

December 10, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
IN NRC

December 16, 2003 (12:15PM)

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA, OFFICE OF SECRETARY
50-414-OLA, RULEMAKINGS AND
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
OBJECTION TO PROPOSED PROTECTIVE ORDER**

Introduction

Following careful consideration and several discussions with counsel for the Nuclear Regulatory Commission ("NRC") Staff and Duke Energy Corporation ("Duke"), Blue Ridge Environmental Defense League ("BREDL") is unable to agree with the content of the draft Protective Order submitted by the Staff on November 26, 2003. BREDL objects to any approval of the proposed Protective Order until the Staff establishes a process by which pleadings regarding Protected Information (as defined in the proposed Protective Order) can be redacted and released to BREDL members and the general public.

Background

On November 26, 2003, the NRC Staff filed a motion for a protective order in this proceeding, to which it attached a proposed protective order for approval by the Atomic Safety and Licensing Board ("ASLB"). NRC Staff's Motion for Protective Order, attaching Draft Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal). The purpose of the

proposed Protective Order is to establish procedures for the litigation of issues involving safeguards and/or proprietary information that may be contained in the security plan revisions and regulatory exemption application that Duke submitted with its license amendment to allow the use of plutonium Mixed Oxide ("MOX") Lead Test Assemblies ("LTAs") at the Catawba nuclear power plant.

The Staff submitted the draft Protective Order to counsel for BREDL on the morning of November 26, 2003, requesting a quick review so that the plan could be filed that day. While BREDL's counsel initially agreed to the content of the Protective Order based on a necessarily hasty review, she later identified three concerns that she raised with the NRC Staff during the Prehearing Conference on December 4. After several discussions with the Staff and Duke, one of those concerns remains outstanding: that the Protective Order should contain a provision that establishes a procedure for redacting pleadings so that they can be released to BREDL members and the public. BREDL requested the opportunity to submit redacted pleadings for review by an appropriate member of the NRC Staff, to determine whether safeguards information had been adequately removed from the redacted pleadings. The Staff has stated that it is unwilling to provide for such a review.

Argument

Openness and public accountability in the regulatory process have long been important goals of the NRC, and indeed are required by statute. The Atomic Energy Act requires that interested members of the public be given a hearing on NRC licensing actions. *See* 42 U.S.C. § 2239(a). The Freedom of Information Act requires maximum

disclosure of documented information, with exceptions that are narrowly drawn. *See* 5 U.S.C. § 552.

In fulfillment of these goals, redacting of confidential documents is a commonly used tool for disclosing as much information as possible about a given issue. With respect to proprietary information, for example, the NRC recently promulgating regulations requiring submitters who seek protection of proprietary information to delineate the specific information for which protection is sought by the use of brackets. *See* Final Rule, Availability of Official Records (April 7, 2003), Accession # ML031000423. In NRC cases involving litigation of proprietary issues, redaction of confidential documents is a common and well-established practice. Redaction is also a common tool for making disclosures under the Freedom of Information Act.

While the Commission does not appear to have a comparable regulation or established practice for the redaction of safeguards information from public documents, the policy reasons for disclosing such information are no less compelling. Security of nuclear facilities has always been a paramount concern for people who live near them, but never more so as in the aftermath of the terrorist attacks of September 11, 2001, when the President and other government officials have announced that nuclear facilities are likely terrorist targets in the future.

The process that NRC has established for allowing approved representatives of citizen organizations to have access to safeguards information for purposes of litigating licensing issues is an important step in the process of maintaining maximum disclosure and accountability, but it is of little use if the individuals with access are completely prevented from communicating with their constituents. While the NRC Staff has

suggested that BREDL can redact pleadings at its own risk, that risk – i.e., potential criminal and civil penalties for unwitting disclosure of safeguards information – is substantial enough as to effectively prevent BREDL from attempting it. Therefore, without a process for NRC approval of disclosure of general information regarding the issues at stake, the public stands no chance of learning to what degree the NRC is addressing important security problems that concern them.

