

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD

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 28, 2004

MEMORANDUM and ORDER

(Setting Schedule for Discovery and Hearing on Security-Related Matters)

All parties in this proceeding,¹ in which we have already set a schedule for discovery and hearing on certain non-security-related contentions, see Order (Confirming Matters Addressed at March 25 Telephone Conference) (March 30, 2004) [hereinafter 3/30/04 Board Order], have now filed (or joined in) proposed schedules for discovery and a hearing on the one security-related contention admitted to date in the proceeding, following a telephone conference held April 20, 2001. Tr. 1701-68. The Licensing Board admitted the one security-related contention in a sealed Safeguards Memorandum and Order issued April 12, 2004 (a public redacted version of which will be issued in the near future), and therein also certified certain questions relating to an additional security-related contention to the Commission. The Commission on

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 (LTAs) 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).

April 21, 2004, accepted the Board's certification and set a briefing schedule of May 5, 2004, for initial briefs and May 12, 2004, for reply briefs. See CLI-04-11 (April 21, 2004), slip op. at 7. The questions certified to the Commission deal with various issues that will almost certainly arise in discovery, litigation, and management of this proceeding with regard to the security-related matters to which the parties' proposed schedules, submitted to us, are addressed.

We have considered the parties' proposed schedules in light of a number of circumstances we find to be relevant, including the Commission's acceptance of our certified questions and the briefing schedule it has set, as well as the legitimate needs of all parties, and herein set a schedule that we find to be the most realistic approach possible that takes into account such circumstances and needs, provides a meaningful opportunity for hearing, and also moves the proceeding forward as expeditiously as possible, as directed by the Commission in CLI-04-11. *Id.*

Applicant Duke in its submission (in which it notes that "the NRC Staff has indicated that it joins") proposes a very ambitious schedule, starting with a proposed deadline of this past Monday, April 26 (two work days after its submission date of Thursday, April 22) as the "*Last day to file interrogatories/requests for admission/document production requests/requests for 'need to know' determinations,*" and including a hearing the week of June 1, 2004, which was earlier tentatively held for a hearing on the security-related contentions. Proposed Schedule for Discovery and Hearing Re Security Contention (submitted electronically April 22, 2004, by Duke Energy counsel) (emphasis added) [hereinafter Duke/Staff Proposal]; see Order (Regarding Deadlines and Scheduling Issues) (Mar. 5, 2004). Duke notes also, however, that it and the Staff request the Board to adopt their proposed schedule "*with the understanding that any unresolved discovery dispute which would involve an extended appeal would likely make meeting such a hearing date impossible.*" Duke/Staff Proposal (emphasis added).

BREDL, in contrast to Duke and the Staff, has set a schedule that is not nearly so ambitious. BREDL urges us to reconsider our earlier internal deadline of August 2004 for issuing our final decision in this proceeding, arguing that doing so is neither necessary, nor possible, in the context of providing it with a “‘meaningful’ opportunity for a hearing, as required by Section 189(a) of the Atomic Energy Act.” [BREDL]’s Proposed Hearing Schedule and Request for Reconsideration of ASLB’s Internal Deadline of August 2004 for Issuing a Decision in this Proceeding (April 19, 2004) [hereinafter BREDL Proposal], at 1, 7 (citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1446 (D.C. Cir. 1984), cert. denied 469 U.S. 1132 (1985)). BREDL’s proposed schedule would culminate in a hearing on the security-related matters in this proceeding in November, with proposed findings and a decision to follow in early 2005.

Between the two “poles” of the parties’ two proposals lie various dates proposed by Duke and the Staff, on the one hand, and BREDL, on the other. We have considered this range of proposed dates, deliberated carefully on all the competing interests and factors involved, and put significant effort into achieving the most expeditious and realistic schedule for all concerned. We note that we have also, prior to this date, made a serious effort in this proceeding to accommodate Duke’s stated need to have a final decision in the proceeding prior to a scheduled Department of Energy (DOE) August shipping date for the feed material to be sent to France, where it is planned to be fabricated into the fuel assemblies, assuming all relevant approvals. See, e.g., Tr. 642; Tr. 1740; Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003) [hereinafter LAR]. We also note in this regard BREDL’s reference to the export license application for the shipment in question, on which BREDL and others have filed petitions that are currently pending before the Commission, a proceeding which is, of course, a much more significant factor affecting the actual shipping date than is this proceeding. See BREDL Proposal at 2; 3 nn.2, 3. We nonetheless have set a

schedule that is quite compressed, and ambitious in itself, for discovery and hearing on the non-security contentions, in an effort to address the needs of Duke and DOE. See 3/30/04 Board Order.

