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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of	Docket No's. 50-413-OLA, 50-414-OLA
DUKE ENERGY CORPORATION	ASLBP No. 03-815-03-OLA
(Catawba Nuclear Station, Units 1 and 2)	August 13, 2004

MEMORANDUM and ORDER
(Confirming August 10, 2004, Bench Ruling
Finding Need to Know and Ordering Provision of Documents Sought by Intervenor in Discovery)

During a closed session in this proceeding[1] held August 10, 2004, this Licensing Board made a verbal bench ruling on BREDL's appeal of an August 6, 2004, determination by Duke, as the holder of two particular documents that are part of its security plan for its Catawba plant, that BREDL has no "need to know" the contents of the documents. We reversed Duke's determination and concluded that the documents shall be made available to BREDL. *See* Tr. 2968-69. We made this ruling verbally during the session in order to avoid delay insofar as possible and move this proceeding forward in the most expeditious manner possible, indicating at the time that we would be confirming the ruling in writing, which we now do.

[1]This proceeding involves Duke Energy Corporation's (Duke's) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station, as part of the U.S.-Russian Federation nuclear nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting it into MOX fuel, to be used in nuclear reactors. Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003). By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information; redacted version issued May 28, 2004), the Licensing Board granted Blue Ridge Environmental Defense League [BREDL]'s request for hearing and admitted various non-security-related and security-related contentions. LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004). The ruling herein relates to the one admitted security contention of BREDL.

The documents in question are listed as items 67 and 68 in an attachment to Duke's response to certain BREDL discovery requests. Letter from Mark J. Wetterhahn to Diane Curran (Aug. 6, 2004), at 5 [hereinafter Wetterhahn 8/6/04 Letter]; [Duke]'s Response to [BREDL]'s First Document Production Request on BREDL Security Contention 5, Attachment 1 (July 2, 2004) at 10. Duke's determination was based on the documents' not having been "developed or changed to support the receipt and storage of MOX fuel" and as such not being "'indispensable' to the issue of the adequacy of the incremental measures taken to protect the MOX lead assemblies against theft," and on their "represent[ing] particularly sensitive information and [being] subject to the policy considerations" of limiting access to safeguards and security information and avoiding inadvertent security breaches. Wetterhahn 8/6/04 Letter at 5; *see id*. at 4.

During the course of the August 10 closed session, the Board ascertained from Duke counsel that, although the documents were not part of those security-related procedures and measures adopted by Duke to protect the MOX fuel assemblies at issue in this proceeding, they do "govern the reaction of the security force to any threat to the facility," including the "ability [of any threat] to get into the facility," the "details of the defenders, where they are positioned, where they have to go and the details of the response strategy," as well as timelines and details of how a security incident is defined and how defenders are to react to an incident. Tr. 2911-12 *see id.* at 2964-65. Although Duke argued that the documents were not indispensable to BREDL because it has already been granted access to other relevant documents, Duke was unwilling to forego the possibility of relying on part or parts of the documents in question or of asking the Board to consider these in our ultimate decision in this proceeding, should BREDL posit a scenario in which intruders would get into the plant and into the spent fuel building, get the MOX fuel and escape with it. *See* Tr. 2927-30. For example, Duke counsel stated at one

point, "I can't say, given the state that we're in on this hypothetical that I'd [never] ever argue that it's not something that we wouldn't somehow or partially rely on, both as the timeline or how long it takes." Tr. 2927.[2] Counsel further agreed that "there exists the possibility that with regard to these two procedures, that if we relied on these two procedures, at some point we'd have to give it to [BREDL]." Tr. 2931.

BREDL for its part insists that it has a current need to know with regard to the two disputed documents, in order to postulate scenarios for pointing out vulnerabilities in Duke's security plan. If it is to "posit detailed scenarios of successful attempts to divert or steal plutonium MOX fuel from the Catawba nuclear power plant," it argues, "then it must be given access to a level of detail regarding Duke's security measures that would allow it to evaluate the number of responders, their weaponry, their positions, and the time it will take them to get to their positions." [BREDL]'s Appeal of [Duke]'s August 6, 2004 Need-To-Know Determination (Aug. 6, 2004), at 2-3. Speaking through its expert, Edwin Lyman, during the August 10 session, it explained, for example, that "a key issue is the amount of time one has to circumvent those fine line measures," and that the "time you have available does depend on your strategy to defeat or otherwise contain the onsite response force and what you know about any additional offsite responders and their response times." Tr. 2915. Continuing, Dr. Lyman stated that "we need to know, first of all, how many forces to deploy and the strategy for getting onto the site," emphasizing that this, along with the likely response from the armed responders, was a "critical bit of information in how you would then go about the successive steps to obtain the fuel and to remove it." *Id.* at 2915-16; *see id.* at 2917-18.

