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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO THE APPEAL OF NORMAN "BUZZ" WILLIAMS, WILLIAM "BUTCH" CLAY, W.S. LESAN, AND THE CHATTOOGA RIVER WATERSHED COALITION

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January 25, 1999

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(a), the staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in opposition to the "Notice of Appeal" and accompanying supporting brief (Appeal Brief) dated January 14, 1999, filed by Norman "Buzz" Williams, William "Butch" Clay, W.S. Lesan, and the Chattooga River Watershed Coalition (CRWC) (collectively referred to as Petitioners). The Petitioners seek review of the Atomic Safety and Licensing Board's decision in *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), LBP-98-33, 48 NRC ___, slip op. (Dec. 29, 1998) (denying petition to intervene). For the reasons set forth below, the Licensing Board's decision in LBP-98-33 should be affirmed.

BACKGROUND

On July 6, 1998, the Duke Energy Corporation (Duke Energy or Applicant) submitted an application pursuant to 10 C.F.R. Part 54 to renew the operating licenses for the Oconee Nuclear

Station, Units 1, 2, and 3 (Application). On August 11, 1998, pursuant to 10 C.F.R. §§ 54.27 and 2.105, the Staff published a notice of opportunity for a hearing on the Application (Notice). "Duke Energy Corporation, Oconee Nuclear Station Units 1, 2, and 3; 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. 42,885 (1998).

On September 8, 1998, the Petitioners filed a letter requesting leave to intervene (Petition). On September 18, 1998, the Atomic Safety and Licensing Board (Board) designated to preside over this proceeding issued a Memorandum and Order in which the Board provided the Petitioners until October 19, 1998, to supplement their Petition with all their proffered contentions. "Memorandum and Order," slip op. at 3 (Sept. 18, 1998) (Prehearing Order). The Applicant and Staff were provided until October 30, 1998, in which to respond to the proffered contentions. *Id.*

On September 27, 1998, the Petitioners requested a 30-day extension of time in which to file an amendment. Petitioners' Motion to Enlarge Time (Sept. 27, 1998) (September Motion). The Board denied this request, but provided the Petitioners an additional 11 days, until October 30, 1998, to furnish their contentions. "Order" (Ruling on Request for Extension of Time), slip op. at 3 (Oct. 1, 1998) (October Order).

In the meantime, on September 30, 1998, the Petitioners filed an amendment with an attachment to their Petition providing further information regarding standing (Amendment). On October 9, 1998, in accordance with the Board's Prehearing Order, the Staff filed its response to the Amendment. "NRC Staff's Answer to the Petition for Leave to Intervene Filed by Norman "Buzz" Williams, William "Butch" Clay, W.S. Lesan, and the Chattooga River Watershed Coalition."

On October 30, 1998, the Petitioners filed their proposed contentions. "Petitioner's First Supplemental Filing" (Oct. 30, 1998) (Supplement). In their Supplement, the Petitioners provided additional information relative to their standing to intervene in this proceeding, proffered four contentions, and requested that the proceeding be stayed. The Staff responded to the Petitioners' Supplement on November 16, 1998, agreeing that they established standing to intervene in this proceeding, but explaining that the Petitioners' contentions failed to meet the requirements of 10 C.F.R. § 2.714(b)(2). "NRC Staff's Response to Petitioner's First Supplemental Filing" (Nov. 16, 1998) (Staff Response).

On November 19, 1998, the Licensing Board issued an Order requesting the Staff to furnish information regarding the transportation of high-level waste (relevant to the Petitioners' Contention 4) by December 2, 1998. "Order" (Requesting Additional Information From Staff" (Nov. 19, 1998) (November Order). The November Order provided that the Applicant and the Petitioners could each file a response by December 9, 1998. The Staff provided the requested information on December 2, 1998. "NRC Staff's Response to Order Requesting Information" (Dec. 2, 1998).

On December 9, 1998, the Petitioners responded, but also provided to the Licensing Board information designated as new regarding requests for additional information (RAIs) the Staff had issued to the Applicant. "Petitioners' Response to the Atomic Safety and Licensing Board's (ASLB) Request for Additional Information and New Information for the ASLB to Consider with the Petitioners First Supplemental Filing" (Dec. 9, 1998) (Petitioner's December Response). On December 11, 1998, the Staff filed a motion for leave to respond to the new information in the Petitioners' December Response, which the Licensing Board granted on December 14, 1998.

