

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 PETITION FOR REVIEW OF  
THE LICENSING BOARD'S RULING RELATED  
TO BREDL'S PROFFERED SECURITY EXPERT

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(b)(1), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission grant interlocutory review of an Order issued from the bench by the presiding Atomic Safety and Licensing Board (Board) at a prehearing conference on June 25, 2004. Transcript of June 25, 2004 Prehearing Conference at 2029-30 (Hereinafter "Tr."). During the prehearing conference, the Board ruled that the intervenor, the Blue Ridge Environmental Defense League (BREDL), had presented sufficient information to qualify BREDL's proffered witness, Dr. Edwin Lyman, as an expert in the area of nuclear security. *Id.* Therefore, the Board held, Dr. Lyman must be granted access to any safeguards information pertinent to this proceeding for which a need-to-know is otherwise established. For reasons fully discussed below, the Order is contrary to governing precedent and raises substantial questions of law. See 10 C.F.R. § 2.786(b)(4)(ii) and (iii). Therefore, the Staff requests that the Commission review and reverse the Board's Order at this time.

## BACKGROUND

Pursuant to the Board's Corrected Order (Confirming Matters Addressed at March 25 Telephone Conference), March 30, 2004, BREDL filed its First Set of Discovery Requests to NRC Staff on Security Plan Submittal (Request) in this proceeding on June 21, 2004. BREDL also filed a request for a need-to-know determination regarding certain safeguards documents that may be required to be released by the Staff in discovery.<sup>1</sup> The Staff filed its objections to BREDL's Request and denied BREDL's request for a need-to-know determination on June 23, 2004.<sup>2</sup> Duke Power Company (Duke), also filed its objections to BREDL's discovery request on Duke and a request for a need-to-know determination on June 23, 2004.<sup>3</sup>

The Staff denied BREDL's request for a need-to-know determination since BREDL had not established that Dr. Lyman is an expert on nuclear security matters. Staff's Need-to-Know Determination at 2. Accordingly, an essential element of Dr. Lyman's "need-to-know" was lacking. See 10 C.F.R. §§ 2.744(e) and 73.21(c)(1)(vi). The Staff also objected to the production of any safeguards documents in response to BREDL's Request on the same grounds. Staff Objections at 3-4. Duke objected to the production of safeguards information on similar grounds. Duke Objections at 4-14. The Board heard oral argument on all parties' objections and on the Staff's need-to-know determination during a prehearing conference on June 25, 2004. (Tr. at 1940-2071). During this conference, to facilitate resolution of whether Dr. Lyman is an expert on nuclear security

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<sup>1</sup> Letter from Diane Curran to Susan Uttal and Antonio Fernández, regarding Request for Need to Know Determination (June 19, 2004).

<sup>2</sup> NRC Staff's Objections to BREDL's First Set of Discovery Requests to NRC Staff Regarding Security Plan Submittal and Request for Protective Order, June 23, 2004 (Staff Objections); NRC Staff's Response to the Blue Ridge Environmental Defense League's Request for a Need to Know Determination (Staff's Need-to-Know Determination).

<sup>3</sup> Duke Energy Corporation's Objections to Blue Ridge Environmental Defense League's First Discovery Request on BREDL's Security Contention (Duke Objections); Letter from Mark Wetterhahn to Susan Uttal and Antonio Fernandez (June 23, 2004).

matters, the Board allowed counsel for BREDL, Duke, and the Staff to question Dr. Lyman on his nuclear security-related qualifications. The Board followed with its own questions. (Tr. at 1970 - 2029). The Board then ruled that Dr. Lyman is an expert on nuclear security matters. (Tr. at 2029-2030). As the result of the Board's ruling, Dr. Lyman must be granted access to all safeguards documents pertinent to the proceeding for which the Staff determines that he otherwise has a need-to-know. The Staff hereby requests that the Commission grant interlocutory review and reverse the Board's Order.<sup>4</sup>

## DISCUSSION

### I. Regulatory Requirements

Pursuant to 10 C.F.R. § 2.786, the Commission may review any action or decision by a presiding officer. Such review may be granted giving due weight to the existence of a substantial question regarding, for example, a legal conclusion that is contrary to established law. See 10 C.F.R. § 2.786(b)(4). The Staff submits that a substantial question exists in the instant case. Specifically, the Board's Order is contrary to established law and raises a substantial and important question of law that requires a prompt decision by the Commission at this time. See 10 C.F.R. § 2.786(b)(4).

### II. The Board's Order is Contrary to Established Law and Raises a Substantial and Important Question of Law

Dr. Lyman has been offered by BREDL as an expert in nuclear security matters. If Dr. Lyman is not qualified as an expert on nuclear security matters, he cannot be found have a need-to-know with respect to the safeguards information requested by BREDL in the course of discovery in this case.<sup>5</sup> *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1

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<sup>4</sup> The Staff, concurrent with this petition is filing a motion seeking a temporary stay and a stay pending interlocutory review of the Board's ruling.

<sup>5</sup> According to NRC regulations, an individual may be granted access to safeguards  
(continued...)

and 2), ALAB-410, 5 NRC 1398, 1404 (1977). To gain access to the safeguards information (SGI) requested by BREDL, a witness must possess the technical expertise 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).

