RAS 8231

Official Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

August 5, 2004 (3:54PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Title: Duke Energy Corporation

Docket Number: 50-413/414-OLA; ASLBP No.: 03-815-03-OLA

Location: Teleconference

Date: Tuesday, August 3, 2004

Work Order No.: NRC-1628 Pages 2828-2867

NEAL R. GROSS AND CO., INC.
Court Reporters and Transcribers
1323 Rhode Island Avenue, N.W.
Washington, D.C. 20005
(202) 234-4433

Template=SECY-032

SECY-02

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

+ + + + +

ATOMIC SAFETY AND LICENSING BOARD

(ASLB)

+ + + + +

TELECONFERENCE

+ + + + +

In the Matter of:	
DUKE ENERGY CORPORATION	Docket Nos. 50-413-OLA 50-414-OLA
Catawba Nuclear Station,	ASLBP No. 03-815-03-OLA
Units 1 and 2	

Tuesday,
August 3, 2004

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

ANN MARSHALL YOUNG, Chairperson
ANTHONY J. BARATTA, Administrative Law Judge
THOMAS S. ELLEMAN, Administrative Law Judge

APPEARANCES:

On Behalf of the Licensee:

DAVID A. REPKA, ESQ.
ANNE W. COTTINGHAM, ESQ.
MARK J. WETTERHAHN, ESQ.
of: Winston & Strawn, L.L.P.
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5726
(202) 371-5950 fax

and

TAMIKA SHAFEEK-HORTON, ESQ.
of: Duke Energy Corporation
526 South Church Street
Charlotte, North Carolina 28202
(704) 382-8134
(704) 382-4504 (fax)

On Behalf of the Petitioner, Blue Ridge Environmental Defense League:

DIANE CURRAN, ESQ.
of: Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street, N.W., Suite 600
Washington, D.C. 20036
(202) 328-3500

On Behalf of the Nuclear Regulatory Commission:

SUSAN UTTAL, ESQ.
ANTONIO FERNANDEZ, ESQ.
MARVIN ITZKOWITZ, ESQ.
Office of General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(301) 415-3725 SU

ALSO PRESENT:

Michael T. Cash, Duke Energy
Edwin S. Lyman, Ph.D., BREDL

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:03 a.m.)

3 JUDGE YOUNG: Okay. Let's go on the

4 record.

5 This is Ann Marshall Young, the Chair of

6 the Board. And Judge Elleman?

7 JUDGE ELLEMAN: I am here.

8 JUDGE YOUNG: And Judge Baratta?

9 JUDGE BARATTA: I'm here.

10 JUDGE YOUNG: And then, let's start with

11 the Staff, and then Duke, and then BREDL, and if you

12 could introduce yourselves and everyone that you have

13 with you.

14 MS. UTTAL: This is Susan Uttal

15 representing the Staff. I'm with Antonio Fernandez

16 and Margaret Bupp. Mr. Fernandez will be arguing

17 today.

18 JUDGE YOUNG: Do you have a security

19 representative present with you?

20 MS. UTTAL: Yes, I'm sorry. Mr. Stapleton

21 is also here.

22 JUDGE YOUNG: Okay. Thank you.

23 Francis Young -- no relation -- will be --

24 I hope will be joining us. I believe he has now been

25 appointed to be our new security assistant, was not

1 available right at 9:00 but is going to try to get
2 over here, so he can be present when he gets free.
3 Okay. Mr. Repka?
4 MR. REPKA: Yes, this is Dave Repka for
5 Duke. And with me are Mr. Wetterhahn and Ms.
6 Cottingham. And then, on separate lines from the
7 Charlotte area are Tamika Shafeek-Horton and Mike
8 Cash.
9 JUDGE YOUNG: And Ms. Curran?
10 MS. CURRAN: This is Diane Curran,
11 representing Blue Ridge Environmental Defense League.
12 And Dr. Edwin Lyman is also on the line.
13 JUDGE YOUNG: Okay. All right. There are
14 several things that we need to talk about today. But
15 the primary one I think that we need to start with is
16 the issue of what is out there that -- on which need-
17 to-know determinations need to be made.
18 We're expecting to get something from the
19 Staff today. We had hoped to get that by the start of
20 this conference call.
21 Ms. Uttal, can you let us know the status
22 of that?
23 MR. FERNANDEZ: Well, Your Honor, the
24 Staff will be making its determination. It hasn't
25 completed everything it has to do today. It will be

1 done today. I don't know aside from that what else we
2 can tell you.
3 JUDGE YOUNG: Okay. Well, I guess one way
4 to approach it is -- well, let's just start with one
5 item.
6 Now, until Mr. Young gets here, if Mr.
7 Stapleton could sort of be on the alert and, if we
8 start to stray, to stop us, if we start to stray into
9 any security areas.
10 I don't think that it would be doing that
11 to just ask -- the Commission noted in a footnote --
12 and looking back we see that BREDL had withdrawn the
13 request for access to the general security plan. And
14 I think we had some discussion over the interpretation
15 of CLI-04-19 with regard to the effect of that. so
16 that's one item that we'd like to hear about.
17 And then, we'd like to know what other
18 documents and information is out there on which either
19 the Staff or Duke expects to be making need-to-know
20 determinations, and make -- we'd like to make sure
21 that all of you, all of us, are on the same page on
22 what documents we're talking about.
23 The Staff, in your letter -- let's see --
24 just referred to the pending need-to-know
25 determination. But based -- looking at Mr.

