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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
Duke Energy Corporation)
)
(Oconee Nuclear Station,)
Units 1, 2, and 3))

Docket Nos. 50-269/270/287 LR

RESPONSE OF DUKE ENERGY CORPORATION TO THE LICENSING BOARD
ORDER REQUESTING INFORMATION CONCERNING THE
HIGH-LEVEL RADIOACTIVE WASTE TRANSPORTATION RULEMAKING

I. INTRODUCTION

On November 16, 1998, both the NRC Staff and Duke Energy Corporation ("Duke") responded to the October 30, 1998 supplemental petition to intervene submitted by the Petitioners in this proceeding. On November 19, 1998, the NRC Atomic Safety and Licensing Board ("Board") in this proceeding issued an Order^{1/} requesting information from the NRC Staff regarding the rulemaking on transportation of high-level radioactive waste ("HLW"). Pursuant to the terms of that Order, Duke herein responds to the NRC Staff's response to those questions, filed December 2, 1998.

Duke concurs with the NRC Staff's filing and the Staff's conclusion that the impacts of the transportation of HLW is not an appropriate issue for litigation in this proceeding.

^{1/} "Order (Requesting Additional Information From Staff)," Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2 and 3), ASLBP No. 98-752-02-LP, 48 NRC __, slip op. (November 19, 1998).

At the outset, Duke observes that the pending rulemaking at issue relates to 10 C.F.R. §51.53(c)(3)(ii)(M) -- which itself relates to the very narrow question of the generic and cumulative environmental impacts of transportation of HLW in the vicinity of the candidate repository site at Yucca Mountain. Petitioners, in proposed contention 4, have raised no specific technical issue (with supporting basis) on potential environmental impacts of such transportation attributable to license renewal. Nor do the Petitioners acknowledge the ongoing generic initiatives (either the Staff's technical initiatives or the pending rulemaking), or present any evidence of unrecognized environmental impacts. Considering the Commission's recent admonitions regarding the formulation of admissible contentions,^{2/} the Petitioners should not be assumed to have proposed a valid Oconee-specific contention on this point.

In any event, Duke has addressed 10 C.F.R. §51.53(c)(3)(ii)(M) in its license renewal application Environmental Report (ER) in a manner consistent with the Commission's expectations that the matter be addressed generically, and not in individual proceedings. In the ER, Duke explained:

Based on its additional consideration of this issue, plus its preliminary analysis of DOE information on HLW transportation impacts and the analysis provided in the GEIS, the NRC has recently determined that HLW transportation should be a Category 1 issue and

^{2/} The Commission "Statement of Policy on Conduct of Adjudicatory Proceedings," CLI-98-12, 63 Fed. Reg. 41872, 41874 (August 5, 1998) states that:

"[A] board may appropriately view a petitioner's support for its contention in a light that is favorable to the petitioner, but the board cannot do so by ignoring the requirements set forth in section 2.714(b)(2) A contention's 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)." [citation omitted]

that it "may be generically adopted in a license renewal application." [Reference 19] For those license renewal applications filed with the NRC before the completion of the above-referenced Part 51 rulemaking, the Commission has directed that a discussion of this topic in the plant-specific ER be required only if a "delay due to the generic rulemaking might affect the licensing process for a license renewal." (SRM M970612). Although Duke's license renewal application for Oconee Nuclear Station was submitted to the NRC before completion of the rulemaking, it would be premature to say at this time that a delay in the completion of the rulemaking has affected the licensing process for Oconee license renewal. Accordingly, Duke has not addressed the existing requirements of Section 51.53(c)(3)(ii)(M) in this ER. Significantly, Duke anticipates that the NRC will initiate this rulemaking later in 1998, which should allow for completion of the rulemaking and promulgation of Part 51 amendments on a schedule that will not delay the Oconee license renewal process.

Oconee license renewal application, Vol. IV, Section 4.14.3, pp. 4-54 - 4-55.^{3/} The information submitted by the NRC Staff on December 2 in response to the Licensing Board's questions reinforces Duke's conclusion that this matter can and should be addressed in a rulemaking.^{4/}

^{3/} A copy of the pertinent pages of the Oconee license renewal application is provided as Attachment A to this Response.

^{4/} On this point, Duke's application is consistent with the NRC Staff's position in the NRC Draft Regulatory Guide DG-4005, "Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses," (July 1998). In Section 4.21 (Transportation of Radiological Waste) of the draft regulatory guide, the NRC states (pp. 45-46) that this issue is the subject of a rulemaking, that the rulemaking will be supported by an EIS supplement to NUREG-1437, and that:

"The staff anticipates that the rulemaking will be completed well before a decision on the first license renewal application. If the rulemaking is not completed prior to issuance of the draft supplemental environmental impact statement on the first license renewal application, the staff will incorporate the report in the statement. Until this rulemaking is completed, an applicant need only reference the technical report in its ER."