As the party sponsoring the witness, BREDL bears the burden of demonstrating that Dr. Lyman is qualified to serve as an expert. *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 in Commission proceedings, the Federal Rules of Evidence have been cited as guidance in NRC proceedings regarding the standard for determining that an individual is qualified to serve as an expert witness. *See, e.g., 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). For security related matters, “an expert . . . should possess extensive training or experience in [nuclear power plant security] or closely related fields. Such a person should be able to assess overall plant security with an appreciation for its

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<sup>5</sup>(...continued)

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). In the context of litigation, disclosure of information “necessary to a proper decision in the proceeding” may be made to “parties in the proceeding . . . and to their *qualified witnesses* and counsel.” 10 C.F.R § 2.744(e) (emphasis added). Clearly, disclosure of safeguards information to a witness who lacks the professional qualifications to evaluate that information is not authorized.

interrelated aspects.” *Duke Power Co.* (Catawba Nuclear Station Units 1 and 2), LBP-82-51, 16 NRC 167, 176 (1982). In *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plants Units 1 and 2), LBP-78-36, 8 NRC 567, 569 (1978) the Board stated that:

technical competence to evaluate the components of a security plan ideally requires practical knowledge flowing from working with the . . . various components of the security system, at least to the extent of being able to design an overall system. [The] burden will not have been met unless there exists evidence of actual practical knowledge or its equivalent.

This Board decision articulates a specific standard for establishing expertise with respect to nuclear security experts and, thus, articulates the pertinent standard that should apply in the instant case.

The record in this case contains insufficient basis to conclude that Dr. Lyman has met the standard described above for an expert on nuclear security matters. Prior to the questioning of Dr. Lyman during the prehearing conference, the available information on his qualifications related to security matters was limited to a copy of his *curriculum vitae* attached to BREDL’s supplemental petition to intervene. Dr. Lyman’s *curriculum vitae* indicates that his education is in the field of physics. Most of the papers, conferences, and professional organizations listed in his *curriculum vitae* relate to physics or nuclear reactor safety; there is no information on the nature of any of Dr. Lyman’s work in the field of nuclear security. Questioning by counsel for the parties and the Board did not reveal sufficient additional information to find that BREDL had met its burden of establishing that Dr. Lyman has met the standard to qualify him as a security expert. On examination by counsel for BREDL, Dr. Lyman’s answers did not reflect expertise in fields related to nuclear security. At best, his answers reflected only a very general, elementary knowledge of security-related matters. (Tr. at 1971-76).

In his answers, Dr. Lyman discussed meetings that he has attended and industry groups to which he belongs. However, he did not provide meaningful details on the substantive topics explored at these meetings and organizations. Nor did he describe the credentials necessary to

participate in these meetings or organizations.<sup>6</sup> (Tr. at 1973-1975). Questioning by counsel for Duke suggests that Dr. Lyman does not have a detailed knowledge of security concepts. Counsel for Duke asked Dr. Lyman a series of questions regarding specific details and components of security strategy with which an expert in security should be thoroughly familiar. In response to each of these questions, Dr. Lyman's response was either that he was not aware of the concept or that he had only a generic knowledge of the concept. (Tr. at 1978-82). Dr. Lyman was also unable to provide any information on any practical experience he may possess related to nuclear security. (Tr. at 1976-78). In response to questions from the Staff, Dr. Lyman was unable to offer a detailed definition and explanation of specific nuclear security-related strategies. (Tr. at 1986- 90). And, in response to a substantive question asked by the Board, Dr. Lyman was unable to offer an answer that went beyond a generic explanation of security-related requirements that are clearly outlined in NRC regulations. (Tr. at 1991-94, line 12). In other words, Dr. Lyman has offered little more than what is readily apparent from the face of the pertinent NRC regulations. Clearly, this is insufficient basis to conclude that he is an expert.

Based on the foregoing, the Staff submits that BREDL has not met its burden to show that Dr. Lyman is an expert on nuclear security matters. As indicated earlier, the standard requires that the proffered nuclear security expert have "practical knowledge flowing from working with the . . . various components of the security system." *Diablo Canyon*, LBP-82-51, 16 NRC at 176. Accordingly, the Board erred in finding that Dr. Lyman is a nuclear security expert. Since the Board found an individual to be an expert, although the requisite standard for doing so has not been met, the Board's Order is contrary to established law.

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<sup>6</sup> For example, membership in organizations or attendance at meetings for which no professional credentials are required would be of little probative value in determining Dr. Lyman's expertise in nuclear security.

CONCLUSION

For the foregoing reasons the Staff submits that the Commission should review and reverse the Board's Order.

Respectfully submitted,

*/RA/*

Margaret J. Bupp  
Counsel for NRC Staff

*/RA/*

Antonio Fernández  
Counsel for NRC Staff

Dated in Rockville, Maryland  
this 30<sup>th</sup> day of June, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTIONS FOR TEMPORARY STAY AND FOR STAY PENDING INTERLOCUTORY REVIEW OF LICENSING BOARD RULING" and "NRC STAFF'S PETITION FOR REVIEW OF THE LICENSING BOARD'S RULING RELATED TO BREDL'S SECURITY EXPERT" 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 30<sup>th</sup> day of June, 2004.

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