UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

DUKE ENERGY CORPORATION'S BRIEF IN OPPOSITION TO APPEAL OF CHATTOOGA RIVER WATERSHED COALITION

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I. INTRODUCTION

In accordance with 10 C.F.R. 2.714a(a), Duke Energy Corporation ("Duke") herein responds in opposition to the appeal filed on January 14, 1999, by the Chattooga River Watershed Coalition and the individuals that it represents (collectively, "CRWC" or "Appellants"). CRWC is appealing the decision of the NRC Atomic Safety and Licensing Board ("Licensing Board"), LBP-98-33, issued on December 29, 1998, denying the petition to intervene in this matter. Many of the issues raised on appeal by CRWC have already been addressed by the Commission, most recently in its decision on the *Calvert Cliffs* docket, CLI-98-25. CRWC presents no basis for the Commission to deviate from *Calvert Cliffs* or from its previously stated expectations for the conduct of this license renewal proceeding. The Licensing Board's decision is in accord with the Commission's clear directions, including the *Calvert Cliffs* precedent, and with the applicable requirements on admissibility of contentions. As such, LBP-98-33 must be affirmed.

II. STATEMENT OF CASE HISTORY

Duke filed its application to renew the operating licenses for Oconee Nuclear Station, Units 1, 2, and 3 (NRC license numbers DPR-38, DPR-47, and DPR-55), on July 6, 1998. On July 14, 1998, the NRC published in the *Federal Register* a Notice of Receipt of Duke's application. 63 Fed. Reg. 37909 (1998). Upon receiving Duke's application, the NRC Staff performed an acceptability and sufficiency review, and on August 11, 1998, published in the *Federal Register* its "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing Regarding Renewal of Licenses Nos. DPR-38, DPR-47, and DPR-55 for an Additional 20-Year Period." 63 Fed. Reg. 42885 (1998).

On July 28, 1998, the Commission issued a Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998) (also published at 63 Fed. Reg. 41872). This Statement of Policy updated prior Commission guidance governing NRC adjudicatory proceedings, including this one. Among other things, the Commission emphasized its expectation that its licensing boards enforce adherence to the Rules of Practice set forth in 10 C.F.R. Part 2. CLI-98-12, 48 NRC at 19. The Commission further emphasized that "the burden of coming forward with admissible contentions is on their proponent," and that the "proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2)." Id. at 22.

On September 8, 1998, the Appellants, including Chattooga River Watershed Coalition and the individuals that it represents -- Messrs. Norman "Buzz" Williams, William "Butch" Clay, and William Steven "W.S." Lesan -- submitted a letter seeking leave to intervene in the Oconee license renewal proceeding. On September 15, 1998, the Commission issued an Order,

CLI-98-17, referring the petition to the Licensing Board and prescribing detailed scheduling and policy guidance for the conduct of any hearing.[1/] The Commission reiterated, in the specific context of this proceeding, many of its expectations as articulated in the earlier Statement of Policy. Moreover, the Commission specified "milestones" for this proceeding, including a milestone for a decision on intervention petitions within 90 days following the date of the Order. CLI-98-17, 48 NRC at 127.

On September 18, 1998, the Licensing Board appointed to preside over this matter issued an initial prehearing Order setting forth its directives and expectations regarding the conduct of this proceeding, and establishing an initial schedule for amended intervention petitions, including proposed contentions and responses.[2/] This initial prehearing Order provided (at 2) that the petitioners could file an amendment to their petition to "address any shortcomings in their initial pleading in addressing the requirements of 10 C.F.R. § 2.714(a)(2)" no later than September 30, 1998.

In accordance with the Licensing Board's initial prehearing Order, CRWC made a second filing, directed solely at the issue of petitioners' standing, on September 30, 1998. This filing, however, was insufficient to establish standing. The Licensing Board identified certain defects in this regard in an October 1, 1998 Order.[3/] (See Oct. 1, 1998 Order at 3, note 2.) In that Order, the Licensing Board allowed the petitioners additional time, until October 30, 1998, to

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1/ "Order Referring Petition for Intervention and Request for Hearing to Atomic Safety and Licensing Board Panel," CLI-98-17, 48 NRC 123 (September 15, 1998).

2/ "Memorandum and Order" (September 18, 1998).

3/ "Order (Ruling on Request for Extension of Time)" (October 1, 1998).

supplement their petition to intervene, in order to: (1) address defects and establish their standing, and (2) propose all of their contentions for litigation, in accordance with the requirements of 10 C.F.R. § 2.714(b)(2). Duke and the NRC Staff were directed to respond to the supplement and any proposed contentions by November 16, 1998.

CRWC's filing of October 30, 1998,[4/] amended, supplemented, and effectively superseded its earlier filings. CRWC set forth additional information relating to the petitioners' standing to intervene and proffered four proposed contentions. In addition, CRWC requested a stay of this proceeding for some months -- defined as "at least ninety days" after Duke has submitted its responses to all of the Requests for Additional Information ("RAIs") made by the NRC Staff on the Oconee renewal application. CRWC argued that this additional time was needed to enable them to prepare a supplemental list of contentions. Proposed Contentions, at 5.

