

February 11, 2004

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 PETITION FOR REVIEW OF
THE LICENSING BOARD'S FEBRUARY 4, 2004 ORDER
RELATING TO BREDL'S REQUEST TO ATTEND A CLOSED MEETING

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(1), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission grant interlocutory review of an Order issued by the presiding Atomic Safety and Licensing Board (Board) on February 4, 2004. Memorandum and Order (Ruling on BREDL Motion) (Feb. 4, 2004) (hereinafter February 4 Order). In the February 4 Order, the Board found that in order to frame contentions relating to security at Catawba Nuclear Station, the petitioner, Blue Ridge Environmental Defense League (BREDL), must be permitted to attend a closed meeting between the Staff and Duke Energy Corporation (Duke) previously scheduled to address a Staff request for additional information (RAI) regarding the pending application.¹ Alternatively, the Board ordered that in lieu of allowing BREDL to participate in the meeting, the Staff could transcribe the meeting so that BREDL could have access to the transcript at a later time. The Board stated that the alternative of producing a transcript is "in order that the status quo may be preserved" February 4 Order at 2. For reasons fully discussed below, the Order is contrary to governing precedent and raises substantial and important questions of law and policy.

¹ This meeting was part of the Staff's usual course of review in connection with a licensee's request for a license amendment and the Staff determined that such meetings would be the most efficient method of resolving outstanding issues. See Affidavit of John A. Nakoski (Exhibit A) at 1-2.

See 10 C.F.R. § 2.786(b)(4)(ii) and (iii). Therefore, the Staff requests that the Commission review and reverse the Board's Order at this time.

BACKGROUND

The instant case arises out of Duke's February 27, 2003, license amendment request (LAR) to irradiate four mixed oxide (MOX) lead test assemblies (LTAs) at Catawba. As part of its LAR, Duke submitted a supplement to its security plan and requested 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).

On August 25, 2003, BREDL filed a hearing request and petition to intervene in this license amendment proceeding. See Blue Ridge Environmental Defense League's Hearing Request and Petition to Intervene, (August 25, 2003). On October 21, 2003, BREDL filed a supplemental petition containing nine proposed contentions. See Blue Ridge Environmental Defense League's Supplemental Petition to Intervene (October 21, 2003). These petitions are still pending before the Board, and, as of this date, there has been no decision by the Board regarding the admission of contentions.²

Acting on Duke's LAR, the Staff issued a request for additional information (RAI) related to Duke's security submittal and decided to hold a meeting with Duke to discuss the RAI on February 6, 2004. See R.E. Martin, NRC, to H.B. Barron, Duke (Jan. 30, 2004) (ADAMS Accession No. ML040300760). The meeting was to be closed to the public because it would involve safeguards information. See Ex. A at 2.

² Also pending is BREDL's December 2, 2003, second supplemental petition requesting the admission of several late-filed contentions.

On February 3, 2004, BREDL filed a motion with the Board asking it to require that the Staff permit BREDL's representatives to attend the February 6 meeting or, alternatively, that the Board order that the meeting be transcribed, and the transcript provided to BREDL. See BREDL's Emergency Motion for Access to NRC Staff Meeting on February 6, 2004 at 4 (Feb. 3, 2004).³ Granting BREDL's motion, the Board determined that BREDL has a need-to-know the information to be discussed at the planned February 6, 2004 meeting. See February 4 Order at 6-7. Thus, the Board ordered that BREDL's representatives be allowed to attend the meeting or that the Staff prepare a transcript of the meeting, which BREDL may receive at a later date. Pursuant to the request filed herein, the Staff requests that the Commission grant interlocutory review of and reverse the Board's Order at this time.⁴

DISCUSSION

I. Regulatory Requirements

Pursuant to 10 C.F.R. § 2.786, the Commission may review any action or decision by a presiding officer. Such review may be granted giving due weight to the existence of a substantial question. See 10 C.F.R. § 2.786(b)(4). The Staff submits that a substantial question exists in the instant case, specifically, that the Board's Order is without governing precedent and a substantial and important question of law and policy is raised that should be decided by the Commission at this time. See 10 C.F.R. § 2.786(b)(4).

³ As a result of the Board's February 4 Order, the Staff postponed the February 6 meeting and has advised the licensee to address the RAI in writing. However, the instant issue remains a live controversy in this case because of the substantial likelihood that the Staff will schedule further meetings with the licensee to expeditiously resolve issues associated with the RAI. See Ex. A at 2.

