

RAS 7646

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

April 21, 2004 (2:52PM)

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED April 21, 2004

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 21, 2004

ORDER

(Regarding Removal of Portion of Transcript from Safeguards Information Category)

Pursuant to a request of Duke Energy Corporation in this proceeding,¹ the Licensing Board hereby removes a portion of the transcript for March 18, 2004, from the Safeguards Information category under 10 C.F.R. § 73.21(i). After consultation with Mr. Robert Manili, appointed by the Commission to assist the Board with matters relating to security classification of materials, the Board finds that the designated material, consisting of the reading of a

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).

statement of the Board by the Board chair, found at pages 1503-12 (a hard copy of which is attached), may be released as publicly available information.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD


Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 21, 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.

1 the basic ground rules for this proceeding,
2 paragraph 3 says that -- entitled "Service on
3 Licensing Board Members and Other Participants."
4 Absent some other directive from the Board, all
5 filings in the case should be served on the Board and
6 the other -- and the other participants so as to
7 ensure receipt on or before the filing deadline.

8 And there are various other similar
9 statements in there, and I would encourage all parties
10 to pay attention to that, as well as all other things
11 that we set forth in our orders. They're not there
12 just as boilerplate, and it is fundamental that if
13 parties don't get documents in time to give them very
14 much consideration it does handicap them in making
15 their arguments.

16 Second, we wanted to say just a couple of
17 things about the order that we issued yesterday. And
18 I'm just going to read to you a statement that we have
19 agreed upon, given that the timing issues are in
20 somewhat of an unusual posture at this point.

21 All right. The parties are aware that
22 yesterday the Licensing Board issued an order in which
23 we stated several things relating to the schedule in
24 this proceeding. We stated, first, that pending any
25 further rulings to the contrary, all previously set

1 deadlines and dates shall remain in place, except for
2 the earlier March 19th deadline for BREDL filing
3 initial discovery requests on the non-security-related
4 contentions.

5 We further indicated that we would address
6 the setting of a new deadline for this, which will be
7 for a date in the very near future, at the already-
8 scheduled March 25 status conference. We also
9 informed the parties -- all parties -- that
10 notwithstanding any earlier discussion suggesting
11 anything to the contrary, no party should assume that
12 any delays of the current schedule will be granted
13 absent a stay from the Commission.

14 We also set deadlines of March 30 for the
15 filing of any amended contentions arising out of the
16 previously-admitted contention 3, and Duke's March 1
17 responses to the Staff's RAIs relating to
18 alternatives, and April 8 for the filing of any
19 contentions based on Duke's responses to the Staff's
20 security-related RAIs.

21 We would note that we are also aware that
22 there is another document on which Duke has asked the
23 Staff to make a need-to-know determination, namely a
24 revised Attachment 1 to Duke's September 15, 2003,
25 security submittal, and that this determination was

1 made late yesterday afternoon, which, assuming that
2 there was concurrent availability, would lead to a
3 deadline of April 16 for any contentions based on
4 that.

5 We noted, finally, that any necessary
6 modifications to our earlier set deadlines and
7 schedule, or any further deadlines and schedules,
8 would be set in accordance with our intention to move
9 this proceeding forward in the most efficient and
10 expeditious manner possible, taking into account all
11 appropriate time and other factors that present
12 themselves in the coming days, weeks, and months.

13 We are obviously aware of Duke's appeal of
14 our March 5 rulings on the non-security-related
15 contentions, and of Duke's request on March 16 that we
16 suspend discovery and all other proceedings related to
17 the non-security-related contentions until the
18 Commission has ruled on Duke's appeal.

19 Tuesday, in discussing this, it appeared
20 that all parties -- for different reasons -- had no
21 problem with this. Also, Duke counsel asked us to
22 schedule time in July of this year for hearing time in
23 the same way that we scheduled the May and June times
24 that we have already set aside.

