UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
DUKE ENERGY CORPORATION	)	Docket Nos. 50-269/270/287-LR
(Oconee Nuclear Station, Units 1, 2, and 3)	)	

CLI-99-11

MEMORANDUM AND ORDER

I. Introduction

In this decision we review an Atomic Safety and Licensing Board Memorandum and Order, LBP-98-33, 48 NRC 381 (1998), that denied a petition for leave to intervene and request for hearing filed by the Chattooga River Watershed Coalition and Messrs. Norman "Buzz" Williams, William "Butch" Clay, and William Steven "W.S." Lesan (collectively referred to as the "petitioners"). The petitioners seek to challenge an application by Duke Energy Corporation ("Duke Energy") to renew for an additional 20-year period the operating licenses for its three Oconee Nuclear Station units. The Licensing Board found that the petitioners have standing to challenge the proposed license renewal, but that they had not submitted an admissible contention. The Board accordingly denied their request for hearing.

Pursuant to 10 C.F.R. § 2.714a, the petitioners have appealed the Board's ruling. Duke Energy and the NRC staff support the Board's decision. We affirm the decision, for the reasons given by the Board itself and for the reasons we give below.

II. Background

On July 6, 1998, Duke Energy filed a license renewal application for the Oconee Nuclear Station, Units 1, 2, and 3. On August 11, 1998, the NRC staff published a notice in the Federal Register stating that the application had been found complete and acceptable for docketing and giving notice of an opportunity for a hearing on the application. See 63 Fed. Reg. 42,885 (1998). In a short letter dated September 8, 1998, the petitioners requested leave to intervene. The Commission soon thereafter referred the intervention petition to the Licensing Board and called on the Board to follow a schedule that would accommodate a final "Commission decision on the pending application in about 2½ years from the date that the application was received." Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 126 (1998). The Commission suggested various milestones for Board action, including a Board decision on intervention petitions within 90 days of the Commission's referral order (issued on September 15). Id. at 127.[1]

Upon receipt of the case, the Board gave the petitioners the opportunity to amend their petition to "address any shortcomings in their initial pleading" and to supplement it with their proffered contentions. See Unpublished Board Memorandum and Order, dated Sept. 18, 1998. The order set as deadlines September 30, for the petitioners to amend their original pleading,

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[1] Previously, in anticipation of an imminent series of license renewal and license transfer proceedings, the Commission had issued a Statement of Policy on the Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998), which suggested a number of mechanisms, including the milestones device, to assure a fair, timely and efficient hearing process. See also Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 339-40 (1998) (explaining "the need to deal with license renewal in a fair and efficient way")(petition for judicial review pending).

and October 19, for filing all contentions. Id. The petitioners responded on September 27, requesting an additional 30 days in which to file an amended petition. On September 30, they filed a letter stating that they had "neither adequate notice nor funds available to retain counsel," and that they objected to the "expedited nature of these proceedings," which they said left them only a "slim window of opportunity to gain expertise on ... certain issues" before petitions to intervene were due to be filed. The Board denied their request for a full 30 day extension but, noting that the petitioners were acting pro se, allowed them until October 30 to amend their intervention petition and to submit their contentions. See Unpublished Board Order, dated Oct. 1, 1998. The Board further provided the petitioners guidance on the need to establish standing to intervene, and also advised them to "strictly adhere" to "the requirements of 10 C.F.R. § 2.714(b)(2) in framing their contentions." Id.

The petitioners timely filed an amended petition with four proposed contentions on October 30. See Petitioners' First Supplemental Filing (Oct. 30, 1998)("Amended Petition"). In it, they set forth the purposes of the Chatooga River Watershed Coalition ("Coalition") and the arguments in support of their standing to intervene, both as individual petitioners and as members of the Coalition. Messrs. Williams, Clay, and Lesan stated that they reside and work within 20 miles of the Oconee Nuclear Station, and that they are members of the Coalition, which seeks to protect and restore the Chattooga River Watershed ecosystem. Mr. Williams stated that he is the Executive Director of the Coalition and serves as its official representative.

The petitioners' four contentions alleged that Duke Energy's license renewal application for Oconee: (1) is incomplete, and thus should be withdrawn or summarily dismissed; (2) does not meet the "aging management and other safety-related requirements mandated by law and NRC regulations, and therefore should be withdrawn and/or summarily dismissed"; (3) does not meet NEPA requirements; and (4) fails to address (a) the status and capacity of the spent fuel

storage facility, (b) the transportation of radioactive waste to other locations if and when storage capacity is exceeded, and (c) the availability of other High Level Waste storage sites in the event that the proposed Yucca Mountain, Nevada, site does not prove to be a viable repository.