We might ultimately have been able to do the same with regard to all the security-related matters in this proceeding, had there not been early delays on these matters caused, among other things, by the Staff's need to reconsider certain terms of a proposed protective order originally submitted by Duke and the Staff on October 8, 2003. We do not fault the Staff for causing such delay. Indeed, had the Board itself not scheduled a conference to address various matters relating to the original proposed protective order, *see, e.g.*, Tr. 6, the important issues presumably addressed subsequently by the Staff, during the interim between the original proposed order and the later December 2003 protective order that was issued, might not have been considered until it was too late to correct any possible harm done. As Staff counsel noted, however, the matter was recognized as being one that "could cause a delay in the proceedings." Tr. 15. Counsel also apologized for the fact that "although [senior NRC security managers had] previously looked at the affidavit [attached to the proposed October protective order] . . . there may be some concern that they are not ready today to give you a final decision on the issues that you're requesting to be briefed on today."

The end result of all this was, in any event, delay in starting any activities with respect to the Safeguards Information addressed in the protective order and related security information, which delay thereby "pushed forward" all relevant times for preparation and work relating to such issues — for the parties, and for the Board, during a period in which there were no "slack times." For example, during December 2003, after the Staff filed the second proposed protective order, oral argument was heard on the original non-security-related contentions of BREDL and Nuclear Information and Resource Service (NIRS) on December 3-4 in Charlotte; a telephone status conference was held on December 11 to address various matters including

argument on the proposed protective order; the parties filed various pleadings; and several orders were issued, addressing scheduling matters and including the second proposed protective order, with certain revisions proposed by the parties subsequent to its filing. Then, oral argument on certain late-filed non-security-related contentions of BREDL was held in Charlotte on January 15, 2004; a closed session was held in Rockville on January 21 to hear argument on certain security-related matters; and various pleadings were filed and orders issued, some sealed as Safeguards Information, during January. During February 2004, another closed session and two telephone conferences were held, and additional pleadings and orders were filed and issued — some, again, sealed as Safeguards Information — and the Commission ruled on various appeals relating to security matters, in CLI-04-06. In March 2004, in addition to issuing LBP-04-04, ruling on all the non-security-related contentions, the Board issued various other orders addressing scheduling and other matters, the parties filed a number of pleadings, both public and Safeguards, and oral argument on BREDL's March 3, 2004, security-related contentions was held on March 18 in a closed session.

During the preceding time period, in an appeal of LBP-04-04 that Duke filed with the Commission, Duke counsel referred to the Board's "aggressive schedule to attempt to complete the hearing on a schedule consistent with the Duke and DOE schedule," stated that Duke had "evaluated pressing forward with litigation of the three admitted contentions," but had reconsidered this approach. Notice of Appeal of [Duke] from [LBP-04-04] (March 15, 2004), at 2-3. Duke counsel later, in a telephone conference held March 16, stated that the Applicant was "*disinclined to proceed with discovery in the near term*" on non-security-related Contentions I and II, and wished to wait until it received a ruling from the Commission on its appeal. Tr. 1233-34 (emphasis added). Counsel also stated that Duke wished to "go ahead with the security issues" (despite the fact that oral argument on these had not yet occurred), but emphasized that it wanted "*in effect a stay of discovery pending Commission action,*" Tr. 1232,

1237 (emphasis added). When asked how it “would be more efficient and expeditious to delay discovery,” Applicant’s counsel referred to “inevitabl[e] . . . discovery disputes,” and reiterated that he did not “see it as efficient to proceed with discovery” based upon the “broad” nature of the contentions. Tr. 1237-38.

After taking the time to consider Applicant Duke’s concerns and request to delay discovery during the March 16 telephone conference, the Board subsequently determined that it was *not* efficient to delay discovery (and thus all proceedings following from discovery) as requested by Duke; notified the parties of this at the conclusion of the March 18 oral argument on the security-related contentions, see Order (Regarding Removal of Portion of Transcript from Safeguards Information Category) (April 21, 2004); conducted a detailed discussion with all parties regarding the discovery schedule that was ultimately put into place, providing for expedited discovery in order to move the proceeding forward notwithstanding Duke’s earlier request to delay discovery (and thereby all subsequent proceedings), Tr. 1514-74; and on March 30 issued an Order setting an expedited discovery schedule for the non-security-related contentions, and scheduling times for conferences to address any discovery disputes, in order to avoid delay. 3/30/04 Board Order.