"Order" (Requests by Staff and Applicant to File Responses) (Dec. 14, 1998) (December Order). Pursuant to the Board's December Order, the Staff responded to the new information on December 22, 1998. "NRC Staff's Response to Petitioners' New Information" (Dec. 22, 1998) (Staff December Response).

THE LICENSING BOARD'S DECISION IN LBP-98-33

On December 29, 1998, the Licensing Board issued LBP-98-33, in which it determined that each of the Petitioners had standing to intervene in this proceeding, but denied the Petition because none of the proffered contentions satisfied the standards of 10 C.F.R. § 2.714(b)(2). In general, the Board rejected the contentions discussed in the Petitioners' Appeal Brief (1) for their failure to demonstrate, as required by 10 C.F.R. § 2.714(b)(2)(iii), that there was a genuine dispute on a material issue of fact or law or (2) because they challenged the Commission's regulations and did not meet the standards for admission of such matters in 10 C.F.R. § 2.758(b). LBP-98-33, slip op. at 9, 12, 14, and 19. The Licensing Board also denied the Petitioners' request for a stay. *Id.* at 21. The Board's specific reasons for rejecting the contentions now on appeal and denying the stay are stated with respect to each of these matters as set forth below.

DISCUSSION

In their Appeal Brief, the Petitioners argue that the Board should have admitted three of their four contentions and should have stayed the proceeding.[1] *See* Appeal Brief at 2-5. In addition, the

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[1] The Petitioners make no argument in their Appeal Brief regarding Contention 3, as proposed in their Supplement. The Staff's Answer demonstrated that proposed Contention 3 was inadequate to satisfy the requirements of section 2.714(b). Staff Answer at 15-19. The Licensing Board rejected Contention 3 because (1) the Petitioners did not attempt to show that the Applicant's environmental report did not meet the specific requirements of 10 C.F.R. § 51.53(c), (2) the (continued...)

Petitioners reaffirmed the "grounds for intervention" set forth in their September filing, their Supplement, and their December Response, and incorporated those arguments by reference into their Appeal Brief. *Id.* at 1. For the reasons set forth below, the Atomic Safety and Licensing Board's decision in LBP-98-33 should be affirmed.

A. Legal Standards for Admissibility of Contentions

A petitioner must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.714 in order to be permitted to participate in a licensing proceeding as a party. 10 C.F.R. § 2.714(b)(1); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996). For a contention to be admitted, it must meet the standards set forth in 10 C.F.R. § 2.714(b)(2), which provide that each contention must consist of "a specific statement of the issue of law or fact to be raised or controverted" and must be accompanied by:

> (i) A brief explanation of the bases of the contention;
>
> (ii) A concise statement of the alleged facts or expert opinion which supports the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion;
>
> (iii) Sufficient information . . . to 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). The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. 10 C.F.R. § 2.714(d)(2)(i); *Arizona Public Service Co.*

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[1](...continued)
Petitioners did not establish a violation of the Counsel on Environmental Quality regulations they referenced, and (3) the Staff has not inappropriately segmented its treatment of the Application. LBP-98-33, slip op. at 14-18. The Petitioners have not identified any infirmity in LBP-98-33 with respect to Contention 3, and it should be affirmed in this regard.

(Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). Further, a contention must also be dismissed where the "contention, if proven, would be of no consequence . . . because it would not entitle [the] petitioner to relief." 10 C.F.R. § 2.714(d)(2)(ii).

Pursuant to section 2.714, a petitioner must provide a "clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." *Palo Verde*, CLI-91-12, 34 NRC at 155-56. The purpose of the basis requirement of section 2.714(b)(2) is (1) to assure that at the pleading stage the hearing process is not improperly invoked; (2) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend or oppose. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). Further, the petitioner has the obligation to formulate the contention and provide the information necessary to satisfy the basis requirement of 10 C.F.R. § 2.714(b)(2). *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 125 (1998); *see also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

B. Petitioners' Contention No. 1

Petitioners' Contention 1 states:

> As a matter of law and fact, Duke Energy Corporation's Application for Renewed Operating License for Oconee Nuclear Station Units 1, 2 and 3 (hereafter referred to as "Application") is incomplete, and should be withdrawn and/or summarily dismissed.

Supplement at 3.