II. RESPONSES TO BOARD QUESTIONS

1. *What is the date Staff anticipates the license renewal process for Oconee will be completed?*

Duke concurs with the December 2, 1998 Response of the NRC Staff ("Staff Response") to Board Question 1. As stated in that Response, the NRC Staff's current proposed schedule for a safety and environmental review for the Oconee license renewal application^{5/} calls for issuance of a Supplemental Safety Evaluation Report (SSER) and Final Environmental Impact Statement (FES) by February 12, 2000. Moreover, the September 15, 1998 Commission Order issued in this proceeding^{6/} provided that any hearing held should reflect the Commission's goal of issuing a decision on the renewal application within two and one-half years from the date that the Oconee application was received. Since the Oconee renewal application was filed on July 7, 1998, Duke currently anticipates that the license renewal process for Oconee will be completed by December, 2000 or January, 2001.^{7/}

^{5/} July 31, 1998 letter from Christopher I. Grimes, Director of the License Renewal Project Directorate, NRC Office of Nuclear Reactor Regulation, to William R. McCollum, Jr., Vice President, Oconee Nuclear Station, Duke Energy Corporation.

^{6/} Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC ___, slip op. at p. 4 (September 15, 1998).

^{7/} Such a schedule is consistent with the specific milestones set forth in the Commission Order in this proceeding directing that any evidentiary hearing required be completed within 125 days of the issuance of the SER and FES (that is, by June, 2000), and that an initial Board decision on the application be completed within 220 days of the issuance of the SER and FES (that is, by September, 2000). Duke Energy Corporation, CLI-98-17, *id.*, slip op. at p. 6.

2. *When was [the] HLW transportation rulemaking initiated and what is the approximate date that a completed rule will become effective?*

The NRC rulemaking in question will eliminate the need for license renewal applicants to perform a plant-specific analysis of the generic and cumulative environmental impacts of transporting HLW in the vicinity of Yucca Mountain.^{8/} The effect of the rulemaking is cogently summarized in the July 1, 1998 memorandum from NRC Executive Director for Operations Joseph Callan to NRC Chairman Shirley Jackson, a copy of which is included as Attachment B to this Response.

The NRC Staff Response states that the HLW rulemaking was formally initiated by the Commission in Staff Requirements Memorandum ("SRM") M970612, dated January 13, 1998, and that the Staff currently anticipates that the NRC final rule promulgating these Part 51 amendments will become effective no later than September, 1999. Duke has no basis to question this information and accepts the Staff's projection as realistic and achievable.

3. *Under the schedule identified in response to questions 1 and 2, will this rulemaking delay the license renewal process for the Oconee units in the manner of concern to the Commission in SRM M970612 so as to require HLW transportation impacts to be addressed in the plant specific environmental report? If not, please explain why.*

It is Duke's view that the ongoing rulemaking *will not delay* the Oconee license renewal proceeding so as to require the generic and cumulative environmental impacts of HLW

^{8/} A generic technical analysis has already been performed to support the rulemaking. See "Supplemental Analysis: Cumulative Environmental Impacts of Spent Nuclear Fuel Transport in the Vicinity of the Proposed Yucca Mountain High-Level Waste Repository Attributable to License Renewal, and Implications of Higher Burn-Up Fuel for the Conclusions in Table S-4," (April 1998). Petitioners do not reference and do not challenge this analysis.

transportation in the vicinity of the repository to be addressed in the Oconee-specific environmental report. This position is consistent with that set forth by Duke in Section 4.14.3 of the Environmental Report included as part of the Oconee license renewal application, as discussed above.

4. *To what extent, if any, must licensing boards in NRC adjudicatory proceedings adhere to Commission directives in SRMs?*

Duke concurs with the NRC Staff's December 2, 1998 Response to Board Question

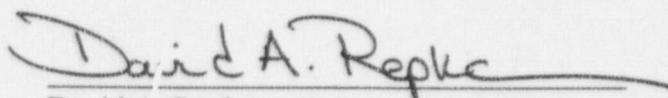
4. The Commission directive in SRM M970612 is not specifically directed to this Licensing Board, does not reflect any attempt to provide direction to a particular NRC adjudicatory proceeding, and is not legally binding upon this Board. (Staff Response, at p. 4). At the same time, however, the SRM does provide conclusive evidence of the Commission's expectation and intention that the cumulative, generic environmental impacts of transporting HLW in the vicinity of the repository not be adjudicated on a plant-specific basis, but rather generically via the Generic Environmental Impact Statement, NUREG-1437. (*Id.*) In Duke's view, there is no reason for this Licensing Board to act in a manner inconsistent with the Commission's express intent to eliminate plant-specific consideration of the HLW transportation issue for license renewal through rulemaking.

