

March 16, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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March 21, 2005 (3:35pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
DUKE ENERGY CORPORATION)
)
(Catawba Nuclear Station,)
Units 1 and 2))
)
)

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

DUKE ENERGY CORPORATION'S OPPOSITION TO PETITION FOR EXPEDITED
DISCRETIONARY REVIEW OF NO SIGNIFICANT HAZARDS CONSIDERATION
DETERMINATION AND REQUEST FOR IMMEDIATE ORDER

I. INTRODUCTION

On March 9, 2005, the Blue Ridge Environmental Defense League ("BREDL") filed an interlocutory petition¹ in this proceeding related to the license amendment application filed by Duke Energy Corporation ("Duke") to authorize receipt, storage, and use of four Mixed Oxide ("MOX") fuel lead assemblies at Catawba Nuclear Station ("Catawba"). BREDL specifically sought: (1) review and reversal of the final no significant hazards consideration ("NSHC") determination issued by the Staff on March 3, 2004; and (2) an order to Duke or "any measures necessary" to preclude Duke from accepting delivery of the MOX fuel assemblies pending the decision of the Atomic Safety and Licensing Board ("Licensing Board") on security

¹ "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," dated March 9, 2005 ("BREDL Petition").

issues in this proceeding. As discussed below, the BREDL Petition is now moot and should be rejected.²

II. BACKGROUND

As referenced in the BREDL Petition, Duke filed the license amendment request at issue on February 27, 2003. Related to that license amendment application, on September 15, 2003, Duke filed information on the added security measures planned to protect MOX fuel assemblies from theft or diversion. These proposed measures are enhancements to the then-existing — and since significantly upgraded³ — physical security measures for protection of Catawba from radiological sabotage. In addition, in the September 2003 submittal Duke requested specific exemptions from several requirements of 10 C.F.R. Parts 11 and 73 for the limited period of time between receipt of MOX fuel assemblies and placement/irradiation of those assemblies in the reactor. The requirements for which exemptions were requested would, absent an exemption, apply to facilities possessing formula quantities of strategic special nuclear material (“SSNM”). In this case, the SSNM would be in the form of MOX fuel assemblies.

On April 5, 2004, the Staff issued a Safety Evaluation for the proposed license amendment, and concluded that: there is reasonable assurance that the health and safety of the public will not be endangered by operation of Catawba with MOX fuel assemblies; the activities will be conducted in compliance with NRC regulations; and the amendment will not be inimical

² The BREDL Petition was also procedurally defective. It was filed “pursuant to 10 C.F.R. § 50.86(b)(6),” a regulatory provision that does not exist.

³ As the Commission is well aware, Catawba has been required to meet several Commission orders on security. Significantly, as of October 29, 2004, Catawba was required to be in compliance with the order establishing a revised Design Basis Threat for power reactors.

to common defense and security or to the health and safety of the public.⁴ On May 5, 2004, the Staff supplemented that review by issuance of a Safety Evaluation on Duke's proposed physical security measures. The Staff concluded that the requested security exemptions are acceptable for the MOX fuel lead assemblies at Catawba.⁵

On July 12, 2004, in accordance with 10 C.F.R. § 50.91-50.92, the Staff issued a proposed NSHC determination and requested comments on that determination.⁶ As now acknowledged by BREDL, BREDL did not comment on the proposed NSHC determination. BREDL Petition, at 9 n. 7.

On March 3, 2005, the NRC issued the requested license amendment. The amendment is supported by another supplemental safety evaluation, addressing certain issues related to radiological dose consequences, and including a final NSHC determination. With respect to the latter, the Staff specifically addressed the relevant criteria of 10 C.F.R. § 50.92(c). In addition, the Staff issued an exemption encompassing, among other requirements, the limited security requirements for which Duke had requested exemptions in September 2003 and which were evaluated in the May 2004 supplemental safety evaluation.

III. DISCUSSION

The Licensing Board issued its decision on the security contention on March 10, 2005. The Licensing Board concluded that, subject to Duke's fulfillment of certain conditions,

⁴ A supplemental safety evaluation was also issued on July 27, 2004, addressing Duke's use of eight Westinghouse Next Generation Fuel lead assemblies at Catawba Unit 1 as that may relate to the MOX fuel lead assemblies.

⁵ "Supplement 1 to Safety Evaluation for Proposed Amendments to the Facility Operating License and Technical Specifications to allow Insertion of Mixed Oxide Fuel Lead Assemblies," dated May 5, 2004, at 3.

⁶ 69 Fed. Reg. 41,852 (2004).

