

RELATED CORRESPONDENCE

July 2, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

July 6, 2004 (1:30PM)

In the Matter of:)
)
DUKE ENERGY CORPORATION)
)
(Catawba Nuclear Station,)
Units 1 and 2))
)
)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

**STATUS OF DUKE ENERGY CORPORATION RESPONSES AND OBJECTIONS TO
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S INTERROGATORIES
AND DOCUMENT PRODUCTION REQUESTS ON SECURITY CONTENTION 5**

In response to the request of the Atomic Safety and Licensing Board ("Licensing Board"),¹ Duke Energy Corporation ("Duke") provides this status report on its responses and objections relating to discovery requests on BREDL Security Contention 5.

I. BACKGROUND

- On June 19, 2004, BREDL filed its "First Set of Discovery Requests to Duke Energy Corporation Regarding Security Plan Submittal" ("BREDL Discovery Request").
- Concurrently, BREDL also filed on June 19, 2004 a "Request for Need to Know Determination," which seeks the release of (1) the Security Plan for the Catawba Nuclear Station and (2) "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. BREDL seeks to have

¹ The Licensing Board made this request during the June 25, 2004 pre-hearing conference on security matters in this proceeding.

this protected information released to Dr. Edwin Lyman, consultant to BREDL, and to BREDL counsel Diane Curran.²

- On June 23, 2004, Duke filed its "Objections to Blue Ridge Environmental Defense League's First Discovery Request on BREDL's Security Contention" ("Duke Objections"), as directed by the Licensing Board's April 28, 2004 Memorandum and Order.³
- On June 23, 2004, Duke also filed with NRC Office of General Counsel attorneys Antonio Fernandez and Susan Uttal a letter responding to BREDL's June 19, 2004 "Request for Need to Know Determination," addressing BREDL's "need to know" determination request in the context of applicable NRC standards, and arguing that the request should be denied.
- The NRC Staff has not made any determinations to date in response to BREDL's "need to know" request.
- On June 25, 2004, counsel for Duke attended a closed pre-hearing conference at the NRC at which BREDL's Discovery Request, and the positions of Duke and the NRC Staff concerning that discovery request, were discussed.
- On July 2, Duke filed its Responses to BREDL's Discovery Request.⁴ (On that same date, Duke also filed its "Response to the NRC Staff's First Set of Interrogatories and Request for Production of Documents to Duke Energy Corporation on the Admitted Security Contention," and a letter to NRC Staff attorneys Antonio Fernandez and Susan Uttal.)
- The NRC Staff has appealed to the Commission the Licensing Board's ruling during the June 25, 2004 pre-hearing conference that Dr. Lyman is qualified as an expert in nuclear power reactor security matters, including the design and implementation of security

² BREDL's Discovery Request to Duke contains several document production requests that overlap with the documents sought in BREDL's "need to know" letter. In addition, there are other documents responsive to BREDL's discovery request that contain Safeguards Information but that are not discussed in BREDL's June 19, 2004 letter.

³ For the convenience of the Board and parties, this document contains brief summaries of Duke's objections to BREDL's document requests. However, Duke's June 23, 2004 Objections should be consulted for the statement of Duke's position.

⁴ Under separate cover today, Duke responded to the June 19, 2004 BREDL Discovery Request in two documents: (1) Duke's "Answers to Blue Ridge Environmental Defense League's First Set of Interrogatories on BREDL Security Contention 5" (Safeguards) and (2) Duke's "Response to Blue Ridge Environmental Defense League's First Document Production Request on BREDL Security Contention 5."

plans. The Commission has granted a temporary stay of the Board's ruling pending its consideration of this issue.

II. STATUS OF DUKE OBJECTIONS AND RESPONSES TO
BREDL DISCOVERY REQUEST ON SECURITY CONTENTION 5

A. BREDL GENERAL INTERROGATORIES

GENERAL INTERROGATORY NO. 1:

Duke has responded to this general interrogatory in its July 2 filing.

GENERAL INTERROGATORY NO. 2:

Duke has responded to this general interrogatory in its July 2 filing.

