

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTIONS FOR TEMPORARY STAY TO PRESERVE THE
STATUS QUO AND FOR STAY PENDING INTERLOCUTORY REVIEW OF THE LICENSING
BOARD'S JANUARY 29, 2004 ORDER REGARDING ACCESS TO
NRC DOCUMENTS CONTAINING SAFEGUARDS INFORMATION

Antonio Fernández
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January 30, 2004

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.788(f), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission issue a temporary stay to preserve the status quo and stay the effect of the Order issued by the Atomic Safety and Licensing Board (Board) on January 29, 2004. See Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan. 29, 2004) (Safeguards version). In the January 29, 2004 Order, the Board found that, in order to frame contentions relating to security at Catawba Nuclear Station while unirradiated mixed oxide (MOX) lead test assemblies (LTAs) are present, petitioner Blue Ridge Environmental Defense League (BREDL) has a need to know the contents of certain safeguards documents relating to security. An immediate, temporary stay is necessary in this case in order to prevent irreparable harm to the common defense and security, which may ensue if BREDL is unnecessarily provided access to the safeguards documents.

Furthermore, pursuant to 10 C.F.R. § 2.788(a), the Staff requests that the Commission also grant a stay pending review of a petition for interlocutory review, which will be filed later today pursuant to 10 C.F.R. § 2.786(g)(1). The Staff submits that it is likely to prevail upon appeal and disclosure of the documents containing safeguards information will result in irreparable harm. The

granting of a stay will not harm the petitioner, but may cause a delay in that portion of the Licensing Board proceeding that may involve security issues. Such delay, however, is outweighed by the public interest in preventing harm to the common defense and security if safeguards information relating to security at Catawba and all reactors is released unnecessarily.

BACKGROUND

The instant proceeding arises out of Duke Energy Corporation's ("Duke") license amendment request (LAR)¹ for the Catawba nuclear power plant. See Letter from M.S. Tuckman to NRC, "Proposed Amendments to the Facility Operating License and Technical Specifications to Allow Insertion of [MOX] Fuel [LTAs] and Request for Exemption from Certain Regulations in 10 CFR Part 50" (February 27, 2003). Duke, under a contract with the DOE, has agreed to irradiate four MOX LTAs at its Catawba facility. BREDL and the Nuclear Information and Resource Service (NIRS) have both filed petitions to intervene in the instant proceeding and seek to challenge Duke's LAR. See Blue Ridge Environment Defense League's Request and Petition to Intervene (August 25, 2003); Nuclear Information & Resource Service's Request for Hearing and Petition to Intervene (August 25, 2003).

As part of its license amendment request to irradiate MOX LTAs, Duke submitted a supplement to its security plan and asked for exemptions from certain regulatory requirements. These requirements would be triggered by the presence of formula quantities of strategic special nuclear material in the form of fresh, unirradiated MOX LTAs. See Letter from M.S. Tuckman, Re. Physical Security Plan and Request for Exemptions to Support MOX Fuel Use (Sept. 15, 2003). Pursuant to a protective order issued by the Board, the Staff allowed access to BREDL's counsel and BREDL's technical consultant to Duke's security submittal, which is a safeguards document. See Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15,

¹Duke's request was made as a result of its participation in the Department of Energy's (DOE) Surplus Plutonium Disposition Program.

2003 Security Plan Submittal) (Dec. 15, 2003). Subsequently, BREDL's counsel requested that the Staff provide her and BREDL's technical consultant with access to several NRC safeguards documents. In particular, BREDL requested that the following documents be made available to them under the terms of the protective order:

1. Three Orders for Modification of License that the NRC issued for Catawba in April 29, 2003, including the revised Design Basis Threat (DBT) for radiological sabotage, the training order and the fatigue order²;
2. The access authorization order that the NRC issued for Catawba on January 7, 2003;
3. Any regulatory guidance associated with these orders;
4. The classified Design Basis Threat for Category 1 facilities, which is asserted to be applicable to Catawba by virtue of the presence of formula quantities of plutonium during LTA testing, and any regulatory guidance associated with it; and
5. The classified orders for modification of license that NRC issued to Nuclear Fuel Services and Babcock and Wilcox on April 29, 2003.

The documents covered in 1, 2 and 3, above, contain safeguards information; documents in 4 and 5, as noted, contain classified information. The Staff denied BREDL's request and informed its counsel that BREDL did not have the requisite need-to-know to be granted access to the safeguards information that they sought. See Letter from Antonio Fernández, Counsel for NRC staff, to Diane Curran, Counsel for BREDL, dated Jan 13, 2004 (ADAMS Accession No. ML040140238). Pursuant to the Protective Order, BREDL requested that the Board review the Staff's need to know determination. In an *in camera* session, the Board heard oral argument on the need to know issues on January 21, 2004. On January 29, 2004, the Board ordered that, no later than February 2, 2004, the Staff make available all of the documents listed at 1, 2 and 3, above. Pursuant to the request filed herein, the Staff requests that the Commission issue an

² The fatigue order is a publicly available document. ADAMS Accession number ML010180188.

immediate stay to preserve the status quo and issue a stay of the Board's order pending review of the Staff's interlocutory appeal.