Duke has met its burden of showing by a preponderance of the evidence that the 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, and that its physical protection system, with the requested exemptions, will provide high assurance that activities involving the MOX fuel assemblies will not be inimical to the common defense and security nor constitute an unreasonable risk to the public health and safety. By its own terms and consistent with 10 C.F.R. § 2.764(a), the Licensing Board's decision is effective immediately — subject to review and further decision only upon acceptance of a petition for review filed by a party (or by the Commission's own motion) pursuant to 10 C.F.R. § 2.786. The final NSHC determination relates only to the issuance and effectiveness of the amendment previously issued by the Staff during the time prior to a Licensing Board decision. *See* 10 C.F.R. § 50.58(b)(5). Accordingly, review of the NSHC determination as requested by the BREDL Petition is now moot. Any further Commission review must focus on the Licensing Board decision and must be sought in accordance with the appropriate Commission regulations.

Nonetheless, in the event that the BREDL Petition is for some reason not considered to be moot, that petition should be rejected because it is unfounded as a matter of law and fact. For the record, Duke here summarizes its bases for this conclusion.

First, there is no legal basis for an extraordinary petition for review of a final NSHC determination. At the time the BREDL Petition was filed, no Commission review was available under 10 C.F.R. § 2.786 because no Licensing Board decision had been issued. Moreover, under 10 C.F.R. § 50.58(b)(6), the Staff NSHC determination is “subject only to the Commission discretion, on its own initiative, to review the determination.” The regulation does not contemplate petitions for review of final NSHC determinations.

Second, BREDL argues that issuing the amendment before the Licensing Board had issued a decision would have, somehow, violated the law. However, issuance of an amendment with a final NSHC determination is precisely what the law — including Section 189.a(2)(A) of the Atomic Energy Act, 42 U.S.C. § 2239.a(2)(A) — contemplates. The fact that the contention in this case involved an exemption request, in addition to a license amendment, does not change that conclusion. BREDL cites *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466-67 (2001), for the assertion that the security exemptions in this case are subject to the prior hearing opportunity of the Atomic Energy Act. BREDL Petition, at 6-7. The fact that the exemption is presently included within the hearing is, however, not in dispute. As the Commission stated in *Private Fuel Storage*: “Because resolution of the exemption request directly affects the licenseability of the proposed [facility], the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties.”⁷ Here, because of the direct link of the security exemptions to the license amendment, the exemptions have been a subject of the hearing. It is the license amendment that confers the hearing opportunity, not the exemption request. As such, the hearing opportunity remains subject to the NSHC provisions of the Atomic Energy Act and NRC regulations.

Third, BREDL argues that the final NSHC determination is defective because it does not address the security exemptions. BREDL Petition, at 7. The NSHC determination, however, addresses the criteria of 10 C.F.R. § 50.92(c). It is not necessary for the Staff to address the security exemption to address the NSHC criteria. Likewise, it is not necessary to address every issue germane to the merits of a license amendment in order to make a final NSHC

⁷ *Private Fuel Storage*, CLI-01-12, 53 NRC at 467 (footnote omitted).

determination. The NSHC criteria are what they are; the Staff appropriately addressed the issues germane to those criteria and BREDL has not argued otherwise. Indeed, BREDL did not take the time to even comment on the proposed NSHC determination.

Fourth, BREDL argues that the Commission should review the NSHC determination to “protect the integrity of the hearing process” and as “part of its ongoing effort to improve security at licensed nuclear facilities.” BREDL Petition, at 8-9. These arguments are sheer rhetoric. BREDL specifically ignores the NRC’s clear authority under the Atomic Energy Act to issue amendments based on NSHC determinations. BREDL also conveniently ignores the fact that the Staff has prepared a detailed safety evaluation related to security issues. BREDL’s argument that the final NSHC determination makes a “mockery of the NRC’s hearing process” is baseless.

Finally, BREDL seeks an order or other relief to prevent the shipment of the MOX fuel assemblies by the Department of Energy and acceptance by Duke. With respect to the former, the matter is beyond the NRC’s jurisdiction. With respect to the latter, such an action would be inconsistent with the Commission’s rules and the NSHC authority under the Atomic Energy Act.

IV. CONCLUSION

For all of the foregoing reasons, the BREDL Petition should be rejected.

Respectfully submitted,



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Dated in Washington, District of Columbia
This 16th day of March, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
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DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
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Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S OPPOSITION TO PETITION FOR EXPEDITED DISCRETIONARY REVIEW OF NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION AND REQUEST FOR IMMEDIATE ORDER" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 16th day of March, 2005. Additional e-mail service, designated by *, has been made this same day, as shown below.

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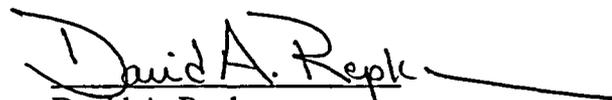
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