

May 12, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

In the Matter of

May 18, 2004 (4:52PM)

DUKE ENERGY CORPORATION

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

(Catawba Nuclear Station, Units 1 and 2)

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
REPLY BRIEF IN RESPONSE TO CLI-04-11**

I. INTRODUCTION

Pursuant to CLI-04-11, the Commission's Memorandum and Order of April 21, 2003, Blue Ridge Environmental Defense League ("BREDL") hereby replies to the briefs filed by Duke Energy Corporation ("Duke") and the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff regarding the admissibility of BREDL's Security Contention 1 and the related questions certified to the Commission by the Atomic Safety and Licensing Board ("ASLB"). Response of Duke Energy Corporation to the Questions Certified to the Commission by Memorandum and Order (Ruling on Security-Related Contentions) (May 5, 2004) (hereinafter "Duke Brief"); NRC Staff's Response to the Commission's April 21, 2004 Order Relating to Certified Questions Regarding BREDL Security Contention 1 (May 5, 2004) (hereinafter "NRC Staff Brief").

Neither Duke nor the Staff justifies their position that Contention 1 should not be admitted. Both parties grossly overreach in their attempts to argue that the holding of CLI-04-06 dictates the dismissal of Contention 1. See CLI-04-06, Memorandum and Order (February 18, 2004). Neither party succeeds in justifying the continued denial of access by BREDL to the post-9/11 security orders that were issued to Catawba in the

spring of 2003. The Commission should rule that Contention 1 is admissible, and allow BREDL access to the information it needs in order to have a meaningful hearing.

II. 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. BREDL asserts that the NRC has upgraded the design basis for Category I facilities, as expressed in the enforcement orders that were issued to Nuclear Fuel Services (“NFS”) and Babcock & Wilcox (“B&WXT”) in April 2003; and that the upgrade must be applied to the proposed license amendment for the Catawba nuclear power plant.

Duke and the Staff argue that the Commission’s ruling in CLI-04-06 effectively precludes admission of Contention 1. Duke Brief at 8; NRC Staff Brief at 3. According to Duke, the reasoning behind the Commission’s statement that this licensing proceeding has “nothing to do with the NRC’s post-September 11 general security orders” applies with “equal or greater force to the issue of the relevance of specific Category I facility orders to this proceeding.” *Id.*, citing CLI-04-06, slip op. at 9-10.

To the contrary, the reasoning behind CLI-04-06 is utterly inapposite to the question of whether the Category I security orders are relevant to this proceeding. In CLI-04-06, the Commission ruled that the “general security orders” issued to all nuclear power plants in April of 2003 are not relevant to the adequacy of Duke’s license amendment request to use plutonium MOX fuel at Catawba, because the orders relate to the “baseline” adequacy of Duke’s security plan for the Catawba nuclear power plant,

which is not at issue in this proceeding. CLI-04-06, slip op. at 10. In support of its conclusion, the Commission observed that neither Duke nor the NRC Staff had demonstrated any intention of measuring Duke's security arrangements for plutonium MOX fuel against the general security orders for nuclear power plants. *Id.*, slip op. at 9-10.¹ In contrast, Contention 1 raises the completely separate question of whether Duke's proposed measures for protecting MOX fuel are adequate to protect against the post-9/11 design basis threat, as articulated by the Commission in the security orders that were issued to Category I facilities in April of 2003.

Duke also argues that the post-9/11 security orders for Category I facilities are "not at issue here," because "Catawba is a Part 50 reactor and the circumstances at Catawba are not equivalent to the Category I fuel fabrication facilities operated by BWXT and NFS that were subject to site-specific security orders." Duke Brief at 8. This argument is specious. While Catawba is a Part 50 reactor, Duke now proposes to make it a Category I fuel cycle facility as well, by virtue of the fact that it will house formula quantities of strategic special nuclear material. The design basis threat for a Category I facility is distinctly different from the design basis threat for a nuclear power plant, because it requires consideration of theft in addition to sabotage. There are no "circumstances" that would excuse Duke from compliance with these standards, other than a duly authorized regulatory exemption.

¹ Subsequently, Duke made statements demonstrating that it intends to rely on measures implemented in response to the general security orders for nuclear power plants in order to satisfy Category I requirements. See discussion in 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 at 8 (May 5, 2004) (hereinafter "BREDL Brief"), citing Memorandum and Order (Ruling on Security-Related Contentions), slip op. at 27-30 (April 12, 2004) (hereinafter "April 12 Memorandum and Order").

