

RAS 7613

RELATED CORRESPONDENCE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

April 16, 2004
DOCKETED 04/19/04

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 MOTION TO COMPEL BLUE RIDGE
ENVIRONMENTAL DEFENSE LEAGUE TO RESPOND TO
NRC STAFF'S FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to 10 C.F.R. §§ 2.740(f), 2.740b, and 2.741, the NRC Staff (Staff) hereby moves the Board to compel the Blue Ridge Environmental Defense League (BREDL) to provide certain information requested in NRC Staff's First Set of Interrogatories and Request for Production of Documents to the Blue Ridge Environmental Defense League, dated March 31, 2004.¹

BACKGROUND

The Staff submitted its First Set of Interrogatories and Request for Production of Documents to the Blue Ridge Environmental Defense League (Request) on March 31, 2004. These included the following requests, that are set forth below with BREDL'S responses, which were provided in BREDL's Response to NRC Staff's First Set of Interrogatories and Request for Production of Documents (Response) on April 14, 2004:

¹ Counsel for Staff spoke with counsel for BREDL by telephone on April 16, 2004, and BREDL agreed to provide the requested answers to the Staff's interrogatories and requests for production of documents by April 21, 2004. The agreement reached by the parties is recorded in the two e-mails attached to this motion. Given that the Board set April 16, 2004 as the deadline to file motions to compel, the Staff determined that this motion should be filed today. However, the Staff requests that the Board hold this motion in abeyance pending receipt of the requested responses from BREDL.

Interrogatory 13. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the analyses described by Duke Energy in its submittal, and supplements thereto, do not adequately account for the differences between an all-LEU core and a core comprised of 189 LEU fuel assemblies and 4 MOX lead test assemblies in assessing the fuel behavior under LOCA conditions.

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4 , 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 14. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the analyses described by Duke Energy in its submittal, and supplements thereto, do not adequately account for the differences between an all-LEU core and a core comprised of 189 LEU fuel assemblies and 4 MOX lead test assemblies in assessing the fuel behavior of a core disruptive accident.

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4 , 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 16. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the analyses described by Duke Energy in its submittal, and supplements thereto, do not adequately account for the differences between an all-LEU core and a core comprised of 189 LEU fuel assemblies and 4 MOX lead test assemblies in assessing the fuel behavior of a hypothetical accident sequence that leads to energetic mechanical dispersal of the fuel.

BREDL's Response: BREDL does not assert that Duke's analysis is inadequate with respect to any accident other than a LOCA.

Interrogatory 17(a). Provide, in detail, your analysis of CDF or risk associated with use of the 4 MOX LTAs.

BREDL's Response: We do not have any additional analyses other than what is described in its contentions and in the oral arguments of December 3-4 , 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 18. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the qualitative judgements by Duke that the 4 MOX LTAs will not impact Probable Risk Assessment (PRA) success criteria and core damage frequency and will only marginally impact calculated offsite consequences are flawed.

BREDL's Response: We do not have any additional analyses other than what is described in its contentions and in the oral arguments of December 3-4 , 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information. See also response to Interrogatory 17. In the meantime, BREDL seeks clarification from the staff of what is meant by PRA "success criteria."

Interrogatory 24. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the introduction of 4 MOX LTAs would create "special circumstances" that raise questions about whether there is adequate protection, and would meet the criteria for "special circumstances" provided in Appendix D to SRP Chapter 19.

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4 , 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 25. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the set of sequences evaluated in Appendix K of Volume 2 of the SPD EIS (e.g., Table K-39) do not provide a reasonable representation of the most risk-significant beyond-design-basis accidents and release categories for Catawba.

BREDL's Response: At this time, BREDL is not challenging the reasonableness of the SPDEIS's representation of the most risk-significant beyond-design-basis accidents and release categories for Catawba. However, to the extent the release categories are based on significant retention of radionuclides within a failed containment, we intend to submit evidence that this is not a sufficiently conservative assumption. For instance, the assumption is not consistent with the most severe scenarios analyzed in NUREG-1150, Severe Accident Risks for Five Nuclear Power Plants (1990).