With respect to the Petitioners' proposed Contention 1, the Licensing Board determined that the Petitioners had only shown that the Staff's review was ongoing, and had not identified instances where the Application itself was assertedly in error. LBP-98-33, slip op. at 10. Further, the Board ruled that the RAIs sent by the Staff to the Applicant were not appropriate as a basis for contentions in this proceeding. *Id.* at 11. In view of the above, the Licensing Board denied the Petitioners' proposed Contention 1, finding it inadequate for failure to demonstrate that a genuine dispute exists on a material issue of law or fact, as required by section 2.714(b)(2)(iii). *Id.* at 9.

On appeal, the Petitioners argue that the RAIs submitted by the Staff to the Applicant "are *prima facie* evidence supporting CRWC's first contention that the application is incomplete. . . . [I]f the application were complete, then the NRC staff would not need to solicit follow-up information." Appeal Brief at 2. The Petitioners further state that "the current application provides an inadequate basis for the Petitioners' comprehensive evaluation of material issues of law and fact . . . to determine grounds to frame contentions, if warranted." *Id.* at 3.

The Commission, however, has expressly rejected these arguments, stating that "the NRC staff's mere posing of questions does not suggest that the application was incomplete, or that it provide[s] insufficient information to frame contentions[.]" *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC ___, slip op. at 20 (Dec. 23, 1998). The Licensing Board expressly relied on the Commission's decision in *Calvert Cliffs* in rejecting the Petitioners' Contention No. 1. LBP-98-33, slip op. at 11-12. Accordingly, LBP-98-33 is correct on this score.

The Petitioners explicitly disclaim any dispute with the adequacy of the Staff's review. Appeal Brief at 2. Rather, the Petitioners are relying on the Staff's RAIs to help establish a basis for their contentions. *Id.* In relying on the RAIs, Petitioners state that "it is not possible for

Petitioners to become experts with regard to these issues within the adjudicatory time frame dictated by the Commission." *Id.* The Petitioners, however, have an affirmative obligation to review all information available to them and independently derive contentions in accordance with 10 C.F.R. § 2.714(b)(2). *See Oconee*, CLI-98-17, 48 NRC at 125; *Duke Power Co.* (Catawba Nuclear Station Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983). The Petitioners' inability to do so with respect to Contention 1 is no reason to reverse LBP-98-33.

C. Petitioners' Contention No. 2

Petitioners' Contention 2 states:

> As a matter of law and fact, Duke Energy Corporation's Application for Renewed Operating License for Oconee Nuclear Station Units 1, 2 and 3 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.

Supplement at 3-4.

The Petitioners set forth three bases in support of this contention. First, the Petitioners stated that ongoing review of owner group reports could not support a determination of safety of the Applicant's aging management programs. *Id.* at 4. Second, the Petitioners questioned the timing of some aging management activities, specifically, certain one-time inspections. *Id.* Third, the Petitioners refer again to their arguments about RAIs made in support of Contention 1. *Id.* The Licensing Board rejected all three bases. LBP-98-33, slip. op. at 12-14. The Petitioners appeal the Licensing Board's decision only with respect to bases two and three. Appeal Brief at 3-4.

Insofar as the basis for Contention 2 was the Staff's ongoing review of generic reports incorporated into the Application, the Board rejected it. LBP-98-33, slip op. at 12-13. The Board specifically found that two of those generic reports had been approved by the Staff, and where one

of them provided for a plant-specific program, the Board found that the Application did indeed contain such a program. *Id.* at 13. The Petitioners do not challenge the Board's determination on this matter. The Licensing Board also rejected the Petitioners' arguments regarding a "one time inspection" as a basis for this contention, in that such an inspection was not intended as an aging management program. *Id.* at 13-14. Further, the Licensing Board found inadequate the Petitioners' reliance on the Staff's ongoing review and RAIs as a basis for Contention 2 for the same reasons the Board found them inadequate as a basis for Contention 1. *Id.* at 14. Accordingly, the Board determined Contention 2 to be inadmissible. *Id.*