The petitioners also requested a stay of the license renewal proceeding, to allow them time to review all Requests for Additional Information (RAIs) that the NRC staff might submit to Duke Energy and to review the applicant's responses to these potential RAIs. Specifically, the petitioners requested that they be permitted to file additional contentions until "at least 90 days" after Duke Energy has responded to all staff RAIs. See Amended Petition at 5.

Neither the NRC staff nor Duke Energy contested the petitioners' standing. They argued, however, that none of the petitioners' contentions met the agency's requirements for an admissible contention. The Licensing Board agreed. In LBP-98-33, the Board found that the petitioners had standing to intervene (48 NRC at 384-86), but denied their intervention petition for failure to state an admissible contention (id. at 386-92).

The Board rejected the petitioners' claim that mere pendency of NRC staff inquiries to Duke Energy, or "RAIs," establishes admissible contentions. "Petitioners have not shown," stated the Board, "how the presence of these RAIs evidence credible safety significance, how the Oconee application is materially incomplete because of the RAI matters, or how the application fails to provide sufficient information to frame contentions." Id. at 387-88. The Board also rejected the petitioners' spent fuel and waste claims, on the ground that these issues were the subject of prior or ongoing generic rulemakings and therefore were not appropriate subjects for an adjudication. Id. at 391-92. Finally, the Board refused to stay proceedings pending disposition of the NRC staff RAIs. Id. at 393-94. The Board reasoned that "speculation that the RAIs may reveal later potential problems" does not amount to

"irreparable injury," does not suggest a "valid contention," and does not override the public interest in the "timely completion" of license renewal proceedings. Id.

On appeal before the Commission, the petitioners argue that their Contentions Nos. 1, 2, and 4 should have been admitted. They do not appeal the Board's rejection of their Contention 3, which involved NEPA claims. The NRC staff and Duke Power support the Board's decision. We affirm.

III. Analysis

For the second time in recent months, we are called upon to consider the admissibility of contentions in the license renewal setting. See Calvert Cliffs, 48 NRC at 348-50. Before addressing the petitioners' particular arguments on appeal, we again review our requirements and standards for admitting contentions into our proceedings.

To gain admission as a party, a petitioner for intervention must proffer at least one admissible contention for litigation.[2] 10 C.F.R. § 2.714(b). A contention must specify the particular issue of law or fact the petitioner is raising, and contain: (1) a brief explanation of the bases of the contention; and (2) a concise statement of the alleged facts or expert opinion that support the contention and upon which the petitioner will rely in proving the contention at the hearing. The contention should refer to those specific documents or other sources of which the petitioner is aware and upon which he "intends to rely in establishing the validity of [the] contention." See 10 C.F.R. § 2.714(b)(2); Final Rule, Rules of Practice for Domestic Licensing

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[2] A prospective intervenor also must establish a sufficient "interest" in the licensing proceeding, or in other words, "standing" to intervene. See 10 C.F.R. § 2.714(a)(2). No party here contests petitioners' standing. Although noting that it was "not necessary for a determination in this case," the Licensing Board's discussion on standing indicated that a "50-mile presumption" -- a presumption of standing for those residing within 50 miles of the reactor that sometimes has been applied in NRC reactor licensing cases -- applies in the license renewal context. See 48 NRC at 385 n.1. Because the petitioners' standing is not an issue on this appeal, the Commission finds it unnecessary to consider the validity of the Board's view on the 50-mile presumption question.

Proceedings -- Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989)("Final Rule, Contentions"). A contention also must show that a "genuine dispute" exists with the applicant on a "material" issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). The dispute at issue is "material" if its resolution would "make a difference in the outcome of the licensing proceeding." Final Rule, Contentions, 54 Fed. Reg. at 33,172.

Our strict contention rule serves multiple interests. First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. See North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC ___ (Mar. 5, 1999), slip op. at 11 n.8; Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974). Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

In 1989 the Commission toughened its contention rule in a conscious effort to raise the threshold bar for an admissible contention and ensure that only intervenors with genuine and particularized concerns participate in NRC hearings. See Final Rule, Contentions, 54 Fed. Reg. at 33,168. By raising the admission standards for contentions, the Commission intended to obviate serious hearing delays caused in the past by poorly defined or supported contentions. At the time, hearings often were "delayed by months and even years of prehearing conferences, negotiations, and rulings on motions for summary disposition." Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1996) (citing

Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410 (1985), where 500 contentions were submitted, 60 were admitted, and only 10 were actually litigated after a period of two and a half years of negotiations).

