LBP-04-21

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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RAS 8481

ATOMIC SAFETY AND LICENSING BOARD PANEL

SERVED 09/17/04

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of	Docket No's. 50-413-OLA, 50-414-OLA
DUKE ENERGY CORPORATION	ASLBP No. 03-815-03-OLA
(Catawba Nuclear Station, Units 1 and 2)	September 17, 2004

MEMORANDUM and ORDER
(Finding Need-to-Know by Intervenor Regarding Certain Classified Documents and Referring Ruling to Commission)

Before us is a request by Intervenor Blue Ridge Environmental Defense League [BREDL] for a "need-to-know" determination with respect to two classified NRC guidance documents that BREDL has sought in discovery on the sole security-related contention admitted in this proceeding.[1] For the reasons stated herein, we find, pursuant to 10 C.F.R. § 2.905, that BREDL's counsel and expert, both of whom have been granted appropriate NRC clearances, do have a need for access to such documents for the preparation of BREDL's case, and find further that granting such access will not, in light of such clearances, as well as protective orders issued and security procedures followed in this proceeding to date,[2] be

[1] *See* [BREDL]'s Request for Need-to-Know Determination (Aug. 26, 2004) [hereinafter BREDL Request].

[2] *See* Memorandum and Order (Protective Order Governing Duke Energy Corporation [Duke]'s September 15, 2003 Security Plan Submittal) (Dec. 15, 2003); Addenda to Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (Mar. 5, 2004); Addendum Number 3 to Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (June 28, 2003); Addendum Number 4 Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (Aug. 13, 2004); Memorandum and Order (Protective Order Governing Non-Disclosure of Proprietary Information) (April 8, 2004); Addendum Number 1 to Protective

(continued...)

inimical to the common defense and security. We also find, after consultation with Mr. Francis Young, Senior Program Manager in the Materials Transportation and Waste Security Section, Division of Nuclear Security, Office of Nuclear Security and Incident Response (NSIR), appointed by the Commission as the representative to advise and assist the Board with respect to security classification of information and the safeguards to be observed in this proceeding,[3] that it would not be possible to redact any of the information in the documents in any way that would be meaningful in light of the need we find on the part of BREDL for the information. We thus rule that access to such documents shall be provided, in a manner and location to be determined in consultation with NRC Staff. Finally, we refer our ruling to the Commission pursuant to 10 C.F.R. §§ 2.730(f) and 2.786(g),[4] and stay the ruling pending the Commission's consideration and ruling.

Background

Subject Matter of Proceeding

This proceeding involves Duke Energy Corporation's (Duke's) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station, as part of the U.S.-Russian Federation nuclear nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting it

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[2](...continued)
Order Governing Non-Disclosure of Proprietary Information (April 8, 2004) (May 18, 2004). In addition, we have on many occasions in this proceeding consulted with the parties, their experts and NRC security experts on the proper security procedures to follow, including procedures related to, among other things, physical security, security classification, information security, and the use of electronic equipment.

[3]Commission Order (Aug. 2, 2004) (citing 10 C.F.R. § 2.904).

[4]The citation to 10 C.F.R. §§ 2.730(f) and 2.786(g) is to the former section numbers that were in effect prior to a significant revision to the agency's 10 C.F.R. Part 2 rules of practice and procedure, which became effective February 13, 2004. Under part of this revision, the provisions of these sections were moved to new sections §§ 2.323(f) and 2.341(f). *See* 69 Fed. Reg. 2182, 2217 (Jan. 14, 2004). Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply here, and we use the former numbering throughout this Memorandum and Order.

into MOX fuel to be used in nuclear reactors.[5] By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information (SI); redacted version issued May 28, 2004), the Licensing Board granted BREDL's request for hearing and admitted various non-security-related and security-related contentions.[6] An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding.[7] The ruling herein relates to the one admitted security contention of BREDL, on which the parties are now engaged in discovery. This is one of a series of "need-to-know" rulings we have made in this proceeding, some of which have been in a discovery context, and all but one of which,[8] up to this date, have concerned Safeguards Information.

The contention to which the need-to-know request now before us relates concerns a number of exemptions Duke seeks, as part of its application, from certain regulatory requirements, found in 10 C.F.R. Part 73, for the physical protection of formula quantities of special nuclear material. The contention in question, in the form we admitted it in LBP-04-10, states:

> Duke has failed to show, under 10 C.F.R. §§ 11.9 and 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1); (h)(3) and (b)(3)–(12); and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.[9]

Both Duke, and BREDL quoting Duke, have described the cited provisions from which Duke seeks exemption as follows:

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[5]Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003).

[6]LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004).

[7]Tr. 2072-2708.

[8]Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination Regarding Classified Documents) (Feb. 17, 2004) (unpublished) [hereinafter 2/27/04 Need-to-Know Ruling].

[9]LBP-04-10, 59 NRC at 352.

§ 73.46(c)(1) requirements related to physical barriers for vital areas and Material Access Areas (MAAs);

§ 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in Section 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in 10 C.F.R. 73.55; and

§ 73.46(d)(9) requirements related to armed guards at MAA access points and search requirements for personnel and materials entering/exiting MAAs.[10]

The documents now at issue are NRC guidance documents providing clarification of the design basis threats for theft or diversion, and for radiological sabotage, at licensee sites where there are formula quantities of special nuclear material. We examine herein BREDL's need for access to these documents for adequate preparation of its case in the current discovery context.

Arguments of Parties

BREDL's initial indication of intent to request copies of the documents in question was made on August 3, 2004, in a letter from BREDL counsel to NRC Staff counsel, in which reference is made to an unclassified letter from Michael F. Weber, identifying "certain NRC guidance documents 'for the design basis threat for theft or diversion.'"[11] The Weber letter contains a reference to the NRC's "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"[12] — the

[10]*See* Letter from M.S. Tuckman, Duke Energy Corporation, to Document Control Desk, NRC, Attachment 7, Request for Exemptions from Selected Regulations in 10 C.F.R. Part 11 and Part 73 (Sept. 15, 2003) at 9 [hereinafter Exemption Request] (SI); [BREDL]'s Contentions on Duke's Security Plan Submittal (Mar. 3, 2004), at 15 [hereinafter BREDL Security Contentions] (citing Exemption Request at 9) (SI); LBP-04-10, 59 NRC at 336.