1 Wetterhahn's filing, you seem to -- is Mr. Wetterhahn
2 with us or just Mr. Repka?
3 MR. WETTERHAHN: I am here. He is here.
4 JUDGE YOUNG: Okay. You seem to be
5 referring to some need-to-know determinations that
6 Duke would be making, which would fit in with the --
7 our earlier discussion about that, where the Staff --
8 the Staff itself, that Duke needed to make need-to-
9 know determinations on documents that were its
10 documents prior to any reconsideration of that by the
11 Staff.
12 So let me just ask Duke and the Staff to
13 address the issue of what documents we're talking
14 about and how inclusive, how all-inclusive is the
15 determination that the Staff will be making today?
16 MR. FERNANDEZ: Your Honor, it is our
17 understanding that the documents that will be
18 addressed in the need-to-know determination provided
19 by the Staff will be the OSRE reports that were
20 covered in our discovery with Duke, the order for
21 compensatory measures related to access authorization.
22 JUDGE YOUNG: Related to what?
23 MR. FERNANDEZ: Access authorization.
24 That's one of the post-9/11 orders. The order for --
25 JUDGE YOUNG: The order regarding access

1 authorization, one of the post-9/11 orders, are you
2 talking about the one issue to Catawba?
3 MR. FERNANDEZ: Yes.
4 JUDGE YOUNG: Okay. Go ahead.
5 MR. FERNANDEZ: All of these are orders
6 that were issued to Catawba. The order for
7 compensatory measures related to training enhancement
8 of tactical and firearms proficiency and physical
9 fitness applicable to armed nuclear plant security
10 force personnel, the order requiring compliance with
11 the revised design basis threat for operating power
12 reactors.
13 The need-to-know determination will not
14 address the physical security plan for Catawba, given
15 Ms. Curran's withdrawal of that request.
16 JUDGE YOUNG: So you've listed four
17 documents, and those are the ones that are going to be
18 encompassed in the determination to be made today.
19 MR. FERNANDEZ: That's correct, Your
20 Honor.
21 JUDGE YOUNG: And what about Duke?
22 MR. WETTERHAHN: Your Honor, attached to
23 our response to discovery was a list of documents that
24 we either have made available or we're asserting that
25 they were safeguards material. This was called

1 Attachment 1.

2 With regard to those in the safeguards
3 column marked "Safeguards," we had forwarded all of
4 those documents to the staff, including the ones
5 mentioned by Mr. Fernandez, for an initial
6 determination of safeguards status in accordance with
7 our theory of this case, that --

8 JUDGE YOUNG: And those included the ones
9 the Staff listed plus others?

10 MR. WETTERHAHN: Plus others.

11 JUDGE YOUNG: Okay.

12 MR. WETTERHAHN: With the understanding
13 that I have now that the Staff will make a
14 determination only on a limited number of documents.
15 I believe it is now incumbent upon the licensee to
16 make its own initial determination with regard to the
17 remainder of those based upon its understanding of the
18 need to know and the need/indispensability of those
19 documents.

20 We would intend to make those
21 determinations by the end of this week, Thursday or
22 Friday, and would inform the Board and parties of a
23 determination and our general reason for making those
24 determinations.

25 JUDGE YOUNG: Okay. So by August 6th.

1 Now, let me ask: if those determinations
2 -- first, I'm going to ask, if those determinations
3 are that there is no need to know, does BREDL plan to
4 ask the Staff to review those determinations? And
5 would that be the process that the parties are
6 contemplating?
7 MS. CURRAN: Well, we don't -- I mean, we
8 -- we don't know what the process is. But the
9 protective order provides for the Licensing Board to
10 resolve disputes I think, and the question is --
11 JUDGE YOUNG: Right.
12 MS. CURRAN: -- do we go to the Staff
13 first?
14 JUDGE YOUNG: But that's exactly the
15 question I'm trying to pose to you. Maybe we should
16 ask the Staff. What's the Staff's position on the
17 process to follow? And, really, this also applies if
18 Duke makes a favorable determination, is there any
19 possibility that the Staff might decide to reconsider
20 that.
21 MR. FERNANDEZ: Your Honor, the process
22 that we've been following in this proceeding is once
23 BREDL has secured a determination from the Staff, if
24 they are unhappy with it, they appealed it to the
25 Board.

1 JUDGE YOUNG: You're not understanding me.
2 I'm talking about the need-to-know determinations that
3 Duke will be making.
4 MR. FERNANDEZ: Well, the Staff's position
5 is, and continues to be, that the process identified
6 in the order is what should govern. And if there is
7 a discrepancy --
8 JUDGE YOUNG: Okay. Let me see if I can
9 make this clearer. The Commission has said that the
10 Staff makes the initial determination on need to know,
11 and that considerable deference should be given the
12 Staff's position. So my question is this: once Duke
13 makes its determination, does the Staff have any
14 intention of reviewing those determinations, either
15 because you might think the determinations are
16 incorrect or because BREDL might think the
17 determinations are incorrect? Before any appeal is
18 taken to the Board.
19 And, Duke, you can speak to that as well.
20 I guess I've just been assuming that once Duke made
21 its determination, before it got to the Board, the
22 Staff would play some role in making -- in reviewing
23 Duke's determination, that there is -- I believe even
24 Mr. Wetterhahn may have used the word -- Duke, making
25 initial determinations at some point, had used that

1 term.