Staff counsel indicated that it seems that whether or not BREDL should be found to have a "need to know" the contents of the documents in question at this point depends on how

[2] Although the transcript at 2927 does not indicate counsel's name, it is evident from the language and context that it was he who was speaking at this point.

the Board interprets the Commission's "indispensability" standard for need-to-know determinations in the discovery phase of a proceeding — according to Duke's interpretation or the Staff's. *See* Tr. 2953-56; 2960-61; *see also* CLI-04-06, 59 NRC 62, 73 (2004). Duke counsel agreed that the need-to-know determination we are called upon to make appears to "hinge on the discovery standard." Tr. 2961.

Duke construes the indispensability standard as being different from and more stringent than the discovery standard of "reasonably calculated to lead to the discovery of admissible evidence." *See* Wetterhahn 8/6/04 Letter at 3. According to Duke:

> To be "indispensable," a document containing Safeguards Information must be narrowly related to the issues in the proceeding, and the particular information requested must be essential to the development of the case regarding the admitted contention. Put another way, under the indispensability standard, an expert in security would find it impossible to analyze the incremental security measures taken to prevent theft of the MOX lead test assemblies and prepare testimony and assist in cross examinations on the limited issue before the Licensing Board without the document in question.

Id.

The Staff, on the other hand, interprets the indispensability standard as being *defined by* the "reasonably calculated to lead to the discovery of admissible evidence" discovery standard during the discovery phase of a proceeding. Letter from Margaret J. Bupp to Diane Curran (Aug. 3, 2004) at 1 [hereinafter Bupp 8/3/04 Letter]; *see also* Tr. 2951. According to the Staff, "during the discovery phase, if there is a safeguards document[ ] involved, . . . and it's reasonably likely, reasonably calculated to lead to admissible evidence at the evidentiary hearing stage of the proceeding, then it should be produced to the party requesting it." Tr. 2951. In its recent need-to-know determination on various documents requested by BREDL, the Staff stated, *inter alia*, that

> [i]t is the Staff's position that nothing in either CLI-04-19 or CLI-04-21 changes the positions set out by the Commission in CLI-04-06. That decision was limited to a finding that BREDL had a need-to-know in relation only to 'information [that

> was] indispensable to BREDL's opportunity to frame [a] litigable contention.' [CLI-04-06, 59 NRC 62, 67 (2004)]. However, CLI-04-06 was limited to the contention stage. At this stage of the hearing, the question becomes what information is indispensable to discovery. In making this determination, the Staff looks to two sources. First the traditional discovery standard, that information is discoverable if it is reasonably calculated to lead to admissible evidence. Second, the Staff follows the Commission's admonition that 'access to safeguards documents be as narrow as possible.' [*Id.*]

Bupp 8/3/04 Letter at 1-2. The Staff found a need to know regarding information "reasonably calculated to lead to admissible evidence," but provided for redaction so that only those portions of a document "related to the exemptions requested by Duke and the additional security measures proposed in support of those exemptions" would be disclosed. *Id.* at 2.

We find the Staff's approach to be a reasonable one, and to be in keeping with the analysis we have implicitly applied previously in this proceeding. *See* Licensing Board Order (Ruling on Duke Energy Corporation Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention) (June 28, 2004) (unpublished). Notwithstanding Duke's argument that "the discovery standard and the indispensability standard are two different things," Tr. 2940, the traditional discovery standard of whether information is "reasonably calculated to lead to the discovery of admissible evidence," *see* FRCP 26(b)(1), which is also contained in the applicable rules in this proceeding, *see* former 10 C.F.R. § 2.740(b)(1), has, as it has developed, come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue. And, as the Commission has stated and the NRC Staff has recognized, "a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information." CLI-04-06, 59 NRC at 72; *see* Bupp 8/3/04 Letter at 1; Tr. 2951. As stated by Staff counsel, this language "means something." Tr. 2951. We thus look to whether the information sought is indispensable to BREDL in preparing for litigation of Contention 5, in the sense of being needed for discovery and "reasonably calculated to lead to the discovery of admissible evidence."