On November 16, 1998, both Duke[5/] and the NRC Staff[6/] filed timely responses to CRWC's request to intervene, proposed contentions, and request for a stay. Duke opposed the request for a hearing on the basis that CRWC had failed to identify a single admissible contention, and had therefore failed to satisfy the requirements of 10 C.F.R. § 2.714. Duke also argued that the request for a stay of the proceeding to allow petitioners additional time in which to prepare contentions should be denied as inconsistent with the Commission's delegation Order in this case,

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4/ "Petitioner's [sic] First Supplemental Filing" (October 30, 1998) (hereafter, "Proposed Contentions").

5/ "Response of Duke Energy Corporation to Supplemental Petition to Intervene Filed by Chattooga River Watershed Coalition and Norman "Buzz" Williams, William "Butch" Clay, and William "W.S." Lesan" (November 16, 1998) (hereafter, "Duke's Initial Response").

6/ "NRC Staff's Response to Petitioner's First Supplemental Filing" (November 16, 1998).

CLI-98-17, and with ample Commission precedent. The NRC Staff took a similar position in its response, arguing that the petition to intervene must be denied given the failure of CRWC to propose contentions satisfying 10 C.F.R. § 2.714(b)(2). The Staff also concluded that the stay request should be denied because CRWC had not satisfied the requirements of 10 C.F.R. § 2.788.

On November 19, 1998, the Licensing Board issued an Order requesting additional information from the NRC Staff on High Level Radioactive Waste ("HLW") transportation issues raised by CRWC's Proposed Contention 4.[7/] The Licensing Board requested an update regarding the status of the Commission's rulemaking relating to 10 C.F.R. § 51.53(c)(3)(ii)(M) on the generic and cumulative environmental impacts associated with the transportation of HLW in the vicinity of Yucca Mountain. The NRC Staff responded to the Licensing Board's request for information on December 2, 1998. In its filing, the Staff stated its expectation that the Oconee license renewal proceeding would be completed by December 2000, and that the Commission's HLW transportation rulemaking, initiated on January 13, 1998, would be completed and result in a final rule by September 1999. The Staff further indicated that, given these schedules, the HLW transportation rulemaking would not delay the Oconee license renewal process so as to require Duke to address on a plant-specific basis the generic, cumulative impacts of HLW transportation in the vicinity of a HLW repository. In a December 9, 1998 response to the Licensing Board, Duke concurred with the NRC Staff's position.[8/] Both Duke and the NRC Staff concluded that the generic matter of potential

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7/ "Order (Requesting Information from Staff)" (November 19, 1998).

8/ "Response of Duke Energy Corporation to the Licensing Board Order Requesting Information Concerning the High-Level Radioactive Waste Transportation Rulemaking" (December 9, 1998).

impacts of HLW transportation in the vicinity of the HLW repository is not an appropriate issue for litigation in this proceeding.

CRWC's December 9, 1998 response to the Licensing Board's questions on the HLW matter[9/] clearly exceeded the scope of the inquiry by introducing purported "new information that has bearing on [petitioners'] contentions." Essentially, CRWC referenced several RAIs from the ongoing NRC Staff review of the Oconee application, and argued that these RAIs support CRWC's contentions (principally, Proposed Contentions 1 and 2) alleging that the application is "incomplete" and must be summarily dismissed. Both Duke and the NRC Staff filed motions seeking leave to respond to the purportedly "new information" submitted by CRWC, and on December 14, 1998, the Licensing Board issued an Order granting leave to respond.[10/] Duke filed its response on December 21, 1998;[11/] the NRC Staff responded on December 22, 1998.[12/]

On December 29, 1998, the Licensing Board issued its Order, LBP-98-33, denying CRWC's requests for intervention and for a stay.[13/] The Licensing Board found that the three individual petitioners, as well as CRWC as the organization representing their interests, have

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9/ "Petitioners' Response to the Atomic Safety & Licensing Board's (ASLB) Request for Additional Information and New Information for the ASLB to Consider with the Petitioners' First Supplemental Filing" (December 9, 1998) (hereafter, "CRWC's Additional Information").

10/ "Order (Request by Staff and Applicant to File Responses)" (December 14, 1998).

11/ "Duke Energy Corporation's Response to New Information Submitted by Chattooga River Watershed Coalition in Support of Proposed Contentions" (December 21, 1998) (hereafter, "Duke's Additional Response").

12/ "NRC Staff's Response to Petitioners' New Information" (December 22, 1998).

