

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7578

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED 04/08/04
SERVED 04/08/04

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA, 50-414-OLA

ASLBP No. 03-815-03-OLA

April 8, 2004

ORDER

(Confirming Matters Addressed at April 6 Telephone Conference)

A telephone conference was held in this proceeding¹ on April 6, 2004, to address certain discovery objections and other matters. The following actions have been taken on these matters as of this date:

1. Regarding Duke's request, via e-mail, that certain pages of the Safeguards transcript of the March 18, 2004, oral argument in this proceeding, no party had any objection to this, Tr. 1579, and it will be done after assuring the appropriateness of all parts thereof with the Board's security representative, Mr. Manili.

2. Regarding Duke's Motion for Protective Order, filed April 2, 2004, no party had any objection to this, Tr. 1580, and the submitted Protective Order is being issued this same date.

3. Regarding Duke's first general objection (I.A) to BREDL's First Set of Discovery Requests Directed to Duke Energy Corporation (March 31, 2004) [hereinafter BREDL's First

¹This proceeding involves Duke Energy Corporation's (Duke's) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station. By Memorandum and Order dated March 5, 2003, Petitioner Blue Ridge Environmental Defense League (BREDL) was admitted as a party in the proceeding, after having filed a petition to intervene and request for hearing in response to a July 2003 Federal Register notice concerning this application. See LBP-04-04, 59 NRC ____ (2004); 68 Fed. Reg. 44,107 (July 25, 2003).

Requests], contained in Duke Energy Corporation's Objections to [BREDL]'s First Discovery Request (April 2, 2004) [hereinafter Duke Objections], concerning certain privileges and similar issues, Duke agreed to comply, to the extent the number of documents at issue does not become unmanageably large, with BREDL's request that any relevant document subject to any such asserted privilege or other asserted limitation on discovery be identified, with the asserted privilege or limitation explained. Tr. 1626-27.

4. Regarding Duke's second general objection (I.B) to BREDL's First Requests, concerning e-mail as one kind of "document," after hearing a recounting of Duke's procedure for including e-mail in a project file, Tr. 1584, BREDL counsel indicated that she was willing not to press this issue in this round of discovery, but would raise it in the next round if it appears to be a problem, Tr. 1584-85, and on this basis this matter was left, to be raised later as necessary. Tr. 1585.

5. Regarding Duke's objection to BREDL's second General Document Production Request, after hearing the arguments of Duke and BREDL, Tr. 1628-32, the following ruling is made: Duke shall, in response to this request, provide any documents not specifically provided in response to General Document Production Requests 1 and 3, which would be relevant, in a positive or negative way, to BREDL non-security-related Contentions I and II.

6. Regarding Duke's objection to BREDL's Specific Interrogatory No. 2, the Board makes the following comments and ruling:

With respect to Contention I, this contention encompasses those calculations involved in the determination of events up to and including LOCAs and DBAs, but does not include analyses related to any releases either in containment or offsite. In Contention II, on the other hand, the term "core disruptive accident" refers to any core melt, whether contained in vessel or not, resulting from LOCAs, DBAs, or severe accidents, and thus Contention II encompasses any consequences thereof, including releases into containment or offsite. We note in this

regard Duke's arguments that the basis for Contention 10 did not make reference to any dose consequences of a LOCA but was limited to ECCS, as explained by Mr. Nesbit, Tr. 1625 (referring to the basis for BREDL Contention 10). We note further, however, the following statements from the basis offered for BREDL Contention 12, which we considered in making our rulings:

In Section 5.6.3.1 of its Environmental Report, Duke addresses the environmental impacts of design basis accidents. License Amendment Application at 5-8. In Section 5.6.3.2, Duke addresses the environmental impacts of severe accidents. *Id.* at 5-8 -- 5-9. Neither section discusses the susceptibility of plutonium MOX fuel to slumping during a LOCA or the adverse effect that slumped fuel may have on the ability of the safety injection system to cool the entire area. The Environmental Report should address the significance of these characteristics with respect to the potential for and consequences of a design basis accident or severe accident.