We find that the material in question is indispensable to BREDL in preparing for the hearing on Contention 5. Clearly, the material is not only reasonably calculated to lead to the discovery of admissible evidence, it may well be admissible evidence itself, as part of the information used in any scenario(s) that BREDL will formulate, as well as in addressing Duke's likely defenses to any BREDL scenarios. With regard to the latter point, we find that the likelihood of Duke relying on information in the documents cannot be said to be so small that we could find the standard for discovery not to have been met at this point. To the contrary, as pointed out by BREDL counsel on August 10, Duke has already in fact stated that it plans "to rely on the existing security force" at Catawba. Tr. 2958-59; *see also* [Duke]'s Answers to [BREDL]'s First Set of Interrogatories on BREDL Security Contention 5 (July 2, 2004) at 14.

More importantly, we conclude that BREDL has a current need for the information in question, which it requested in discovery, and that the information is indispensable in formulating scenarios to demonstrate any asserted vulnerabilities in Duke's planned security measures for the MOX fuel. Indeed, taking into account, as we have previously noted, the integrated nature of nuclear power plant security, we cannot say that BREDL could prepare an effective scenario — whether or not it ultimately successfully points out any vulnerabilities — *without* access to information on timelines and other details relating to security measures and procedures to prevent access to the plant, whether for radiological sabotage or theft. And thus, even under Duke's argued standard of "essential to the development of the case regarding the admitted contention," the material is discoverable.

In making our ruling on August 10 and confirming it herein, we are cognizant of, and wish to highlight, Duke's statement, noted above, that "there exists the possibility that with regard to these two procedures, that if we relied on these two procedures, at some point we'd have to give it to [BREDL]." Tr. 2931. We also note counsel's statement that, if at some point

Duke relied on the documents in question, "then we agree that they would have a right to stop the proceeding, or to some point examine these and take the time necessary to determine how they would respond to that." Tr. 2930. Counsel agreed, moreover, that it "might be the case" that, should we follow the approach in effect suggested by counsel — to delay providing the materials at issue until such time as Duke specifically indicates some reliance on them — this would involve further delay in the sense of providing at such point for a time period for BREDL to look at the materials and for additional hearing time to take more evidence on whatever was thereby produced. *See* Tr. 2931-32. As stated by the Chair at that time, Duke in such instance would have to recognize that it "would be giving up any opportunity to complain about the time that it took to go through that procedure," by virtue of urging us to delay provision of the materials at issue until such time as Duke relied on them to "defend against" any scenario presented by BREDL. Tr. 2932. Counsel agreed that this "might present a problem." Tr. 2935.

We find that Duke's proposal in effect that we at the same time rule quickly on the issue now before us, *see* Tr. 2939, and also leave for a later time any ruling actually providing access to the materials in question, would indeed be problematic were we to take the latter course. Such a course could very plausibly create significant inefficiencies — in the time it would take to make the materials available to BREDL, allow its counsel and expert to prepare a modified scenario or scenarios in response, and then allow time for all parties to present evidence and argument on both a probable defense of Duke and BREDL's new scenario(s). To go through essentially the same process twice — the likely impact of such a course — would obviously cause delay, in this case in which Duke strongly urges an accelerated schedule. Indeed, Duke's acknowledgment that the materials might well at some point need to be provided supports our ruling herein. As noted at the August 10 session, discovery is designed to get all information that is likely to be relevant in a hearing out "on the table" *prior to* a hearing, in order

to promote the efficient conduct of a proceeding. To wait, as applicant Duke would have us do, and at a later date go through the process discussed above would, we find, cause undue and unnecessary delay in this proceeding.

We therefore direct Duke to make available the documents in question. The Staff may view the materials to see whether it believes any redactions are necessary, provided this is done in a timely manner, and takes into account Duke counsel's own statement that the documents in question are "so short and so Catawba-specific that if you removed any portion of it, [ ] in essence, it would counter [the Board's] ruling." Tr. 2971. Absent an appeal and stay of this ruling, the materials shall be made available as soon as possible, and any disputes on redaction issues shall likewise be brought to the attention of the Board at the earliest possible time, and will be considered to the degree necessary at the next scheduled closed session in this proceeding, on September 1, 2004, at 10:00 a.m.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

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Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

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Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

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Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 13, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DUKE ENERGY CORPORATION	)	Docket Nos. 50-413-OLA
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(Catawba Nuclear Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CONFIRMING AUGUST 10, 2004, BENCH RULING FINDING NEED TO KNOW AND ORDERING PROVISION OF DOCUMENTS SOUGHT BY INTERVENOR IN DISCOVERY) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 13th day of August 2004