UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE ENERGY CORPORATION	)	Docket Nos. 50-369, 370, 413 AND 414
	)	
(McGuire Nuclear Station,	)	
Units 1 and 2, and	)	
Catawba Nuclear Station,	)	
Units 1 and 2)	)	

NRC STAFF'S BRIEF IN SUPPORT OF APPEAL FROM LBP-02-04

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February 4, 2002

Table of Contents

TABLE OF AUTHORITIES

FEDERAL DECISIONS

ADMINISTRATIVE DECISIONS

Commission

Atomic Licensing Appeal Board

Atomic Safety and Licensing Board

REGULATIONS

FEDERAL REGISTER

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.714a(c), the staff of the Nuclear Regulatory Commission (Staff) hereby appeals the decision of the Atomic Safety and Licensing Board (Licensing Board) in LBP-02-04. This decision grants intervention to both Nuclear Information and Resource Service (NIRS) and the Blue Ridge Environmental Defense League (BREDL), finding they have demonstrated standing and have proposed at least one valid contention. As discussed below, the Licensing Board erred in admitting the two contentions and the Order admitting the contentions should be reversed and the request for hearing denied.

STATEMENT OF THE CASE

This case arises from the June 13, 2001 application by Duke Energy Corporation (Duke) to renew the facility operating licenses for McGuire Nuclear Station, Units 1 and 2 (McGuire), and Catawba Nuclear Station, Units 1 and 2 (Catawba).[1] On August 15, 2001, the NRC published a "Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing."

[1]Application to Renew the Operating Licenses of McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2, June 13, 2001 (ADAMS Accession Numbers ML011660301, ML011660145, ML011660167) (License Renewal Application or LRA).

66 Fed. Reg. 60,693 (2001). On September 14, 2001, NIRS and BREDL independently filed petitions for intervention and requests for hearing in the license renewal matter.[2] Subsequently, on October 4, 2001, the Commission issued an order referring both petitions to the Atomic Safety and Licensing Board (ASLB).[3] On November 29, 2001, both NIRS and BREDL separately filed their supplemented and amended petitions.[4] Duke and the NRC filed responses to the petitioners' contentions on December 13, 2001.[5] Oral argument was heard by the Board on December 18 and 19, 2001, addressing the admissibility of contentions raised by NIRS and BREDL. On January 24, 2002, the Licensing Board issued an order admitting two contentions, certifying the issue of terrorism to the Commission and granting the requests for hearing.[6]

STATEMENT OF THE ISSUES

The Licensing Board below committed several errors in reaching its conclusion that some of the petitioners' contentions were admissible. The Board erred in four major respects. First, the Board incorrectly admitted contentions related to the possible aging effects of using mixed oxide (MOX) fuel in a reactor. Second, the Board erroneously accepted an environmental contention on the use of MOX. Third, the Board erred in "reframing" the petitioners' contentions. Fourth, the

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[2]Nuclear Information Resource Services Request for Hearing and Petition to Intervene, (September 14, 2001); BREDL Petition for Intervention and Request for Hearing (September 14, 2001).

[3]*See* Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel, 54 NRC __, CLI-01-20 (October 4, 2001).

[4]Contentions of Nuclear Information and Resource Service (NIRS Contentions), November 29, 2001; Blue Ridge Environmental Defense League Submittal of Contentions in the Matter of the Renewal of Licenses for Duke Energy Corporation (DUKE) McGuire Nuclear Stations 1 and 2 (McGuire) and Catawba Nuclear Stations 1 and 2 (Catawba) (BREDL Contentions), November 29, 2001.

[5]NRC Staff's Response to Contentions Filed by [NIRS] and [BREDL] (Staff Response), December 13, 2001; Response of Duke Energy Corporation to Amended Petitions to Intervene Filed by [NIRS] and [BREDL] (Duke Response), December 13, 2001.

[6]Order (Ruling on Standing and Contentions), LBP-02-04, 55 NRC __ (January 24, 2002).

