

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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 MOTIONS FOR TEMPORARY STAY TO PRESERVE THE STATUS QUO  
AND FOR STAY PENDING INTERLOCUTORY REVIEW OF THE LICENSING  
BOARD'S JUNE 25, 2004 FINDING REGARDING DR. EDWIN LYMAN'S EXPERTISE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.788(f), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission issue a temporary stay to preserve the status quo and stay the effect of an order issued from the bench by the Atomic Safety and Licensing Board (Board) on June 25, 2004. Tr. 2029-30. During a closed prehearing conference regarding discovery issues associated with the portion of the instant proceeding related to nuclear security issues, the Board found that Dr. Edwin Lyman, Blue Ridge Environmental Defense League's (BREDL or Intervenor) technical advisor, is an expert in the area of nuclear security. *Id.* Thus, the Board effectively found that Dr. Lyman has the necessary expertise to be given access to safeguards information (SGI) concerning security at Catawba. An immediate, temporary stay is necessary in this case to prevent possible release of SGI to an individual based on an insufficient showing that he meets the standard to be declared an expert.

Furthermore, pursuant to 10 C.F.R. § 2.788(a), the Staff requests that the Commission also grant a stay pending review of the accompanying petition for interlocutory review filed pursuant to 10 C.F.R. § 2.786(g)(1). The Staff submits that it is likely to prevail upon appeal, and disclosure

of the documents containing safeguards information will result in irreparable harm. Granting a stay will not harm the Intervenor, but may cause a delay in that portion of the Licensing Board proceeding that involves security issues.<sup>1</sup> Such delay, however, is outweighed by the possibility that the Board's ruling at issue will result in the unwarranted release of SGI to an individual who has not been shown to meet the standard to be declared an expert.

#### BACKGROUND

As part of its license amendment request, which is the subject of this proceeding, Duke Energy Corporation (Duke) submitted a supplement to its security plan and asked for exemptions from certain regulatory requirements. See Letter from M.S. Tuckman, Re: Physical Security Plan and Request for Exemptions to Support MOX Fuel Use (Sept. 15, 2003) (Safeguards). After being granted access to Duke's security submittal, BREDL filed contentions in the area of security. See Blue Ridge Environmental Defense League's Contentions on Duke's Security Plan Submittal (Mar. 3, 2004) (Safeguards). Upon consideration of the contentions, the Board ruled that BREDL's proposed security contention 5 was admissible. See unpublished "Memorandum and Order (Ruling on Security-Related Contentions)" (Apr. 12, 2004) (Safeguards). Subsequently, discovery regarding BREDL's admitted contention commenced. After receiving the first round of discovery requests from BREDL, the Staff filed an objection challenging Dr. Edwin Lyman's (the Intervenor's technical advisor) qualifications as an expert in security at a nuclear power plant. See NRC Staff's Objections to BREDL's First Set of Discovery Requests to NRC Staff Regarding Security Plan Submittal and Request for Protective Order at 3-4 (Jun. 23, 2004). As explained in the accompanying petition for interlocutory review, if Dr. Lyman is recognized as an expert he can gain access to SGI.

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<sup>1</sup> Any delay caused in the discovery process could be mitigated by the fact that an evidentiary hearing on the security contention is not scheduled until September, 2004.

During a closed prehearing conference, the presiding Board heard argument on, among other things, the Staff's objection to providing safeguards information to BREDL until it established that Dr. Lyman is an expert regarding security at nuclear power plants. Tr. 2029-30. During the closed session, the Board invited the parties to participate in a *voir dire* examination of Dr. Lyman to facilitate a determination of whether he should be recognized by the Board as a nuclear security expert. Tr. 1969-70. Upon completion of the *voir dire*, the Board ruled that Dr. Lyman is an expert in the area of nuclear security. Tr. 2029-30. This effectively determined that Dr. Lyman met one of the critical elements of determining his "need to know" so as to be afforded access to SGI. For the reasons discussed below, the Staff believes that the Board's determination in this respect is unwarranted and, therefore, requests that the Commission issue an immediate stay to preserve the status quo and issue a stay of the Board's order pending review of the Staff's interlocutory appeal of the Board's determination that there is sufficient basis to conclude that Dr. Lyman is an expert in the area of nuclear security.

