

July 9, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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In the Matter of

DUKE ENERGY CORPORATION

Docket No's. 50-413-OLA,
50-414-OLA

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

(Catawba Nuclear Station, Units 1 and 2)

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
OPPOSITION TO NRC STAFF PETITION FOR REVIEW OF
ASLB RULING ON BREDL SECURITY EXPERT QUALIFICATIONS
AND OPPOSITION TO MOTION FOR STAY**

I. INTRODUCTION

Blue Ridge Environmental Defense League ("BREDL") hereby responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff's petition for review of a bench order by the Atomic Safety and Licensing Board ("ASLB"), ruling that BREDL's expert witness on security matters, Dr. Edwin S. Lyman, is a qualified expert with respect to the security-related matters at issue in this proceeding.¹ In addition, BREDL responds to the NRC Staff's motion for a temporary stay of its obligation to produce safeguards documents to BREDL, pending disposition of its petition for review.²

¹ NRC Staff's Petition for Review of the Licensing Board's Ruling Related to BREDL's Proffered Security Expert (June 30, 2004) (hereinafter "Petition for Review").

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 (June 30, 2004) (hereinafter "Stay Motion"). By an Order dated July 1, 2004, the Commission granted the Staff's motion for a housekeeping stay, without ruling on the Staff's request for a stay pending review.

For the reasons discussed below, both the petition for review and the stay motion should be denied.³

II. FACTUAL BACKGROUND

Duke has applied to the NRC for a license amendment that would allow it to use plutonium mixed oxide (“MOX”) lead test assemblies (“LTAs”) at the Catawba nuclear power plant. Duke’s License Amendment Request (“LAR”) includes proposed revisions to its security plan and a request for an exemption from certain Category I security requirements, which will be applicable to Catawba by virtue of the presence of formula quantities of plutonium at the plant. The security plan revisions and exemption application are collectively referred to as Duke’s “Security Plan Submittal.”

On December 15, 2003, with the agreement of all parties including the NRC Staff, the ASLB approved a Protective Order granting access to the Security Plan Submittal and related documents to BREDL’s attorney, Diane Curran and BREDL’s expert on security matters, Dr. Edwin S. Lyman.⁴ Implicit in the Protective Order is a need-to-know determination by the NRC Staff with respect to the Security Plan Submittal. At several junctures thereafter, the Staff found that BREDL had a “need-to-know” with respect to other security-related information, *i.e.*, relevant responses to Requests for Additional Information (“RAIs”), a revision to Duke’s Security Plan Submittal, and the Staff’s Supplemental Safety Evaluation.⁵ The Staff found that BREDL had no need-to-know,

³ BREDL notes that it has elected to respond to the NRC Staff’s Petition for Review and Stay Motion in a single pleading. The pleading is less than 20 pages in length, which is the sum of the page limits in 10 C.F.R. §§ 2.786(b)(2) and 2.788(b).

⁴ Memorandum and Order (Protective Order Governing Duke Energy Corporation’s September 15, 2003 Security Plan Submittal).

⁵ *See, e.g.*, letter from Antonio Fernández to Diane Curran (March 9, 2004) (making need-to-know determination with respect to Duke’s March 1, 2004, RAI

however, with respect to safeguards and classified orders and guidance documents regarding the Design Basis Threat (“DBT”) for nuclear power plants and Category I facilities. The Staff’s negative need-to-know determination regarding this information was based on the assertion that the Staff was not relying on them in its review of Duke’s Security Plan Submittal and that the information was not “otherwise relevant.”⁶

The ASLB overruled the Staff’s determination with respect to the requested safeguards documents, but affirmed the Staff’s determination with respect to classified information.⁷

In CLI-04-06, reversing the 1/29/04 ASLB Order, the Commission ruled that BREDL did not have a need-to-know with respect to the revised DBT and related guidance for protection of the Catawba nuclear power plant against sabotage. Based on Duke’s statements that it did not rely on its existing security plan for measures to protect MOX fuel against theft, the Commission concluded that the requested additional information was not necessary for the formulation of security contentions. *Id.*, slip op. at 8.⁸

Responses); letter from Antonio Fernández to Mark J. Wetterhahn (March 17, 2004) (making need-to-know determination with respect to Revised Attachment 1 to Duke’s Security Plan Submittal); letter from Margaret J. Bupp to Mark J. Wetterhahn (April 21, 2004) (making need-to-know determination with respect to Duke’s April 13, 2004, RAI Response). The Staff also sent counsel for BREDL a copy of the confidential safeguards version of its May 5, 2004, Supplemental Safety Evaluation regarding security issues via Board Notification 2004-06 (May 11, 2004).