Board erred in admitting contentions relating to the Applicant's severe accident mitigation alternatives (SAMA) analysis.

LEGAL STANDARDS

A. LEGAL STANDARD FOR INTERLOCUTORY APPEAL OF LICENSING BOARD ORDER GRANTING A PETITION TO INTERVENE OR REQUEST FOR A HEARING

Pursuant to 10 C.F.R. 2.714a(c) the Staff, applicant or any other party may appeal an order granting a petition to intervene and/or request for a hearing, but only on the grounds that the petition to intervene or request should have been wholly denied. In considering an appeal raised pursuant to section 2.714a(c), the Commission has the option to consider all the points of error raised on appeal, rather than simply whether the petition should have been wholly denied. *See Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning) CLI-01-02, 53 NRC 9, 19 (2001); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987).

B. LEGAL STANDARDS FOR THE ADMISSION OF CONTENTIONS

To gain admission to a proceeding as a party, a petitioner for intervention, in addition to establishing standing and raising an aspect within the scope of the proceeding, must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.714(b).[7] For a contention to be admitted, it must consist of (1) a specific statement of the issue raised or controverted, (2) a brief explanation of the bases for the contention, (3) a concise statement of the alleged facts or expert opinion supporting the contention on which the petitioner intends to rely in proving the contention at any hearing, and (4) sufficient information to show that a genuine dispute exists on a material issue of law or fact. *See* 10 C.F.R. § 2.714(b)(2). "The intervenor must do more than submit 'bald or conclusory allegation(s)' of a dispute with the applicant."

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[7] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 (1996).

Dominion Nuclear Connecticut Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC _, slip op. at 12 (2001). *Id.* (citation omitted). "He or she must 'read the pertinent portions of the license application, . . . state the applicant's position and the petitioner's opposing view.'" *Id.* at 12-13 (citation omitted). There must be a specific factual and legal basis for the contention. *Id.* "[P]residing officers may not admit open-ended or ill-defined contentions lacking in specificity or basis." *Id.*

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." *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). 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). Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel, CLI-01-20, 54 NRC_____, at 2 (October 4, 2001); *See also Millstone,* CLI-01-24, slip op. at 19, n.10; *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Any deficiencies in the contentions or bases cannot be remedied by the Licensing Board. *See Millstone*, CLI-01-24, slip op. at 19, n.10.

C. LICENSE RENEWAL

License renewal is governed by two sets of regulatory requirements. The NRC conducts a technical review of the license renewal application pursuant to 10 C.F.R. Part 54 in order to

assure that public health and safety requirements are satisfied. The NRC also completes an environmental review pursuant to 10 C.F.R. Part 51, focusing on potential environmental impacts of the additional 20 years of nuclear power plant operation.

In license renewal, the focus of Part 54 safety review is on "plant systems, structures, and components for which the [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation." *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001), *quoting* 60 Fed. Reg. at 22,469 (alteration in original).[8] The Commission has defined a narrow scope for license renewal review by determining that the current licensing basis (CLB) is not completely open to re-analysis. The current licensing basis is a "term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application." *Id.* at 9. Ongoing regulatory oversight has been deemed sufficient to ensure compliance with the current licensing basis during the renewal period. "In short, the regulatory process commonly is 'the means by which the Commission continually assesses the adequacy of and compliance with' the current licensing basis." *Id.* at 9, *quoting* 60 Fed. Reg. at 22,473.