25 We discussed the fact that setting any

1 July hearing dates would make it virtually impossible
2 for us to get out any ruling on that by the August
3 timeline that we have been aiming to meet, if at all
4 possible, within the context of providing a fair and
5 meaningful hearing of all appropriate issues in this
6 proceeding.

7 After our meeting, we discussed these
8 issues further, and also actually discussed the
9 scheduling issues with the Chief Judge as part of our
10 effort to make sure he is kept aware of all scheduling
11 issues, so that, for example, any conflicts can be
12 avoided.

13 Given various factors, including the
14 potential conflict Judge Baratta might have in July,
15 we ultimately determined that we did not want to leave
16 the parties with the impression that we were in
17 agreement with putting aside for the future any
18 proceedings on the non-security-related contentions,
19 and felt that this matter would more appropriately be
20 posed to the Commission in a Motion for Stay.

21 We, therefore, issued the order yesterday
22 informing the parties of the above circumstances. We
23 will consider these further next week on March 25. In
24 the meantime, however, we also think it might be
25 helpful to the parties to give you some insights that

1 might help you in your activities relating to the non-
2 security-related contentions up to the point that the
3 Commission might stay these activities. And I guess
4 I should add "or rule on them."

5 First, we want to let BREDL counsel know
6 that, absent a stay, we will be inclined to set a
7 deadline for the issuance of initial discovery
8 requests very shortly after our March 25 conference,
9 for March 26 or 29, for example, so that you should
10 probably get started on these in advance of that date.

11 We realize that this puts you in the
12 position of starting work on something that may later
13 be stayed or made unnecessary, but we feel that it is
14 important not to get slowed down in this proceeding
15 absent a Commission indication that this is
16 appropriate in light of Duke's appeal.

17 Second, we want to let all parties know
18 that we will be looking at a schedule of dates for the
19 filing of various discovery requests on an expedited
20 schedule, followed by quite shortened times for
21 responses, specific times for depositions, specific
22 deadlines for any discovery-related motions, motions
23 to compel, motions to quash, any objections to
24 discovery, and so forth, and specific dates for
25 argument on any objections or motions.

1 We will expect you to bring any possible
2 disputes to our attention as soon as possible, so that
3 we can handle these as quickly as possible within the
4 context of everyone's schedule, as well as the
5 schedule dates we set for all these events.

6 Finally, we have observed from Duke's
7 appeal that there may be some areas of confusion that
8 we might clear up to some degree with regard to the
9 proceedings before us relating to the non-security-
10 related contentions, until and unless the Commission
11 issues any stay, or otherwise instructs us to set
12 aside all such non-security-related proceedings, of
13 course, and also, of course, without getting into any
14 additions to or changes of our prior rulings.

15 We note in this regard that Duke has
16 raised several issues that it contends we have left
17 unresolved, and the suggestion has been made that we
18 have somehow expanded the original underlying
19 contentions, portions of which formed the reframed
20 contentions 1 and 2.

21 We want to emphasize several points.
22 First, our reframing of the original issues in the
23 original contentions 1, 2, 6, 7, 10, 11, and 12,
24 should not be taken to expand the issues presented in
25 the original contentions in any way. We want to make

1 it clear that nothing of the sort was intended, and we
2 would direct the parties to our statement on page 42
3 of the slip opinion of LBP-04-04 that we "deny all
4 portions not included within the" reframed
5 contentions.

6 Further, with regard to any issue that any
7 party feels are unresolved, we would direct the
8 parties to the reframed contentions themselves. So
9 long as we are going forward on these, they should be
10 taken to mean what they say, no more and no less.

11 With regard to issues of discovery
12 relating to contentions 1 and 2, we would direct the
13 parties to the NRC rules relating to discovery,
14 including 10 CFR Section 2.740(b) on the scope of
15 discovery.