GENERAL INTERROGATORY NO. 3:

Duke has responded to this general interrogatory in its July 2 filing.

B. BREDL GENERAL DOCUMENT PRODUCTION REQUESTS

REQUEST NO. 1:

Duke has responded to this general document production request in its July 2 filing.

REQUEST NO. 2:

In its June 23, 2004 Objections (pp. 4-6), Duke objected to General Document Production Request No. 2 on grounds that the request is vague, overbroad and unduly burdensome, and that it fails to meet the Commission requirement that requests for discovery of NRC Safeguards Information be narrowly tailored and show that the information sought is "indispensable" to the entity seeking it.⁵ The Licensing Board has not yet ruled on Duke's objection. Moreover, in response to General Document Production Request Nos. 1 and 3, Duke

⁵ See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 72-73, 75 (2004).

will supply documents identified in, referred to, or relied upon in responding to BREDL's security-related interrogatories, as well as documents that will be used to support Duke testimony on Security Contention 5.

REQUEST NO. 3:

Duke has responded to this general document production request in its July 2 filing.

C. BREDL SPECIFIC INTERROGATORIES

SPECIFIC INTERROGATORY NO. 1:

Duke has provided a partial response to Specific Interrogatory No. 1 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 1 to the extent that it would require Duke to disclose protected Safeguards Information in responding. *See* June 23, 2004 Duke Objections, at 7-8. The Licensing Board has not yet ruled on Duke's objection.

Duke's objection was based on the fact that responding to this question could force Duke to reveal aspects of the design basis threat ("DBT") for radiological sabotage, such as specific adversary characteristics, as well as details of its responsive capabilities and defensive strategy. Because Duke's defensive strategy is common to all three of its nuclear power plants, disclosure would have impacts beyond those for the Catawba facility. An additional concern is that such disclosure would effectively reveal not only protected Safeguards Information for Catawba, but also for all other commercial nuclear power plants in the United States, since the NRC DBT for radiological sabotage is understood to be common for all commercial nuclear power plants in the United States.

SPECIFIC INTERROGATORY NO. 2:

Duke has provided a partial response to Specific Interrogatory No. 2 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 2 for the same reasons that it

opposed Specific Interrogatory 1 (e.g., that responding would require Duke to disclose protected Safeguards Information). See June 23, 2004 Duke Objections, at 8. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 3:

Duke has provided a partial response to Specific Interrogatory No. 3 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 3 for the same reasons that it opposed Specific Interrogatories 1 and 2 (e.g., that responding would require Duke to disclose protected Safeguards Information). See June 23, 2004 Duke Objections, at 8. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 4:

Duke has provided a partial response to Specific Interrogatory No. 4 in its July 2 filing. However, Duke objected to providing the information requested in the second sentence of this interrogatory, to the extent that responding would require disclosure of the Catawba DBT, which is protected Safeguards Information. See June 23, 2004 Duke Objections, at 9. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 5:

Duke responded to Specific Interrogatory No. 5 in its July 2 filing.

SPECIFIC INTERROGATORY NO. 6:

Duke has provided a partial response to Specific Interrogatory No. 6 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 6 because discussing Duke's "security capability" would require Duke to disclose aspects of the radiological DBT for Catawba, which constitutes protected Safeguards Information. See June 23, 2004 Duke Objections, at 9. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 7:

Duke has provided a partial response to Specific Interrogatory No. 7 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 7 to the extent that responding would require Duke to disclose protected Safeguards Information (such as specific details of the Catawba DBT, the contents of post-September 11, 2001 NRC security orders, and Catawba's protective strategy) in responding. This interrogatory is also objectionable because it fails to focus narrowly on the incremental security measures applicable to the receipt and storage of the MOX fuel assemblies. *See* June 23, 2004 Duke Objections, at 9-10. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 8:

Duke has responded to Specific Interrogatory No. 8 in its July 2 filing.

SPECIFIC INTERROGATORY NO. 9:

Duke has responded to Specific Interrogatory No. 9 in its July 2 filing.

SPECIFIC INTERROGATORY NO. 10:

Duke has responded to Specific Interrogatory No. 10 in its July 2 filing.