[11]Letter from Diane Curran to Antonio Fernández (Aug. 3, 2004).

[12]Letter from Michael F. Weber, Director, Division of Fuel Cycle Safety and Safeguards, NRC Office of Nuclear Material Safety and Safeguards, to Duke Engineering & Services, Inc., Attn: Mr. Peter Hastings (Mar. 13, 2000).

documents to which BREDL seeks access. On August 19, 2004, NRC Staff counsel informed BREDL counsel that, "[p]ursuant to 10 C.F.R. §2.905(b)(1) and (f), the Staff has determined that you must make your requests to the Board presiding over the instant case."[13] Thereafter, BREDL filed its formal request of August 26, 2004.

BREDL in its request asserts that it "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."[14] As such, BREDL argues, the documents "not only illustrate the NRC Staff's view of how to comply with NRC regulations, but are given 'considerable weight' in NRC adjudicatory proceedings," and adherence to them "may be deemed sufficient to demonstrate compliance with NRC regulatory requirements." *Id.* Therefore, BREDL urges, it is "appropriate and necessary for BREDL to evaluate whether Duke's Security Plan Submittal complies with this guidance." *Id.*

Citing the Commission's decisions in CLI-04-6 and CLI-04-19 as well as certain regulations on access to restricted data and national security information, Duke argues that BREDL's request for the documents at issue should be denied.[15] Noting that the Weber letter "specifically states that [the guidance documents are] to 'be used in the design of the [MOXFFF],'"[16] Duke asserts that "[c]learly, the guidance was being provided only for its potential applicability to a particular proposed fuel fabrication facility. There is no indication of any more

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[13]Letter from Antonio Fernández to Diane Curran and Mark J. Wetterhahn (Aug. 19, 2004).

[14]BREDL Request at 2.

[15][Duke]'s Response to [BREDL]'s Request for Need-to-Know Determination on Classified Regulatory Guidance for NRC Category I Facilities (Aug. 31, 2004), at 2, 5 [hereinafter Duke Response].

[16]The license application for the MOX fuel fabrication facility is the subject of another proceeding that is currently pending before another licensing board. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility, Docket No. 070-03098-ML, ASLBP No. 01-790-01-ML.

general applicability."[17] Duke also represents that it has never relied upon this guidance, and states that "[b]ecause the [two guidance documents] do not apply to Catawba, it is neither 'appropriate' nor 'necessary' for BREDL to have access to those documents" to prepare its case on the one security-related contention admitted in this proceeding.[18] Duke suggests that the Commission has ruled that "[i]nformation relating to NRC Category I facilities . . . [is] outside the limited scope of this proceeding," and, more specifically, that "any guidance applicable to the MOX FFF as to *radiological sabotage* is clearly beyond the scope of this proceeding."[19] Finally, Duke has asked that, if we grant BREDL's request, we also make the documents in question "available to Duke's attorneys, representatives and consultants who have the required security clearance," and moved that we certify questions related to this need-to-know request to the Commission for its determination."[20]

The NRC Staff has indicated that it does not object to BREDL's request for access to the two classified documents in question, "[i]n light of the Board's recent order issued on August 13, 2004."[21] In addition, "given the type of information contained in the documents, the Staff joins the licensee in its motion for certification of this matter to the Commission." [22]

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[17]Duke Response at 4.

[18]*Id.*

[19]*Id.* at 5 (citing CLI-04-19, 60 NRC __, __ (slip op. at 10) (July 7, 2004) (emphasis in original).

[20][Duke]'s Request for Action Under Subpart I of 10 C.F.R. Part 2 (Aug. 27, 2004) at 2 [hereinafter Duke Request].

[21]NRC Staff Response to Intervenor's Motion Requesting Access to Certain Classified Documents (Sept. 7, 2004) [hereinafter Staff Response] (citing Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need to Know and Order Provision of Documents Sought by Intervenor in Discovery) (Aug. 13, 2004) [hereinafter 8/13/04 Memorandum and Order]).

[22]*Id.*

Licensing Board's August 13, 2004, Memorandum and Order

Given the Staff's reliance on our August 13 Memorandum and Order, along with Duke's indication on more than one occasion (including in its current Response) that it considers that it has somehow retained the right to appeal a portion of our rulings therein,[23] and give as well as the applicability of principles addressed therein to the dispute currently before us, we recount here some of the salient points then at issue. We do this in some detail, in order to clarify as much as possible the development in this proceeding of an approach and standard for making the kind of need-to-know determinations that, in addition to being uniquely related to the application at issue in this proceeding, have come to be more frequently called for in this post-9/11 world. We follow and develop further this approach and standard in our analysis of the current dispute, which, like that at issue in the August 13 ruling, involves the discovery stage of the proceeding, and which, according to recent indications,[24] is not the last need-to-know dispute that we will see in this case. Moreover, in the post-9/11 threat environment, there are likely to be an increasing number of such need-to-know disputes requiring resolution generally, and we provide this background for whatever light it may shed on the types of factual and legal issues and nuances that may arise in such disputes.

In the August 13 memorandum and order we confirmed an August 10 verbal bench ruling reversing an August 6 determination by Duke, as the holder of two documents that are part of its security program for its Catawba plant, that BREDL had no "need to know" the contents of the documents. On BREDL's appeal, we concluded that the documents should be

[23] *See* Letter from Mark J. Wetterhahn to Administrative Judges (Aug. 16, 2004); Duke Response at 3; *see also* 10 C.F.R. § 2.786(b)(1), which provides that a petition for review must be filed within 15 days after service of a decision or action.