In their Appeal Brief, the Petitioners challenge the Board's rulings with respect to the Petitioners' reference to a "one time inspection" and their reliance on the Staff's ongoing review and RAIs as bases for the contention. In their Appeal Brief, the Petitioners quote or refer to several RAIs that, they assert, "obviously describe[] specific inadequacies and problems with the application's aging management programs[.]" Appeal Brief at 3. To support this argument, the Petitioners recite three Staff RAIs, one asking "why cracking is not treated as an applicable aging effect" regarding reinforced concrete elements; another stating that "[t]hermal fatigue has not been identified as an applicable aging effect for the components of the Containment Heat Removal System" (CHRS); and a third directing the applicant to "[i]dentify which aging effects are applicable to [the lower control rod drive mechanism service support structure] and describe your aging management program for these components in the license renewal application." *Id.* The Petitioners also refer to Staff RAIs concerning reactor vessel flow stabilizers and austenitic stainless steel weld cladding in reactor vessel forgings that "request an aging management program be provided for those components." *Id.* at 3-4. Similarly, the Petitioners reiterate statements in their December Response gleaned from the

RAIs regarding the Reactor Building Spray System Inspection and General Question G-2 (concerning the presence or absence of various degradation mechanisms specific to certain components). *Id.* at 4.

These Staff RAIs, however, do not indicate that the Application is deficient; rather, they are intended to elicit additional information to assist the Staff in making its determination on the application. *See Calvert Cliffs*, CLI-98-25, slip op. at 20-21. Indeed, cracking may or may not be an applicable aging effect with respect to reinforced concrete elements; thermal fatigue may or may not be an applicable aging effect for the CHRS; the other components referred to by the RAIs may or may not require aging management; the various degradation mechanisms may or may not be absent; and proposed inspections may or may not be adequate to achieve their stated purposes. Consistent with the Commission's decision in *Calvert Cliffs*, the Licensing Board determined that these RAIs were merely additional examples of areas where additional information regarding the application is being sought by the Staff and, as such, are unacceptable as contentions or bases for contentions. LBP-98-33, slip op. at 12 n. 2. Accordingly, the Licensing Board's decision with respect to Contention No. 2 should be affirmed.[2]

The Petitioners assert that the Licensing Board "totally misinterpreted" their reference to the one-time inspection programs. Appeal Brief at 4. As the Appeal Brief states, "Petitioners asserted

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[2] The Petitioners did not analyze these RAIs in this fashion in their Supplement, as they were not then available. Petitioners' December Response at 1. The RAIs do not raise any information not already available to the Petitioners in the Application. *See* Staff December Response at 2-3. If the RAIs are considered as new information, however, the Petitioners should have addressed the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1) in their December Response in their attempt to provide new bases for Contention No. 2. Their failure to do so amounts to an untimely, unauthorized supplement to their contentions that should not be considered. *See Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993).

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." *Id.* The Licensing Board, however, clearly understood that such inspections related only to the detection of aging effects, and not to programs to manage aging, such that the Petitioners' concern could not be a basis for Contention No. 2, which relates to aging management. LBP-98-33, slip op. at 13-14.

In addition, the Petitioners have not provided any basis, supported by expert opinion or asserted facts, to show that a genuine dispute exists with the Application with respect to the one-time inspection issue (or any of the issues described above), as required by 10 C.F.R. § 2.714(b)(2)(i) and (ii). *See* 10 C.F.R. § 2.714(b)(2)(ii); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998); *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 232-33 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994) (Licensing Board dismissed a proposed contention because the petitioner did not provide data, expert opinion, or other sources to counter the information in the record). The Staff's RAI merely seeks enough information to determine if the one-time inspection is adequate or not; it does not assert that the Application is in error with respect to this matter, as the Petitioners do, nor is the RAI a basis for such an assertion. Accordingly, the Licensing Board correctly rejected the one-time inspection issue as a basis for Contention No. 2.

D. Petitioners' Contention No. 4

Petitioners' Contention 4 states:

> The Petitioners submit that the specific issue of the storage of spent fuel and 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 transport of radioactive material to other locations, if and when storage capacity is exceeded, must be disclosed and addressed. The real and potential availability and viability of other High Level Waste storage sites must be disclosed and addressed.

Supplement at 5.