2 So I think we need to be clear on what the

3 process is. Is it Duke, and then any appeals to the

4 Board from Duke's determination? Or is it Duke and

5 then the Staff reviews Duke's determinations should

6 any party feel that Duke's determination or

7 determinations are incorrect, and then come to the

8 Board?

9 MR. FERNANDEZ: Your Honor, the Staff's

10 position on that particular issue is that the Staff,

11 as another party in this proceeding, if it were to

12 disagree with a need-to-know determination made by

13 Duke, either if it's made in the affirmative to give

14 access to information, or to deny access to

15 information, we would follow the same process that

16 BREDL would follow, which would be to file a brief

17 with the Board and state why we disagree with the

18 determination.

19 JUDGE YOUNG: So you don't anticipate

20 making -- that the Staff does not anticipate or plan

21 to make any determinations itself. Rather, what you

22 are saying is that you don't see the Staff as playing

23 any role other than the role of a party that might

24 appeal a determination by Duke to the Board.

25 MR. FERNANDEZ: Given that -- yes, I mean,

1 it -- that role is a substantial one. I mean, we
2 would play a role in informing the Board of its
3 established position and --
4 JUDGE YOUNG: Hi. Come on in.
5 Hold on just one second.
6 Mr. Young has just come in, Francis Young.
7 And I'm going to put us on speaker at this point. So
8 if I break up, just let me know.
9 Okay. Mr. Young, can you hear --
10 MR. YOUNG: Yes.
11 JUDGE YOUNG: Okay.
12 MR. FERNANDEZ: Your Honor, would you like
13 me to give a brief context, so that Mr. Young is aware
14 of what we're talking about?
15 JUDGE YOUNG: I think I should do that.
16 Hold on.
17 What we're just talking about is right now
18 there are some need-to-know determinations that are
19 being made by the Staff. There are also some
20 documents that are Duke documents that Duke itself is
21 going to be making need-to-know determinations on by
22 Friday.
23 And we were just discussing the process
24 for that, whether -- we were discussing whether the
25 Staff would then make a need-to-know determination, if

1 there were any Duke determinations, or -- and then,
2 Mr. Fernandez, who represents the Staff, just
3 indicated that that was not the Staff's plan.
4 That if anyone disagreed, if either the
5 Staff or BREDL, the Intervenor, disagreed with what
6 Duke decides on the need-to-know determination, that
7 either or both of those would ask the Board, and then
8 we would probably consult with you on those
9 determinations. And then, there would -- I don't know
10 whether -- well, let me just ask.
11 If any party disagrees with any need-to-
12 know determination that we might make, would you plan
13 to appeal that to the Commission, then, on an
14 interlocutory basis?
15 MR. YOUNG: I think it's too early to
16 determine that. It depends exactly what the document
17 is and whether the Board is allowed any redactions in
18 the document before giving it to BREDL. So at this
19 point, at least for the licensee, it's -- we are
20 unable to make that determination at this time.
21 JUDGE YOUNG: But I'm assuming that you
22 would want to hold open the possibility of doing that.
23 MR. YOUNG: I believe that, yes, we would
24 like to hold it open. I believe that the Commission's
25 previous orders in this case would allow us to proceed

1 along that path.

2 JUDGE YOUNG: And let me just check to

3 make sure that the Staff would assume the same.

4 MR. FERNANDEZ: Like Mr. Wetterhahn, it

5 would be too early to prejudge whether we would appeal

6 or not, although we would not want to waive any rights

7 to interrogatory review by the Commission.

8 JUDGE YOUNG: Okay. So the purpose of

9 talking about that is to get some sense of timeline.

10 If we get Duke's determinations by Friday, and we will

11 have Staff's today, we will know by Monday -- well,

12 let me just make sure. Is there anything else out

13 there that could still require any determinations

14 after this Friday? It doesn't sound like there is.

15 MR. WETTERHAHN: No, Your Honor, not on

16 this first round of discovery. We don't believe so.

17 JUDGE YOUNG: Does anyone anticipate that

18 there are any documents that could come up in the

19 second round of discovery that we would need any need-

20 to-know determinations on? And I want you to answer

21 that same vein as we discussed or comparable vein as

22 we discussed on the duty to supplement this. If you

23 have any anticipation at all that there might be any,

24 let's hear them now, so we can get a good idea of what

25 to expect. And I guess --

1 MR. WETTERHAHN: While we can't rule out,
2 Your Honor, we believe we have identified
3 substantially all the documents that exist at the
4 present time which support -- which support the
5 contention and which are responsive to the requests of
6 BREDL.
7 JUDGE YOUNG: Well, you don't -- so on
8 Duke's part, you don't believe that there are any
9 other documents out there that could be of a nature
10 that they would -- for a need-to-know determination?
11 MR. WETTERHAHN: While I can't rule it out
12 completely, I believe we've identified in our
13 Attachment 1 most of the responsive documents which
14 are categorized as safeguards information.
15 JUDGE YOUNG: Okay. Well, I just need to
16 understand if when you say, "We don't rule anything
17 out," whether you really have an idea that there might
18 be something realistically there.
19 MR. WETTERHAHN: I think there's a finite
20 but small possibility there might be additional
21 documents.
22 JUDGE YOUNG: BREDL, what do you -- Ms.
23 Curran, why don't you -- for BREDL, why don't you give
24 us your thoughts.
25 MS. CURRAN: Well, I guess it's kind of