16 And without reading the whole section,
17 which you can do, we note that the standard is that
18 parties may obtain discovery regarding any matter not
19 privileged which is relevant to the subject matter
20 involved here, relevant to the issues posed in
21 contentions 1 and 2, "whether it relates to the claim
22 or defense of any other party, including the
23 existence, description, nature, custody, condition,
24 and location of any books, documents, or other
25 tangible things."

1 Further, skipping down to near the end of
2 subsection (b) (1), that it is not ground for objection
3 that the information sought will be inadmissible at
4 the hearing, if the information sought appears
5 reasonably calculated to lead to the discovery of
6 admissible evidence. You can read the rules on this.

7 Section 2.740(c) deals with protective
8 orders. Section (d) deals with the sequence and
9 timing of discovery, and as we have said we are
10 looking at a schedule that would place some control on
11 the sequence and timing of discovery, including for
12 the resolutions of any disputes that may arise.

13 Regarding evidence on the contentions,
14 evidence will be admitted if it is, as required by
15 10 CFR Section 2.743(c), relevant, material, and
16 reliable, and not unduly repetitious.

17 We do not feel it is appropriate to make
18 any further statement on why we ruled the way we did.
19 Our memorandum and order stands, and the Commission
20 will be reviewing it in the context of Duke's appeal.
21 Assuming, as I believe we must, until directed
22 otherwise, in the context of the scheduling
23 considerations we have addressed, assuming we go
24 forward on the contentions, we will proceed based on
25 the wording of the reframed contentions and will make

1 any discovery and evidence-related rulings under the
2 legal standards set forth in the sections we have
3 cited to you today, and any other legal standards.

4 All in all, we find that proceeding in the
5 manner we have defined will more likely ensure the
6 most efficient handling of this proceeding. If the
7 Commission feels that we should stay all action on the
8 non-security-related contentions, then of course we
9 will do that. But that is the prerogative of the
10 Commission, and we do not feel it appropriate for us
11 to, in effect, stay these matters at this time in
12 light of the scheduling considerations and
13 difficulties that face us all in this proceeding.

14 We will try to accommodate each party's
15 situation as much as possible, in a context of moving
16 the entire proceeding forward expeditiously. But we
17 will also count on all parties to proceed in
18 accordance, both with the schedules that we will be
19 producing for you and with the need we all have to
20 achieve our respective functions in this process --
21 the Petitioner, the Staff, the Applicant, and the
22 Licensing Board.

23 We hope that's helpful to you in doing
24 your own planning. And unless there are any other
25 issues that we need to address today, that would

1 conclude these proceedings. Mr. Repka, you raised
2 your hand just in time. What would you like to --

3 MR. REPKA: I wanted to get in under the
4 wire. I have one question regarding the March 17th
5 order. It states on page 2 that -- it states on
6 page 1 that, pending any further rulings, all
7 previously set deadlines and dates shall remain in
8 place, except that BREDL will not be required to file
9 its initial discovery request on March 19th.

10 That March 19th deadline applied to Duke
11 as well. I wanted to clarify that --

12 JUDGE YOUNG: Yes.

13 MR. REPKA: -- we also would not be
14 required to file --

15 JUDGE YOUNG: Yes.

16 MR. REPKA: -- tomorrow.

17 JUDGE YOUNG: Yes, I apologize. I -- yes.

18 MR. REPKA: Thank you.

19 MS. UTTAL: And I assume that the Staff
20 would not be required to file.

21 JUDGE YOUNG: Yes. And the only reason we
22 put that in there was because we had already said that
23 yesterday -- two days ago. And we're going to take up
24 all these issues again next week, and we'll see where
25 we are at that point.

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 (REGARDING REMOVAL OF PORTION OF TRANSCRIPT FROM SAFEGUARDS INFORMATION CATEGORY) 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 (REGARDING REMOVAL OF
PORTION OF TRANSCRIPT FROM
SAFEGUARDS INFORMATION CATEGORY)

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


Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of April 2004