In any event, Duke's argument that the April 30 security orders for the NFS and BWXT Category I facilities are not applicable to the "circumstances" at Catawba is not supported by the Commission's own description of the Category I design basis threat revisions. *See* discussion in BREDL Brief at 5 and note 2. The design basis threat revisions focus on the characteristics of the adversary rather than the characteristics of the facility involved. *Id.* Even if were supportable, Duke's claim that the circumstances of the Catawba reactor are so different as to render the Category I design basis threat revisions irrelevant is a factual claim that goes to the merits of Contention 1, and may not be decided at the admissibility stage.²

Duke's next argument, that BREDL provided "[n]o basis" for asserting the relevance of the post-9/11 security orders for Category I facilities, is patently incorrect. Duke Brief at 8-9. In fact, as discussed in Contention 1, the Commission itself clearly established BREDL's basis for asserting the relevance of those orders to this proceeding. By the Commission's own admission, each of those orders "supercedes [sic] the Design Basis Threat (DBT) specified in 10 CFR 73.1." BREDL Brief at 4, quoting Contention 1. Once again, if Duke has some factual reason for believing that significant revisions to the design basis threat for the two existing Category I facilities should not be applied to a third proposed Category I facility, this is factual question that goes to the merits of

² In support of its position, Duke argues that because of the "unique situation" presented by the use of plutonium fuel assemblies at Catawba, the Staff has established "specific review guidance" for the case, which does not take into account the content of the April 2003 security orders issued to NFS and BWXT. Duke Brief at 11-12. The fact that the Staff does not consider the orders to be relevant to this proceeding is just that: a fact. The Staff is a party to this proceeding, not the final arbiter of what measures are sufficient to satisfy the "no undue risk" standard.

Contention 1. It does not constitute grounds for denial of Contention 1 at this threshold stage of the proceeding.

Duke also takes issue with the ASLB's observation that the issuance of orders revising the design basis threat for the two existing Category I facilities may have established a *de facto* design basis threat that would apply to Catawba. Duke Brief at 9, citing April 12 Order, slip op. at 24-25. According to Duke, under "established principles of administrative law," the orders to NFS and BWXT cannot establish a new design basis threat that is applicable to Catawba because "Commission orders establish requirements only for those to whom the orders are issued." Duke Brief at 9. *See also* NRC Staff Brief at 4. There is no debate that a particular enforcement order applies only to the party to whom it is issued. But Duke sidesteps the more important question of what is the significance of the Commission's statement, in both enforcement orders to NFS and BWXT, that the enforcement orders revise the design basis threat as contained in 10 C.F.R. § 73.1. Clearly, the Commission issued those orders because it believed that as a general matter, the pre-9/11 design basis threat was not rigorous enough to protect the two existing Category I facilities against the current threat of theft of strategic special nuclear material. Thus, the content of those orders establishes a new security standard to which Duke must be held.³

³ As discussed in BREDL's Brief at 6, mere satisfaction of NRC regulations is not always sufficient to justify issuance of a license. Under the Atomic Energy Act, 42 U.S.C. § 2077, the Commission must also determine that a proposed Category I facility poses "no undue risk" to health and safety or the common defense and security. *See Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1010 (1973). The fact that the Commission upgraded the design basis threat for the NFS and BWXT facilities strongly indicates that the Commission has altered its concept of what constitutes "undue risk" of theft of strategic nuclear material for any Category I facility. This is a litigable issue that has been properly placed before the Commission in Contention 1.

Duke argues that Contention 1 should be rejected because it fails to identify any “credible vulnerabilities” in Duke’s Security Plan Submittal. Duke Brief at 13, citing CLI-04-06, slip op. at 10. According to Duke, Contention 1 is deficient because it “never explains why the enhancements identified in the Security Submittal are insufficient to address the potential theft of the MOX lead assemblies.” Duke Brief at 13.

Based on its interpretation of CLI-04-06, Duke would impose an admissibility standard on Contention 1 that requires BREDL to propose theft scenarios and explain why Duke’s proposed security measures are inadequate to defeat them. This argument is fatally defective for three reasons. First, nothing in CLI-04-06 suggests that the Commission intended to revise the admissibility standard for contentions that is contained in 10 C.F.R. § 2.714. In CLI-04-06, the Commission merely suggested that, even without access to the post-9/11 general security orders for Catawba, BREDL should be able to review Duke’s Security Plan Submittal against the Part 73 regulations and identify “credible vulnerabilities.” *Id.*, slip op. at 10. The Commission did not state that it would reject a contention that otherwise satisfied the admissibility standards in 10 C.F.R. § 2.714.