As with the 10 C.F.R. Part 54 health and safety review, the Commission sought to develop a focused environmental review in 10 C.F.R. Part 51, dividing environmental requirements for license renewal into generic and plant-specific components, examining the potential environmental consequences for the renewal term. Generic conclusions are classified as Category 1 issues and do not need to be re-analyzed on a site-specific basis since they involve environmental effects that are essentially similar for all plants." *Id.* If new and significant information may affect the applicability of a Category 1 issue at a particular plant, the applicant must then provide additional

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[8]Where special circumstances warrant, the Commission can waive application of the license renewal rules on a case-by-case basis, or make an exception for the proceeding at issue. *Turkey Point* at 10.

analyses in its Environmental Report. *Id.* Individuals are afforded ample opportunity to raise new and significant information that would then require the applicant to analyze what might otherwise be classified a generic issue. *Id.* at 12. Environmental issues that are not deemed generic by the Commission are classified as Category 2, and require a plant-specific review. *Id.* at 11.

DISCUSSION

A. THE LICENSING BOARD ERRED IN ADMITTING NIRS CONTENTION 1 REGARDING THE POSSIBLE FUTURE USE OF MOX AT MCGUIRE AND CATAWBA.

The Board rewrote and admitted NIRS' contentions relating to MOX. The text of the admitted contention, as rewritten by the Board, states:

> Anticipated MOX fuel use in the Duke plants will have a significant impact on aging and environmental license renewal issues during the extended period of operations in the Duke plants, through mechanisms including changes in the fission neutron spectrum and the abundances of fission products, and must therefore be considered in the license renewal application and addressed in the Supplemental EIS.

LBP-02-04, slip op. At 69. In contrast, the contentions articulated by NIRS were:

> 1.1.1 MOX Fuel Use Will Have a significant Impact on the Safe Operation of Catawba and McGuire During the License Renewal Period and Must be Considered in the License Renewal Application.
>
> 1.2.4 Environmental Reports Do Not Consider MOX Fuel Use

See NIRS Contentions at 2, 20. In admitting and subsequently rewriting NIRS' contentions relating to MOX, the Board below committed a variety of errors.

The MOX issue arose in the proceeding below out of two proposed contentions pled by NIRS. In its pleading, NIRS separately argued 1) that the application was deficient for not including a discussion of the impacts of MOX on the analyses performed pursuant to Part 54 (NIRS Contention 1.1.1); and, 2) that the applicant's environmental report was deficient because it did not analyze the impacts of irradiating MOX at Catawba and McGuire (NIRS Contention 1.2.4). NIRS Contentions at 2, 20. NIRS supported its Part 54 claims by citing to a variety of reports and arguing that issues associated with fast neutron flux and gamma heating (as a result of introducing MOX

into the reactor) would have a direct effect on the aging analyses contained in the applicants application. Id. at 2-4. In relation to its environmental claims, NIRS' supported its contention by arguing, without providing any expert opinions or citations to supporting documentation for its arguments, that MOX irradiation would result in an increase of actinides and plutonium in the reactors' effluents. Id. at 20.

Advancing similar arguments, the Staff and the Applicant, in responding to the contentions proffered by NIRS, argued that consideration of issues related to MOX fuel were beyond the scope of this proceeding. Staff Response at 12. In essence, under Part 54, the renewal application was not required to address MOX because it was not part of the current licensing basis at the time the application was filed. Staff Response at 12; Duke Response at 13. Further, the Staff and the Applicant argued that the case law governing the consideration of environmental impacts confirmed that, in circumstances such as exist here, NEPA did not require consideration of issues related to MOX. Staff Response at 12-15.

1. The Licensing Board Misinterpreted the Meaning of "Current Licensing Basis."

The Licensing Board included a discussion of the meaning of "Current Licensing Basis" (CLB) in the context of license renewal. *See* LBP-02-04, slip op. at 17-18, 51-53. The Board cited the language in 10 C.F.R. § 54.29(a) that states that for a license to be renewed, there must be "reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB, and that any changes made to the plant's CLB in order to comply with this paragraph are in accord with the Act and the Commission's regulations," focusing on the phrase "*changes made to the plant's CLB*" to support its later conclusion that possible future changes, not related to the license renewal, can also be considered. *See* LBP-02-04, slip op. at 51-52. Immediately thereafter, the Board cites the definition of CLB in 10 C.F.R. § 54.3, concluding, despite that regulation's clear statement that the CLB consists of "the set of NRC requirements applicable to a specific plant and a licensee's written commitments for ensuring

