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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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SUBJ: In the Matter of Duke Energy Corporation, Catawba Nuclear Station  
Units 1 and 2 (Docket Nos. 50-413-OLA, 50-414-OLA)

Dear Ms. Uttal and Mr. Fernández:

Duke Energy Corporation ("Duke") has received a copy of the June 19, 2004, "Request for Need to Know Determination" directed to both of you from Ms. Diane Curran, counsel to intervenor Blue Ridge Environmental Defense League ("BREDL") in this proceeding. This "need to know" determination request seeks the release of certain security-related information and documents to Dr. Edwin Lyman, a consultant to BREDL in this proceeding, and to Ms. Curran. In particular, BREDL seeks the Security Plan for the Catawba Nuclear Station and "information regarding the feasibility of manufacturing nuclear weapons from the quantity of strategic special nuclear material" to be stored at Catawba under the proposed MOX fuel lead assembly license amendment request. (Letter, at p. 1). At the same time that it filed this "need to know" request, BREDL also filed its first discovery request to Duke on BREDL's admitted security contention. BREDL's discovery request to Duke contains several document production requests that overlap with the documents sought in BREDL's letter.<sup>1</sup> In addition, there are documents responsive to BREDL's discovery requests which contain Safeguards Information but which are not discussed in BREDL's letter of June 19, 2004.

<sup>1</sup> See June 19, 2004 "Blue Ridge Environmental Defense League's First Set of Discovery Requests to Duke Energy Corporation Regarding Security Plan Submittal."

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The documents that BREDL seeks under this “need to know” determination request contain NRC Safeguards Information or Classified Information, as do certain of the documents or information requested of Duke. BREDL asserts that it seeks access to this protected information because (1) “Duke and the NRC Staff have relied on [this information] in formulating their positions on the acceptability of Duke’s request for an exemption.” (Letter, at p. 1); (2) “It *may* be necessary to review safeguards or classified information” in order for BREDL “to understand the bases for various conclusions reached in Supplement 1 to the Staff’s Safety Evaluation of May 5, 2004.” (Letter, at pp. 1-2) (emphasis added); and (3) “[U]nless Dr. Lyman can review this information, he will not be able to adequately understand the bases for Duke’s and the NRC Staff’s positions,” and therefore will be unable “to make a meaningful presentation on behalf of BREDL in the evidentiary hearing on Duke’s Security Plan submittal.” (Letter, at p. 2).

BREDL, as the requestor of this information, has the burden to demonstrate that it is entitled to it under the Commission’s requirements as these have been interpreted after the events of September 11, 2001. In this proceeding, the Commission has made clear that “need to know” determinations involving protected NRC information, such as documents designated as Safeguards or Classified Information, should be made by the U.S. Nuclear Regulatory Commission Staff:

“[A]s is evident from the text of our regulations, it is appropriate for NRC Staff experts to make the initial ‘need to know’ decisions. When a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment, should give considerable deference to the Staff’s judgments. The Commission has confidence in our Staff, which is well trained and is experienced in NRC licensing and enforcement proceedings, and intimately familiar with both NRC safeguards regulations and the licensing or enforcement matter at hand.”<sup>2</sup>

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<sup>2</sup> See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 75 (2004) (internal citations omitted). In CLI-04-06, the Commission reversed the Atomic Safety and Licensing Board’s January 29, 2004 unpublished “Memorandum (Providing Notice of Granting BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions),” in which the Licensing Board ordered the NRC Staff to provide access to certain safeguards documents, including: (1) three April 29, 2003 Orders for Modification of License that the NRC issued for Catawba Nuclear Station, including the revised Design Basis Threat for radiological sabotage, the training order, and the fatigue order; (2) the January 7, 2003 access authorization order that the NRC issued for Catawba; and (3) any regulatory guidance associated with the above orders.

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Duke submits that for the reasons discussed herein and in "Duke Energy Corporation's Objections to Blue Ridge Environmental Defense League's First Discovery Request on BREDL's Security Contention," BREDL's request should be denied.