Prior to the contention rule revisions, Licensing Boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation. Indeed, in practice, intervenors could meet the rule's requirements merely "by copying contentions from another proceeding involving another reactor." Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986). Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination. See Cotter, Nuclear Licensing: Innovation Through Evolution in Administrative Hearings, 34 Admin. L. Rev. 497, 505, 508 (1982). Congress therefore called upon the Commission to make "fundamental changes" in its public hearing process to assure that "hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors." H.R. Rep. No. 177, 97th Cong. 1st Sess. at 151 (1981).

The 1989 revisions to the contention rule thus insist upon "some factual basis" for an admitted contention. 54 Fed. Reg. at 33,171. The intervenor must "be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue." Id. These requirements are intended to "preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." Id. Although in quasi-formal adjudications like license renewal an intervenor may still use the discovery process to develop his case and help prove an admitted contention, contentions shall not be admitted if at the outset they are not described with

reasonable specificity or are not supported by "some alleged fact or facts" demonstrating a genuine material dispute. Id. at 33,170.

This is not to say that our contention rule should be turned into a "fortress to deny intervention." Peach Bottom, 8 AEC at 21. The Commission and its Boards regularly continue to admit for litigation and hearing contentions that are material and supported by reasonably specific factual and legal allegations. See, e.g., Seabrook, 49 NRC at ___, slip op. at 13-17; Private Fuels Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142 , aff'd, CLI-98-13, 48 NRC 26 (1998).

We turn now to the petitioners' arguments that their contentions 1, 2, and 4 are admissible in this case.

A. Contention One

Contention One alleges that "[a]s a matter of law and fact," Duke Energy's license renewal application for the Oconee Nuclear Station, Units 1, 2, and 3 "is incomplete, and should be withdrawn and/or summarily dismissed." See Petitioners' Appeal Brief at 2 (Jan. 14, 1999). In support of their contention, the petitioners submitted two bases before the Licensing Board. As their first basis, the petitioners explained that the license application incorporates by reference several generic Babcock and Wilcox Owners Group topical reports applicable to the Oconee reactor coolant system, and also incorporates by reference a 1996 Duke Energy report to the NRC on the reactor building (containment). The petitioners go on to conclude that because the NRC staff has not completed its review of these generic reports, the license application must be deemed incomplete. The Licensing Board correctly rejected this basis as a ground for the contention, noting that all the petitioners "ha[d] done is search the record for instances of uncompleted staff review of the Oconee application." 48 NRC at 386. The mere fact that the staff review is ongoing says nothing about whether the application is deficient or

will be found to satisfy all applicable requirements. Apparently, the petitioners have accepted the Licensing Board's rejection of this basis because they do not reiterate it in their appeal brief's discussion of Contention One.

On appeal, the petitioners rely solely on the NRC staff's issuance of Requests for Additional Information (RAIs) to the applicant. The petitioners' contention is said to include "each of the [RAIs] filed or forthcoming" by the NRC staff to the applicant. See Amended Petition at 3 (emphasis added). They argue on appeal:

> [T]he numerous Requests for Additional Information (RAIs) submitted by Nuclear Regulatory Commission staff (NRC) to Duke regarding the subject application are prima facie evidence ... that the application is incomplete. The simple and clear logic supporting this contention is that if the application were complete, then the NRC staff would not need to solicit follow-up information.

Appeal Brief at 2. We cannot agree.

As the Commission recently made clear, "RAIs are a standard and ongoing part of NRC licensing reviews." Calvert Cliffs, 48 NRC at 349. They are a routine means for our staff to request clarification or further discussion of particular items in the application. What would be unusual in a license renewal case is if by now no RAIs had been issued, not that some have been. Even the Federal Register notice for this proceeding indicated that the "docketing of the renewal application does not preclude requesting additional information as the review proceeds, nor does it predict whether the Commission will grant or deny the application." 63 Fed. Reg. 42,885, 42,886 (Aug. 11, 1998). The NRC does not "violate[] any clear legal duty by proceeding first to docket [an application] and thereafter to request additional information." Concerned Citizens of Rhode Island v. NRC, 430 F. Supp. 627, 634 (D. R.I. 1977). See also 10 C.F.R. § 2.102(a)(staff during its review may request applicant to supply additional information).

In short, "the NRC staff's mere posing of questions does not suggest that the application [is] incomplete." Calvert Cliffs, 48 NRC at 349.

To satisfy the Commission's contention rule, then, petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. Id. at 350. RAIs generally "indicate[] nothing more than that the staff requested further information and analysis from the licensee." Sacramento Municipal Utility Dist. (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146 (1993). The NRC's issuance of RAIs does not alone establish deficiencies in the application, or that the NRC staff will go on to find any of the applicant's clarifications, justifications, or other responses to be unsatisfactory.