In addition, as observed by the NRC Staff, NRC precedent has generally established that issues which are the subject, or that will be the subject, of NRC rulemaking should not be adjudicated in individual licensing proceedings.^{2/} As the NRC Staff concludes in its December 2 Response, the impacts of spent nuclear fuel and HLW transportation are inappropriate for litigation in this proceeding. If the Board disagrees, or seeks additional clarification of the Commission's

^{2/} See the "NRC Staff's Response to Petitioner's First Supplemental Filing," November 16, 1998, at pp. 21-23.

intent, Duke requests that the Board refer or certify this question to the Commission immediately. Such a referral would clearly fall within the scope of the September 15, 1998 Commission Order in this proceeding dealing with the handling of "novel legal or policy questions." See Duke Energy Corporation, id., CLI-98-17, slip op. at p. 3.

Respectfully submitted,



David A. Repka
Anne W. Cottingham

Paul R. Newton
Lisa F. Vaughn

Counsel for Applicant
DUKE ENERGY CORPORATION

Dated at Washington, D.C.
This 9th day of December, 1998

APPLICATION FOR RENEWED OPERATING LICENSES

OCONEE NUCLEAR STATION, UNITS 1, 2, AND 3

Volume IV

Contents

**Exhibit D:
Applicant's Environmental Report
Operating License Renewal Stage**

4.14 Transportation of High Level Waste

4.14.1 Requirement [§51.53(c)(3)(ii)(M)]

The environmental effects of transportation of fuel and waste shall be reviewed in accordance with §51.52. The review of impacts shall also discuss the generic and cumulative impacts associated with transportation operation in the vicinity of a high-level waste repository site. The candidate site at Yucca Mountain should be used for the purpose of impact analysis as long as that site is under consideration for licensing.

This regulatory requirement is scheduled to be revised by the NRC, as discussed below.

4.14.2 Finding from 10 CFR 51, Appendix B to Subpart A, Table B-1

"Table S-4 of this part contains an assessment of impact parameters to be used in evaluating transportation effects in each case. See §51.53(c)(3)(ii)(M)."

4.14.3 Duke Energy Response

As promulgated in 1996, 10 CFR § 51.53(c)(3)(ii)(M) requires license renewal applicants to address in their Environmental Report the generic and cumulative environmental impacts of transporting spent nuclear fuel (SNF) and high-level radioactive waste (HLW) to a DOE geologic repository that may be located at Yucca Mountain, Nevada. However, the Commission has recently authorized the commencement of a Part 51 rulemaking as a "long-term solution" intended to eliminate this requirement from Part 51. This rulemaking will amend Part 51 to re-categorize the HLW transportation issue as a generic (Category 1) issue for purposes of license renewal. [Reference 17] Once the Part 51 amendments become effective, a plant-specific analysis of the environmental impact of HLW and SNF transportation as part of a license renewal applicant's ER will no longer be required.

In the supplementary information accompanying the issuance of Section 51.53(c)(3)(ii)(M) in 1996, the NRC referred to insufficient information and unresolved issues concerning the magnitude of the cumulative impacts arising from the transportation of HLW in the vicinity of the repository; accordingly, the NRC declined to categorize this issue as Category 1 at that time. At the same time, however, the NRC also recognized the generic nature of this issue, and agreed to consider whether further changes to the rule "are desirable to generically address" the issue of cumulative SNF and HLW transportation impacts. [Reference 18]

Based on its additional consideration of this issue, plus its preliminary analysis of DOE information on HLW transportation impacts and the analysis provided in the GEIS, the

NRC has recently determined that HLW transportation should be a Category 1 issue and that it "may be generically adopted in a license renewal application." [Reference 19] For those license renewal applications filed with the NRC before the completion of the above-referenced Part 51 rulemaking, the Commission has directed that a discussion of this topic in the plant-specific ER be required only if a "delay due to the generic rulemaking might affect the licensing process for a license renewal." (SRM M970612). Although Duke's license renewal application for Oconee Nuclear Station was submitted to the NRC before completion of the rulemaking, it would be premature to say at this time that a delay in the completion of the rulemaking has affected the licensing process for Oconee license renewal. Accordingly, Duke has not addressed the existing requirements of Section 51.53(c)(3)(ii)(M) in this ER. Significantly, Duke anticipates that the NRC will initiate this rulemaking later in 1998, which should allow for completion of the rulemaking and promulgation of Part 51 amendments on a schedule that will not delay the Oconee license renewal process.