13/ "Memorandum and Order (Denying Petition to Intervene)" (December 29, 1998).

standing to intervene. However, the Licensing Board rejected all four of the proposed contentions because CRWC failed to meet NRC requirements governing the admissibility of proposed contentions. Accordingly, the Licensing Board denied the petition to intervene. Appellants seek review of the decision pursuant to 10 C.F.R. § 2.714a.[14/] Duke herein responds in opposition to the appeal.[15/]

III. ARGUMENT

A. *Proposed Contention 1 Was Properly Rejected.*

Proposed Contention 1 asserts that, as a matter of law and fact, Duke's license renewal application is "incomplete" and that it should be "withdrawn and/or summarily denied." The Licensing Board properly found this contention to be "inadequate for failure to demonstrate, as required by 10 C.F.R. § 2.714(b)(2)(iii), that a genuine dispute exists on a material issue of law or fact." LBP-98-33, slip op. at 9. The Licensing Board observed: "Because the petitioners have only shown that the [NRC] staff review is ongoing and have not identified instances where the application itself is allegedly in error, Contention 1 must be rejected." Id. at 10. The Licensing Board's decision is unassailably the correct decision, based on longstanding Commission precedent, including the recent *Calvert Cliffs* case.

14/ See CRWC's "Notice of Appeal" and "Brief in Support of Appeal of Order Denying Intervention Petition and Dismissing Proceeding" (January 14, 1999) (hereafter, "Appeal Brief").

15/ The Licensing Board also rejected CRWC's request for a stay of the proceeding.

On appeal, CRWC's argument on this contention focuses solely on the existence of several pending NRC Staff Requests for Additional Information on Duke's license renewal application for Oconee.[16/] Offering these RAIs as the sole basis for admission of the contention, Appellants argue that the RAIs "are prima facie evidence supporting CRWC's first contention that the application is incomplete." Appeal Brief, at 2. They offer no other basis for the proposed contention and advance no other argument to support its admissibility. Therefore, this is an issue easily decided. The Commission has already rejected identical arguments, most recently in the *Calvert Cliffs* case.

As cited by the Licensing Board in the decision below (LBP-98-33, slip op. at 10-11), the Commission in *Calvert Cliffs* squarely held that:

> . . . the NRC Staff's mere posing of questions does not suggest that the application was incomplete, or that it provided insufficient information to frame contentions. Indeed, were the application as rife with serious omissions as [the petitioner] suggests, then [the petitioner] should have no problem identifying such inadequacies -- yet [it] has not done so. What [the petitioner] ignores is that RAIs are a standard and ongoing part of NRC licensing reviews. Questions by the NRC regulatory staff simply indicate that the staff is doing its job: making sure that the application, if granted, will result in safe operation of the facility. The staff assuredly will not grant the

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16/ The Appellants' original basis for proposed Contention 1 was comprised of two components: 1) two generic topical reports on license renewal issues subject to ongoing NRC Staff review and 2) the pending NRC Staff RAIs on the Oconee application. The argument with respect to the first was that the matters addressed in the topical reports were still subject to NRC Staff review, and thus the application was incomplete. Proposed Contentions, at 3. Duke addressed the inadequacy of this basis in Duke's Initial Response to the proposed contention. Duke's Initial Response, at 10-12. Because this basis was focused only on Staff "open items," it was rejected by the Licensing Board. LBP-98-33, slip op. at 10. CRWC appears to have accepted the Licensing Board's decision in that they did not appeal this aspect of LBP-98-33.

> renewal application if the responses to the RAIs suggest unresolved safety concerns.

Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC ___, slip op. at 20 (December 23, 1998).

CRWC essentially "borrowed" both Proposed Contention 1 and its argument on appeal from the petitioner in the *Calvert Cliffs* case. As with the petitioner in the *Calvert Cliffs* case, nothing raised by CRWC suggests that the Oconee application is "rife with serious omissions." Notwithstanding the perfectly foreseeable need to issue RAIs, the NRC Staff accepted the Oconee license renewal application as sufficient for review. See 63 Fed. Reg. 42885-42887 (August 11, 1998). As in *Calvert Cliffs,* the existence of RAIs certainly does not mean that a license application is "incomplete" and must be rejected. See also Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995). The Licensing Board correctly applied this precedent. Its decision finding the RAIs to be an insufficient basis for a contention is also consistent with that of earlier licensing boards. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146 (1993); Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346 and 357-58 (1991) (rejecting contentions/bases merely referencing Staff questions).[17/]

17/ Proposed Contention 1 must be rejected in the first instance because it contravenes NRC precedent, including the *Calvert Cliffs* decision. But CRWC goes so far as to request the extraordinary relief of summary dismissal of the application based solely on the existence of RAIs. Even if the contention were valid, dismissal of the application would not be an appropriate remedy. Compare Commonwealth Edison Company (Byron Nuclear Power Station, Units 1 and 2), ALAB-770, 19 NRC 1163, 1169 (1984) ("uncertainty" regarding a license application does not warrant an outright denial of the application); see 10 C.F.R. § 2.714(d)(2)(ii).

In the proceedings below, CRWC advanced the RAI argument in its December 9, 1998 unauthorized filing, citing purportedly "new information" to support its proposed contentions. The "new information," in fact, was no more than NRC Staff RAIs. Duke addressed this issue in Duke's Additional Response of December 21, 1998 (at 4-5), and the discussion there still applies. As Duke suggested, if every RAI could spawn a contention or new "basis," the original contention would do nothing to identify the issues for litigation; the eventual litigation scope would ultimately turn on the NRC Staff's review and the scope of the hearing would be, in effect, unbounded. A contention stating merely that the application is "incomplete" is not a contention at all, and thus cannot be admitted.