1 hard to foresee, but certainly the pattern has been
2 that this proceeding has been pretty contentious. So
3 I guess I would -- I think what makes sense is to
4 build time into the schedule to deal with disputes
5 that may arise.
6 I'm not talking about an unreasonable
7 amount of time, but it seems as though we've had
8 disputes at just about every turn here, and that we
9 probably will continue to have some.
10 JUDGE YOUNG: What I'm trying to do is if
11 any party knows of any documents out there that you
12 think might come up in discovery, or at any point, I
13 think it would be a good idea to identify them at this
14 point, so that we can avoid delay as much as possible.
15 MS. CURRAN: Well, an example is -- and I
16 meant to fax this to Mr. Fernandez last week -- but I
17 guess you were out on vacation anyway, Antonio. There
18 is a March 13, 2000, letter from Mike Webber to Duke
19 that mentions guidance documents for the design basis
20 threat for theft or diversion.
21 And we've had a discussion about this
22 letter before. This letter attaches NRC guidance
23 documents regarding the design basis threat for theft
24 or diversion. And so obviously there is some document
25 that exists, and we've had a conversation before in

1 which the Staff said it was unaware of any guidance
2 document for that theft or diversion.
3 So I imagine that when we ask for this
4 document it may cause some problems. I don't know.
5 MR. WETTERHAHN: Your Honor, this is Mark
6 Wetterhahn. That document was not addressed to Duke.
7 It was addressed to DCS, which is the separate entity
8 constructing the fuel fabrication facility for MOX.
9 So it has nothing to do with Catawba, and we believe
10 that's already covered by the various Commission
11 decisions on other facilities, on other Category 1
12 facilities.
13 MS. CURRAN: Mark, this is a document from
14 the year 2000. And so, you know, I don't think you
15 can -- even if it's -- it's not clear to me that this
16 guidance is just for the MOX facility. And even if it
17 is, I don't think you could say it's irrelevant.
18 MR. WETTERHAHN: Well, Diane, who was the
19 letter addressed to?
20 MS. CURRAN: It's from Mike Webber to
21 Peter Hastings at Duke Engineering Services.
22 MR. WETTERHAHN: Right.
23 MS. CURRAN: And it has to do -- it says
24 design basis threat guidance applicable to the mixed
25 oxide fuel fabrication facility. It's not clear

1 whether it's generic guidance or just for the MOX
2 facility. But even if it were for the MOX facility,
3 our position would be that it's relevant.
4 So, and it's pre-September 11th. So all
5 of the arguments about September 11th don't apply to
6 this document. I'm just -- I don't think we need to
7 resolve this right here. Judge Young asked, "Can you
8 envision some document that is going to create any
9 kind of conflict between the parties?" This one could
10 be. That's all.
11 JUDGE YOUNG: Are there any others that
12 you can think of?
13 MS. CURRAN: Not that I can think of.
14 MR. FERNANDEZ: Your Honor, before we move
15 on, just so that the Staff can start working on that,
16 could we get the date of the letter?
17 MS. CURRAN: Yes. It's March 13, 2000.
18 And if you want me to, I'll fax it to you after we
19 hang up.
20 MR. FERNANDEZ: That would be great.
21 Thank you.
22 DR. LYMAN: This is Dr. Lyman. I think
23 it's safe to assume that there may be other documents
24 that we will be requesting, or at least we'll be
25 asking for follow up. And since we don't have a full

1 set of responses to our first list of discovery
2 questions, it's hard to say right now.
3 But, for instance, in the whole issue of
4 how the Staff determined certain -- made certain
5 conclusions regarding the use of -- or the suitability
6 of MOX fuel for conversion into nuclear weapons, we'd
7 be seeking all of the additional information the Staff
8 may have used, any information they have received from
9 other agencies that would inform that decision, and
10 that may well involve safeguards or even classified
11 information. So --
12 JUDGE YOUNG: Would it be -- we can talk
13 more about these now. But I think what we, as a
14 Board, would like is that either now in this
15 conference call, or later today, for example, the
16 parties could get together separately and lay out all
17 of the documents or documents you think that you might
18 -- that you at this point expect that you might be
19 asking for --
20 COURT REPORTER: Excuse me, Your Honor.
21 This is the Court Reporter. Your voice is clipping in
22 and out. I'm not catching all of your words.
23 JUDGE YOUNG: Okay. I'm going to lean
24 forward a little bit closer, because I -- Mr. Young is
25 here. Actually, maybe I'll say what I say on the

1 phone, and then I'll put it down again.

2 What I think as a Board we would like is

3 that all of the parties, however you do it, get --

4 flush out, get them on the table, all of the documents

5 that might possibly -- might even possibly come up,

6 and don't sort of hold those for later, and

7 communicate with each other, so that Duke and the

8 Staff can go ahead and, whether or not you make formal

9 need-to-know determinations, you can know what your

10 determination will be such that we can talk about

11 these things on next Tuesday.

12 MS. UTTAL: Judge, this is Susan Uttal for

13 the Staff.

14 JUDGE YOUNG: Let me put you back on

15 speaker.

16 MS. UTTAL: This is Susan Uttal for the

17 Staff. I have a problem with the procedure that

18 you've just outlined. Until Ms. Curran makes formal

19 discovery requests, or makes a discovery request,

20 there is nothing on the table for us to talk about.

21 We can't guess what she might need. So in the absence

22 of a discovery request, it's a vacuum for us to try to

23 decide what documents may be out there.