Here, to support Contention 1, the Amended Petition simply referred to all RAIs "filed or forthcoming;" the contention is bereft of supporting detail. *See* Amended Petition at 3. This is a far cry from the reasonable specificity our contention rule demands. A contention alleging that an application is deficient must identify "each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.714(b)(2)(iii). "The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point." Public Serv. Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 241 (1989). All the petitioners did here was attach to their Amended Petition an NRC memo discussing the status of particular RAIs the staff had issued. The petitioners point to no specific safety deficiency identified in the NRC memo. The memo simply reflects areas where the NRC staff has made inquiries and Duke Energy's agreement "to consider ... additional clarification."

The petitioners themselves provided no analysis, discussion, or information of their own on any of the issues raised in the RAIs -- which, we note, cover a wide variety of disparate subject matters, such as door locking mechanisms and the Oconee coatings program. At

bottom, the RAIs show only an ongoing staff dialogue with Duke Energy, not any ultimate staff determinations. Apart from a broad reference to these follow-up questions posed by the staff, the petitioners did not posit any reason or support of their own -- no alleged facts and no expert opinions -- to indicate that the application is materially deficient. Petitioners seeking to litigate contentions must do more than attach a list of RAIs and declare an application "incomplete." It is their job to review the application and to identify what deficiencies exist and to explain why the deficiencies raise material safety concerns.

We find, therefore, that Contention 1 does not meet the requirements for an admissible contention. It lacks specificity, presents no underlying support other than a general reference to assorted RAIs issued by the staff, and cannot be viewed as showing a genuine dispute with the applicant on a material issue. Indeed, the petitioners effectively concede as much in their appeal brief. Their overarching complaint throughout this proceeding has been the time limits our regulations impose upon those seeking a hearing. The petitioners want the Commission to grant them "until at least 90 days" after Duke has responded to the last RAI in which to file contentions. This time extension would, the petitioners explain, enable them to review all the RAIs and responses "and then, if warranted, set forth contentions." Appeal Brief at 3 (emphasis added). They do not believe that the renewal application provided adequate material for them "to determine grounds to frame contentions, if warranted." Id. at 2-3 (emphasis added).

The petitioners, it appears, are still in the process of determining whether contentions even are "warranted." This is not so much a case, then, of petitioners who, after reviewing all relevant licensing documents, have isolated specific issues they dispute and wish to litigate. It is more a case of petitioners who simply desire more time and more NRC staff information to determine whether they even have a genuine material dispute for litigation.

The petitioners' demand that initiation of the NRC hearing process await completion of NRC staff reviews would turn our adjudicatory process on its head. Under our practice, a petitioner has "an ironclad obligation" to examine the application, and other publicly available documents, with sufficient care to uncover any information which could serve as the foundation for a contention. See Rancho Seco, 37 NRC at 147; Final Rule, Contentions, 54 Fed. Reg. at 33,170. Petitioners must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties. See, e.g., Business and Professional People for the Public Interest v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974). "[I]t is the license application, not the NRC staff review, that is at issue in our adjudications." Calvert Cliffs, 48 NRC at 350. It is reasonable to expect a person or organization seeking to participate in a proceeding to study the portions of the application addressing the issues of concern and identify exactly what these concerns are.

The petitioners have not done so, and instead have come forward only with what amounts to generalized suspicions, hoping to substantiate them later as the NRC staff conducts its own safety review. But the 1989 revisions to our contention rule effectively work to bar ill-defined "anticipatory" contentions like the petitioners'. See Union of Concerned Scientists v. NRC, 920 F.2d 50, 53 (D.C. Cir. 1990); Final Rule, Contentions, 54 Fed. Reg. at 33,171. Our revised rules do not permit "vague, unparticularized contentions," or "notice pleading, with details to be filled in later." See Seabrook, 49 NRC at ___, slip op. at 14. Petitioners do not have the right to wait and "have the [NRC] staff studies as a sort of pre-complaint discovery tool." Union of Concerned Scientists, 920 F.2d at 56. Moreover, "much of what those [NRC] reports will bring to light will ... not be new issues but new evidence on issues that [already] were apparent at the time of application," had the application been carefully reviewed. See id. at 55.

On the other hand, if genuinely new and material safety or environmental issues later emerge from RAIs or other NRC staff documents, our contention rule does not prevent their litigation. See 10 C.F.R. §§ 2.714(a); 2.714(b)(2)(iii). In fact, the Commission today affirmed a Licensing Board decision granting late intervention under our rules. See Private Fuel Storage, L.L.C. (ISFSI), CLI-99-10, 49 NRC ___ (April 15, 1999). We believe that our procedural rules thus strike a fair balance between assuring that interested persons can raise significant environmental and safety issues and providing for expeditious hearings.

