

DOCKETED
USNRC

December 21, 1998
'98 DEC 22 P3:31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ADJ.

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 RESPONSE TO
"NEW INFORMATION" SUBMITTED BY CHATTOOGA RIVER
WATERSHED COALITION IN SUPPORT OF PROPOSED CONTENTIONS

I. INTRODUCTION

On November 16, 1998, Duke Energy Corporation ("Duke") responded to the October 30, 1998 "First Supplemental Filing" submitted by the Petitioners in this proceeding. Duke opposed admission of all four contentions proposed by the Petitioners in that document. Then, by a filing dated December 9, 1998, but actually received by Duke on December 10, 1998, the Petitioners offered what they assert to be "new information" to support the proposed contentions. On December 14, 1998, the Licensing Board allowed Duke the opportunity to respond to this unauthorized filing. Duke herein responds and demonstrates that this "new information" does not support admission of the proposed contentions. Petitioners have still failed to provide any basis, documentary or otherwise, to support any contention that the Oconee application is incomplete, or that the programs, processes, and conclusions described therein do not meet the applicable license renewal requirements.

19836

II. DISCUSSION

A. The “New Information” Should be Rejected at the Threshold

First, the December 10, 1998 supplemental filing by the Petitioners, in offering additional bases for the contentions, was not authorized by the Licensing Board. On November 19, 1998, the Licensing Board requested certain information from the NRC Staff regarding the agency’s rulemaking on transportation of high-level radioactive waste (“HLW”) in the vicinity of the HLW repository. Both Duke and the Petitioners were invited to respond to the Staff’s information by December 9, 1998. Pursuant to the terms of that Order, Duke responded on December 9, 1998. The Petitioners’ filing, though dated December 9, 1998, was actually untimely in that it was not received until December 10. In addition, the Petitioners’ response far exceeds the Licensing Board’s invitation to comment on the NRC Staff’s information on the HLW transportation rulemaking,^{1/} by providing an additional discussion on “New Information For the ASLB to Consider With the Petitioners’ First Supplemental Filing.” This unsolicited discussion constitutes a filing without leave to file. The Petitioners have ignored rules of procedure designed to ensure a fair, efficient, and focused proceeding. For this reason alone, the “new information” portion of Petitioners’ filing should be stricken.^{2/}

Second, to the extent the Petitioners proffer “new information” that bears on specific matters not previously raised in their proposed contentions, then the “new information” is really a

^{1/} Duke does not here respond to the portion of Petitioners’ filing regarding the HLW transportation rulemaking. Duke’s position is clear in its filing of December 9, 1998. Petitioners’ attempt to devalue or illegitimize the NRC’s generic approach to address a generic issue is unsupported and contrary to substantial administrative precedent.

^{2/} All participants in formal NRC proceedings -- whether lawyers or not -- are bound to follow the NRC’s Rules of Practice. See, e.g., Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station), ALAB-609, 12 NRC 172, 173 at n.1 (1980).

new, late-filed contention. Petitioners are obligated to affirmatively address the five factors for assessing the admissibility of late-filed contentions in 10 C.F.R. § 2.714(a)(1). Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 578 (1982), citing Duke Power Co. (Perkins Nuclear Station, Units 1,2, and 3), ALAB-615, 12 NRC 350, 352 (1980). Petitioners have not done so, and the new matters should be rejected.

For example, in the “new information” Petitioners specifically reference ten NRC Staff “Requests for Additional Information” (“RAIs”) on the Oconee license renewal application. Of these, only three RAIs (3.4.5-2(b), 3.4.5-4, and 3.4.5-5) relate to the specific topical reports referenced in the Petitioners’ original bases for the proposed contentions.^{3/} Two more RAIs (4.3.9-2 and G-2) relate to the timing of certain inspections, an issue vaguely referred to in the basis for proposed Contention 2, though the reference there was in a different context. To the extent Petitioners seek to raise specific technical issues on matters raised in the other RAIs referenced in the “new information,” they have failed to propose new contentions and failed to meet 10 C.F.R. § 2.714(a)(1).

Finally, even if the Licensing Board restricts its view of the “new information,” so that it is treated as no more than proffered support for the earlier proposed contentions, the “new information” should still be rejected. Petitioners’ filing does not really offer “new information” at all. Their proposed contentions were directed toward the “completeness” of the application and of the description of “aging management programs.” The Petitioners’ “First Supplemental Filing” clearly anticipated RAIs. It even included a printout listing correspondence between Duke and the NRC Staff on RAIs. Petitioners now are merely referencing details from specific RAIs recently

^{3/} These three RAIs all relate to topical report BAW 2251, which addresses the management of aging effects for reactor vessels. This topical report is currently undergoing NRC Staff review, as discussed in Duke’s initial response to proposed Contention 1 (at pp. 10-12).

issued. Petitioners are simply citing to the NRC Staff review process that is working exactly as was expected. The existence of RAIs is not “new” or unanticipated information and should be disregarded by the Licensing Board on this basis alone.