[24] *See*, for example, our discussion in note 74, below.

made available to BREDL.[25] The documents then before us were listed as items 67 and 68 in an attachment to Duke's response to certain BREDL discovery requests, identified as "Armed Response Procedure Security Procedure 213" and "Security Conditions Security Procedure 401."[26]

Duke's original determination not to provide documents 67 and 68 had been based on their not having been "developed or changed to support the receipt and storage of MOX fuel" and as such, in Duke's view, not being "'indispensable' to the issue of the adequacy of the incremental measures taken to protect the MOX lead assemblies against theft"; and on their "represent[ing] particularly sensitive information and [being] subject to the policy considerations" of limiting access to safeguards and security information and avoiding inadvertent security breaches.[27]

During the course of the August 10 closed session, the Board ascertained from Duke counsel that, although documents 67 and 68 were not part of those security-related procedures and measures adopted by Duke to protect the MOX fuel assemblies at issue in this proceeding, they do "govern the reaction of the security force to any threat to the facility," including the "ability [of any threat] to get into the facility," the "details of the defenders, where they are positioned, where they have to go and the details of the response strategy," as well as timelines and details of how a security incident is defined and how defenders are to react to an incident.[28] Moreover, although Duke had also argued that the documents were not indispensable to

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[25] *See* 8/13/04 Memorandum and Order at 1; Tr. 2968-69 (SI).

[26] *See* 8/13/04 Memorandum and Order at 2 (citing Letter from Mark J. Wetterhahn to Diane Curran (Aug. 6, 2004), at 5 [hereinafter Wetterhahn 8/6/04 Letter]; [Duke]'s Response to [BREDL]'s First Document Production Request on BREDL Security Contention 5, Attachment 1 (July 2, 2004) at 10). For ease of reference we will refer herein to the two documents then in question as "documents 67 and 68."

[27] *Id.* at 2 (quoting Wetterhahn 8/6/04 Letter at 5); *see id*. at 4).

[28] Tr. 2911-12, 2964-65 (SI); *see* 8/13/04 Memorandum and Order at 2; Tr. 2964-65 (SI).

BREDL because it had already been granted access to other relevant documents, Duke was unwilling to forego the possibility of relying on part or parts of the documents in question or of asking the Board to consider these in our ultimate decision in this proceeding, should BREDL posit a scenario in which intruders would get into the plant and into the spent fuel building, get the MOX fuel and escape with it.[29]

BREDL insisted that it has a current need to know with regard to the two disputed documents, in order to postulate scenarios for pointing out vulnerabilities in Duke's security plan. If it is to "posit detailed scenarios of successful attempts to divert or steal plutonium MOX fuel from the Catawba nuclear power plant," BREDL argued, "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."[30] Speaking through its expert, Dr. Edwin Lyman, during the August 10 session, it explained, for example, that "a key issue is the amount of time one has to circumvent those fine line measures," and that the "time you have available does depend on your strategy to defeat or otherwise contain the onsite response force and what you know about any additional offsite responders and their response times."[31] Continuing, Dr. Lyman stated that "we need to know, first of all, how many forces to deploy and the strategy for getting onto the site," emphasizing that this, along with the likely response from the armed responders, was a "critical bit of

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[29]8/13/04 Memorandum and Order at 2; s*ee* Tr. 2927-30 (SI). For example, at Tr. 2927, Duke counsel stated at one point, "I can't say, given the state that we're in on this hypothetical that I'd [never] ever argue that it's not something that we wouldn't somehow or partially rely on, both as the timeline or how long it takes." Counsel further agreed that "there exists the possibility that with regard to these two procedures, that if we relied on these two procedures, at some point we'd have to give it to [BREDL]." 8/13/04 Memorandum and Order at 2-3; Tr. 2931 (SI).

[30]8/13/04 Memorandum and Order at 3; [BREDL]'s Appeal of [Duke]'s August 6, 2004 Need-To-Know Determination (Aug. 6, 2004), at 2-3 [hereinafter BREDL 8/6/04 Appeal].

[31]8/13/04 Memorandum and Order at 3; Tr. 2915 (SI).

information in how you would then go about the successive steps to obtain the fuel and to remove it."[32] As indicated below, these sorts of factors are also relevant to the current dispute.

For its part, Staff counsel indicated that whether or not BREDL should be found to have a "need to know" the contents of the documents in question at this point in this proceeding depended on how the Board interpreted the Commission's "indispensability" standard for need-to-know determinations in the discovery phase of a proceeding — according to Duke's interpretation or the Staff's.[33] Duke counsel agreed that the need-to-know determination we were called upon to make appeared to "hinge on the discovery standard."[34]

Duke construed the indispensability standard as being different from and more stringent than the discovery standard of "reasonably calculated to lead to the discovery of admissible evidence."[35] Duke's argument then was that,

> [t]o be "indispensable," a document containing Safeguards Information must be narrowly related 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 test assemblies and prepare testimony and assist in cross examinations on the limited issue before the Licensing Board without the document in question.[36]

The Staff, on the other hand, interpreted the indispensability standard as being *defined by* the discovery standard during the discovery phase of a proceeding,[37] and stated during oral argument, that "during the discovery phase, if there is a safeguards document[ ] involved, . . .

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[32]8/13/04 Memorandum and Order at 3; Tr. 2915-16 (SI); *see id.* at 2917-18 (SI).

[33]8/13/04 Memorandum and Order at 3-4; *see* Tr. 2953-56, 2960-61 (SI); *see also* CLI-04-06, 59 NRC 62, 73 (2004).

[34]8/13/04 Memorandum and Order at 4; Tr. 2961. (SI)

[35]8/13/04 Memorandum and Order at 4; *see* Wetterhahn 8/6/04 Letter at 3.

[36]8/13/04 Memorandum and Order at 4; Wetterhahn 8/6/04 Letter at 3.