The balance of CRWC's argument on appeal of this contention revolves around perceived prejudice to petitioners if they must frame contentions based on the application -- in effect, without benefit of the NRC Staff's review. This argument, like the proffered bases itself (i.e., the existence of RAIs), is not new. The Commission already addressed and dismissed the same argument in *Calvert Cliffs*. See Calvert Cliffs, CLI-98-25, slip op. at 22 ("if the Commission were to take [the petitioner's] preferred approach, and allow 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 proceedings, such as the Commission contemplated for license renewal, would prove impossible"); see also Baltimore Gas & Electric Company (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45, 50 (August 26, 1998) ("[t]o be sure, diligence and effort will be required, but that is true in litigation of any stripe, at least where deadlines govern"). The Commission's expectations for this proceeding were the same as for

Calvert Cliffs, as plainly expressed in the Order on this docket delegating this matter to the Licensing Board. See CLI-98-17, 48 NRC at 126-28.

The Commission also rejected arguments similar to Appellants' in amending its Rules of Practice in 1989. See 54 Fed. Reg. 33168, 33171 (1989) ("[t]he Commission also disagrees with the comments that § 2.714(b)(2)(iii) should permit the petitioner to show that it has a dispute with the Commission Staff or that petitioners not be required to set forth facts in support of contentions until the petitioner has access to NRC reports and documents"). Indeed, the Commission rejected these arguments as far back as 1983, in Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048-49 (1983). That case has long stood for the proposition that the focus of a contention is the application; petitioners are not permitted to delay submittal of proposed contentions pending the availability of other NRC documents or reports, or the applicant's responses to RAIs, or pending the availability of discovery. The Commission's rules require a petitioner to review the application and offer some facts or evidence of its own to support a contention on the application.[18/]

CRWC attempts (Appeal Brief, at 2) to excuse their failure to identify and articulate a technically sound contention upon the fact that the NRC Staff's review of the Oconee license renewal application is incomplete. The Appellants assert that in formulating contentions, it is their "right" as taxpayers and concerned citizens to "access the complete assembly of technical and scientific facts produced by the NRC Staff." Id. They complain that this "complete assembly" of

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18/ The Licensing Board also correctly applied these Commission policies and precedents in LBP-98-33, in denying CRWC's request for a stay of the proceeding pending submittal of all of Duke's RAI responses. LBP-98-33, slip op. at 21-25.

information will not be available until the completion of the Staff's review of the application. As set forth above, however, NRC precedent makes clear that petitioners who seek to intervene in NRC proceedings may not delay filing proposed contentions until the Staff's licensing review is complete. CRWC is attempting to manipulate the NRC regulatory process and established adjudicatory deadlines to use the NRC Staff as its technical experts. However, Appellants may not transfer their independent responsibility to articulate a valid basis for proceeding with this litigation to the NRC Staff. CRWC has had months to join forces with qualified technical experts to review the Oconee application and frame any resulting technical concerns as proposed contentions. They assumed that responsibility by entering this adjudicatory forum. CRWC's failure to fulfill this responsibility should not accrue to their benefit. In short, CRWC cannot be heard to complain that they are somehow prejudiced by their own failure to fulfill the responsibilities attendant to one's status as a litigant in this type of proceeding. This contention was properly rejected by the Licensing Board.

B. *Proposed Contention 2 Was Properly Rejected.*

Proposed Contention 2 asserts that Duke's license renewal application "does not meet the [NRC's] aging management and other safety-related requirements," and requests that the application be "withdrawn and/or summarily dismissed." This contention is also premised only on RAIs and allegedly open Staff review items, and is substantively identical to Proposed Contention 1. The Licensing Board properly rejected this contention, for lack of a basis. LBP-98-33, slip op. at 12-14. The Licensing Board's decision is clearly correct. CRWC failed to specify a technical

challenge to the application and failed to offer any legitimate basis sufficient to show the existence of a genuine dispute. 10 C.F.R. § 2.714(b)(2).[19/] The Licensing Board's decision must be affirmed.

As originally articulated in the supporting "basis" statement, Proposed Contention 2 alleged that the Oconee license renewal application was "incomplete" in describing "aging management program activities." It was specifically directed to Duke's treatment in the renewal application of two generic topical reports on aging effects and aging management programs. Proposed Contentions, at 4. As explained in Duke's Initial Response (at 15-17), the "basis" statement offered at the time by CRWC reflected their misunderstanding of the application, of how the generic topical reports were being utilized, and of how Duke addressed Renewal Applicant Action Items from the topical reports in the Oconee application. As described in Duke's Initial Response, the NRC Staff's review of these topical reports is complete, Safety Evaluation Reports ("SERs") have been issued, and Duke's application has addressed the necessary Renewal Applicant Action items. See Duke's Initial Response, at 14-18. The Licensing Board correctly dismissed these proffered bases as inadequate. LBP-98-33, slip op. at 12-13.