24 MS. CURRAN: Judge Young, this is Diane

25 Curran. I just want to add to that. We have proposed

1 findings on Contention 1 due the end of this week, and
2 we're pretty busy working on those. And I also -- in
3 order to formulate the next round of document
4 production requests, I mean, I'm perfectly willing to
5 do whatever we need to do to work collaboratively with
6 the other parties.
7 It's just that we need to finish the first
8 round of discovery, take some time to sit down and
9 evaluate what we need to ask for next. And I don't
10 think we'd be able to do a complete job of that this
11 week. We'd only be kind of guessing at things. So
12 just in terms of the time that's available it's not --
13 it doesn't -- I don't know how useful it would be.
14 JUDGE YOUNG: Okay. Let me see if I can
15 sort of make it a little bit more clear what we're
16 trying to get across here. We don't expect you to
17 finish your second round of discovery this week. And,
18 obviously, no one can make determinations on things
19 that you don't know what they are.
20 But we're in a situation here where we
21 know from the start that whoever makes the initial
22 determination there is likely to be an appeal to the
23 Board of that determination. And then whatever
24 determination the Board makes there is likely to be an
25 appeal to the Commission. And substitute the word

1 "possible" or "likely" in each of those instances.

2 So we're talking about time segments that

3 have -- create a great potential for delay in each

4 case. For that reason, when we looked at the

5 submissions of Duke and BREDL, for example, we think

6 that the approach that Duke is suggesting makes more

7 sense, because we can't really start putting down

8 dates until we get these need-to-know determinations

9 out of the way.

10 So to the extent that you know something

11 at this point, that it would not take you more work to

12 identify, to communicate about, so that the Staff and

13 Duke can go ahead and informally at least be making

14 its need-to-know determination, the more we get under

15 our belt past us on that score the farther ahead we'll

16 be with regard to planning for all of us.

17 So we don't expect you to take a lot of

18 time to do that, but we would like you, if you know of

19 anything, to share that information with each other,

20 so that next Tuesday when we meet we'll be on a better

21 footing with regard to having an idea where we stand

22 on timing issues.

23 What we also want to do next Tuesday is to

24 look at the motions to compel on the first round of

25 discovery, and by that time we will have all the need-

1 to-know determinations relating to those. And we
2 would like for each of you to be able to tell us which
3 things with regard to which parts of the motions to
4 compel any party anticipates any appeal of the -- of
5 whatever need-to-know determination, if any, may be
6 relevant to those parts, so that we can get a clear
7 idea of where we are.
8 We'll go ahead and hold argument on all
9 parts of the motions to compel that we can hold
10 argument on. And if there are any that any of the
11 parties identify as needing further consideration of
12 in the need-to-know sort of context, to be able to
13 identify those.
14 And then, Ms. Curran, on the general
15 security plan, I guess what I'd like to hear from you
16 is you indicated that you were withdrawing that. We
17 had some discussions -- your request for that.
18 MS. CURRAN: I don't think I said I was
19 withdrawing it. I said I thought the Commission had
20 essentially ruled that anything relevant to the
21 security plan was off the table, and that's a little
22 different. And I was surprised to see the
23 Commission's footnote.
24 JUDGE YOUNG: Well, that's something that
25 I think we need to clear up, because, as we indicated,

1 I think after we got that -- the interpretation of
2 what the Commission said in CLI-04-19, and how that
3 relates to your original request for the security
4 plan, and relates as well to our ability to ultimately
5 make a decision in the case, I think that -- and Judge
6 Baratta and Judge Elleman, correct me if I'm
7 misstating anything here -- but that if you want -- if
8 you, BREDL, want at any point to assert that you've
9 been denied anything by the Board or as a result of
10 CLI-04-10, in a situation in which we might not
11 necessarily agree with you -- and I'm not saying
12 whether we do or don't -- on the interpretation of
13 CLI-04-19.
14 I'm not sure that -- I'm not sure that you
15 could make that argument to us without having
16 presented it to us at an early enough stage that --
17 that we could really deal with that effectively. In
18 other words, don't withdraw something and then say,
19 "We weren't allowed to present it," without asking us
20 to present it.
21 MS. CURRAN: Okay.
22 JUDGE YOUNG: Am I making sense?
23 MS. CURRAN: I understand.
24 JUDGE YOUNG: Judge Baratta and Judge
25 Elleman, does that --

1 JUDGE ELLEMAN: As I recall the Commission
2 document, it left open the door for future
3 reconsideration, if circumstances changed. And we'd
4 have to look again at that wording.
5 JUDGE BARATTA: That's my recollection as
6 well. This is Judge Baratta.
7 MS. CURRAN: Do you mean the latest order?
8 Because the first order did.
9 JUDGE ELLEMAN: The first order was what
10 I was referring to. This is Judge Elleman.
11 JUDGE YOUNG: CLI-04-19.
12 MS. CURRAN: The first order left open the
13 question of whether, if circumstances change, the --
14 JUDGE YOUNG: Oh. CLI-04 -- not CLI-04-
15 19, but the earlier one.
16 MS. CURRAN: Yes. What is it, 04-06 or
17 something?
18 JUDGE YOUNG: And then, the Commission
19 declined to revisit that, so --
20 MS. CURRAN: Right.
21 JUDGE YOUNG: -- I guess what we're trying
22 to get across here is we need to know what the status
23 of your request for the security plan is. And if,
24 indeed, you've withdrawn it, that needs to be clear.
25 And if you haven't, that needs to be clear because --

