

September 9, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

September 11, 2003 (5:19PM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

**ANSWER OF DUKE ENERGY CORPORATION TO THE PETITIONS TO INTERVENE  
AND REQUESTS FOR HEARING OF THE NUCLEAR INFORMATION AND  
RESOURCE SERVICE AND THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE**

**I. INTRODUCTION**

Duke Energy Corporation ("Duke"), applicant in the captioned matter, herein responds to the petitions to intervene and requests for hearing filed in this proceeding by the Nuclear Information and Resource Service ("NIRS") and the Blue Ridge Environmental Defense League ("BREDL"). In accordance with 10 C.F.R. § 2.714(c), this Answer addresses the matter of the petitioners' standing to intervene. As discussed below, Duke does not contest NIRS's claim of representational standing in this proceeding. Similarly, subject to clarification of the intent of BREDL's declarant as discussed below, Duke would not contest BREDL's representational standing.

## II. BACKGROUND

### A. Duke's MOX Fuel Lead Assembly License Amendment Request

The two petitions to intervene respond to the Notice of Opportunity for Hearing<sup>1</sup> published by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") in the *Federal Register* on July 25, 2003, concerning Duke's application to amend its operating licenses for the McGuire Nuclear Station ("McGuire"), Units 1 and 2 (Dockets 50-369 and 50-370), and the Catawba Nuclear Station ("Catawba"), Units 1 and 2 (Dockets 50-413 and 50-414). The license amendment request ("LAR") at issue was filed with the NRC on February 27, 2003. The LAR seeks authorization to revise the McGuire and Catawba Technical Specifications ("TS") to allow the insertion of four mixed oxide ("MOX") lead assemblies (out of a total of 193 fuel assemblies in the reactor core) at *either* the McGuire or Catawba Nuclear Station. All of the lead assemblies are to be loaded into non-limiting core locations.

This LAR was submitted as part of the ongoing United States — Russian Federation plutonium disposition program, a nuclear nonproliferation program. The U.S. Department of Energy ("DOE") plans to dispose of surplus weapon grade ("WG") plutonium by converting that material to MOX fuel and using that fuel in commercial nuclear reactors. In furtherance of that effort, Duke has contracted with Duke Cogema Stone & Webster, LLC ("DCS"), a DOE contractor, to use MOX fuel at the McGuire and Catawba reactors.<sup>2</sup>

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<sup>1</sup> See "Duke Energy Corporation, et al., Catawba Nuclear Station, Units 1 and 2; McGuire Nuclear Station, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing," 68 Fed. Reg. 44,107 (July 25, 2003).

<sup>2</sup> MOX fuel has been used extensively in Europe for over 20 years and is currently being used in more than 30 European power reactors. The MOX fuel used in Europe is manufactured from the plutonium extracted from reprocessed LEU fuel discharged from European reactors; this MOX fuel is typically referred to as reactor grade ("RG") MOX fuel. Reactor grade MOX fuel is similar to the weapons grade MOX fuel that Duke

Licensing of the use of MOX fuel at McGuire and Catawba will be in two steps. The LAR relates to only the first step. The LAR supports current plans for four MOX fuel lead assemblies to be irradiated for a minimum of two cycles at a McGuire or Catawba unit to confirm acceptability of the planned MOX fuel assembly design, verify the validity of Duke's models to predict fuel assembly performance, and confirm the applicability of the European database to Duke's use of MOX fuel. Poolside post-irradiation is planned to verify selected mechanical properties of the lead assemblies. Some or all of the lead assemblies will also undergo a third cycle of irradiation. Examination of one or more fuel rods in a hot cell is planned at the completion of the MOX fuel lead assembly irradiation program. It is Duke's intention to file a separate license amendment application in the future to support "batch use" of MOX fuel (that is, use of significant quantities of MOX fuel along with conventional low enriched uranium ("LEU") fuel).

The language of some existing plant Technical Specifications ("TS") necessitates several TS changes as part of the LAR. In general, these proposed revisions involve the storage of MOX fuel assemblies in the spent fuel storage racks, the description of the fuel pellet and cladding material, references to approved methodologies in the Core Operating Limits Report, and information in the TS bases.

