

August 27, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

September 2, 2004 (1:09PM)

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,
Units 1 and 2)

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Docket Nos. 50-413-OLA
50-414-OLA

DUKE ENERGY CORPORATION'S REQUEST
FOR ACTION UNDER SUBPART I OF 10 C.F.R. PART 2

By letter dated August 19, 2004, Mr. Antonio Fernandez, counsel for the NRC Staff, wrote to counsel for Duke Energy Corporation ("Duke") and Blue Ridge Environmental Defense League ("BREDL") regarding to two documents classified as National Security Information to which BREDL has requested access during the discovery phase of the litigation of Security Contention 5. Because of the classified nature of the documents, that letter invoked the procedures of 10 C.F.R. Part 2, Subpart I, "Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information." That letter contained the Staff's determination that, in accordance with 10 C.F.R. § 2.905(b)(1) and (f), any party requesting access to National Security Information that may be required for the preparation of that party's case must apply to the Atomic Safety and Licensing Board ("Licensing Board" or "Board") for an order granting access to such information.

On August 26, 2004, BREDL filed a request entitled "Blue Ridge Environmental Defense League's Request for Need-to-Know Determinations" that seeks access to these

classified documents.¹ As indicated at the August 10, 2004 conference (Tr. 3056-57), Licensee herein requests – pursuant to 10 C.F.R. § 2.905(b)(1) – that the Licensing Board, if it grants BREDL’s request, make the subject documents available to Duke’s attorneys, representatives and consultants who have the required security clearance. In such an event, Duke’s attorneys, representatives and consultants will require the same information for the preparation and presentation of Duke’s case in this proceeding.

Duke further moves, pursuant to 10 C.F.R. § 2.905(d), that the Board certify to the Commission for its consideration and determination questions relating to access and “need-to-know” regarding the two classified documents. Duke makes this request because of the Commission’s significant prior involvement in this case with regard to the proposed disclosure of classified material relating to Category I facilities, and its ability to give prompt and timely guidance on this issue and the issue of the appropriate theft and diversion design basis threat for Catawba during the receipt of the MOX fuel. Duke believes that certification may ultimately speed the completion of these time-sensitive proceedings.² Significantly, the Commission has already determined that guidance applicable to other specific facilities, and not addressed to the particular situation regarding receipt of the four MOX lead assemblies at a power reactor, has no relationship to this proceeding, Commission guidance is also appropriate given the classified

¹ Duke will respond to this request separately. Duke does not concede in this present filing that there is a need-to-know with respect to the classified documents.

² See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62 (2004); *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, ___ NRC ___ (July 7, 2004 slip op.). See also Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 25 (2004) (“The Commission will take action in individual proceedings, as appropriate, to provide guidance to the Boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication.”).

nature of the documents at issue and the difficulties this would raise in holding an evidentiary hearing on Contention 5.³

For the foregoing reasons, the requested relief should be granted.

Respectfully submitted,



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ATTORNEYS FOR DUKE ENERGY
CORPORATION

Dated in Washington, District of Columbia
This 27th day of August, 2004

³ To date, only one of Duke's counsel (Mr. Repka) has applied for the requisite security clearance. That review is now complete. Furthermore, a number of potential witnesses have not applied for such clearances inasmuch as it was not anticipated that classified matters would be involved in this proceeding. As required by subpart I, only individuals having appropriate clearances will have access to any classified documents obtained by Duke.

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In the Matter of:)
DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
(Catawba Nuclear Station,) 50-414-OLA
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S REQUEST FOR ACTION UNDER SUBPART I OF 10 C.F.R. PART 2" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 27th day of August, 2004. Additional e-mail service, designated by *, has been made this same day, as shown below.

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Office of Commission Appellate
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Adjudicatory File
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