[37]8/13/04 Memorandum and Order at 4; Letter from Margaret J. Bupp to Diane Curran (Aug. 3, 2004) at 1 [hereinafter Bupp 8/3/04 Letter]; *see also* Tr. 2951 (SI).

and it's reasonably likely, reasonably calculated to lead to admissible evidence at the evidentiary hearing stage of the proceeding, then it should be produced to the party requesting it."[38] We noted that, in its recent need-to-know determination on various documents requested by BREDL, the Staff had stated, *inter alia*, that

> [i]t is the Staff's position that nothing in either CLI-04-19 or CLI-04-21 changes the positions set out by the Commission in CLI-04-06. That decision was limited to a finding that BREDL had a need-to-know in relation only to 'information [that was] indispensable to BREDL's opportunity to frame [a] litigable contention.' [CLI-04-06, 59 NRC 62, 67 (2004)]. However, CLI-04-06 was limited to the contention stage. At this stage of the hearing, the question becomes what information is indispensable to discovery. In making this determination, the Staff looks to two sources. First the traditional discovery standard, that information is discoverable if it is reasonably calculated to lead to admissible evidence. Second, the Staff follows the Commission's admonition that 'access to safeguards documents be as narrow as possible.' [*Id.*][39]

The Staff had found a need to know regarding information "reasonably calculated to lead to admissible evidence," but provided for redaction so that only those portions of a document "related to the exemptions requested by Duke and the additional security measures proposed in support of those exemptions" would be disclosed.[40]

In our August 13 decision we found the Staff's approach to be a reasonable one, and to be in keeping with the analysis we had implicitly applied previously in this proceeding.[41] Notwithstanding Duke's argument that "the discovery standard and the indispensability standard are two different things,"[42] we pointed out that the traditional discovery standard of whether

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[38]8/13/04 Memorandum and Order at 4; Tr. 2951 (SI).

[39]8/13/04 Memorandum and Order at 4-5; Bupp 8/3/04 Letter at 1-2 (citing CLI-04-4; CLI-04-19; CLI-04-21, 60 NRC ___ (July 29, 2004)).

[40]8/13/04 Memorandum and Order at 5; Bupp 8/3/04 Letter at 2.

[41]8/13/04 Memorandum and Order at 5 (citing Licensing Board Order (Ruling on Duke Energy Corporation Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention) (June 28, 2004) (unpublished)).

[42]Tr. 2940 (SI).

information is "reasonably calculated to lead to the discovery of admissible evidence,"[43] which is contained in the rules that are applicable in this proceeding,[44] has, as it has developed, come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue.[45] And, as the Commission has stated and the NRC Staff has recognized, we noted 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."[46] We observed, citing a statement of Staff counsel, that this language "means something."[47] We thus looked to whether the information sought was indispensable to BREDL in preparing for litigation of Contention 5, in the sense of being needed for discovery and "reasonably calculated to lead to the discovery of admissible evidence,"[48] and found that it was.[49]

We observed that "the material is not only reasonably calculated to lead to the discovery of admissible evidence, it may well be admissible evidence itself, as part of the information used in any scenario(s) that BREDL will formulate."[50] And we found that the likelihood of Duke relying on information in the documents could not be said to be so small that we could find the standard for discovery not to have been met at this point.[51] We found, to the contrary (as

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[43] *See* FRCP 26(b)(1).

[44] *See* 10 C.F.R. § 2.740(b)(1).

[45] 8/13/04 Memorandum and Order at 5.

[46] *Id.* (citing CLI-04-06, 59 NRC at 72; Bupp 8/3/04 Letter at 1; Tr. 2951).

[47] *Id.* (citing Tr. 2951 (SI)).

[48] *Id.*

[49] *See id.* at 6.

[50] *Id.*

[51] *See id.*

pointed out by BREDL counsel on August 10), that Duke had already in fact stated that it plans "to rely on the existing security force" at Catawba.[52]

We concluded:

> . . . BREDL has a current need for the information in question, which it requested in discovery, and [ ] the information is indispensable in formulating scenarios to demonstrate any asserted vulnerabilities in Duke's planned security measures for the MOX fuel. Indeed, taking into account, as we have previously noted, the integrated nature of nuclear power plant security, we cannot say that BREDL could prepare an effective scenario — whether or not it ultimately successfully points out any vulnerabilities — *without* access to information on timelines and other details relating to security measures and procedures to prevent access to the plant, whether for radiological sabotage or theft. And thus, even under Duke's argued standard of "essential to the development of the case regarding the admitted contention," the material is discoverable.[53]

We therefore ordered provision of the documents, subject, as noted above, to possible redaction at the request of the Staff.[54] No appeal was taken of this ruling, although, as

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[52] *Id.* at 6 (citing Tr. 2958-59 (SI); [Duke]'s Answers to [BREDL]'s First Set of Interrogatories on BREDL Security Contention 5 (July 2, 2004) (SI) at 14).

[53] *Id.* at 6. We noted in making our ruling that we were cognizant of Duke Counsel's agreement that, if at some point Duke relied on the documents in question, BREDL "would have a right to stop the proceeding, or to [at] some point examine these and take the time necessary to determine how they would respond to that," and that it "might be the case" that this could necessitate additional hearing time to take more evidence arising out of the results of BREDL's examination. 8/13/04 Memorandum and Order; Tr. 2930-32. As stated by the Chair at that time, Duke in such instance would have to recognize that it "would be giving up any opportunity to complain about the time that it took to go through that procedure," by virtue of urging us to delay provision of the materials at issue until such time as Duke relied on them to "defend against" any scenario presented by BREDL. 8/13/04 Memorandum and Order at 7; Tr. 2932. We noted Counsel's agreement that this "might present a problem." 8/13/04 Memorandum and Order at 7; Tr. 2935 (SI).

