April 30, 2004

The Honorable Edward J. Markey
United States House of Representatives
Washington, DC 20515

Dear Congressman Markey:

On behalf of the Nuclear Regulatory Commission (NRC), I am responding to your letter to Chairman Diaz, dated March 12, 2004, regarding the Commission's ruling in the *Duke Energy Corporation* (Catawba Nuclear Station) proceeding, denying access to petitioners to Safeguards and classified National Security Information. In particular, you suggest that this determination reflects disparate treatment by the NRC of public interest groups, on the one hand, and nuclear industry groups, on the other. Because your letter raises questions that are intrinsically intertwined with an ongoing adjudication and underlying decision making process, it would be inappropriate for the Chairman to respond, and, for that reason, your letter has been referred to me.

The Commission's regulations and procedures for providing access to Safeguards Information and classified information comport with well-established government requirements and practices, including Executive Orders and statutes, among them the Atomic Energy Act and Executive Order 12958. In short, two determinations must be made before access to either category of information is allowed. First, a need-to-know must be established for the specific information to which access is sought. If that threshold is met then a second threshold involving access to the information, including the trustworthiness of an individual must be determined, sometimes requiring a formal background investigation.

In your first two questions, you ask, in essence, why the Nuclear Energy Institute (NEI) was granted access to Safeguards Information while the petitioner in the *Catawba* proceeding, the Blue Ridge Environmental Defense League (BREDL), was not. The decision in the *Catawba* proceeding to which you refer, CLI-04–06, issued on February 18, 2004, describes the Commission's rationale in the particular context of that case. To very briefly summarize, the Commission concluded that the petitioner's representatives, notwithstanding their possession of a security clearance, had not adequately established a need-to-know with respect to specific Safeguards Information and classified information.

As the Commission noted in its decision, in keeping with a protective order that existed in that proceeding, these representatives already had been afforded access to other security-related information directly pertinent to the pending license amendment application. This information, the Commission observed, should be sufficient at the pre-hearing stage of the proceeding to frame contentions related to the discrete license amendment application being considered. In short, the petitioner had not demonstrated a need for the specific additional information requested. Beyond that, given the discussion in CLI-04-06, the responses below focus more broadly on the NRC's practices regarding access to such information, and not on the particular petitioner in the *Catawba* proceeding.

Access to Safeguards Information has been afforded to the NEI, as well as to reactor licensees, in developing specific compensatory measures to protect against the current threat environment where implementation of such measures was necessary on a prompt basis. As with anyone else, access by NEI staff to Safeguards Information or classified information is subject to the thresholds established by law (10 C.F.R. 73.21). Access was confined to a specific set of information related to the potential threat and available remedies. The interaction with NEI regarding Safeguards Information was, and is, necessary to facilitate timely, coordinated input, feedback, and implementation of various security programs.

In your third question, you ask why, inasmuch as licensees are developing new, site-specific security plans in response to the Commission's Design Basis Threat (DBT) orders, NEI continues to need access to the Safeguards Information. Because NRC recognizes NEI as a representative of the industry, providing it access to Safeguards Information is intended to facilitate the timely planning and implementation by individual licensees of security measures authorized by the Commission. As such, NEI plays an important role, helping ensure that a range of complementary efforts regarding the security at nuclear power plants is addressed in a timely, coordinated manner.

Security plans currently being crafted by licensees are not "generic" as suggested in your third question. Although there are certainly common attributes to the DBT, each licensee will have to develop its own acceptable defensive strategy in order to meet the NRC's requirements for its specific facility -- each will be unique. Licensees are developing these plans in accordance with guidance developed by NRC and guidance developed by NEI in consultation with the NRC and licensees. Providing guidance to licensees, while also offering timely feedback to the NRC, responsibly accelerates the process of implementing enhanced security measures at the nuclear power plants in the public interest. NEI's role as an industry representative has facilitated greater uniformity to the plans being developed in those areas in which elements are common with less impact on the agency, allowing the staff to focus its resources more productively and on a more timely basis on the unique characteristics for each facility. NEI's role in this regard is consistent with the tenets of good government which require the prudent use of resources to accomplish tasks.

Your fourth question is linked to the current litigation, and therefore it would not be appropriate to comment specifically. Addressing the issue from a more generic perspective, the NRC must weigh the benefits of sharing sensitive information based on the need-to-know principle with the disadvantages associated with more widespread dissemination of that sensitive information. That threshold is not unique to the NRC, being used by other agencies throughout the government.

Regarding questions 5 and 6, the NRC, on a recurring basis, receives requests for access to Safeguards Information. Those requesting Safeguards Information, whether they are other Federal, State, or local officials, licensees, NEI, members of the public or, for that matter, even NRC staff, must meet both the access and need-to-know standards. The determination of need-to-know is made by the entity having custody of the specific information and responsibility for its handling. While such requests for access and declinations are made on a recurring

basis, most are made informally. The NRC does not maintain centralized reporting or record keeping of individual requests and decisions to grant or deny access. I would note, however, that the NRC has heightened its attention to “need to know” decisions in the aftermath of the 9/11 attacks.

The Commission regards its responsibility to represent the interests of good government very seriously. It also has both a legal and ethical responsibility to protect sensitive and classified information. While we have worked diligently to share sensitive information with licensees, Federal agencies, and State and local governments to enhance protection of the public, we have also redoubled our efforts to ensure that we do not share information that could be exploited by adversaries in sabotaging nuclear facilities or stealing nuclear materials. There will continue to be occasions when access to information by government representatives, the private sector, and the general public cannot be granted. While there will be those who disagree with such decisions, be assured that the decisions are not made to favor one stakeholder over another, but rather to help ensure the proper protection of the public.

Your interest in this topic is appreciated.

Sincerely,

/RA/

William D. Travers
Executive Director
for Operations

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William D. Travers
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*Previously concurred

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