

July 20, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

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

July 27, 2004 (12:14PM)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
OPPOSITION TO NRC STAFF'S MOTION FOR LEAVE
TO REPLY TO BREDL'S OPPOSITION**

Blue Ridge Environmental Defense League ("BREDL") hereby responds to the NRC Staff's Motion for Leave to Reply to BREDL's Opposition to NRC Staff's Petition for Review Regarding BREDL's Security Expert (July 19, 2004) (hereinafter "NRC Staff Motion").¹ BREDL opposes the NRC Staff Motion because it is inexcusably late and because the Staff has mischaracterized the argument by BREDL to which the Staff seeks leave to reply.

First, the NRC Staff Motion should be rejected because it is inexcusably late. Although there is no time limit on the filing of a reply to a response to a petition for review because no such reply is allowed, ten days is far beyond the time period that reasonably should be allowed in a case where the petitioner has requested such extraordinary relief as a stay and interlocutory review. The Staff's delay is particularly inexcusable because this proceeding has been expedited at the request of the NRC Staff.²

¹ The NRC Staff Motion is accompanied by NRC Staff's Reply to BREDL's Response to the Staff's Petition for Review (July 19, 2004) (hereinafter "NRC Staff Reply").

² At the request of Duke Energy Corporation (hereinafter "Duke") and the Staff, the ASLB has set an "aggressive" schedule for this entire license amendment proceeding,

Moreover, the Staff inexplicably failed to seek to reply to BREDL by July 13, 2004, the deadline set by the Commission for any reply by BREDL to Duke's responsive brief. See the Commission's July 1, 2004 Order. Finally, the adverse effect on the discovery process of the Staff's ongoing and meritless objection to Dr. Lyman's expert qualifications has already caused the ASLB to suspend the security-related aspects of this proceeding until the Commission rules on the issue. See Order issued from the bench on July 16, 2004. Given the likely additional delays that would be caused by consideration of the Staff's tardy reply, the lateness of the NRC Staff Motion is unjustified.

Second, the Staff's motion should be rejected because it mischaracterizes the argument by BREDL to which the Staff seeks leave to reply. The Staff alleges that BREDL raised the issue of "whether the Staff waived its right to object to BREDL's expert qualifications." NRC Staff Motion at 2. In fact, BREDL has not raised any general objection to the Staff's right to challenge Dr. Lyman's qualifications as a security expert in this proceeding. In response to the Staff's and Duke's objections to Dr. Lyman's expert qualifications, BREDL sought to resolve the issue by offering Dr. Lyman for *voir dire* during the oral argument on June 25, 2004. See 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 at 5 (July 9, 2004) (hereinafter "BREDL Opposition"). Both the Staff and Duke participated in the *voir dire* without objection. *Id.*

in order to accommodate Duke's and the U.S. Department of Energy's wish to ship plutonium to France for fabrication into lead test assemblies ("LTAs") while the Cadarache plant is still open. See Memorandum and Order (Setting Schedule for Discovery and Hearing on Security-Related Matters), slip op. at 2- 5 (April 28, 2004).

Contrary to the Staff's characterization, what BREDL argued in its Opposition was that the Staff had waived its right to argue that disclosure to Dr. Lyman of the limited amount of additional safeguards information disputed in discovery would cause "irreparable harm" under the standard for issuing a stay or granting interlocutory review. BREDL Opposition at 7. BREDL contended that because the Staff had already made five separate need-to-know determinations granting Dr. Lyman access to a substantial quantity of safeguards information regarding Duke's Security Plan Submittal, without challenging his qualifications to review that information, any alleged harm caused by further disclosures of requested discovery information to Dr. Lyman would be merely incremental and would not rise to the level of "irreparable harm." *Id.*

Thus, there is no merit to the Staff's claim that it has good cause to reply because BREDL raised this argument "for the first time" in its Opposition. NRC Staff Motion at 2. BREDL would have had no reason to address the issue of irreparable harm before the ASLB. The question of the validity of the Staff's claim to irreparable harm did not come up until the Staff filed its stay motion and petition for review.

In summary, the Staff has failed to submit any "good reason[]" why it should be allowed to reply to BREDL's showing that the Staff's claim of irreparable harm has no basis in fact. *See* Staff Motion at 2, quoting *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-115, 6 AEC 257 (1973). Therefore, the Staff's motion for leave to reply to BREDL should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 20, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S OPPOSITION TO NRC STAFF'S MOTION FOR LEAVE TO REPLY TO BREDL'S OPPOSITION were served on the following by e-mail and/or first-class mail, as indicated below:

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