

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7577

DOCKETED 04/08/04

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

SERVED 04/08/04

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

MEMORANDUM AND ORDER
(Protective Order Governing Non-Disclosure of Proprietary Information)

This Protective Order governs the disclosure and use of certain Protected Information¹ potentially relevant to the application of Duke Energy Corporation ("Duke") for a license amendment to allow use of four mixed oxide ("MOX") fuel lead assemblies at the Catawba Nuclear Station ("Catawba"). Specifically, counsel and consultants for the Blue Ridge Environmental Defense League ("BREDL"), shall be permitted access to Protected Information upon the following conditions:

1. BREDL shall execute a Confidentiality and Non-Disclosure Agreement, in the form attached hereto.
2. Only individual counsel, consultants, and others who have executed a Confidentiality Undertaking, in the form attached hereto, may have access to Protected Information on a "need to know" basis pursuant to this Protective Order.
3. Counsel, consultants, and others who receive any Protected Information (including transcripts of *in camera* hearings, filed testimony, or any other document that reveals Protected

¹ "Protected Information" means the information set forth at Section 1 of the Confidentiality and Non-Disclosure Agreement, annexed hereto, as well as any use of or reference to that material in this proceeding, including, but not limited to, statements of contentions, written or oral testimony, or transcripts of hearings or other proceedings related to this material.

Information) shall maintain its confidentiality as required in the annexed Confidentiality and Non-Disclosure Agreement, the terms of which are hereby incorporated in this Protective Order.

4. Counsel, consultants, and others who receive any Protected Information shall use it solely for the purpose of participation in this proceeding in matters directly pertaining to the Protected Information, and for no other purpose.

5. Counsel for BREDL shall keep a record of all documents containing Protected Information in the possession of BREDL (including counsel, consultants, and others) and shall, upon termination of this proceeding, account for and deliver that information for disposal or safekeeping to a person authorized to receive Protected Information on behalf of Duke, in accordance with the Confidentiality and Non-Disclosure Agreement annexed hereto.

6. There shall be a limit of two transcripts per party for any proceeding conducted on the record in which Protected Information is disclosed or discussed. Parties shall not reproduce or photocopy these transcripts without the express prior approval of the Licensing Board.

7. In addition to the requirements specified in the Confidentiality and Non-Disclosure Agreement, all pleadings and correspondence in this proceeding (including testimony) that contain any Protected Information shall be segregated and:

- (a) served only on lead counsel,² the members of this Licensing Board, and the NRC's Office of Secretary;³
- (b) served only by United States registered, express, or certified mail, by internal NRC mail, by overnight delivery (e.g., Federal Express), or by personal delivery; and⁴

² The following attorneys shall be considered "Lead Counsel" for service purposes: David A. Repka (Duke); Diane Curran (BREDL); and Susan Uttal (NRC Staff).

³ The original and two copies of the pleading or correspondence containing the Protected Information should be appropriately marked and served on the Secretary of the Commission (Rulemaking and Adjudications staff).

⁴ The parties shall not make any facsimile or e-mail transmission to the Licensing Board or parties of document(s) which contain or discuss Protected Information subject to this Protective Order, in contrast to the procedure which has been established for the service of other documents in this proceeding. Any such documents should be served in accordance with Paragraph 7 of this Protective Order by an

- (c) include an attached cover letter or memorandum, which shall be served on all participants to the proceeding, the Licensing Board, and the Office of Secretary, by United States Postal Service first-class mail, with a copy by e-mail, that briefly describes the contents of the pleading or correspondence without reference to any Protected Information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

8. Counsel, experts or any other individual who has reason to suspect that documents containing Protected Information may have been lost or misplaced (for example, because an expected document has not been received) or that Protected Information has otherwise become available to unauthorized persons shall notify this Licensing Board promptly of those suspicions and the reasons for them.

9. This Protective Order does not encompass any safeguards or security information protected in accordance with the requirements of 10 C.F.R. Part 73.

10. Any violation of the terms of this Protective Order or a Confidentiality and Non-Disclosure Agreement executed in furtherance of this Protective Order may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 8, 2004⁵

approved means that will ensure receipt on the day due. Further, the parties should submit copies of documents which contain or discuss Protected Information on a 3.5 diskette or a compact disc, along with a paper copy.

⁵Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

THIS CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT ("Agreement") is entered into as of this _____ day of April, 2004, by and between Duke Energy Corporation ("Duke") and Blue Ridge Environmental Defense League ("BREDL").

In consideration of the mutual promises contained herein, the parties agree as follows:

1. Duke may disclose to BREDL certain proprietary information potentially relevant to Duke's License Amendment Request ("LAR") to the U.S. Nuclear Regulatory Commission ("NRC"), dated February 27 2003, as subsequently amended, seeking authorization to possess and use four mixed oxide ("MOX") fuel lead assemblies at the Catawba Nuclear Station ("Catawba"). Duke will clearly identify such proprietary information at the time it is disclosed, and will appropriately mark that information. Collectively, any disclosed information so identified and marked shall be referenced in this Agreement as the "Protected Information" and shall be subject to this Agreement.