In this regard, Duke asks that the Staff consider the following factors in making its "need to know" determination. Most significantly, the arguments proffered in support of BREDL's request for access to additional Safeguards documents in this proceeding fail to meet the standard articulated recently by the Commission in CLI-04-06. In that decision, the Commission affirmed the NRC Staff's determination that BREDL's attorney, Diane Curran, and its security consultant, Edwin Lyman, lacked the requisite "need to know" with respect to the Safeguards Information that Intervenor sought. Specifically, the Commission noted that "the touchstone for a demonstration of 'need to know' is whether the information is indispensable" (59 NRC at 73), and that NRC regulations define "need to know" in the safeguards context as "a finding that it is *necessary* for a recipient to have the safeguards information to perform official duties . . ." *Id.* at 71 (emphasis supplied). Under the "necessity" definition, "need to know" is a much narrower standard than the standard for general discovery. Thus, the bar set by the Commission post-9/11 for the release of Safeguards or Classified Information is high; BREDL has failed to demonstrate that it is entitled to the information. Merely because a party desires information or believes that the information is needed to provide context or background falls far short of, and indeed "may have little or no bearing on," a "need to know" determination. *Id.* at 72.<sup>3</sup> Even giving credence to BREDL's claims in the letter as to why it seeks the additional protected information, none of Intervenor's arguments shows that the information requested is "indispensable" to BREDL's ability to litigate its security contention. *Id.* at 73. Accordingly, BREDL does not have the requisite "need to know" with respect to this Safeguards Information.

In CLI-04-06, the Commission also emphasized the limited scope of this license amendment proceeding in ruling that "[m]ore general security information related to the Catawba plant-at-large" (precisely the kind of information in NRC Orders that the Board had ordered disclosed to BREDL) "is not, in our judgment, 'necessary' to allow BREDL to participate meaningfully in this license amendment proceeding." CLI-04-06, 59 NRC at 72. The Commission also relied upon policy considerations, including its "strong interest in limiting access to safeguards and security information," in its decision. *Id.* at 73. These considerations similarly weigh against disclosing the Protected Information now sought by BREDL. BREDL has not made any attempt to make its request "as narrow as possible" in order to meet the Commission's admonition in CLI-04-06.<sup>4</sup>

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<sup>3</sup> See also CLI-04-06, 59 NRC at 73, where the Commission stated that "a desire to obtain safeguards materials for 'context' is an insufficient basis for access to safeguards information."

<sup>4</sup> In CLI-04-06, the Commission stated: "it is imperative that access to safeguards documents be as narrow as possible." 59 NRC at 75.

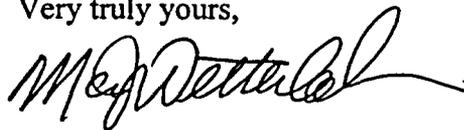
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Nor does BREDL's "need to know" request acknowledge that BREDL has previously been given access to substantial information relating to its security contention. *See* Duke's June 23, 2004 Objections to BREDL's First Discovery Request on BREDL's Security Contention for a listing of the security-related information already provided to the Intervenor. Virtually all of this information is designated as Safeguards Information. In particular, note that BREDL has already been given access to those portions of the Catawba Security Plan that relate to the protection of MOX fuel assemblies. The remainder of the Security Plan is not specific to the protection of the MOX assemblies, and thus is not "indispensable" to BREDL's ability to litigate its security contention.

Additionally, Duke notes that Dr. Edwin Lyman, who is serving as a security consultant to BREDL and who will review this material on behalf of BREDL is not qualified by either education or experience as an expert in specific nuclear power plant security matters. The burden is on the sponsor to demonstrate his witnesses' credentials. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405 (1977). For example, based on the statement of his qualifications filed in this proceeding, it does not appear that Dr. Lyman is an expert in offensive or defensive security strategy or tactics, or the preparation, execution or testing of a security plan, which are the focus of the admitted security contention. An expert in nuclear power plant security should possess extensive training or experience in that or closely related fields. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 172 (1982). In that case, the Board rejected the intervenor's position that such expertise was only available to the owners of nuclear power plants. *Id.* This necessitates the denial of BREDL's "need to know" request.

For all of these reasons, BREDL's "need to know" determination request fails to meet applicable standards, and should be denied. Please contact me if the Staff wishes for Duke to provide additional information in connection with this requested "need to know" determination.

Very truly yours,



Mark J. Wetterhahn  
Counsel for Duke Energy Corporation

cc: Service List