We ultimately found that Duke's proposal that we, in effect, at the same time rule quickly on the issue now before us, and also leave for a later time any ruling actually providing access to the materials in question, would be problematic and could very plausibly create significant inefficiencies and delays, in this case in which Duke strongly urges an accelerated schedule. 8/13/04 Memorandum and Order at 7 (citing Tr. 2939 (SI)). Pointing out that discovery is designed to get all information that is likely to be relevant in a hearing "on the table" *prior to* a hearing, in order to promote the efficient conduct of a proceeding, we determined that to wait, as applicant Duke would have had us do, and at a later date go through the somewhat cumbersome need-to-know process, would more likely cause undue and unnecessary delay and therefore was not appropriate. *Id.* at 7-8.

[54] Disclosure of the information in documents 67 and 68 is still a pending matter in certain respects. In directing Duke to make available the documents in question, we allowed the Staff to view the materials to see whether, in its view, any redactions to it were necessary, provided this was done in a timely manner and took into account Duke counsel's own statement that the documents in question

(continued...)

indicated above, Duke has attempted nonetheless to retain its ability to appeal a portion of our ruling related to the standard for need-to-know in a discovery context (without, we note, addressing the question of the timeliness of any such appeal under 10 C.F.R. § 2.786(b)(1)).

Analysis

With the preceding background in view, we turn now to the question of BREDL's need for the two classified documents now at issue. We note first that, as Duke argues, there is no reliance by Duke on any information in these documents, in contrast to the possibility of such reliance on documents 67 and 68. Thus the reliance principle that we discussed in our August 13 Memorandum and Order provides no basis for finding a need to know at this time. With regard to the discovery standard we discussed in our August 13 ruling, and to BREDL's ability to create scenarios for pointing out vulnerabilities in Duke's security plan, as Duke has challenged it to do,[55] we find these to be more relevant herein. Our analysis in this vein starts with the contention in support of which BREDL's scenarios will be offered.

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[54](...continued)
are "so short and so Catawba-specific that if you removed any portion of it, [ ] in essence, it would counter [the Board's] ruling." 8/13/04 Memorandum and Order at 8; Tr. 2971 (SI). Duke subsequently decided to make certain redactions to the documents. *See* Letter from Mark J. Wetterhahn to Administrative Judges (Aug. 16, 2004). Thereafter, on September 1, 2004, Duke agreed to provide the documents to BREDL in unredacted form. *See* Tr. 3141-42 (SI). Then later, on September 3 (notwithstanding our direction that, "absent an appeal and stay of this ruling, the materials shall be made available as soon as possible, and any disputes on redaction issues shall likewise be brought to the attention of the Board at the earliest possible time, and will be considered to the degree necessary at the next scheduled closed session in this proceeding, on September 1, 2004," 8/13/04 Memorandum and Order at 8), upon the recommendation of the Staff, Duke changed course again and decided not to provide the documents unredacted, but only in their redacted state. Letter from Mark J. Wetterhahn to Diane Curran (Sept. 3, 2004); Letter from Antonio Fernández to Administrative Judges (Sept. 3, 2004). The appropriateness of the redactions to the documents is thus currently pending before us. *See* Tr. 3240-81; Letter from Diane Curran to Antonio Fernández and Susan L. Uttal (Sept. 7, 2004) (SI).

[55]The first reference in this proceeding to the positing of scenarios by BREDL was in Duke's argument in its (SI) response to BREDL's original security contentions in this matter, based upon its reading of CLI-04-6. *See id.* at 73; LBP-04-10, 59 NRC 296, 312, 346 (2004); *but see also id.* at 350-52. Duke continues to seek (at this point, in discovery requests to BREDL) details of scenarios to be postulated by BREDL, *see* Tr. 3141-42 (SI), and BREDL has indicated an intent to provide the same, *see id*.; BREDL 8/6/04 Appeal at 2-3, even though Duke, as the applicant in this proceeding, will bear the burden of persuasion that its application should be granted, *see* 10 C.F.R. § 2.732.

As noted above, in this contention BREDL challenges Duke's request for exemption from several subsections of 10 C.F.R. § 73.46, arguing that Duke has failed to show the exemptions are "authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and the public interest."[56] Again, the specific exemptions that are sought concern the following § 73.46 requirements:

> § 73.46(c)(1) requirements related to physical barriers for vital areas and Material Access Areas (MAAs);
>
> § 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in § 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in § 73.55; and
> § 73.46(d)(9) requirements related to armed guards at MAA access points and search requirements for personnel and materials entering/exiting MAAs.[57]

10 C.F.R. Part 73 governs the "Physical Protection of Plants and Materials." Section 73.46 addresses "Fixed site physical protection systems, subsystems, components, and procedures." We accept the above-quoted summaries of the subject matter of the specific provisions of § 73.46 from which Duke seeks exemption. We note as well the following regulatory provisions from Part 73, including the beginning language of § 73.46, which states:

> (a) A licensee physical protection system established pursuant to the general performance objective and requirements of § 73.20(a) and the performance capability requirements of § 73.45 shall include, but are not necessarily limited to, the measures specified in paragraphs (b) through (h) of this section. . . .

Looking to § 73.20(a), we find the following requirements:

> (a) In addition to any other requirements of this part, each licensee who . . . possesses or uses formula quantities of strategic special nuclear material at any site . . . subject to control by the licensee; . . . shall establish and maintain or make arrangements for a physical protection system which will have as its objective to provide high assurance that activities involving special nuclear

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[56] LBP-04-10, 59 NRC at 352.

[57] *See* LBP-04-10, 59 NRC at 336.

material are not inimical to the common defense and security, and do not constitute an unreasonable risk to the public health and safety. The physical protection system shall be designed to protect against the design basis threats of theft or diversion of strategic special nuclear material and radiological sabotage as stated in § 73.1(a).

Finally, § 73.1(a) provides in relevant part as follows:

> (a) *Purpose.* This part prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The following design basis threats, where referenced in ensuing sections of this part, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. . . .
>
> (1) *Radiological sabotage.* . . .
>
> . . . .
>
> (2) *Theft or diversion of formula quantities of strategic special nuclear material*. . . .

