

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Nicholas G. Trikouros
Dr. William M. Murphy

In the Matter of

DUKE ENERGY CAROLINAS, LLC

(Combined License Application
for William States Lee III Nuclear Station,
Units 1 and 2)

Docket Nos. 52-018-COL
and 52-019-COL

ASLBP No. 08-865-03-COL-BD01

April 29, 2009

MEMORANDUM AND ORDER
(Regarding BREDL's New Contention Eleven)

The Blue Ridge Environmental Defense League (BREDL) proffers a new contention, Contention Eleven, for the Board's consideration in the William States Lee III (WSL) combined license proceeding. Because the Board no longer has jurisdiction, we dismiss BREDL's request.

On December 12, 2007, Duke Energy Carolinas, LLC (Duke) submitted a combined license application to the NRC for WSL Units 1 and 2 (Application).¹ The NRC accepted the Application for docketing on February 25, 2008, and published a hearing notice on April 28, 2008.² The hearing notice required any person whose interests might be affected by this

¹ The Application was supplemented by letters dated January 28, 2008, February 6, 2008, and February 8, 2008. Duke Energy; Notice of Hearing and Opportunity to Petition for Leave to Intervene, 73 Fed. Reg. 22,978, 22,978 (Apr. 28, 2008).

² Duke Energy; Acceptance for Docketing of an Application for a Combined License for William States Lee III Units 1 and 2, 73 Fed. Reg. 11,156 (Feb. 29, 2008); 73 Fed. Reg. at 22,978.

proceeding and who wished to participate as a party to file a petition for leave to intervene within 60 days of the notice, in accordance with 10 C.F.R. § 2.309.³ BREDL filed a timely petition on June 27, 2008, which contained proffered contentions numbered One through Ten A and B.⁴ On July 22, 2008, Duke and the NRC Staff filed timely answers opposing all of BREDL's contentions.⁵ On August 8, 2008, BREDL filed a timely reply.⁶

After oral argument regarding the admissibility of BREDL's initial proffered contentions, the Board issued a memorandum and order on September 22, 2008, denying BREDL's petition for intervention and request for hearing.⁷ The Board referred its ruling on the inadmissibility of one of BREDL's contentions, Contention Two, to the Commission because it was identical to a contention that was referred to the Commission in a proceeding before another licensing board.⁸ BREDL did not appeal the Board's ruling, nor did the Commission indicate that it was reviewing the Board's ruling sua sponte. The Board's referral of BREDL's Contention Two is currently pending before the Commission.

On March 10, 2009,⁹ BREDL filed its "New Contention Eleven," in which it asserts that:

³ 73 Fed. Reg. at 22,979.

⁴ Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (June 27, 2008).

⁵ Duke Energy Carolinas, LLC's Answer Opposing Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League (July 22, 2008); NRC Staff Answer to "Petition for Intervention and Request for Hearing by the Blue Ridge Environmental Defense League" (July 22, 2008).

⁶ Reply of the Blue Ridge Environmental Defense League to Answers of Duke Energy Carolinas and NRC Staff (Aug. 8, 2008).

⁷ LBP-08-17, 68 NRC __, __ (slip op. at 31-32) (Sept. 22, 2008).

⁸ Id. at __ (slip op. at 13-14).

⁹ BREDL's pleading is dated March 9, 2009, but BREDL's certificate of service and the e-filing system both indicate that BREDL did not file and serve its pleading until March 10, 2009. See New Contention Eleven (Mar. 10, 2009).

Neither the Proposed Waste Confidence Decision nor the Proposed Spent Fuel Storage Rule satisfies the requirements of NEPA or the Atomic Energy Act. Therefore they fail to provide adequate support for the Applicant's Environmental Report or for an Environmental Impact Statement in this particular licensing case. The deficiencies in the Waste Confidence Rule also fatally undermine the adequacy of the NRC's findings in Table S-3 of 10 C.F.R. § 51.51 to satisfy NEPA. Unless and until the NRC remedies the deficiencies in the Waste Confidence Rule, Table S-3, and the Proposed Spent Fuel Storage Rule, the NRC has no lawful basis to issue a license for the proposed William States Lee III nuclear power plant.¹⁰

Duke and the NRC Staff filed answers on April 3, 2009 opposing the admission of BREDL's new contention.¹¹ On April 17, 2009, pursuant to an extension of time granted by this Board,¹² BREDL filed its reply to Duke's and the NRC Staff's answers.¹³

In its answer Duke argues, among other things, that BREDL's new contention submission should be dismissed because the Board lacks jurisdiction to review it.¹⁴ Duke, citing NRC case law, asserts that "[o]nce a licensing board denies an intervention petition and the period in which the Commission could exercise its right to review the record expires, jurisdiction passes back to the Commission, including jurisdiction over any new petitions, contentions, or motions."¹⁵ The NRC Staff also questions whether the Board has jurisdiction to rule on the

¹⁰ Id. at 4.