Nowhere below and nowhere on appeal does CRWC provide a basis for an independent challenge to the technical adequacy of the matters addressed in license renewal topical reports, the SERs on those reports, or Duke's Oconee application. Proposed Contention 2 has always been styled as a challenge to the "completeness" of the Oconee application, in effect identical to Proposed Contention 1. The original "basis" statement began by cross-referencing the alleged "basis" for Proposed Contention 1, focusing on the "completeness" concern. Proposed Contentions,

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19/ See also n. 17, above.

at 4. In its unauthorized supplemental filing of December 9, 1998, CRWC attempted to link several specific RAIs to this contention, again focusing on the "completeness" of the application (i.e., the purported lack of certain information). CRWC's Additional Information, at 2-3. And, on appeal, Appellants are again arguing that Duke's application is "incomplete." Proposed Contention 2 is premised at this appeal stage only on Staff RAIs. For each RAI reference, CRWC recites that "there exists a fundamental void in the application." Appeal Brief, at 3-4. As with Proposed Contention 1, the logic is that because the NRC Staff has questions in this area (i.e., RAIs), the application is not complete.

As such, the Appellants' argument is identical to the argument made with respect to Proposed Contention 1. And for the same reasons discussed above, this proposed contention must also be rejected. RAIs do not suggest, much less prove, the existence of a "fundamental void" in the application. Calvert Cliffs, CLI-98-25, slip op. at 20. A Staff request for clarification or additional information is common in a Staff technical review and, in itself, is not indicative of a deficiency. Id. Appellants have never articulated, or supported with a technical basis, a specific and genuine technical issue directed at some portion of the Oconee license renewal application.

The reference to "aging management programs" in Proposed Contention 2 may narrow the focus a bit more than Proposed Contention 1. However, this is not a sufficient focus. The proposed contention never rises to anything more than a "completeness" contention. Proposed Contention 2 simply asserts that the Oconee renewal application "does not meet the aging management and other safety-related requirements." It remains a bald assertion insufficient to meet the standards of Section 2.714(b)(2). "Neither Section 189a of the Atomic Energy Act nor § 2.714 . . . permits the filing of a vague, unparticularized contention . . ." See 54 Fed. Reg. 33168, 33170

(August 11, 1989) (Supplementary Information for 1989 amendments to 10 C.F.R. § 2.714, quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983)). Rather, an admissible contention requires that a petitioner "refer to the specific portion of the license application being challenged, state the issue of fact or law associated with that portion, and provide a 'basis' of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or expert opinions." Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996). As the Commission clearly decided in *Calvert Cliffs,* a mere recitation of RAIs does not support a contention that Duke's approach to aging management or inspection activities is incomplete or technically inadequate.

In amending its Rules of Practice in 1989 to adopt 10 C.F.R. § 2.714(b)(2)(iii), the Commission clearly intended to restrict formal adjudicatory proceedings to genuine disputes on material issues of law or fact. Regarding its revised Rules of Practice, the Commission has stated:

> These requirements are designed to raise the Commission's threshold for admissible contentions and to require a clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources that establish the validity of the contention. See 54 Fed. Reg. 33168, 33170 (August 11, 1989).

Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).[20/] CRWC failed to meet the perceptibly heightened pleading standard

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20/ In Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n, 920 F.2d 50 (D.C. Cir. 1990), the Court upheld the NRC's revisions to 10 C.F.R. § 2.714, compared the amended Section 2.714(b) to the prior version, and confirmed that "[t]he new rule perceptibly heightens th[e] pleading standard" for contentions. Id. at 52.

for proposed contentions. In asserting only that several RAIs demonstrate the "incompleteness" of the application, CRWC failed to define a precise technical issue. And, because CRWC offered no support other than an RAI -- no independent basis for a technical dispute regarding the adequacy of the Oconee aging management programs (such as a third-party document or an expert opinion) -- they failed to meet 10 C.F.R. § 2.714(b)(2). See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-75 16 NRC 986, 993 (1992) (rejecting a broad assertion that an emergency plan is inadequate, without specifying a portion of the plan that is inadequate); Florida Power and Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 515, 521 at n.12 (1990) (rejecting a proposed contention which alleged omissions and errors in the applicant's documents and analyses, but lacked any independent bases concerning the importance of the alleged omissions).

