

RAS 8346

RELATED CORRESPONDENCE

# WINSTON & STRAWN LLP

Electronic  
Letterhead

1400 L STREET, N.W., WASHINGTON DC 20005-3502  
202-371-5700

35 W. WACKER DRIVE  
CHICAGO IL 60601-9703  
312-558-5600

200 PARK AVENUE  
NEW YORK, NY 10166-4193  
212-294-6700

38TH FLOOR, 333 SOUTH GRAND AVE  
LOS ANGELES, CA 90071-1543  
213-615-1700

101 CALIFORNIA STREET  
SAN FRANCISCO CA 94111-6894  
415-691-1000

43 RUE DU RHONE  
1204 GENEVA, SWITZERLAND  
41-22-317-75-75

21 AVENUE VICTOR HUGO  
75116 PARIS, FRANCE  
33-1-53-64-82-82

CITY POINT, 1 ROPESHAW STREET  
LONDON, ENGLAND EC2Y 9HT  
44-207-183-1025

August 6, 2004

DOCKETED  
USNRC

August 17, 2004 (3:15PM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Diane Curran, Esq.  
Harmon, Curran, Spielberg & Eisenberg, LLP  
1726 M Street, N.W.  
Suite 600  
Washington, DC 20036

Re: Need to Know Determination Regarding Certain Duke Energy Corporation  
Documents Containing Safeguards Information Identified in Response to BREDL  
Discovery Request 1

Dear Ms. Curran:

On behalf of Duke Energy Corporation ("Duke"), I am presenting the results of a need-to-know evaluation relating to certain documents identified as containing Safeguards Information in Attachment 1 to Duke Energy Corporation's Response to Blue Ridge Environmental Defense League's First Document Production Request on BREDL Security Contention 5 dated July 2, 2004 (Safeguards) ("Duke's Response"). The NRC Staff made the need-to-know determination for the remainder of the Safeguards documents in Attachment 1.

Duke's need-to-know determination was made in the context of the single admitted security contention, which challenges certain of the exemptions sought by Duke associated with its request to receive and store four MOX fuel lead assemblies prior to their use at Catawba Nuclear Station ("Catawba"). These exemption requests are solely related to the security of the MOX lead assemblies during a limited period after their arrival on site and before insertion into the reactor. The exemptions are not otherwise required to meet NRC security requirements for the protection of Catawba against the design basis threat ("DBT") for radiological sabotage. The additional measures that Duke proposes to take to protect the MOX lead assemblies are incremental to, not a substitute for, the security measures necessary to protect the facility against radiological sabotage. Further, these incremental MOX security measures do not in any way degrade the existing security measures. As the Commission reiterated in CLI-04-19, "[t]he focus of this adjudication is the license application, which proposes specific measures -

DC:369355.1

Template = SECY-043

SECY-02

Diane Curran, Esq.  
August 6, 2004  
Page 2

- enhancements of security requirements for commercial reactors -- necessary to protect the MOX fuel from theft or diversion.”<sup>1</sup>

In the context of this proceeding, a finding of “need-to-know” is a finding that it is *necessary* for a recipient to have the Safeguards Information in question to participate in the NRC hearing.<sup>2</sup> The Commission explained the narrowness of this definition:

Plainly, under this “necessity” definition, “need to know” is a much narrower standard than general relevance. A party’s mere desire to have information or its belief that the information is needed to provide context or background may have little or no bearing on a “need-to-know” determination, which must distinguish between “wants” and needs.<sup>3</sup>

The Commission also spoke to the limited scope of this license amendment proceeding:

This proceeding has a limited scope, focusing on the lawfulness and safety of Duke’s proposed MOX amendment. Duke has already provided its security plan for implementing that amendment, including safeguards information. More general security information related to the Catawba plant-at-large -- the kind of information in the NRC orders that the Board has ordered disclosed to BREDL -- is not, in our judgment, “necessary” to allow BREDL to participate meaningfully in this license amendment proceeding.<sup>4</sup>

---

<sup>1</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, \_\_\_ NRC \_\_\_, slip op. at 10 (July 7, 2004). *See also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 73 (2004).

<sup>2</sup> CLI-04-6, 59 NRC at 71.

<sup>3</sup> *Id.* at 72.