The Commission acknowledges that our rules require individuals concerned about a licensing action to work within a limited time frame to review the license application and any available related licensing documents and to submit their intervention petition and contentions. Admittedly, this can pose a significant burden, especially for pro se petitioners who are likely to have less available time and resources. But it has long been a "basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation." Texas Utilities Generating Co. (Comanche Peak Steam Elec. Station), Units 1 and 2), CLI-83-18, 17 NRC 1037, 1048 (1983). "A second fundamental principle applicable here is that there is a substantial public interest in efficient and expeditious administrative proceedings. Although this interest is undoubtedly subordinate to the public's interests in health, safety, and the environment, it is an interest which the Commission incorporates" into the NRC's procedural rules. Id. (citations omitted). "The NRC staff," of course, "will consider and resolve all safety questions regardless of whether any hearing takes place." Calvert Cliffs, 48 NRC at 350.

In sum, we agree with the Licensing Board that Contention 1 is inadmissible, and we deny the petitioners' request to "reschedule" this proceeding until all "the RAIs have been resolved." See Appeal Brief at 2. As the Commission quite recently stated, if we "allow[ed]

petitioners to await completion of the RAI process before framing specific contentions, the hearing process frequently would take months or years even to begin, and expedited hearings, such as the Commission contemplated for license renewal, would prove impossible." Calvert Cliffs, 48 NRC at 350.

B. Contention Two

Contention Two alleges that "[a]s a matter of law and fact," Duke Energy's license renewal application "does not meet the aging management and other safety-related requirements mandated by law and NRC regulations, and therefore should be withdrawn and/or summarily dismissed." As with Contention 1, however, on appeal the petitioners' only basis for this contention is NRC staff RAIs. For the reasons given above, staff RAIs generally do not suffice to show that petitioners *themselves* have sufficient knowledge and concern to trigger our adjudicatory apparatus.

We first note that the petitioners have dropped most of the bases originally relied upon in their Amended Petition for Contention Two. For instance, one of the arguments featured in their Amended Petition suggested that the applicant failed to include a program for the "sample inspection of small bore Reactor Coolant System piping." See Amended Petition at 4. As the Board pointed out, however, the petitioners apparently had misread the application, which in fact had provided a discussion of this program. See 48 NRC at 388-89; NRC Response to Petitioners' First Supplemental Filing, at 12-13 (Nov. 16, 1998). Instead of directly challenging the adequacy of the applicant's program, the petitioners merely -- and incorrectly -- assumed that the application had not addressed the issue. The petitioners originally also relied on the claim that the staff had yet to complete their review of all the generic topical reports incorporated by reference in the application. See Amended Petition at 4. But, again, as we stated in regard to Contention 1, the staff's ongoing review of the application does not provide a

basis for a contention. The petitioners could have reviewed the particular topical reports themselves to see if there were any information or finding in them that they wished to controvert or that called Duke Energy's application into question.

Having dropped the above arguments, on appeal the petitioners turn solely to the NRC staff RAIs. On this point, their Amended Petition contained only the simple declaration that an "[a]dditional basis for this Contention shall also be set forth in each of the RAIs that will be filed by the NRC staff." See Amended Petition at 4 (emphasis added). As we already have held (see discussion above), such vague, open-ended, and prospective references to RAIs cannot support a litigable contention, which requires a reasonably specific explanation of an actual safety-related deficiency.

Several weeks after filing their original intervention petition, the petitioners made an effort to introduce specificity into their contention by submitting to the Board additional information on particular RAIs. They entitled their new pleading (filed on December 9, 1998), "New Information for the ASLB to Consider." At the time, the Board had given all the parties an opportunity to comment on an issue involving Contention 4, which addresses high-level waste. The petitioners not only commented on the waste issue, but also took the occasion to cite and quote several RAIs which they claimed "directly name the matters of law and fact that are discussed in the Petitioners' Contentions." See New Information Supplement at 2. These RAIs, the petitioners explained, had not been available when they filed their Amended Petition.

The NRC staff argues in its appeal brief that if these RAIs "are considered [] new information," the petitioners should have addressed the agency standards for late-filed contentions, and their failure to do so "amounts to an untimely, unauthorized supplement to their contentions that should not be considered." See Staff Appeal Brief at 16 n.2. We fully agree. In virtually identical circumstances in Calvert Cliffs, where the petitioners attempted to

introduce new, RAI-driven claims well after the deadline for contentions, we refused to permit the claims in the absence of a showing of good cause for lateness. See 48 NRC at 347-48. Here, too, the record is barren of any effort by the petitioners to justify the lateness of their submission.