On appeal, CRWC cites two RAIs (RAI 4.3.9-2 and General Question G-2) related to the timing of certain inspection activities related to aging management. Appeal Brief, at 4. These RAIs were first cited in the unauthorized filing of December 9, 1998. CRWC, then and now, appears to be arguing that these inspections should not be delayed until the period between the issuance of license extension and the expiration of the current license. CRWC urges the acceleration of these inspections, not for any technical reason, but because failure to conduct the inspections now would somehow deprive CRWC of information and render the application "incomplete." In its appeal brief, CRWC asserts that "it is inappropriate and unacceptable to delay these inspections to the time period between the issuance of a license extension and the expiration of the existing license." Appeal Brief, at 4. However, CRWC has never provided technical support for such an assertion; it has never explained which "one-time inspections" it has in mind, or provided support for the notion

that delay of these inspections would be *technically* unacceptable. The NRC's license renewal regulations require aging management programs to address aging effects during the renewal period. "One-time inspections" will be conducted to characterize aging effects (if any) and to determine whether additional actions are required to manage them. In general, delaying these inspections provides further time for any aging effect to manifest itself, so that an appropriate aging management program can then be implemented prior to the beginning of the period of extended operation. While the precise timing of certain inspections may remain a matter of discussion with the NRC Staff, no technical rationale is offered by Appellants to justify conducting these inspections at the present time.[21/]

Whether it be RAIs and responses, or inspections and results, in Proposed Contention 2 Appellants are not really arguing the technical merits of Duke's aging management programs. Appellants are arguing that they want more information, up front. However, as discussed above, this is a position which the Commission has rejected on numerous occasions. CRWC and its members

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21/ The confusion created by CRWC on this particular matter further belies the lack of a basis for a technical challenge to the application on this question. In the original basis statement for this proposed contention, CRWC appeared to argue the point exactly the opposite from its position now: that a "one-time inspection" should be conducted closer to the period of extended operation to avoid missing several years of "wear and tear." Appellants now assert, however, that this was not the intent of their argument. In any event, management of "wear and tear" *during the present license term* is clearly not an appropriate issue for a license renewal proceeding. See, e.g. 60 Fed. Reg. 22461, 22463-64 (May 8, 1995) ("issues that are relevant to current plant operation will be addressed by the existing regulatory process rather than deferred until the time of license renewal"). The Licensing Board construed the concern as focusing on conducting one-time inspections early in the "extension's early years" and properly rejected this formulation of the basis because it was "based on a misunderstanding about this subject." LBP-98-33, slip op. at 13. The Licensing Board was correct that a "one-time inspection is not the same as age-related management during the period of extended operation." If an aging effect is identified due to an inspection or industry experience, an aging management program will be required.

are not being deprived an opportunity to participate and comment on the license renewal application. All aspects of the application and review process are open and accessible to the public for comment, and will remain so throughout the process -- whether or not this proceeding continues. However, if CRWC or any other petitioner wishes to participate in this formal and expensive litigation process, it must be prepared to state an issue of its own and provide an evidentiary basis. CRWC has simply failed to do so and the Licensing Board correctly rejected this proposed contention.

C. *Proposed Contention 4 Was Properly Rejected.*

Through Proposed Contention 4, CRWC seeks to address in this proceeding the specific issue of the storage of spent nuclear fuel ("SNF") and other radioactive substances at Oconee, the status and capacity of the current Oconee spent fuel storage facility, the transport of radioactive materials to other locations, and the generic issue of the "availability and viability" of the proposed High Level Waste ("HLW") repository. Proposed Contentions, at 5. CRWC further argues that Duke's license renewal application fails to comply with the Commission's existing requirements in 10 C.F.R. § 51.53(c)(3)(ii)(M), related to cumulative environmental impacts of transportation of HLW in the vicinity of the candidate HLW repository site at Yucca Mountain. Appeal Brief, at 4. This proposed contention raises matters that are explicitly beyond the scope of this proceeding because they have been or will be addressed in generic rulemakings.[22/] In LBP-98-33, the Licensing Board properly ruled (slip op. at 17-18) that none of the issues raised by Proposed Contention 4 -- including on-site storage issues, the availability of an ultimate disposal site for

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22/ The use of the NRC's rulemaking authority is appropriate to determine issues that do not require case-by-case consideration. "A contrary holding would require the agency 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).

Oconee spent fuel, and transportation impacts in the vicinity of Yucca Mountain -- can provide the basis for an admissible contention in this proceeding. The Licensing Board's dismissal of Proposed Contention 4 must be affirmed.

The Licensing Board first rejected (LBP-98-33, slip op. at 18-19) those aspects of Proposed Contention 4 dealing with the storage of HLW and SNF, citing NRC regulations which explicitly provide that license renewal applicants need not (either in the Environmental Report or elsewhere) perform analyses or provide other information concerning on-site storage of SNF, disposal of SNF and HLW, or the storage and disposal of low-level radioactive waste ("LLW") and mixed waste. See 10 C.F.R. §§ 51.53(c)(3)(I), 51.95(c); see also Part 51, Subpart A, Appendix B, Table B-1. Waste transportation impacts are similarly addressed in Part 51, Table S-4. These matters have all been addressed in the NRC's Generic Environmental Impact Statement ("GEIS") for License Renewal, NUREG-1437, and in the NRC's Waste Confidence rulemaking. The Commission's regulations clearly preclude the litigation of these matters in this proceeding.[23/]

In its Waste Confidence rulemaking, the NRC made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least thirty years beyond the licensed operational life of that reactor (including the term of any renewed license) in a spent fuel pool or at onsite or offsite independent spent fuel storage installations. Further, the NRC determined that "reasonable assurance" exists that at least one mined geologic repository will be available within the first quarter of the twenty-first