The Licensing Board ruled in LBP-98-33 that the issues raised by Contention 4 related to on-site storage and the ultimate disposal of spent nuclear fuel could not provide a basis for admissible contentions in this proceeding. LBP-98-33, slip op. at 18. Specifically, the Board held that the Commission's rules provided that applicants need not submit environmental information regarding these issues, citing 10 C.F.R. §§ 51.53(c)(2), 51.53(c)(3)(i), 51.59, 51.23, and Table B-1 in Appendix B to Subpart A of Part 51. *Id.* Accordingly, the Board explained that these issues were barred as subjects for contentions pursuant to 10 C.F.R. § 2.758, in the absence of a showing by the Petitioners of special circumstances. Because the Petitioners had not offered any showing of special circumstances by demonstrating that the application of these regulations would not serve the purpose for which they were adopted, as set forth in section 2.758(b), these issues were not appropriate subjects for contentions. *Id.* at 19-20.

On appeal, for the first time, the Petitioners seek to show special circumstances only with respect to 10 C.F.R. § 51.23 (the Waste Confidence rule).[3] In doing so, the Petitioners state that (1) the capacity of the proposed high-level waste (HLW) repository at Yucca Mountain is limited by legislation to 70,000 metric tons of high level waste; (2) it seems reasonable to conclude that an additional 20 years of reactor operation and spent fuel generation could challenge this limit; (3) problems have been experienced with onsite storage of spent fuel since initial promulgation of the Waste Confidence rule (giving two examples); and (4) the Department of Energy (DOE) missed its original target date for the HLW repository. The Petitioners assert, therefore, that the Waste Confidence rule should be reconsidered in this proceeding. Appeal Brief at 5.

Since the Petitioners did not raise the Waste Confidence Rule below, it is inappropriate to raise it on appeal and it should not be considered. *See Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 348 (1978). To the extent the issue is considered at all, the underlying purpose 10 C.F.R. § 51.23 is to evaluate, on a generic basis, the environmental impacts that will result from the storage of spent fuel for at least 30 year beyond the expiration of nuclear reactor operating licenses. *See* Final Rule, "Requirements for Licensee Actions Regarding the Disposition of Spent Fuel Upon Expiration of Reactor Operating Licenses," 49 Fed. Reg. 34,688 (1984). The Petitioners raise no site-specific issue to demonstrate that application of section 51.23 to the Oconee Nuclear Station will not serve this purpose. Rather, the Petitioners attempt to show that the generic determination in the rule is incorrect. This proceeding, however, is not the appropriate forum for a generic attack on section 51.23. The

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[3] Petitioners do not appeal the Board's reference to Section 51.23. Rather, they are now seeking to challenge the rule itself.

Petitioners have not shown that application of the rule in this proceeding will not serve its underlying purpose.[4]

With respect to the Petitioners' remaining basis for Contention 4, involving transportation of high-level waste, the Licensing Board determined that (1) rule-making had been initiated to resolve this issue on a generic basis; (2) it would be counterproductive to litigate such an issue unless there is good reason to do so; (3) the Commission had stated that an applicant for license renewal would not have to include this issue in its application if the rule-making would not delay the licensing process; and (4) because the rule will become effective no later than September 1999, it will not delay the expected December 2000 completion of this license renewal proceeding. LBP-98-33, slip op. at 20. Accordingly, the Board rejected this issue as a basis for Contention 4.

The Petitioners' response to LBP-98-33 on appeal is that 10 C.F.R. § 51.53(c)(3)(ii)(M) has not yet been changed and still controls. Appeal Brief at 4. The Petitioners assert that "there is no guarantee that the proposal to change [10 C.F.R. § 51.53(c)(3)(ii)(M)] will proceed unimpeded." *Id.* The Petitioners further argue that "it is reasonable to predict that the NRC's projected timeline for changing [10 C.F.R. § 51.53(c)(3)(ii)(M)] would be delayed or thwarted altogether." *Id.* at 5. The Petitioners, therefore, believe the existing regulations mandate that the Applicant disclose its plan for high-level waste transportation in the Application. *Id.*

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[4] The Petitioners refer to letters to the Commission from members of the House of Representatives and Senators representing South Carolina who, the Petitioners assert, believe that the ultimate disposal of HLW and spent fuel management should be considered in individual license renewal proceedings regardless of the Commission's regulations in Part 51. These bare assertions are no reason to ignore the Commission's rules.

