

August 6, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED
USNRC

In the Matter of

DUKE ENERGY CORPORATION

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

August 12, 2004 (3:47PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

(Catawba Nuclear Station, Units 1 and 2)

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
APPEAL OF DUKE ENERGY CORPORATION'S
AUGUST 6, 2004 NEED-TO-KNOW DETERMINATION**

Pursuant to paragraph C.2 of the Atomic Safety and Licensing Board's ("ASLB's") Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (December 15, 2003), Blue Ridge Environmental Defense League ("BREDL") hereby appeals a need-to-know determination made by Duke Energy Corporation ("Duke") with respect to certain documents identified by Duke as responsive to BREDL's request for production of documents in discovery on BREDL Contention 5.

In response to BREDL's discovery request for production of Duke's Security Plan, Duke has identified various portions of the Security Plan, including its implementing procedures. In a letter to undersigned counsel for BREDL dated August 6, 2004, Duke's counsel, Mark J. Wetterhahn, made a positive need-to-know determination with respect to most of the implementing procedures identified in its discovery response, with the exception of two implementing procedures for the Catawba Security Plan. See Wetterhahn Letter at 5. These procedures are identified as items 67 and 68 in the index of documents responsive to BREDL's document production request that is attached to Duke Energy Corporations' Response to Blue Ridge Environmental Defense League's First Document Production Request on BREDL Security

Contention 5 (July 2, 2004). Item 67 is entitled “Armed Response Procedure Security Procedure 213,” and Item 68 is entitled “Security Conditions Security Procedure 401.”

Mr. Wetterhahn asserts two reasons for withholding documents 67 and 68, neither of which is sufficient to justify the withholding of the information. First, he states that the procedures “were not developed or changed to support the receipt and storage of MOX fuel,” and therefore are not “‘indispensable’ to the issue of the adequacy of the incremental measures taken to protect the MOX lead assemblies against theft.” *Id.*, quoting *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 73 (2004). Contrary to Mr. Wetterhahn’s argument, the fact that the procedures were developed before Duke submitted its application to use plutonium MOX fuel does not, of itself, show that the procedures are not indispensable to the adequacy of Duke’s Security Plan Submittal. The relevant question is whether Duke depends on any aspect of the procedures for protection of plutonium MOX fuel against theft. Mr. Wetterhahn’s letter does not address this question, and therefore Duke has not justified the withholding of the procedures.

Second, Mr. Wetterhahn asserts that given the “specificity” of the procedures, “they represent particularly sensitive information” that should not be disclosed to BREDL because of the risk that the information may accidentally fall into the wrong hands. Wetterhahn Letter at 5. Mr. Wetterhahn does not explain, however, in what respect these procedures are more detailed than the eight other procedures (items 69 – 76) for which Duke has made a positive need-to-know determination. Presumably, all of these procedures flesh out the details of how Duke plans to carry out its Security Plan.

In fact, the more specific the procedures are, the more necessary they are to evaluating the adequacy of Duke’s measures to protect plutonium MOX fuel assemblies against theft. If, as

suggested by Duke on numerous occasions, BREDL is expected to posit detailed scenarios of successful attempts to divert or steal plutonium MOX fuel from the Catawba nuclear power plant, 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. Presumably, the implementing procedures contain some or all of this information.

Finally, contrary to Mr. Wetterhahn's suggestion, once BREDL's need-to-know is established, it is not appropriate to apply an additional test related to the sensitivity of the information. As made clear in CLI-04-06, the existence of the need-to-know standard itself is intended to address the "delicate balance between fulfilling [the NRC's] mission to protect the public and providing the public enough information to help us discharge that mission." CLI-04-06, slip op. at 10. The determination of BREDL's need-to-know the requested information must be made solely on the basis of whether the information is indispensable to BREDL's preparation of its case regarding Contention 5, *i.e.*, whether Duke relies to any extent on the procedures for protection of plutonium MOX fuel against theft.

Accordingly, the ASLB should reverse Duke's need-to-know determination with respect to documents 67 and 68, and order Duke to produce them.

Respectfully submitted,



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August 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2004, copies of Blue Ridge Environmental Defense League's Proposed Findings of Fact and Conclusions of Law Regarding BREDL Contention I, Blue Ridge Environmental Defense League's Appeal of Duke Energy Corporation's August 6, 2004 Need-to-Know Determination, and letter from Diane Curran to Antonio Fernández, were served on the following by e-mail and/or first-class mail, as indicated below.

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