Interrogatory 27. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the behavior of MOX fuel (e.g., fuel relocation temperature) is sufficiently different than LEU fuel, that during a LOCA (or any other postulated sequence) the MOX fuel pellet column will collapse into the lower part of the fuel rod sooner than LEU.

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4, 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 28. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses to demonstrate that the differences between the use of M5 cladding with MOX fuel and the use of M5 cladding with LEU fuel are sufficient to increase the probabilities that an accident cannot be mitigated, or to demonstrate that the differences between MOX fuel behavior (e.g., fuel microstructure and oxidation potential) and LEU behavior for the four MOX LTAs are sufficient to increase the release rates and release fractions of fission products and actinides.

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4, 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 29. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and/or in its examination of applicant or staff witnesses, to demonstrate that Duke Energy has not adequately established that

operation of the Catawba plant with four MOX lead test assemblies will not result in offsite radiation doses in excess of 10 C.F.R. § 100.11 or 10 C.F.R. § 50.67, as applicable, as a result of design basis accidents.

BREDL's Response: As discussed in BREDL's contentions, design basis release fractions may be greater for MOX fuel than for LEU fuel. BREDL has not performed calculations to determine the extent of this difference.

Interrogatory 32. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and in examination of applicant or staff witnesses, to demonstrate that "the experimental database for MOX fuel performance during LOCAs is woefully inadequate."

BREDL's Response: BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4, 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 33. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and in examination of applicant or staff witnesses, to demonstrate that due to unknowns regarding the behavior of MOX fuel during a LOCA, Duke does not have a factual basis for "assuring that the existing emergency core cooling systems at Catawba will meet the acceptance criteria in 10 C.F.R. § 50.46.

BREDL's Response: See BREDL response to Duke Interrogatory 13. Other than this information, BREDL has not conducted any analyses other than what is described in its contentions and in the oral arguments of December 3-4, 2003, and January 15, 2004. We will supplement our answer to the interrogatory at such time as we have additional information.

Interrogatory 34. Identify and describe in detail, providing bases and justification for, any analyses or evaluations that BREDL or its experts, have performed and/or expect to rely upon in its testimony and in examination of applicant or staff witnesses, to demonstrate that the use of MOX fuel at Catawba "appears to pose a risk that plant safety systems will not be adequate to stop a LOCA from progressing to a core melt."

BREDL's Response: See response to Interrogatory 33.

Document Production Request 6. Any and all documents referred to or relied upon in answering the above interrogatories.

BREDL's Response: Documents relied on to answer the Staff's interrogatories are referenced in the interrogatory responses. With the exception of the MACCS2 code, all documents are either publicly available or have been provided to the parties. The MACCS2 code is being provided under separate cover.

Document Production Request 8. All documents that evaluate or otherwise discuss the impact of differences in the fuel behavior between the 4 MOX lead test assemblies and LEU assemblies during design basis accidents.

BREDL's Response: See response to Document Production Request 6.

ARGUMENT

I. THE DISCOVERY SOUGHT BY THE STAFF IS APPROPRIATE AND BREDL SHOULD BE COMPELLED TO RESPOND, AS REQUIRED BY THE PERTINENT REGULATIONS

Pursuant to 10 C.F.R. § 2.740b(b), each interrogatory must be answered fully by a respondent unless a proper objection is asserted. If the interrogatory is the subject of an objection, the reasons for the objection must be stated in place of the answer. *Id.* The deadline for the parties to file objections to discovery requests in this proceeding was April 2, 2004. BREDL failed to object to any of the Staff's interrogatories or requests for production of documents. Nor did it seek a protective order pursuant to 10 C.F.R. § 2.740(c). Therefore, BREDL is required to respond to the interrogatories and requests for production of documents.