The Duke Power Company Nuclear Security and Contingency Plan will be revised to include enhanced security requirements during the receipt, handling, and storage of the

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proposes to use. The difference between these types of mixed oxide fuel is in the isotopic content of the plutonium.

MOX fuel has also been used in demonstration programs in 5 U.S. reactors. The most recent such program was the use of 4 MOX fuel assemblies (out of 121 core assemblies) at the Ginna nuclear facility in the early 1980s. The NRC reviewed and approved the use of MOX fuel at Ginna. (See license amendment No. 32 to Provisional Operating License No. DPR-18, April 15, 1980.)

unirradiated MOX fuel assemblies. (No plan changes are necessary with respect to irradiated MOX fuel.) The specific proposed changes to the security plan will be submitted to the NRC in the near future, to facilitate NRC review and approval of the revisions on a schedule commensurate with that for the LAR.

DOE will transport the new (unirradiated) MOX fuel assemblies to the McGuire or Catawba facility. This DOE transportation activity is not part of this licensing action. After irradiation of the MOX fuel assemblies, one or more MOX fuel rods will be selected for post-irradiation examination at an offsite DOE hot cell facility. Transportation of the irradiated MOX fuel rods is beyond the scope of this licensing action. The remaining MOX fuel rods will be stored in the spent fuel pool of the unit where they are used. The eventual transport and disposal of spent MOX fuel lead assemblies from McGuire or Catawba to a geologic repository is not part of this licensing action.

**B. NRC Standing Requirements**

Any entity requesting a hearing or seeking to intervene in an NRC licensing proceeding must demonstrate that it has standing to do so. *See* 10 C.F.R. § 2.714(a)(1). A petition to intervene must, among other things, "set forth with particularity the interest of the petitioner in the proceeding, [and] how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene," with particular reference to the factors in Section 2.714(d)(1).<sup>3</sup> *See* 10 C.F.R. § 2.714(a)(2). Additionally, a petition for leave to intervene must set forth "the specific aspect or aspects of the

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<sup>3</sup> In ruling on a petition for leave to intervene, the NRC Licensing Board is to consider: (i) the nature of the petitioner's right to be made a party to the proceeding; (ii) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (iii) the possible effect of any order that may be entered in the proceeding on the petitioner's interest. *See* 10 C.F.R. § 2.714(d)(1).

subject matter of the proceeding as to which petitioner wishes to intervene.” *Id.* A petitioner may satisfy this requirement by identifying “general potential effects of the licensing action or areas of concern that are within the scope of matters that may be considered in the proceeding.”<sup>4</sup>

In determining whether a petitioner has established the requisite “interest” in the proceeding to intervene, the Commission “has long applied contemporaneous concepts of judicial standing.”<sup>5</sup> To obtain standing in a Commission proceeding under 10 C.F.R. § 2.714, a petitioner must demonstrate that “it has suffered (1) a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision.”<sup>6</sup> With respect to the alleged “injury-in-fact,” the Commission has held that petitioners must allege some “plausible chain of causation” from the licensing action at issue to the alleged injury that would or could be redressed in the NRC

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<sup>4</sup> *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 89 (1990), citing *Virginia Elec. and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633 (1973).

<sup>5</sup> *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 23 (2002), citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see, e.g., *Gulf States Utility Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994).

<sup>6</sup> *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 188 (1999), *pet. for review denied sub nom. Dienethal v. United States Nuclear Regulatory Comm’n*, 203 F.3d 52 (D.C. Cir. 2000); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); see generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

proceeding.<sup>7</sup> Such injury may be actual or threatened.<sup>8</sup> The injury, however, must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’”<sup>9</sup>

An organization may attempt to demonstrate standing to participate in an NRC licensing hearing in one of two ways. It can assert injury to organizational interests and demonstrate that those interests are protected by the Atomic Energy Act of 1954, as amended (“AEA”),<sup>10</sup> or base standing on the interests of individuals that it represents — as NIRS and BREDL have done in this case. To derive representational standing from an individual, an organization must identify at least one member (by name and address) and provide some “concrete indication” that the member has authorized the organization to represent him or her in the proceeding. Significantly, the intervention petition must also demonstrate the standing of that individual assessed against the standards discussed above.<sup>11</sup>

In appropriate cases, the NRC has historically granted standing based upon a petitioner’s proximity to the nuclear facility in question. This so-called proximity or geographical presumption assumes that a petitioner “has standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other

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<sup>7</sup> See *Commonwealth Edison Co.*, CLI-99-4, 49 NRC at 192.

