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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

RAS 7766

**From:** Ann Young  
**To:** Anthony Baratta; Antonio Fernandez; Cottingham, Anne; Diane Curran; Helen Byrd; Lisa F. Vaughn; Margaret Bupp; Mary Olson; Office of HearingDocket; Repka, David; Susan Uttal; Thomas S. Elleman  
**Date:** Thu, May 13, 2004 2:53 PM  
**Subject:** RE: Request for time on 5/14/04 to make oral motion

The Licensing Board will take up these matters tomorrow, and asks all to have your calendars, along with those of any necessary witnesses, available so that we can discuss potential dates for any rescheduling.

Administrative Judge Young

>>> "Repka, David" <DRepka@winston.com> 05/13/04 02:31PM >>>

I have received the e-mail this morning from Ms. Curran. I have no objection to discussing this matter at the conference on Friday, and for planning purposes would appreciate confirmation that this issue will or will not be on the agenda. In the meantime, a brief response to the issues raised by Ms. Curran is warranted.

At the outset, Duke and its counsel are deeply sympathetic to the situation involving Dr. Lyman, and our best wishes are with him.

As reflected in Ms. Curran's e-mail to the Board, counsel for Duke and counsel for BREDL have discussed various possibilities regarding scheduling in light of the present, unfortunate circumstances. However, we think it important to be clear that Duke has not agreed to any specific proposal regarding the schedule on the non-security contentions.

Duke remains committed to resolving the issues in this case at the earliest possible date. As we have stated before, schedule is critical for the MOX fuel lead assembly program. Duke cannot accept the entire burden and the entire risk that results from these unfortunate circumstances. Timely resolution of this case simply cannot be subject to the schedule of one individual. We recognize that extreme and unavoidable circumstances can necessitate some

small schedule accommodations and, accordingly, Duke can take reasonable measures to accommodate Dr. Lyman and BREDL. However, as sympathetic as we are for Dr. Lyman, Duke and DOE should not alone suffer the consequences of circumstances that are not of their making.

Duke has raised the issue of settlement with BREDL several times since this proceeding began, and is encouraged regarding the representations this week from BREDL regarding Contention II. Duke is eager to engage in further settlement discussions with BREDL on Contention II, but emphasizes the importance of a prompt conclusion in this regard. (We are willing to do that as early as tomorrow, after the scheduled conference.) A prompt settlement of Contention II may provide a means to accommodate BREDL's request for a delay on Contention I.

If a settlement can be reached promptly on Contention II, and there is an available date for a shorter hearing in early July, a deferral of the hearing on Contention I is one possible resolution to the problem -- as represented by Ms. Curran. However, there are conditions to any approach involving a deferral that must be discussed and resolved with the Licensing Board. First, to justify any delay, there needs to be assurance of a successful outcome regarding settlement of Contention II. Further, there needs to be an available hearing date to timely address Contention I. Duke understands from past conferences that July presents scheduling difficulties for the Board. However, this approach may be possible since the hearing might be reduced to one day. Duke does not believe that it should be forced to accept a delay into August.

Finally, the approach suggested by Ms. Curran, and as further clarified above, is not the only possible resolution of BREDL's problem. Although Duke has not discussed this with the parties, it is also possible that we go forward with hearings on Contention I in June as scheduled -- in light of the potential for narrowing of the issues to that contention. This approach would require accommodations from the Staff and Duke regarding outstanding discovery due from BREDL. However, the issues in Contention I have been discussed at recent ACRS meetings in which Dr. Lyman has participated. Seemingly, this would reduce the time required to prepare testimony and prepare for hearing.

We appreciate the Board's consideration of Duke's views on this matter. We will be prepared to discuss these issues tomorrow.

David A. Repka  
Winston & Strawn LLP  
202-371-5726

-----Original Message-----

From: Diane Curran [<mailto:dcurran@harmoncurran.com>]

Sent: Thursday, May 13, 2004 9:08 AM

To: Office of Secretary; Susan L. Uttal; Repka, David; Mary Olson; Janet and Lou Zeller; Ann Marshall Young; Lisa F. Vaughn; Antonio Fernandez; NRC Office of Appellate Adjudication; Anthony J. Baratta; Thomas S. Elleman; Cottingham, Anne; Margaret J. Bupp

Cc: Ed Lyman; Janet and Lou Zeller

Subject: Request for time on 5/14/04 to make oral motion

Dear Judges Young, Elleman, and Baratta,

I am writing to request an opportunity to make an oral motion for a change in the schedule for litigation of Contentions I and II, at tomorrow's meeting. The reason for the motion is that Dr. Lyman's father is still in critical condition, and during the past week Dr. Lyman has had to spend most of his time at the hospital with his family. Because of this, BREDL will not be able to meet today's deadline for filing discovery responses, nor will Dr. Lyman be prepared for his deposition on Tuesday May 18. These delays will also make it impossible to meet the deadline for filing testimony on May 25.

Dr. Lyman remains uncertain as to when he will be able to return to Washington and resume his work on this case, but he hopes to be back at work by the end of May or early June.

I have consulted with counsel for both Duke and the NRC Staff regarding this situation. Although I have not yet heard back from the NRC Staff, counsel for Duke and I have agreed on the following general principles regarding a schedule adjustment:

1. Complete discovery and file testimony as soon as possible, hopefully during the month of June;
2. Undertake settlement negotiations regarding Contention II, which both BREDL and Duke have agreed is capable of informal resolution (BREDL to make a written proposal to Duke when Dr. Lyman returns to Washington);
3. Hold a one or two day hearing in July or August. If Contention II is settled, one day should suffice.

I respectfully request an opportunity to present this request in the form of an oral motion at tomorrow's meeting.

Thank you for your consideration.

Sincerely,  
Diane Curran

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the permission of the author.

**CC:** Ed Lyman; Janet and Lou Zeller

**Mail Envelope Properties**

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**Subject:** RE: Request for time on 5/14/04 to make oral motion

**Creation Date:** Thu, May 13, 2004 2:53 PM

**From:** Ann Young

**Created By:** AMY@nrc.gov

**Recipients**

duke-energy.com

IfVaughn (Lisa F. Vaughn)

eos.ncsu.edu

elleman (Thomas S. Elleman)

harmoncurran.com

dcurran (Diane Curran)

main.nc.us

nirs (Mary Olson)

nrc.gov

owf5\_po.OWFN\_DO

AXF2 (Antonio Fernandez)

HearingDocket (Office of HearingDocket)

MJB5 (Margaret Bupp)

SLU (Susan Uttal)

nrc.gov

twf2\_po.TWFN\_DO

AJB5 (Anthony Baratta)

nrc.gov

twf3\_po.TWFN\_DO

HRB (Helen Byrd)

skybest.com

BREDL CC (Janet and Lou Zeller)

ucsusa.org  
elyman CC (Ed Lyman)

winston.com  
ACottingham (Cottingham, Anne)  
DRepka (Repka, David)

**Post Office**

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twf2\_po.TWFN\_DO  
twf3\_po.TWFN\_DO

**Route**

duke-energy.com  
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