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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

September 8, 2004 (11:13AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
DUKE ENERGY CORPORATION)
(Catawba Nuclear Station,)
Units 1 and 2))

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

DUKE ENERGY CORPORATION'S RESPONSE TO BLUE RIDGE ENVIRONMENTAL
DEFENSE LEAGUE'S REQUEST FOR NEED-TO-KNOW DETERMINATION
ON CLASSIFIED REGULATORY GUIDANCE FOR NRC CATEGORY I FACILITIES

I. Background

Duke Energy Corporation ("Duke") herein responds in opposition to the Blue Ridge Environmental Defense League's ("BREDL") August 26, 2004, request that the NRC Atomic Safety and Licensing Board ("Licensing Board") make a "positive need-to-know determination" granting BREDL counsel Diane Curran and its expert witness Edwin Lyman access to two NRC guidance documents that contain classified National Security Information.¹

The two classified documents at issue are referenced in and enclosed with a March 13, 2000 letter from Mr. Michael F. Weber, Director, Division of Fuel Cycle Safety and Safeguards, NRC Office of Nuclear Material Safety and Safeguards, to Mr. Peter Hastings, Duke

¹ See "Blue Ridge Environmental Defense League's Request for Need-to-Know Determination" (August 26, 2004) ("BREDL Request"). BREDL's Request was prompted by an August 19, 2004 letter from NRC Staff counsel Antonio Fernandez to Ms. Curran and counsel for Duke, providing the Staff's determination that BREDL's request for access to the classified National Security Information documents must be made to the Licensing Board, pursuant to 10 C.F.R. § 2.905. On August 30, 2004, NRC Staff counsel informed the parties by letter that it has forwarded to the Licensing Board "the documents that are the subject of the parties' requests for the Board's review."

Engineering & Services, Inc., under the subject heading “Design Basis Threat Guidance Applicable to the Mixed Oxide Fuel Fabrication Facility.” The NRC’s letter describes the documents as follows: “(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.” The “Sabotage DBT” regulatory guidance and the “Theft/Diversion DBT” regulatory guidance for NRC Category I facilities are both classified as “confidential.”

For the reasons discussed below, BREDL’s request for access to this classified National Security Information (“NSI”) should be denied.

II. Argument

A. BREDL Has Failed to Meet NRC Standards for Access to Classified Regulatory Guidance Applicable to One Category I Fuel Facility

10 C.F.R. § 2.905(b)(1) provides that access to classified NSI introduced into proceedings may be granted to persons with the required security clearance upon an application showing that access to the NSI may be “required for the preparation” of a party’s case. 10 C.F.R. § 95.35(a)(2) further provides that individuals may not have access to National Security Information unless the individual has an established “need to know.” BREDL has not satisfied the Commission’s standards for such access in its current request.

The appropriate standard for granting access to this confidential information is whether it is “necessary” and “indispensable” to the preparation or litigation of BREDL Security Contention 5. As the Commission has previously ruled in this proceeding: “Plainly, under this ‘necessity’ definition, ‘need-to-know’ is a much narrower standard than general relevance.”²

² *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 72 (2004).*

The Commission further ruled that “the touchstone for a demonstration of ‘need-to-know’ is whether the information is indispensable.”³ In its August 13, 2004 Memorandum and Order on other “need-to-know” determinations, the Licensing Board equated the “need-to-know” standard to the discovery standard, concluding that the latter effectively defines what is necessary and indispensable to a party.⁴ While Duke does not concede this point for purposes of possible appellate review,⁵ access to the documents should be denied even under the Board’s “need-to-know” standard and the standard of 10 C.F.R. § 2.905(b)(1) that access to NSI may be granted if shown to be “required for the preparation of a party’s case.”

BREDL broadly asserts that it has a “need-to-know” regarding the two classified 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” and, further, that it is necessary for BREDL “to evaluate whether Duke’s Security Plan Submittal complies with this guidance.” (BREDL Request, at 2).

³ *Catawba*, CLI-04-6, 59 NRC at 73. In this proceeding, the Commission has reiterated its “strong interest in limiting access to safeguards and security information.” *Id.*, see also 59 NRC at 75, where the Commission emphasized that access to Safeguards documents should be “as narrow as possible,” and that disclosure of sensitive Safeguards documents “must be ‘necessary’ or ‘required.’” *Id.*, 59 NRC at 75 (footnote omitted). This standard “entails thorough examination” of the NRC protected information in question, as well as the release of only redacted documents in some instances and the withholding of documents in other instances. *Id.* These cautions apply with equal (if not greater) force in the case of National Security Information.

⁴ See 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),” slip op. at 5.

⁵ See the August 6, 2004 letter from Mark J. Wetterhahn, counsel for Duke Energy Corporation, to Diane Curran, counsel for BREDL, re “Need-to-know Determination Regarding Certain Duke Energy Corporation Documents Containing Safeguards Information Identified in Response to BREDL Discovery Request 1” for a more complete statement of Duke’s position regarding indispensability.

BREDL's discussion of the nature of the NRC regulatory guidance (BREDL Request, at 2), however, does not advance its "need-to-know" argument. That the classified documents sought appear to be NRC guidance documents is not in dispute, since the March 13 2000 NRC letter so indicates. However, the letter specifically states that this NSI is to "be used in the design of the mixed oxide fuel fabrication facility (MOX FFF)" This is emphasized by the subject line of the March 13, 2000 NRC letter, which states that the letter concerns the "design basis threat guidance applicable to the mixed oxide fuel fabrication facility." Clearly, the guidance was being provided only for its potential applicability to a particular proposed fuel fabrication facility. There is no indication of any more general applicability.

