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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DUKE ENERGY
CORPORATION FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM
AND ORDER LBP-02-04 (RULING ON STANDING AND CONTENTIONS)

I. INTRODUCTION

On January 24, 2002, the Atomic Safety and Licensing Board (“Licensing Board” or “Board”) in this matter issued a Memorandum and Order admitting two consolidated and restated contentions for hearing.¹ The two reframed contentions were based on proposed contentions filed by petitioners Nuclear Information and Resource Service (“NIRS”) and the Blue Ridge Environmental Defense League (“BREDL”) (collectively, “Petitioners”). The original proposed contentions were submitted by Petitioners on November 29, 2001 in supplemental filings (“Amended Petitions”) amending the requests for hearing and petitions for leave to intervene that Petitioners had filed in this license renewal proceeding on September 14, 2001.² Pursuant to Nuclear Regulatory Commission (“NRC”) regulations in 10 C.F.R. § 2.714a,

¹ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, __ NRC __ (slip op., Jan. 24, 2002).

² “Contentions of Nuclear Information and Resource Service” (Nov. 29, 2001) (“NIRS Contentions”); “Blue Ridge Environmental Defense League submittal of contentions in the matter of renewal of licenses for Duke Energy Corporation (DUKE) McGuire

Duke Energy Corporation (“Duke”) hereby appeals the Licensing Board’s decision in LBP-02-04, to the extent that it restated and admitted two contentions. As discussed further below, Duke opposes admission of these contentions because, contrary to the holdings of the Licensing Board, neither raises an admissible matter. Duke respectfully requests that the Commission reverse the Licensing’s Board’s admission of the contentions and dismiss this proceeding. In the alternative, Duke requests that the Commission exercise its inherent supervisory authority to address the significant and novel legal and policy issues raised by the admission of these contentions, and take appropriate action to assure the efficient conduct and timely completion of this proceeding.

II. BACKGROUND

A. The License Renewal Application And The Proceedings To Date

On June 13, 2001, Duke submitted an application to the NRC to renew the operating licenses for McGuire Nuclear Station, Units 1 and 2 (“McGuire”), and Catawba Nuclear Station, Units 1 and 2 (“Catawba”). The NRC published the notice of receipt of Duke’s application in the *Federal Register* on July 16, 2001.³ On August 15, 2001, the NRC issued a notice of its acceptance of the application for docketing, concurrent with a notice of an opportunity for hearing.⁴ Petitioners thereafter filed petitions to intervene and requests for hearing pursuant to 10 C.F.R. § 2.714 on September 14, 2001. Duke and the NRC Staff

Nuclear Stations 1 and 2 [McGUIRE] and Catawba Nuclear Stations 1 and 2 [CATAWBA]” (Nov. 29, 2001) (“BREDL Contentions”).

³ See “Duke Energy Corporation, McGuire, Units 1 and 2, and Catawba, Units 1 and 2; Notice of Receipt of Application for Renewal of Facility Operating License Nos. NPF-9, NPF-17, NPF-35, and NPF-52 for an Additional 20-Year Period,” 66 Fed. Reg. 37,072 (July 16, 2001).

⁴ See “Duke Energy Corporation, McGuire, Units 1 and 2, and Catawba, Units 1 and 2; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing Regarding Renewal of Facility Operating License Nos. NPF-9, NPF-17, NPF-35, and NPF-52 for an Additional 20-Year Period,” 66 Fed. Reg. 42,893 (Aug. 15, 2001).

responded to these petitions, on the issue of standing only, on October 1, 2001.⁵ On October 4, 2001, the Commission issued its “Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel.”⁶ The Commission therein defined the limited scope of matters properly within this license renewal proceeding, consistent with its delegation orders in earlier license renewal proceedings.⁷

Prior to the submission of proposed contentions by either Petitioner, BREDL filed a petition before the Commission to dismiss or suspend this license renewal proceeding, requesting that the NRC Staff halt its ongoing review of the docketed license renewal application (“LRA”) until the status of certain issues is resolved, including concerns related to the potential for use in the future at McGuire and Catawba of mixed oxide (“MOX”) fuel.⁸ Both Duke and the NRC Staff opposed the BREDL Petition to Dismiss.⁹ The BREDL Petition to Dismiss was in fact later denied by the Commission.¹⁰

⁵ “Duke Energy Corporation’s Response to Requests for Hearing and Petitions for Leave to Intervene” (Oct. 1, 2001) (“Duke Response”); “NRC Staff’s Response to Requests for Hearing and Petitions for Leave to Intervene Filed by Nuclear Information and Resource Service and Blue Ridge Environmental Defense League” (Oct. 1, 2001) (“NRC Staff Response”).

⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001) (“Delegation Order”).

⁷ *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327 (2000).

⁸ *See* “Blue Ridge Environmental Defense League Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance” (Oct. 23, 2001) (“BREDL Petition to Dismiss”).

⁹ *See* “Response of Duke Energy Corporation to Blue Ridge Environmental Defense League Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold It in Abeyance” (Nov. 5, 2001) (“Duke Response to Petition”); “NRC Staff’s Response to Blue Ridge Environmental Defense League’s Petition to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance” (Nov. 8, 2001) (“NRC Staff Response to Petition”).

¹⁰ *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-01-27, __ NRC __ (slip op., Dec. 28, 2001). In its decision, the Commission held that it was premature to halt this license renewal adjudication, and reiterated that “[l]icense renewal, by its very nature, contemplates a limited inquiry” and

NIRS and BREDL filed their Amended Petitions, containing their proposed contentions, on November 29, 2001.¹¹ On December 13, 2001, Duke and the NRC Staff responded to Petitioners' filings. Both Duke and the NRC Staff opposed admission of Petitioners' proposed contentions in their entirety.¹² A prehearing conference was held in Charlotte, North Carolina, on December 18-19, 2001, at which the Licensing Board heard oral argument from Duke, the NRC Staff, and the Petitioners on the issue of the admissibility of the proposed contentions.

On January 24, 2002, the Licensing Board issued its Memorandum and Order admitting two consolidated contentions. The two admitted contentions are now styled as NIRS Consolidated Contention 1 and BREDL/NIRS Consolidated Contention 2. The first relates to MOX fuel issues and the second relates to the Severe Accident Mitigation Alternatives ("SAMA") evaluation included in Duke's license renewal environmental reports ("ERs").

B. Status Of Duke's Plans Regarding MOX Fuel

As Duke has explained in the license renewal application cover letter, and in substantive filings in this proceeding before both the Licensing Board and the Commission, Duke is currently participating in an international program to reduce stockpiles of surplus weapons plutonium in the United States and Russia. This program may eventually involve the use of MOX fuel at McGuire and/or Catawba. However, the future use of MOX fuel at McGuire

"focuses on *aging* issues, not on everyday operating issues." *Id.*, slip op. at 6 (emphasis in original) (footnote omitted).

¹¹ See NIRS Contentions, *supra*; BREDL Contentions, *supra*.

¹² See "Response of Duke Energy Corporation to Amended Petitions to Intervene Filed by Nuclear Information and Resource Service and Blue Ridge Environmental Defense League" (Dec. 13, 2001) ("Duke Response to Contentions"); "NRC Staff's Response to Contentions Filed by Nuclear Information and Resource Service and Blue Ridge Environmental Defense League" (Dec. 13, 2001) ("NRC Staff Response to Contentions").

and Catawba reactors “is not a certainty.”¹³ Substantial uncertainties and contingencies continue to surround the program, as further discussed below.

If the program proceeds as planned, Duke anticipates submitting, in 2002, a license amendment request to the Commission which would, if granted, allow Duke to load a very limited number of MOX fuel demonstration or lead test assemblies. If the amendment request is granted by the NRC, Duke would be authorized to begin using the MOX fuel lead test assemblies in one of the four units by 2004. In addition to submittal of the first MOX-related license amendment application, Duke plans to submit a license amendment request to allow the use of MOX fuel in “batch” quantities. The latter application is not expected to be filed before late 2003 or early 2004. Use of this additional amount of MOX fuel, if approved by the Commission, is not anticipated to begin before late 2007.

As the above information demonstrates, while Duke is actively evaluating the use of MOX fuel at McGuire and Catawba, it has filed no license amendment request with the Commission for the approval of such use. As pointed out by Duke in prior filings, the ultimate use of any MOX fuel is dependent on a number of factors entirely outside Duke’s control. These include, but are not limited to, actions by the U.S. Department of Energy, including the consummation of certain international agreements, the outcome of the current licensing proceeding for the proposed MOX fuel fabrication facility in South Carolina, and plutonium disposition activities in Russia. Developments in any one of these areas have the potential to delay or halt the current plans for future MOX use.

