

May 9, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 REPLY TO BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE'S BRIEF IN RESPONSE TO CLI-05-10

I. INTRODUCTION

In accordance with the Commission's Memorandum and Order of April 21, 2005,¹ Duke Energy Corporation ("Duke") herein replies to the brief submitted by Blue Ridge Environmental Defense League ("BREDL"), dated May 2, 2005.² The BREDL Brief purports to respond to the question raised by the Commission in CLI-05-10: whether the license conditions imposed by the Atomic Safety and Licensing Board ("Board") in its final partial initial decision in this matter are necessary.³ In fact, however, BREDL sidesteps the Commission's question in CLI-05-10. Apart from two cursory arguments in Section III.C. of its brief, BREDL declines to

¹ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-05-10, __ NRC __ (slip op. April 21, 2005) ("CLI-05-10").

² "Blue Ridge Environmental Defense League's Brief in Response to CLI-05-10 Regarding Commission Review of LBP-05-10," dated May 2, 2005 ("BREDL Brief").

³ *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), "Final Partial Initial Decision (Issues Relating to BREDL Security Contention 5)," ASLBP No. 03-815-03-OLA (slip op. March 10, 2005) (Safeguards) ("Board Decision").

address whether the license conditions are necessary. Instead, BREDL merely spars with the Commission as to the meaning of the straightforward request in CLI-05-10. Accordingly, Duke need not reiterate here the arguments it made in its initial, comprehensive brief in response to CLI-05-10.⁴ Duke in its initial brief followed the Commission's clear direction that the parties address the substantive need for the license conditions. Duke thoroughly demonstrated that the conditions are not necessary. Duke here responds only to BREDL's "mootness" argument and its argument regarding the appropriate standard for the Commission to take review.⁵

II. ARGUMENT

A. Commission Review is Not Precluded by the "Mootness" Doctrine

BREDL's first argument (BREDL Brief, Section III.A.) is that the Commission's inquiry is moot because: (1) the mixed oxide ("MOX") fuel lead assemblies at issue have been delivered to Catawba Nuclear Station ("Catawba"); (2) Duke has met the conditions imposed by the Board; and (3) "there is no reason to expect that the NRC will receive another application to test plutonium MOX fuel." (BREDL Brief, at 6). BREDL therefore argues that there is no reasonable expectation that the matters addressed in the Board Decision will recur and, therefore, that the issues on review are moot. BREDL, however, is reading both the facts of this case and the Commission's review authority far too narrowly.

Because it has responsibilities for all actions and policies of the agency, the Commission has the inherent authority to act or review *sua sponte* any matter before an NRC

⁴ See "Duke Energy Corporation's Brief on Review of the Licensing Board's Final Order Addressing Security Contention 5," dated May 2, 2005.

⁵ On Saturday, May 7, 2005, BREDL filed a "Motion to Exceed Page Limitation," in which it seeks consent from the Commission to submit a Reply Brief that exceeds by four pages the ten-page limit imposed by the Commission. Duke will respond to BREDL's Motion in a timely fashion after it has had an opportunity to review BREDL's Reply Brief.

tribunal. *Pub. Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977);⁶ *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129 (1998).⁷ The Commission has also emphasized the importance in the adjudicatory context of its inherent supervisory and appellate authorities to address novel legal or policy issues to provide guidance to the boards and parties in order to facilitate prompt and effective resolution of matters. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20, 23, 25 (1998).⁸ The Commission's decision to review the Board Decision in this case is entirely appropriate because of the generic nature and applicability of some of the issues and implications of the decision, the potential precedential effect specifically with respect to a later MOX fuel application (by Duke or any other licensee), and the ongoing burdens imposed on Catawba by those conditions.

With regard to BREDL's mootness argument, a case is moot only "when there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful action." *Advanced Medical Systems*, CLI-

⁶ Here the Commission emphasized that its authority to intervene and provide guidance "is not limited by the terms of 10 CFR 2.786(a)," and asserted that "in the interest of orderly resolution of disputes, there is every reason why the Commission should be empowered to step into a proceeding and provide guidance on important issues of law or policy." *Seabrook*, CLI-77-8, 5 NRC at 516-17. The Commission outlined how the licensing board should conduct an additional NEPA-based site comparison and also established the conditions under which construction at Seabrook could resume.

