Licensing Board was issued on December 22, 2004, finding that the LAR was adequate to satisfy NRC safety regulations. LBP-04-32, 60 NRC 713 (2004). The second contention, Security Contention 5, alleged that Duke had not demonstrated that its proposed exemption from certain NRC regulations designed to protect formula quantities of SSNM against the design basis threat for theft met the standards for exemptions in 10 C.F.R. §§ 73.5 and 11.9.

On April 4, 2004, the Staff issued its Safety Evaluation (SE) for the proposed license amendments finding in favor of granting the LAR. On May 5, 2004, the Staff issued a supplement to the SE concluding that the requested security exemptions from 10 C.F.R. Parts 11 and 73 were acceptable.

On July 12, 2004, the Staff issued a proposed NSHC determination, pursuant to 10 C.F.R. §§ 50.91, 50.92. 69 Fed. Reg. 41,852 (2004).

An evidentiary hearing on BREDL Security Contention 5 was held on January 11-14, 2005. On March 3, 2005, the Staff issued Duke's requested license amendments, a supplemental SE, and a final NSHC determination. The Staff also issued the exemptions from the regulations.

On March 9, 2005, BREDL filed the instant petition asking the Commission for discretionary review of the Staff's March 3 NSHC determination and the issuance of the license amendments and exemptions. On March 10, 2005, the Licensing Board issued a final partial initial decision on issues relating to BREDL Security Contention 5, disposing of all issues pending before it. *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), (March 10, 2005) (unpublished Licensing Board decision). The Licensing Board found, subject to Duke's fulfillment of certain conditions, that Duke met its burden of showing by a preponderance of the evidence that its requested exemptions from the requirements of 10 C.F.R. Parts 11 and 73 are appropriate under 10 C.F.R. §§ 11.9 and 73.5.

#### DISCUSSION

BREDL's petition for expedited discretionary review should be dismissed, first, because BREDL has no right to request review of the staff's no significant hazards consideration determination, and second, the matter is moot.

NRC regulations provide that "[n]o petition or other request for review of or hearing on the staff's significant hazards consideration determination will be entertained by the Commission." 10 C.F.R. § 50.58(b)(6). See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-07, 53 N.R.C. 113, 118 (2001). "The staff's determination is final, subject only to the Commission's discretion, *on its own initiative*, to review the determination." (Emphasis added). See *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986), reversed in part on other grounds, *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, 799 F.2d 1268 (9th Cir.1986). In the present case, BREDL has essentially requested that the Commission for review of the staff's final NSHC determination.

The regulations clearly state that no petition or other request for review will be granted and thus, the petition for review in this case should be rejected for that reason.

Moreover, BREDL's petition for expedited discretionary review and BREDL's request for an immediate order that Duke may not accept plutonium MOX fuel should be dismissed as moot. On March 10, 2005, the Licensing Board issued a final partial initial decision disposing of all issues pending before it relating to the amendment, exemptions, and BREDL Security Contention 5, concluding that subject to several conditions, issuance of the requested actions was warranted. *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), (March 10, 2005) (unpublished Licensing Board decision).

A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 NRC 192, 200 (1993) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). NRC cases have held that the mootness doctrine applies at all stages of review, whenever it becomes applicable because a justiciable controversy no longer exists. *See Texas Utilities Electric Co.*, CLI-93-10, 37 NRC at 200. When effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot. *See id.*

In the present case, on March 9, 2005, BREDL petitioned the Commission stating the NRC may not amend a nuclear power plant operating license without offering interested members of the public an opportunity for hearing before a license amendment is issued, unless the NRC makes a NSHC determination. *See* BREDL's Petition at 6. BREDL further contends that where an exemption is requested and must be resolved in order to grant the license amendment application, the scope of the hearing must include the exemption request. *See* BREDL's Petition at 6. BREDL then argues that the exemptions must be decided by the Licensing Board before the Staff may issue the license amendment. Thus, BREDL requests the Commission review the NSHC

determination including the exemption request. See *id.* at 6-8. While the Staff agrees that in this case the scope of the hearing includes the exemption requests, the Staff does not agree that the exemptions were required to be resolved in a hearing in order to grant the license amendment request. Nor does the Staff agree that any further findings on the part of the Staff were required before the amendment and the exemptions could be issued.

On March 10, 2005, the Licensing Board issued a final partial initial decision which disposed of these issues. *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), (March 10, 2005) (unpublished Licensing Board decision). Thus, as BREDL requested in its March 9, 2005 brief, a hearing was conducted which considered the requested amendment and associated exemptions and the Licensing Board found Duke to have met its burden. As noted above, when effective relief cannot be granted because of subsequent events, an appeal is dismissed as moot. *Texas Utilities Electric Co.*, CLI-93-10, 37 NRC at 200. In this case, BREDL has asked that the grant of the exemptions be revoked and that the Commission await the issuance of the Licensing Board's decision. This hearing has occurred and a decision has been issued. Therefore, the issues raised in BREDL's Petition are moot.

In addition, BREDL asks the Commission to order Duke not to accept any shipment of plutonium MOX fuel at the Catawba nuclear power plant until the Licensing Board has issued its decision. See BREDL's Petition at 9. As the Licensing Board has now issued its decision, and found Duke to have met its burden for the requested exemptions, the request to stay shipments to Duke is also moot.

CONCLUSION

Based on the foregoing, the Staff respectfully submits that the Petition for Expedited Discretionary Review and Request for Immediate Order that Duke may not accept plutonium MOX fuel shipments be denied.

Respectfully submitted,

*/RA/*

Nathan R. Wildermann  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 21<sup>st</sup> day of March, 2005

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter in accordance with 10 C.F.R. § 2.314(b).

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Name of Party: NRC Staff

Respectfully submitted,

**/RA/**  
Nathan R. Wildermann  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 21<sup>st</sup> day of March, 2005



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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S PETITION FOR EXPEDITED DISCRETIONARY REVIEW OF NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND REQUEST FOR IMMEDIATE ORDER THAT DUKE MAY NOT ACCEPT PLUTONIUM MOX FUEL SHIPMENT" 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 21<sup>st</sup> day of March, 2005:

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