

RAS 8514

RELATED CORRESPONDENCE
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 24, 2004
DOCKETED 09/27/04

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S OBJECTIONS TO BREDL'S SECOND SET OF
DISCOVERY REQUESTS TO NRC STAFF REGARDING SECURITY CONTENTION 5

INTRODUCTION

On September 20, 2004, the Blue Ridge Environmental Defense League (BREDL) filed its Second Set of Discovery Requests to NRC Staff Regarding the Security Plan Submittal (Request) in the above-captioned matter. The Request consists of one General Interrogatory, one General Document Production Request, eight Specific Interrogatories, and two Specific Document Production Requests.

The Staff hereby files its objections to BREDL's Request, as discussed below.¹ The Staff also requests that the Licensing Board issue a protective order that the discovery not be had pursuant to 10 C.F.R. § 2.740(c).

¹ Pursuant to 10 C.F.R. § 2.744, a request for production of a document may be served on the Executive Director for Operation and shall, inter alia, state why the record or document is relevant to the proceeding. Similarly, 10 C.F.R. 2.720(h)(2)(ii) requires a finding by the Licensing Board that the answers to the interrogatories are necessary to a proper decision and are not obtainable from another source. Without waiving its right to object based on failure to comply with 10 C.F.R. 2.744, the staff is filing the objections delineated herein.

OBJECTIONS

A. Objections to Document Production Requests

DOCUMENT PRODUCTION REQUEST NO. 1: Please provide access to the portions of the Security Plan which address devitalization during cold shutdown.

The Staff objects to BREDL's request. The instant request asks for access to information for which the Staff has already determined BREDL does not have a need-to-know. At the time the Staff produced the Physical Security Plan to BREDL the Staff determined that certain portions must be redacted because BREDL did not have an appropriate need for that information. In the instant request, as it has before, BREDL seeks access to information that would disclose the identification of vital areas unrelated to the instant proceeding. As the Staff has previously stated, precise identification of the location of vital areas and target sets is unnecessary, even in light of the Intervenors proposed scenario involving the use of diversionary tactics. In fact, the Intervenors ability to frame a scenario in response to Duke's discovery request proves that the Staff's request to withhold this information is reasonable (i.e., BREDL is capable of framing scenarios without access to this information).

DOCUMENT PRODUCTION REQUEST NO. 2: Please provide the results of all OSREs conducted by the NRC at licensed nuclear facilities in the United States.

The Staff objects to BREDL's request. BREDL's request is overly broad and goes beyond the scope of this proceeding. BREDL's request must be denied as it requests Safeguards Information that in no way pertains to the Catawba facility. Given the narrow scope of the security issues pending before the Board, the information sought by the Intervenor could not lead to any admissible evidence. Notably, the Staff has already produced the OSRE report concerning the Catawba facility. Therefore, the request is improper and should be denied.

B. Objection to General Interrogatory No. 1

GENERAL INTERROGATORY NO. 1. State the name, business address, and job title of each person who was consulted and/or who supplied information for responding to each of the interrogatories, requests for admission, and requests for

the production of documents posed by BREDL herein. Specifically note for which interrogatories, requests for admissions and requests for production each such person was consulted and/or supplied information.

If the information or opinions of anyone who was consulted in connection with your response to an interrogatory or request for admission differs from your written answer to the discovery request, please describe in detail the differing information or opinions, and indicate why such differing information or opinions are not your official position as expressed in your written answer to the request.

The Staff has no objection to the first paragraph of General Interrogatory No. 1. The Staff, however, objects to the second paragraph of General Interrogatory No. 1 on the basis of the deliberative process privilege. The deliberative process privilege is designed to encourage frank discussions within the Government regarding the formulation of policy and the making of decisions. *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197-98 (1994). Communications are deliberative if they reflect a consultative process. *Id.* at 197. This privilege applies even where a purely factual matter is inextricably intertwined with privileged communications or the disclosure of the factual material would reveal the agency's decision-making process. *Id.* Since revealing the differing information or opinions, if any exist, along with the reasons why such information or opinions are not the official agency position would reveal the agency's decision-making process, the Staff objects to the second paragraph of General Interrogatory No. 1.

Moreover, 10 C.F.R. 2.740(b)(3) states that "while interrogatories may seek to elicit factual information reasonably related to a party's position in the proceeding, including data used, assumptions made, and analyses performed by the party, such interrogatories may not be addressed to, or be construed to, require reasons for not using alternative data, assumptions, and analyses where the alternative data, assumptions, and analyses were not relied on in developing the party's position." 10 C.F.R. §2.740(b)(3). Thus, to the extent the second paragraph of General Interrogatory No. 1 requests that the Staff provide the reasons why any differing information or

opinions, if any exist, are not the official position of the agency, the Staff objects to the interrogatory.

C. Objections to Specific Interrogatories

INTERROGATORY NO. 2: Please describe any proposals or plans by the NRC Staff to revise the Design Basis Threat for theft of strategic special nuclear materials from the Catawba nuclear power plant, including the content of any such proposals and the existing or proposed schedule for implementation.

The Staff objects to BREDL's interrogatory. Interrogatory 2 requests that the Staff reveal predecisional information of internal Staff plans or proposals. This information is clearly protected by the deliberative process privilege and is not subject to discovery in this proceeding. *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197-98 (1994)*. In addition, the interrogatory seeks disclosure of information that is outside the scope of this proceeding. At issue in the instant case, is the alleged inadequacy of Duke's request for exemptions from certain 10 C.F.R. Part 73 requirements, not any measures that the Staff may impose at some future time. Therefore, based on the foregoing, the interrogatory is improper and should be denied.

INTERROGATORY NO. 3: Please provide a comprehensive list of all types of information provided by the Staff and/or licensees to NRC specialized security contractors prior to their development of scenarios for use in force-on-force testing.

The Staff objects to BREDL's interrogatory. Interrogatory 3 requests information that is beyond the scope of this proceeding. The Intervenor's interrogatory requests information unrelated to the issues in this proceeding. The internal processes by which the NRC comes up with scenarios for force-on-force exercises are clearly unrelated to the issue of whether Duke should be granted an exemption from certain requirements in 10 C.F.R. Part 73. Consequently, the interrogatory is improper and should be denied as it seeks the discovery of information not relevant to the instant proceeding.

CONCLUSION

Based on the foregoing, the Staff has demonstrated good cause and, therefore, respectfully requests that the Licensing Board issue a protective order that the discovery not be had pursuant to 10 C.F.R. § 2.740(c).

Respectfully submitted,

/RA/

Antonio Fernández
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of September 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OBJECTIONS TO BREDL'S SECOND SET OF DISCOVERY REQUESTS TO NRC STAFF REGARDING SECURITY CONTENTION 5" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 24th day of September, 2004.

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