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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,
Units 1 and 2)

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Docket Nos. 50-413-OLA
50-414-OLA

DUKE ENERGY CORPORATION'S REPLY TO BLUE RIDGE
ENVIRONMENTAL DEFENSE LEAGUE'S BRIEF ON CERTIFIED QUESTIONS

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I. INTRODUCTION

On May 5, 2004, Intervenor Blue Ridge Environmental Defense League ("BREDL") submitted a brief¹ in response to the Commission's Memorandum and Order of April 21, 2004, CLI-04-11.² In accordance with the schedule set forth in CLI-04-11, Duke Energy Corporation ("Duke"), the applicant for a license amendment to utilize four lead assemblies containing mixed oxide ("MOX") fuel at its Catawba Nuclear Station ("Catawba"), herein submits its reply to BREDL's brief. This reply focuses on BREDL's argument that

¹ "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" (May 5, 2004) ("BREDL Brief").

² *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, ___ NRC ___ (slip op. April 21, 2004). In that Memorandum and Order the Commission accepted certification of certain security-related issues from the presiding NRC Atomic Safety and Licensing Board ("Licensing Board"), as set forth in the Licensing Board's April 12, 2004 Memorandum and Order. See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), ASLBP No. 03-815-03-OLA (slip op. April 12, 2004) (Safeguards Information) ("Board Order").

BREDL proposed Security Contention 1 was admissible under the Nuclear Regulatory Commission's ("NRC" or "Commission") standards in 10 C.F.R. § 2.714. BREDL Brief at 5-7. In its initial filing³ made pursuant to CLI-04-11, Duke largely anticipated BREDL's request for reconsideration (BREDL Brief at 7-8) of the finding in the Commission's decision in CLI-04-06⁴ that the post-September 11 NRC security orders issued to nuclear power reactors, including Catawba, are not material to, or at issue in, this proceeding. Therefore, that BREDL argument need not be addressed further herein.

II. BREDL PROPOSED SECURITY CONTENTION 1 IS NOT ADMISSIBLE

BREDL paraphrases its proposed Security Contention 1 as stating 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 Brief at 5. The fatal defect in BREDL's Security Contention 1 is illustrated by that language. Contrary to the contention as proposed by BREDL, the Commission has not promulgated a "revised design basis threat for Category I facilities." The Commission has issued specific post-September 11 orders to the two existing Category I fuel facilities in the United States, the Nuclear Fuel Services-Irwin ("NFS") and BWXT facilities. However, the issuance of these orders to two specific facilities has no generic effect, and did not create a universal design basis threat ("DBT") applicable to any facility that might possess Category I material in the future.

The fallacy underlying BREDL Security Contention 1 is evidenced by the Commission's own words in its recent brief in the Second Circuit in the *Public Citizen* case,

³ "Response of Duke Energy Corporation to the Questions Certified to the Commission by Memorandum and Order (Ruling on Security Related Contentions)" (May 5, 2004) ("Duke Brief").

⁴ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC ____ (slip op. Feb. 18, 2004).

which BREDL cited in its brief.⁵ In that proceeding, the petitioners challenged the NRC's use of facility-specific orders instead of notice-and-comment rulemaking in instituting new security requirements after September 11, 2001. The Commission stated in response that one of the reasons for choosing adjudication (*i.e.*, orders) rather than rulemaking was to "tailor security requirements to site-specific conditions at licensed facilities."⁶ The NRC further indicated that the "NRC's [facility-specific] orders do not in fact amend or modify NRC regulations," and that "[t]he effect of the NRC's orders is not to change the fundamental nature or scope of the NRC's existing regulations, but to add new and detailed security requirements."⁷ In its orders to NFS and BWXT, the NRC has chosen to add new requirements for these two Category I facilities, on a facility-by-facility basis, in order to tailor the requirements to site-specific conditions. The Commission clearly intended the post-9/11 security orders to apply only to the facility to which they had been issued, and that these orders not be applied generically.

BREDL argues that "the design basis threat has as much or more to do with the nature of the threat of Category I [strategic special nuclear material] as the nature of the facility to be protected," and asserts that neither Duke nor the Staff disputes this. BREDL Brief at 5. On the latter point, however, Duke has consistently argued in this proceeding that the NFS and BWXT facilities, which are both fuel processing facilities, are so different in the nature, type and amount of Category I material present that the threat of theft at those facilities cannot be compared in any way to that at the Catawba facility, and that the considerations which led to the

⁵ See April 14, 2004 Brief for the Federal Respondents, *Public Citizen, Inc., et al.* (D.C. Cir.) (No. 03-1181).

⁶ *Id.* at 19.

⁷ *Id.* at 20.

post-9/11 security requirements for NFS and BWXT do not apply to Catawba.⁸ Thus, BREDL's statement that Duke does not dispute its point is incorrect.

BREDL's substantive assertion that the DBT is dependent more on the presence of Category I material than the nature of the facility is equally specious. The BWXT and NFS facilities process strategic special nuclear material ("SSNM") in a number of forms for the fabrication of fuel assemblies. Manufacturing the final products at these facilities entails many steps, with the Category I material in process or in storage at many locations during the processing. During such processing, a number of workers have direct contact with the Category I material, which may be in bulk or pellet form and susceptible to theft or diversion in small quantities. In contrast, the MOX fuel at Catawba that is the subject of this proceeding will be contained in four discrete assemblies wherein the MOX fuel is contained in pellets within sealed rods. Each assembly is large, heavy, and handled as a unit; there is no reason why the MOX fuel pellets would be separately handled while at Catawba.⁹ These considerations support the

⁸ See "Duke Energy Corporation's Response in Support of the NRC Staff's Motion for Interlocutory Review of the Licensing Board's January 29, 2004 Order" (Feb. 6, 2004), pp. 5-8 (Safeguards Information); "Duke Energy Corporation's Opposition to the 'Blue Ridge Environmental Defense League's Request for Need to Know Determination and Motion for Extension of Deadline for Filing Security Contentions,'" (Jan. 20, 2004), pp. 7-10 (Safeguards Information).