⁶ Letter from Antonio Fernández to Diane Curran (January 13, 2004).

⁷ Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions) (January 29, 2004) (hereinafter “1/29/04 ASLB Order”); Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination Regarding Classified Documents (February 17, 2004).

⁸ Subsequently, the Commission denied a request by BREDL to revisit this determination in light of more recent statements by Duke that it does, in fact, rely on the

Based on the information available to it, BREDL submitted a set of contentions challenging the adequacy of Duke's Security Plan Submittal. Although the NRC Staff and Duke both opposed admission of the contentions, they did not challenge Dr. Lyman's qualifications to sponsor the contentions. The ASLB admitted one of BREDL's contentions, which challenged the adequacy of Duke's application for an exemption from the NRC's security regulations.⁹ In admitting Contention 5, the ASLB found that the contention was adequately supported by Dr. Lyman's expert opinion.¹⁰

During the first round of discovery on security issues, BREDL requested Duke and the Staff to provide certain information or documents that appeared to constitute safeguards information, such as Duke's security plan for the Catawba nuclear power plant, and the Staff's technical justification for its opinion regarding the feasibility of manufacturing nuclear weapons from the quantity of strategic special nuclear material ("SSNM") to be held at the Catawba site.¹¹ Therefore, BREDL requested the Staff to make a need-to-know determination regarding this information and any other information identified as responsive to BREDL's discovery requests that constituted safeguards information.¹² In response, the Staff issued a determination that BREDL did not have a need-to-know with respect to any safeguards information that it requested, due to Dr.

Catawba security plan for protection of MOX fuel against theft. CLI-04-19, Memorandum and Order (July 7, 2004).

⁹ Memorandum and Order (Ruling on Security-Related Issues) (April 12, 2004).

¹⁰ *Id.* at 70.

¹¹ *See, e.g.*, Blue Ridge Environmental Defense League's First Set of Discovery Requests to Duke Energy Corporation Regarding Security Plan Submittal, Document Production Request No. 1 (June 19, 2004); Blue Ridge Environmental Defense League's First Set of Discovery Requests to NRC Staff Regarding Security Plan Submittal, Interrogatory No. 7 (June 19, 2004).

¹² Letter from Diane Curran to Susan Uttal and Antonio Fernández re: Request for Need to Know Determination (June 19, 2004).

Lyman's alleged lack of expert qualifications on security matters.¹³ The Staff and Duke also filed objections to BREDL's discovery requests on the same ground, *inter alia*.¹⁴ On June 25, 2004, the ASLB heard oral arguments on the parties' discovery objections, including the Staff's and Duke's objections to Dr. Lyman's expert qualifications on security matters. Without objection from any party [*see* tr. at 1970], the ASLB allowed the parties to conduct extensive *voir dire* of Dr. Lyman [tr. at 1970-2011], and asked its own questions. *Id.* The ASLB also entertained arguments from all parties. Tr. at 2011-2028. At the conclusion of the questioning, the ASLB issued a bench ruling that Dr.

Lyman:

has demonstrated sufficient knowledge, skill, experience, training and education to be able to ask the probing questions and do the evaluations on behalf of the Intervenor that would assist and aid us in making our determinations in this case.

We find that he has shown skill and ability to understand, analyze and utilize the sort of specific information that would be relevant in such a way that it would aid us in our determinations . . .

Tr. at 2029-10. The ASLB subsequently issued written confirmation of its bench ruling in LBP-04-13, Memorandum and Order (Confirming June 25, 2004, Bench Ruling Regarding Expertise of Dr. Edwin S. Lyman) (July 2, 2004) (hereinafter "LBP-04-13").

On July 2, 2004, the parties filed their responses to the first round of security-related discovery questions. In its response, the Staff did not identify any safeguards information that it was refusing to provide. Duke refused to provide the requested

¹³ NRC Staff's Response to the Request for a Need to Know Determination (June 23, 2004).