DISCUSSION

Filing an appeal or request for interlocutory review does not, in and of itself, stay the effect of a disputed ruling. *See* 10 C.F.R. § 2.730(g); *cf.* 10 C.F.R. § 2.786(f). Rather, a stay request must be filed under 10 C.F.R. § 2.788. Pursuant to 10 C.F.R. § 2.788(f), in extraordinary cases the Commission can stay the effectiveness of a disputed ruling without waiting for an answer to the request for a stay to preserve the status quo. The instant case, involving the release of certain documents containing safeguards information, is one of the extraordinary situations contemplated by the rule. A temporary stay is necessary here to prevent irreparable harm to the common defense and security. If the Staff is required to comply with the Board's order, on February 2, 2004, BREDL would have access to documents that cover most of the Commission's work in the area of nuclear security since the events of September 11, 2001. Once the content of these documents is disclosed, the harm to the common defense and security cannot be undone. *See e.g., Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-05, 39 NRC190, 193 (1994)* (Adverse impact of release of documents otherwise held in confidence is "irreparable and could not be alleviated through future review. . ."). *See also Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334.* Specifically, in the event that, acting on the Staff's appeal, the Commission later reverses the Board's need-to-know determination it would then be too late to undo the disclosure to individuals who were not eligible to have access to the safeguards documents (BREDL).

Additionally, the Staff meets the criteria set forth in 10 C.F.R. § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;

(3) Whether the granting of a stay would harm other parties; and

(4) Where the public interest lies.

10 C.F.R. §2.788(e)(1)-(4); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002). The Staff, as the moving party, is likely to prevail upon appeal. The information requested by BREDL is not relevant to this proceeding. The narrow scope of this proceeding concerns the request to irradiate four MOX LTAs at Catawba. As part of the request, Duke has submitted an update to its security plan and a request for exemption from certain regulatory requirements triggered by the possession of formula quantities of strategic special nuclear material. In reviewing the exemption requests and the security plan changes, the Staff will not be referring to or relying upon the documents requested by BREDL. Furthermore, Duke's submittal itself does not make reference to any of the documents requested. Thus, the documents are not relevant and BREDL has no need-to-know. Since there is no need-to-know, and due to the sensitive nature of the safeguards documents requested and their relation to the security of all reactor facilities, the Staff and the public will be irreparably harmed if the information is provided pursuant to a clearly erroneous determination that BREDL has a need-to-know. Once the information is released, the adverse impact to the Staff and the public would be immediate and irreversible.

Moreover, the granting of a stay will not harm the petitioner, other than possibly causing a temporary delay in that portion of the Licensing Board proceeding that may deal with security issues. Such delay is outweighed by the public interest in preventing harm to the common defense and security if information relating to the security of all reactors is released to individuals who are not authorized to have it. Finally, the public interest will not be served by releasing safeguards information to persons and organizations without a "need to know." The public interest lies in protecting the public health and safety and the common defense by protecting the integrity of the

security at nuclear reactors. Security could be compromised if safeguards information relating to security is released without justification. Because of the nature of the information, access to the material in question also involves important policy issues which are best determined by the Commission. Therefore, the request for a temporary stay to preserve the status quo until the Commission has accepted review and a stay pending appeal should be granted.

Staff counsel consulted with David Repka, attorney for Duke, who indicated that Duke supports the within motion for stay. Staff counsel also consulted with Diane Curran, attorney for BREDL, who indicated that "BREDL intends to file a response to the Staff's stay request and given the emergency nature of the request, BREDL plans to file its response on the following business day after receiving the motion, at or before the time of day when the motion was received." The Staff requests that because the Board has ordered the Staff to make the documents available on Monday, February 2, 2004, and due to the extraordinary nature of this case, the Commission grant the stay pursuant to 10 C.F.R. § 2.788(f), which states that the Commission may grant a temporary stay to preserve the status quo without waiting for an answer to be filed.

CONCLUSION

For the foregoing reasons the Staff submits that a temporary stay to preserve the status quo is appropriate and necessary in this case. Additionally, a stay pending Commission review is necessary.

Respectfully submitted,


Antonio Fernández
Counsel for NRC staff

Dated in Rockville, Maryland
This 30th day of January 2004.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTIONS FOR TEMPORARY STAY TO PRESERVE THE STATUS QUO AND FOR STAY PENDING INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S JANUARY 29, 2004 ORDER REGARDING ACCESS TO NRC DOCUMENTS CONTAINING SAFEGUARDS INFORMATION" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 30th day of January, 2004.

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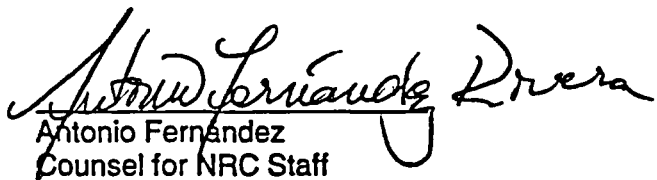
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