

August 26, 2004

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

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

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

DOCKETED
USNRC

August 27, 2004 (2:51PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
REQUEST FOR NEED-TO-KNOW DETERMINATION**

Pursuant to 10 C.F.R. § 2.905(b)(1) and (f), Blue Ridge Environmental Defense League ("BREDL") hereby requests that the Atomic Safety and Licensing Board make a need-to-know determination with respect to two Nuclear Regulatory Commission ("NRC") guidance documents referenced in a letter from Michael F. Weber, Director, NRC Division of Fuel Cycle Safety and Safeguards, to Peter Hastings, Duke Engineering and Services Inc. (March 13, 2000) (hereinafter "Weber Letter"). A copy of the letter is attached. According to counsel for the NRC Staff, these documents contain classified National Security Information, for which a need-to-know determination must be made by the ASLB.

Factual Background

The Weber letter identifies two NRC guidance documents for the design basis threat ("DBT") for theft or diversion and the DBT for radiological sabotage that are "to be used in the design of the mixed oxide fuel fabrication facility (MOX FFF) with respect to safeguards and security." The documents are entitled "Design Basis Threat for Theft or Diversion Guidance" and "Design Basis Threat for Radiological Sabotage Guidance." Both documents are designated "confidential."

By letter dated August 3, 2004, counsel for BREDL requested counsel for the NRC Staff to make a need-to-know determination with respect to these two NRC guidance documents. Letter from Diane Curran to Antonio Fernández re: Discovery in MOX LTA Proceeding. Mr. Fernández responded that the guidance documents contain classified National Security Information, and therefore BREDL must request access to the documents through the ASLB. Letter from Antonio Fernández to Diane Curran and Mark J. Wetterhahn re: In the Matter of Duke Energy Corporation (Catawba Nuclear Station, Units 1 and 2), Docket Nos. 50-413 OLA, 50-414-OLA (August 19, 2004). Therefore, BREDL has filed the instant request for a need-to-know determination.

BREDL Has a Need-to-Know With Respect to the Requested Documents

BREDL has a need-to-know with respect to the requested documents because they appear to constitute generic NRC guidance for compliance with NRC regulations for security of its licensed facilities, including protection against both theft and sabotage. As such, they not only illustrate the NRC Staff's view of how to comply with NRC regulations, but are given "considerable weight" in NRC adjudicatory proceedings. *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 and n.10 (1983). Moreover, in the absence of other evidence, adherence to regulatory guidance may be deemed sufficient to demonstrate compliance with NRC regulatory requirements. *Metropolitan Edison, Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-698, 16 NRC 1290, 1298-99 (1982), *rev'd in part on other grounds*, CLI-83-22, 18 NRC 299 (1983). *See also Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 397-98 (1995) (a licensee may rely on NUREGs and Regulatory Guides to demonstrate compliance with NRC regulations.) Therefore, it is appropriate and necessary for BREDL to evaluate whether Duke's Security Plan Submittal complies with this guidance.

During oral discussions before the ASLB, the relevance of these guidance documents has been questioned based on the suggestion that they may have been devised especially for the MOX FFF. While this cannot be determined without examining the documents, the general nature of the titles of the documents indicates that they are generic rather than specific to any particular plant. In any event, even if the guidance documents were developed specifically for the MOX FFF, they are likely to contain relevant guidance with respect to other facilities possessing Category I quantities of strategic special nuclear material, including the Catawba nuclear power plant once it receives the MOX LTAs. It is likely that the characteristics of the adversary who would attack or attempt to steal SSNM from the MOX FFF are similar if not identical to the characteristics of an adversary who would attack or attempt to steal SSNM from the Catawba nuclear power plant.

Therefore, for the foregoing reasons, BREDL requests the ASLB to make a positive need-to-know determination with respect to the requested NRC guidance documents. BREDL requests that access to the documents be provided to BREDL's counsel and expert witness, Diane Curran and Dr. Edwin S. Lyman. Both Ms. Curran and Dr. Lyman possess Level L security clearances.

Respectfully submitted,



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August 26, 2004

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2004, copies of Blue Ridge Environmental Defense League's Request for Need-to-Know Determination were served on the following by e-mail and/or first-class mail, as indicated below.

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Diane Curran



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
CONFIDENTIAL

March 13, 2000

Duke Engineering & Services, Inc.
ATTN: Mr. Peter Hastings
P. O. Box 20091
Charlotte, NC 28202

SUBJECT: DESIGN BASIS THREAT GUIDANCE APPLICABLE TO THE MIXED OXIDE
FUEL FABRICATION FACILITY

Dear Mr. Hastings:

Enclosed are the U.S. Nuclear Regulatory Commission's (NRC) guidance documents for the design basis threat (DBT) for theft or diversion and the DBT for radiological sabotage to be used in the design of the mixed oxide fuel fabrication facility (MOX FFF) with respect to safeguards and security.

Both documents are classified as confidential and should be treated accordingly.

If you have any questions, please call the MOX FFF Project Manager, Mr. Andrew Persinko, at (301) 415-6522.

Sincerely,

Michael F. Weber, Director
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Material Safety
and Safeguards

Docket: 70-3098

Enclosures:

- 1) Design Basis Threat For Theft
or Diversion Guidance (confidential)
- 2) Design Basis Threat For
Radiological Sabotage Guidance
(confidential)

Upon removal of
Enclosure, this document
is not classified.

CONFIDENTIAL