1 MS. CURRAN: Well, then, I would like to
2 make it clear I have not withdrawn it, and that I
3 considered that -- and I should perhaps not have said
4 that I -- my interpretation of CLI-04-19 was that it
5 was ruled irrelevant. But I think I need to request
6 a ruling from the Licensing Board on that question,
7 because, you're right, I need an evidentiary ruling
8 from the Board on that issue.
9 JUDGE YOUNG: All right. Then, there are
10 two things that would need to be done with regard to
11 that. One would be we would like to hear argument
12 from all of the parties on that, the degree to which
13 the -- and I think to some degree Mr. Wetterhahn and
14 Ms. Uttal or Mr. Fernandez indicated that you didn't
15 -- did not think that the Commission had left that
16 open.
17 But that's something that I think we need
18 to talk about next Tuesday. And in the interim, given
19 that this is a possibility that, well, we've all known
20 about for a long time before now, it would be helpful
21 that I guess, Duke, you would be the one that would be
22 making that determination, since it's your security
23 plan, if you could be prepared with a need-to-know
24 determination on that, should that be the way we go.
25 Does that make sense?

1 MR. WETTERHAHN: Yes. One of the
2 documents that we identified was the security plan, so
3 we will be making -- if the Staff does not make that
4 determination, Duke will be making a determination on
5 the security plan and what I continue to call
6 derivative documents -- implementing procedures with
7 regard to the security plan also. They have the same
8 theoretical base, so we will be making that
9 determination and informing the parties of the basis
10 -- and the Board -- the basis of that determination.
11 JUDGE YOUNG: Okay. You --
12 MR. FERNANDEZ: Your Honor?
13 JUDGE YOUNG: -- the Staff doesn't?
14 MR. FERNANDEZ: Your Honor?
15 JUDGE YOUNG: Yes.
16 MR. FERNANDEZ: This is Antonio Fernandez.
17 If Ms. Curran abandons her position articulated on
18 July 8th where she said that it was not seeking to
19 compel production of Duke's security plan for the
20 Catawba nuclear powerplant, and requests that
21 document, the Staff believes that it will make the
22 need-to-know determination on that document.
23 JUDGE YOUNG: The Staff will make the
24 determination.
25 MR. FERNANDEZ: The Staff will. It is not

1 like the derivative documents, as Mr. Wetterhahn has
2 called, which are documents that reside at the plant
3 and the Staff does not normally review.
4 JUDGE YOUNG: Okay. Then, you could make
5 that determination by Friday as well? Or can you do
6 that by today?
7 MR. FERNANDEZ: Let me ask that briefly,
8 and I'll get back to you.
9 JUDGE YOUNG: Okay.
10 MR. FERNANDEZ: I need to consult.
11 (Pause.)
12 Assuming that Ms. Curran has renewed
13 her --
14 JUDGE YOUNG: I think she said --
15 MS. CURRAN: Yes.
16 JUDGE YOUNG: -- yes.
17 MR. FERNANDEZ: Yes. We can make that
18 determination. However, we are -- we would be going
19 to the document to make redactions today. So until we
20 do that, we couldn't make it available. We could make
21 the need-to-know determination. We couldn't make the
22 document available until the redactions would be done.
23 We assume that those could be completed within a
24 couple of days.
25 JUDGE YOUNG: Okay. Well, just go ahead

1 with that. And if you should -- pardon me. If you
2 should get done and decide to give a redacted version,
3 there would be no need to hold up on that. And in any
4 event, we'll know where things stand on next Tuesday,
5 right?
6 MR. FERNANDEZ: That's correct. And we
7 would give access to the document pursuant to the
8 order. The documents will be housed here at the NRC.
9 MR. WETTERHAHN: Your Honor, I hate to
10 throw a sabot into the works, but we would like to see
11 what redactions that the Staff is proposing to see if
12 they are sufficient before they are made available to
13 BREDL.
14 JUDGE YOUNG: Okay. Why don't you do
15 that, then. If the Staff, once you have made your
16 proposed redactions, then share those with Duke and
17 see if there are any more that Duke wants to make.
18 And we can handle any disputes next Tuesday.
19 MR. FERNANDEZ: Prior to making any of
20 Duke's documents available to BREDL, we anticipate
21 meeting with Duke. So --
22 MR. WETTERHAHN: Thank you.
23 JUDGE YOUNG: Okay. All right. So, then,
24 next Tuesday we're going to talk about the motions to
25 compel and whether there are any outstanding need-to-

1 know appeals that are going to be brought with regard
2 to any of those.
3 We could set a deadline for any such
4 appeals today. If we're getting the determinations by
5 Friday, we're meeting on Tuesday, is there any chance
6 that we could get the appeals before we meet on
7 Tuesday? You pretty much know what you would say, I
8 would expect --
9 MS. CURRAN: Yes.
10 JUDGE YOUNG: -- the parties would know
11 that.
12 MS. CURRAN: Are you available on Monday,
13 Dr. Lyman?
14 DR. LYMAN: Yes.
15 MS. CURRAN: Okay. We can certainly try.
16 JUDGE YOUNG: Okay. See if you can do
17 that, and then that would apply on the other side to
18 Duke and the Staff, as to either of you disagree with
19 the other's determinations. And then, we may also be
20 in a little bit better shape with regard to knowing
21 what other documents are out there.
22 JUDGE ELLEMAN: Judge Young?
23 JUDGE YOUNG: Yes.
24 JUDGE ELLEMAN: This is Judge Elleman. A
25 question for Mr. Wetterhahn.