Moreover, even were we to overlook the fatal lateness of the petitioners' December 9 filing, the filing adds no persuasive substantive support to the petitioners' contention and therefore cannot serve as the basis for a hearing. The petitioners' basic premise is that follow-up inquiries by the staff during its review of the application represents "prima facie" evidence that the application is materially in error or deficient. The petitioners believe, therefore, that "each of the RAIs" filed by the NRC staff supplies a basis for a contention. See Amended Petition at 4. Although the petitioners did not attach a copy of the RAIs they referenced, they quoted selected language from them, arguing that these RAIs demonstrate a "fundamental void" in the application. See Appeal Brief at 3.

Read in context and in their entirety, the particular RAIs noted by the petitioners do not by themselves present any genuine material dispute or litigable issue. They represent nothing more than what RAIs by definition are -- requests for further information. Far from showing a definitive staff conclusion that a program proposed in the application is deficient or flawed, many of the cited RAIs suggest that the staff may be inclined to accept a particular program or schedule as proposed in the application, as long as Duke Energy better explains its underlying reasons and procedures. See, e.g., RAI 4.3.9-2. Other cited RAIs simply request that Duke Energy further describe or explain specific technical issues, such as the engineering analysis, to aid the staff in completing its evaluation and assessment of the particular item under review. See, e.g., RAI 3.5.3-2. In all instances, though, the RAIs show issues that are still under review

and as yet inconclusive; in every case, whatever the issue, the staff has accorded Duke Energy the opportunity to expand upon or otherwise justify the approach taken in the application.

The petitioners' extensive reliance on RAIs, and a similar approach taken in another recent license renewal case, Calvert Cliffs, causes us to elaborate, briefly, our understanding of the use of RAIs in adjudications. We said in Calvert Cliffs that RAIs are not always "irrelevant to the adjudicatory process." 48 NRC at 350 (citation omitted). They can, for instance, provide a jumping-off point for the petitioners to focus upon particular parts of the application and thereby develop potential issues of concern. The extent to which an RAI might help support a contention must be considered on a case by case basis, but the Commission expects that in almost all instances a petitioner must go beyond merely quoting an RAI to justify admission of a contention into the proceeding.

To show a genuine dispute with the applicant, petitioners must use the RAI to make the issue of concern their own. This means they must develop a fact-based argument that actually and specifically challenges the application. Where, for example, as in this case, the NRC staff issues an RAI that questions a particular inspection schedule -- directing the applicant to further describe and support it -- a genuine and material dispute for litigation does not arise from a petitioner's mere mention of the RAI. The petitioner's contention must indicate why the petitioner believes the particular inspection schedule makes the license renewal application unacceptable, not just that the NRC staff has requested a better explanation or description of it.[3] As the Licensing Board has aptly stated, a contention "that fails directly to controvert the

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[3] Several of the specific RAIs the petitioners have cited here involve one-time inspection programs for different plant systems. These RAIs question why the applicant proposes to complete these inspections only by the end of the initial license term. For example, one RAI states the following: "Provide a justification for not completing the inspection activities at the time of application. Along with your justification, describe the methodology, identify any applicable acceptance criteria, identify planned corrective actions, and provide a schedule for implementation." (RAI-4.3.9-2) Apart from merely quoting this language from the RAI, the

(continued...)

license application ... is subject to dismissal." Private Fuel Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142, 181 (1998). Moreover, if the RAI in question does nothing more than request further information, it is not unreasonable to expect a petitioner to provide additional information corroborating the existence of an actual safety problem. Documents, expert opinion, or at least a fact-based argument are necessary. The petitioners here have provided none of this.

It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of petitioners who themselves have no particular expertise -- or expert assistance -- and no particularized grievance, but are hoping something will turn up later as a result of NRC staff work. Our contention rule would soon be rendered insignificant if any petitioner with standing had only to cite an RAI to gain entitlement to an adjudicatory hearing.