Moreover, as also further discussed below, any future applications to the NRC for approval of the use of MOX fuel, in any amount, would be subject to NRC safety and

¹³ Duke Response at 8 (footnote omitted).

environmental reviews, as well as opportunities for a hearing by interested members of the public. These hearings, if granted following admission of valid contentions, would allow full consideration of the safety and environmental issues relevant to MOX fuel use within the defined scope of the specific approval at issue. This result will occur regardless of whether the instant license renewal proceeding is ongoing, has concluded, or is dismissed for lack of an admissible contention.

C. Licensing Board Admission Of Contentions In LBP-02-04

This appeal arises from the admission by the Licensing Board of two consolidated contentions based on contentions proposed by NIRS and BREDL. The two admitted contentions are discussed below.

1. NIRS Consolidated Contention 1

The first contention admitted by the Licensing Board is based upon NIRS Contentions 1.1.1 and 1.2.4, concerning the question of the effects of possible future MOX fuel use on the McGuire and Catawba reactors.¹⁴ As originally presented by NIRS, Contention 1.1.1 stated that “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.” NIRS Contention 1.2.4 stated that the license renewal application “Environmental Reports Do Not Consider MOX Fuel Use.” The Licensing Board noted that these two proposed contentions “relate to alleged aging and license renewal environmental issues associated with . . . use of MOX fuel.” LBP-02-04, slip op. at 42. The Licensing Board also briefly summarized NIRS’s bases for these contentions, including claims that (1) MOX fuel use could result in increased “fast neutron flux and heating rates” and subsequent aging-related

¹⁴ See NIRS Contentions at 2-4, 21-22.

degradation effects on the reactors, and (2) MOX fuel use will cause “increased plutonium and actinides in all forms of discharge from the reactor,” therefore creating an alleged need for an environmental analysis and an analysis of effects of MOX fuel on thermal discharges. *Id.*, slip op. at 43-45 (*citing* NIRS Contentions at 21-22). As admitted and restated by the Licensing Board, NIRS Consolidated Contention 1 reads as follows:

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 [license renewal Supplemental Environmental Impact Statement].

LBP-02-04, slip op. at 69.

2. BREDL/NIRS Consolidated Contention 2

The second contention admitted by the Licensing Board is derived from BREDL Contention 4, and NIRS Contentions 1.1.4, 1.1.4(a), 1.1.5 and 1.1.5(a).¹⁵ BREDL Contention 4 and NIRS Contentions 1.1.4 and 1.1.4(a) asserted that Duke should consider “new information” concerning postulated Station Blackout events and early containment failure, specifically a report published by the NRC entitled “NUREG/CR-6427/SAND99-2553, ‘Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments’” (April 2000) (“NUREG/CR-6427”). LBP-02-04, slip op. at 85-87. NIRS Contentions 1.1.5 and 1.1.5(a) also claimed that Duke should consider as part of its environmental report SAMA analyses a plant modification to address a Station Blackout event — specifically, “dedicated electrical line[s] from the hydroelectric generating dams adjacent to [the McGuire and Catawba] reactor site[s].” *Id.*, slip op. at 88; *see also* NIRS Contentions at 13-17. The Licensing Board defined the relief

¹⁵ See BREDL Contentions at 37-45; NIRS Contentions at 13-17.

sought by Petitioners in these proposed contentions as “consideration in Duke’s SAMA analysis of the NUREG/CR-6427 information and the dedicated line alternative.” *Id.*, slip op. at 96. As admitted and restated by the Licensing Board, the consolidated and reframed BREDL/NIRS Consolidated Contention 2 reads as follows:

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.

Id., slip op. at 97. The Licensing Board noted with regard to this contention that its ruling was “limited to admitting only the issues reflected in our reframing of the contention, and not any that do not reasonably fall within it.” *Id.*

III. ISSUES PRESENTED

1. Whether NIRS Consolidated Contention 1 was properly admitted by the Licensing Board.
2. Whether BREDL/NIRS Consolidated Contention 2 was properly admitted by the Licensing Board.

IV. STANDARD OF REVIEW ON APPEAL

If proposed contentions are initially admitted into litigation by a Licensing Board, the applicant and the NRC Staff may appeal admission of those contentions to the Commission pursuant to 10 C.F.R. § 2.714a. Section 2.714a(c), by which Duke appeals herein, states that “[a]n order granting a petition for leave to intervene and/or request for a hearing is appealable by a party other than the petitioner on the question of whether the petition and/or the request for a

hearing should have been wholly denied.” Accordingly, the standard of review is whether the contentions were properly admitted and the hearing request properly granted.¹⁶

Additionally, while considering the question of whether the admitted contentions should have been denied in their entirety, the Commission should not end its inquiry if it determines that at least one contention was properly admitted. In order to achieve the “prompt and efficient resolution of contested issues,” as sought by the Commission in its Delegation Order,¹⁷ Duke requests a Commission ruling on the admissibility of each of the contentions separately, on the basis of the arguments discussed in this memorandum of law. As a matter of policy, the Commission has clearly expressed its intention to “exercise its inherent supervisory authority” in particular proceedings¹⁸ and has emphasized that it will “take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.”¹⁹ The Commission has also previously recognized the discretion inherent in its appellate jurisdiction with respect to the scope of its review and its ability to fashion appropriate relief.²⁰

¹⁶ See, e.g., *Vermont Yankee Nuclear Power Corp.*, (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13 (1987), *aff’d*, ALAB-876, 26 NRC 277 (1987) (reversing a Licensing Board decision to admit contention).

¹⁷ CLI-01-20, 54 NRC at 215.

¹⁸ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20 (1998).

¹⁹ *Id.* at 25. The Commission reiterated this intention in its Delegation Order in this license renewal proceeding. CLI-01-20, 54 NRC at 217.

²⁰ See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 19 (2001) (citing *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-869, 26 NRC 13, 25-27 (1987)); see also 10 C.F.R. § 2.718(i); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-89-1, 29 NRC 5, 9 (where Licensing Board certified rulings to Appeal Board, pursuant to § 2.718(i), to avoid delay in proceeding and “affect[ing] . . . proceeding in a pervasive or unusual manner”).

As Duke demonstrates below, neither of the contentions admitted by the Licensing Board in this proceeding is a proper subject for litigation under the Commission's existing regulations, precedent, and heightened standards of admissibility. Moreover, the admitted contentions raise significant and novel issues of law and policy, issues that will inherently shape the scope of this proceeding and the scope of future license renewal reviews.

V. ARGUMENT

A. The Licensing Board Erred In Admitting NIRS Consolidated Contention 1 Regarding MOX Fuel Issues

As the Commission is aware and as is discussed above, Duke may in the future seek NRC authorization to use MOX fuel at McGuire and Catawba as part of the United States government program to reduce stockpiles of surplus weapons plutonium. NIRS Consolidated Contention 1, as reframed and accepted by the Licensing Board, injects MOX fuel issues into the current license renewal review. The contention, as reframed, argues that both alleged "aging effects" and "environmental issues" associated with MOX fuel must be addressed in the license renewal application, the environmental reports, and the NRC's license renewal Supplemental Environmental Impact Statement ("SEIS"). *See* LBP-02-04, slip op. at 69.

The Licensing Board appears to contemplate that the issue accepted for hearing at this stage is whether possible future MOX fuel use is indeed properly within the scope of this license renewal proceeding and, thus, whether it must be addressed in the application, safety evaluations, environmental reports, and SEIS. *See* LBP-02-04, slip op. at 67 (" . . . what we decide herein is not the ultimate merits of whether MOX fuel use should be addressed in the SEIS based on what is at this point a relatively poorly-developed record, but rather the (also significant) issue of whether the contention, that any future MOX use should be considered in this proceeding, is sufficiently arguable and supported . . ."). Thus, for various reasons that it

perceives, the Licensing Board contemplates an initial hearing to develop a “full record” to support the threshold scope determination. *Id.*, slip op. at 67-68. In deciding to admit this threshold issue and to go forward with a factual inquiry on what is essentially a legal issue, the Licensing Board clearly felt constrained by the Commission’s decision on the prior BREDL Petition to Dismiss (CLI-01-27, slip op. at 7). *Id.*, slip op. at 65.

For the reasons discussed below, Consolidated Contention 1 should not have been admitted. Whether a safety issue under Part 54 or an environmental issue under Part 51, the contention indeed raises a basic threshold question regarding the scope of this proceeding. It was appropriate for the Licensing Board to make a threshold decision in the context of assessing admissibility of the proposed contentions, because the scope of the proceeding is an inherent issue in determining whether a proposed contention raises a “genuine dispute . . . on a material issue of law or fact.” 10 C.F.R. § 2.714(b)(2)(iii) (emphasis added). In this case, however, the Licensing Board erred in concluding that it must admit the threshold scope issue as a contention in order to develop a factual record on that issue. In effect, by ordering a hearing the Licensing Board apparently decided that MOX fuel issues are within the scope of this renewal proceeding, thereby forcing Duke and the NRC Staff to analyze those issues. The Licensing Board’s concerns regarding meeting the Commission’s expectations in CLI-01-27 are unfounded; the Licensing Board has incorrectly interpreted that decision as deciding the scope issue in favor of the Petitioners and compelling admission of the contention.