1 Mr. Wetterhahn, for the documents that you
2 are going to be making a safeguards determination this
3 week, are all of those documents that have been
4 requested by BREDL through discovery?
5 MR. WETTERHAHN: Yes, Your Honor, and they
6 are listed on Attachment 1 of our response to the
7 discovery request.
8 JUDGE ELLEMAN: Thank you.
9 JUDGE YOUNG: And that's safeguards,
10 right? Because Judge Elleman may not have all that
11 with him, but will next week. He'll be here on
12 Monday, so we'll --
13 MR. WETTERHAHN: Your Honor, following
14 that up, does the Board wish to see the documents
15 in camera prior to the Tuesday session?
16 JUDGE YOUNG: If there is any dispute
17 between the parties that you're going to be arguing
18 about on Tuesday, it would be helpful to have those
19 available at least.
20 MR. WETTERHAHN: Your Honor, we will
21 attempt to get them to the Board on Monday morning,
22 those which at least the licensee has made its need-
23 to-know determination.
24 JUDGE YOUNG: Okay. Now --
25 MR. FERNANDEZ: Your Honor --

1 JUDGE YOUNG: Let me just -- before we go
2 to you, Mr. Fernandez, I'm not sure that we want to
3 get documents that -- that final determinations have
4 not yet been made. In other words, if you make a
5 determination that the -- that BREDL does not have a
6 need to know, don't bring those to us Monday. You
7 might have them available on Tuesday, should we want
8 to look at them. But don't just -- don't just bring
9 those to us on Monday, I would say.
10 Judge Baratta and Judge Elleman, would you
11 disagree?
12 JUDGE ELLEMAN: No, that's satisfactory.
13 JUDGE BARATTA: That's satisfactory, yes.
14 This is Judge Baratta.
15 MR. WETTERHAHN: That's fine. We will
16 have them at the hearing, should the Board decide to
17 view them in camera.
18 JUDGE YOUNG: Okay. And the same would go
19 for the Staff. Mr. Fernandez, you said you wanted to
20 say something?
21 MR. FERNANDEZ: We were about to make the
22 same point the Board made, so we agree with the Board
23 and we will bring the documents with us.
24 JUDGE YOUNG: Okay.
25 MR. FERNANDEZ: All right. Does anyone

1 see anything else that we could possibly discuss
2 today?
3 MR. REPKA: Judge Young, this is Dave
4 Repka. One outstanding issue which maybe we should
5 talk about --
6 JUDGE YOUNG: I'm going to put you on
7 speaker. Hold on. Go ahead.
8 MR. REPKA: One outstanding issue which
9 maybe we can talk about today or defer until Tuesday
10 is the issue of the schedule going forward. We, in
11 our submittal last week, outlined a number of mile
12 posts, as you know, to get to an evidentiary hearing.
13 And BREDL has also proposed a specific schedule.
14 We could put our proposed -- we don't
15 agree with the BREDL schedule in some respects. In
16 other respects, we do. We could put dates to our
17 milestones in our filing from last week, and I don't
18 know if it would be helpful for us to put that forward
19 today -- we could just read that proposal into the
20 record -- or whether that's something you would prefer
21 to do next week.
22 But we have discussed this briefly with --
23 COURT REPORTER: Excuse me. This is the
24 Court Reporter.
25 Mr. Repka, your voice is beginning to drop

1 out.

2 MR. REPKA: Okay. We have discussed this

3 briefly with Ms. Curran, but I would take the lead of

4 the Board as to whether you want us to propose some

5 dates.

6 JUDGE YOUNG: Why don't everyone be

7 prepared with your calendars, and be prepared to

8 discuss dates on Tuesday, so that we -- and if there's

9 anybody else out there that, for example, experts or

10 anyone else, that either -- any party would need to

11 have available on any date, to have their calendars,

12 their availability also. And then we'll try to start

13 putting together a schedule.

14 Again, this is one of the reasons why I

15 want to strongly encourage the parties to try to get

16 everything on the table as soon as possible, because

17 every time we -- we have one of these situations where

18 need-to-know determinations are appealed to us, and

19 with the possibility of another appeal to the

20 Commission, everything sort of is put on hold until

21 both our and the Commission's determinations are made.

22 And that may or may not result in a change

23 in the schedule. But I think it would make the most

24 sense to get everything out on the table now, so that

25 we won't go through this more than one -- at least to

1 the degree possible, we'll limit the potential for
2 that.
3 MS. CURRAN: Judge Young?
4 JUDGE YOUNG: Yes.
5 MS. CURRAN: This is Diane Curran. One of
6 the things that we mentioned in our pleading that we
7 filed the other day was the fact that it appears that
8 the basic premise or reason for expediting the LTA
9 proceeding has changed because, you know, we're now
10 past the point of being able to get a decision before
11 the shipment of plutonium to France.
12 And I wondered if it would be helpful to
13 have Duke make a report on what is the status of that
14 situation. I would imagine one would have to find out
15 from the DOE.
16 JUDGE YOUNG: I think that might be a good
17 idea. One thing -- Mr. Young is going to have to
18 leave at 10:00. Is our conference next Tuesday --
19 MS. CURRAN: 10:00.
20 JUDGE YOUNG: 10:00, that's what I
21 thought. Pardon us.
22 (Pause.)
23 We can't talk about the schedule -- the
24 actual dates of any shipments, but we can talk about
25 whether it's expected to go forward, I think is --