During this same period, we note, the Board and parties were also addressing various security-related issues and the security-related contentions, in a manner which involves a number of somewhat cumbersome and time-consuming procedures. Some examples of this include: the need to obtain and use stand-alone computers and printers to produce any materials that contain Safeguards Information; the need to assure that all such material (including the computers being used to produce the Safeguards documents) is always kept locked in a safe or watched over at all times by a person with appropriate clearance, to avoid inadvertent disclosure; the need to observe certain detailed requirements regarding transmission of such material; and the need to meet in closed, in-person sessions to resolve

any disputes on such matters that cannot easily be discussed without any possibility of mentioning Safeguards Information or other protected material.

We also note, regarding the various closed sessions and sealed pleadings and rulings during December 2003 and January-March 2004, that the Board and all parties were addressing a number of security-related issues that are quite difficult from both a legal and a practical perspective — and which have never previously arisen in an NRC proceeding to the extent they have in this proceeding, such that at least one other board has in fact looked to this proceeding for “lessons learned” on how best to manage future such security-related proceedings. The Board has at all times attempted to address these issues in the most efficient manner possible — for example, providing for expedited scheduling to the degree reasonably possible; using telephone conferences, without requiring as many paper pleadings, in order to facilitate the more speedy resolution of disputes that arise; and providing for alternative courses of action to avoid delay pending any appeals. See, e.g., 3/30/04 Board Order; Board Memorandum and Order (Ruling on BREDL Motion Regarding Staff February 6, 2004, Meeting with Duke Energy and Request for Need to Know Determination) (Feb. 4, 2004), at 6. The effort and work put forth by all involved in this proceeding on these issues at all stages of this proceeding should not be underestimated.

Nor, however, should the fact of the Staff’s original delay with regard to the protective order, or Applicant Duke’s attempted delay of discovery on non-security-related issues (and the actual delay occasioned by the need to address this), or the impact of either occasion of delay, be ignored — the effects of these matters must, in all fairness, however, be recognized, particularly given the current request by Duke and the Staff to move forward in what we find to be an unreasonably hasty manner. Although BREDL is the party now coming forward with a request for more time to address the security-related matters now at issue, it was not BREDL that caused the Staff’s original delay or the need to deal with Duke’s later attempted delay,

without which this case would have been much more developed at this point — and without which we might have been able to meet our earlier goal of trying to complete a decision on all matters in this proceeding prior to the planned DOE August shipment date.

At this point, we do not find that it would be possible to provide a meaningful hearing or a meaningful decision on the security matters at issue during the time frame now proposed by Duke and the Staff. BREDL has provided examples of other proceedings in which there was expedited discovery, in which longer periods of time for discovery than we have herein were permitted. BREDL Proposal at 7 n.5. Duke itself (having previously called the already existing schedule for non-security-related contentions an “aggressive schedule”) has acknowledged, regarding the security-related contention aspect of this proceeding that “we’re clearly in a difficult position,” Tr. 1743, and that “it would be a significant challenge to – to accomplish this by August,” Tr. 1747. The Staff has agreed that to do this “would be an ambitious schedule,” Tr. 1751. We note that during the April 20 conference, the Board had nonetheless attempted to facilitate the speediest possible action on the security-related contention, with the Chair suggesting at one point that discovery requests could start right away. Tr. 1754. BREDL counsel even agreed that doing requests in such manner might be reasonable, but pointed out that doing the responses would take significant time. Tr. 1761.

We note that it was also pointed out that, although the Board had earlier indicated that it would attempt to get out a decision on the security-related contentions even more quickly, this decision was not issued until April 12. Tr. 1761-62. We had indeed hoped to issue our ruling earlier, but would note that April 12 itself was less than one month after oral argument, a much shorter time period than the 60-day rule-of-thumb time period for the same. To have issued the decision earlier than we did — or to issue any ruling in a rushed manner — would risk issuing a ruling that would not be based on the requisite attentive deliberation and consultation among

board members, on all relevant factual information and legal argument in the record, that is necessary to insure a meaningful decision that fairly addresses the issues the parties raise.

Perhaps most importantly from a practical standpoint, we note that all of the preceding discussion took place *prior to* the Commission's April 21 issuance of CLI-04-11, with its briefing dates of May 5 and 12, thus indicating that there will be no ruling from the Commission on some quite significant and difficult issues until at least the middle of May. Moreover, we note, this as a practical matter ensures that the "inevitable discovery disputes" — which it would seem are bound to occur on these issues (as Duke and the Staff in effect acknowledge in their April 22 filing), and which are in some ways much more serious, significant and difficult issues than those in question on the non-security-related contentions — of necessity could not be resolved until the latter half of May at the very earliest. By this time the parties will be in their most intensive period of preparation for the mid-June hearing on the non-security-related contentions (a period during which the Board itself will likewise be preparing for the hearing by reading and consulting with each other on the prefiled testimony in order to better assure an efficient hearing).