B. The “New Information” Does Not Support Admission of the Proposed Contentions

As Duke discussed in its November 16, 1998 Response to Petitioners’ “First Supplemental Filing,” Petitioners’ proposed Contentions 1 and 2 challenge the completeness of the Oconee license renewal application, most particularly in the area of “aging management programs.”^{4/} As discussed below, the RAIs now referenced by the Petitioners do not demonstrate the “incompleteness” of the application. Nor do they support a proposed contention that the application fails to adequately address “aging management programs.”^{5/}

1. Proposed Contention 1: Completeness of the Application

Proposed Contention 1 alleges that the Oconee renewal application is incomplete. As originally proposed, this contention was premised upon 1) pending NRC Staff review of certain generic topical reports and 2) NRC Staff RAIs, both “filed and forthcoming,” related to Duke’s application. The allegedly “new information” does not alter this theory. The Petitioners’ argument in the latest filing is premised only on NRC Staff RAIs and does not identify any failure to meet the requirements of 10 C.F.R. § 54.21. As was the case before, the Petitioners inherently presume that

^{4/} Petitioners’ proposed Contention 3 is a vague challenge to the environmental report for similar reasons. Petitioners’ latest filing is ostensibly offered to support this contention as well. The purported link to proposed Contention 3 is never explained, is not apparent to Duke, and is not further addressed here. Petitioners’ proposed Contention 4 relates to storage and disposal of high level radioactive waste and spent nuclear fuel. This proposed contention is not at all implicated by the Petitioners’ latest filing.

^{5/} To the extent Petitioners are alleging that the RAIs demonstrate that the application fails to provide information or “safety evaluations” on issues other than aging management programs, Petitioners are offering a new late-filed contention which should be rejected for the reasons discussed above.

the existence of an RAI means that the application is “incomplete.” This is, quite simply, wrong.

As discussed in Duke’s November 16, 1998 response (at p. 9), the NRC Staff has already accepted Duke’s application as “sufficient,” and this sufficiency review is not the focus of the present hearing opportunity. Moreover, Petitioners are merely continuing their attempt to piggyback the NRC Staff’s review of the license renewal application. As also discussed in Duke’s earlier response (at p. 12), RAIs certainly do not mean that the license application must be rejected as “incomplete” as the Petitioners propose. See Curators of the University of Missouri, CLI-95-8, 41 NRC 386, 395 (1995); see also Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC ____, slip op. at 17-18 (October 16, 1998). An RAI is routine and is no more than a question from the NRC Staff. It does not mean an application is incomplete, because no application could possibly anticipate every question the NRC Staff might have (particularly in the relatively new arena of license renewal).

The situation here precisely parallels that addressed by the Commission in Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 146 (1993). Incorporating by reference Staff questions to the licensee/applicant is insufficient to support admissibility of a contention. See also Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 346 and 357-58 (1991) (contentions/bases merely referencing Staff questions rejected by the licensing board). If every RAI could spawn a contention, the Staff’s review would be precisely what is at issue in this case, the litigation scope would far exceed the original contention, and the hearing would be effectively unbounded. Such

a result would clearly be inconsistent with the Commission's expectations.^{6/} For this reason, and the reasons discussed in Duke's original response, the proposed contention must be rejected.

2. Proposed Contention 2: Aging Management Programs

Proposed Contention 2, as originally articulated, alleges that the Oconee application does not meet "aging management and other safety related requirements." It was specifically directed to Duke's treatment in the renewal application of two generic topical reports on aging effects and aging management programs. As explained in Duke's response (at pp. 15-17), the basis statement offered at the time by the Petitioners reflected only their misunderstanding of the application, of how the topical reports were being utilized, and how Duke addressed Renewal Applicant Action Items in the application. In the latest filing, Petitioners would link several specific RAIs to this contention. However, this does nothing to remedy the defects in the proposed contention and basis. Petitioners still have neither articulated nor supported any specific, genuine issue independent of the Staff RAIs.

Even with the "new information," it remains unclear what the Petitioners are arguing in this proposed contention. There are two possible readings. First, Petitioners could be arguing that the application is incomplete with respect to aging management programs (and that the RAIs further demonstrate this "incompleteness"). Second, they could be arguing that the aging management programs described by Duke are in some way inadequate (and that the RAIs support this notion). Given this ambiguity, and because the burden is on the Petitioners to articulate the issue, the

^{6/} The Commission has made clear that the focus of this proceeding, as in any NRC proceeding, "is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC Staff performance." 54 Fed. Reg. 33168, 33170-71 (1989) (NRC Supplementary Information accompanying 1989 amendments to 10 C.F.R. § 2.714).

contention must be rejected. And, even overlooking this defect, either reading of the proposed contention must be rejected as inadmissible for lack of sufficient basis.

Based on the original submittal, the first reading would seem the most probable. This proposed contention has always appeared to be a variation on the “completeness” argument of proposed Contention 1. As such, the proposed contention remains inadmissible. The “new information” -- Staff RAIs -- does not make the application “incomplete,” and the contention must be rejected, for all the reasons already discussed under proposed Contention 1.