BREDL attempts to link the Category I facility guidance documents to the Catawba Nuclear Station (the Part 50 facility whose MOX fuel-related security provisions are the sole focus of Security Contention 5), by making the broad claim that this regulatory guidance addresses the "security of [NRC] licensed facilities." (BREDL Request, at 2). This characterization is clearly overly broad. There is no indication that the material was prepared for or intended for use by NRC power reactors that may receive and store Category I material. There is no showing that this material was ever transmitted to or relied upon by Duke for its Catawba facility. In fact, Duke represents that it never relied upon this guidance; nor did Duke rely upon any other classified information in designing the security arrangements for MOX fuel at Catawba. Because the Category I Facility Sabotage DBT guidance and the Category I Facility Theft/Diversion DBT guidance do not apply to Catawba, it is neither "appropriate" nor "necessary" for BREDL to have access to those documents to "evaluate whether Duke's Security Plan Submittal complies with this guidance," or to otherwise prepare its case on Security Contention 5. (BREDL Request, at 2).

B. The Classified Regulatory Guidance that BREDL Seeks Is Outside the Scope of this Proceeding

Information relating to NRC Category I facilities has repeatedly been ruled by the Commission to be outside the limited scope of this proceeding. Those Commission rulings provide part of the legal and procedural context in which BREDL's current request must be considered. Neither the Category I Sabotage DBT guidance nor the Category I Theft/Diversion DBT guidance in question should be made available to BREDL because the subject matter of those guidance documents is beyond the scope of this proceeding.

With respect to the Sabotage DBT Guidance for the MOX FFF, the Commission has noted that: "[t]he focus of this adjudication is the [Duke MOX LTA] license application, which proposes specific measures -- enhancements of security requirements for commercial reactors -- necessary to protect the MOX fuel *from theft or diversion*."⁶ The DBT for sabotage for Catawba, as well as for other power reactors, is contained in an individual plant-specific order, which remains unchanged by the proposal to use MOX fuel at the site. Thus, any guidance applicable to the MOX FFF as to *radiological sabotage* is clearly beyond the scope of this proceeding.

The Theft/Diversion DBT guidance for the MOX FFF is also beyond the scope of this license amendment proceeding, as that scope has been defined by the Commission in CLI-04-6 and again in CLI-04-19. Earlier this year, BREDL sought access to certain post-9/11 NRC Orders, including Safeguards and Classified Information concerning the design basis threat for commercial nuclear power reactors and individual Category I facilities. In CLI-04-6, the Commission denied Intervenor's request for access to such protected information. The

⁶ *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, ___ NRC ___ (July 7, 2004 slip op. at 10) (emphasis supplied).*

Commission found that the MOX proceeding “has nothing to do with the NRC’s post-September 11 general security orders,” (*id.*, 59 NRC at 72), and it agreed that it is Duke’s September 2003 Security Plan Submittal, not the post 9/11 security orders, that “details the particular security measures that will be taken as a consequence of the presence of the MOX assemblies at issue here.” *Id.*⁷ Subsequently, in CLI-04-19, the Commission emphasized that “the security needs at Catawba, on the one hand, and at NFS and BWXT, on the other, are visibly different.”⁸ In that decision it found that “BREDL’s erroneous insistence in Security Contention 1 that some other standard applies here [specifically, the standards applicable to NRC Category I facilities] does not beget an admissible contention or create a need-to-know additional safeguards information.” CLI-04-19, slip op. at 10.

The Commission’s reasoning in these previous decisions applies with even greater force to the classified material that BREDL now seeks. The regulatory guidance referenced in the March 13, 2000 NRC letter predates the events of September 11, 2001. It is directed at a specific fuel cycle facility. Clearly, Catawba and the MOX FFF “are visibly different” types of facilities. There has been no demonstration by BREDL that these documents have broader applicability, and are necessary to the development of its case for Security Contention 5.

⁷ Noting that Duke had already made available its security plan for implementing the proposed MOX lead assembly license amendment (the “Security Plan Submittal”), the Commission ruled that: “More general security information related to the Catawba plant-at-large . . . is not, in our judgment, ‘necessary’ to allow BREDL to participate meaningfully in this license amendment proceeding.” CLI-04-6, 59 NRC at 72. The Commission’s admonition that security information “related to the Catawba plant-at-large” is not necessary for BREDL’s meaningful participation in this case still stands. Nonetheless, at this point in the proceeding, Duke has now made available considerably more security-related information relating to the protection of the MOX fuel assemblies (including, for example, large portions of the Catawba Security Plan, a number of specific plant security procedures, and relevant responses to NRC Requests for Additional Information) than it had when CLI-04-6 was issued.

⁸ *Catawba*, CLI-04-19, slip op. at 7.

III. Conclusion

The Licensing Board should find that BREDL does not have a "need-to-know" with respect to the two NSI documents at issue. Alternatively, for the reasons stated in Duke Energy Corporation's August 27, 2004 request for action under Subpart I of 10 C.F.R. Part 2, the Board may, pursuant to 10 C.F.R. § 2.905(d), certify to the Commission any questions relating to access to these classified documents.

Respectfully submitted,



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Dated in Washington, District of Columbia
This 31st day of August, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
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Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Energy Corporation's Response to Blue Ridge Environmental Defense League's Request For Need-to-Know Determinations on Classified Regulatory Guidance for NRC Category I Facilities" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 31st day of August, 2004. Additional e-mail service, designated by *, has been made this same day, as shown below.

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