As further discussed below, the Licensing Board should have developed whatever facts and arguments it believed necessary on the scope issue prior to deciding the admissibility of the contention. In fact, based on the record already developed, the Licensing Board should have concluded that both the facts and law preclude admission of Consolidated Contention 1.

Contention 1 represents a consolidation of safety (Part 54) and environmental (Part 51) issues that are inadmissible as outside the scope of a license renewal review and a license renewal hearing.

1. *Contention 1 As It Relates To Alleged Safety Impacts Is Beyond The Application, The Current Licensing Basis, And The Scope Of A Part 54 Review*

As reflected in reframed Consolidated Contention 1, NIRS proposed Contention 1.1.1 asserted that Duke will apply in 2002 for a license amendment to load MOX fuel lead test assemblies in at least one unit and will apply in 2005 for license amendments for “batch” use in all four units. NIRS argued that the use of MOX fuel will increase fast neutron flux in the core and increase gamma heating rates. NIRS Contentions at 3-4. Therefore, NIRS asserts that there will be a “significant impact” on aging of structures and components within the scope of license renewal, and that a “number” of time-limited aging analyses must be reevaluated. *Id.* Even assuming that these conclusory statements constitute an adequate factual basis for an admissible contention under 10 C.F.R. § 2.714(b)(2) (they do not), the issues are nonetheless outside the scope of the present review in a license renewal proceeding.

As argued in response to the prior BREDL Petition to Dismiss, Duke is not now authorized to use MOX fuel at either McGuire or Catawba. In applying for license renewal, Duke is not now seeking authorization to use MOX fuel. Duke’s license renewal application is predicated upon, and assumes throughout, that licensed activities will be conducted at each unit through the current license term and the period of extended operation in accordance with the Current Licensing Basis (“CLB”) (*i.e.*, using low enriched uranium fuel only). MOX fuel is simply not “on the table” in the present application.

In contrast, NRC authorizations to load test assemblies or batch assemblies — if they are eventually sought — would be the subjects of separate NRC license amendment

applications. Those amendment applications will be made in accordance with NRC requirements, and will be subject to any applicable notice and hearing requirements. Those amendment applications will include any necessary safety analyses, including any necessary evaluation of changes in fast neutron flux and gamma heating rates and associated impacts on equipment aging (*i.e.*, age-related degradation effects), as well as any necessary evaluation of effects on time-limited aging analyses. There is no substantive, legal, or practical reason why those technical safety issues should or must be evaluated now, in the present context. Any necessary limits on the number of MOX assemblies to be irradiated, or on the time period for use of MOX fuel assemblies, will be defined in the MOX submittals and — at that time — the appropriate evaluations can and will be made for MOX fuel effects correlated to the actual scope and time period of the proposed MOX fuel use. Any additional monitoring or management programs also can and will be addressed in MOX submittals.

The effect of admitting Consolidated Contention 1 is to force the evaluation of MOX issues forward and into the license renewal context. Evaluation of these issues at this time is premature and unwarranted. The NRC in its 1991 license renewal rule limited a 10 C.F.R. Part 54 review to age-related degradation unique to license renewal. *See* “Final Rule, Nuclear Power Plant License Renewal,” 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). In the 1995 Supplementary Information for the subsequent revisions to the license renewal rule, the NRC further emphasized its regulatory philosophy of license renewal. The first principle is that, “with the exception of age-related degradation unique to license renewal and possibly a few other issues related to safety only during the period of extended operation of nuclear power plants, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains [sic] an acceptable level of safety . . .” “Final Rule, Nuclear Power Plant

License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,464 (May 8, 1995). The second principle is that the CLB must be maintained through the period of extended operation. *Id.*

Consistent with these principles, a license renewal application properly assumes the current CLB. The MOX fuel effects alleged in the contention can and indeed must be addressed through the normal regulatory processes applicable at the time a CLB change related to MOX fuel use is actually proposed. In the case of MOX fuel, the process for CLB changes is by NRC-approved license amendment. There has been no showing that alleged MOX fuel effects are unique to the period of extended operation, or that they could not be addressed by the appropriate CLB changes (including NRC-approved license conditions or Technical Specifications) evaluated, adopted and implemented at the time MOX fuel use is considered.²¹

In many other situations, the NRC has recognized that the scope of a safety review, and any related hearing on a licensing action, is limited by the nature of the proposed amendment. *See, e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 204 (1998) (“The scope of the [License Termination Plan] proceeding is, of course, coextensive with the scope of the LTP itself”); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998) (“The scope of an adjudicatory hearing is specified by the notice of hearing . . . and contentions that deal with matters outside that defined scope must be rejected”). Recently, in an analogous situation, the Licensing Board presiding on the application for authorization to construct a fuel fabrication facility found proposed contentions related to MOX fuel effects in commercial reactors to be inadmissible and

²¹ Under Part 54, for in-scope structures and components subject to an aging management review, a licensee must demonstrate that the effects of aging will be adequately managed. 10 C.F.R. § 54.21(a)(3). An evaluation is also required to assure the continued viability of time-limited aging analyses or that aging effects addressed in those analyses will be managed. 10 C.F.R. § 54.21(c)(1). A MOX fuel license amendment application safety

to be more appropriate for any hearing in connection with a license amendment application to use MOX fuel. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, ___ NRC ___, slip op. at 43-44, 73-74 (Dec. 6, 2001). While, as pointed out by the Licensing Board, the above case involves a hearing on a facility distinct from the facility where the MOX fuel might one day be used, similar conclusions have been reached for issues related to different authorizations for the same facility. *See, e.g., Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-86-21, 23 NRC 849, 858-59 (1986) (Licensing Board limited scope of admitted contention, noting that it “has no authority to look beyond the license amendment application” and “cannot speculate on events that might occur in the future”); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 79-80 (1996); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-43, 22 NRC 805, 811 (1985); *Umetco Minerals Corp.*, LBP-93-7, 37 NRC 267, 277 (1993). The NRC can and should sequence and apportion its safety reviews in accordance with the timing and scope of each application put before it. Otherwise, the safety reviews for the license renewal and MOX fuel projects are effectively consolidated.

In discussing this aspect of the proposed contention, the Licensing Board seems to suggest that 10 C.F.R. §§ 54.21(b), 54.37(b), and 54.29 may somehow work to bootstrap future CLB changes (such as a license amendment authorizing MOX fuel use) into a current license renewal review. *See* LBP-02-04, slip op. at 50-53. This is not the case. Section 54.21(b) indeed requires, during the pendency of the license renewal review, an “amendment to the [license] renewal application” identifying any change to the CLB made during NRC review of the application “that materially affects the contents of the license renewal application.” Similarly,

evaluation would, in order to demonstrate reasonable assurance of safety, need to address similar issues for the relevant period of MOX fuel use.

after a renewed license is issued, Section 54.37(b) establishes a continuing process, consistent with 10 C.F.R. § 50.71(e), for evaluating future CLB changes with respect to license renewal technical issues. These two regulations serve a purpose: to assure that CLB changes (that are evaluated/authorized by processes apart from Part 54) are addressed with respect to potential long-term aging effects, potential impacts on time-limited aging analyses, and potential impacts on any other basis for a renewed license. *See generally* 60 Fed. Reg. at 22,481-84. However, these regulations do not direct that the review of prospective CLB changes (*i.e.*, changes that must be approved by the NRC), and any related hearing rights, be brought forward into the Part 54 process.

10 C.F.R. § 54.29 lists the findings required in order for the NRC to issue a renewed license. Section 54.29(a) provides that a renewed license may be issued if, among other things, the Commission finds 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 [Atomic Energy] Act and the Commission’s regulations.” The reference in 10 C.F.R. § 54.29(a) to these possible CLB changes is not — by the plain meaning of the language — a reference to unrelated, future CLB changes to be proposed by the licensee. Rather, it is a reference to changes mandated by the license renewal review itself. Section 54.29(a) is not a basis to bootstrap potential future CLB changes into this Part 54 review.²²

²² The Licensing Board seems to agree that the reference in Section 54.29(a) is to changes to the CLB resulting from, for example, the license renewal proceeding itself. Thus, the required finding under Section 54.29(a) is that the activities under the renewed license will be conducted in accordance with the CLB, as modified to address license renewal considerations. This finding does not encompass CLB changes that might be contemplated to address other downstream authorizations (*e.g.*, future changes in fuel parameters). The acceptability of the latter changes must be addressed in any findings required to authorize those CLB changes.

