UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of Duke Energy Carolinas Combined License Application For William States Lee III Units 1 and 2	)	Dockets No. 52-018, 52-019 ASLBP No. 08-865-03-COL-BD01 August 28, 2008

ANSWER OF THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE TO DUKE ENERGY CAROLINA'S MOTION TO STRIKE

In accordance with 10 CFR § 2.323(c), the Blue Ridge Environmental Defense League hereby files its answer in opposition to the motion by Duke Energy Carolinas to strike portions of its reply.

Background

On June 27, 2008 the Blue Ridge Environmental Defense League ("BREDL") filed a petition to intervene and request for hearing ("Petition") in the matter captioned above. On July 22, 2008, Duke Energy Carolinas ("Duke") submitted its answer to the Petition ("Answer"). Pursuant to 10 C.F.R. § 2.309(h)(2) and in accord with the ASLB's order of July 25, 2008, BREDL filed its reply ("Reply") on August 8, 2008. On August 18, 2008 Duke filed a motion to strike portions of BREDL's Reply ("Motion to Strike").

Discussion

Duke's Motion to Strike asserts, "[T]he BREDL Reply impermissibly includes new arguments and support not found in the Petition for Intervention and Request for

Hearing filed on June 27, 2008." Motion to Strike at 1. However, as discussed below, the Petitioner's Reply does not raise new arguments; it amplified issues raised in the Petition. Information provided in Petitioners' Reply was a *bona fide* response to rebuttals made by Duke. The contentions of the June 27th Petition state the inclusive arguments to be raised. Rules of procedure for prehearing conferences[1] permit contentions, motions and other pertinent matters to be simplified, clarified and specified. They allow authentication of documents. They allow identification of expert witnesses and documents. They allow the disposition of pending motions. *See* 10 CFR § 2.329 Plainly, the extant matter has not reached the prehearing phase; the Petitioner's intervention is at an early stage.

Duke's pointed discussion of *pro se* intervention begs a response. Duke stated, "BREDL cannot claim inexperience or ignorance…BREDL is an experienced player…Nor should BREDL's status as a *pro se* petitioner excuse its failure to comply with these requirements." Motion to Strike at 6. Duke's disingenuous remarks are

[1] 10 CFR § 2.329 (c) Other matters for consideration. As appropriate for the particular proceeding, a prehearing conference may be held to consider such matters as:
(1) Simplification, clarification, and specification of the issues;
(2) The necessity or desirability of amending the pleadings;
(3) Obtaining stipulations and admissions of fact and the contents and authenticity of documents to avoid unnecessary proof, and advance rulings from the presiding officer on the admissibility of evidence;
(4) The appropriateness and timing of summary disposition motions under subparts G and L of this part, including appropriate limitations on the page length of motions and responses thereto;
(5) The control and scheduling of discovery, including orders affecting disclosures and discovery under the discovery provisions in subpart G of this part.
(6) Identification of witnesses and documents, and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence, including the establishment of reasonable limits on the time allowed for presenting direct and, where permitted, cross-examination evidence;
(7) The disposition of pending motions;
(8) Settlement and the use of special procedures to assist in resolving any issues in the proceeding;
(9) The need to adopt special procedures for managing potentially difficult or protracted proceedings that may involve particularly complex issues, including the establishment of separate hearings with respect to any particular issue in the proceeding;…

disrespectful of the Petitioner. Nowhere in this proceeding has BREDL impugned the integrity of Duke Energy Corporation or Morgan Lewis & Bockius LLP, nor the NRC Staff whose interests they claim to be defending.

In the discussion below we answer Duke's motion straightforwardly. We will limit our specific answers to the two contentions for which the Board has requested to hear argued at the prehearing conference and which Duke has moved to strike: Contentions Three and Five. We respectfully reserve the right to argue all the other Contentions and to have them admitted by the Board.

Contention Three

Duke states that the Reply adds new information about the WS Lee plant's consumptive use of water and suggests the filing an amended contention, stating, "BREDL's original arguments in the Petition related to water use, consumption, and related impacts contain no such claims." Motion to Strike at 10. However, the Reply merely draws upon Duke Combined License Application Environmental Report Section 2.3.2 and does the math to amplify the argument. The Petition does cite the ER chapter referenced in the Reply, stating, "The WS Lee Environment Report also fails to provide the necessary information. ER Section 2.3.1 Hydrology…." Petition at 17.