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[23/] On-site storage of SNF at Oconee in the Independent Spent Fuel Storage Installation is separately licensed under 10 C.F.R. Part 72. SNF storage in the spent fuel pool is also separately licensed under 10 C.F.R. Part 50. These matters are governed by NRC licensing regimes completely independent of the license renewal application and this proceeding.

century, and that sufficient repository capacity will be available within thirty years beyond the licensed life for operation of any reactor to dispose of the HLW and SNF originating in such reactor and generated up to that time. See 10 C.F.R. § 51.23(a) and 51.53(c)(2); see also 49 Fed. Reg. 34658 (August 31, 1984); 55 Fed. Reg. 38472 (September 18, 1990).[24/] In addition, in establishing its rules for environmental review of license renewal applications, the NRC specifically reiterated its belief that "there is sufficient understanding and experience with the storage of [low level waste] and [high level waste] to conclude that the waste generated at any plant can be stored safely and without significant environmental impacts. . . ." See 61 Fed. Reg. 66537, at 66537-38 (December 18, 1996) (Supplementary Information accompanying the 1996 amendments to 10 C.F.R. Part 51).[25/] The Oconee situation falls squarely within these generic determinations.

The Commission's rules and regulations are not subject to attack in NRC adjudicatory proceedings, including license renewal proceedings. The sole exception to this rule is a showing of "special circumstances" demonstrating that the application of the regulation would not serve the purposes for which the regulation was adopted. See 10 C.F.R. § 2.758(b). In Proposed Contention 4, CRWC is clearly attacking the substance of the Commission's regulations, but has not met the strict standard of Section 2.758. There are no "special circumstances" that would justify further inquiry in this proceeding. Indeed, far from showing any "special circumstances" that arguably

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24/ Duke understands that the NRC currently anticipates updating its Waste Confidence decision again in the year 2000. See 55 Fed. Reg. 38474, 38475 (Sept. 18, 1990).

25/ Compare Pacific Gas and Electric Co. (Diablo Canyon Nuclear Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993) and Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 107-110 (1990) (both rejecting similar waste storage contentions in proceedings on amendments extending the term of plant operation by means of "construction period recapture").

would allow this proposed contention to be litigated, the Appellants offer no new basis at all for challenging this aspect of the Licensing Board's dismissal of Proposed Contention 4. For example, Appellants challenge the Waste Confidence rule by citing various facts and events that relate in some fashion to the issue of SNF storage and to the Yucca Mountain candidate HLW repository site. Appeal Brief, at 5. However, beyond a mere recitation of their views on certain events, Appellants fail to demonstrate how any of the examples cited support their assertion that license renewal "challenges" or "compromises" the NRC's Waste Confidence rule. Appellants' assertion that "the NRC's Waste Confidence Decision appears suspect" never rises to more than an improper challenge to NRC regulations under 10 C.F.R. § 2.758.[26/]

On appeal, CRWC further focuses Proposed Contention 4 onto the transportation of HLW/SNF and how Duke addresses 10 C.F.R. §51.53(c)(3)(ii)(M). CRWC asserts that the environmental impacts of transportation of spent fuel to "other locations" must be addressed in the Oconee license renewal application. Here CRWC recites the same arguments raised in their December 9, 1998 filing before the Licensing Board (CRWC's Additional Information, at 1-2). The Licensing Board properly found, however, that the "transportation of spent fuel rods from the Oconee reactor to an off-site storage site is not a permissible subject for a contention in this proceeding." LBP-98-33, slip op. at 19. At the explicit direction of the Commission in a Staff

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26/ Moreover, CRWC may not raise new arguments such as these for the first time on appeal. See Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 at n.30 (1997); Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-845, 24 NRC 220, 235, 248 at n.29 (1986) ("[I]n keeping with court practice, arguments and issues not raised before the Board below cannot properly be pressed initially on appeal. ALAB-836, 23 NRC at 496 n.28.") The Commission should strike or refuse to consider this portion of the appeal.

Requirements Memorandum ("SRM") of January 13, 1998,[27] these issues are currently the subject of an ongoing NRC rulemaking. When completed, the rulemaking will remove the requirement in Section 51.53(c)(3)(ii)(M) for license renewal applicants to discuss in their plant-specific Environmental Reports "the generic and cumulative impacts associated with transportation operation in the vicinity of a high-level repository site." Pending completion of the rulemaking, in accord with the SRM, applicants need not address this issue on a plant specific basis if the final rule will be issued at a time so as not to delay the license renewal proceeding in question. As shown by the NRC Staff's response to the Licensing Board's request, this is indeed the case with the Oconee application. These issues will be addressed generically through a generic finding and a supplement to the GEIS.