⁷ *Sua sponte* review has been utilized, for example, to confirm that there are no significant safety issues requiring corrective action. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-729, 17 NRC 814, 889 (1983), *aff'd on other grounds*, CLI-84-11, 20 NRC 1 (1984).

⁸ *See also Seabrook*, CLI-98-18, 48 NRC at 130 (The fact that a NEPA-related segmentation issue is "novel" and "has broad implications for this and other proceedings" makes it precisely the type of issue that could benefit from Commission review, as emphasized in the 1998 Commission Policy Statement).

93-8, 37 NRC 181, 185 (1993), citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Under this test, review of the Board Decision is not moot. The issues raised by the Board Decision transcend the four MOX fuel lead assemblies at Catawba. For example, the conflict between a licensing board's authority to impose conditions upon a licensee and the NRC Staff's day-to-day oversight of licensee's actions is a continuing and important issue that could recur in the future in practically any NRC licensing proceeding. The limitation on a licensing board's authority to impose prerequisite license conditions related to exercises, as addressed in Duke's initial brief, in particular is a significant matter that extends beyond the facts of this case. In addition, some of the specific issues of fact and law addressed in Duke's initial brief, directly related to the license conditions, could very well recur with respect to a MOX fuel "batch use" application.⁹ Finally, while the Board-imposed conditions are currently satisfied, the conditions remain in place until the MOX fuel is loaded into the reactor core. Thus, the effects of the conditions have not been "eradicated" and they still represent an ongoing burden on Duke that prompt Commission review could alleviate. The fact that Duke took special efforts to comply quickly with the conditions should not prevent Commission consideration of this important matter.¹⁰

As a matter of law, even were the matter to be considered technically moot, the Commission is not subject to the jurisdictional limitations placed upon Federal courts by the "case or controversy" provision in Article III of the U.S. Constitution. *Texas Utilities*

⁹ BREDL argues at one point (BREDL Brief, at 6) that security issues will be "far more serious" for batch use. This statement is, quite simply, unfounded.

¹⁰ The license conditions have also been used by BREDL and others in the media around Catawba to give a misleading impression to the public regarding Duke's actions to provide for the security of the MOX fuel lead assemblies. If there is no need for those conditions, the Commission has an opportunity to correct the public record and improve public understanding of the facts.

Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), citing *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), remanded on other grounds sub nom. *Minnesota v. Nuclear Regulatory Commission*, 602 F.2d 412 (D.C. Cir. 1979). There is no barrier to the Commission's issuance of an advisory opinion even on issues that have been indisputably mooted by events subsequent to a licensing board's decision if there is a compelling cause for such review. *Comanche Peak*, ALAB-714, 17 NRC at 93. Where an issue is of "demonstrable recurring importance," an opinion that is essentially advisory in nature is warranted. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 284 (1988), citing *Shoreham*, ALAB-743, 18 NRC 387, 390 n.4.¹¹ For the reasons discussed above, the issues before the Commission are of demonstrable recurring importance and should be addressed now.

B. Commission Review is Entirely Consistent with the Standard of Review

BREDL argues (BREDL Brief, Section III.B.) that the Board's factual findings may not be overturned unless they are "clearly erroneous," citing *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 26 (2003). Accordingly, BREDL advocates a "cautious approach" to *sua sponte* review, and inherently (without any elaboration) suggests that review in this case would be inappropriate. However, in relying on these general concepts, BREDL is being highly selective in its recitation of the legal standard for Commission review. Moreover, in this case Commission action would be completely justified and would be completely consistent with the Commission's actual standard for review.