¹¹ See Duke Energy Carolinas, LLC's Answer Opposing [BREDL] New Contention Eleven (Apr. 3, 2009) [hereinafter Duke Answer]; NRC Staff Answer to "New Contention Eleven" Filed By [BREDL] (Apr. 3, 2009) [hereinafter NRC Staff Answer].

¹² See Licensing Board Order (Granting Extension of Time) (Apr. 8, 2009) at 2 (unpublished).

¹³ See Reply to Answers of Duke Energy and NRC Staff Regarding New Contention Eleven (Apr. 17, 2009) [hereinafter BREDL Reply].

¹⁴ Duke Answer at 2.

¹⁵ Id. at 7-8 (citing Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35 (2006); Metropolitan Edison Co. (Three Mile Island Station, Unit 1), ALAB-699, 16 NRC 1324, 1326-27 (1982); Licensing Board Order (S.C. Elec. & Gas Co. (Virgil C. Summer Nuclear Station, Units 2 and 3)) (Mar. 3, 2009) at 1 (unpublished)).

admissibility of BREDL's new contention, analogizing the procedural posture of this case to others where the Commission had jurisdiction, not the licensing board.¹⁶

In its reply BREDL does not address directly whether the Board has jurisdiction.¹⁷ Instead, BREDL responds to Duke's argument¹⁸ that the proceeding is closed and BREDL therefore should have addressed the requirements for a motion to reopen under 10 C.F.R. § 2.326. BREDL cites to the definition of "contested proceeding" under 10 C.F.R. § 2.4 for the proposition that this proceeding is not closed because the NRC Staff "ha[s] not yet resolved all issues regarding the [Application]."¹⁹ The definition contemplates contested proceedings before the Commission as well as a licensing board, therefore it does not answer the question here of whether the Board now has jurisdiction.²⁰

The Board finds that it does not have jurisdiction to rule on the admissibility of BREDL's newly proffered Contention Eleven. The Board agrees that the cases cited by Duke and the NRC Staff show that the issuance of the Board's September 22, 2008 decision denying BREDL's intervention petition²¹ and the expiration of the period of time within which the Commission may exercise its authority for sua sponte review (but did not) terminated the proceeding before the Board.²² That the Board's referral of its ruling on BREDL Contention Two

¹⁶ NRC Staff Answer at 3 n.3.

¹⁷ See generally BREDL Reply.

¹⁸ See Duke Answer at 8-9.

¹⁹ BREDL Reply at 4-5.

²⁰ See 10 C.F.R. § 2.4 (defining "contested proceeding" to include "[a] proceeding in which a petition for leave to intervene in opposition to an application for a license or permit has been granted or is pending before the Commission").

²¹ LBP-08-17, 68 NRC at ___ (slip op. at 31-32).

²² See, e.g., Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-06-4, 63 NRC 32, 35 (2006) (motion improperly filed before licensing board when "the Board ha[d] already dismissed the case and no longer ha[d] jurisdiction over the matter").

is currently pending with the Commission further supports the view that jurisdiction no longer rests with the Board.²³

Accordingly, the Board dismisses BREDL's request.²⁴

It is so ORDERED.²⁵

THE ATOMIC SAFETY
AND LICENSING BOARD*

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 29, 2009

²³ Cf. Dominion Nuclear Connecticut, Inc. (Millstone Power Station, Unit 3), CLI-09-05, 69 NRC __, __ (slip op. at 7) (Mar. 5, 2009) (stating that generally after an appeal from a licensing board ruling on standing and contention admissibility "jurisdiction passes to the Commission").

²⁴ In its new contention pleading, BREDL requests that "[i]f 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." New Contention Eleven at 3. In the circumstances, the Board declines to refer to the Commission a matter over which it lacks jurisdiction.

²⁵ Copies of this order were sent this date by the agency's E-filing system to counsel for (1) Applicant Duke Energy Carolinas, LLC; (2) BREDL; (3) the NRC Staff; (4) the South Carolina Office of Regulatory Staff; and (5) the North Carolina Utilities Commission.

* Judge William M. Murphy did not participate in the issuance of this Memorandum and Order.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
DUKE ENERGY CAROLINAS, LLC) Docket Nos. 52-018-COL
) 52-019-COL
(William States Lee III Nuclear Station)
Units 1 and 2))
)
(Combined Operating License))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING BREDL'S NEW CONTENTION ELEVEN) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 29th day of April 2009