Consistent with the SRM, the Licensing Board found no valid reason for requiring Duke to address this narrow issue in the license renewal Environmental Report:

> In SRM M970612 dated January 13, 1998, the Commission directed staff to proceed with a generic rulemaking for the transportation of high-level waste. In it, the Commission also stated that license renewal applicants would not have to include these transportation issues in their applications if the rulemaking would not delay the license renewal application. See SECY-97-279 and SRM M970612 attached to Staff's November 16, 1998 Response as Attachment 2. Although this board is not bound by Commission SRMs, we agree with the general concept that it would be counterproductive to litigate issues which are being treated in an ongoing generic rulemaking unless there is good reason to do otherwise. As the Commission has recognized, delay to a license extension proceeding would provide a good basis for requiring treatment of the fuel transportation issue in the application and not awaiting completion of the transportation rulemaking. However, because this rulemaking commenced on January 13, 1998 and will become effective no later than September

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[27] SRM M970612 (January 13, 1998).

> 1999, it is clear that the rulemaking will not delay the December 2000 completion of the Oconee license renewal proceeding. See NRC Staff Response of December 2, 1998 and affidavit of Donald P. Cleary attached thereto. No other good reasons are apparent as to why high-level [waste] transportation information should be included in the Oconee application.

LBP-98-33, slip op. at 19-20. Appellants fail to state any new facts or legal grounds that might undermine the validity of the Licensing Board's decision on this issue.[28/]

Appellants' discussion of Proposed Contention 4 also cites 10 C.F.R. § 2.788 and argues (Appeal Brief, at 5) that they have requested that these proceedings be "stayed" for an indeterminate time until Duke "complies" with Section 51.53(c)(3)(ii)(M). While Appellants previously contended that Duke needs to address Section 51.53(c)(3)(ii)(M) on a site-specific basis, any request for a "stay" of the proceeding pursuant to 10 C.F.R. § 2.788 is novel on appeal and should be denied. Furthermore, Section 2.788 is inapposite under the current circumstances. That regulation applies to stays of decisions pending review, not to "stays" of proceedings. Here there is no decision to be stayed pending review. Appellants' "stay" request amounts to no more than the very same argument now before the Commission on review: CRWC's argument that Duke should address HLW impacts in the vicinity of Yucca Mountain on this docket, as opposed to allowing it to be addressed generically in the NRC rulemaking. However, as discussed above, the Commission

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28/ Appellants' reference to a December 17, 1998 letter to NRC Chairman Jackson from the South Carolina Congressional delegation (Appeal Brief, at 5) does not support the admissibility of Proposed Contention 4. Most importantly, this reference does not challenge (and is not intended to challenge) any aspect of the NRC license renewal review process, or the Licensing Board's ruling rejecting Proposed Contention 4 in its entirety. In addition, when read in context, the letter actually expresses confidence in the "ultimate success" of the HLW repository program.

has already spoken on this issue in SRM M970612.[29/] Moreover, there is no legal basis for the approach advocated by Appellants. See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998) ("[A] contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible.")

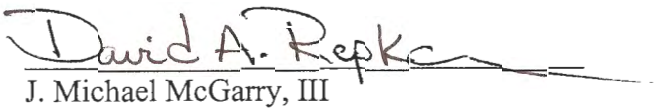
In sum, Proposed Contention 4 seeks to address generic issues related to HLW and LLW storage, transportation, and disposal -- generic issues that the Commission has chosen to preclude from plant-specific litigation. The Licensing Board properly rejected this contention. CRWC could more properly pursue these matters in a petition for rulemaking or, in the case of the issue on Section 51.53(c)(3)(ii)(M), in comments on the upcoming rulemaking. The Licensing Board's decision rejecting the proposed contention was correct, and should be affirmed.

29/ Even if Section 2.788 could be construed to apply, Appellants do not provide any basis for a "stay" other than their core assertion regarding Section 51.53(c)(3)(ii)(M). They do not address the four criteria in Section 2.788(e), other than a passing reference to the "public interest" and a cursory assertion that their interests will be "irreparably" injured if a major radiological accident occurs due to Duke's "neglecting to determine and follow an approved plan for the management and transportation of Oconee Nuclear Station's repository of HLW." Appeal Brief, at 5. Such unsupported assertions fall far short of the stringent showing required to justify the extraordinary remedy of a stay. Moreover, Appellants have not made any showing of how they will be "irreparably" injured if this proceeding is not stayed. They cite no specific problems in the Oconee renewal application that might cause the postulated "major radiological accident" mentioned. Nor have the Appellants met the third criterion under Section 2.788(e) by demonstrating how Duke would not be harmed by such a delay. Finally, the Appellants have not demonstrated that the public interest would be served by granting a stay, and do not acknowledge the countervailing public interest requiring the timely completion of adjudicatory proceedings.

IV. CONCLUSION

For the reasons set forth above, the Licensing Board's decision in LBP-98-33 should be affirmed.

Respectfully submitted,



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Dated at Washington, D.C.
this 25th day of January, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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 "DUKE ENERGY CORPORATION'S BRIEF IN OPPOSITION TO APPEAL OF CHATTOOGA RIVER WATERSHED COALITION" in the above captioned proceeding have been served upon the following by electronic mail or facsimile as noted, with conforming copies and additional service deposited in United States Mail, first class, this 25th day of January 1999.

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