An approach whereby a license renewal application must address future, planned CLB changes is also fundamentally unbounded. If potential MOX fuel issues must be front-loaded into a license renewal application and review, what other possible future license amendments/Technical Specification changes must also be included in the renewal review? If the Commission embraces the Licensing Board's approach, linking potential future changes in the CLB to Part 54, any license amendment that might continue in effect into the period of extended operation, or might have any aging or maintenance implications, would need to be addressed in the license renewal application itself (rather than through the ongoing mechanisms established by Sections 54.21(b) and 54.37(b)). This universe of potential downstream CLB changes could include amendments such as those involving power uprates, other potential changes regarding fuel characteristics (*e.g.*, enrichment, burn-up), or major hardware additions or replacements (*e.g.*, steam generators). Nothing in Part 54 or the Commission's Part 54 rulemaking supports such a wide and prospective sweep for a license renewal review. The wide and prospective sweep implicit in the admission of Contention 1 would work to the extreme detriment of the NRC's focused and efficient license renewal process.

In sum, the safety aspects of NIRS Consolidated Contention 1 related to MOX fuel use are clearly outside the scope of Duke's current Part 54 application and the current Part 54 review and hearing. Those issues can and will be addressed when the related safety analyses are prepared and submitted to the NRC in MOX fuel license amendment applications. No further factual inquiry or interim hearing in this proceeding is necessary to decide this threshold license renewal review scope issue. This aspect of Consolidated Contention 1 should not have been admitted.

2. *Environmental Impacts Related To MOX Fuel Are Beyond The Scope Of The Current Part 51 License Renewal SEIS*

As reflected in reframed Consolidated Contention 1, NIRS Contention 1.2.4 had alleged that the environmental impacts of the use of MOX fuel at McGuire and Catawba must be addressed in the license renewal environmental reports (and, implicitly, in the NRC Staff's SEIS). NIRS asserted that the use of MOX fuel would result in a core that has a "significantly greater fraction of plutonium," that "a higher percentage of actinides will be formed," and that "an analysis of . . . thermal discharges should also be done." NIRS Contentions at 21-22. Putting aside whether any adequate factual basis existed for this proposed contention (which, as proposed, included only these conclusory statements), these environmental issues are not appropriate for consideration in this license renewal proceeding. Rather, they can and must be raised in the context of an application to authorize use of MOX fuel in a reactor.

In its proposed contention, NIRS did not argue that its environmental MOX fuel contention was based on any requirements of the National Environmental Policy Act ("NEPA"). Nor did NIRS cite any case law decided under NEPA as support for the argument that MOX and license renewal need to be linked. *See* NIRS Contentions at 21-22. Indeed, no legal theory at all was offered to support the proposed contention.²³ At the prehearing conference, the Petitioner's argument focused on whether an EIS would be required in connection with a review of a MOX fuel application, and therefore whether the opportunity for input at that time would be somehow diminished relative to the opportunity afforded in connection with the license renewal SEIS. (Tr.

²³ The issue of linking alleged MOX fuel impacts was first raised by BREDL in its Petition to Dismiss filed with the Commission. Even that filing, however, provided only a minimal argument by obliquely invoking, without citation, the NEPA rubric of improper "segmentation."

at 584-87, 613-15.) Therefore, the Licensing Board supplied the NEPA theory in analyzing and ruling on the contention. *See* LBP-02-04, slip op. at 53-64.

Duke maintains that, under 10 C.F.R. § 2.714(b), a petitioner raising a legal contention (such as an argument that the environmental reviews of the license renewal and MOX applications must be linked under NEPA), must supply a “specific statement of the issue of law” and a “brief explanation of the bases of the contention” — just as is required for a proposed factual contention. *See* 10 C.F.R. § 2.714(b)(2)(i). NIRS failed to do so. Duke also concludes that in determining the admissibility of the contention, the Licensing Board should have dismissed NIRS Contention 1.2.4 as beyond the scope of this proceeding — as required by 10 C.F.R. § 2.714(b)(2)(iii). Based upon the legal principles discussed below, the Licensing Board should have concluded that neither NEPA nor 10 C.F.R. Part 51 requires an assessment of potential environmental impacts of prospective MOX fuel use in the license renewal application or the SEIS.

The Council on Environmental Quality (“CEQ”) regulations implementing NEPA require federal agencies, in determining the scope of an environmental review, to consider “connected actions” and “cumulative actions” within a single EIS, to avoid improper “segmentation.” *See generally* 40 C.F.R. § 1500 *et seq.* As recognized by the Licensing Board, considerable litigation has arisen with respect to whether multiple proposed actions are in fact “connected” or “cumulative,” and therefore must be addressed in a single NEPA review. As discussed in Duke’s Response to the BREDL Petition to Dismiss, the pending license renewal application and the future MOX fuel applications are not connected or cumulative actions for NEPA purposes. These actions are not interdependent; conversely, they each have “independent utility.” Moreover, the use of MOX fuel — particularly the “batch” assembly application —

remains uncertain and cannot yet be considered a “concrete proposal” for environmental review. And, perhaps most importantly, by treating license renewal and MOX fuel use separately, in the sequence in which they would actually be proposed, no premature commitment will be made to MOX fuel use and no environmental issues will escape review.

First, ample case law supports the notion that discrete projects — such as license renewal and MOX fuel use — do not need to be evaluated together if they are not interdependent. In *Webb v. Gorsuch*, 699 F. 2d 157, 161 (4th Cir. 1983), cited by the Licensing Board, the Court of Appeals found that the Environmental Protection Agency did not need to consider the “cumulative impacts” of permits for water discharges from underground mines together with the impacts of discharges from future mines (*i.e.*, proposed mines beyond those presently before the agency) — if the current projects “did not represent a practical commitment to the others.” Stated another way, the Court found that agencies are required to consider projects together (cumulatively) only when the projects are “so interdependent that it would be unwise or irrational to complete one without the others.” *Id.* Indeed, impacts of single projects, or “segments,” can properly be evaluated separately from those of other projects or “segments” if the individual segments have “independent utility.” See *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985) (*citing Daly v. Volpe*, 514 F.2d 1106 (9th Cir. 1975)).²⁴

²⁴ In *Thomas*, the petitioners sought to enjoin construction of a timber road, which the U.S. Forest Service planned to build only because of contemplated plans to sell timber from an inaccessible area. The Court of Appeals determined that the construction of the road and the future timber sales were “connected actions” under CEQ regulations, and that they were “inextricably intertwined,” because the former action was initiated solely to facilitate the latter, by providing the necessary access. *Id.* at 759. Significantly, however, aside from its intended use to facilitate logging and timber sales, the road had no “independent utility.” Accordingly, NEPA required the preparation of an EIS that considered the cumulative environmental impacts of both the road and the contemplated timber sales. *Id.* at 759-761. In contrast to these facts, the independent utility of license renewal and possible future MOX fuel use for the McGuire and Catawba plants is clear. License renewal is not undertaken by Duke to facilitate future use of MOX fuel at its facilities, or vice versa. In *Daly*, the Court of Appeals had allowed the environmental

Similarly, in *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 433 (10th Cir. 1996), the Court of Appeals found that the Federal Aviation Administration did not inappropriately ignore “cumulative impacts” when its environmental assessment related to a runway upgrade at the Albuquerque airport did not analyze extensively the remaining future components postulated as part of the airport’s twenty-year master plan, including expansion of the passenger terminal, construction of an additional parking structure and new cargo terminal, and expansion of surface access roads. The Court observed that the remaining components of the plan were not “so interdependent . . . that it would be unwise or irrational” to complete the runway upgrade without them. *Id.* at 433. Additionally, the Court found that the currently proposed runway project had “independent utility from other components of the Master Plan” because it would accommodate the increasing number of commercial airline passengers already using that airport. *Id.* at 429. The runway upgrade did not necessarily signal a commitment to proceed with the rest of the master plan, and there was “no ‘inextricable nexus’” between that discrete project and other aspects of the master plan. Accordingly, the preparation of an EIS addressing cumulative impacts from possible future actions was not required. *Id.* at 431.

As often repeated in this proceeding to date, the McGuire-Catawba license renewal application and the prospective MOX fuel amendments are separate projects that — on their face — do not meet a standard of “interdependence.” All four McGuire and Catawba units currently operate with low enriched uranium dioxide fuel (not MOX fuel) and can continue to do so through their full operating license terms and through the proposed period of extended operation. Conversely, even if the licenses were not renewed, Duke could continue to operate

impacts of a single highway segment to be evaluated separately from the impacts associated with the rest of the highway because the segment in question was deemed to have “independent utility.” *See also Lange v. Brinegar*, 625 F.2d 812, 815-16 (9th Cir. 1980), which affirmed the continuing validity of *Daly*.

and seek NRC approval to use MOX fuel during the current license terms. No evidentiary hearing is needed to determine that the license renewal proposal and the prospective MOX fuel approvals are not “interdependent” or that they have “independent utility.”