compliance . . . that are *docketed and in effect,"* that "the CLB would arguably appear to include any 'license conditions' that might be added as a result of any 'changes' resulting from, for example, a license renewal proceeding." *Id.* at 52 (emphasis supplied). Although the Licensing Board cites license renewal as an example of changes that would be included in 10 C.F.R. § 54.29(a), it is clear, given its admission of this contention, that the Board would apply this regulatory requirement to include changes that are not necessary for license renewal.

The Licensing Board's conclusions regarding the CLB are erroneous. First, the changes cited in 10 C.F.R. § 54.29(a) explicitly refer to "changes made to the plant's CLB *in order to comply with this paragraph."* That paragraph is limited to changes that result from the license renewal review itself, *i.e.* changes necessary to accommodate aging management in the CLB as it existed at the time of the application, and not changes unrelated to the license renewal review.[9] In this case, any changes in the CLB resulting from the license renewal would not involve the use of MOX since the license renewal application does not involve a request to use MOX. Any reference to MOX would be a direct result of the Licensing Board's error in including MOX within the scope of this proceeding. Moreover, the Staff would have difficulty determining the scope of systems, structures and components, as well as the applicable aging effects associated with the speculated use of MOX, since it is not presently defined in the CLB. Second, the regulations and Commission precedent are very clear in stating that the CLB includes only those requirements "applicable to a specific plant that are *in effect at the time of the license renewal application."* *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001).

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[9] The regulation provides that a renewed license may be issued upon a finding that actions have been identified and have been or will be taken with respect to aging management of the functionality of structures and components and time-limited aging analyses, "such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB, and that any changes made in the plant's CLB in order to comply with this paragraph are in accord with the Act and the Commission's regulations."

2. The Board Erred by Admitting a Contention that Is Beyond the Environmental Scope of this Proceeding.

As discussed above, the scope of license renewal is defined by 10 C.F.R. Parts 51 and 54. These regulations provide the basic framework within which license renewal applicants, the Staff, Intervenors, and licensing boards need to work. The Staff submits that the Licensing Board went beyond the bounds defined by the regulations and the precedent related to consideration of environmental impacts; as such, the Board committed reversible error. The Board ignored precedent identified by the Staff and the applicant relating to the requirement that in order for a matter to be considered within an EIS it first needs to be a proposal before the agency. LBP-02-04, slip op. at 48. Specifically, by concluding that NIRS' environmental MOX contention was admissible, the Board tacitly decided that the use of MOX at Catawba and McGuire is currently a proposal before the Commission. Thus, as explained below, the Board, while purporting to develop the record, erred in admitting a contention that is beyond the scope of this proceeding.[10]

As stated above, NIRS' contention alleged that the environmental impacts of MOX needed to be considered by the Applicant in its environmental report.[11] NIRS Contentions at 21. NIRS'

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[10] *Compare* LBP-02-04, slip op. at 67 (stating that the Board is interested in developing a full record in relation to resolving issues of whether MOX is a proposal before the Commission) *with id.* at 68-69 (ruling that the NIRS' MOX contentions are within the scope of this proceeding). Interestingly, in ruling that NIRS' environmental MOX contention was within the scope of the proceeding, the Board merely relied on the fact that NIRS pled that using MOX would affect the plants' thermal discharges. *Id.* at 68. However, NIRS never provided any supporting documentation for this bald assertion.