Discovery is proper if it extends to "any matter, not privileged, which is relevant to the subject matter involved in the proceeding." 10 C.F.R. § 2.740(b)(1). The Board has "always held that a . . . liberal definition of relevance may be used in the context of discovery." *Safety Light Corp.* (Bloomsburg Site Decontamination), LBP-92-3A, 35 NRC 110, 111 (1992); *see also Commonwealth Edison Company* (Zion Station, Units 1 and 2), ALAB-196, 7 AEC 457, 461-62 (1974). Information obtained during discovery "need not be admissible per se," as it "is

sufficient if the requested discovery could reasonably lead to obtaining evidence that would be admissible at the future evidentiary hearing.” *Safety Light Corp.*, LBP-92-3A, 35 NRC at 111. A motion to compel may be sought “if a deponent or party upon whom a request for . . . answers to interrogatories fails to respond.” *Id.* § 2.740(f). Giving an “evasive or incomplete answer” is a failure to respond *Id.*; *Houston Lighting and Power Company* (South Texas Project, Units 1 and 2), LBP-79-05, 9 NRC 193, 195 (1979); *see also Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), LBP-82-116, 16 NRC 1937 (1982). Under the standards discussed above, BREDL’s answers to the Staff’s discovery requests amount to a failure to respond.

A. Interrogatory 13

Staff’s Interrogatory 13 requests a detailed description of the analyses or evaluations BREDL has conducted or intends to rely on to demonstrate that Duke’s submittal does “not adequately account for the differences between an all-LEU core and a core [containing] 4 MOX lead test assemblies in assessing the fuel behavior under LOCA conditions.” Request at 8. BREDL’s response is not acceptable. It does not describe BREDL’s analyses and evaluations. Instead, the response is merely a general reference to “what is described in the contentions and in the oral arguments.” Response at 5. At a minimum, BREDL’s answer should include reference to a specific contention(s) or to a specific page number(s) in the transcript where the requested analysis and/or evaluation may be found. Also, it appears that BREDL has viewed the terms “analyses” and “evaluations” too narrowly. BREDL seems to read the terms as limited to formal scientific or mathematical study of the issues. However, neither term in the interrogatory is so limited. The interrogatory calls for a response detailing BREDL’s interpretations and theories regarding Duke’s submittal, none of which BREDL has provided.

B. Interrogatories 14, 17a, 18, 24, 27, 28, 29, 32, 33, and 34

These interrogatories are substantially similar to Interrogatory 13. All request detailed descriptions of analyses and evaluations conducted by BREDL that support positions taken by

BREDL. BREDL's answers to these Interrogatories are identical to its answer to Interrogatory 13. For the same reasons that BREDL's response to Interrogatory 13 is not acceptable, as discussed above, BREDL's responses to Interrogatories 14, 17a, 18, 24, 27 through 29, and 32 through 34 are not acceptable.

C. Interrogatory 16

Interrogatory 16 requested a detailed description, including bases and justifications, of analyses or evaluations demonstrating that the analyses in Dukes submittal "do not adequately account for the differences between an all-LEU core and a core comprised of 189 LEU fuel assemblies and 4 MOX lead test assemblies in assessing the fuel behavior of a hypothetical accident sequence that leads to energetic mechanical dispersal of the fuel." Request at 9. However, BREDL's answer to Interrogatory 16 states that "BREDL does not assert that Duke's analysis is inadequate with respect to any accident other than a LOCA," but does not provide any analyses or evaluations BREDL intends to rely on in support of this assertion. Response at 6. BREDL's response to Interrogatory 16 fails to provide the required specificity and therefore is not acceptable.

