

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 04/21/04

Nils J. Diaz, Chairman  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )

DUKE ENERGY CORPORATION )

(Catawba Nuclear Station, )  
Units 1 and 2) )  
\_\_\_\_\_)

Docket Nos. 50-413-OLA, 50-414-OLA

CLI-04-11

**MEMORANDUM AND ORDER**

This is a license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of Duke Energy Corporation's Catawba commercial nuclear reactors. Duke has appealed the Licensing Board's decision to grant the Blue Ridge Environmental Defense League's (BREDL) hearing request. We dismiss Duke's appeal, without prejudice, as premature. We also accept the Board's April 12, 2004 certification of questions regarding a security contention and set out a briefing schedule.

**I. BACKGROUND**

This litigation arises from Duke Energy Corporation's license amendment request to revise the McGuire and Catawba Technical Specifications to allow insertion of four MOX lead test assemblies at either the McGuire or the Catawba Nuclear Station.<sup>1</sup> Following publication

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<sup>1</sup>MOX is a mixture of uranium and plutonium oxides. As part of a cooperative program with the Russian Federation, the U.S. Department of Energy plans to dispose of weapons grade plutonium by converting it into MOX fuel for commercial nuclear reactors. Under contract with DOE, Duke initially intended to test four MOX fuel assemblies in one of its Catawba or McGuire reactors. Duke later narrowed its request to placing the four test assemblies into the 193-assembly core of one of the Catawba reactors. After irradiation, the MOX assemblies will be tested to verify their properties. Prior to "batch use" of the fuel, a subsequent license

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of a notice of opportunity for hearing in the *Federal Register*,<sup>2</sup> BREDL and the Nuclear Information and Resource Service (NIRS) filed petitions to intervene and requests for hearing. Neither Duke nor the NRC Staff contested the standing of either organization.

On October 21, 2003, both NIRS and BREDL filed supplemental petitions containing, respectively, five and nine contentions unrelated to security. The NRC Staff opposed admission of all except parts of two of BREDL's contentions and all of NIRS's contentions. Duke opposed all of the contentions of both petitioners. The Board heard oral argument on the contentions on December 3-4, 2003.

On December 2, 2003, BREDL submitted four late-filed contentions. Both Duke and the NRC Staff opposed the late-filed contentions on substantive grounds, as well as on grounds of failure to meet the criteria of 10 C.F.R. § 2.714(a)(1) regarding late-filed contentions.<sup>3</sup> The Board heard oral argument on the late-filed contentions on January 15, 2004.

BREDL submitted its security-related contentions on March 3, 2004, after the Commission resolved the parties' disputes about BREDL's "need to know" certain safeguards information.<sup>4</sup> The content of the security contentions is not at issue in Duke's appeal.

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<sup>1</sup>(...continued)  
amendment will be necessary.

<sup>2</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>3</sup>The NRC has recently amended its adjudicatory procedural rules, 10 C.F.R. Part 2. See "Changes to Adjudicatory Process: Final Rule," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new rules of procedure apply to proceedings noticed on or after Feb. 13, 2004. Thus, the NRC's adjudicatory regulations which were in effect before Feb. 13, 2004, apply to the Duke proceeding. Except as otherwise noted, references to 10 C.F.R. Part 2 in this order cite the earlier version of the rules.

<sup>4</sup>See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-06, 59 NRC \_\_\_ (Feb. 18, 2004) for detailed information regarding these disputes.

The Board issued its order on standing and non-security contentions on March 5, 2004.<sup>5</sup> The Board found that NIRS had submitted no admissible contentions and thus denied NIRS's request for a hearing. The Board stated that portions of several of BREDL's contentions were admissible. The Board then "consolidate[d], reframe[d], and admit[ted]" the following contentions:

**Contention I:** The LAR [license amendment request] is inadequate because Duke has failed to account for differences in MOX and LEU [low enriched uranium] fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs [loss of coolant accidents] and on the DBA [design basis accident] analysis for Catawba.

**Contention II:** The LAR is inadequate because Duke has (a) failed to account for the impact of differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) on the potential for releases from Catawba in the event of a core disruptive accident, and (b) failed to quantify to the maximum extent practicable environmental impact factors relating to the use of the MOX LTAs [lead test assemblies] at Catawba, as required by NEPA.