¹⁴ 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) (hereinafter "NRC Staff Objections"); Duke Energy Corporation's Objections to Blue Ridge Environmental Defense League's First Discovery Request on BREDL's Security Contention (June 23, 2004).

portions of its Catawba security plan, plus the results of Operational Safeguards Response Evaluation (“OSRE”) exercises conducted at the Catawba plant some seven years ago. Although the ASLB had overruled Duke’s objection to producing the OSRE results¹⁵, Duke continued to object on the ground of Dr. Lyman’s alleged lack of expert qualifications. For the same reason, Duke refused to produce any portion of its security plan for Catawba or related documents.

On July 7, 2004, the Commission issued CLI-04-19, in which, *inter alia*, it refused a request by the ASLB to reconsider its need-to-know ruling in CLI-04-06. Thus, regardless of Dr. Lyman’s alleged lack of qualifications as a security expert, CLI-04-19 establishes that BREDL may not have access to most of the documents for which the Staff disputes BREDL’s need-to-know in its Petition for Review. The only apparent exception consists of the OSRE exercise results withheld by Duke.

III. ARGUMENT

A. The Staff Has Failed to Demonstrate Irreparable Harm

In its Stay Motion, the NRC Staff argues that irreparable harm will result from disclosure of “certain” unidentified safeguards documents to BREDL.¹⁶ Stay Motion at 3. As a result of CLI-04-19, however, most of the safeguards documents that BREDL sought in discovery, *i.e.*, the Catawba security plan and related documents, need not be disclosed. The only remaining safeguards documents, identified by Duke in response to BREDL’s discovery requests, consists of the OSRE test results for Catawba. While this

¹⁵ Order (Ruling on Duke Energy Corporation Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention) (June 28, 2004).

¹⁶ Notably, although irreparable harm is also a criterion for interlocutory review, *see* CLI-04-06, slip op. at 6, the Staff does not attempt to address the standard for interlocutory review, or even acknowledge that it is seeking this drastic and generally disfavored remedy. *Id.*

somewhat dated information gives a general indication of the adequacy of the security response at Catawba prior to September 11, 2001, it contains no information that would be useful to adversaries today. Thus, it can hardly be said to qualify as the type of current, post-9/11 security information regarding Catawba that concerned the Commission in CLI-04-06.

Moreover, if the Staff is arguing that disclosure of *any* safeguards information to Dr. Lyman constitutes irreparable harm, then the Staff is so late in making this argument as to have waived it. The limited amount of information in the OSRE test results is merely incremental to the body of safeguards information that has already been disclosed to Dr. Lyman, *i.e.*, the Security Plan Submittal and related documents. If the Staff had been concerned about Dr. Lyman's qualifications to review this information, it could have – and should have – objected to his qualifications at a much earlier stage of the litigation. Indeed, it is the Staff who has argued that an expert's qualifications must be examined as part of a need-to-know determination.¹⁷ The Staff does not explain why, after making five separate need-to-know determinations granting Dr. Lyman access to safeguards documents, it has decided at this late juncture that it would be generally harmful to the public interest to grant Dr. Lyman access to such documents. It is simply far too late now to make such a claim.¹⁸

¹⁷ See Staff's Objections at 4 and Petition for Review at 3-4, citing *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977).

¹⁸ The Staff also claims that granting a stay will not harm BREDL, "other than possibly causing a brief delay in that portion of the proceeding concerning security issues." Stay Motion at 5. The Staff also argues that any delay in the discovery process caused by the issuance of a stay "could be mitigated by the fact that an evidentiary hearing on the security contention is not scheduled until September, 2004." *Id.* at 2 n.1. This claim is frivolous. The schedule for the entire MOX LTA litigation is expedited in

B. The Staff Fails to Justify Review of the ASLB's Decision.

The Staff argues that the ASLB's ruling that Dr. Lyman is qualified is "contrary to established law and raises a substantial and important question of law," but it fails to cite any law that the ASLB violated or disregarded. Petition for Review at 3. In fact, the ASLB followed a careful and thorough procedure to ascertain the facts, and then applied relevant law to determine Dr. Lyman's expert qualifications. In response to the NRC Staff's and Duke's objections to Dr. Lyman's expert qualifications to meet the need-to-know standard, the ASLB allowed all parties to conduct *voir dire* of Dr. Lyman. Neither the NRC Staff nor Duke claimed that this constituted an inadequate opportunity to examine Dr. Lyman regarding his qualifications. As discussed above, the ASLB then took argument from all the parties regarding their respective positions. Following a brief recess, the ASLB then issued a detailed ruling that he is qualified as an expert regarding security matters. The NRC Staff fails to explain how this process violated the law, or what standard was misapplied.

