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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket Nos. 50-413/414-OLA

RAS 7351

From: "Repka, David" <DRepka@winston.com>
To: "Ann Young" <AMY@nrc.gov>
Date: Wed, Feb 11, 2004 11:47 AM
Subject: RE Docket Nos. 50-413-OLA; 50-414-OLA: information regarding 2/13/04 oral argument

Judge Young:

The individuals that will attend the Friday, February 13, 2004 oral argument on behalf of Duke Energy are: Mr. Repka, Mr. Wetterhahn, Ms. Cottingham, Ms. Vaughn, Mr. Cash, and Mr. Nesbit. A document providing the information that you requested for these individuals will be provided in an immediate follow-up e-mail to a more limited distribution list.

In response to your e-mail, Mr. Nesbit is presently the only representative of Duke Energy with clearance for access to Classified National Security Information (NSI) (i.e., classified at a level beyond Safeguards information). His L clearance was issued by the Department of Energy through DOE's Chicago Operations Office. To allow the NRC to verify, Mr. Nesbit's social security number will be included in the follow-up e-mail.

However, to be clear, Mr. Nesbit is not an attorney and is not appearing at the argument to represent the company in a legal capacity. It is Duke Energy's expectation that -- while BREDL's access to Classified NSI is the subject of the argument -- specific Classified information cannot (and need not) be discussed during that argument. The subject of the argument is a "need to know" determination, and Classified information cannot be disclosed, released, or discussed until after an affirmative "need to know" determination has been made with respect to that information. Thus, no Classified information can be discussed in the argument as part of the process of making a "need to know" determination.

Moreover, any "need to know" determination with respect to Classified NSI is subject to certification or appeal under 10 C.F.R. 2.905(d). Therefore, to preserve the process the Classified information cannot be disclosed at this juncture even to those with the requisite clearance (a prerequisite to access independent of the requirement for "need to know"). Indeed, in its filing of January 20, 2004, Duke Energy has already requested that the Licensing Board certify to the Commission any decision to find a "need to know" with respect to Classified information (see page 14). Accordingly, we anticipate that the discussion on Friday would involve no more or less than the Safeguards information in Duke's security submittal of September 15, 2003.

We will, of course, be prepared to discuss any related issues that the Licensing Board wishes to consider, including potential impacts in this proceeding of any Commission's decision on the Staff's two pending appeals.

Please also note that -- given the nature of the discussion above -- we have included the Office of Secretary on distribution for this e-mail. (We will not send the follow-up e-mail with personal information to the Secretary.) In order to preserve the record in this matter, we believe that it would also be prudent to send the Licensing Board's earlier e-mails to the Secretary. The message to which this e-mail replies is already duplicated below.

David A. Repka
Winston & Strawn LLP
202-371-5726

-----Original Message-----

From: Ann Young [mailto:AMY@nrc.gov]
Sent: Tuesday, February 10, 2004 12:52 PM
To: lfvaughn@duke-energy.com; dcurran@harmoncurran.com; Antonio Fernandez; James Cutchin; Kathleen Kannler; Susan Uttal; Cottingham, Anne; Repka, David
Cc: Anthony Baratta; Cynthia Harbaugh; Michael Bodin; Robert Manili
Subject: information regarding 2/13/04 oral argument

Would all participants please, no later than tomorrow, February 11, reply to this email, with copies to Mack Cutchin, at JMC3@nrc.gov; Michael Bodin, at MWB1@nrc.gov; R. Barry Manili, at RBM1@nrc.gov; and Cynthia Harbaugh, at CGH1@nrc.gov; providing the following information:

- a list of all persons who will be attending the Friday oral argument; and, for each:
- the organization with which the person is associated;
- his or her birth date; and
- whether each is a US citizen.

We anticipate that we will begin the session with discussion of matters relating only to up-to-Safeguards-level information, and then, after a short break, move into discussion of issues relating to Classified information up to the "L" level. Please provide the above-listed information for any and all persons you intend to bring to either part of the session, designating which part or parts of the session each will attend, pursuant to what level clearance.

As of now, I am assuming that the following persons will be attending:

Susan Uttal (for NRC Staff)
Antonio Fernandez (for NRC Staff)
Diane Curran (for BREDL)
Edwin Lyman (for BREDL)
Stephen Nesbit (for Duke)
David Repka (for Duke, only during the Safeguards part of the session)

Mr. Bodin will, from the information you provide, give my office a list of those persons who are cleared to have access to Safeguards Information, as well as a separate list of those cleared for access to Classified Information at the "L" clearance level. On Friday, someone from my office will be checking all attendees against the lists of those with appropriate clearance levels.

As indicated above, at the beginning of the session we will address certain matters involving only up-to-Safeguards-level information. Then, before starting to address any Classified information, all those not cleared for access to that will have to leave the room. For each part of the session, we will query counsel for each participant regarding the specific "need to know" on the part of each person who will attend the respective parts of the session.

Prior to the session, all persons should gather in the lobby area next to the entrance to Two White Flint (to your left after you enter Two White Flint), and someone from my office will escort everyone to the location of the session in a group. No one will be permitted to attend the respective parts of the session without the appropriate level of clearance.

Thank you for your attention to these matters.

Administrative Judge Ann Marshall Young
Chair, Atomic Safety and Licensing Board

The contents of this message may be privileged and confidential. Therefore, if this message has been received in error, please delete it without reading it. Your receipt of this message is not intended to waive any applicable privilege. Please do not disseminate this message without the permission of the author.

CC: "Anthony Baratta" <AJB5@nrc.gov>, "Cynthia Harbaugh" <CGH1.twf4_po.TWFN_DO@nrc.gov>, "Michael Bodin" <MWB1@nrc.gov>, "Robert Manili" <RBM1.owf4_po.OWFN_DO@nrc.gov>, <lfvaughn@duke-energy.com>, <dcurran@harmoncurran.com>, "Susan Uttal" <SLU.owf5_po.OWFN_DO@nrc.gov>, "Cottingham, Anne" <ACottingham@winston.com>, "James Cutchin" <JMC3@nrc.gov>, "Kathleen Kannler" <KAK1@nrc.gov>, "Antonio Fernandez" <AXF2@nrc.gov>, <HEARINGDOCKET@nrc.gov>, <elleman@eos.ncsu.edu>

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Creation Date: Wed, Feb 11, 2004 11:47 AM

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