To go forward in the expectation that under these circumstances there could be a hearing on the security-related contention during the first week of June would, we find, be unrealistic and unreasonable, and would itself be inefficient and cause further delay than has already occurred in this proceeding. This result would follow from the virtually certain need to revise the schedule as a result of discovery disputes (as recognized by Duke and the Staff, with no disagreement from BREDL). And consideration of the resulting schedule changes would be further encumbered and delayed by the extensive security-related procedures we describe above. In contrast, what we wish to accomplish in the schedule we have arrived at, and set herein, is the *most realistic and expeditious schedule possible*, under the undeniable and significantly difficult circumstances that confront us in this proceeding, relating to the security

issues now in question. We find that to set any earlier schedule would, under the circumstances, result in denying any meaningful opportunity for a hearing in this proceeding on these very important security-related issues.

We have deliberated carefully on various ways of approaching the schedule. We have considered having discovery start on the security-related issues prior to the hearing on the non-security-related contentions — but, for the reasons discussed above, having to do with better ensuring effective preparation and thereby a more efficient hearing, we have concluded that this would not be appropriate or workable. Nor, we conclude, would doing this further either the goal of moving forward on the case as a whole in a meaningful and expeditious manner, or any expectation of achieving the earliest possible resolution of all matters in the proceeding.

We recognize that the schedule we set herein will create some hardship on BREDL, who requested a more lengthy schedule, and who has but one attorney and one expert in comparison to Duke's and the Staff's multiple attorneys and experts. The schedule will also result in Duke having to take on some level of risk in having the feed material for the fuel assemblies shipped prior to having a final decision in this proceeding. But Duke counsel has agreed that this is something that is possible, and that the failure to issue the requested LAR by August does not preclude the shipment in August. Tr. 1743.

Balancing the interests of all the parties in light of all of the above considerations, and in the interest of moving forward with this proceeding in the most efficient, effective, meaningful and fairest manner possible, the Board has determined that the following schedule most appropriately addresses the remaining parts of this proceeding of which we are aware at this time:

- First, all existing deadlines, previously set in our Order of March 30, 2004, shall remain the same. These are as follows:

- Depositions on non-security-related contention issues shall be taken during the period of April 26 through May 14, 2004. Any scheduling difficulties relating to these shall be brought to the licensing board in a timely manner to avoid delays, and will be considered in scheduled conferences to the extent possible.

- Any objections to the second round of written discovery requests on non-security-related contention issues shall be served and filed no later than April 30, 2004.

- A telephone conference shall be held May 4, 2004, at 10:00 a.m. to address any discovery objections and responses thereto on non-security-related contention issues, as well as any other appropriate matters.

- Responses to the initial written discovery requests on non-security-related contention issues shall be served and filed no later than May 10, 2004.

- Any motions to compel regarding the initial discovery requests on non-security-related contention issues shall be served and filed no later than May 12, 2004.

- A telephone conference shall be held May 14, 2004, at 10:00 a.m. to address any motions to compel and responses thereto on non-security-related contention issues, as well as any other appropriate matters.

- Prefiled written direct testimony on non-security-related contention issues shall be filed no later than May 25, 2004.

- Any prefiled written rebuttal testimony on non-security-related contention issues shall be filed no later than May 28, 2004.

- The previously-scheduled hearing on non-security-related contentions shall be held June 15 through 17, 2004, in Charlotte, in the Federal Courthouse, commencing at 9:00 a.m. each day and ending at 5:00 p.m. each day. The hearing will not, as previously considered, continue into Friday, June 18. Prior to the hearing, the Board will set time limits for the presentation of evidence on each contention. If there are any requests for limited appearance statements, the Board will attempt to hear these either during the daytime hours of June 15, 16, or 17, or will set an evening session, in a location to be announced, for such statements.

- Proposed findings of fact and conclusions of law following the June 15-17 hearing shall be filed by all parties simultaneously no later than July 9, 2004. Responses shall be filed simultaneously no later than July 23, 2004.

- Initial written discovery requests on the security-related contention(s) (the plural possibility is noted in the event Security Contention 1 is later admitted by the Commission, or in follow-up to the Commission's ruling on certified questions currently before them; hereinafter the term "security-related issues" shall be used), along with any associated requests for "need to know" determinations, shall be served and filed no later than June 21, 2004.

