

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of |) | Dockets No. 52-018, 52-019 |
| Duke Energy Carolinas |) | |
| Combined License Application |) | ASLBP No. 08-865-03-COL-BD01 |
| For William States Lee III Units 1 and 2 |) | |
| _____ |) | April 17, 2009 |
| |) | |

**REPLY TO ANSWERS OF DUKE ENERGY AND NRC STAFF
REGARDING NEW CONTENTION ELEVEN**

Pursuant to 10 C.F.R. § 2.309(h)(2) and the April 8, 2009 Order of the ASLBP, the Blue Ridge Environmental Defense League (“BREDL”) hereby files its reply to the answers of Duke Energy Carolinas (“Duke”) and the Nuclear Regulatory Commission Staff (“NRC Staff”) in the matter captioned above (“Answers”).

Background

BREDL filed a Petition for Intervention and Request for Hearing (“Petition”) on June 27, 2008. The ASLB held a prehearing conference in Gaffney, SC on September 3rd. On September 22nd the ASLB issued a memorandum and order which found BREDL had standing to intervene, which referred BREDL Contention Two to the Nuclear Regulatory Commission¹, but which denied BREDL’s request for an evidentiary hearing. On March 9, 2009 BREDL filed New Contention Eleven “challenging the adequacy of the application by Duke Energy Carolinas to build and operate a new nuclear power plant on the William States

¹ BREDL Contention Two: The applicant fails to analyze the “carbon footprint” of the construction and operation of the William States Lee nuclear reactors 1 & 2 in its environmental report

Lee III site.” (“Contention Eleven”) Duke Energy Carolinas and NRC Staff filed Answers on April 3rd. In response to an April 4th request by BREDL, the ASLB granted an extension of time to file a reply until April 17th.

Discussion

BREDL requested that the Atomic Safety and Licensing Board admit Contention Eleven and hold it in abeyance pending final action in the Waste Confidence rulemaking proceeding by the Commission. Duke’s Answer states:

BREDL erroneously filed New Contention Eleven with the Board instead of the Commission. Moreover, the record for the contested portion of this proceeding is closed and BREDL fails to demonstrate it should be reopened. BREDL also fails to satisfy the timeliness, standing, and contention admissibility requirements in 10 C.F.R. § 2.309. Finally, BREDL fails to establish that New Contention Eleven should be held in abeyance or referred to the Commission.

Duke Answer at 2. As discussed below, the extant proceeding is not closed, Contention Eleven is not late-filed, BREDL has satisfied the requirements of 10 C.F.R. § 2.309 and, therefore, Contention Eleven should be admitted and held in abeyance.

First, BREDL satisfied the requirements of 10 C.F.R. § 2.309(d) with the filing of its Petition of June 27, 2008 which includes: (ii) the nature of the petitioner’s right to be made a party; (iii) the nature and extent of the petitioner’s interest in the proceeding; and (iv) the possible effect of any order that may be entered in the proceeding on the petitioner’s interest. *See* June 27, 2008 Petition at 2.

Second, Contention Eleven was not late-filed and had no need to meet the non-timely filing requirements of 10 C.F.R. § 2.309(c). The NRC's Waste Confidence Decision Update² set a comment deadline of December 8th which was subsequently extended³ by 60 days to February 9, 2009. Contention Eleven is based on comments submitted on February 6, 2009, regarding the U.S. Nuclear Regulatory Commission's proposed Waste Confidence Decision Update, 73 Fed. Reg. 59551. The legal and technical analyses of the proposed waste confidence decision and the proposed temporary storage rule were not available to BREDL until February 6, 2009, when the comments by Texans for a Sound Energy Policy⁴ were finalized and presented to BREDL for concurrence.

However, if Contention Eleven had been late-filed—which it was not—the additional requirements of 10 C.F.R. § 2.309(c), including (v) the availability of other means whereby the petitioner's interest will be protected; (vi) the extent to which the petitioner's interests will be represented by existing parties; and (vii) the extent to which the petitioner's participation will broaden the issues are addressed in Contention Eleven which states:

Blue Ridge Environmental Defense League recognizes that the issues raised by our Comments—and therefore by this contention—are generic in nature. Therefore we do not seek to litigate them in this individual proceeding. Instead, the contention should be admitted and held in abeyance in order to avoid the necessity of a

² NUCLEAR REGULATORY COMMISSION, 10 CFR Part 51 [Docket ID-2008-0482] Waste Confidence Decision Update, 73 Fed.Reg. 59551, October 9, 2008

³ NUCLEAR REGULATORY COMMISSION, 10 CFR Part 51 [NRC-2008-0404 and NRC-2008-0482] Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation and Waste Confidence Decision Update: Extension of Comment Period, 73 Fed.Reg. 72370, November 28, 2008

⁴ Comments by Texans for a Sound Energy Policy on a Proposed Waste Confidence Decision Update and Proposed Rule Regarding Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operations, Docket ID-2008-0482, RIN: 3150-A147, Docket ID-2008-0404, February 6, 2009

premature judicial appeal if this case should conclude before the NRC has completed the rulemaking proceeding. If the ASLB does not determine that it has the authority to admit the contention because it presents a challenge to a generic rule, we request the ASLB to refer the contention to the Commission.