<sup>8</sup> *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995), *cert. denied*, 515 U.S. 1159 (1995); *Gulf States Utility Co.*, CLI-94-10, 40 NRC at 47.

<sup>9</sup> *Lujan*, 504 U.S. at 560 (citations omitted); see *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), LBP-03-03, 57 NRC 45, 52 (2003).

<sup>10</sup> See *Tennessee Valley Authority*, LBP-02-14, 56 NRC at 23; see, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).

<sup>11</sup> *Georgia Inst. of Tech.*, CLI-95-12, 42 NRC at 115; *Tennessee Valley Authority*, LBP-02-14, 56 NRC at 23.

source of radioactivity.”<sup>12</sup> Under the rule of thumb generally applied in proceedings related to a construction permit or operating license, individual petitioners residing within fifty miles of a reactor may be presumed to have standing.<sup>13</sup> Significantly, however, the Commission has also ruled that no 50-mile proximity presumption for standing exists in reactor licensing proceedings involving approvals with less potential for off-site radiological consequences:

It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool. However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact’ that will result from the action taken . . . .<sup>14</sup>

More recently, the Commission reiterated that “in an operating license amendment proceeding, a petitioner cannot base his or her standing simply upon a residence or visits near the plant, unless the proposed action quite ‘obvious[ly]’ entails an increased potential for offsite consequences.”<sup>15</sup>

As the Commission has emphasized, the focus of the proximity presumption is upon whether the proposed licensing action “involves a significant source of radioactivity

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<sup>12</sup> *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146 (2001), *aff’d. on other grounds*, CLI-01-17, 54 NRC 3 (2001); *Tennessee Valley Authority*, LBP-02-14, 56 NRC at 23.

<sup>13</sup> *Sequoyah Fuels Corp. and Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n. 22 (1994); *Florida Power & Light Co.*, LBP-01-6, 53 NRC at 148.

<sup>14</sup> *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (internal citations omitted).

<sup>15</sup> *Commonwealth Edison Co.*, CLI-99-4, 49 NRC at 191.

producing an obvious potential for offsite consequences.”<sup>16</sup> The analysis then considers whether the petitioner is within the potential zone of radioactive harm of the proposed action. This must be determined on a case-by-case basis, by examining the nature of the proposed licensing action as well as the significance of the radioactive source.<sup>17</sup> In sum, “[t]he determination of how proximate a petitioner must live or have frequent contacts to a source of radioactivity depends on the danger posed by the source at issue.”<sup>18</sup>

### III. DISCUSSION

#### A. Petitioners’ Representational Standing

NIRS bases standing on the interests of several individuals identified as NIRS members, with residences near Catawba or McGuire. (NIRS Petition, at 2.) Specifically, the Declarations of Nancy Jocoy and Gregg Jocoy state that they reside together in Fort Mill, S.C., which is located within 10 miles of Catawba and 50 miles of McGuire. The Declaration of Kathryn Koppers, who resides in Midland, North Carolina, states that Ms. Koppers lives within 40 miles of McGuire and Catawba. The Declaration of Sherry Lorenz, who resides in Tega Cay, S.C., states that Ms. Lorenz lives within 40 miles of McGuire and Catawba. The Declaration of W. Gray Newman, Jr., of Charlotte, N.C., states that Mr. Newman resides within 40 miles of McGuire and Catawba.

As noted above, a petitioner who seeks to intervene in an operating license amendment proceeding such as this may not base a claim of standing solely upon geographical

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<sup>16</sup> *Tennessee Valley Authority*, LBP-02-14, 56 NRC at 24, citing *Georgia Inst. of Tech.*, CLI-95-12, 42 NRC at 116.

<sup>17</sup> *Id.*, 56 NRC at 24, 26, citing *Georgia Inst. of Tech.*, *id.*, 42 NRC at 116-17.

<sup>18</sup> *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 75 n.22.



proximity to the nuclear facility in question (e.g., a residence near the nuclear facility), unless the proposed licensing action "quite obviously" entails an increased potential for offsite radiological consequences. Absent a showing of an obviously increased risk for such offsite consequences, the petitioner must, in addition to making a showing of geographical proximity, further allege a specific injury in fact that will result from the licensing action.