#### DISCUSSION

Filing an appeal or request for interlocutory review does not, in and of itself, stay the effect of a disputed ruling. See 10 C.F.R. § 2.730(g); *cf.* 10 C.F.R. § 2.786(f). Rather, a stay request must be filed under 10 C.F.R. § 2.788. Pursuant to 10 C.F.R. § 2.788(f), in extraordinary cases the Commission may stay the effectiveness of a disputed ruling without waiting for an answer to the request for a stay if necessary to preserve the status quo. The instant case, involving the release of certain documents containing safeguards information, is one of the extraordinary situations contemplated by the rule. A temporary stay is necessary here to prevent possible release of SGI to an individual based on an insufficient showing that he is an expert. If the Board's ruling that Dr. Lyman is an expert stands, the Staff, on July 2, 2004, is required to provide BREDL access to SGI. Once the contents of these safeguards documents are disclosed, the harm to the common defense and security cannot be undone. See, e.g., Georgia Power Co. (Vogle Electric

Generating Plant, Units 1 and 2), CLI-94-05, 39 NRC 190, 193 (1994) (Adverse impact of release of documents otherwise held in confidence is “irreparable and could not be alleviated through future review. . . .”); *see also Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-83-6, 17 NRC 333, 334. Specifically, in the event that, on subsequent review, the Commission later reverses the Board’s determination regarding Dr. Lyman’s expertise, it would then be too late to undo the disclosure to individuals who were not shown to be eligible to have access to the safeguards documents.

Additionally, the instant motion meets the criteria set forth in 10 C.F.R. § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. §2.788(e)(1)-(4); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002). The Staff, as the moving party, is likely to prevail upon appeal. As explained in the accompanying petition for interlocutory review, the Board’s ruling that Dr. Lyman is an expert in the area of nuclear security is without sufficient basis. Since it has not been shown that Dr. Lyman meets the standard for qualifying as an expert, and due to the security-sensitive nature of the safeguards information at issue, irreparable harm will result if the safeguards information is provided to him at this time. Once security-sensitive information is released to a person without the requisite qualifications and need to know, the adverse impact to the Staff and the public is immediate and irreversible.

Moreover, granting a stay will not harm the Intervenor, other than possibly causing a brief delay in that portion of the proceeding concerning security issues.<sup>2</sup> The public interest, on the other hand, will not be served by releasing safeguards information to persons and organizations that do not meet the legal requirements associated with access to safeguards information by experts. *See, e.g., Pacific Gas & Elec. Co. (Diablo Canyon)*, LBP-78-36, 8 NRC 567, 569 (1978). The public interest lies in protecting the public health and safety and the common defense and security by protecting the integrity of nuclear security, including ensuring that SGI is not released to individuals unless they meet the requirements prescribed by the Commission (including, in this instance, that the individual possesses the technical expertise necessary to evaluate the information requested). Therefore, the request for a temporary stay to preserve the status quo until the Commission has accepted review and a stay pending appeal should be granted.

The Staff has consulted with counsel for Duke, who indicated that Duke supports the instant motion. The Staff counsel also consulted with counsel for BREDL, who indicated that BREDL does not oppose the motion for a temporary stay but does oppose the motion for a stay pending interlocutory review of the Board's ruling. Because of the extraordinary nature of this case and the obligation on the Staff (and Duke) to respond to discovery on July 2nd, the Staff requests that the Commission grant the stay pursuant to 10 C.F.R. § 2.788(f), which authorizes the issuance of a temporary stay to preserve the status quo without waiting for an answer to be filed.

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<sup>2</sup> However, see note 1, *supra*.

CONCLUSION

For the foregoing reasons, the Staff requests that the Commission issue a temporary stay to preserve the status quo as well as a stay pending Commission review.

Respectfully submitted,

***/RA/***

Antonio Fernández  
Counsel for NRC staff

***/RA/***

Margaret Bupp  
Counsel for NRC staff

Dated in Rockville, Maryland  
this 30th day of June, 2004