SPECIFIC INTERROGATORY NO. 11:

Duke objected to Specific Interrogatory No. 11 on grounds that responding would require Duke, in answering the question relating to bullet-resistant enclosures, to disclose specific aspects of the Catawba DBT, which constitutes protected Safeguards Information. This interrogatory is also objectionable because it fails to focus narrowly on the incremental security measures applicable to the receipt and storage of the MOX fuel assemblies. *See* June 23, 2004 Duke Objections, at 10-11. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 12:

Duke has provided a partial response to Specific Interrogatory No. 12 in its July 2 filing. However, Duke objected to Specific Interrogatory No. 12 on grounds that it would require Duke, in providing information concerning the specifics of an adversary team, to disclose specific aspects of the Catawba DBT, which constitutes protected Safeguards Information. See June 23, 2004 Duke Objections, at 11. The Licensing Board has not yet ruled on Duke's objection.

SPECIFIC INTERROGATORY NO. 13:

Duke responded to Specific Interrogatory 13 in its July 2 filing.

D. SPECIFIC DOCUMENT PRODUCTION REQUEST RESPONSES

REQUEST NO. 1:

Duke objected to Specific Production Request No. 1 to the extent that it seeks production of the entire Catawba Nuclear Security and Contingency Plan, which is protected Safeguards Information. This discovery request is also objectionable as overly broad, and ignores the responsive information previously made available to BREDL. See June 23, 2004 Duke Objections, at 11-14. The Licensing Board has not yet ruled on Duke's objection. Independent of Duke's objection, BREDL's "need" regarding access to the entire Catawba Security Plan is also the subject of an ongoing "need to know" determination request, to which the NRC Staff has not yet responded.

REQUEST NO. 2:

Duke objected to Specific Document Production Request No. 2. See July 23, 2004 Duke Objections, at 14-15. The Licensing Board has overruled Duke's objection. See June

28, 2004 "ORDER (Ruling on Duke Energy Corporation Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention)."

Despite this ruling, it is Duke's position that BREDL has not demonstrated the necessary "need to know" regarding this protected information. Regarding the requirement that any disclosure be "necessary" or "required," BREDL has not shown that access to all records of OSRE tests at Catawba are "indispensable" to its ability to litigate Security Contention 5. *See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 73 (2004)*. Moreover, CLI-04-06 requires that any disclosure of Safeguards Information be "as narrow as possible," and this production request is not tailored accordingly. Duke has now asked the NRC Staff for a specific "need to know" determination" in connection with this document production request, in that the documents which are directly responsive are NRC Staff documents.

REQUEST NO. 3:

Duke objected to Specific Production Request No. 3 as duplicative, unnecessarily broad, and unduly burdensome. *See June 23, 2004 Duke Objections, at 15-16*. The Licensing Board has not yet ruled on Duke's objection.

Respectfully submitted,

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Dated in Washington, District of Columbia
This 2nd day of July 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
DUKE ENERGY CORPORATION)
)
(Catawba Nuclear Station,) Docket Nos. 50-413-OLA
Units 1 and 2) 50-414-OLA
)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the documents listed below have been served on the following in the captioned proceeding by Federal Express, this 2nd day of July, 2004. Alternative service by hand delivery, as indicated by **, has also been made this 2nd day of July, 2004.

(1) "Duke Energy Corporation's Answers to Blue Ridge Environmental Defense League's First Set of Interrogatories on BREDL Security Contention 5" (SAFEGUARDS);

(2) "Duke Energy Corporation's Response to Blue Ridge Environmental Defense League's First Document Production Request on BREDL Security Contention 5;"

(3) "Status of Duke Energy Corporation Responses and Objections to Blue Ridge Environmental Defense League's Interrogatories and Document Production Requests on Security Contention 5;"

(4) July 2, 2004 letter to Antonio Fernandez, Esq., and Susan Uttal, Esq., from Mark J. Wetterhahn.

(5) "Duke Energy Corporation's Response to the NRC Staff's First Set Of Interrogatories and Request for Production of Documents to Duke Energy Corporation On The Admitted Security Contention."

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