Duke does not concede that the proposed amendments at issue here, which involve only four MOX fuel lead assemblies, are amendments with an obvious potential for offsite consequences. Indeed, the lead assemblies will have only slightly different nuclear and thermal-hydraulic characteristics from resident LEU fuel assemblies. In the LAR, Duke has demonstrated that the four MOX fuel lead assemblies do not significantly increase offsite radiological consequences of postulated events. See generally LAR, Attachment 3, Sections 3.7 - 3.8. However, Duke recognizes that the NRC, in the context of a showing of standing, will view assertions of potential consequences of proposed actions in the most favorable "non merits" light.<sup>19</sup> Therefore, Duke does not contest the standing of NIRS in this proceeding based on the proximity of the residence of Nancy and Gregg Jocoy, who apparently live within 10 miles of Catawba.<sup>20</sup>

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<sup>19</sup> "To evaluate a petitioner's standing, we construe the petition in favor of the petitioner." *Georgia Inst. of Tech.*, CLI-95-12, 42 NRC at 115.

<sup>20</sup> Duke does not concede that the residence of other declarants at distances up to 40 or more miles from a nuclear plant would be sufficient for standing based on geographical proximity. Compare *Tennessee Valley Authority*, LBP-02-14, 15 NRC at 25-28 (Finding standing for petitioner with representative members who live within 17 miles of the nuclear plants, but declining to grant standing to petitioner who resides more than 50 miles from the plants); *Dominion Nuclear Connecticut, Inc.* LBP-03-03, 57 NRC at 60-63 (Finding standing for organization with member who resides within 2 miles of the nuclear plant, but denying standing to another based on its member's residence 23 miles from the plant).

By contrast, the Declarations of Dr. Lewis E. Patrie and Ms. Kate Boniske of Asheville, N.C., fail to support a claim of representational standing for NIRS. Neither Dr. Patrie nor Ms. Boniske resides within 50 miles of either McGuire or Catawba. Both of these individuals' standing claims are based entirely upon proximity to Interstate 40 and/or Interstate 26, "where it is possible that irradiated MOX fuel from McGuire reactors would be transported en route to Oak Ridge National Lab." Duke is not seeking transportation-related authority, and issues relating to the possible future transportation of irradiated MOX fuel rods from McGuire or Catawba to a hot cell are beyond the scope of the LAR and this license amendment proceeding. Thus, concerns relating solely to the possible transportation of some MOX fuel rods cannot provide a proper basis for representational standing in this proceeding.

BREDL bases its representational standing entirely upon the Declaration of BREDL member Gregg Jocoy, of Fort Mill, S.C., who states that he lives "within 20 miles" of both McGuire and Catawba. (See BREDL Petition, Exhibit 1, paragraph 1.)<sup>21</sup> For the same reasons as discussed above for NIRS, Duke generally does not contest the representative standing of BREDL in this proceeding, based on the proximity of Mr. Jocoy's residence to Catawba. However, Mr. Jocoy, in a separate affidavit filed by NIRS, has authorized NIRS to represent him in this proceeding. Accordingly, as a prerequisite to a grant of standing to BREDL, Mr. Jocoy should clarify the record as to which organization will represent his interests in this proceeding. (If Mr. Jocoy authorizes only NIRS to represent his interests here, then BREDL does not have standing.)

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<sup>21</sup> In his BREDL Declaration, Mr. Jocoy states that his home lies within 20 miles of both McGuire and Catawba. In his NIRS Declaration, Mr. Jocoy states that his home lies within 40 miles of McGuire and Catawba. The Declaration of Nancy Jocoy, Mr. Jocoy's wife, states that their residence lies within 10 miles of Catawba and 50 miles of McGuire.