The two classified documents at issue, which the parties have agreed we should examine in making our ruling herein,[58] contain certain unclassified language, which is relevant to the preceding regulatory requirements. One of the documents, entitled "Guidance on Adversary Characteristics for the Design Basis Threat for Theft or Diversion," contains the following introductory language:

> (U) 10CFR73.1(a)(2) enumerates a set of adversary characteristics that comprise the NRC Design Basis Threat (DBT) for theft or diversion of formula quantities of strategic special nuclear material. The DBT is not intended to represent a real, or actual threat, but rather a hypothetical threat that: 1) provides a standard with which to measure changes in the real threat environment; 2) is used as a basis to develop regulatory requirements; and 3) provides a standard for evaluation of implemented safeguards systems.
>
> (U) The lack of specificity in describing individual adversary characteristics in 10CFR73.1(a)(2) was done to provide information to the public that was not sensitive and would not provide specific details of the adversary against which a licensee's systems were designed to protect. Therefore the following discussion provides clarification and guidance when describing selected characteristics of the adversary to be used for evaluating licensee implemented physical protection programs.

[58]Tr. 3195-96 (SI).

The other of the two classified documents, entitled "Guidance on Adversary Characteristics for the Design Basis Threat for Radiological Sabotage (Category I Fuel Cycle Facility)," contains similar introductory language:

> (U) 10CFR73.1(a)(1) enumerates a set of adversary characteristics that comprise the NRC Design Basis Threat (DBT) for radiological sabotage. The DBT is not intended to represent a real, or actual threat, but rather a hypothetical threat that: 1) provides a standard with which to measure changes in the real threat environment; 2) is used as a basis to develop regulatory requirements; and 3) provides a standard for evaluation of implemented safeguards systems.
>
> (U) The lack of specificity in describing individual adversary characteristics in 10CFR73.1(a)(1) was done to provide information to the public that was not sensitive and would not provide specific details of the adversary against which a licensee's systems were designed to protect. Therefore the following discussion provides clarification and guidance when describing selected characteristics of the adversary to be used for evaluating licensee implemented physical protection programs.

It is apparent from the introductory language to the two documents that, contrary to Duke's arguments, they are generic in providing "clarification and guidance" related to the DBTs for theft or diversion of formula quantities of strategic special nuclear material — which all parties agree is relevant herein — as well as for radiological sabotage regarding the same. Indeed, it is difficult to imagine a clearer "indication of . . . general applicability"[59] than that contained in the quoted language.

We note the parenthetical reference to an unspecified "Category I Fuel Cycle Facility" in the title of the second document, a term we find to be somewhat ambiguous and uncertain as to what kind of facility is being referenced. The "fuel cycle" consists of a number of activities — mining, milling, extraction, enrichment, fabrication, utilization, and disposal or reprocessing. The words "Category I" would limit the activities to those at the enrichment phase or later. But a plant to manufacture fuel would more likely be called a "fuel fabrication facility," and indeed, contrary to Duke's argument to the effect that the document relates specifically to the MOX or

[59] *See* Duke Response at 4.

any other "fuel fabrication facility," the words "fuel cycle" are appropriately associated with any of the phases of the fuel cycle, as listed above, limited only by the modifier, "Category I," to enrichment, fabrication, utilization, and disposal or reprocessing facilities. And, of course, a reactor is a utilization facility.[60] Thus, just as with the governing regulations and the document relating to the DBT for theft or diversion, there is no limitation on the application of this document, relating to the DBT for radiological sabotage, to any one or more fuel fabrication facilities. Moreover, the purpose of the document — to "provide[ ] clarification and guidance" in light of the "lack of specificity" in 10 C.F.R. § 73.1(a)(1) — is clearly stated.

We also note Duke's argument, with regard to the second document, that radiological sabotage is outside the scope of this proceeding, based on the Commission's statement that the "focus of this adjudication is the license application, which proposes specific measures — enhancements of security requirements for commercial reactors — necessary to protect the MOX fuel from theft or diversion."[61] But such a focus does not, we find, exclude any consideration at all of radiological sabotage, which BREDL has stated will play a role in its scenario(s) for theft or diversion of SSNM, as part of diversionary tactics the hypothetical attackers might employ.[62]

In addition, although, as Duke argues, the Commission stated in CLI-04-6 that this proceeding "has nothing to do with the NRC's post-September 11 general security orders,"[63] the documents at issue obviously provide something much more fundamental and basic: namely, "clarification and guidance" regarding regulatory requirements that undisputedly apply to

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[60]The Commission has explained that, although reactors are not generally considered to be Category I facilities, "[b]y possessing the four lead test assemblies, Catawba will be a Category I facility until the assemblies are inserted into the reactor core." CLI-04-19, 60 NRC at __ (slip op. at 3 n.11).

[61]Duke Response at 5; CLI-04-19, 60 NRC at __ (slip op. at 10).

[62]*See* Tr. 3092, 3106-07, 3111-15 (SI).

[63]59 NRC at 72; *see* Duke Response at 5-6.

Catawba during the time when, as stated at § 73.20(a), it "possesses" formula quantities of SSNM, prior to loading the MOX fuel into the core of the reactor.[64] As such, these documents are without question not only relevant as well as "reasonably calculated to lead to the discovery of admissible evidence"; we find they provide clarification that is "necessary" and "indispensable" to BREDL in formulating scenarios that address the governing regulatory requirements — they clarify the actual requirements of § 73.1(a).