In its Response to the BREDL Petition to Dismiss, Duke also cited *Society Hill Towers Owners’ Ass’n v. Rendell*, 210 F.3d 168, 181 (3rd Cir. 2000). In this case, neighborhood residents challenged a Housing and Urban Development Department approval of an urban development action grant to the city of Philadelphia to assist in funding a hotel and parking garage. The residents claimed that the city’s NEPA review of the project was deficient because it did not consider, in addition to the impacts of the hotel and garage, the impact of future development — including a proposed “mega” entertainment complex that had been identified in several planning documents. The Court of Appeals rejected this claim because it was not clear that the additional projects would ever be completed. *Id.* at 182. Further, the Court observed a lack of “interdependence” between the hotel/parking garage and other contemplated projects, and found no evidence that the City would be unable to sever any connection between the hotel/garage and the other contemplated projects “without destroying the proposed action’s functionality.” *Id.*

In rejecting petitioners’ “segmentation” argument, the Third Circuit in *Society Hill Towers* concurred with the “interdependence” logic of the Fourth Circuit in *Webb* and related cases. However, the Court of Appeals also observed another important factor in an analysis of the scope of an environmental review: the uncertainty attached to the potential future projects.²⁵ Similarly, in the present case, the uncertainties surrounding the MOX fuel project

²⁵ In a case analogous to *Society Hill Towers*, the Fifth Circuit ruled that the city of New Orleans appropriately limited its environmental review under the urban development action grant program to a proposed hotel, retail, and parking development project. The review excluded other aspects of the city’s master plan for the affected area that the Court

remain and are clear — particularly with respect to the more significant amendment involving the “batch” quantities of MOX fuel. The variables and uncertainties inherent in this project weigh heavily against a premature assessment of MOX fuel issues.²⁶ Importantly, the oft-cited holding in the seminal case of *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976), was stated as follows: “[W]hen several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together” (emphasis added). While no showing has been made that license renewal and MOX fuel will have cumulative or synergistic impacts upon the region, there is clearly no proposal to use MOX fuel pending before the NRC at this time. No evidentiary hearing is necessary on this point.²⁷

As recognized by the Licensing Board, the Supreme Court in *Kleppe* held that agencies are not required to consider the impacts of “less imminent actions.” *Id.* at 410 n.20. As

found to be indefinite and speculative. No design work or land acquisition had been conducted for the excluded aspects and no final plans or private funding commitments had been obtained. *Vieux Carre Property Owners v. Pierce*, 719 F.2d 1272, 1275 (5th Cir. 1983).

²⁶ Recent history is replete with examples of nuclear-related technical projects that were pursued but later cancelled. (See, e.g., the New Production Reactor, the Advanced Neutron Source Reactor, Accelerator Production of Tritium, the Superconducting Supercollider, the Actinide Processing and Storage Facility, the Louisiana Centrifuge Enrichment Facility, and the Advanced Vapor Laser Isotopic Separation Enrichment Facility.) The MOX fuel project, like many of these examples, is a DOE project subject to the vagaries of the annual appropriations process.

²⁷ See also *Park County Resource Council, Inc. v. USDA*, 817 F.2d 609, 623-24 (10th Cir. 1987), *overruled on other grounds*, *Village of Los Rancheros De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992), concluding that a comprehensive or cumulative EIS was not required with respect to future airport expansion plans where those plans “were not concrete enough,” and where the environmental review could be deferred pending submission of a “more concrete proposal.” For practical reasons discussed further below, similar considerations apply with respect to addressing potential impacts associated with MOX fuel. See also *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1477-78 (D.C. Cir. 1990) (the Court of Appeals found that *Kleppe* “clearly establishes that an EIS need not delve into the possible effects of a hypothetical project, but need only focus on the impact of the particular proposal at issue and other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue”).

shown above, the use of MOX fuel, particularly in “batch” quantities, is a “less imminent action.” The practical wisdom of this approach is reflected in a case cited by the NRC Staff and the Licensing Board, *Sierra Club v. Marsh*, 976 F.2d 763 (1st Cir. 1992). This case stands for the proposition that “agencies need not consider potential effects that are highly speculative or indefinite” (LBP-02-04, slip op. at 57). It also suggests something more — a practical approach to timing the environmental reviews related to consecutive projects:

Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several different factors. With what confidence can one say that the impacts are likely to occur? Can one describe them ‘now’ with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account ‘now,’ will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government’s decision?

Sierra Club, 976 F.2d at 768 (citations omitted). The thrust here is obvious: an agency should act rationally in determining its approach to evaluating environmental impacts by balancing considerations such as the uncertainty of the future project, the ripeness of the issues for review, whether impacts of a later project might bear on the present approval, or whether the present approval would commit the agency to a particular course of action on the future project. Because of the independent utility and lack of interdependence of license renewal and MOX fuel use, because of uncertainties surrounding the MOX project, because MOX fuel-related technical and environmental analyses are still in progress, and because license renewal does not commit either Duke or the government to the MOX fuel project, the rational course for the NRC would be to address these matters separately. Moreover, no suggestion has been made by anyone to date in this proceeding that any environmental issues would escape review by the NRC by utilizing this eminently logical approach. Indeed, none would.

In sum, an evidentiary hearing is not necessary to address this issue. The Licensing Board erred in deciding that it needed to hold a hearing on environmental impacts of future amendments in order to conclude that neither it nor the NRC Staff would need to consider those impacts. The Commission should recognize the lack of any interdependence between these projects and take the only rational, prudent approach. The Commission should find, pursuant to 10 C.F.R. § 2.714(b)(2)(iii), that admitted Consolidated Contention 1 actually relates to matters beyond the scope of the current application and environmental review.

3. *The Licensing Board Was Not Constrained To Admit Either The Safety Or Environmental Aspects Of Contention 1 By The Commission's Decision In CLI-01-27*

As discussed above, the argument on the need to address MOX fuel in the present renewal proceeding was first raised in the BREDL Petition to Dismiss. In its December 28, 2001 decision denying BREDL's petition, the Commission found it to be "premature to address contention-like arguments such as those BREDL presents here [in the Petition to Dismiss] regarding plutonium/MOX fuel." CLI-01-27, slip op. at 7. The Commission continued:

In this proceeding, the issue is styled: whether the NRC staff is obliged to consider in an Environmental Impact Statement the cumulative effect of the instant license extension action together with an as-yet-unfiled application for an amendment permitting use of plutonium/MOX fuel We believe it is generally preferable for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record.

*Id.*²⁸ Based on the Commission's decision, and this discussion of Commission preferences, the Licensing Board decided that it was in effect directed by the Commission to develop a factual

²⁸ Between the time of the BREDL Petition to Dismiss and the Commission decision on the petition, proposed contentions were filed. Paradoxically, BREDL did not propose a MOX/NEPA contention. NIRS proposed its Contentions 1.1.1 and 1.2.4 but, as discussed above, did not style its issue as an environmental/NEPA contention in quite the same way as BREDL had in the Petition to Dismiss or, indeed, in precisely the way as paraphrased by the Commission in CLI-01-27.

record on the NEPA issue (and presumably the safety review issue as well), and only then to decide the “merits” of the threshold scope question. LBP-02-04, slip op. at 65. The resolution of the “merits” of the threshold question would be something short of a final decision on the adequacy of any required assessment of MOX fuel aging effects and environmental impacts, as might later be required in the license renewal application and/or the SEIS. *Id.*, slip op. at 68-69.

Duke believes that the Licensing Board has misconstrued CLI-01-27, leading it to improperly admit Contention 1. This is a reversible error and one that, in any event, invites an exercise of the Commission’s inherent supervisory authority over licensing proceedings. It is clear that, in CLI-01-27, the Commission directed the Licensing Board to decide the issue of the scope of the requested license renewal environmental review in the first instance in the context of specific proposed contentions. However, it is not necessary to equate the Commission’s reference to a “full record” to a direction to hold an evidentiary hearing on the record. A “full record” would refer to any proposed contentions (not before the Commission in the BREDL Petition to Dismiss), applicant and NRC Staff responses to those contentions, and a prehearing conference wherein the relationship between the two authorizations could be explored as well as relevant legal arguments. The Licensing Board’s conclusion, in effect, reads the Commission’s decision in CLI-01-27 as a decision to accept the proposed contention for hearing.

Consistent with 10 C.F.R. § 2.714(b)(2) and CLI-01-27, the Licensing Board was not required or even urged to accept any issue for any level of hearing — including either an interim hearing on the “merits” of the threshold contention (one not stated in the proposed contentions) or on the merits of the ultimate question (the assertions of aging effects and environmental impacts, as stated in the proposed contentions). Rather, the Licensing Board was directed by the Commission to decide whether there was an admissible contention. For the

reasons discussed above, there was (and is) no admissible contention — because both the aging and the Part 51 environmental issues related to MOX fuel are, as a matter of law, outside the scope of this proceeding.

