

June 23, 2004

RAS 7990

**RELATED CORRESPONDENCE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

DOCKETED 06/24/04

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 OBJECTIONS TO BREDL'S FIRST
SET OF DISCOVERY REQUESTS TO NRC STAFF
REGARDING SECURITY PLAN SUBMITTAL
AND REQUEST FOR PROTECTIVE ORDER

INTRODUCTION

On June 21, 2004, the Blue Ridge Environmental Defense League (BREDL) filed its First Set of Discovery Requests to NRC Staff Regarding the Security Plan Submittal (Request) in the above-captioned matter. The Request consists of three General Interrogatories, three General Document Production Requests, twenty-six Specific Interrogatories, and three Specific Document Production Requests.

The Staff hereby files its objections to BREDL's Request, as discussed below.¹ The Staff also requests that the Licensing Board issue a protective order that the discovery not be had pursuant to 10 C.F.R. § 2.740(c).

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

¹ Pursuant to 10 C.F.R. § 2.744, a request for production of a document may be served on the Executive Director for Operation and shall, inter alia, state why the record or document is relevant to the proceeding. Similarly, 2.720(h)(2)(ii) requires a finding by the Licensing Board that the answers to the interrogatories are necessary to a proper decision and are not obtainable from another source. Without waiving its right to object based on failure to comply with 2.744, the staff is filing the objections delineated herein.

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.² The specific documents subject to objection will be identified in the Staff's response to the Request.

In addition, the Staff notes that some of the documents responsive to BREDL's Request, as well as some of the answers to interrogatories, may be Safeguards Information (SGI). In such a case, BREDL must establish a need to know such information.³ In the event that additional SGI is identified in the course of preparing the Staff's response to BREDL's request, an additional need to know determination may be necessary.

OBJECTIONS

A. Objection to Document Production Requests

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

² 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 first round of written discovery on security-related matters by June 23, 2004. The responses to the first round of discovery are not due until July 2, 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.

³ The Staff today is responding separately to a request for a need to know determination submitted by BREDL dated June 19, 2004.

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 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.

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.

4. The Staff objects to BREDL's interrogatories and requests for document production in so far as they would require the Staff to turn SGI or classified documents over to BREDL or its proffered security expert without the proper showing of a need to know. According to NRC regulations, an individual may be granted access to safeguards information if that person "has an established 'need to know' for the information and is . . . [an] individual to whom disclosure is ordered pursuant to § 2.744(e)" of the Commission's regulations. 10 C.F.R. § 73.21(c)(1)(vi). "Need to know" is defined as "a determination by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment." 10 C.F.R. § 73.2(a).

Dr. Edwin Lyman has been put forth by BREDL as an expert in security matters. If Dr. Lyman cannot qualify as an expert on security-related matters, he can have no need to know. *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977). Prior Commission precedents require that, in order to gain access to the types of information requested by BREDL, a witness must possess the technical competence necessary to evaluate the information requested. *Id.* In its rulemaking on standards for access to SGI, the Commission cited *Diablo Canyon* with approval and stated that the guidance in the case was adequate. 46 Fed. Reg. 51718 (Oct. 22, 1981). Recently, the Commission indicated its approval of *Diablo Canyon* by citing to the case. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 75 (2004).

In the instant case, BREDL has not established that Dr. Lyman possesses the expertise required to evaluate the information requested. The burden of demonstrating that an individual is qualified to serve as an expert rests with the party sponsoring the witness. *Diablo Canyon*, ALAB-410, 5 NRC at 1405; *see also Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001). Although not binding on Commission proceedings, the Federal Rules of Evidence provide guidance for demonstrating that an individual is qualified to serve as an expert witness. *Shearon Harris*, LBP-01-9, 53 NRC at 250. In particular, Federal Rule of Evidence 702 “allows a witness qualified as an expert by ‘knowledge, skill, experience, training, or education,’ to testify ‘if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.’” *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982) (citing Fed. R. Evid. 702). The record in this case contains insufficient basis determine that Dr. Lyman is an expert on security matters. Therefore, until Dr. Lyman, or another individual proffered by BREDL, is shown to be an expert in security matters, the Staff objects to the interrogatories and requests for production of documents in so far as they require the release of SGI or classified documents.

B. Objection to General Interrogatory No. 1

GENERAL INTERROGATORY NO. 1. State the name, business address, and job title of each person who was consulted and/or who supplied information for responding to each of the interrogatories, requests for admission, and requests for the production of documents posed by BREDL herein. Specifically note for which interrogatories, requests for admissions and requests for production each such person was consulted and/or supplied information.

If the information or opinions of anyone who was consulted in connection with your response to an interrogatory or request for admission differs from your written answer to the discovery request, please describe in detail the differing information or opinions, and indicate why such differing information or opinions are not your official position as expressed in your written answer to the request.

The Staff has no objection to the first paragraph of General Interrogatory No. 1. The Staff, however, objects to the second paragraph of General Interrogatory No. 1 on the basis of the deliberative process privilege. The deliberative process privilege is designed to encourage frank discussions within the Government regarding the 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.* Since revealing the differing information or opinions, if any exist, along with the reasons why such information or opinions are not the official agency position would reveal the agency's decision-making process, the Staff objects to the second paragraph of General Interrogatory No. 1.

Further, Section 2.740(b)(3) states that "while interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party, such interrogatories may not be addressed to, or be construed to, require reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position." 10 C.F.R. § 2.740(b)(3). Thus, to the extent the second paragraph of General

Interrogatory No. 1 requests Staff to provide the reasons why any differing information or opinions, if any exist, are not the official position of the agency, the Staff objects to the interrogatory.

CONCLUSION

Based on the foregoing, the Staff has demonstrated good cause and, therefore, respectfully requests that the Licensing Board issue a protective order that the discovery not be had pursuant to 10 C.F.R. § 2.740(c).

Respectfully submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of June 2004

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OBJECTIONS TO BREDL'S FIRST SET OF DISCOVERY REQUESTS TO NRC STAFF REGARDING SECURITY PLAN SUBMITTAL AND 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 23rd day of June, 2004.

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