<sup>4</sup> *Id.* at 72. While the Commission stated that 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, the Commission certainly did not say or imply that the standard by which the request for Safeguards Information was to be judged changed, *i.e.*, that the test of “necessity” or “indispensability” of that information to the requestor was subjugated to or superseded by the “general relevancy” discovery standard. The Commission’s remark concerning different stages of the proceeding could just as reasonably be interpreted as an  
(footnote continued)

Diane Curran, Esq.  
August 6, 2004  
Page 3

In CLI-04-6, the Commission addressed and rejected the argument that BREDL would require documents to give some more information about the context, or baseline, against which it will measure Duke's security submittal:

But a desire to obtain safeguards materials for "context" is an insufficient basis for access to safeguards information. Rather, the touchstone for a demonstration of "need to know" is whether the information is indispensable. Here, as the pleadings before us represent, neither Duke nor the NRC Staff has any intention of measuring Duke's security arrangements for MOX against last year's general security orders issued to reactors. Indeed, those orders do not impose immutable requirements, but are subject to change depending on updated assessments of the terrorist threat. All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That's not at issue in this MOX license amendment case. At stake here is the appropriate increment -- the appropriate heightening of security measures -- necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.<sup>5</sup>

Webster's New World Dictionary defines "indispensable" as "absolutely necessary or required." In deciding the need-to-know issue at this stage of the proceeding, this standard must be utilized to be in conformance with Commission directives. This is a much higher standard than the standard for production of documents during the discovery phase of a proceeding where Safeguards Information is not involved. To be "indispensable," a document containing Safeguards Information must narrowly relate 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 assemblies and prepare testimony and assist in cross examinations on the limited issue before the Licensing Board without the document in question.

---

observation that, after admission of a contention, the "need" for information would be narrowed to the scope of that contention from the universe of potential contentions at the pleading stage.

<sup>5</sup> *Id.* at 73.

Additionally, the possibility of inadvertent release of sensitive security information must be taken into account in the need-to-know determination. In this regard, the Commission has stated:

As a policy matter, the Commission has a strong interest in limiting access to safeguards and security information. We must limit distribution of safeguards information to those having an actual and specific, rather than a perceived, need to know. Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements.<sup>6</sup>

In this regard, I emphasize that the documents being withheld (discussed below) are extremely sensitive. They address the specific measures that the Catawba security force is utilizing to protect against radiological sabotage, in some cases on a security post-by-post basis. While Duke does not question Dr. Lyman and your compliance with the December 15, 2003 Protective Order in this proceeding, the Commission's admonition to guard against the potential for disclosure must be a factor in any need-to-know decision.

#### Determination as to Specific Documents<sup>7</sup>

Using the "Item No." designator in Attachment 1 to Duke's Response, Duke's need-to-know determination regarding BREDL's first round of discovery using the principles set forth above is set forth below. In the interest of expediency, Duke is proposing to make a number of the documents available even though the "indispensability" standard is not met. Such action does not change the designation of those documents as Safeguards Information. Nor does Duke waive any objections it may assert to the production of any other documents during discovery, or to the use of the documents being disclosed at any hearing in this matter.

13. This document (video) is being made available to BREDL.
14. This document is being made available to BREDL.

---

<sup>6</sup> *Id.*

<sup>7</sup> No determination is being made relating to those items for which the NRC Staff made an initial need-to-know evaluation in its letters of August 3 and August 4, 2004, *i.e.*, Item Nos. 12, 60-65.

Diane Curran, Esq.  
August 6, 2004  
Page 5

26. This document is being made available to BREDL.

28, 30. The worksheets and database contents which relate to the fuel handling building as a target for the present DBT are being made available to BREDL.

44-50. These items are already available to BREDL.

51. This item, which is merely a slightly reformatted version of information already provided (*see* Item 49), is being made available to BREDL.

52, 57-59. These items are being made available to BREDL.

67-68. These items represent detailed implementing procedures for the security plan designed to protect the Catawba facility against the radiological DBT. They were not developed or changed to support the receipt and storage of MOX fuel. As such, these items are not "indispensable" to the issue of the adequacy of the incremental measures taken to protect the MOX lead assemblies against theft, which is the subject of BREDL's security contention. Moreover, given their specificity, they represent particularly sensitive information and are subject to the policy considerations described above. Duke has thus determined that BREDL has no need to know the contents of these two documents.

69-76. These procedures are being made available to BREDL.

77. This document is being made available to BREDL.

As I mentioned during the August 3, 2004 phone call with the Licensing Board and parties, documents produced in response to BREDL's first discovery request, with the exception of those containing Safeguards Information, are available for your review at Winston & Strawn offices in accordance with the December 15, 2003 Protective Order.

Sincerely,



Mark J. Wetterhahn  
Counsel for Duke Energy Corporation

cc: Service List