In fact, what the NRC Staff is asking the ASLB to do is to reverse a careful and well-reasoned factual determination by the ASLB. Such a thorough and plausible factual finding should not be reviewed, however, unless it is "clearly erroneous." 10 C.F.R. § 2.786(b)(4)(i). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

the extreme, in order to accommodate Duke's wish to have the case resolved before plutonium is shipped to France for processing into MOX fuel. Despite the novelty and complexity of this case, and despite the cumbersome security-related procedures which require BREDL's expert and counsel to go to the offices of Duke's counsel to review important documents and which preclude discussion of any security matters by telephone or e-mail, the total amount of time that has been allotted for discovery (two rounds of written discovery requests and depositions) amounts to only seven weeks. Prefiled written testimony is due August 20, less than two weeks after the close of discovery. This extremely tight schedule cannot accommodate additional delays without a change in the hearing date.

Installation), CLI-03-8, 59 NRC 11, 26 (2003) (NRC's standard for "clear error" is "quite high"); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 382 (2001) ("we repeatedly have declined to second-guess plausible factual Board decisions").

Nothing about the ASLB's decision suggests disregard for the parties' positions, the relevant facts, or the applicable law. In making its ruling, the ASLB "gave, and continue to give, considerable deference to the Staff in its determination regarding Dr. Lyman's expertise, as required by the Commission in CLI-04-06." *Id.*, slip op. at 3. Nevertheless, "[b]alancing all the evidence and argument on this issue," the ASLB concluded that "BREDL and Dr. Lyman clearly demonstrated his expertise in the area of nuclear security, sufficient to support our ruling under relevant law." *Id.*, slip op. at 3. This determination was based on a detailed discussion of Dr. Lyman's training, experience, and publications. *Id.*, slip op. at 5-6.

Moreover, the ASLB explained how this factual information demonstrated to the ASLB that Dr. Lyman is a qualified security expert under the NRC's standards and the Federal Rules of Evidence. The ASLB also specifically found that Dr. Lyman meets the standard for expert qualifications that is described in *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977) (hereinafter "ALAB-410"), the case cited to the ASLB by the NRC Staff as setting a standard that Dr. Lyman could not meet. *See* NRC Staff objections at 4. As the ASLB concluded:

[Dr. Lyman's] qualifications and experience . . . demonstrate that Dr. Lyman possesses the "technical competence necessary to evaluate [relevant portions of a nuclear plant security] plan," and constitute "extensive training and experience" in fields that are closely related to nuclear plant security so as to enable him to

“assess overall plant security with an appreciation for its interrelated aspects,” as required, respectively, under *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977), cited by Staff in its June 23 determination; and *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 176 (1982), cited by Duke in its June 23, 2004, letter to NRC Staff counsel regarding BREDL’s need-to-know request.

Id., slip op. at 5-6. The ASLB also criticized the Staff for giving “insufficient attention” to this information in making its negative need-to-know determination. *Id.*, slip op. at 5. Thus, the ASLB’s decision met every standard of thoroughness, reason and care.

Moreover, even if the Commission should come to the conclusion that the ASLB made an error in reaching its decision, the appropriate remedy is to remand the issue to the ASLB rather than for the Commission to make its own factual findings. ALAB-410, *supra*, 5 NRC at 1405.

In any event, the record shows that Dr. Lyman possesses the necessary expert qualifications to review security-related documents in this proceeding. One need only review the ASLB’s decision to see the entirely meritless nature of the NRC Staff’s claim that Dr. Lyman is not qualified as an expert on security issues. Dr. Lyman has many years of professional experience in nuclear security issues, including research, publications, membership in a professional organization, and advising members of Congress on security issues. As summarized by the ASLB:

Specifically, we note Dr. Lyman’s A.B., M.S., and Ph.D. in physics, as well as his post-doctoral work for three years at the Center for Energy and Environmental Studies in the School of Engineering at Princeton University, where he researched issues associated with security and safety of nuclear materials and nuclear weapons, including the physical protection regime for the security of plutonium in general and MOX fuel in particular, and including his review of all publicly available documents at Princeton referring to the security and safety of the storage and processing of plutonium. *See* Tr. 1971-72.