**B. Petitioners' "Specific Aspects"**

**1. NIRS**

In addition to attempting to make the required showing of interest, the NIRS petition raises a number of issues regarding either the proposed MOX lead assembly license amendment or the prospective amendment related to batch use of MOX fuel. (NIRS Petition, at 3-12). These issues are not styled as proposed contentions, generally lack the detail required for proposed contentions, and do not directly address the requirements for proposed contentions as set forth in 10 C.F.R. § 2.714(b)(2). Therefore, these issues are most appropriately construed as an attempt to comply with 10 C.F.R. § 2.714(a)(2) requiring that petitions designate "the specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." Some of the NIRS issues or "aspects" are within the scope of this proceeding related to the lead assembly approval, others are not. All issues remain subject to the further showing — with the requisite specificity and basis — necessary to support an admissible contention under 10 C.F.R. § 2.714(b)(2) and (d)(2). Duke reserves the right to later respond to admissibility of proposed contentions at the appropriate time. However, Duke briefly addresses certain of NIRS's "aspects" below.

*Timeliness of the Application (Item #4):* NIRS first argues that it is premature to address the lead assembly application because of a pending generic safety issue (attributed in the NIRS petition to Union of Concerned Scientists) related to containment sump failures. (NIRS Petition, at 3.) The issue alluded to by NIRS is being addressed by the NRC as Generic Safety Issue ("GSI") 191. Consistent with longstanding NRC practice, in designating the issue as a GSI the NRC has determined that this generic issue can be addressed in due course, with no undue risk to the public, while plant operation and licensing continue. The resolution of this generic

safety issue is clearly a matter beyond the scope of this proceeding.<sup>22</sup> Therefore, there is no basis for the argument that this proceeding is premature.

*Uncertainty in Program (Item #5):* NIRS next argues, in effect, that the license amendment application is premature because of uncertainty surrounding the plutonium disposition program. (NIRS Petition, at 4). None of the "uncertainties" cited, however, affect Duke's current application. Duke's application is filed, as discussed above, in support of the DOE plutonium disposition program and the broader policy objectives of the United States government. It is a necessary first step, from an NRC licensing perspective, to allow testing of lead assemblies. The timing of the filing is consistent with DOE's projected program schedule, and therefore the application is neither untimely nor premature.<sup>23</sup> The application has been made, and the NRC will conduct its reviews based on the filing before it. The timeliness argument does not raise any specific safety or environmental issue within the scope of this proceeding.

*Availability of Information on Lead and Batch Assemblies (Item #6):* NIRS argues that there is not yet sufficient information available with respect to the lead assemblies or the batch assemblies to determine whether "the lead test assemblies are representative of the plutonium fuel that would be irradiated in batch quantities." (NIRS Petition, at 4). The focus of the NIRS concern is on where the lead assemblies will be manufactured and whether the lead assemblies will "bound the safety issues" related to batch irradiation. *Id.* In this "aspect" NIRS does not articulate any specific issue within the scope of the review of the lead assembly

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<sup>22</sup> Compare *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79 (1974); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP-86-8, 23 NRC 182, 185-86 (1986).

<sup>23</sup> If the DOE MOX fuel program changes in a way that would obviate the lead assembly license amendment, Duke would not be required to use MOX fuel assemblies.

application; rather, NIRS raises an issue primarily relevant to a *future* application addressing batch use. Information is included in the lead assembly application to support the request for license authority to utilize a limited number of assemblies for a limited number of cycles. The design considerations relevant to the lead assemblies are addressed and will form the basis for any NRC approval and any license conditions, independent of where the assemblies will be manufactured. Any contention in the current proceeding would need to focus on the safety issues and environmental impacts associated with the proposed design information or with the proposed limited use of lead assemblies. Conversely, if NIRS in the future — in connection with a batch assembly application — believes that the lead assemblies are not representative of the batch assemblies proposed to be authorized *at that time*, NIRS would have a potential issue related to *that* approval (subject to the requirements of 10 C.F.R. § 2.714(b)(2) from an admissible contention) rather than to the present approval.<sup>24</sup>

*The “Segmentation” Argument (Item #7):* NIRS indicates that it will argue that “it would violate the National Environmental Policy Act [“NEPA”] to conduct a proceeding solely on the irradiation of Lead Assemblies as a separate issue from the question of the intended full-use of MOX.” (NIRS Petition, at 5). While there is no legal basis for the argument, the

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<sup>24</sup> The Petitioner argues that DOE “has not yet done the environmental impact statement on European fabrication of the LTAs that was previously drafted and promised to the government of Belgium.” (*Id.*) Duke understands that DOE plans to issue an additional NEPA document on this issue in the near future.