[11] The case law presented to the Board specifically addresses the obligations of a federal agency to consider the environmental impacts of "proposals" before it. *See* Staff Response at 13-15. NIRS, in its MOX environmental contention, however, focused its challenge on the alleged incompleteness of the Applicant's environmental report. The case law surrounding the proposal requirement is relevant in determining the completeness of the Applicant's environmental report. Under 10 C.F.R. §51.45 (c), an applicant's environmental report is required to contain enough information to allow the Commission to conduct its review. Therefore, *if* NEPA required that the NRC consider the impacts from irradiation of MOX in conjunction with the impacts arising from license renewal, then the applicant, in its report, would include a discussion of the two sets of impacts. Since NEPA does not require such consideration, however, the Applicant's environmental (continued...)

argument, however, is premature and, therefore, beyond the scope of this proceeding. The time at which a federal agency is required to consider the impacts of an activity has been the subject of a great deal of litigation.[12] The Supreme Court has been clear that an agency is required to consider an activity, for purposes of its environmental impacts, only once it has a "proposal" before the agency. *Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976). In the instant case, as of yet, the use of MOX as fuel in the reactors is not a proposal before the Commission.[13] Therefore, such issues are, as a matter of law, excluded from this proceeding.[14]

Nevertheless, in admitting NIRS' contentions, the Board effectively ruled that the use of MOX was within the scope of this proceeding.[15] The Board, however, in its lengthy discussion of

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[11](...continued)
report is not required to include such a discussion.

[12]*See, e.g., City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Sierra Club v. Marsh*, 976 F.2d 763, 778 (1st Cir. 1992); *Neighbors Organized to Insure a Sound Environment v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989); *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609, 622-24 (10th Cir. 1987); *Crounse Corp. v. ICC*, 781 F.2d 1176, 1194-5 (6th Cir. 1986); *Webb v. Gorsuch*, 699 F.2d 157, 161 (4th Cir. 1983); *Concerned Citizens On I-90 v. Secretary of Transportation*, 641 F.2d 1, 5-6 (1st Cir. 1981); *Lange v. Brinear*, 625 F.2d 812, 815-16 (9th Cir. 1980).

[13]Presently, it is uncertain when the Commission will receive a proposal for use of MOX at Catawba and McGuire. For example, the MOX Fuel Fabrication Facility (MFFF) has not received its construction authorization and has not even applied for a license to possess and use special nuclear material (SNM). Furthermore, in order to use MOX at the reactors, the Applicant would have to submit a license amendment request to change its technical specifications. Since none of these eventualities have occurred and the agency has not received a proposal to use MOX fuel at Catawba and McGuire, the consideration of this issue is premature and would require all involved to engage in resolving a hypothetical situation.

[14]As argued by Applicant in their brief opposing BREDL's petition to dismiss, even if one were to treat the use of MOX as a proposal before the Commission, such use would be beyond the scope of the environmental review necessary to renew the licenses. Amending Catawba and McGuire's licenses to authorize use of MOX would be an action independent of the instant case and neither action would force the Commission to pursue a particular course in either proceeding.

[15]Much of the Board's concern regarding any future license amendment proceeding involving the use of MOX at Catawba and McGuire seems to focus on the fact that the Commission's regulations do not *require* the preparation an EIS for a license amendment, but require an EIS for license renewal. The Board apparently was concerned that the Intervenors would somehow be denied their "right" to an EIS regarding MOX. Transcript at 607-08. As the Staff pointed out, whether or not an EIS will be prepared is a decision that will be made in (continued...)

Kleppe and its progeny, failed to identify any reasons to support its conclusion that the contention was admissible. LBP-02-04, slip op. At 53-65. The Board's discussion of several cases merely recounted the facts and findings involved in those cases without providing any meaningful analysis of the cases and their applicability to the instant case. Id. In fact, the Board's decision seems contrary to the majority of the cases discussed therein.[16] Therefore, without incorporating into the record the justification for making the judgment that MOX issues are within the scope of this proceeding, the Board erroneously admitted NIRS' environmental contentions related to MOX.[17]

3. The Licensing Board Erred in Rewriting and Expanding the Contention.

The Licensing Board rewrote and expanded the contention, erring in the process. As the Commission has recently reiterated, it is the petitioner's responsibility, not the Licensing Board's, to write the contentions. *See Millstone*, CLI-01-24, 54 NRC __, slip op. at 19, n.10. *See also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). The Licensing Board expanded NIRS' contentions to include a clause regarding the scope of the

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[15](...continued)
accordance with the Commission's regulations, when and if an application to use MOX is received, and, in any event, there is no right to an EIS and consideration of what may happen in a future proceeding is irrelevant to the instant case.