⁴ The regulations require that the party requesting interlocutory review make specific references, "including record citation," to where the party has previously raised matters it complains of to the Board. 10 C.F.R. § 2.786(b)(2)(ii). The Staff, however, cannot at this time provide such references because a transcript of the Board's conference has not yet been issued. Nevertheless, all matters of fact and law addressed herein have been raised, in the first instance, with the Board.

II. **The Board's February 4 Order is Beyond the Scope of its Authority and Infringes on the Regulatory Activities Reserved to the Staff. Therefore, the Order is Contrary to Governing Precedent and Raises a Substantial and Important Question of Law and Policy**

The Board's February 4 Order fails to address a critical jurisdictional issue raised by the Staff during the Board's February 4, 2004 telephone conference with the parties. In particular, meetings between the Staff and a licensee regarding an RAI are integral to the Staff's administrative function of reviewing a request for a license amendment. Such meetings are outside the hearing process over which the Board presides and are simply beyond the Board's jurisdiction; the Board has exercised authority over the meeting for the benefit of a non-party in the instant proceeding.

The February 4 Order cites no legal precedent that would permit the Board to exercise authority in any way over license review meetings conducted by the Staff under circumstances present here. In fact, the only legal authority pertinent to the issue confirms that the February 4 Order is an exercise of authority by the Board into the Staff's review of license applications (in this case, a request for an amendment)—a regulatory function reserved to the Staff. The Board, in its February 4 Order, refers to two prior cases regarding the Staff's conduct of meetings in support of the proposition that the Board did not consider itself to be interfering with the Staff's functions. *See* February 4 Order at 4 (citing *Northeast Nuclear Energy Co.* (Montague Nuclear Power Station, Units 1 & 2), LBP-75-19, 1 NRC 436 (1975); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-5, 37 NRC 168 (1993)). However, the cases do not support this proposition. In those cases, the Commission and a licensing board held that the Staff is under no duty to inform all parties to a proceeding of the substance of communications that occur during the usual course of the Staff's review. *See Rancho Seco*, 37 NRC at 170; *Montague*, 1 NRC at 437; *see also* 10 C.F.R. § 2.102(a) (permitting the Staff to "request any one party to the proceeding to confer with the staff informally."). Moreover, in *Montague*, a panel of the ASLB, ruling on a request to make a meeting accessible to intervenors, stated that the Board did not have

the authority to mandate how the Staff conducts its meetings. *Montague*, 1 NRC at 437.

Specifically, the Board stated:

Under the Commission's regulatory scheme, the Staff is given the duty of reviewing applications for licenses. ... The regulations do not give the Licensing Board a part in this review or in the preparation of the resulting reports. The Commission has delegated to the Licensing Boards power and duties with respect only to the hearing process. The Staff's review and reporting function is largely completed in a setting outside the hearing process and therefore without the purview of the Licensing Board.

Id. (internal citations omitted) (emphasis added).

In the instant case, the Board has mandated that the Staff grant access to a Staff-initiated meeting—where safeguards information will be discussed—to individuals who are not parties to a hearing. Notwithstanding the Board's statement that they did not see themselves as "in any way exercising any authority over the Staff in the performance of its reviewing or other functions ... ," February 4 Order at 4 n.3, in light of the aforementioned precedent and the fact that BREDL has not filed any contentions related to security, it is clear that the Board is, in fact, intruding into the license review function that is reserved exclusively to the Staff. As the Licensing Board pointed out in *Montague*, "[t]he fact that the [Board's adjudication and the Staff's review] may proceed, for a time, concurrently, does not extend to the Board any supervisory authority over that part of the process that has been entrusted to the Staff." *Montague*, 1 NRC at 437. This includes ordering attendance at meetings by individuals who the Staff has determined are without authority to be present (i.e., the Staff has determined that BREDL does not have a requisite "need-to-know"). The Board also lacks authority to order the Staff to conduct a meeting with a licensee "on-the-record" (i.e., with a transcript) when the Staff has elected not to do so. Since the Board exceeded its authority when it issued the February 4 Order without the support of governing precedent, the Commission should grant the Staff's request for review of the Order at this time.