- Any objections of any nature to any such written discovery requests on security-related issues, as well as responses to any requests for "need to know" determinations, shall be served and filed no later than June 23, 2004.

- A closed session shall be held at the NRC's Rockville facility on June 25, 2004, commencing at 1:00 p.m., to address any discovery objections, responses thereto and related questions on security-related issues, as well as any "need to know" issues and any other appropriate matters.

- Responses to the initial written discovery requests on security-related issues shall be served and filed no later than July 2, 2004.

- Any motions to compel regarding the initial discovery requests on security-related issues shall be served and filed no later than July 7, 2004.

- A closed session shall be held at the NRC's Rockville facility on July 15, 2004, commencing at 1:00 p.m., to address any motions to compel and responses thereto on security-related issues, as well as any other appropriate matters.

- Written requests for a second round of written discovery on security-related issues, along with any associated requests for "need to know" determinations, shall be served and filed no later than July 19, 2004. Depositions on security-related issues shall also be taken during

the period of July 19 through August 9, 2004. Any scheduling difficulties relating to depositions shall be brought to the licensing board in a timely manner to avoid delays, and will be considered in scheduled sessions to the extent possible.

- Any objections to the second round of written discovery requests on security-related issues, as well as responses to any requests for “need to know” determinations, shall be served and filed no later than July 22, 2004.

- A closed session shall be held at the NRC’s Rockville facility on July 27, 2004, commencing at 1:00 p.m., to address any discovery objections, responses thereto, and “need to know” requests and responses on security-related issues, as well as any other appropriate matters.

- Responses to the second round of written discovery requests on security-related issues shall be served and filed no later than August 2, 2004.

- Any motions to compel regarding the second round of discovery requests on security-related issues shall be served and filed no later than August 6, 2004.

- A closed session shall be held at the NRC’s Rockville facility on August 10, 2004, at 10:00 a.m. to address any motions to compel and responses thereto on security-related issues, as well as any other appropriate matters.

- Prefiled written direct testimony on security-related issues shall be filed no later than August 20, 2004. Any prefiled written rebuttal testimony shall be filed no later than August 27, 2004.

- The hearing on the security-related contention(s), which shall be closed to all except those with appropriate clearance and need to know, shall be held in the NRC’s Rockville facility on September 8-9, 2004.

- Proposed findings of fact and conclusions of law on the security-related contention(s) shall be filed by all parties simultaneously no later than September 20, 2004. Responses shall be filed simultaneously no later than September 30, 2004.

As previously stated, all parties shall have a continuing duty to supplement any and all discovery responses with any information that would, had it been available on the date originally due, have been of a nature to warrant including it in the original response. This duty shall continue, regarding each issue, through the hearing and closing of the record on such issue. As also previously stated, all deadlines hereinafter set in this proceeding shall be construed to require that service and filing shall be accomplished in a manner to assure actual receipt by the licensing board and all parties by the date set.

Any further deadlines and schedules will be set in accordance with the Board's intention to move this proceeding forward in the most efficient and expeditious manner possible, while at the same time ensuring that the proceedings are fair and allow for meaningful presentation and consideration of all evidence and argument on all issues, and accommodating all legitimate circumstances that present themselves. No changes of the above dates will be made except in extreme and unavoidable circumstances, or to accommodate changes brought about by circumstances outside the control of the Licensing Board and parties, including Commission rulings that would lead to a different approach to any of the matters addressed herein.

In closing, we note that the above schedule does not take into account the fact that the Staff has not to date issued its environmental review in this proceeding. This is expected within days at this point. Even if issued this same date, however, whatever document is issued — be it an Environmental Impact Statement or an Environmental Assessment — opens up an additional area that could lead to delays. Again, while such delay is quite appropriate in light of the need for the Staff to do a thorough and full review, the possibility of such delay is undeniable and unavoidable. The Staff itself has noted the possibility of late-filed contentions

based on whatever document is issued, and discovery on this against the Staff has not, of course, even started at this point. This and all issues relating to this or to other pertinent matters may be addressed during the conference already scheduled for May 4, 2004, and thereafter as needed.

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 28, 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 MEMORANDUM AND ORDER (SETTING SCHEDULE FOR DISCOVERY AND HEARING ON SECURITY-RELATED MATTERS) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-413-OLA and 50-414-OLA
LB MEMORANDUM AND ORDER (SETTING
SCHEDULE FOR DISCOVERY AND HEARING
ON SECURITY-RELATED MATTERS)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of April 2004