[16] *See* LBP-02-04, slip op. at 54-62 (citing *Airport Neighbors Alliance, Inc. v. U.S.*, 90 F.3d 426 (10th Cir. 1996); *City of Grapevine v. DOT*, 17 F.3d 1502 (D.C. Cir. 1994); *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992); *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990); *Neighbors Organized to Insure a Sound Environment v. McArtor*, 878 F.2d 174 (6th Cir. 1989); *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609 (10th Cir. 1987)).

[17]Notably, the Board relies heavily on the Commission's order denying BREDL's petition to hold the proceeding in abeyance. *See Duke Energy Corp.* (McGuire Nuclear Plant, Units 1 & 2, Catawba Nuclear Plant, Units 1 & 2), CLI-01-27, 54 NRC __ (2001). The Board, in its decision, states that the order requires them to admit these contentions in order to develop a full record. LBP-02-04, slip op. at 65-66. The Board, however, fails to recognize that the reason why the "record" needs to be developed is that NIRS did not plead with enough specificity any of the facts that would support its environmental contention. The Board itself calls attention to this fact when it recognizes that all it had been presented with were assertions. Id. at 67. Therefore, if NIRS failed to plead sufficient facts to support its contention, the contention should not be admitted so that through the hearing process it could develop it into an admissible contention.

Staff's SEIS, which has yet to be issued, that is: the use of MOX fuel must be addressed in the Staff's supplemental EIS.[18] The Licensing Board thus admitted a contention that addresses the merits of the impacts of the use of MOX at McGuire and Catawba.[19] As the Board said in admitting the contention: "At the hearing on this contention, all parties may present evidence to establish whether or not this contention should be sustained on the merits, which will determine whether MOX fuel use must be addressed in the SEIS and the LRA." *Id.* at 69. Clearly, the Board anticipates having an evidentiary hearing regarding the impacts of MOX. *See id.* at 67-68. The contention, as recast by the Board, places the Staff in an untenable position by requiring the Staff to analyze the use of MOX without having the licensee's proposal before it and the necessary site-specific technical information needed for an analysis of the issues.[20]

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[18]*Compare* NIRS Contentions at 20 (complaining that the Applicant's environmental report did not address the use of MOX) *with* LBP-02-04, slip op. at 69 (recasting the submitted contentions as an argument relating to the Supplemental EIS).

[19]The Licensing Board's decision appears to contemplate that it would conduct an evidentiary hearing on the MOX fuel issue "in the near future," prior to the issuance of the Staff documents (Draft SER and SEIS) and apparently irrespective of whether any application to use MOX as a proposal before the agency. LBP-02-04, slip op. at 67-68. Such a plan would be in direct contravention of the Commission's Order referring this case to the ASLBP. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-01-20, 54 NRC __ (2001). In that Order, the Commission stated that "[t]he evidentiary hearing should not commence until after completion of the final SER and FES," but granted discretion to hear safety issues prior to issuance of the final SER under certain circumstances. CLI-01-20, slip op. at 5. No such discretion was afforded regarding environmental issues.