D. Interrogatory 25

Interrogatory 25 requests a detailed description, including bases and justification, of analyses and evaluations demonstrating "that the set of sequences evaluated in Appendix K of Volume 2 of the SPD EIS (e.g., Table K-39) do not provide a reasonable representation of the most risk-significant beyond-design-basis accidents and release categories for Catawba." Request at 11. BREDL's response states that they "intend to submit evidence that" basing release categories on "significant retention of radionuclides within a failed containment . . . is not a sufficiently conservative assumption." Response at 9. However, no specifics on the evidence that BREDL intends to submit are included in the response. Nor did BREDL provide a basis or justification of analyses and evaluations, as requested in the interrogatory. Therefore, BREDL's response to Interrogatory 25 is not acceptable.

E. Document Production Requests 6 and 8

Document Production Request 6 seeks the documents “referred to or relied upon in answering the . . . interrogatories.” Request at 14. BREDL’s response states that, with the exception of one document provided by BREDL, “all documents are either publicly available or have been provided to the parties.” BREDL, however, has failed to provide the titles or locations of the publicly available documents, as required by 10 C.F.R. § 2.740(b)(1). Therefore, BREDL’s response to Document Production Request 6 is not acceptable.

Document Production Request 8 seeks “documents that evaluate or otherwise discuss the impact of differences in the fuel behavior between the 4 MOX lead test assemblies and LEU assemblies during design basis accidents.” Request at 14. As a response, BREDL refers to its answer to Document Production Request 6. For the same reasons, discussed above, that BREDL’s answer to Document Production Request 6 is insufficient, BREDL’s answer to Document Production Request 8 is also not acceptable.

CONCLUSION

For the foregoing reasons, BREDL has failed to provide proper responses to the Staff’s discovery requests. Therefore, the Staff moves that BREDL should be ordered to provide proper answers to the above-described requests.

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of April, 2004

From: Diane Curran <dcurran@harmoncurran.com>
To: "Susan L. Uttal" <slu@nrc.gov>
Date: 04/16/2004 3:14PM
Subject: Agreement regarding discovery responses

Dear Susan,

This is to confirm an agreement we have reached in order to avoid litigation over motions to compel in the Catawba LTA proceeding. I have agreed to supplement BREDL's responses to Interrogatories 13, 14, 17a, 18, 24, 27, 28, 29, 32, 33, and 34 by providing specific information rather than referring to BREDL's contentions and the oral argument. As I stated over the telephone, this exercise will not result in the generation of any additional information other than was stated in the contentions and the transcripts, because BREDL has not yet had sufficient time to develop its testimony or otherwise refine its position on Contentions I and II, beyond what was stated in the contentions and at the oral argument.

I have also agreed to give you a list of documents that BREDL intends to rely on in the hearing. As I also explained over the telephone, at this point, BREDL has not identified additional documents on which it plans to rely, other than the documents that were referred to in its contentions and the oral arguments on them. Once Dr. Lyman begins preparing his testimony, we anticipate that we will identify additional documents responsive to your requests.

I have also agreed to amend BREDL's answer to Interrogatory 25, by providing more information about retention of radionuclides within a failed containment.

You have agreed to identify the owners of all of the proprietary documents listed in the Staff's privilege log. You have also agreed to give me contact information for each owner, so that I can informally seek access to the documents under a nondisclosure agreement. If we cannot obtain access to these documents informally, we will consider seeking a subpoena from the ASLB.

You have also agreed to make inquiries to the technical Staff regarding whether some of the documents withheld under the designation "deliberative process" actually constitute predecisional documents. The titles of two documents the Staff has withheld indicate to me that they represent final Staff reports on safety issues, rather than predecisional documents. These documents are:

Technical Evaluation Report (Non-Proprietary Version) of BAW-10231P "COPERNIC Fuel Rod Design Computer Code Chapter 13-MOX Applications" (July 2003) and

Safety Evaluation Report of the Topic Report BAW-10227P (Evaluation of Advanced Cladding and Structural Material (M5) in PWR Reactor Fuel (October 1999).