Contention Five

BREDL's Reply stated, "Duke implies uncertainty where none exists; there is no inference required or made." Reply at 21. We then proceeded to amplify our arguments. The Petition addressed the issues of the potential presence of capable tectonic sources near the WS Lee site; in fact, the Tennessee Seismic Zone is near the WS Lee site.

Duke's motion claims that BREDL has raised "entirely new arguments" and states, "In its Reply, BREDL—for the first time—cites to a particular section of the WLS FSAR…" Motion to Strike at 14. This is incorrect. The Petition states: "The FSAR insufficiently analyzes reactor units' capability to withstand a design-basis and safe shutdown earthquake…" Petition at 22. BREDL concluded: "Under 10 CFR § 100.20 and the Environmental Standard Review Plan, the NRC must independently determine what is the true nature of the hazard and what would be required." Petition at 28

The Role of Public Participation

In its Reply, BREDL developed its argument on the public's role in NRC licensing procedures. We need not repeat them here. However, the Motion to Strike raises important issues centering on the ability of the public to fulfill its role in adjudicatory licensing procedures. Blue Ridge Environmental Defense League's experience in these matters indicates that applicants have a great deal of power to get licenses approved. They have the resources, the people and the money. Public interest organizations' and *pro se* intervenors' resources are relatively limited. Nevertheless, we and others bring issues before the Commission at the local licensing stage and at rulemaking procedures. However, the playing field is not even. A Cornell University study investigated the appearances and the realities of public participation:

> "[A]lthough intervenors are said to be full parties in energy facility licensing hearings, their influence may be negligible, since government agencies have the ultimate say in who the intervenors shall be and what issues they may contest. When an intervenor petitions to participate in a power-plant licensing hearing, he must state his interests in the proceeding, estimate the expected effect of the proposed action on his interest, and identify the aspects of the conflict in which he intends to intervene. The NRC has discretionary power to limit his presentation. Furthermore, an intervenor can enter the licensing hearing only after the staff and applicant are in agreement about the proposed energy facility. They may present a virtual united front against the intervenor.

> Moreover, the intervenor usually lacks the financial and technical resources necessary to present a convincing argument. [2]

The study was completed in 1978 and to this day the Commission has no means of funding public intervenors' attorneys and expert witnesses. This lack of resources tips the balance in favor of the applicant. Nelkin and Fallows continue:

> While federal energy legislation states participatory objectives the actual provisions share a number of procedural biases that limit their effective implementation. These biases suggest that agencies, while responding to political demands for greater public involvement, also seek to reinforce their traditional control over the decision-making process, a control that they perceive as necessary for administrative efficiency. [*id.*]

Well-intended but vague statutory language regarding public participation allows an intrinsic bias against public participation to persist in NRC administrative procedures. Regarding changes in the adjudicatory processes, a 1997 NRC memorandum stated,

> In stakeholder comments on NRC strategic planning and rebaselining efforts, DOE, the Organization of Agreement States and other commenters encouraged the NRC to resolve licensing issues before hearings and to evaluate other existing licensing procedures in order to streamline and focus the NRC hearing process. Similarly, NEI, joined by ABB-CE and Yankee Atomic Electric Company, identified the current adjudicatory hearing process as an area warranting reform[.] (citations omitted) [3]

A few years later, the rules were "streamlined." Regulations state broad principles—members of the public are assured the right to participate by a method appropriate to their interests in the matter—but without guidelines for determining that interest, "the potential for manipulation remains." *Nelkin & Fallows.*

> Agencies "may" establish committees, "may" hold public hearings, "may" consult with experts, "may distribute reports, and "may" notify affected parties of an action. This

[2] Nelkin & Fallows, *The Evolution of the Nuclear Debate: The Role of Public Participation*, Annu.Rev.Energy, 1978, 3:275-310

[3] Nils J. Diaz and Edward McGaffigan, Jr. to Chairman Jackson and Commissioner Dicus in a Memorandum dated December 15, 1997 Subject: Streamlining NRC Adjudications

> vague wording effectively gives an administrative agency the discretion to limit the availability of information, since they can establish such rigid procedures for obtaining documents as to impeded access to that information. Also, vagueness allows agencies to select the outside opinion it deems representative, as in the case of intervenors at public hearings. (citations omitted) [4]

The rulemaking process which resulted in the 2004 revisions to10 CFR Part 2 was done to make the process more "effective and efficient." *See* 69 FR 2182 (January 14, 2004). It did not enhance public participation.