[20]It is particularly troublesome that the Board relies on a December 28, 2001, Memorandum and Order from the Commission denying BREDL's petition to dismiss the license renewal application. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC __ (2001). In that order, the Commission stated that "it is generally preferable for the Licensing Board to address ... questions in the first instance, allowing us ultimately to consider them after development of a full record." *Id.* The Licensing Board apparently took this statement by the Commission as a direction to admit contentions in order to develop a record. *See* LBP-02-04, slip op. at 65-66. (stating "the Commission has explicitly directed us not only to address the question, but also to 'develop[ ] a full record'" (citing CLI-01-27, 54 NRC at 7)). The Staff submits that the Licensing Board misinterpreted the Commission's statement. The full record referenced in the Commission's Order refers to, in the first instance, the parties' pleadings, the transcript of the oral argument and the Licensing Board's opinion on the

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B. THE LICENSING BOARD ERRED IN ADMITTING CONTENTIONS RELATING TO THE APPLICANT'S SEVERE ACCIDENT MITIGATION ALTERNATIVES ANALYSIS.

The Licensing Board admitted the following consolidated contention:

> The Duke SAMA analysis is incomplete, and insufficient to mitigate severe accidents, in that it
>
> (a) fails to include information from NUREG/CR-6427, and
>
> (b) fails to include a severe accident mitigation alternative relating to Station Blackout-Caused Accidents, namely, a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

LBP-02-04, slip op. at 97. The Staff submits that the admission of this contention (BREDL/NIRS Contention 2) was in error.

The contention was based on NIRS Contentions 1.1.4 and 1.1.5 and one aspect of BREDL Contention 4. *See* LBP-02-04, slip op. at 84-89, 94-97. The Licensing Board admitted BREDL Contention 4 and NIRS Contentions 1.1.4 to the extent that they allege that Duke's SAMA analysis failed to address an April 2000 Sandia study on Direct Containment Heating (DCH) ("Assessment of the DCH Issue for Plants with Ice Condenser Containments," NUREG/CR-6427).[21] *Id.* But, as the Staff argued below, neither of the Intervenors alleged that the analysis contained in the applicant's submittal was incorrect. Furthermore, the fact that Duke did not specifically reference or address the findings from the Sandia study does not mean that Duke's plant probabilistic risk assessment (PRA), on which its SAMA analysis relies, is deficient in this regard. *See* McGuire Environmental Report, Reference 3.1, Attachment K, page 32; Catawba Environmental Report,

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[20](...continued)
issue of admissibility of the contention. The Staff does not believe that the Commission's statement was an invitation or direction to admit the contention without regard to whether it is within the scope of this proceeding or whether it is sufficient under 10 C.F.R. § 2.714. *See also* Section A.2, *supra*, at 10-11 & n.17.

[21] The Licensing Board rejected the portions of the contentions and bases that alleged deficiencies in design and safety concerns.

Reference 3.1, Attachment H, page 31. As the Staff pointed out below, the Duke PRA addresses several severe accident initiators, including station blackout (SBO), loss of coolant accidents (LOCAs), transients, anticipated transient without scram (ATWS), and internal floods, and includes treatment of all important containment challenges, including DCH over-pressure failure, and hydrogen combustion. *See* Staff Response at 22. NIRS, however, failed to allege that Duke failed to consider any of the initiators or containment challenges which are included in the Sandia report. Moreover, the set of SAMAs considered by Duke also includes installing backup power to igniters that would mitigate the major contributor to containment failure in the Sandia study. *See* NUREG/CR-6427, Summary and Recommendation Section at 121. The Board noted no specific deficiencies in the applicant's analysis, other that the failure to cite NUREG/CR-6427 and the failure to include the SAMA offered by the Intervenors. The Licensing Board dismissed both Duke's and the Staff's arguments regarding the sufficiency of the SAMA analysis and the lack of basis and specificity of the Intervenors' arguments, stating that they go to the merits of the contentions at issue. *See* LBP-02-04, slip op. at 94. But, the Board accepted the petitioners' contentions without regard to the lack of basis and specificity and the lack of a nexus between the contention (that the SAMA is incomplete because it does not address NUREG/CR-6427) and the licensee's documents. In fact, the Intervenors did not show that addressing the Sandia study would lead to a different conclusion.

The admitted contention is also based upon NIRS Contention 1.1.5, and states that the SAMA analysis is inadequate because it does not include a SAMA relating to Station Blackout Accidents postulated by NIRS, that is, a dedicated electrical line from the hydroelectric generating dams adjacent to each reactor site.