**Contention III:** The Environmental Report is deficient because it fails to consider Oconee as an alternative for the MOX LTAs.<sup>6</sup>

Duke appealed the Board's decision.<sup>7</sup> The NRC Staff supported and BREDL opposed the substance of the appeal. BREDL also argued that Duke's appeal is premature and requested that it be held in abeyance pending issuance of the Board's decision on the security contentions.

After Duke filed the instant appeal, the Board issued an order on the five security contentions BREDL filed on March 3, 2004.<sup>8</sup> The Board certified Security Contention 1, along

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<sup>5</sup>See LBP-04-04, 59 NRC \_\_ (Mar. 5, 2004).

<sup>6</sup>*Id.* at \_\_, slip op. at 63.

<sup>7</sup>Pursuant to 10 C.F.R. § 2.714a(b), NIRS had a right to appeal the Board's decision, but did not do so.

<sup>8</sup>On April 8, 2004, BREDL also filed amended contentions on Duke's security plan  
(continued...)

with associated questions, to the Commission, admitted one reframed contention, and denied the remaining three.<sup>9</sup>

## II. DISCUSSION

Today we hold that Duke's appeal is premature and, therefore, dismiss it without prejudice to a later timely appeal. We also accept the Board's certification regarding one of BREDL's security contentions. We turn first to a discussion of Duke's interlocutory appeal.

### A. Duke's Appeal

Duke stated that it appealed pursuant to 10 C.F.R. § 2.714a(c).<sup>10</sup> Under that regulation, "[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 whether the petition and/or the request for a hearing should have been wholly denied."<sup>11</sup> Although LBP-04-04 does indeed grant a petition to intervene and request for hearing, we hold that the order is not appealable, for it is too early to tell if BREDL's petition should have been "wholly" denied. As explained below, to be appealable under § 2.714a(c), the disputed order must dispose of the entire petition so that a successful appeal by a non-petitioner will terminate the proceeding as to the appellee petitioner. But at the time Duke filed its appeal, the Board had not yet ruled on any of BREDL's security contentions.

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<sup>8</sup>(...continued)  
submittal. The Board has not yet ruled on these amended contentions.

<sup>9</sup>See unpublished "Memorandum and Order (Ruling on Security-Related Contentions)" (April 12, 2004). This order contains safeguards information and therefore will not be made public.

<sup>10</sup>In view of our holding today, we need not address Duke's substantive arguments: (1) that BREDL's late-filed contentions were inexcusably late; (2) that none of BREDL's 13 non-security contentions were admissible; (3) that the Board's "reframing," using (allegedly inadmissible) bits and pieces of BREDL's contentions, exceeded its authority; and (4) that the contentions as reframed were also inadmissible.

<sup>11</sup>10 C.F.R. § 2.714a(c).

For the Board's order to have been appealable when Duke filed its appeal, we would have to interpret § 2.714a(c) as granting a right to appeal any hearing request the Board grants erroneously, whether or not the Board rules on the entire petition.<sup>12</sup> Although it was only a partial ruling on BREDL's petition, LBP-04-04 did specifically grant the petition to intervene, and it ruled on both standing and admissibility of contentions. But, before Duke's appeal, BREDL had submitted three groups of contentions, the Board in LBP-04-04 had granted a hearing based on the first two groups, and the third group remained pending. By appealing LBP-04-04, Duke implicitly argues that the appealable question is whether the Board should have granted a hearing on the basis of the subset of materials the Board actually considered in making its incomplete ruling on BREDL's petition to intervene. Under this view, the Board's continued consideration of other pending contentions is immaterial.