In addition, we note Dr. Lyman's experience, including: (1) his tenure from 1995 to April 2003 first as scientific director and then as president of the Nuclear Control Institute, where he focused on nuclear nonproliferation and evaluated publicly available aspects of the security and safety of the nuclear fuel cycle, the physical protection of special nuclear materials and nuclear facilities against sabotage, Tr. 1973; (2) as a member of the Institute of Nuclear Materials Management since 1996, providing at least one paper every year at the institute's annual conference, many of which pertain to physical protection issues, *id.*, *see also* Tr. 2003-06; (3) his being invited to brief the Joint Atomic Energy Intelligence Committee on issues associated with post-September 11 security issues relating to nuclear terrorism, as well as briefing the National Intelligence Council and the Central Intelligence Agency on issues of security of spent fuel storage, *id.*, *see also* Tr. 2001; (4) his participation in routine meetings with NRC Staff and the nuclear industry on issues pertaining to the security of nuclear power plants, force-on-force exercises, and the revised rulemaking on 10 C.F.R. Part 73, *id.*; (5) his speaking twice on being invited to be a member of panels on NRC safeguards policy at the NRC Regulatory Information Conference, Tr. 1974; (6) his expertise being sought out by Lawrence Livermore National Laboratory scientists on a particular vulnerability with regard to the use of nuclear materials in a radiological device, Tr. 1974-75; (7) his study and writing on the useability of reactor-grade plutonium in nuclear weapons, including verification of a statement of J. Robert Oppenheimer regarding the potential yield of nuclear weapons, Tr. 1975; and (8) his current employment as a Senior Staff Scientist with the Union of Concerned Scientists, *see* Curriculum Vitae of Edwin Stuart Lyman, Attachment to [BREDL] Supplemental Petition to Intervene (Oct. 21, 2003) [hereinafter Lyman CV].

We also note articles of Dr. Lyman in the journals, *Science* and *Science and Global Security*, among others, on subjects including "Revisiting Nuclear Power Plant Safety" in the former, in 2003, and "The Proliferation Risks of Plutonium Mines" in the latter, in 2000. Lyman CV; *see* Tr. 1999-2003. He also published articles on spent fuel pool and repository security-related issues in *Science and Global Security*. We note that *Science and Global Security* is a double-blind peer-reviewed journal. Tr. 1996-2003.

Id., slip op. at 4-5. Dr. Lyman's understanding of security issues goes well beyond the "elementary" level alleged by the NRC Staff. Petition for Review at 5.¹⁹

¹⁹ In making this argument, the Staff seems to attach great significance to the fact that Dr. Lyman was not able to identify what is meant by several security-related acronyms and was not familiar with several specific pieces of equipment used for security purposes. Petition for Review at 6, citing tr. at 1978-82. But the Staff does not explain why a person with Dr. Lyman's high level of experience and skill could not quickly master such details when presented with the information. By focusing on these

As the ASLB concluded in its well-reasoned decision, Dr. Lyman has “demonstrated sufficient knowledge, skill, experience, training, and education to be able to ask appropriate probing questions and do appropriate evaluation on behalf of Intervenor BREDL so as to assist and aid the Board in making or determinations on the security issues in this proceeding.” 7/2/04 ASLB Order, slip op. at 2.

IV. CONCLUSION

For the foregoing reasons, the Staff’s Stay Motion and Petition for Review should be denied.

Respectfully submitted,



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minutiae, the Staff overlooks the importance of the expert’s ability to “assess overall plant security with an appreciation for its interrelated aspects.” 7/2/04 ASLB Order, slip op. at 6, quoting ALAB-410, 5 NRC at 1404. As the ASLB concluded, Dr. Lyman possesses just such an ability.

CERTIFICATE OF SERVICE

I hereby certify that on July 9, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S OPPOSITION TO NRC STAFF PETITION FOR REVIEW OF ASLB RULING ON BREDL SECURITY EXPERT QUALIFICATIONS AND OPPOSITION TO MOTION FOR STAY were served on the following by e-mail and/or first-class mail, as indicated below:

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