

January 30, 2004  
February 2, 2004 (superceded)

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 MOTION FOR INTERLOCUTORY REVIEW OF  
THE LICENSING BOARD'S JANUARY 29, 2004 ORDER FINDING A NEED-TO-KNOW  
AND ORDERING NRC STAFF TO PROVIDE PETITIONER WITH ACCESS TO  
DOCUMENTS CONTAINING SAFEGUARDS INFORMATION

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(g)(1), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission grant interlocutory review of the Order issued by the presiding Atomic Safety and Licensing Board (Board) on January 29, 2004, finding that, in order to frame contentions relating to security at Catawba Nuclear Station during the time fresh mixed oxide fuel (MOX), in the form of four lead test assemblies (LTAs), is present on site, the petitioner, Blue Ridge Environmental Defense League (BREDL) has a need-to-know the contents of certain safeguards documents relating to security. For reasons more fully discussed below, the Order will cause immediate and irreparable harm on the staff and the public that is not amenable to subsequent relief.<sup>1</sup>

BACKGROUND

The instant case arises out of Duke Power Corporation's (Duke) license amendment request (LAR) to irradiate four MOX LTAs at the Catawba nuclear power plant. As further described in the Staff's separate request for a stay filed earlier today, the Board presiding over the case below has

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<sup>1</sup> See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC 222 (2002).

ordered the Staff to, no later than February 2, 2004, provide access to the following NRC safeguards documents:

1. April 29, 2003 Order regarding the Design Basis Threat (DBT) for radiological sabotage;
2. April 29, 2003 Order regarding training;
3. January 7, 2003 Order regarding access authorization; and,
4. Any regulatory guidance associated with these orders.

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). Pursuant to the request filed herein, the Staff requests that the Commission grant interlocutory review of the Board's Order.

#### DISCUSSION

1. Interlocutory Review of the Board's Order is Appropriate Because the Order Threatens Irreparable Harm to the Staff and the Public

In accordance with 10 C.F.R. §2.786(g) interlocutory review is appropriate "where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), citing 10 C.F.R. § 2.786(g); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). See also *PFS*, CLI-02-08, 55 NRC 222 (2002). The instant case warrants Commission interlocutory review of the Board's Order to avoid such irreparable harm to the Staff, to the public and to the Nation's common defense and security. If the Commission denies the instant request, the Staff will be required to allow BREDL's counsel and technical consultant access to the aforementioned documents. Once BREDL has reviewed the documents in question, the harm to the Staff will be irreversible and cannot otherwise be remedied.

The Board's Order threatens the Staff with "immediate and serious irreparable impact that, as a practical matter, could not be alleviated through a petition for review of the [Board's] final decision," and thus the decision is appropriate for review by the Commission. *See e.g. Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994). *See also, Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000). If the Staff were forced to comply with the Board's order BREDL would have access to documents that cover much of the Commission's work in the area of nuclear security since the events of September 11, 2001. In addition, the content of these documents reveal sensitive information pertinent to all operating nuclear power plant licensees. Once the content of these documents is disclosed, the harm to the common defense and security cannot be undone. Indeed, in the event that, acting on the Staff's appeal, the Commission, at a later time, reversed the Board's need-to-know determination it would be too late to undo the disclosure to BREDL.

## 2. The Board's January 29, 2003 Order

In its Order, the Board instructs the Staff to provide BREDL with access to NRC safeguards documents based on the Board's conclusion that BREDL has established a need-to-know. *See* Order at 17. The Board states that its conclusion primarily rests on "*statements made in Duke's submittal itself, referring to and/or relying on information contained in various of the non-publicly-available documents sought by BREDL ...*" *Id.* at 10 (emphasis in original). The Board then goes on to cite several portions of Duke's submittal that it believes, although wrongly, support its conclusion. *See, e.g., id.* at 11-15. None of the language cited by the Board, however, mentions any information that is contained in the documents requested by BREDL. The examples cited by the Board as bases for its conclusion that Duke's application brings the documents

requested by BREDL within the scope of the proceeding are, at best, unenlightening.<sup>2</sup> All of the examples cited by the Board in fact refer back to Duke's current physical security plan and do not directly refer to any of the documents requested by BREDL. *See, e.g., id.* at 11.

In determining that BREDL has a need-to-know this information, the Board agrees with BREDL's representations that certain requirements that are necessary to the filing of BREDL's contentions are not currently available to them. *See id.* at 11-13. The Board bases its agreement, as described above, on statements made by the licensee in its submittal. *Id.* While agreeing with BREDL, the Board erroneously seems to believe that some standard other than the existing standards for granting of exemptions requested by Duke in their submittal, set forth in 10 C.F.R. Parts 11 and 73, will be applied in determining the acceptability of Duke's submittal. Contrary to the Board's decision, Duke's submittal will be reviewed on the basis of the currently applicable standards and not by any further measures that may be compelled by the documents requested by BREDL. *See, e.g.,* 10 C.F.R. §73.5, 10 C.F.R. §11.9. In effect, all of the standards and requirements that Duke must meet in its application are publicly available as regulations codified in the *Code of Federal Regulations*.

Moreover, the effect of the Board's ruling is tantamount to granting discovery to BREDL prior to it filing any admissible contentions. *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973).* BREDL is attempting to obtain documents that are not relied upon by Duke in support of its application (nor by the Staff with respect to its review). Duke merely cites to its own practices. To the extent BREDL may wish to obtain additional Duke documents

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<sup>2</sup>Particularly, the Board failed to identify any references by Duke in its submittal that would support any argument that the April 29, 2003 Order regarding training should be made available to BREDL.

referenced in the submittal, it has not made such a request in the proceeding below. Therefore, the matter is not currently before the Commission.

CONCLUSION

For the foregoing reasons the Staff submits that the Commission should take review of the Board's Order of January 29, 2004.

Respectfully submitted,

  
Antonio Fernández  
Counsel for NRC staff

Dated in Rockville, Maryland  
This 2nd day of February 2004.