Second, Duke’s failure to address the revised design basis threat that was established in the April 30 security orders to NFS and BWXT does indeed constitute a “credible vulnerability” in Duke’s Security Plan Submittal. No theft scenario is

(footnote continued from previous page)

As also discussed in BREDL’s Brief at 7, Contention 1 does not pose a challenge to the Commission’s regulations. Instead, it argues that the Commission itself has upgraded its concept of what constitutes “no undue risk,” beyond what is contained in the regulations, such that a mere finding of compliance with NRC regulations would not satisfy the “no undue risk” standard in 42 U.S.C. § 2077. Accordingly, the cases cited by Duke at page 10 note 16 do not apply.

necessary to establish the alarming vulnerability demonstrated by the fact that Duke is proposing to use plutonium fuel at the Catawba nuclear power plant, based on a security plan that pays no regard to the post-9/11 design basis threat for theft of strategic special nuclear material.⁴ Instead, Duke's plan is based on a design basis threat that was devised in 1979. *See* Final Rule, Physical Protection Upgrade Rule, 44 Fed. Reg. 68,184 (November 28, 1979). Given that Osama Bin Laden has described theft of nuclear weapons as a religious obligation, it is difficult to imagine how the outdated status of Duke's Security Plan Submittal could fail to qualify as a credible vulnerability. *See* George J. Tenet, Statement Before the Senate Select Committee on Intelligence, *The Worldwide Threat 2004: Challenges in a Changing Global Context* (February 24, 2004), available on the internet at www.cia.gov/cia/pub.

Third, it is it would be absurd to require BREDL to devise theft scenarios, without also giving BREDL access to the Commission's assumptions regarding the nature and capability of the adversary that is assumed under the revised design basis threat. BREDL obviously has no access to that information, because it is contained in the classified security orders that went out to NFS and BWXT. In any event, BREDL did not need to present that information in order to plead an admissible contention under the Commission's admissibility standard in 10 C.F.R. § 2.714. BREDL's contention satisfies all the pleading requirements of Section 2.714. *See* BREDL Brief at 5-7.

B. The Commission Should Reconsider CLI-04-06

In its brief, Duke confirms that in order to provide adequate protection of plutonium MOX fuel against the threat of theft, Duke intends to rely on its existing

⁴ As Duke concedes, it does not event know what the post-9/11 security orders to NFS and BWXT require. Duke Brief at 11.

security plan, including the revisions to the plan that were made in response to the post-9/11 general security orders for nuclear power plants. Duke Brief at 17. Thus, Duke's own brief establishes that the Commission's assumption in CLI-04-06 -- that the adequacy of Duke's Security Plan Submittal would not be measured against Duke's post-9/11 security upgrades -- is incorrect. In fact, it is now clear the content of the NRC's post-9/11 security orders for the Catawba nuclear power plant constitutes relevant, if not crucial, information needed by BREDL to evaluate the adequacy of Duke's measures to protect against the Category I design basis threat.⁵ Duke has now stated that compliance with those orders constitutes Duke's basis for asserting that it provides adequate protection of the plutonium MOX fuel against theft. Thus, in order to evaluate the adequacy of Duke's Security Plan Submittal to meet NRC Category I security standards or justify an exemption from those standards, BREDL must have access to the orders.

⁵ In an effort to minimize the significance of the post-9/11 security orders, Duke refers to the Security Plan Submittal as "incremental" or "additive." *See, e.g.*, Duke Brief at 17. Regardless of Duke's characterization of the magnitude of its security plan revisions, the question remains: do these revisions satisfy the Commission's regulatory requirements, or has Duke satisfied the standard for obtaining an exemption from those requirements? Here, Duke is contending that it should be exempted from Category I security requirements based on its satisfaction of requirements imposed in the April 30 general security orders. BREDL needs to see those orders in order to evaluate whether such measures are sufficient to substitute for compliance with the Category I standards.

III. 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 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2004, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S REPLY BRIEF IN RESPONSE CLI-04-11 were served on the following by e-mail and/or first-class mail, as indicated below:

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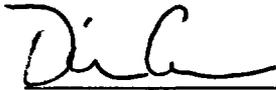
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