¹¹ In this decision, the Atomic Safety and Licensing Appeal Board found that the applicant's appeal from the licensing board's decision on the proper scope of an exercise

Under NRC regulations and case law, review of a licensing board initial decision is “purely discretionary with the Commission.”¹² Commission review is appropriate, for example, if a finding of fact is clearly erroneous; if a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; if a substantial and important question of law, policy or discretion has been raised; or for any other reason the Commission deems to be in the public interest. *See, e.g.*, 10 C.F.R. § 2.786(b)(4).¹³ Duke’s bases for concluding that the license conditions are clearly unsupported by the record and inconsistent with the Commission’s regulations are set forth in Duke’s initial brief. BREDL has offered nothing substantive on that point. Commission review and reversal of the Board Decision is appropriate, and the standard of review does not argue otherwise.

In CLI-05-10, the Commission offered BREDL an opportunity to address the merits of the Commission’s questions. Instead, BREDL diverges into an argument regarding “ample notice” and “ample opportunity” to address the relevant issues. Clearly, BREDL was given ample notice and opportunity in this case.¹⁴ It simply failed to take advantage of that

of the offsite emergency plan was technically moot, but nevertheless proceeded to issue an advisory opinion affirming the licensing board’s conclusion.

¹² *Private Fuel Storage*, CLI-03-8, 58 NRC at 17.

¹³ In the *Private Fuel Storage* case cited by BREDL, the Commission denied the State of Utah’s petition for review of the licensing board’s partial initial decision because it determined, after reviewing all challenged sections of the decision below, that those sections were “well reasoned and amply supported by the record.” CLI-03-8, 58 NRC at 38. While “the Commission certainly has authority to make its own *de novo* findings of fact,” it was not necessary for the Commission to do so in that case. *Id.* at 25-26.

¹⁴ The *Offshore Power Systems* case cited in BREDL’s Brief (at p. 2) provides no support for BREDL’s claim that CLI-05-10 is so “vaguely phrased” that it fails to give adequate notice of the matters at issue here. In that case, the Appeal Board stated: “[I]f our *sua sponte* review uncovers problems in a licensing board’s decision or the record that may require corrective action adverse to a party’s interest, our consistent practice is to give the party ample opportunity to address the matter, as appropriate.” *Offshore Power Systems*

opportunity. In its brief, BREDL did not articulate a single coherent reason why any of the four license conditions imposed by the Board is necessary. Although the record may be large, a well-founded license condition would surely have a clear rationale that could be stated within the confines of a 25-page brief. BREDL has not shown any such rationale in this case.¹⁵ In the end, BREDL relies solely on the fact that the Board Decision is 80 pages long. (BREDL Brief, at 8). However, the length of the Board Decision (or any other decision) does not make it *per se* well-reasoned, or establish that the decision is correct as a matter of fact or law.

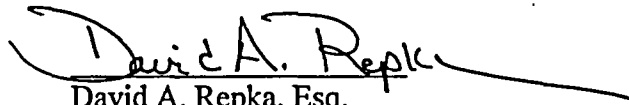
(Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n. 8 (1982). Here, as in that case, the Commission has detected problems in the Board Decision that may require corrective action adverse to BREDL's interests, and has given the parties clear notice of its concerns and ample opportunity to address them.

¹⁵ In this regard, the need for the conditions could be premised on a number of considerations, including the merits of the issues in the case, the clarity of Duke's commitments, the requirements of specific regulations, and any other consideration BREDL might like to argue, such as those suggested in Section C of the BREDL Brief. Duke's point is that the need has not been established on *any* of these bases.

III. CONCLUSION

For the reasons discussed above, and for the reasons discussed in Duke's initial brief, License Conditions A through C are neither necessary nor supported by the record in this case. To avoid unnecessary precedential effect, these conditions should be vacated. License Condition D should be modified to provide more appropriate specificity.

Respectfully submitted,



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Dated in Washington, District of Columbia
This 9th day of May, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
(Catawba Nuclear Station,) 50-414-OLA
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S REPLY TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S BRIEF IN RESPONSE TO CLI-05-10" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 9th day of May, 2005. Additional e-mail service, designated by *, has been made this same day, as shown below.

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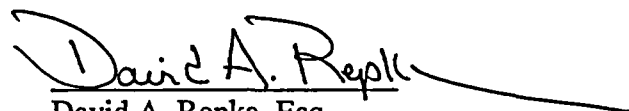
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