Moreover, the effect of the Board's ruling is tantamount to granting discovery to BREDL prior to the admission of any contentions and prior to the filing of any admissible contentions

related to security matters. *See 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). Longstanding Commission practice requires that "contentions must rest on the *license application*, not on NRC staff reviews." *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998) (emphasis in original). Thus, for the purpose of formulating contentions, the petitioner, BREDL, is not entitled to attend a closed NRC Staff review meeting or to require a creation of a transcript of that meeting for its benefit. Should BREDL become a party to the instant proceeding before the Board, it would then be entitled to participate in the discovery process provided by 10 C.F.R. Part 2. In that event, and should it be determined that BREDL has the requisite "need-to-know" the substance of the information discussed at the meeting at issue, BREDL could seek discovery regarding the meeting. However, this is far different from the Board—at this stage of the proceeding and before BREDL becomes a party—ordering the Staff to admit BREDL to the meeting or transcribing the meeting for BREDL's benefit.

The Order reflects a number of bases for the Board's view that it was authorized to direct BREDL's attendance at the meeting and/or transcription of discussion at the meeting between the Staff and the licensee. However, none of these provide legal support for the Board's exercise of authority over the Staff's ongoing license review function. First, the Board relies on the Protective Order which states that if a "dispute arises regarding any 'need to know' determination under this Protective Order, the determination of 'need to know' will be made by the Licensing Board." February 4 Order at 3; *see also* Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal at 2 (Dec. 15, 2003). However, the Protective Order cannot reasonably be read to empower the Board to render a determination that it simply has no jurisdiction to issue. Nothing in the Protective Order suggests that it was designed to authorize the Board to make "need to know" determinations that would authorize attendance of non-party

individuals at Staff-initiated closed meetings conducted as part of the Staff's licensing review. Nor does the Protective Order authorize the Board to direct the Staff whether to hold meetings with a licensee on the record or without a transcript.

Second, the February 4 Order reflects that the option of holding the meeting "on the record" would simply be preserving the status quo pending additional guidance from the Commission.⁵ February 4 Order at 2. This is not correct. Providing the Staff the option of admitting BREDL into the meeting, or producing a transcript of the meeting, has effectively nullified the Staff's determination that the meeting should be held without BREDL and without a transcript. Thus, the February 4 Order effectively intrudes into Staff activities that are beyond the jurisdiction of the Board. If, as the Staff contends, the Board lacks jurisdiction to affect the Staff's ongoing review of the LAR, ordering that the meeting be held "on the record" does not preserve the status quo. It disturbs the status quo by requiring the Staff to modify the form of meetings it wishes to convene as part of its licensing review.

Third, the February 4 Order focuses on statements by BREDL and Duke Power that providing a transcript of the (now postponed) February 6 meeting "would be acceptable and would not constitute any harm to them." February 4 Order at 4. This misses the mark. If, as the Staff contends, the Board is without authority to order such a meeting to be transcribed because this is an unsupportable exercise of authority over the license review function reserved to the Staff, it is irrelevant whether BREDL and the licensee view a transcript as harming them. It is incontestable that the Board cannot expand its jurisdiction by relying on parties' assertions that doing so would not harm them.

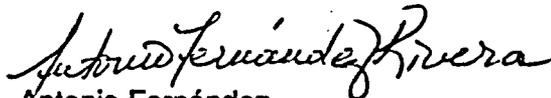
⁵ In fact, the issues currently pending before the Commission would not resolve whether the Board can expand its jurisdiction to exercise authority over meetings initiated by the Staff as part of its ongoing review of Duke's LAR.

The Board itself appeared to be concerned that its February 4 Order could be viewed as "exercising...authority over the Staff in the performance of its reviewing or other functions... ." February 4 Order at 4 n.3. Seemingly to attenuate this concern, the Board asserts that it is "simply ruling on BREDL's motion... ." *Id.* The fact that the Board simply may be ruling on a motion does not serve to expand its authority to grant relief not otherwise within its powers. Accordingly, the Commission should grant review of the important question of law and policy of whether the Board is permitted to exercise jurisdiction it does not have, simply because the Board is presented with a motion that it do so.

CONCLUSION

For the foregoing reasons the Staff submits that the Commission should review and reverse the Board's Order of February 4, 2004.

Respectfully submitted,



Antonio Fernández
Counsel for NRC Staff

Dated in Rockville, Maryland
this 11th day of February 2004