We make this finding in full consideration of the Commission's guidance that distribution of Safeguards Information must be limited to "those having an actual and specific, rather than a perceived, need to know."[65] The same obviously applies to Classified Information, as does the following Commission statement from CLI-04-6:

> 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.[66]

In addition, we are heedful of the Commission's direction that "Boards, like the Commission itself, must keep in mind 'the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission.'"[67]

In this proceeding, which involves issues not only of national but of international concern, it is particularly important to be attentive to this "delicate balanc[ing]" that we must perform. The interest in limiting the distribution of materials such as the Classified documents now at issue is great. But the measures that we and the parties have taken in this proceeding,

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[64] *See supra* note 60; *see also*, *e.g.*, CLI-04-19, 60 NRC at __ (slip op. at 6), wherein the Commission states that the "NRC Staff measures license applications against regulatory standards, not against enforcement orders."

[65] CLI-04-6, 59 NRC at 73; *see also* CLI-04-21, 60 NRC at __ (slip op. at 7).

[66] CLI-04-6, 59 NRC at 73.

[67] CLI-04-21, 60 NRC at __ (slip op. At 9-10).

in following extensive security procedures[68] and, on the part of some, obtaining appropriate clearances, have also been significant; and the number of persons who would have access to the documents in question is small. In addition, BREDL has shown itself very capable in its important role in this proceeding of "helping [the NRC] discharge [its] mission" of protecting the public by in effect "looking out for" the safety of the public from the perspective *of* the public, of which it is a part, so that providing it with access to relevant materials is to a meaningful degree a consideration on both sides of that delicate balance.[69]

In this context, as in our August 13 ruling, we note, notwithstanding Duke's argument that the discovery standard and the indispensability standard are two different things, that the traditional discovery standard of relevance and whether information is "reasonably calculated to lead to the discovery of admissible evidence,"[70] has as it has developed come to define what is "necessary" and "indispensable" to a party in preparing for litigation on any cause or issue. Thus, although in all need-to-know questions we must undertake the "delicate balanc[ing]" we address in the preceding paragraphs, we do not find it to be inconsistent, in this discovery stage of this proceeding, to find that the discovery and need-to-know standards are effectively congruent and coextensive. Indeed, there is a balancing inherent in many discovery rulings,

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[68] *See supra* note 2.

[69] To say that BREDL serves in such a role relating to public safety in no way, of course, minimizes the respective responsibilities and particular expertise of the NRC, its Staff, and Duke, relating to the protection of public safety. For example, the central importance of public safety as part of the NRC's mission is often recognized. BREDL, however, with members who live in the area of Catawba, also serves a public safety function in its own unique, and not insignificant, way, thereby helping the NRC discharge its own public safety mission, a role the Commission recognized in CLI-04-21. *See* text accompanying note 67, above,.

[70] This standard was incorporated into the governing discovery rule in this proceeding,10 C.F.R. § 2.740(b)(1), which defines the scope of discovery as allowing parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

which take into account not only relevance and need for information but also such things as, for example, "embarrassment, oppression, or undue burden or expense," any of which may be grounds for limitation or denial of discovery.[71]

This approach is also consistent with the Commission's statement in CLI-04-6 that "a party's need to know may be different at different stages of a proceeding,"[72] language which the Staff has correctly stated "means something" — i.e., the language has meaning that may be applied in making rulings on need-to-know questions. Thus, for example, in our earlier need-to-know ruling on certain classified post 9/11 orders issued by the commission, we found that a balancing of all relevant factors *at that time* led us to a ruling that allowing access to such classified information prior to admitting BREDL as a party was inappropriate under the circumstances.[73] The need-to-know standard that we applied at that stage of this proceeding, prior to admission of contentions, was — reasonably so — more stringent than that we now apply. But we agree with the Staff that, at this discovery stage of this proceeding, provision of the documents at issue is both appropriate and consistent with the discovery standard. And we find, at this stage, that defining the need-to-know "indispensability" standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow — a course which leads herein to our ruling that access to the documents in question is warranted.

In further explanation of our ruling herein, we reiterate that BREDL, in the contention to which the current discovery and creation of scenarios apply, is contesting Duke's request for exemption from certain requirements that — absent such exemption — will apply to Catawba should Duke go forward with the MOX lead test assembly proposal. BREDL contends that the

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[71] *See* 10 C.F.R. § 2.740(c).

[72] CLI-04-6, 59 NRC at 72.

[73] *See* 2/27/04 Need-to-Know Ruling at 9.

exemptions cannot be justified, and in response Duke essentially challenges BREDL to construct a credible scenario that could produce theft of the MOX fuel if the exemptions are granted. BREDL has stated that it intends to identify potential weaknesses in Duke's defense strategy, if not a complete strategy leading to theft of MOX fuel while in the spent fuel pool. In order to make such identification, BREDL needs to make reasonably accurate assumptions about defensive strategies, attack teams, and personnel placements in the plant who might defend against intruders who enter the plant and then try to make their way to the spent fuel pool building.[74] The requested documents will permit BREDL to craft its scenarios with relevant information that clarifies governing regulatory requirements. Such scenarios will, as Dr. Lyman stated, be directed to theft or diversion of the MOX fuel, as well as diversionary tactics using radiological sabotage to draw the attention of security personnel away from the spent fuel pool building area. Thus, we find, the clarifying information in the documents at issue is "relevant," as well as "reasonably calculated to lead to the discovery of admissible evidence," and at the same time also "necessary" and "indispensable" to BREDL in the preparation of its case.