4. *The Licensing Board's Approach Will Lead To Unwarranted Inefficiencies In The Hearing Process And Frustrate Important Policy Objectives*

As discussed above, it appears that the Licensing Board contemplates a bifurcated or phased hearing in which to develop a factual record on the reframed Contention 1. The first phase would develop facts to allow the Licensing Board to decide the “merits” of the threshold issue of whether the application and SEIS must be updated to address MOX fuel. If so, a second phase, while only implied at this point, would seemingly be necessary to address the technical assertions set forth in the re-formatted contention.²⁹ While Duke is certainly supportive of moving hearings forward to expedite the process, in this case the approach could not work, or at least could not work efficiently. The facts discussed above (regarding, for example, the status of the MOX fuel project, the independent utility of both the MOX fuel and license renewal approvals, and the uncertainties with respect to a MOX fuel amendment application) would properly support a decision to exclude Contention 1 at the contention admissibility stage.

A hearing on Contention 1 as admitted would have the effect of linking two otherwise independent actions at a time when the MOX fuel amendment applications and supporting analyses have not been fully prepared and have certainly not been submitted. Duke has stated before that the application for authorization related to “batch” irradiation of MOX fuel is scheduled for late 2003 or early 2004, with MOX fuel use in substantial quantities not planned

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It is difficult to ascertain what scope the Licensing Board would consider for this second phase. This second phase might address the technical issues currently in the reframed contention. Or it may be that the Licensing Board contemplates an opportunity to identify new contentions based on the new material submitted in the supplemented application or environmental report, or in the SEIS.

to begin before 2007. The Licensing Board's approach would, in addition to affecting NRC Staff resources, force Duke to: (1) move forward its schedule for the analyses of MOX fuel technical and environmental issues; (2) address those issues prematurely without benefit of full analyses; (3) substantially delay the license renewal schedule; or (4) withdraw from the MOX fuel project. None of these options would appear to be consistent with good sense, Commission policy objectives, or other national interests.

With respect to developing the MOX fuel analyses in the short term, this approach is not consistent with efficient use of Duke resources, DOE resources, or NRC Staff review resources. The current schedule for the MOX fuel applications balances resource commitments in a way that is consistent with the expected timeline for developments with respect to the other matters that are prerequisites to the MOX project (*e.g.*, international agreements, the development and licensing of a MOX fuel fabrication facility) as well as the uncertainties inherent in the project. On the other hand, the option of going forward with the contemplated interim hearing, with something less than full technical and environmental analyses, seems inconsistent with the specific technical content of the reframed and admitted contentions as well as the Petitioners' original bases statements for those contentions. A premature hearing could frustrate the development of a full and sound record on the issues inherent in admitted Consolidated Contention 1.

The option of a substantial delay in the license renewal schedule, to allow the MOX project to "catch up," is also not desirable. The Commission has frequently articulated its commitment to timely decisions on license renewal applications. *See, e.g., Duke Energy Corp.*, CLI-01-20, 54 NRC 211 (2001); *Turkey Point*, CLI-00-23, 52 NRC 327 (2000). The last option,

withdrawal from the MOX project, would clearly undermine an important United States government non-proliferation and national security initiative.

The approach contemplated in the Licensing Board's decision also offers no countervailing benefit. As discussed above, all of the issues identified in the proposed contentions would be addressed in the MOX fuel license amendment applications and related reviews, at least to the extent those issues are actually applicable to a specific MOX fuel application. Environmental reviews also would be performed, as required under 10 C.F.R. Part 51 and NEPA, for these license amendment applications. The only possible difference identified between those environmental reviews and the present review is one of the form of the Staff's environmental reviews: license renewal involves an EIS (the SEIS), a MOX fuel license amendment application may or may not.³⁰ The fact that there will be an EIS on license renewal, however, is dictated by the Commission's generic decision to require an SEIS rather than an environmental assessment for license renewal,³¹ not by the fact that MOX fuel is involved. The determination of need for an EIS on a MOX fuel proposal should be driven by the MOX proposal itself.³² The environmental review process distinction highlighted by NIRS does not justify bootstrapping MOX fuel issues into the license renewal SEIS. Indeed, if it did, as discussed above, other potential future CLB changes might need to be addressed in the SEIS. Moreover, the Board's contemplated approach would create the very real possibility of a

³⁰ Whether it does or not, the NRC will conduct an environmental review. The only issue is the form of the documentation of the review – either an EIS or an EA.

³¹ See, e.g., "Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses," 61 Fed. Reg. 28,467, 28,470 (June 5, 1996).

³² Indeed, the Department of Energy has also prepared EISs related to the MOX fuel program (Tr. at 623). See U.S. Department of Energy, *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* (DOE/EIS-0229) (Dec. 1996); U.S. Department of Energy, *Surplus Plutonium Disposition Final Environmental Impact Statement* (DOE/EIS-0283) (Nov. 1999).

duplication of effort on behalf of Duke, the NRC Staff, and other interested parties.³³ MOX fuel environmental issues would be addressed now and might be raised yet again for hearing if and when a MOX fuel application is submitted.³⁴

In sum, the Licensing Board erred in admitting reframed Consolidated Contention 1. The Licensing Board took safety issues outside the scope of the present renewal application and allowed them for hearing. In addition, the Licensing Board accepted an environmental contention in order to develop a record in order to determine if the contention should have been admitted in the first place. The Licensing Board should have simply addressed the threshold issue and concluded, consistent with Part 54, Part 51, and NEPA case law, that the proposed contentions were inadmissible. The approach contemplated by LBP-02-04 will lead to inefficiencies and other results contrary to the policies and objectives of the NRC and the United States government.

B. The Licensing Board Erred In Admitting BREDL/NIRS Consolidated Contention 2 Regarding SAMA Issues

BREDL/NIRS Consolidated Contention 2, as reframed and accepted by the Licensing Board, challenges the sufficiency of the SAMA analyses in the environmental reports included with the Duke license renewal application. Specifically, the reframed contention is that the “SAMA analysis is incomplete” and “insufficient to mitigate severe accidents” in that it:

- fails to include risk assessment information from NUREG/CR-6427; and

³³ For example, there could be changes in the future related to the details of the MOX fuel project.

³⁴ During the prehearing conference, NIRS agreed that “if no issues concerning MOX fuel use as it related to aging and license renewal would be foreclosed in a later license amendment proceeding, there is no need to consider the same issues twice.” Tr. at 435-36, cited in LBP-02-04, slip op. at 49.

- fails to include an evaluation of 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 97.³⁵ In so reframing the contention, the Licensing Board properly (if implicitly) rejected aspects of the original proposed contentions challenging the general sufficiency of ice condenser systems, the aging management programs for the containment and ice condenser systems, and the discussion in the application of operating experience related to these systems.³⁶ Nonetheless, the surviving aspect of the contention — challenging the Duke SAMA analysis — was not properly admitted. This consolidated and reframed contention lacks a basis sufficient to satisfy 10 C.F.R. § 2.714(b)(2)(iii). It would, in any event, be inadmissible under 10 C.F.R. § 2.714(d)(2)(ii) because it involves a matter which would be of no consequence in the proceeding in that it would not entitle the Petitioners to any relief.

1. *There Is Inadequate Basis For The Contention As Admitted*

As discussed in the proceeding before the Licensing Board, Duke’s license renewal application met the requirements of 10 C.F.R. § 51.53(c)(3)(ii)(L) by including SAMA

³⁵ The aspect of the reframed contention that suggests that the SAMA analysis is “insufficient to mitigate severe accidents” is not at all clear. A SAMA analysis by its nature does not mitigate accidents. A SAMA analysis considers the risk benefit of specific accident sequences and assesses whether plant enhancements (“alternatives”) to address those sequences are cost-justified. In its totality, therefore, Duke reads Contention 2 as challenging the sufficiency of the SAMA analysis on the grounds that: (1) the risk portion of the analysis does not consider data from NUREG/CR-6427 and (2) the list of enhancements considered does not include the proposed transmission line.

³⁶ A challenge to the adequacy of the ice condenser system would be a challenge to the CLB, beyond the scope of the license renewal review. Challenges to the other matters were simply lacking in basis. They failed to acknowledge or address the information on these subjects actually included in the application.

analyses for both McGuire and Catawba.³⁷ In the SAMA analyses, Duke described the plant-specific severe accident studies completed for the stations, taking into account plant-specific enhancements implemented since the 1980's to reduce the risks of severe accidents. These analyses calculated a total core damage frequency and quantified risks in terms of person-rem per year exposures. These analyses further calculated a range of costs beyond which plant enhancements would not be cost-justified based on change in risk or averted costs. The analyses also identified a number of specific accident mitigation-related plant enhancements for a comparison of costs of the enhancements versus the calculated averted risk benchmark. Not every theoretically possible plant enhancement or mitigation alternative was included in the SAMA analyses. Such is not required, or, for that matter, possible. Nevertheless, consistent with Section 51.53(c), it follows that enhancements (both those listed and other hypothetical additions) with a cost that would exceed the calculated risk savings would not be cost-justified.

