RAS 7740

May 5, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA,
50-414-OLA

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S BRIEF IN RESPONSE TO CLI-04-11, REGARDING ADMISSIBILITY OF BREDL SECURITY CONTENTION 1; AND REQUEST FOR RECONSIDERATION OF CLI-04-06

I. INTRODUCTION

Pursuant to CLI-04-11, the Commission's Memorandum and Order of April 21, 2003, Blue Ridge Environmental Defense League ("BREDL") hereby briefs the admissibility of BREDL Contention 1 regarding the adequacy of Duke Energy Corporation's ("Duke's") Security Plan Submittal filed in support of its application to use plutonium mixed oxide ("MOX") lead test assemblies ("LTAs") at the Catawba nuclear power plant. BREDL also requests reconsideration of CLI-04-06, Memorandum and Order (February 18, 2004), in light of the information set forth by the Atomic Safety and Licensing Board ("ASLB") in its April 12, 2004, Memorandum and Order (Ruling on Security-Related Contentions) (hereinafter "April 12 Memorandum and Order").

II. FACTUAL AND PROCEDURAL BACKGROUND

By letter dated February 27, 2003, Duke applied to the NRC for a license amendment that would allow it to use plutonium LTAs at the Catawba nuclear power plant. In connection with the application, on September 15, 2003, Duke submitted revisions to the Catawba security plan. Duke also submitted an application for an

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exemption from certain Category I security requirements, which will be applicable to Catawba by virtue of the presence of formula quantities of plutonium at the plant. The security plan revisions and exemption application are collectively referred to as Duke's "Security Plan Submittal."

On September 4, 2003, BREDL requested a hearing on Duke's license amendment application. BREDL submitted contentions on safety and environmental issues on October 21 and December 2, 2003.[1] Because the Security Plan Submittal was not part of the publicly available application, BREDL was not able to submit security-related contentions.

Subsequently, the ASLB approved a Protective Order, and BREDL obtained access to the Security Plan Submittal. In the course of reviewing the Security Plan Submittal, it became clear to BREDL that in order to formulate contentions, it was necessary to review certain standards that were not publicly available. These standards consisted of, *inter alia,* (1) the NRC's post-9/11 security orders for the Catawba nuclear power plant (withheld from public disclosure as safeguards information); (2) the NRC's post-9/11 security orders for the two other U.S. Category I facilities, operated by NFS and BWXT (withheld from public disclosure as classified information); and (3) classified portions of the NRC's Part 73 standards for Category I facilities, and/or regulatory guidance for implementation of those standards.

By order dated January 29, 2004, a quorum of the ASLB found that under NRC standards for the disclosure of safeguards information, BREDL had demonstrated a "need to know" the information contained in the requested post-9/11 security orders for the

[1] Blue Ridge Environmental Defense League's Supplemental Petition to Intervene; Blue Ridge Environmental Defense League's Second Supplemental Petition to Intervene.

Catawba nuclear plant. Memorandum and Order (Ruling on BREDL Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions). The Commission reversed that decision, however, in CLI-04-06 According to the Commission, access to the post-9/11 security orders for Catawba was not necessary, because, *inter alia*:

> [t]he current proceeding has nothing to do with the NRC's post-September 11 general security orders.[21] It is not those orders, but Duke's MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of the MOX fuel assemblies at issue here.
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> [21] *Cf. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-03-05, 57 NRC 233 (2003) (license applications are measured against regulatory standards, not against enforcement orders).

CLI-04-06, slip op. at 9. The Commission also found that:

> the touchstone for a demonstration of 'need to know' is whether the information is indispensable. Here, as the pleadings before us represent, neither Duke nor the NRC staff has any intention of measuring Duke's security arrangements for MOX against last year's general security orders issued to reactors . . .

Id., slip op. at 9-10.

On March 3, 2004, BREDL submitted a set of contentions on Duke's Security Plan Submittal. Contention 1 asserted that: "Duke's revisions to its security plan and its exemption application are deficient because they fail to address the post-9/11 revised design basis threat for Category I nuclear facilities." Blue Ridge Environmental Defense League's Contentions on Duke's Security Plan Submittal at 3. The basis statement of the contention stated that:

> Following the terrorist attacks of September 11, 2001, the NRC conducted a 'top-to-bottom review' of its security-related regulations for all licensed facilities. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 379 (2001). As the Commissioners stated in that decision:

> we currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect 'public health and safety' and the 'common defense and security.'

Id. at 343.