In this case, BREDL's members are extremely concerned about the adequacy of security for the proposed use of plutonium at the Catawba nuclear plant. Their concern is heightened by the facts that (a) Duke has applied for an exemption from regulatory requirements for Category I facilities, which may be more rigorous than the requirements for nuclear power plants; and (b) the NRC Staff recently informed BREDL that it does not intend to evaluate either the security plan revisions or the exemption request against confidential portions of the Design Basis Threat (DBT) for nuclear power plants, or the revised DBT for Category I facilities.¹ Thus, BREDL's members have a strong interest in obtaining some amount of information regarding the quality of security measures for plutonium fuel use at the Catawba nuclear power plant.

It is BREDL's understanding that the Staff's basis for refusing to provide a process for review of redacted documents is a concern over a lack of Staff resources. BREDL respectfully submits that this concern does not justify shrouding security-related proceedings in complete secrecy, to the point that not even the general outlines of the issues are known. The members of BREDL are entitled to some measure of

¹ BREDL plans to raise these issues in the hearing before the ASLB.

accountability regarding security issues involving use of plutonium fuel at the Catawba nuclear plant.

Moreover, the Catawba case is not a unique circumstance for which the public need for disclosure and accountability could somehow be ignored on a one-time basis. In the post-9/11 environment, there are a growing number of cases involving use of information that must be kept confidential for security reasons. For instance, security concerns involving safeguards information are now being litigated in the Private Fuel Storage case. In that case, it appears that the Staff has committed to make an effort to review redacted documents, but there is no formal agreement. BREDL submits that the Staff should make a formal commitment to undertake such reviews, as part of its responsibility to maintain as much openness as possible in the regulatory process.

BREDL is aware that the ASLB does not have the authority to force the Staff to take action. In addition, BREDL does not believe that the ASLB itself has the expertise in security matters to undertake a review of the adequacy of redaction of safeguards-related documents. Therefore, BREDL requests that the ASLB delay approval of the Protective Order until the Staff has established a reasonable procedure for reviewing proposed redactions of safeguards-related pleadings, including articulation of criteria for information that must be redacted, and time frames for conducting the review.

~~Respectfully submitted,~~



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December 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2003, copies of Blue Ridge Environmental Defense League's Objection to Proposed Protective Order were served on the following by e-mail and/or first-class mail, as indicated below:

<p>Ann Marshall Young, Chair Administrative Judge Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Mail Stop: T-3F23 Washington, D.C. 20555 E-mail: AMY@nrc.gov</p> <p>Anthony J. Baratta Administrative Judge Atomic Safety and Licensing Board U.S. Nuclear Regulatory Commission Mail Stop: T-3F23 Washington, D.C. 20555 E-mail: AJB5@nrc.gov</p> <p>Office of Commission Appellate Adjudication U.S. Nuclear Regulatory Commission Mail Stop: O-16C1 Washington, D.C. 20555</p> <p>Thomas S. Elleman Administrative Judge Atomic Safety and Licensing Board 4760 East Country Villa Drive Tucson, AZ 85718 E-mail: elleman@eos.ncsu.edu</p> <p>Office of the Secretary (original and two copies) ATTN: Docketing and Service U.S. Nuclear Regulatory Commission Mail Stop: O-16C1 Washington, D.C. 20555 E-mail: HEARINGDOCKET@nrc.gov</p>	<p>Susan L. Uttal, Esq. Antonio Fernandez, Esq. Kathleen A. Kannler, Esq. Office of the General Counsel Mail Stop - O-15 D21 U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001 E-mail: slu@nrc.gov axf2@nrc.gov, KAK1@nrc.gov</p> <p>Mary Olson Southeast Office, Nuclear Information and Resource Service P.O. Box 7586 Asheville, NC 28802 E-mail: nirs.se@mindspring.com</p> <p>Lisa F. Vaughn, Esq. Legal Dept. (PBO5E) Duke Energy Corporation 526 South Church Street (EC11X) Charlotte, NC 28201-1006 E-mail: lfVaughn@duke-energy.com</p> <p>Janet Marsh Zeller, Executive Director Blue Ridge Environmental Defense League P.O. Box 88 Glendale Springs, NC 28629 E-mail: BREDL@skybest.com</p>
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