1 yes. And, Duke, can you just give us an answer on
2 that?
3 MR. REPKA: At this point, I do not know
4 what DOE's plans are. The last I heard that they were
5 -- was they were working to proceed on their schedule.
6 But I don't know if that, in fact, remains the case or
7 what the specific plans are.
8 JUDGE YOUNG: Why don't you find out and
9 let us know next Tuesday.
10 MR. REPKA: We can do that. I would say,
11 though, regardless of the status of that shipment, I
12 don't buy into the notion that if -- once August has
13 passed, we're on a more leisurely pace. I think that
14 timeliness and --
15 JUDGE YOUNG: I think you can rest assured
16 that we're not going to be on a leisurely pace in any
17 event. But we would -- it would be helpful to know
18 the status of everything and where we stand. And if
19 everyone has their calendars, and we try to get all
20 information possible out on the table, then it will
21 make it easier for all of us in terms of planning.
22 MS. CURRAN: This is Diane Curran. I just
23 want to clarify that BREDL isn't trying to slow this
24 down to the point of leisurely, just it has felt
25 somewhat break-neck at various points in the

1 proceeding, and we question whether that is necessary.
2 MR. REPKA: I think we still have a time-
3 sensitive amendment at issue, and I think we are very
4 interested in moving the proceeding along.
5 JUDGE YOUNG: Okay. We understand your
6 points of view, and everyone be prepared to address
7 that on Tuesday. And I think that's probably it.
8 Thanks a lot.
9 Is there anything else that -- again, that
10 it would be possible to talk about today? Duke
11 mentioned the schedule, and we're -- let's talk about
12 specifics next week in light -- especially in light of
13 the issues we've talked about today, in terms of
14 getting things out on the table and getting a
15 reasonable expectation of what to expect in the future
16 without requiring a whole lot of extra time from the
17 parties this week when you are -- do have your
18 proposed findings on the non-security-related
19 contentions due on Friday.
20 Anything else?
21 MR. FERNANDEZ: Your Honor, this is
22 Antonio Fernandez. Given that we are on an elevated
23 alert level, access to the building at White Flint is
24 a lot more restricted now. So in the event that the
25 alert level is still at orange on Tuesday, people

1 should plan ahead of time and make sure to arrive
2 early enough, and that enough escorts are available
3 for everybody, because everybody needs to be escorted
4 at all times while they're in the building. So
5 everybody should plan ahead.
6 MS. CURRAN: Antonio, I have a question
7 about that. At some previous point, somebody said
8 that there might be a requirement to provide a second
9 form of ID, and --
10 JUDGE YOUNG: There is now, actually, all
11 the time going to be a requirement for a second form
12 of ID. It doesn't have to be a picture ID, the second
13 one, I don't think. But some other -- one picture ID
14 and at least one other form of ID of some sort.
15 DR. LYMAN: This is Ed Lyman. Are you
16 sure it doesn't have to be two photo IDs? Because
17 there's a meeting on Wednesday, a public meeting on
18 security issues, and the instructions were it was two
19 forms of photo ID.
20 JUDGE YOUNG: Well, now, that may have
21 changed actually, so I --
22 JUDGE BARATTA: We'll check on that. This
23 is Judge Baratta. We'll check on that and try to get
24 something out to all the parties.
25 MS. CURRAN: Yes. That would be very

1 helpful to me, because I don't think I have another
2 photo ID. So --
3 JUDGE BARATTA: Do you have a passport?
4 MS. CURRAN: Oh, yes. Okay, yes.
5 JUDGE BARATTA: Your passport and your
6 driver's license, or something like that --
7 MS. CURRAN: Okay.
8 JUDGE BARATTA: -- should be appropriate.
9 But we'll confirm that with security --
10 MS. CURRAN: Thank you.
11 JUDGE BARATTA: -- and get back to
12 everybody. Okay?
13 MS. CURRAN: Yes, thank you.
14 MR. WETTERHAHN: One final additional
15 matter. We have been discussing documents that no
16 need-to-know determination has been made. I want to
17 remind BREDL and the Board and other parties that we
18 have made a number of documents available at our
19 offices, which are not subject to this objection. So
20 in order to proceed, in order to make it more
21 efficient, we would like to share those documents and
22 make them available to BREDL for its inspection.
23 MS. CURRAN: Okay.
24 JUDGE YOUNG: Judge Baratta and Judge
25 Elleman, is there anything else?

1 JUDGE ELLEMAN: Yes. This is Judge
2 Elleman. I will be arriving in Washington early
3 Monday morning next week. And so if any of you are
4 going to be transmitting any safeguards-related
5 documents between now and next week, it would help me
6 if you would send my copies directly to Judge Young at
7 NRC.
8 JUDGE YOUNG: Anything from you, Judge
9 Baratta?
10 JUDGE BARATTA: No. That's all.
11 JUDGE YOUNG: Okay. Well, thank you all
12 for being available today, and we look forward to
13 seeing you in person next week for the safeguards
14 session. And as Judge Baratta said, actually I think
15 it'll probably be him that will notify you about the
16 -- any additional information about the forms of ID,
17 because I'm not going to be in the rest of this week,
18 but I will be back Monday morning. And I'll be here
19 this afternoon.
20 All right. Thank you. See you all next
21 week.
22 (Whereupon, at 9:58 a.m., the proceedings
23 in the foregoing matter were adjourned.)
24
25

CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: Duke Energy Corporation

Docket Number: 50-413/414-OLA;

ASLBP No. 03-815-03-OLA

Location: Teleconference

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

John Mongoven
Official Reporter
Neal R. Gross & Co., Inc.