

RAS 7702

RELATED CORRESPONDENCE

April 30, 2004
DOCKETED 05/03/04

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))	

NRC STAFF'S (1) OBJECTIONS TO THE BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE'S SECOND SET OF DISCOVERY REQUESTS TO
TO NRC STAFF AND (2) REQUEST FOR PROTECTIVE ORDER

INTRODUCTION

On April 26, 2004, the Blue Ridge Environmental Defense League (BREDL) filed the Blue Ridge Environmental Defense League's Second Set of Discovery Requests to NRC Staff (Request) in the above-captioned matter. The Request consists of three requests for production of documents: Requests No.I-9, II-5, and II-6.

REQUEST NO. I-9 Any and all documents containing the Staff's evaluation of the relationship between the behavior of "Next Generation Fuel" and MOX fuel, as discussed in Duke's April 23, 2004, presentation to the NRC Staff.

REQUEST NO. II-5. Any and all documents containing data from the VERCORS test series that was referred to by members of the Reactor Fuels Subcommittee of the Advisory Committee on Reactor Safeguards that was held at the NRC on April 21, 2004. Based on statements made by ACRS members at that meeting, it is BREDL's understanding that the NRC Staff has recently come into possession of this information.

REQUEST NO. II-6 Any and all documents containing the Staff's evaluation of the effect of using "Next Generation Fuel" and MOX fuel on the potential for or consequences of a severe accident at the Catawba nuclear power plant.

The NRC Staff (Staff) hereby files its objections to BREDL's Request, as discussed below. As a preliminary matter, the Staff notes that while some of BREDL's discovery requests may not be objectionable in themselves, specific documents that the staff compiles in response to BREDL's Request may be exempt from disclosure under 10 C.F.R. § 2.790 and principles of discovery applicable in this proceeding. Therefore, pursuant to 10 C.F.R. § 2.744, the Staff objects to the production of such documents.¹ The specific documents subject to objection will be identified in the Staff's response to the Request.

OBJECTIONS

1. To the extent that BREDL's document production requests seek the production of publicly available documents, the Staff objects. "When any . . . document . . . sought is reasonably available from another source . . . sufficient response to an interrogatory involving such materials would be the location [and] title [of] the . . . document." 10 C.F.R. § 2.740; see also *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 147-48 (1979) (A party need only state that a document is publicly available and "provide sufficient information to locate the document."). Therefore, the Staff's response to BREDL's requests for document production will be limited to the production of documents that are not publicly available (assuming they otherwise may be released in discovery) and a list of the titles and locations of documents that are in the public domain or available from another source.

2. To the extent that BREDL's document production requests seek the production of documents covered under the deliberative process privilege, the Staff objects. The deliberative process privilege is designed to encourage frank discussions within the Government regarding the

¹ The Board's Corrected Order (Confirming Matters Addressed at March 25 Telephone Conference), March 30, 2004, directed the parties to serve any objections to the second round of written discovery by April 30, 2004. The responses to the second round of discovery are not due until May 12, 2004. Therefore, the Staff has not yet designated the documents that may be responsive to BREDL's Request and cannot at this time identify those documents that are within the scope of the categorical objections identified herein.

formulation of policy and the making of decisions. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197-98 (1994). Communications are deliberative if they reflect a consultative process. *Id.* at 197. This privilege applies even where a purely factual matter is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decision-making process. *Id.* Therefore, pursuant to 10 C.F.R. § 2.744, the Staff objects.²

3. To the extent that the document production requests seek the production of proprietary documents, they are exempt from disclosure under 10 C.F.R. § 2.790. See 10 C.F.R. § 2.790. See also The Trade Secrets Act, 18 U.S.C. § 1905 (providing penalties for the disclosure of trade secrets by federal employees, except as provided by law). Therefore the staff objects.

MOTION FOR PROTECTIVE ORDER

The production of NRC records and documents is governed by 10 C.F.R. §§ 2.790 and 2.744. Section 2.744 states that “[t]he provisions of § 2.740(c) . . . shall apply to production of NRC records and documents pursuant to [2.744].” 10 C.F.R. § 2.744(h). The NRC staff,

² Pursuant to the Licensing Board's Order of April 8, 2004, the Staff filed a brief on April 14, 2004 discussing, in more detail, the case law regarding the deliberative privilege. See NRC Staff Brief in Response to the ASLB's April 8, 2004 Order (April 14, 2004).

therefore, requests that the Board issue a protective order denying BREDL's request for production of documents objected to by the Staff as subject to the deliberative process exception or as proprietary, pursuant to 10 C.F.R. § 2.740(c).³

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
This 30th day of April 2004

³ The Staff recognizes that a protective order cannot be issued until specific documents have been designated by the Staff as subject to the Staff's objections.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S (1) OBJECTIONS TO THE BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S SECOND SET OF DISCOVERY REQUESTS TO NRC STAFF AND(2) REQUEST FOR PROTECTIVE ORDER" 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 30th day of April, 2004.

Ann Marshall Young, Chair** *
Administrative Judge
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AMY@nrc.gov)

Anthony J. Baratta** *
Administrative Judge
Atomic Safety and Licensing Board
Panel
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AJB5@nrc.gov)

Thomas S. Elleman**
Administrative Judge
Atomic Safety and Licensing Board
Panel
5207 Creedmoor Rd. #101
Raleigh, NC 27612
(E-mail: elleman@eos.ncsu.edu)

Office of the Secretary** *
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate
Adjudication*
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Board
Panel
Adjudicatory File*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555

Diane Curran, Esq.**
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, N.W., Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

Lisa F. Vaughn, Esq.**
Legal Department
Mail Code - PB05E
Duke Energy Corporation
426 S. Church Street (EC11X)
Charlotte, NC 28201-1006
(E-mail: IfVaughn@duke-energy.com)

David A. Repka, Esq.**
Anne W. Cottingham, Esq.**
Winston & Strawn LLP
1400 L Street, N.W.
Washington, D.C. 20005-3502
(E-mail: drepka@winston.com
acotting@winston.com)

/RA/

Susan L. Uttal
Counsel for NRC Staff