2. With respect to the Protected Information, and in accordance with the Protective Order of the Atomic Safety and Licensing Board ("Licensing Board") issued on April 8, 2004 ("Protective Order"), BREDL agrees to:

- (a) restrict disclosure only to BREDL's counsel, consultants, employees or representatives with a need to know such information for purposes of evaluating the above-referenced LAR, and only after advising them of the requirements of this Agreement and having them sign an undertaking in the form of Exhibit A agreeing to be bound by the terms of this Agreement;
- (b) not disclose the Protected Information to third parties unless required to do so by law, regulation or legal process and only after notifying Duke prior to disclosure of the requirement and providing Duke with the opportunity to seek an appropriate protective order;
- (c) use the Protected Information only for the purpose of evaluating the above-referenced LAR;
- (d) use the same degree of care with respect to the Protected Information as it uses to protect its own confidential and private information which standard of care shall be no less than reasonable care;
- (e) return the Protected Information to an authorized representative of Duke, or Duke's counsel, promptly upon BREDL completing its review and, in any event, no later than thirty (30) days after the date of final NRC action on the LAR, including any and all copies thereof containing Protected Information then in the possession of BREDL or its counsel, consultants, employees or representatives, and shall ensure the destruction of any summaries, notes or extracts thereof.

3. Should BREDL desire to rely upon, reference, or cite the Protected Information, or any part thereof, in any comments to the NRC or proceeding at the NRC in connection with the LAR, BREDL agrees to utilize appropriate NRC procedures, including those outlined in 10 C.F.R. § 2.790 and those outlined in the Protective Order, to assure that the Protected Information is treated by the NRC as confidential proprietary information.

4. BREDL agrees that any threatened or existing violation of this Agreement would cause Duke, Duke Cogema Stone & Webster ("DCS"), and/or DCS's contractors irreparable harm for which Duke, DCS and/or DCS's contractors would not have an adequate remedy at law, and that Duke, DCS and/or DCS's contractors shall be entitled to seek immediate injunctive relief prohibiting such violation in addition to any other rights or remedies. If a party is liable to the other on account of this Agreement, the measure of damages shall include any amount for indirect, incidental, consequential, or punitive damages and/or lost profits.

5. The parties recognize that BREDL may ask the NRC to decide on the confidential status of the Protected Information, and all parties will undertake to provide the level of confidentiality determined by the NRC to be appropriate. Duke and BREDL each has the right to seek changes in the level of confidentiality to be afforded by the NRC, subject to the following:

- (a) Nothing in this Agreement shall be deemed to preclude BREDL from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this proceeding under this Agreement. Accordingly, nothing in this Agreement shall be deemed to preclude any party in any other administrative or judicial proceeding from seeking protected status for any such information or materials.
- (b) Nothing in this Agreement shall be deemed to preclude any party from pursuing any available administrative or judicial appeals with respect to any NRC decision regarding the appropriate confidential treatment to be afforded the Protected Information by the NRC under 10 C.F.R. § 2.790. If at any time the NRC finds that the Protected Information need not be protected, BREDL agrees that the Protected Information will continue to be protected under this Agreement for an additional fifteen (15) days pending an appeal of the NRC decision. Nothing in this Agreement shall be deemed to preclude any party from seeking additional administrative or judicial appeals of NRC decisions with respect to the confidential treatment of Protected Information.

6. This Agreement shall be governed and construed in accordance with the laws of the State of North Carolina without giving effect to its principles of conflict of laws. The parties shall submit to the exclusive jurisdiction of the state and federal courts located in the State of North Carolina for any dispute arising out of this Agreement.

7. If any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable and this Agreement shall be construed as if the illegal, invalid or unenforceable provision had never been a part of this Agreement and the remaining provisions of this Agreement shall be given full force and effect.

8. No party shall assign its rights or delegate its duties hereunder to a third party without the prior written consent of the other party.

9. Duke, DCS and/or DCS's contractors, as applicable, shall retain all rights, title, and interest in and to the Protected Information that is transmitted subject to this Agreement.

10. This Agreement shall become effective as of the date first written above. This Agreement contains the entire agreement between the parties concerning the confidentiality and non-disclosure of the Protected Information and no modifications of this Agreement or waiver of its terms and conditions shall be binding unless agreed to in writing by each party hereto.

DUKE ENERGY CORPORATION

BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

EXHIBIT A

CONFIDENTIALITY UNDERTAKING

With reference to the Confidentiality and Non-Disclosure Agreement by and between Duke Energy Corporation and the Blue Ridge Environmental Defense League, dated as of April __, 2004 (the "Agreement"), the undersigned affirms that he/she has read the Agreement and agrees to be bound by the terms and provisions thereof as if he/she were himself a party thereto.

Date: _____, 2004

By: _____

Name: _____

Title: _____

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 MEMORANDUM AND ORDER (PROTECTIVE ORDER GOVERNING NON-DISCLOSURE OF PROPRIETARY INFORMATION) 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
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Administrative Judge
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Atomic Safety and Licensing Board Panel
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Washington, DC 20036

Docket Nos. 50-413-OLA and 50-414-OLA
LB MEMORANDUM AND ORDER (PROTECTIVE
ORDER GOVERNING NON-DISCLOSURE OF
PROPRIETARY INFORMATION)

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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