See Contention Eleven at 3. The venues in which and the means by which and the reasons for which BREDL wished to have the high-level nuclear waste issues considered are stated *infra* and elsewhere as, for example, “*Our contention seeks to enforce, in this specific proceeding, the NRC’s commitment that ‘it would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely’*” and “*The contention also seeks to enforce the requirement of the National Environmental Policy Act that generic determinations under NEPA must be applied to individual licensing decisions and must be adequate to justify those individual decisions.*” Contention Eleven at 2.

Third, the Combined Operating License Application proceeding for Duke’s William States Lee III site is not closed. Duke states: “[T]he Board denied the only petition to intervene filed in this proceeding and, therefore, BREDL is not a party to this proceeding. In fact, there is no active contested proceeding.” Duke Answer at 8. Duke’s interpretation of a contested proceeding is overly restrictive. In fact, rules of procedure define contested proceeding in two ways: one in which a petitioner is granted leave to intervene or one in which terms of the pending license are in doubt.⁵ Plainly, the NRC staff have not yet

⁵ 10 CFR §2.4 Definitions: *Contested proceeding* means (1) a proceeding in which there is a controversy between the staff of the Commission and the applicant for a license concerning the issuance of the license or any of the terms or conditions thereof or (2) a proceeding in which a petition for leave to intervene in opposition to an application for a license has been granted or is pending before the Commission.

resolved all issues regarding the WS Lee COLA. Therefore, by definition this is a contested proceeding.

Fourth, the NRC proposed revising two findings of the Waste Confidence Decision: Finding 2, that a mined geologic repository could be available within 50–60 years beyond the operating license of any commercial reactor and, Finding 4, that, if necessary, irradiated fuel from any reactor could be stored safely without significant environmental impacts for at least 60 years beyond the operating license.⁶ Duke states that “These findings form the basis of the Commission’s generic determination that there are no significant environmental impacts from temporary storage of spent fuel after cessation of reactor operations.” Duke Answer at 5. As stated *infra*, BREDL recognizes that the issues raised by Contention Eleven are generic in nature and we therefore request that it be admitted and held in abeyance seeking to ensure that whatever decisions the Commission reaches on the Proposed Waste Confidence Decision and Proposed Temporary Storage Rule will be applied to the licensing decision for W.S. Lee III.

Further, Duke states, “The Proposed Waste Confidence Update *does not in any way* call into question the adequacy of the existing Waste Confidence Decision or Waste Confidence Rule.” (emphasis added) Duke Answer at 6. However, by the very nature of its update, the NRC has altered its previous estimate of 30 years beyond reactor licensing by a factor of 100%. One cannot plausibly argue that a doubling of an expected target date does not in any way question the adequacy of the existing target date.

⁶ NUCLEAR REGULATORY COMMISSION, 10 CFR Part 51 [Docket ID–2008–0482] Waste Confidence Decision Update, 73 Fed.Reg. 59551, October 9, 2008

Conclusion

High-level radioactive waste from commercial nuclear power reactors generated after 2011 has no disposal space unless a second repository is opened. As the Supreme Court held in *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983):

The key requirement of NEPA . . . is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking *and the individual proceedings*, brings those effects to bear on the decisions to take *particular actions that significantly affect the environment*.

462 U.S. at 96 (emphasis added). There is no basis for assuming that there will be a second repository and neither Duke nor NRC Staff have provided any sound argument to the contrary. The proposed reactors at W.S. Lee III have no place to dispose of high-level radioactive waste, raising legitimate safety and environmental questions about on-site storage. For the above reasons, Contention Eleven should be admitted and held in abeyance.

Respectfully submitted,

A handwritten signature in black ink, reading "Louis A. Zeller", followed by a horizontal line.

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April 17, 2009

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CERTIFICATE OF SERVICE

I hereby certify that copies of
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REGARDING NEW CONTENTION ELEVEN
were served on the following persons via Electronic Information Exchange this 17th day of
April, 2009.

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