The first challenge to the Duke SAMA analyses that was accepted by the Licensing Board is the challenge to the underlying SAMA risk assessment because it does not specifically reference NUREG/CR-6427 and does not specifically address the risk data in that study. According to the Licensing Board: “. . . it is apparent that Duke has not considered or applied the values for conditional containment failure probability discussed in NUREG/CR-6427 in its own calculations. Whether or not it *should* apply these values goes to the merits of the contentions at issue, as do many of the quite extensive and detailed arguments of Duke and the Staff.” LBP-02-04, slip op. at 94 (emphasis in original). This conclusion, however, is in error. While Duke indeed provided a detailed explanation of the SAMA analyses in order to address

³⁷ The McGuire SAMA analysis is described in Section 4.21 of the McGuire ER and the analysis itself is found in Attachment K to the McGuire ER. The Catawba SAMA analysis is described in Section 4.21 of the Catawba ER and the analysis itself is found in Attachment H to the Catawba ER.

the proposed contention, this explanation was necessary to a proper determination of whether there was an adequate basis for the contention as required by 10 C.F.R. § 2.714(b)(2).

The NRC's Atomic Safety and Licensing Appeal Board recognized some time ago that, in applying the Commission's threshold requirements of 10 C.F.R. § 2.714, a licensing board is not constrained to uncritically accept on its face a document offered as support for a contention. Rather, the licensing board should undertake a "thoughtful, albeit non-merits" review to determine whether the document indeed provides support for a litigable issue. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989). An explanation of NUREG/CR-6427 and its relationship to the SAMA analyses performed by Duke is necessary for a thoughtful assessment of the proposed contention. With this background, it becomes clear that there is no basis for a litigable issue.³⁸ There is no "genuine dispute" as required by 10 C.F.R. § 2.714(b)(2)(iii).

As discussed in Duke's Response (at 28-29) to the proposed contention (NIRS Contention 1.1.4), NUREG/CR-6427 addressed the Direct Containment Heating ("DCH") issue for nuclear plants with ice condenser containments, such as McGuire and Catawba. The DCH issue for ice condenser plants differs from that for other plants because of the use of the ice condenser system to suppress design-basis accident heat loads, ac-powered igniters to control hydrogen concentrations in containment, smaller containment volumes, and relatively lower ultimate capacity of the containment to withstand internal pressures.³⁹ The NRC contractor that prepared NUREG/CR-6427 concluded that ice condenser plants are more vulnerable to early containment failure than other pressurized water reactors. This vulnerability was dominated by

³⁸ Indeed, Duke in its response to this contention did not go into any detailed critique of the NUREG/CR-6427 data or their applicability. Duke purposely addressed the issue in an overview fashion.

³⁹ NUREG/CR-6427, Abstract, at iii.

non-DCH hydrogen combustion events and largely would depend on plant-specific probabilities for a Station Blackout event. This would be true because the hydrogen igniters used to control hydrogen concentrations would not be operable in a Station Blackout event since the igniters are ac powered.⁴⁰ Therefore, NUREG/CR-6427 might legitimately provide some basis for an assertion related to the vulnerability of ice condenser plants to early containment failure and Station Blackout events. In a license renewal context, however, such an assertion would be an inadmissible challenge to the CLB. *See* 10 C.F.R. § 54.30.

In contrast, NUREG/CR-6427 provides no basis to link the research to the adequacy of Duke's SAMA analyses. As also discussed in Duke's Response to the proposed contention (at 32-33) and during the prehearing conference (Tr. at 365-80), NUREG/CR-6427 provides no insights or commentary on the plant-specific McGuire and Catawba analyses described in the discussion of the SAMA issue in the license renewal application. As noted in Duke's Response (at 33), the ER description of the SAMA analyses prepared by Duke describes the Probabilistic Risk Assessment and Individual Plant Examination ("IPE") work performed for McGuire and Catawba and used as the basis for the SAMA analyses. NUREG/CR-6427, while specifically citing McGuire and Catawba, does not on its face purport to address the current design, operation, or maintenance of the two plants.

⁴⁰ Even though the ice condenser plants were determined to have this relatively increased vulnerability to Station Blackout events, the NRC Staff has concluded that the weighted probability of early containment failure for these plants is generally within the goals for containment performance. "Memorandum to Samuel Collins, Director, Office of Nuclear Reactor Regulation, from Ashok Thadani, Director, Office of Nuclear Regulatory Research, re DCH Issue Resolution for Ice Condenser Plants" (June 22, 2000), at 1. The NRC has also announced the availability of a draft rule concerning standards for combustible gas control systems. *See* 66 Fed. Reg. 57,001 (Nov. 14, 2001). The NRC Staff is investigating further requirements related to deliberate ignition systems. This generic rulemaking would apply to the present license term and is beyond the scope of this proceeding.

Moreover, while Duke's SAMA analyses do not explicitly cite NUREG/CR-6427, that does not equate to a lack of awareness of the document. Duke's SAMA analyses specifically addressed the early containment failures such as those identified in NUREG/CR-6427.⁴¹ Those analyses specifically included potential containment performance alternatives to mitigate the early containment failure mode,⁴² as well as alternatives to address Station Blackout events.⁴³ Further, Duke's SAMA analyses specifically reflected that Duke has already taken actions (not reflected in the NUREG/CR-6427 data) to reduce the frequency of Station Blackout sequences by improving diesel generator reliability.⁴⁴ The NUREG and the proposed contention do not respond directly to any of the material actually included in the application. To constitute an acceptable basis for a contention, the material offered needs to state more than a generalized issue; it must address the "pertinent portions of the license application" and provide a specific factual basis for the contention. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC ___, slip op. at 12-13 (Dec. 5, 2001).

The second challenge to the Duke SAMA analyses accepted by the Licensing Board is based on the fact that the alternative of a dedicated electrical line from "adjacent" hydroelectric generating dams was not included to address Station Blackout events. The basis for this aspect of the proposed contention (drawn from NIRS Contention 1.1.5) involved concerns regarding terrorism and climate change (*i.e.*, severe weather) that might increase the

⁴¹ See McGuire ER, Attachment K, Table 5-1, and Catawba ER, Attachment H, Table 5-1.

⁴² *Id.* (mitigation alternatives 1, 2, 5, 6, 8 and 9). These include the alternative of installing "backup power to igniters," which directly responds to the Station Blackout sequence described in NUREG/CR-6427.

⁴³ *Id.* at 16 and Table 4-2 ("install third diesel generator").

⁴⁴ As noted in the McGuire SAMA analysis (McGuire ER, Attachment K, at 7 (Table 2-1)), Duke performed a Emergency Diesel Generator System Reliability Centered Maintenance Study and implemented several recommendations (such as hardware

potential for loss-of-offsite power events. This aspect of the admitted Contention 2 is also baseless and should not have been accepted.

As discussed in Duke's Response (at 39) and during the prehearing conference (Tr. at 555-59, 562-63, 572-74), Duke's SAMA analyses specifically evaluated Station Blackout events. One of the accident sequences specifically identified for reduction in core damage frequency and asserted exposures and averted costs was a Station Blackout event involving a weather-induced loss-of-offsite power and failure of the two onsite diesel generators already installed.⁴⁵ The SAMA analyses included a calculation of "total present worth" of enhancements to address/mitigate this sequence. One enhancement specifically evaluated to mitigate this sequence was installing a third diesel generator. As reported in the SAMA analyses, the cost of this project would exceed the total present averted-risk worth. There is no comparison made in the proposed contention, and no basis offered, to conclude that the extraordinary cost of installing another dedicated offsite power line would be cost-justified while an additional diesel is not. Consolidated Contention 2 is therefore factually baseless.

The Licensing Board suggests that the alternative of an additional line could be contemplated under the 10 C.F.R. § 50.2 definition of "alternate ac source." LBP-02-04, slip op. at 94-95.⁴⁶ However, that definition specifically requires that an alternate ac source have "minimum potential for common mode failure with offsite power or the onsite emergency ac

modifications and changes to the maintenance program) to enhance diesel generator reliability.

⁴⁵ See, e.g., McGuire ER, Attachment K, Table 4-2.

⁴⁶ A Station Blackout event, as defined in 10 C.F.R. § 50.2, is an event where it is assumed that there is a loss-of-offsite power (the transmission lines) concurrent with a loss-of-onsite emergency ac power (for McGuire and Catawba, the emergency diesel generators). The Station Blackout rule, 10 C.F.R. § 50.63, requires the ability to withstand, or cope with, this scenario. Providing an additional offsite power line that might be assumed to be lost in a Station Blackout event (particularly if the basis of concern is severe weather

power sources.” An over-ground transmission line from the hydroelectric facilities would clearly be vulnerable to common mode failure (*e.g.*, weather) with the existing offsite power lines. With respect to an underground line, the SAMA analyses included in the license renewal ERs already included the present worth associated with the relevant accident sequence. The cost of the third diesel generator specifically evaluated in the analyses exceeded the present worth benchmark. A “thoughtful” assessment of the dedicated offsite power line alternative would clearly lead to a conclusion that an underground line would be a significant project that also would exceed that benchmark. A detailed factual record is not necessary on that limited point. A contention that a SAMA analysis is incomplete should not be admitted simply because it dreams up an alternative that is not listed. Some basis must be provided to show that the alternative is feasible in comparison to the averted exposures and costs as calculated in the SAMA analyses (or in the basis for the contention). This is especially the case when the cost of such alternative would clearly exceed that of another at least equally plausible alternative that is addressed and that is shown to be not cost justified.