While it is true that, pursuant to Part 51, an environmental report filed with the Commission in support of a license renewal application must contain "a consideration of alternatives to mitigate severe accidents" if these alternatives have not been previously examined, the Intervenors failed

to raise an admissible contention related to the SAMAs analyzed by the applicant. 10 C.F.R. § 51.53 (c)(ii)(L). NIRS argued that having a dedicated power source in the form of an electrical line from hydroelectric dams is an unexamined mitigation alternative that must be included in Duke's SAMA analysis. However, NIRS failed to allege any facts or expert opinion to support its position that the proposed SAMA is viable.[22] The only support for the contention were statements that such a line existed at Oconee and Duke owns hydroelectric plants in proximity to McGuire and Catawba. Despite the Licensing Board's finding that the Intervenors "provided a sufficient, reasonably specific explanation of the bases" . . . to meet the requirement of section 2.714(b)(2)(i), as well as sufficient expert opinion, facts, and references to sources and documents . . . under section 2.714(b)(2)(ii), and sufficient information to show that a genuine dispute exists with regard to the material facts of whether and to what extent Duke's SAMA analysis should . . . include the alternative of a separate dedicated line . . . " (LBP-02-04, slip op. at 96), the record is bereft of any such expert opinion, facts, references or information relating to the SAMA proffered by NIRS and accepted for litigation by the Licensing Board. In fact, NIRS made no showing, by way of expert opinion or facts that its postulated SAMA is viable and cost effective or that Duke's SAMA analysis is inadequate for failure to address the postulated SAMA. In identifying potential SAMAs, it is not required that all conceivable SAMAs be explicitly identified and analyzed, since there may be many different ways in which a specific risk contributor or failure mode might be reduced or eliminated, some of which may be viable and some which may be impractical or impossible (*i.e.*, prohibitively expensive, low effectiveness, etc.). Therefore, what is important for

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[22] The Staff notes that subsequent to the issuance of the Licensing Board's Order, the Applicant submitted to the Licensing Board and the parties its January 31, 2002, response to a Staff Request for Additional Information (RAI), in which it provided, among other things, an analysis of NIRS' proffered SAMA. Letter to Ann Marshall Young, Charles N. Kelber, Lester S. Rubenstein, Administrative Judges, from David A. Repka, Counsel for Duke Energy Corp. (February 1, 2002). The Applicant's analysis of the SAMA does not alter the Staff's position that the contention submitted by NIRS was not supported by sufficient bases, facts or expert opinion, and was therefore inadmissible under the requirements of 10 C.F.R. § 2.714.

purposes of the SAMA analysis is that a reasonable set of potential enhancements/alternatives be considered to address each of the major risk contributors. That is why it is essential that any contention alleging that a SAMA analysis include a specific proffered SAMA must meet the criteria of 10 C.F.R. § 2.714(b)(2) and must have sufficient bases, be supported by expert opinion or facts, and contain sufficient information to show that the proffered SAMA is viable and cost effective. Without this threshold for admission of a contention, any SAMA, whether reasonable or not, could be admitted for litigation. The Staff submits that is exactly what occurred below. NIRS submitted an unsupported contention alleging that a specific SAMA had to be analyzed, and the Licensing Board accepted the contention without requiring that NIRS meet the threshold for admission of contentions and demanding the support required by 10 C.F.R. § 2.714. Because the contention was not supported by sufficient basis as required by 10 C.F.R. § 2.714(b)(2)(ii), it should not have been admitted.

CONCLUSION

The Licensing Board erred in admitting NIRS Contention 1 and BREDL/NIRS Contention 2. Therefore, the Licensing Board's decision should be reversed and the petitions for intervention and requests for hearing wholly denied.

Respectfully submitted,

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Dated at Rockville, Maryland
this 4th day of February 2002.