

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 6893

DOCKETED 10/09/03

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

SERVED 10/09/03

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA, 50-414-OLA

ASLBP No. 03-815-03-OLA

October 9, 2003

ORDER

(Addressing Certain Security Issues and Scheduling Telephone Conference)

In this Order the Licensing Board addresses certain security issues relating to this proceeding, which involves a February 2003 application of Duke Energy Corporation (Duke) to amend the operating license for its Catawba Nuclear Station units to allow the use of four mixed oxide (MOX) lead assemblies at the station, and August 2003 petitions to intervene and requests for hearing filed by Petitioners Nuclear Information and Resource Service (NIRS) and Blue Ridge Environmental Defense League (BREDL) in response to a July 2003 Federal Register notice concerning the application. See 68 Fed. Reg. 44,107 (July 25, 2003). The security issues in question arise out of an October 8, 2003, Motion for Protective Order filed by Duke and the NRC Staff, relating to certain material requested by Petitioners' counsel, which, in addition to apparently containing proprietary and confidential information, the Staff has determined contain protected Safeguards Information. Duke and the Staff request that the Board grant the motion "as promptly as possible, with a target date of no later than October 10, 2003." Motion for Protected Order (October 8, 2003), at 3. Because of certain concerns set forth below, the Board will hold a telephone conference on Friday, October 10, at 10:00 a.m., to address these concerns with counsel and NRC security personnel, whom the Board asks Staff Counsel to have present to participate in the conference.

In a proposed Protective Order submitted by Duke and the Staff, to which they indicate counsel for Petitioners has agreed, persons including Petitioners' and Duke's counsel and legal secretaries, as well as Petitioners' expert, are proposed to be afforded access to protected information, upon signing a Nondisclosure Affidavit attached to the proposed Order.

Under 10 C.F.R. § 73.21(c)(1), unless the Commission otherwise authorizes, no person may have access to Safeguards Information unless the person has an established "need to know" for the information and is (i) an employee, agent, or contractor of an applicant, a licensee, the Commission, or the U.S. Government, with the proviso that an individual to be authorized access by a nuclear power reactor applicant or licensee must undergo a Federal Bureau of Investigation criminal history check to the extent required by 10 C.F.R. 73.57; (ii) a member of a duly authorized committee of Congress; (iii) the Governor of a State or designated representatives; (iv) a representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC; (v) a member of a state or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or (vi) an individual to whom disclosure is ordered pursuant to 10 C.F.R. § 2.744(e).

Section 2.744(e), to which reference is made in section 73.21(c)(1)(vi), deals with orders for the production of documents, including Safeguards information, and provides, among other things, that Safeguards information that is found to be necessary to a proper decision in a proceeding may be ordered to be produced, under "such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States . . . and to their qualified witnesses and counsel." In addition, under § 2.744(e), a "presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which

would be available if Safeguards Information were not involved.” Various sanctions and criminal penalties for violation of any order issued pursuant to the section are also addressed.

In light of the requirement at § 73.21(c)(1)(i) that persons to be authorized access by a nuclear power reactor applicant or licensee must undergo an FBI criminal history check to the extent required by § 73.57, this Licensing Board is hesitant to authorize access to Safeguards information to any person who may not have undergone screening such as that required for licensed attorneys, for example, without any further screening, or consultation with NRC Security personnel. Although it does not appear this proceeding involves Restricted Data and/or National Security information, with regard to which, under 10 C.F.R. § 2.904, a request might be made asking the Commission to designate a representative to advise and assist with respect to security classification of information, the Board believes it would be of benefit to them and the parties to consult directly with a security representative.

The Board would therefore ask the NRC Staff to arrange to have a security expert present for the conference, to discuss screening and other security matters. **Participants should call 301/231-5539 or 1-800/638-8081 a few minutes before 10:00 a.m. Friday, October 10, and give passcode 4253# to be connected in to the conference.**

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 9, 2003

¹Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

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NUCLEAR REGULATORY COMMISSION

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Catawba Nuclear Station, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (ADDRESSING CERTAIN SECURITY ISSUES AND SCHEDULING TELEPHONE CONFERENCE) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-413-OLA and 50-414-OLA
LB ORDER ((ADDRESSING CERTAIN SECURITY
ISSUES AND SCHEDULING TELEPHONE CONFERENCE))

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of October 2003