Ruling

Based upon the preceding analysis, and pursuant to 10 C.F.R. § 2.905, we conclude that access to the classified documents in question shall be provided to BREDL counsel Diane Curran and BREDL expert Dr. Lyman, and also, as requested by Duke, to Duke counsel David Repka and Duke MOX Fuel Project Manager Stephen Nesbit, all of whom, we are informed, hold the appropriate clearances for such access. We conclude that granting such access to the documents will not, in light of clearances held by those to whom access will be provided, along with protective orders issued and security procedures followed in this proceeding to date, be

[74] *See also* our discussion, *supra*, of our August 13 ruling, with regard to the various sorts of factors that may play into the creation of such scenarios.

inimical to the common defense and security. Examination of such documents shall take place in a manner and location to be determined in consultation with NRC Staff.[75]

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[75]We encourage the parties to work together in good faith to achieve what is ordered herein, and note again, as we have previously done, that such good faith cooperation on matters not legitimately and seriously in dispute may further the goal of going forward in this proceeding in an efficient and expeditious manner — just as we have, for example, made bench rulings (followed by timely-issued written confirming orders) whenever possible, in order to move this proceeding forward as speedily as possible. Such an approach is necessary if we are to avoid, for example, the need to suspend discovery pending appropriate resolution of matters necessary to the completion of meaningful discovery, in which there are delays, as we have had to do on one occasion earlier in this proceeding. *See* Memorandum and Order (Confirming July 16, 2004, Bench Ruling Suspending Discovery Proceedings Pending Further Commission Guidance) (July 28, 2004) (unpublished) [hereinafter 7/28/04 Memorandum and Order]. The then-pending matter was the Staff's appeal of our ruling in LBP-04-13, 60 NRC __ (July 8, 2004) (subsequently affirmed by the Commission in CLI-04-21, 60 NRC __ (July 29, 2004)), finding, in a need-to-know context, that BREDL's expert, Dr. Edwin Lyman, possessed sufficient knowledge, skill, experience, training, and education to be able to assist and aid the Board in making our determinations on the security issues in this proceeding, and to render him an acceptable expert to examine, with his NRC-issued "L" level clearance, appropriate Safeguards Information. LBP-04-13, 60 NRC at __ (slip op. at 1, 6).

Unfortunately, despite commendable efforts to proceed as expeditiously as possible even without resolution of all pertinent disputed matters (for example, BREDL's agreement to go forward in good faith with attempts at scenarios in the absence of resolution of all pending need-to-know matters, Tr. 3237 (SI)), we are constrained to observe that delays of the sort addressed in our 7/28/04 Memorandum and Order are still with us. One example of this that is particularly of concern because of the number of documents involved is an apparent misunderstanding between BREDL and the Staff regarding an August 13 BREDL request for various guidance documents, over whether BREDL was expected to await certain post-9/11 public availability determination processes of the Public Documents Room (PDR) prior to the Staff taking action itself to facilitate the speediest possible resolution of these issues with regard to a significant number of requested documents (the Staff citing the provision of 10 C.F.R. § 2.740(b)(1) that when items are "reasonably available" from the PDR it is sufficient response to provide mere reference to the document). Tr. 3312-14 (SI); *see id*. 3309-24 (SI); Letter from Diane Curran to Antonio Fernández (Aug. 13, 2004). The parties are now, at the encouragement of the Board, continuing their admirable attempts to work together to resolve all necessary need-to-know determinations as quickly as possible, but the potential for delay remains a cause for concern, in this as well as certain other matters.

One other matter that more directly involves the sole non-security-related contention in this proceeding, on which we held a hearing July 15-16, 2004, Tr. 2072-2708, is Duke's recent notification of certain calculated doses in a table in the Catawba Updated Final Safety Analysis Report (UFSAR) not being up to date, indicating that Duke was "working to provide . . . updated material by September 10, 2004." Letter from David A. Repka to Administrative Judges (Aug. 31, 2004), and Attached Letter from W.R. McCollum to NRC Document Control Desk (Aug. 31, 2004) at 2. Later, on September 15, 2004, Duke counsel provided notification that the "new target date" for provision of this information is September 17, 2004. E-mail from Anne Cottingham to service list for proceeding (Sept. 15, 2004). Although Duke has stated that this information is not material to certain matters at issue on the non-security contention, the Staff and BREDL have not taken a position on the effect of the information until they have seen the documents, with the Staff indicating that its review of the updated material would take "a least two weeks, and that is a minimum." Tr. 3083 (SI); *see id*. 3079-84 (SI). It is hoped that this problem will not negatively affect either the Board's current deliberations and work on its initial decision

(continued...)

We are mindful of the Commission's guidance in CLI-04-6 that when we make such a ruling, "it is imperative that access to safeguards documents be as narrow as possible," and it goes without question that the same applies to classified documents.[76] With regard to the two classified documents at issue, however, we conclude, after consultation with our security expert and advisor, Mr. Young, that it would not be possible to redact any of the information in the documents in any way that would be meaningful in light of the need we find on the part of BREDL for the information.

Finally, taking into consideration both Duke's request, joined in by the Staff, that we certify questions related to this need-to-know request to the Commission for its determination,[77] and BREDL's argument that we as the trier of fact should first make a determination before sending this to the Commission;[78] and given as well the security classification level of the documents in question, their significance, and the effect on the basic structure of this proceeding of providing access to them;[79] we refer our ruling to the Commission, pursuant to

[75](...continued)
on the non-security-related issues heard in July, or any ongoing preparation for a hearing on the security-related contention, but the ultimate impact on either is unknown at this time.

[76]CLI-04-6, 59 NRC at 75.

[77]Duke Request at 2; Staff Response at 1.

[78]Tr. 3182 (SI).

[79]*See* CLI-04-06, 59 NRC at 70.

10 C.F.R. §§ 2.730(f) and 2.786(g)(1),(2). We also stay the ruling, pursuant to 10 C.F.R. § 2.718(e), pending the Commission's consideration and ruling.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

_____
Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

_____
Anthony J. Baratta
ADMINISTRATIVE JUDGE

_____
Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 17, 2004[80]

[80]Copies of this Memorandum and Order were sent this date by internet e-mail to counsel for all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (FINDING NEED-TO-KNOW BY INTERVENOR REGARDING CERTAIN CLASSIFIED DOCUMENTS AND REFERRING RULING TO COMMISSION) (LBP-04-21) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket Nos. 50-413-OLA and 50-414-OLA
LB MEMORANDUM AND ORDER
(FINDING NEED-TO-KNOW BY INTERVENOR
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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of September 2004