As a general rule, matters that are or are about to become the subject of a general rule-making by the Commission should not be admitted as contentions in individual license proceedings. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-729, 17 NRC 814, 889-90 (1983).[5] *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-813, 22 NRC 59, 86 (1985) *citing Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Facility), ALAB-218, 8 AEC 79, 85 (1974). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998). An exception to this general rule is where the consideration of such an issue on a case-by-case basis was contemplated by the approach adopted in the rule-making proceeding. *Three Mile Island*, ALAB-729, 17 NRC at 889-90. *See also Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-1A, 15 NRC 43 (1982); *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-81-51, 14 NRC 896, 898 (1981).

The Staff has initiated a rule-making on the specific issue of the environmental impacts of transportation of high level waste. *See* SECY-98-278 (Dec. 1, 1998). In SECY-98-278, the Staff requested Commission approval to publish in the *Federal Register* a proposed rule that would, *inter alia*, eliminate from 10 C.F.R. Part 51 the requirement that license renewal applicants address the generic and cumulative environmental impacts associated with transportation in the vicinity of a

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[5] The Commission reversed the Appeal Board's holding that the issue involved there -- environmental qualification of safety related equipment -- was being resolved outside the pending proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-84-11, 20 NRC 1, 4 (1984). The Commission declared that the generic rule-making on environmental qualification did not preclude a challenge to the continued operation of a plant where it is alleged that the plant could not operate safely. *Id.* at 6. The Commission, however, did not disagree with the Appeal Board's statement that, as a general matter, issues that are the subject of a rule-making are inappropriate for consideration in an individual license proceeding. *See id.*

high-level waste repository. *Id.* at 1. SECY-98-278 resulted from the Staff's efforts in response to the Commission's decision to approve the Staff's proposal in SECY-97-270, dated December 3, 1997, to amend 10 C.F.R. § 51.53(c)(3)(ii)(M) to categorize the impacts of the transportation of high-level waste as a Category 1 issue, *i.e.*, about which an applicant need not provide information.[6] *See* Staff Requirements Memorandum, SRM M970612 (Jan. 13, 1998) (SRM).

A review of SECY-97-270 and the SRM indicates that the environmental impacts of the transportation of high-level waste should not be litigated in individual applications. In the SRM, the Commission directed the Staff to require applicants who have submitted applications before the rule-making is completed to provide a discussion of this issue in its Environmental Report only if to await the completion of the rule-making would delay the licensing process. Thus, if it would not delay the licensing process, an applicant would not need to address this issue and the Staff's consideration of it under NEPA would be considered generically rather than on a plant specific basis.[7]

In considering this issue, the Board relied on the Staff's December Response and the affidavit of Donald P. Cleary attached thereto, and found that the rule-making will not delay this proceeding. LBP-98-33, slip op at 20-21. The Licensing Board's decision on this issue is in accordance with Commission precedent and Commission policy expressed in its SRM on the current rule-making. The Petitioners offer only conjecture in asserting that the rule-making could be delayed. Appeal

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[6] Section 51.53(c)(3)(i) provides that an applicant need not provide information regarding Category 1 issues set forth in Appendix B to Part 51, Subpart A.

[7] If the Staff were to conclude that it would delay the licensing process to await the completion of the rule-making and conduct a plant specific review on this issue, any new information that results from this plant specific review may arguably constitute good cause for a late-filed intervention petition. *See* 10 C.F.R. § 2.714(a)(1).

Brief at 5. Such conjecture is not sufficient to establish that the Applicant should address the transportation of high-level waste in the Application. Accordingly, the Commission should affirm LBP-98-33 with respect to this issue.

E. Petitioners' Request for a Stay.

As part of this appeal, the Petitioners have requested a stay of this proceeding "until such a time as Duke Energy Corporation complies with 10 C.F.R. § 51.53(c)(3)(ii)(M) in their application." Appeal Brief at 5. This request does not satisfy the standards for granting a stay and should be denied.

In ruling on requests for a stay, the Commission has been guided by the factors set forth in 10 C.F.R. § 2.788. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). Section 2.788 provides that in determining whether to grant or deny a stay, the presiding officer must consider:

> (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
>
> (2) Whether the party will be irreparably injured unless a stay is granted;
>
> (3) Whether the granting of a stay would harm other parties; and
>
> (4) Where the public interest lies.

10 C.F.R. § 2.788(e). Irreparable injury is the most important of the four factors. *Sequoyah Fuels*, CLI-94-9, 40 NRC at 7.