UNITED STATES
 NUCLEAR REGULATORY COMMISSION
 WASHINGTON, D.C. 20555-0001

July 1, 1998

MEMORANDUM TO: Chairman Jackson

Commissioner Diaz
 Commissioner McGaffigan

FROM: L. Joseph Callan *L. Callan*
 Executive Director for Operations

SUBJECT: RULEMAKING FOR 10 CFR PART 51, ENVIRONMENTAL
 PROTECTION REGULATIONS

In response to the staff requirements memorandum (SRM) dated January 13, 1998, pertaining to SECY-97-279, the staff plans to amend the 10 CFR Part 51 requirement that license renewal applicants address the generic and cumulative environmental impacts of transportation of high-level waste (HLW) in the vicinity of an HLW repository. This rulemaking will also amend Part 51 to address the environmental impacts of the use of higher burn-up fuel and of transportation on local services during the renewal term.

The proposed rulemaking would revise 10 CFR Section 51.53 (c)(3)(ii)(M) and Table B-1 of Subpart A, Appendix B to 10 CFR Part 51, to reflect the generic and cumulative environmental impacts of transportation of HLW in the vicinity of an HLW repository as a Category 1 issue. This revision would allow a license renewal applicant to adopt the staff's generic analysis so that a plant-specific analysis of the generic and cumulative environmental impacts of HLW transportation in the vicinity of an HLW repository would not need to be performed. Specifically, Section 51.53(c)(3)(ii)(M) would be deleted and Table B-1 would be modified to reflect the Category 1 designation. As discussed in SECY-97-279, the basis for the rule change would be the staff's supplemental analysis performed to evaluate the environmental impacts of spent nuclear fuel transportation in the vicinity of the proposed Yucca Mountain HLW repository attributable to license renewal. The report, "Supplemental Analysis: Cumulative Environmental Impacts of Spent Nuclear Fuel Transport in the Vicinity of the Proposed Yucca Mountain High-Level Waste Repository Attributable to License Renewal, and Implications of Higher Burn-Up Fuel for the Conclusions in Table S-4," was completed in April 1998. As discussed in SECY-97-279, the report has been placed in the PDR, and is available for near-term license renewal applicants to reference in their applications, consistent with Option 2 if Option 2 is deemed necessary under the guidance in the SRM.

The staff's supplemental analysis also supports rulemaking to address the environmental impacts of the use of higher burn-up fuel. The proposed rulemaking would revise 10 CFR 51.53(c)(ii)(M) and Table B-1 of Subpart A, Appendix B to 10 CFR Part 51 to reflect the use of higher enriched uranium and higher burn-up values. Many licensees have requested and received license amendments to use higher enriched fuel and to allow higher burn-up. The bases for these amendments and proposed rule change include the staff's supplemental analysis, NUREG/CR-5009, "Assessment of the Use of Extended Burn-Up Fuel in Light Water

Power Reactors." dated February 1988, and "Extended Burn-Up Use in Commercial LWRs: Environmental Assessment and Finding of No Significant Impact" (53 FR 6040), dated February 29, 1988.

As an administrative amendment to the rule, the staff also proposes to address the environmental impacts of transportation on local services during the renewal term. This issue was identified as a Category 2 issue in NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants" (GEIS), dated May 1996. However, it was inadvertently omitted from 10 CFR 51.53(c)(3)(ii)(J) and Table B-1. The proposed rule would add this issue as a Category 2 issue for which a license renewal applicant would need to provide a plant-specific impact analysis in its environmental report.

Absent significant public comment and identification of major issues, the milestones and completion dates for the proposed rule are as follows:

Draft rule to the EDO: 8/30/98
Draft rule to the Commission: 9/15/98
Comment period: 75 days
Final rule office-level concurrence: 4/30/99
Final rule to the EDO: 5/30/99
Final rule to the Commission: 6/15/99

Resources to conduct this rulemaking are budgeted at approximately .25 FTE and \$25K in contract support.

The Office of the General Counsel has no legal objection to this memorandum. The Office of Administration concurs in this rulemaking plan. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objections.

cc: SECY
OGC
OCA
OIP
CFO
CIO

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "RESPONSE OF DUKE ENERGY CORPORATION TO THE LICENSING BOARD ORDER REQUESTING INFORMATION CONCERNING THE HIGH-LEVEL RADIOACTIVE WASTE TRANSPORTATION RULEMAKING" 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 9th day of December 1998.

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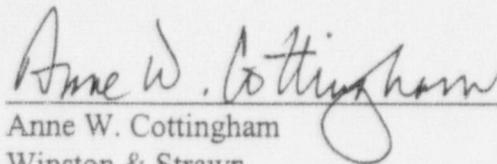
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