Duke's apparent conception of Section 2.714a(c) is not incompatible with the language of the regulation. An authoritative Appeal Board decision, issued 17 years ago in the *Shoreham* proceeding, held that appeals lie only when a party challenges a Licensing Board's dispositive ruling on the entire petition to intervene:

[A] party may appeal from the acceptance or rejection of contention(s) at the threshold if, but only if, such acceptance or rejection controlled the Licensing Board's disposition of the petition for intervention advancing the contention(s). Thus, for example, a would-be intervenor may appeal immediately the rejection of *all* of its contentions and the resultant denial of its petition. . . . Conversely, in circumstances where an intervention petition is granted on the strength of the acceptance of one or more of the contentions set forth therein, another party to

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<sup>12</sup>We often refer to the Statement of Considerations as an aid in interpreting our regulations. For section 2.714a, however, the Statement of Considerations is not illuminating. See 37 Fed. Reg. 28,710-28,711 (Dec. 29, 1972). We also note that there is no material change in the language of the corresponding regulation in our new rules. The new rule is 10 C.F.R. § 2.311(c): "An order granting a petition to intervene and/or request for hearing is appealable by a party other than the requestor/petitioner on the question as to whether the request/petition should have been wholly denied." 69 Fed. Reg. at 2241.

the proceeding may appeal at once if its claim is that all of the contentions should have been rejected and the petition therefore denied.<sup>13</sup>

We agree that, for a hearing petitioner to take an appeal pursuant to Section 2.714a(b), the petitioner must claim that, after considering all pending contentions, the Board has erroneously denied a hearing. And for a license applicant, like Duke, to take an appeal under the counterpart regulation, Section 2.714a(c), the applicant must contend that, after considering all pending contentions, the Board has erroneously granted a hearing to the petitioner.

Although *Shoreham* presented circumstances different from here,<sup>14</sup> we endorse the Appeal Board's interpretation of Section 2.714a. Moreover, two earlier Appeal Board decisions involving attempted appeals of *incomplete* rulings by Licensing Boards are factually similar to the instant case and reinforce our ruling today.<sup>15</sup> In those cases, the Appeal Board refused to entertain appeals by license applicants challenging partial Board rulings -- *i.e.*, rulings not considering all pending contentions.

Based on the Appeal Board's rulings -- which continue to reflect the Commission's stance on appeals under Section 2.714a -- the Commission dismisses Duke's appeal without prejudice. When Duke took its appeal the Licensing Board had not yet ruled on BREDL's security contentions. Duke can renew or modify its appeal after the Board rules on BREDL's

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<sup>13</sup>*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 136 (1987) (emphasis in original, citations omitted).

<sup>14</sup>*Shoreham* addressed a non-party's attempt to appeal part of a Licensing Board's decision to admit contentions. See *Shoreham*, ALAB-861, 25 NRC at 132.

<sup>15</sup>See *Cincinnati Gas and Electric Co.* (Wm. H. Zimmer Nuclear Power Station), ALAB-595, 11 NRC 860, 863 (1980); *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570 (1978).

entire petition; *i.e.*, Duke can appeal on an interlocutory basis if a successful appeal would dispose of the case.<sup>16</sup> We turn next to the second matter before the Commission.

### **B. The Board's Certified Questions**

The Board has sought further guidance from the Commission on the admissibility of BREDL's Security Contention 1. Under 10 C.F.R. § 2.718(i),<sup>17</sup> the Board has certified the questions "specifically raised in Security Contention 1, and those that arise out of and relate to it, the responses to it, and also to issues addressed in CLI-04-06, as discussed [in the Board's order of April 12, 2004.]"<sup>18</sup>

Consistent with our customary practice,<sup>19</sup> we accept the Board's certification and seek briefs on the admissibility of Security Contention 1 and on what the Board characterized as "several pertinent related questions." The briefs shall not exceed 30 pages and should be filed simultaneously by May 5, 2004. Reply briefs, containing only rebuttal, shall not exceed 10 pages and should be filed simultaneously by May 12, 2004. The Board shall move forward expeditiously on all other issues in this adjudication.

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<sup>16</sup>Because the Board's April 12, 2004 order did not rule on admissibility of one of BREDL's security contentions, this case remains unripe for appeal under 10 C.F.R. § 2.714a(c).

<sup>17</sup>This regulation empowers a presiding officer to certify questions to the Commission, either in the discretion of the presiding officer or on direction of the Commission.

<sup>18</sup>Unpublished order at 33 (Apr. 12, 2004).

<sup>19</sup>See, *e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 461 (2001).

### III. CONCLUSION

For the foregoing reasons, the Commission (1) *dismisses* Duke's appeal *without prejudice*; (2) *accepts* the Board's certification; and (3) *invites* the parties to submit briefs.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
the 21<sup>st</sup> day of April 2004