> The Commission's review resulted in the issuance of enforcement orders imposing security upgrades at all operating nuclear power plants and Category I facilities. For the Category I facilities, the NRC explicitly declared that the revised design basis threat 'supercedes [sic] the Design basis Threat (DBT) specified in 10 CFR 73.1.' In the Matter of Nuclear Fuel Services, Inc., Erwin, TN; Order Modifying License (Effective Immediately), 68 Fed. Reg. 26,676 (May 16, 2003). Thus, for Category I facilities, the NRC has revised and replaced the design basis threat that is specified in 10 CFR § 73.1.[1]
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> Before granting Duke's license amendment application to use plutonium fuel at Catawba, the NRC must satisfy itself that the amendment poses 'no undue risk to the public health and safety or the common defense and security.' 42 U.S.C. § 2077. By changing the definition of the design basis threat, the Commission has changed the concept of what constitutes 'no undue risk' to public health and safety and the common defense and security, such that mere compliance with NERC regulations will not suffice. As discussed below in Contentions 2 through 4, Duke has not complied with NRC's published regulations for maintaining security of formula quantities of strategic special nuclear material (SSNM) at the Catawba nuclear power plant. Even if it were to demonstrate compliance with those standards, however, Duke still would not be entitled to a license, unless it could demonstrate compliance with the no undue risk standard as it is currently conceived by the Commission.
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> [1] The Staff has previously argued that the enforcement orders issued to NFS and BWXT are specific to those facilities, and that their terms would not apply to the Duke application. Transcript of February 13, 2004, oral argument at 1066. This argument ignores the Commission's explicit statement in those orders that it was revising the general regulatory requirement in 10 C.F.R. § 73.1. The Commission has no authority to revise a regulation in an individual enforcement proceeding. In any event, the characteristics of the design basis threat have at least as much to do with the nature of the adversary as the nature of the facility to be protected. In fact, the overwhelming lesson of the September 11 attacks was that adversaries are better equipped and more determined than was previously thought.

Id. at 3-4.

Both Duke and the NRC Staff opposed admission of the contention. In its April 12, 2004, Memorandum and Order, the ASLB made no decision to either admit or deny

Contention 1. Instead, it certified to the Commission several questions relating to both the admissibility of the contention and the continuing viability of CLI-04-06, in light of more recent statements by Duke and the NRC Staff regarding the relevance of the NRC's post-9/11 enforcement orders to Catawba.

III. ARGUMENT

A. Contention 1 is Admissible.

Contention 1 charges that Duke has failed to address the revised design basis threat for Category I facilities in its Security Plan Submittal, and therefore the Security Plan Submittal is deficient. The contention must be admitted if BREDL has described, with basis and specificity, "sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii).

Contention 1 is admissible because it raises a material dispute of fact and law with Duke regarding the adequacy of the Security Plan Submittal to satisfy the NRC's "no undue risk standard" with respect to the security of plutonium MOX fuel at the Catawba nuclear power plant. *See* 42 U.S.C. § 2077. First, the contention raises a material issue of fact with respect to the applicability to Catawba of the Category I design basis revisions for the NFS-Erwin and BWXT facilities. As BREDL argues in the contention, and as neither Duke nor the Staff disputes, the design basis threat has as much or more to do with the nature of the threat of Category I SSNM as the nature of the facility to be protected.[2] Thus, the enforcement orders to NFS and BWXT demonstrate that the

[2] The fact that the design basis threat revisions focus on the nature of the adversary rather than the nature of the targeted facility is confirmed in a brief recently filed by the Commission in the D.C. Circuit of the U.S. Court of Appeals:

> The NRC's April 29, 2003, DBT orders specify detailed, quantitative adversary characteristics that do not appear in any NRC regulation, past or present, in part

Commission's concept of what constitutes "no undue risk" has changed, and that this conceptual change is not dependent on the characteristics of any specific Category I facility.

Second, BREDL has demonstrated that it has a genuine dispute with Duke over what level of security is required to satisfy the "no undue risk" standard in 42 U.S.C. § 2077. Arguments by Duke and the NRC Staff that Duke need only satisfy the regulations that are in the code book do not comport with the Atomic Energy Act or the Commission's interpretation of it. Under the Atomic Energy Act, in licensing a nuclear facility, the NRC must make a determination that the facility poses no undue risk to the public health, safety, and security, *in addition to* a finding that the facility will operate in compliance with the NRC's regulations.[3] As the Appeal Board recognized in *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1010 (1973):

> [t]he most reasonable inference to be drawn from the Act as a whole is that, while Congress was prepared to have the Commission determine through its rule-making process what affirmative requirements, restrictions and limitations were necessary to provide adequate safety protection, it was not turning its back upon

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> because such detailed information rises to the level of 'safeguards information' that cannot be publicly disclosed. *See* AEA § 147, 42 U.S.C. § 267; 10 C.F.R. § 73.21 . . . These details include, *inter alia,* the size of the vehicle bomb, the caliber of guns and ammunition, the kinds of explosive charges, and the number of attackers and teams that the hypothetical adversary can use.