The second reading is equally problematic. If the Petitioners are now alleging that aging management programs are inadequate, or in some way technically deficient, then they are proposing a new contention and have failed to follow appropriate procedures to support such a contention, as discussed above. Furthermore, a recitation of RAIs alone does not support a contention that Duke’s approach to “aging management” is technically inadequate. As noted earlier, an RAI does not mean that there is a technical problem with the applicant’s approach to an issue. A need for clarification or additional information is common in a technical review and, in itself, is not indicative of a deficiency. For this reason, licensing boards and the Commission have previously rejected contentions based only on RAIs. Rancho Seco, CLI-93-3, 37 NRC at 146; Claiborne Enrichment Center, LBP-91-41, 34 NRC at 346 and 357-58.

As discussed in Duke’s November 16, 1998 response (at pp. 9-10), the Commission’s Rules of Practice mandate that proposed contentions focus on the application -- which in this case has been available for independent review for five months. The purpose of a contention is to identify for all parties and the Licensing Board the issues that *a petitioner* proposes for litigation. A contention should focus and narrow the issues, based upon *a petitioners’* own view of the technical issues, not create infinite possibilities for discovery and litigation based on questions that have been

or will be raised in past and future *NRC Staff* RAIs. The Commission's expectation is that the technical issues should be articulated, and that the proponent of the issue provide its own independent basis for the issue. See, e.g., 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 in some way 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 alleging omissions and errors in the applicant's documents and analyses, but lacking any independent bases concerning the importance of the alleged omissions). Petitioners in proposed Contention 2 have failed in both regards. In asserting only that several RAIs demonstrate the inadequacy of the application, they have failed to define a precise technical issue. And, because Petitioners offer 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 have failed to meet the Commission's threshold for admission of a contention.

Petitioners are in no sense being denied an opportunity for "meaningful review" of the license renewal application. All aspects of the application and the review process are open to the public and accessible for comment and litigation in this proceeding. It is incumbent upon the Petitioners to state an issue of their own and to provide an evidentiary basis (i.e., a proffer of technical information) demonstrating a flaw in an approach articulated in the application. Reference to an RAI does not and cannot satisfy these requirements. Accordingly, notwithstanding the "new information" now offered, Petitioners have still failed to provide a basis sufficient to meet 10 C.F.R. § 2.714(b)(2).

III. CONCLUSION

For the procedural reasons discussed above, Petitioners' submittal of "new information" should be stricken. In the alternative, if the Licensing Board should decide to consider the "new information," it should conclude that the information does not support admission of any of Petitioners' proposed contentions.

Respectfully submitted,



David A. Repka

WINSTON & STRAWN
1400 L Street, NW
Washington, D.C. 20005-3502
202/371-5726 or 202/371-5724

Paul R. Newton
Lisa F. Vaughn
DUKE ENERGY CORPORATION
422 South Church Street
P.O. Box 1244
Charlotte, North Carolina 28202

ATTORNEYS FOR
DUKE ENERGY CORPORATION

Dated at Washington, D.C.
This 21st day of December, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
US-NRC

'98 DEC 22 P3:31

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF
PUBLIC AFFAIRS
ADMINISTRATIVE SERVICES

In the Matter of)
)
DUKE ENERGY CORPORATION)
)
(Oconee Nuclear Station,)
Units 1, 2 and 3))

Docket Nos. 50-269/270/287-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "DUKE ENERGY CORPORATION'S RESPONSE TO 'NEW INFORMATION' SUBMITTED BY CHATTOOGA RIVER WATERSHED COALITION IN SUPPORT OF PROPOSED CONTENTIONS" 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 21st day of December 1998.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Chief Administrative Judge
B. Paul Cotter, Jr., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Two White Flint North, 3rd Floor
11545 Rockville Pike
Rockville, MD 20852-2738
(E-mail copy to bpc1@nrc.gov)

Administrative Judge
Richard F. Cole
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Two White Flint North, 3rd Floor
11545 Rockville Pike
Rockville, MD 20852-2738
(E-mail copy to rfl1@nrc.gov)

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Two White Flint North, 3rd Floor
11545 Rockville Pike
Rockville, MD 20852-2738
(E-mail copy to psl@nrc.gov)

Marian L. Zabler
Robert M. Weisman
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
(E-mail copies to oconee@nrc.gov)

W.S. Lesan
P.O. Box 66
Long Creek, SC 29658

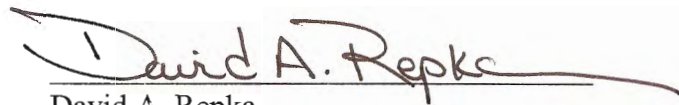
Adjudicatory File
Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Two White Flint North
11545 Rockville Pike
Rockville, MD 20852-2738

Norman "Buzz" Williams
190 Mountain Cove Rd.
Mountain Rest, SC 29664

William "Butch" Clay
P.O. Box 53
Long Creek, SC 29658

Chattooga River Watershed Coalition
P. O. Box 2006
Clayton, GA 30525
(facsimile copy to (706)782-6098; e-mail
copy to crwc@acme-brain.com)

Office of the Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
Attn: Rulemakings and Adjudications
(original & 2 copies)
(E-mail copy to hearingdocket@nrc.gov)



David A. Repka
Winston & Strawn
Counsel for Duke Energy Corporation