The petitioners in this case effectively concede they have no independent knowledge or expertise to bring to the adjudicatory process, but intend to rely solely upon the "staff's technical and scientific assessment of the application," which they understand is ongoing and as yet inconclusive. See Appeal Brief at 2-3. Because they were unable before filing their petition to see how the NRC staff RAIs will be ultimately resolved, they are unsure if contentions are even "warranted." Distilled, the petitioners' pleadings reveal only one clearly defined dispute -- not

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[3](...continued)
petitioners present no health or safety argument for why the inspection already should have been completed, which presumably is their concern. Although they claim that their earlier Amended Petition was "totally misinterpreted" by the Board, the plain reading of their Amended Petition suggests that they originally believed these types of one-time inspections should be conducted later, not sooner. In their Amended Petition, the petitioners argued that if the one-time inspection were conducted "well in advance of the expiration date for the Oconee Nuclear Station's current operating license .... then at the beginning of the nuclear station's extended term there could be ten years of `wear and tear' ... that would be unaccounted for." Amended Petition at 4. Now on appeal, they simply declare, without more, that it is "unacceptable to delay these inspections." Appeal Brief at 4. Regardless, though, of whether the petitioners have changed their position on these one-time inspections, they present no argument or rationale for why the schedule should be one way or the other.

with the contents of the application, but with the very structure of the Commission's adjudicatory process -- which requires petitioners to come forward now, rather than later, with contentions. But generic changes in our adjudicatory rules can be accomplished only through the rulemaking process, not through individual adjudications. The Board was correct in refusing to allow the petitioners to litigate generalized grievances.

C. Contention Four

Contention 4 is phrased as follows: "The Petitioners submit that the specific issue of the storage of spent fuel and the other radioactive substances on the site of the Oconee Nuclear Station must be addressed in these proceedings. In addition, the status and capacity of the current spent fuel storage facility must be disclosed and addressed. The real and potential availability and viability of other High Level Waste storage sites must be disclosed and addressed." See Appeal Brief at 4. The basis for the contention is the failure of Duke Energy's environmental report to address the onsite storage, transportation, and ultimate disposal of the Oconee facility's spent fuel.

We begin by noting generally that agencies are free either to determine issues on a case-by-case basis through adjudications or, when appropriate, to resolve matters generically through the rulemaking process. Otherwise, the agency would be required "continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." See Heckler v. Campbell, 461 U.S. 458, 467 (1983). Accord Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir.), cert. denied, 515 U.S. 1159 (1995). In the area of waste storage, the Commission largely has chosen to proceed generically. See generally id. at 1512-14, 1519-20; Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204-05, 211-13 (1998). Thus, where the Commission can determine that particular analyses or findings

are applicable to all nuclear power plants with common plant characteristics, the Commission frequently has chosen to codify these findings in environmental protection regulations.

Here, the petitioners' concerns in Contention 4 are, with one exception, already addressed generically by Commission regulation, and Duke Energy therefore did not have to provide a plant-specific discussion of these items in its environmental report. For instance, 10 C.F.R. § 51.53(c)(3)(i) explicitly states that an applicant's site-specific environmental report for operating license renewals need not contain an analysis of any issues identified as "Category 1" issues in Appendix B to Part 51, subpart A, because the Commission already has addressed those issues in a generic fashion. Category 1 issues include the radiological impacts of spent fuel and high-level waste disposal, low-level waste storage and disposal, mixed waste storage and disposal, and on-site spent fuel. See Table B-1, Part 51, Subpt. A, App. B. The Commission's generic determinations governing on-site waste storage preclude the petitioners from attempting to introduce such waste issues into this adjudication.

The Commission expressly has decided to address the environmental and radiological effects of onsite spent fuel storage generically in the context of license renewal. See, e.g., "Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 66,537, 66,538 (Dec. 18, 1996). Our rules state:

> [I]f necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.

10 C.F.R. § 51.23(a). Our rules also state that "[t]he expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository is not

available." See Table B-1, Part 51, Subpt. A, App. B. An applicant's environmental report therefore "need not discuss any aspect of the storage of spent fuel for the facility within the scope of [these] generic determinations.[4] 10 C.F.R. § 51.53(c)(2). See also NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants."

We turn next to the petitioners' claim that the environmental report should have addressed the "real and potential availability and viability of other High Level Waste storage sites." Again, the Commission has chosen to address this matter generically by rule. See 10 C.F.R. §§ 51.53(c)(2); 51.23(a)("the Commission believes ... that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor"). On appeal, the petitioners attack this finding, stating that it "appears suspect" because the candidate site of Yucca Mountain has yet to be licensed; the Department of Energy's target date for the repository has been missed; the capacity of the repository may be insufficient; and there have been safety-related incidents involving dry cask spent fuel storage. See Appeal Brief at 5.