BREDL's Second Supplemental Petition to Intervene (Dec. 2, 2004) at 6-7.

In light of the final sentence in the quoted language, as well as the apparent confusion over the term "core disruptive accident," and the definition provided of this above, we make the following ruling: Although BREDL's Specific Interrogatory No. 2 is directed to Contention I and not Contention II, we find that, rather than strike the request, which could then simply be resubmitted as is but directed to Contention II, it is more efficient to direct that the request be considered to relate to Contention II, as elucidated above, and be responded to as such.

7. Regarding Duke's objection to Specific Document Request No. II-6, regarding publicly available documents, Duke shall reply by simply identifying any such documents and noting that they are publicly available, along with the locations where they may be found.

8. Regarding Duke's objection to Specific Document Request No. III-1, relating to admitted non-security-related Contention III, the ruling on this will be deferred until the Board issues its ruling on Duke's Motion to Dismiss Contention III, in the near future.

9. Regarding the NRC Staff's general statement in its Introduction, regarding the possibility that some documents may be exempt from disclosure because of privileges or other

reasons, NRC Staff's Objections to [BREDL]'s First Set of Discovery Requests to NRC Staff (April 2, 2004) at 1, the Staff will, in its responses, identify any document or response it contends is subject to any such asserted privilege or other asserted limitation (except as provided in paragraph 11 below), and explain the asserted privilege or limitation.

10. Regarding the Staff's objection to document production requests seeking the production of publicly available documents, the Staff shall, as with Duke and as it states in its objection, reply by simply identifying any such documents and noting that they are publicly available, along with the locations where they may be found.

11. Regarding The Staff's objection to General Interrogatory No. 1, based on the deliberative process privilege and 10 C.F.R. § 2.740(b)(3), first, BREDL agreed to strike the last phrase of the request, "and indicate why such differing information or opinions are not your official position as expressed in your written answer to the request," based on § 2.740(b)(3). Regarding the remainder of the interrogatory, the following procedure shall be followed:

If the Staff finds that it wishes to invoke the deliberative process privilege with regard to any response to any discovery request, it shall not at this time be required to state the privilege with regard to each response separately, but it shall indicate that it invokes the privilege generally, and shall brief all related issues, including the question of whether such a general objection may meet the Staff's burden under *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994), or specific invocation of the privilege regarding each separate request is required under such burden. (If the Staff determines that it does not need or wish to invoke the privilege, no briefing shall be required at this time.)

Thereafter, BREDL shall respond to any such invocation of the privilege and brief in any motion to compel to be filed, according to the previously-set schedule, on April 16, 2004.

12. Any matters not addressed above shall be addressed in a later issuance or issuances.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 8, 2004²

²Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (CONFIRMING MATTERS ADDRESSED AT APRIL 6 TELEPHONE CONFERENCE) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Anthony J. Baratta
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas S. Elleman
Atomic Safety and Licensing Board Panel
5207 Creedmoor Rd., #101
Raleigh, NC 27612

Susan L. Uttal, Esq.
Antonio Fernández, Esq.
Margaret J. Bupp, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Henry B. Barron, Executive Vice President
Nuclear Operations
Duke Energy Corporation
526 South Church Street
P.O. Box 1006
Charlotte, NC 28201-1006

Mary Olson
Director of the Southeast Office
Nuclear Information and Resource Service
729 Haywood Road, 1-A
P.O. Box 7586
Asheville, NC 28802

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

Docket Nos. 50-413-OLA and 50-414-OLA
LB ORDER (CONFIRMING MATTERS ADDRESSED
AT APRIL 6 TELEPHONE CONFERENCE)

David A. Repka, Esq.
Anne W. Cottingham, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn LLP
1400 L Street, NW
Washington, DC 20005

Lisa F. Vaughn, Esq.
Duke Energy Corporation
Mail Code - PB05E
422 South Church Street
P.O. Box 1244
Charlotte, NC 28201-1244

Paul Gunter
Nuclear Information and Resource Service
1424 16th St., NW, Suite 404
Washington, DC 20036

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of April 2004