Public Citizen, Inc. v. NRC, No. 03-1181, Brief for the Federal Respondents at 15-16 (April 14, 2004).

[3] Thus, for example, 10 C.F.R. § 723.20 requires that for any facility licensed to possess or use formula quantities of strategic nuclear material, the applicant must establish a physical protection system which will have as its objective to provide "high assurance" that activities involving special nuclear material "are not inimical to the common defense and security, and do not constitute an unreasonable risk to the public health and safety." In addition, an applicant must meet the specific regulatory requirements of Part 73.

the possibility that, in some circumstances, compliance with the promulgated regulations might not be sufficient.

In this case, BREDL has raised, with factual basis, a genuine dispute regarding whether the Commission has elevated the general security standard for Category I facilities by revising the design basis threat, such that compliance with the NRC's promulgated regulations is not sufficient to satisfy the no undue risk standard.[4]

Duke has both argued that Contention 1 constitutes a challenge to NRC regulations, and is therefore inadmissible. Answer of Duke Energy Corporation to the 'Blue Ridge Environmental Defense League's Contentions on Duke's Security Plan Submittal' at 10 (March 16, 2004). The argument is incorrect. While a rulemaking petition or a waiver petition might be appropriate where BREDL sought to elevate the Commission's concept of undue risk, that is not the case here. In this case, the Commission itself has announced that compliance with its regulations is not sufficient to satisfy the no undue risk standard. BREDL merely seeks fulfillment of the statutory standard, based on the Commission's own actions and pronouncements. Under the rule of *Maine Yankee,* the contention is admissible.

B. The Commission Should Reconsider CLI-04-06

In CLI-04-06, the Commission ruled that BREDL could not have access to the NRC's post-9/11 security upgrade orders for Catawba, on the ground that they have "nothing to do" with this proceeding, and that it is clear that neither Duke nor the NRC Staff intends to measure its Security Plan Submittal against those orders. *Id,* slip op. at 9-

[4] The very fact that, as the NRC stated in its D.C. Circuit brief, the new orders are more specific than NRC regulations regarding the nature and capabilities of attackers reflects a substantial upgrade to the concept of what constitutes an undue risk from a security standpoint. *See* note 2, *supra.*

10. As discussed in detail in the ASLB's April 12, 2004, this presumption has been upended by various statements by counsel for Duke and the NRC Staff in the course of oral arguments on the admissibility of BREDL's contentions. It is now clear that not only is Duke relying on its alleged compliance with the post-9/11 security orders to demonstrate the adequacy of its Security Plan Submittal, but that it has invited the ASLB to do the same. April 12 Order, slip op. at 27-30. It would be grossly unfair if BREDL were the *only* party that is precluded from making a judgment as to whether Duke's alleged compliance with the post-9/11 security orders for the Catawba nuclear power plant provides a sufficient level of security to satisfy the Commission's Category I standards or to justify an exemption from those standards. Indeed, it is impossible for BREDL to proceed without this information, because we have no way of knowing whether Duke is correct when it asserts that compliance with the post-9/11 security orders provides a robust enough defense to protect against any threat of theft. Under the circumstances, the necessity for BREDL to have access to the post-9/11 security orders is now clear. Therefore, the Commission should reconsider CLI-04-06 and order that these safeguards documents be released to BREDL.

IV. CONCLUSION

For the foregoing reasons, the Commission should direct the ASLB to admit BREDL's Contention 1. It should also reconsider CLI-04-06 and allow BREDL access to the NRC's post-9/11 orders upgrading security requirements for the Catawba nuclear power plant.

Respectfully submitted,

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May 5, 2004

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2004, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S BRIEF IN RESPONSE CLI-04-11, REGARDING ADMISSIBILITY OF BREDL SECURITY CONTENTION; AND REQUEST FOR RECONSIDERATION OF CLI-04-06 were served on the following by e-mail and/or first-class mail, as indicated below:

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