Petitioners' effort to attack the Commission's "waste confidence" determination is unpersuasive. First, petitioners raise their waste confidence claim for the first time on appeal. That alone defeats the argument at a procedural level. See, e.g., Sequoyah Fuels Corp. (Gore, Okla. Site), CLI-97-13, 46 NRC 195, 221 (1997). Substantively, the petitioners' claims, even read in the most generous light, do not come close to showing why this proceeding

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[4] On a related point, the Commission handles as a separate licensing matter any applications for an onsite ISFSI. ISFSI licenses are granted under 10 C.F.R. Part 72. The Commission, for example, in 1990 granted Duke Energy a 20 year license to store spent fuel in an ISFSI at the Oconee facility. 55 Fed. Reg. 4035 (Feb. 6, 1990). The Commission provided an opportunity for a hearing on this license. 53 Fed. Reg. 26,122 (July 11, 1988). A request for an expansion of the spent fuel pool also would entail an opportunity for hearing. See 10 C.F.R. § 2.1107.

presents such special or different circumstances that it warrants disregarding or waiving the application of our generic spent fuel storage and high level waste disposal rules. See 10 C.F.R. § 2.758. At bottom, the petitioners voice concerns only about uncertainties in high-level waste disposal, uncertainties that the Commission has always acknowledged, but has decided will be overcome in the next several decades.

The Commission sensibly has chosen to address high-level waste disposal generically rather than unnecessarily to revisit the same waste disposal questions, license-by-license, when reviewing individual applications. High level waste storage and disposal, we have said, "is a national problem of essentially the same degree of complexity and uncertainty for every renewal application and it would not be useful to have a repetitive reconsideration of the matter." 61 Fed. Reg. 66,537, 66,538 (Dec. 11, 1996). The petitioners have presented no reason for the Commission to depart from its generic waste storage determinations in this proceeding and instead litigate the question in an individual case. If petitioners are dissatisfied with our generic approach to the problem, their remedy lies in the rulemaking process, not in this adjudication.

Lastly, pointing to 10 C.F.R. § 51.53(c)(3)(ii)(M), the petitioners claim that Duke Energy's environmental report should have addressed the impacts of transporting high-level waste to a high-level waste repository site. This is a matter not governed by a current Commission rule. But the Licensing Board correctly found that the transportation of spent fuel rods to an offsite repository is not an appropriate subject for a contention because it is the subject of a pending rulemaking. It has long been agency policy that Licensing Boards "should not accept in individual license proceedings contentions which are (or are about to become) the subject of general rulemaking by the Commission." See Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974); Duke Power

Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 86 (1985); Private Fuel Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142, 179 (1998).

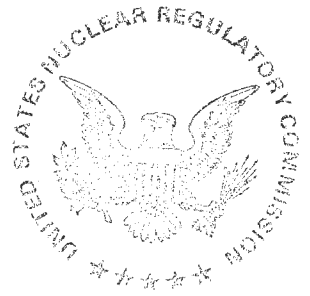
In a Staff Requirements Memorandum (SRM), dated January 13, 1998, the Commission directed the NRC staff to proceed with a rulemaking to amend 10 C.F.R. § 51.53(c)(3)(ii)(M) to categorize the impacts of transporting high-level waste as a generically addressed Category 1 issue. The Commission explicitly stated that current license renewal applicants should not address these transportation issues unless waiting for the rulemaking to be final would delay the license renewal proceeding. As the Licensing Board in this case indicated, a final rule on this question is expected no later than September 1999, and therefore this rulemaking is not expected to delay the anticipated December 2000 completion of the license renewal proceeding. See 48 NRC at 392.

On appeal, the petitioners merely argue that there is "no guarantee that the proposal to change the HLW rule will proceed unimpeded." Appeal Brief at 5-6. We note, however, that there have been no delays to date in the process and formal notice of the proposed rule already has been published. See 64 Fed. Reg. 9884 (Feb. 26, 1999). The petitioners may, of course, raise any concerns about the proposed rule by participating in this rulemaking. In any event, Duke Energy's license renewal application will not be granted without the resolution of this matter. Given current information, we agree with the Licensing Board that it would be "counterproductive" (and contrary to longstanding agency policy) to initiate litigation on an issue that by all accounts very soon will be resolved generically.

III. Conclusion and Order

For the reasons stated in this decision, the Commission hereby affirms LBP-98-33 in its entirety.

IT IS SO ORDERED.



For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15 day of April, 1999.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	Docket Nos. 50-269/270/287-LR
	)	
(Oconee Nuclear Station, Units 1, 2, and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-99-11) have been served upon the following persons by deposit in the U.S. mail, first class, as indicated by an asterisk (*) or through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by double asterisks (**), with copies by electronic mail as indicated.

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Docket Nos. 50-269/270/287-LR
COMMISSION MEMORANDUM AND ORDER
(CLI-99-11)

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Dated at Rockville, Maryland
this 15th day of April 1999