In sum, neither aspect of the admitted SAMA contention is supported by a basis acceptable for a license renewal contention. The citation to NUREG/CR-6427 fails to correlate the data in that study to the risk assessments actually performed for McGuire and Catawba and credited in the SAMA analyses submitted in the application. The contention merely states that the SAMA analysis fails to reference NUREG/CR-6427 and does not specifically address that study’s risk data. The contention fails to articulate what risk data must be addressed, and provide a basis therefor. Such a conclusory statement does not rise to the level of an admissible contention. Moreover, the proposal for an additional alternative to be considered lacks a basis in

or terrorist attacks) is of questionable value in addressing the accident sequence of concern.

fact, logic, and the regulations. Accordingly, there has been no showing that there is a genuine dispute on a material issue of law or fact. Therefore, the proposed contention fails to meet 10 C.F.R. § 2.714(b)(2)(iii) and should not have been reformatted and admitted.

2. *The Contention Would Not Entitle Petitioners To Any Relief And Is Effectively Moot*

As discussed above, a SAMA analysis required in an environmental report must, under the Commission's rules, include a consideration of alternatives to mitigate severe accidents. 10 C.F.R. § 51.53(c)(3)(ii)(L). As also discussed above, Duke has already submitted such a consideration of alternatives. The admitted contention challenges the risk assessment utilized in the Duke analyses (because the NUREG/CR-6427 data are not used) and the list of alternatives considered (because the additional offsite transmission line is not evaluated). However, neither of these two issues can lead to any meaningful relief in this proceeding. The contention therefore is of no consequence and should be dismissed in accordance with 10 C.F.R. § 2.714(d)(2)(ii).

In a licensing proceeding on a SAMA issue, the only relief possible is further analysis to be included in an ER. For the beyond-design-basis scenarios addressed in a SAMA analysis, there is no regulatory basis to compel a remedy beyond further analysis — such as compelling implementation of specific mitigation alternatives.⁴⁷ Thus, as discussed below, there is no value in engaging the cumbersome NRC licensing hearing process to address the two issues accepted by the Licensing Board.⁴⁸

⁴⁷ See 61 Fed. Reg. at 28,481 (in reclassifying severe accidents as Category 2 issue, Commission “requir[es] only that alternatives to mitigate severe accidents be considered . . .”); cf. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 n.16 (1989) (“NEPA imposes no substantive requirement that mitigation measures actually be taken”).

⁴⁸ Indeed, in proposing these SAMA contentions, the Petitioners did not demonstrate any independent expertise on risk assessment. In its proposed Contention 1.2.4, NIRS refers

As regards the asserted need to include risk assessment information from NUREG/CR-6427, the NRC Staff identified a number of Requests for Additional Information (“RAIs”).⁴⁹ The RAIs specifically seek, among other things, a comparison of the conditional early containment failure probability for McGuire and Catawba to the conditional containment failure probabilities reported in NUREG/CR-6427, and a discussion of the models and assumptions that account for the major differences. The NRC also requested a re-evaluation of the benefits associated with the hydrogen control measures, assuming a containment response consistent with the findings of NUREG/CR-6427. In responses to the RAIs for each station, dated January 31 and February 1, 2002,⁵⁰ Duke has provided this information to the NRC Staff, including revised averted-risk values. The NRC Staff can choose to include this information in its SEIS or not. However, by any measure relevant to the contention, Duke’s SAMA analyses would be “complete.” In effect, the NRC Staff has requested the information identified in Consolidated Contention 2 and Duke has provided that information, making further relief unnecessary and the contention moot.⁵¹

As regards the asserted need to include an evaluation of a dedicated electrical line from the hydroelectric generating dams near each reactor operating site, the NRC Staff’s RAIs

to Dr. Lyman and issues related to MOX fuel, but does not demonstrate any ability to add to a record on the SAMA analyses submitted to the NRC.

⁴⁹ See letters dated November 21, 2001 (for McGuire) and December 10, 2001 (for Catawba).

⁵⁰ See Letters, M.S. Tuckman to U.S. Nuclear Regulatory Commission, Document Control Desk, “Response to Requests for Additional Information in Support of the Staff Review of the Application to Renew the Facility Operating Licenses of McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2,” Docket Nos. 50-369, 50-370, 50-413 and 50-414, dated January 31, 2002 (McGuire) and February 1, 2002 (Catawba). Copies of these documents were served on the Licensing Board and parties on February 1, 2002.

⁵¹ See *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-19, 42 NRC 191, 195 (1995) (citing *Texas Utils. Elec. Co.* (Comanche Peak Steam

seek (and Duke has provided) information on additional SAMAs related to containment performance. Duke's RAI responses include an assessment of a dedicated line from the hydroelectric stations to the nuclear plants, along with other additional alternatives identified by the NRC Staff and Duke. As discussed above, the estimated cost of the dedicated transmission line alternative will be far in excess of the benefit that can be derived from the Station Blackout contribution to core damage frequencies. No further relief, therefore, can be granted in this proceeding.

In sum, the Commission should exercise its current appellate jurisdiction to reverse the admission of Consolidated Contention 2, because the contention would be of no consequence — particularly in light of the data already provided by Duke in response to the request by the NRC Staff. And even if not considered an error under 10 C.F.R. § 2.714 to admit these contentions, the Commission should — in light of the issues, the facts, and the status of the Staff's review — exercise its inherent supervisory authority to reject these issues to assure prompt and efficient resolution of this license renewal process. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 20, 24-25. The proceeding should be limited to genuine issues and disputes, not matters for which there can be no further remedy.

Electric Station, Unit 2), CLI-93-10, 37 NRC 192 (1993)) (mootness "occurs when a justiciable controversy no longer exists").

VI. CONCLUSION

For the reasons discussed above, the Licensing Board's decision in LBP-02-04 should be reversed. Reframed and admitted NIRS Consolidated Contention 1 and BREDL/NIRS Consolidated Contention 2 should be dismissed.

In the alternative, the Commission should exercise its inherent discretion and supervisory authority to address the significant and novel legal and policy issues raised by the admission of these contentions and direct the conduct of this proceeding consistent with the discussion above. Such direction is necessary to assure the efficient use of resources and the timely completion of this proceeding.

Respectfully submitted,

A handwritten signature in black ink, reading "David A. Repka", with a long horizontal flourish extending to the right.

David A. Repka
Anne W. Cottingham
L. Michael Rafky
WINSTON & STRAWN
1400 L Street, NW
Washington, D.C. 20005-3502

Lisa F. Vaughn
DUKE ENERGY CORPORATION
422 South Church Street
Charlotte, N.C. 28202

ATTORNEYS FOR DUKE ENERGY
CORPORATION

Dated in Washington, D.C.
this 4th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NOTICE OF APPEAL" AND "MEMORANDUM OF LAW IN SUPPORT OF APPEAL OF DUKE ENERGY CORPORATION FROM ATOMIC SAFETY AND LICENSING BOARD MEMORANDUM AND ORDER LBP-02-04 (RULING ON STANDING AND CONTENTIONS)" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 4th day of February 2002. Additional e-mail service has been made this same day as shown below.

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Edward McGaffigan, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Jeffrey S. Merrifield, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Greta J. Dicus, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Nils J. Diaz, Commissioner
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lester S. Rubenstein
Administrative Judge
4760 East Country Villa Drive
Tucson, Arizona 85718
(e-mail: lesrrr@msn.com)

Ann Marshall Young, Chairman
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: amy@nrc.gov)

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Rulemakings and Adjudications Staff
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Dr. Charles N. Kelber
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: cnk@nrc.gov)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Mary Olson
Director of the Southeast Office
Nuclear Information and Resource Service
729 Haywood Road, 1-A
P.O. Box 7586
Asheville, NC 28802
(e-mail: nirs.se@mindspring.com)

Paul Gunter
Nuclear Information and Resource Service
1424 16th Street, NW
Washington, DC 20026
(e-mail: pgunter@nirs.org)

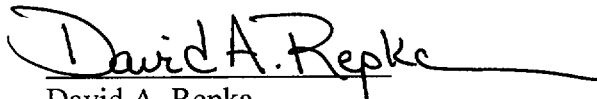
Jesse Riley
854 Henley Place
Charlotte, NC 28207
(e-mail: Jlr2020@aol.com)

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Uttal, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: slu@nrc.gov)

Janet Marsh Zeller
Executive Director
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
(e-mail: BREDL@skybest.com)

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, SC 29802-3487
(e-mail: donmoniak@earthlink.net)


David A. Repka
Counsel for Duke Energy Corporation