Opportunity to Respond

Duke states that "NRC regulations do not allow the applicant to respond to a petitioner's reply" and therefore "would unfairly deprive other participants of an opportunity to rebut the new claims." Motion to Strike at 4. Duke cites a Commission precedent, stating, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief." *Id*.[5] However, the purpose of general litigation is to ascertain civil or criminal penalties based on events which occurred in the past. "*Salt down the facts, the law will keep*" is North Carolina dictum.[6] In license issue cases the facts are not salted down; that is, they change as the applicant, the Commission and other agencies proceed with design certifications, convenience and necessity determinations, environmental impact statements, RAI's, etc. Petitioners face the burden of contending with a moving target. The only conceivable option open to petitioners in this situation would be to pepper the Commission with

[4] Nelkin & Fallows, *The Evolution of the Nuclear Debate: The Role of Public Participation*, Annu.Rev.Energy, 1978, 3:275-310, page 293 footnote 34

[5] citing LES CLI-04-25, 60 NRC 225

[6] Sen. Sam Ervin, Jr., *Humor of a Country Lawyer*, University of North Carolina Press, 1984

amended and late-filed contentions, not the most efficient means of proceeding and surely not the intent of 10 CFR Part 2.

Regarding Commission practice, the Memorandum and Order cited by Duke concerns the NRC's decision to reject contentions offered not by a public interest group or a *pro se* litigant but by the New Mexico Environmental Department and the Attorney General of New Mexico; who cited delays obtaining expert witnesses, budget shortfalls and misapprehension of NRC rules.

BREDL rejects Duke's argument that new arguments and support were included in the Reply; but even if it were so, the applicant may yet avail itself of the extant process to make any responses it so desires. Commission guidance provides fair opportunity for such response before proffered contentions.[7] It states:

> Before a contention is excluded from consideration, the intervenor should have a fair opportunity to respond to applicant's comments. When an intervenor files a late contention and argues that it has good cause for late filing because of the recent availability of new information, intervenor should have the chance to comment on applicant's objection that the information was available earlier. Intervenors should be permitted to reply to the opposition to the admission of a late filed contention. The principle that a party should have an opportunity to respond is reciprocal. When intervenor introduces material that is entirely new, applicant will be permitted to respond. Due process requires an opportunity to comment. If intervenors find that they must make new factual or legal arguments, they should clearly identify the new material and give an explanation of why they did not anticipate the need for the material in their initial filing. If the explanation is satisfactory, the material may be considered, but applicant will be permitted to respond. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-82-89, 16 NRC 1355, 1356 (1982); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205, 206 (1994), citing Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-565, 10 NRC 521, 524 (1979).

In the interest of fairness, BREDL would not object to such measures deemed appropriate and approved by the ASLB. Regarding the ability of an applicant to

[7] NRC Practice and Procedures, NUREG 0386, January 2002, Pre 110

respond to a petitioner's reply, BREDL believes that adequate opportunity for such response may be had, with the judges' consent, at the initial prehearing conference stage.

Conclusion

Precisely because the proceeding is at an early stage, Petitioners believe that it would be premature to strike portions of its Reply. Petitioners pray that the substance of our contentions and our Reply, as well as Duke's and NRC Staff's answers and all motions will be given a full opportunity for hearing by the ASLBP. As *pro se* litigants, Petitioners have worked hard to bring important issues before the Commission.
We respectfully request that the Board admit all portions of our reply.

Respectfully submitted,

August 28, 2008
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CERTIFICATE OF SERVICE

I hereby certify that copies of the August 28, 2008
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