The Petitioners do not address whether they are likely to prevail on the merits, and whether the granting of the stay would harm other parties. The Petitioners address the irreparable injury factor by asserting that their interests in protecting and promoting the natural ecological integrity of

the Chattooga River watershed would be irreparably injured should a major radiological accident occur as a result of the applicant neglecting to determine and follow an approved plan for the management and transportation of Oconee Nuclear Station's high-level waste. Appeal Brief at 5. The Petitioners add that it is in the public interest to apply 10 C.F.R. § 51.53(c)(3)(ii)(M) as it exists, and not rely on the ongoing rule-making regarding high-level waste transportation. *Id.* These assertions fail to demonstrate that a stay if warranted.

The Petitioners' asserted injury is not associated with this proceeding. The Applicant is not required to set forth a plan for the management and transportation of high- level waste as part of its license renewal application. *See* 10 C.F.R. §§ 54.19, 54.21.[8] In addition, an applicant for license renewal is not required to address the environmental impacts of storage and disposal of spent fuel. 10 C.F.R. § 51.53(c)(3)(i). Finally, the Petitioners have failed to demonstrate how they will be irreparably injured by a decision to address the issue of the environmental impacts of transportation of high-level waste on a generic as opposed to a plant-specific basis. Thus, there is no injury to the Petitioners if this proceeding were to continue.[9]

Nor do the remaining three factors warrant a stay of this proceeding. With respect to the first factor, the likelihood of success on the merits, insomuch as the fact that the high level waste issues raised by the Petitioners are, by virtue of the Commission's regulations, either outside the scope of

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[8] The storage and management of spent fuel is outside the scope of this proceeding because it is part of the current licensing basis. *See* 10 C.F.R. §§ 54.3, 54.30. Here, the Applicant was granted a license pursuant to Part 72 to store spent fuel in an independent spent fuel storage facility. *See* "Issuance of Materials License SNM-2503 for the Duke Power Co. [ISFSI] at the Oconee Nuclear Power Station Site," 55 Fed. Reg. 4035 (1990).

[9] *See* note 7 above.

this proceeding, or are intended to be addressed on a generic basis, The Petitioners cannot satisfy this factor. Regarding the harm to other parties, the Applicant and the Staff could be harmed by a delay in this proceeding since they have an interest in the timely identification of issues in order to meet the Commission's milestones set forth in *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-98-17, 48 NRC 123, 127 (Sept. 15, 1998). Further, the public interest lies with the prompt resolution of proceedings. *See Statement of Policy On Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 19. Thus, the Petitioners' request for a stay of this proceeding should be denied.

F. Petitioners' Request for an Extension of Time.

In their Appeal Brief, the Petitioners also request that "the time period for timely filings should be extended until at least 90 days after Duke's final submittal of supplemental information." Appeal Brief at 3.[10] A request for an extension of time may be granted only upon a showing of unavoidable and extreme circumstances. *Oconee*, CLI-98-17, 48 NRC at 128. The Petitioners have not addressed this standard. The supplemental information referred to by the Petitioners in this request is contained in the Applicant's responses to the Staff's RAIs. Appeal Brief at 2-3. As discussed above, the Petitioners have an obligation to derive contentions from the application, not from the Staff's ongoing review. Therefore, the Petitioners have not shown the existence of extreme and unavoidable circumstances warranting the requested extension of time.

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[10] This request was previously made to the Licensing Board in the form of a request for a stay of the proceeding. Supplement at 5. The Licensing Board denied this request. LBP-98-33, slip. op. at 21. The Petitioners have not challenged the Board's decision on this issue. Rather, they have restyled the request as a request for an extension of time.

CONCLUSION

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

Respectfully submitted,

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Dated at Rockville, Maryland
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-LR
	)	50-270-LR
(Oconee Nuclear Station,	)	50-287-LR
Units 1, 2, and 3)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN OPPOSITION TO THE APPEAL OF NORMAN "BUZZ" WILLIAMS, WILLIAM "BUTCH" CLAY, W.S. LESAN, AND THE CHATTOOGA RIVER WATERSHED COALITION" in the above captioned proceeding have been served on the following by electronic mail with conforming copies deposited in the Nuclear Regulatory Commission's internal mail system, or as indicated by an asterisk, by e-mail with conforming copies deposited in United States mail, first class, or as indicated by a double asterisk by deposit in the NRC's internal mail system or as indicated by triple asterisk by deposit in the United States mail, first class, this 25th day of January, 1998.

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