⁹ The attractiveness of Category I material for theft and diversion also differs considerably from that of the MOX fuel assemblies, and supports disparate treatment of different facilities. As the NRC Staff pointed out in its May 5, 2004 Safety Evaluation by the Office of Nuclear Security and Incident Response related to the proposed additional protective measures to provide enhanced physical security for MOX LTAs for Catawba:

The NRC staff found that the MOX material, while technically meeting the criteria of a formula quantity, is not attractive to potential adversaries from a proliferation standpoint due to its low Pu concentration, composition, and form (size and weight). The MOX fuel consists of Pu oxide particles dispersed in a ceramic matrix of depleted uranium oxide with a Pu concentration of less than six weight percent. The MOX LTAs will consist of conventional fuel assemblies designed for a commercial light-water power reactor that are over 12 feet long and weigh approximately 1500 pounds. Therefore, the MOX LTAs represent a

Commission's decision to proceed on a facility-by-facility basis, rather than to make pronouncements that may apply to all facilities that may utilize Category I materials. The issuance of facility-specific orders to certain Category I facilities does not change the review standard for the Catawba facility.¹⁰

BREDL's proposed Security Contention 1 is a claim unsupported by any basis. The argument that the two facility orders have generic applicability is simply incorrect as a matter of law. Moreover, with respect to BREDL's arguments regarding the nature and significance of the threat posed by Category I material, there is simply no factual basis offered to support arbitrarily applying those facility-specific orders to Catawba. Security Contention 1 amounts to a bald assertion with no factual support and no acknowledgement of the substantial differences between the NFS and BWXT facilities on the one hand and a Part 50-licensed reactor on the other. *Compare* 10 C.F.R. § 2.714(b)(2).

BREDL argues that it has a genuine dispute with Duke over the level of security required to satisfy the "no undue risk standard." BREDL Brief at 5. Duke fully understands that it must meet the "no unreasonable risk" standard finding contained in the Atomic Energy Act of 1954, as amended, and the Commission's security regulations.¹¹ While compliance with NRC

significantly less attractive theft or diversion target, from a proliferation standpoint, as compared to the materials at the Category I fuel fabrication facilities, which 10 C.F.R. 73.45 and 73.46 were primarily intended to address. A large quantity of MOX fuel and an elaborate extraction process would be required to yield enough material for use in an improvised nuclear device or weapon.

NRC Safety Evaluation at 2.

¹⁰ BREDL's Brief offers no support for BREDL's claim (pp. 5-6) that "the enforcement orders to NFS and BWXT demonstrate that the 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."

¹¹ BREDL cites 42 U.S.C. § 2077. Section 2077.c provides that the Commission shall not distribute any special nuclear material (SNM) or issue a license pursuant to Section 53 if

regulations generally meets such requirements, Duke recognizes that it has requested certain limited exemptions to a number of security-related regulations and that the grant of such exemptions requires a demonstration that the “no unreasonable risk” standard is still met. However, proposed Security Contention 1 deals solely with the applicability to Catawba of requirements imposed on two specific Category I facilities that are very different from Catawba. As discussed above, there is no indication that the Commission intended when it issued those two orders to change the “no unreasonable risk” standard as it applies to Catawba.¹² BREDL has also not shown that a material issue of law or fact resulting in a genuine dispute exists. As previously discussed,¹³ in the context of this contention, BREDL has not demonstrated with basis and specificity that a risk (let alone an unreasonable risk) exists related to the requested amendment. In pleading this proposed contention (and its other security contentions), BREDL has failed to assert the existence of a credible vulnerability in the additional security arrangements for the receipt and storage of MOX fuel, and thus has failed to demonstrate that a genuine dispute exists.¹⁴ BREDL therefore has not raised a contention that meets the specificity and basis requirements of 10 C.F.R. § 2.714. Thus, BREDL’s proposed Security Contention 1 is not admissible.

such distribution or license “would be inimical to the common defense and security or constitute an unreasonable risk to the health and safety of the public.” *See also* 10 C.F.R. § 73.20(a).

¹² *See* NRC Safety Evaluation at 2 (Duke’s requested security-related exemptions “are authorized by law and will not constitute an undue risk to the common defense and security.”).

¹³ *See* “Response of Duke Energy Corporation to the Question Certified to the Commission by Memorandum and Order (Ruling on Security Related Contentions)” (May 5, 2004).

¹⁴ *See* CLI-04-06; slip op. at 10; Duke Brief at 12-14; “Answer of Duke Energy Corporation to the ‘Blue Ridge Environmental Defense League’s Contentions on Duke’s Security Submittal’” (March 16 2004), pp. 5-10 (Safeguards Information). It is Duke’s position that an admissible contention must specify, with basis, a credible vulnerability that could result in MOX fuel being taken from the facility.

III. CONCLUSION

For the foregoing reasons, BREDL's proposed Security Contention 1 does not satisfy the Commission's requirements for admissibility. Furthermore, for the reasons stated in Duke's May 5, 2004 brief on the certified questions, CLI-04-06 was properly decided by the Commission, and reconsideration is unwarranted.

Respectfully submitted,



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Dated in Washington, District of Columbia
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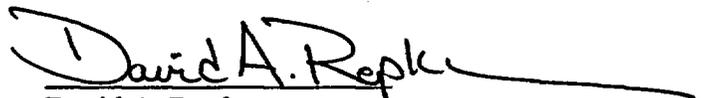
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