Sincerely,
Diane Curran

CC: Ann Marshall Young <AMY@nrc.gov>, "Thomas S. Elleman" <elleman@eos.ncsu.edu>, "Anthony J. Baratta" <AJB5@nrc.gov>, "David A. Repka" <drepka@winston.com>, "Anne W. Cottingham" <acotting@winston.com>, "Lisa F. Vaughn" <lfVaughn@duke-energy.com>, NRC-SECY <secy@nrc.gov>

From: Susan Uttal
To: Curran, Diane
Date: 04/16/2004 4:04PM
Subject: Re: Agreement regarding discovery responses

Dear Ms Curran;

This is to confirm our second agreement regarding more specific answers to discovery requests, reached as a result of our telephone conversation on April 16, 2004.

You agreed to provide an answer to the Staff's interrogatory number 16, as to LOCAs. In addition you agreed to provide the answers previously agreed upon and the answer to number 16 on Wednesday, April 21, 2004.

Also, as I explained to you during our first conversation, BREDL seems to have viewed the terms "analyses" and "evaluations" too narrowly in answering the interrogatories. The interrogatories call for responses detailing BREDL's interpretations and theories regarding Duke's submittal, which BREDL has not provided.

Finally, in response to your request, in BREDL's response to Interrogatory 18, for a definition of "success criteria", as I indicated, a definition of that term is found in the "Standard of Probable Risk Assessment for Nuclear Power Plant Applications, ASME RA-S- 2002, which is published by ASME and provides the industry standard in the filed of PRA. In addition, "success criteria" is briefly defined in Section 3.8 of Duke's LAR.

You advised me that you did not know whether Dr. Lyman had a copy of the ASME standard. I therefore agreed to provide you with the ASME definition:

success criteria: criteria for establishing the minimum number or combinations of systems or components required to operate, or minimum levels of performance per component during a specific period of time, to ensure that the safety functions are satisfied.

Because the Board's scheduling order designates April 16 2004, as the date to file Motions to Compel, we will be filing the Staff's motion today, with a request that the Board hold it in abeyance pending receipt of BREDL's responses.

Sincerely,
Susan Uttal

>>> Diane Curran <dcurran@harmoncurran.com> 04/16 3:14 PM >>>
Dear Susan,

This is to confirm an agreement we have reached in order to avoid litigation over motions to compel in the Catawba LTA proceeding. I have agreed to supplement BREDL's responses to Interrogatories 13, 14, 17a, 18, 24, 27, 28, 29, 32, 33, and 34 by providing specific information rather than referring to BREDL's contentions and the oral argument. As I stated over the telephone, this exercise will not result in the generation of any additional information other than was stated in the contentions and the transcripts, because BREDL has not yet had sufficient time to develop its testimony or otherwise refine its position on Contentions I and II, beyond what was stated in the contentions and at the oral argument.

I have also agreed to give you a list of documents that BREDL intends to rely on in the hearing. As I also explained over the telephone, at this point, BREDL has not identified additional documents on which it plans to rely, other than the documents that were referred to in its contentions and the oral arguments on them. Once Dr. Lyman begins preparing his testimony, we anticipate that we will identify additional documents responsive to your requests.

I have also agreed to amend BREDL's answer to Interrogatory 25, by providing more information about retention of radionuclides within a failed containment.

You have agreed to identify the owners of all of the proprietary documents listed in the Staff's privilege log. You have also agreed to give me contact information for each owner, so that I can informally seek access to the documents under a nondisclosure agreement. If we cannot obtain access to these documents informally, we will consider seeking a subpoena from the ASLB.

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Safety Evaluation Report of the Topic Report BAW-10227P (Evaluation of Advanced Cladding and Structural Material (M5) in PWR Reactor Fuel (October 1999).

Sincerely,
Diane Curran

CC: Baratta, Anthony; Cottingham, Anne W.; Elleman, Thomas S.; Repka, David A.; SECY, NRC-SECY; Vaughn, Lisa F.; Young, Ann

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 "NRC STAFF'S MOTION TO COMPEL BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE TO RESPOND TO NRC STAFF'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 16TH day of April, 2004.

Ann Marshall Young, Chair** *
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