issue would appear to be one within the scope of the present hearing notice. Duke will respond to any proposed contention on this point at the appropriate time.<sup>25</sup>

*Equipment Aging Issues Associated With Use of MOX Fuel (Item #8):* In light of the pending license renewal application for McGuire and Catawba, NIRS next raises the issue of potential impacts of MOX fuel use on equipment aging. (NIRS Petition, at 8). To the extent that NIRS would focus on any effects from MOX fuel test assemblies rather than from batch quantities of MOX fuel (or a “partial MOX core”), this would be an “aspect” within the scope of the present hearing notice. However, NIRS still has the burden to plead a contention that meets the admissibility standards of 10 C.F.R. §§ 2.714(b)(2) and (d)(2).

*Other Safety and Environmental Aspects (Item #9):* The petition next includes a shopping list of other issues, concerns, or “aspects” on which NIRS seeks to participate. (NIRS Petition, at 8-12). None of these issues are framed as proposed contentions in accordance with the requirements of 10 C.F.R. § 2.714(b)(2), and all are too general to satisfy the contention admissibility standard. While not all of the issues listed are within the scope of the present hearing notice, at least some are within scope and therefore are sufficient to satisfy the “specific aspects” requirements of 10 C.F.R. § 2.714(a)(2).

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<sup>25</sup> With respect to its legal theory, NIRS ignores the fact that DOE, which is ultimately responsible for the plutonium disposition program, has already prepared an environmental impact statement addressing the overall program, including fuel fabrication, lead assemblies, and batch use of MOX fuel in mission reactors. See *DOE Surplus Plutonium Disposition Final Environmental Impact Statement*, DOE/EIS-0283, Office of Fissile Materials Disposition, Washington, D.C. (Nov. 1999). DOE has also prepared a *Supplemental Analysis for Changes Needed to the Surplus Plutonium Disposition Program*, DOE/EIS-0238-SA1 (2003) (evaluating the changes to the MOX fuel portion of the surplus plutonium disposition program entailed by the decision to pursue a MOX fuel-only disposition strategy, and the impacts of those changes.). See also *DOE Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement*, DOE/EIS-0229, Office of Fissile Materials Disposition, Washington, D.C. (Dec. 1996).

For example, issues related to quality assurance (NIRS Petition, at 9), the validity of assumptions relied on in the lead assembly application (*id.*, at 9-10), thermal issues (*id.*, at 10), reactivity effects (*id.*), and aging effects (*id.*), are in scope — to the extent they relate to the limited use of MOX fuel lead assemblies as proposed in the current application. However, at the present time the statements are so generalized and vague that they do not demonstrate, with basis, that “a genuine dispute exists with the applicant on a material issue of law or fact.” See 10 C.F.R. § 2.714(b)(2)(iii).

Other issues included on the shopping list raise matters outside the scope of the present matter. For example: security related to MOX fuel during transportation, such as transfers between the fuel fabrication facility and the mission reactors (NIRS Petition, at 9), is an issue beyond the scope of the current application because security in transport is a responsibility of DOE; other environmental issues associated with offsite transportation of MOX fuel assemblies (*id.*) have been addressed in the DOE environmental reviews and are beyond the scope of the present NRC application (which does not involve any transportation approval); no change is involved in the application with respect to NRC indemnification and liability insurance requirements (*id.*, at 11); land use, demographics and emergency preparedness (*id.*, at 11) are not impacted by the proposed use of a limited number of lead assemblies; the “environmental justice” concerns related to the MOX fuel fabrication facility (*id.*, at 12, n.7) are beyond the scope of this proceeding;<sup>26</sup> and safety, security, and waste disposal at Oak Ridge (*id.*, at 11-12)

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<sup>26</sup> NIRS claims that Duke “has a corporate history of exploitation of less privileged communities.” (NIRS Petition, at 12). The proffered basis for this inaccurate assertion is the NRC’s draft EIS for the construction and operation of the MOX fuel fabrication facility (“MOX FFF”) at the Savannah River Site. The decision to locate the MOX FFF at Savannah River was made solely by DOE. Thus, neither that siting decision nor any attendant environmental justice concerns can reasonably be attributed to Duke, or to

are DOE activities beyond the scope of any hearing with respect to the use of a few lead assemblies at McGuire and Catawba. Accordingly, any contention proposed with respect to any of these “aspects” will, by definition, fail to raise a “genuine dispute with respect to a material issue of law or fact.”

2. BREDL

In its brief petition, BREDL also identifies “five specific aspects of the subject matter of this proceeding as to which BREDL wishes to intervene.” The five aspects are not particularly specific, but Duke does not challenge the sufficiency of BREDL’s list to satisfy Section 2.714(a)(2). The issues generally raise matters within the scope of the proceeding — subject to the development of further detail in proposed contentions appropriately focused on the MOX lead assembly application.

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DCS. In any event, NIRS’s claim raises an issue clearly beyond the scope of this proceeding.



#### IV. CONCLUSION

For the reasons set forth above, Duke does not contest the representational standing of NIRS in this proceeding. Similarly, Duke would not contest the representational standing of BREDL if BREDL can appropriately clarify that it, not NIRS, represents the interests of its member Gregg Jocoy.

In the event the Licensing Board finds that NIRS and/or BREDL has established standing, neither Petitioner can be admitted as a party until they have proffered at least one admissible contention. Duke will respond to proposed contentions at the appropriate time.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

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NUCLEAR REGULATORY COMMISSION

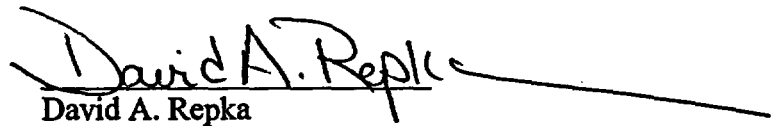
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-369
Duke Energy Corporation	)	50-370
	)	50-413
(McGuire Nuclear Station, Units 1 and 2,	)	50-414
and Catawba Nuclear Station, Units 1 and 2 )		

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Address:	Winston & Strawn, LLP 1400 L Street, N.W. Washington, DC 20005
E-Mail:	dreпка@winston.com
Telephone Number:	(202) 371-5726
Facsimile Number:	(202) 371-5950
Admissions:	District of Columbia Court of Appeals
Name of Party:	Duke Energy Corporation 526 South Church Street Charlotte, NC 28202-1802

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

Dated at Washington, District of Columbia  
this 9th day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

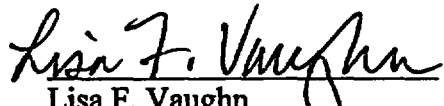
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-369
Duke Energy Corporation	)	50-370
	)	50-413
(McGuire Nuclear Station, Units 1 and 2,	)	50-414
and Catawba Nuclear Station, Units 1 and 2 )		

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party:	Duke Energy Corporation 526 South Church Street Charlotte, NC 28202-1802

  
Lisa F. Vaughn  
Counsel for Duke Energy Corporation

Dated at Washington, District of Columbia  
this 9th day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION


BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-369
Duke Energy Corporation	)	50-370
	)	50-413
(McGuire Nuclear Station, Units 1 and 2,	)	50-414
and Catawba Nuclear Station, Units 1 and 2 )		

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Name of Party:	Duke Energy Corporation 526 South Church Street Charlotte, NC 28202-1802

  
Anne W. Cottingham  
Winston & Strawn, LLP  
Counsel for Duke Energy Corporation

Dated at Washington, District of Columbia  
this 9th day of September, 2003

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

DUKE ENERGY CORPORATION

(McGuire Nuclear Station,  
Units 1 and 2, and  
Catawba Nuclear Station,  
Units 1 and 2)

)  
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)  
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)  
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Docket Nos. 50-369-LR  
50-370-LR  
50-413-LR  
50-414-LR

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF DUKE ENERGY CORPORATION TO THE PETITIONS TO INTERVENE AND REQUESTS FOR HEARING OF THE NUCLEAR INFORMATION AND RESOURCE SERVICE AND THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 9th day of September, 2003. Additional e-mail service, designated by \*\*, has been made this same day, as shown below.

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

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

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)

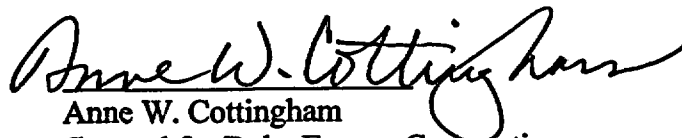
Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Adjudicatory File  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
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