

RAS 8544

RELATED CORRESPONDENCE

September 24, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD September 30, 2004 (3:26PM)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

DUKE ENERGY CORPORATION'S OBJECTIONS TO
BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
SECOND SET OF DISCOVERY REQUESTS TO DUKE ENERGY
CORPORATION REGARDING SECURITY PLAN SUBMITTAL

On September 20, 2004, Blue Ridge Environmental Defense League ("BREDL") propounded its second set of discovery requests to Duke Energy Corporation ("Duke") related to BREDL's security contention.¹ In accordance with the schedule of the Atomic Safety and Licensing Board ("Licensing Board"), Duke objects to a limited number of BREDL's discovery requests.

I. GENERAL OBJECTIONS

In "Duke Energy Corporation's Objections to Blue Ridge Environmental Defense League's First Discovery Request on BREDL's Security Contention," dated June 23, 2004, Duke raised objections to two of the instructions which accompany those requests, the first dealing with documents that may be privileged and the second with the scope of searches for e-mails

¹ "Blue Ridge Environmental Defense League's Second Set of Discovery Requests to Duke Energy Corporation Regarding Security Plan Submittal" (September 20, 2004) (Safeguards).

which may be responsive to a discovery request. Because the instructions for BREDL's second set of discovery are substantially the same in these two respects, Duke is continuing those objections. Having said that, the privilege to be accorded documents has not been a significant issue heretofore in this proceeding, and Duke is committed to notifying and working with the parties should such issues arise. With regard to e-mails, Duke believes that an accommodation has been achieved with BREDL,² and Duke will continue its prior practice in this regard.

II. GENERAL DISCOVERY

A. Requests for Entering Upon Land and Inspection

GENERAL REQUEST FOR INSPECTION NO. 1. Please provide access to the Catawba nuclear power plant for a comprehensive site tour. BREDL seeks access to all areas that would be shown to NRC Staff inspectors and contractors prior to a force-on-force exercise, including but not limited to the Unit 1 and 2 auxiliary buildings and reactor buildings and the owner-controlled area. BREDL also seeks leave to take photographs.

Duke will attempt to accommodate BREDL's request consistent with its obligations as a Nuclear Regulatory Commission licensee, and with applicable health, safety and security requirements at Catawba. Duke's counsel will communicate with BREDL's counsel prior to the conference on September 28, 2004 to discuss and attempt to reach agreement on appropriate conditions for such a tour.³

With regard to the statement that "BREDL also seeks leave to take photographs," Duke's site security practices prohibit unauthorized use of cameras onsite. Compliance with such rules is monitored. Such a rule is necessary for security reasons, and Duke strongly

² See the Licensing Board's "ORDER (Confirming Matters Addressed at April 6 Telephone Conference)," April 8, 2004, at 2, paragraph 4. See also Tr. 1581-1585 (April 6, 2004).

³ The NRC Staff has indicated its desire to accompany BREDL representatives on any site tour.

opposes BREDL being permitted to bring a camera onsite for the purpose of taking photographs of security-related features. An argument previously advanced by BREDL in this proceeding and apparently accepted by the Licensing Board that Dr. Edwin Lyman should be able to obtain information through discovery equivalent to that available to an "insider" would support denial of the requested discovery. Assuming that individual were badged for unescorted access, he or she would not be reasonably expected to move about the site taking pictures without being identified and challenged by a security patrol or other badged individual. This is particularly true in areas of the facility having a higher security sensitivity. Another argument also advanced by BREDL to obtain discovery is that it should be able to obtain discovery materials equivalent to that obtained by the designated adversary in a force-on-force exercise. This BREDL position also mandates denial of this request. Designated adversaries in force-on-force exercises are not permitted to take photographs within the facility in developing their strategy. Thus, BREDL should also not have this opportunity.

Duke submits that, in deciding this issue, the Licensing Board should consider that photographs of the site — particularly photographs of security features — are particularly sensitive from a tactical security perspective.

GENERAL REQUEST FOR INSPECTION NO. 2. BREDL requests the opportunity to observe any security drill(s), table-tops or exercise(s) that Duke plans to conduct during the discovery period.:

Duke objects to this request as beyond the scope of authorized discovery, unduly burdensome and intrusive, and disruptive of operations and security at Catawba. The grant of the requested discovery could also potentially degrade security at the site.

Specifically, as evidenced by the discovery material already produced, table top exercises, drills, and exercises are carried out to hone the response of the security organization

and to develop and confirm new security strategy. To have to plan these activities to give BREDL representatives an opportunity to be notified and make arrangements to attend would simply be unworkable, and would interfere with the licensee's ability to meet NRC requirements. Moreover, there is simply no authority for such access to a site by an intervenor in an NRC security-related proceeding. While onsite, the BREDL representatives would have to be escorted and supervised, placing an unusual burden on Duke. The exact time and circumstances in which exercises are being conducted is kept confidential as the testing of the security system and personnel represents a challenge to the security organization. In any event, the results of exercises that will be conducted will be made available to BREDL. This request should be denied.

III. SPECIFIC DISCOVERY

A. Specific Interrogatories

INTERROGATORY NO. 4: Does Duke plan to conduct any force-on-force exercises at Catawba in the future? If so, when will they be conducted? In addition, please describe the nature of the planned force-on-force exercise(s), including whether they are full-scale exercises or partial exercises and what scenarios and adversary capabilities will be tested.

Duke objects to this interrogatory for reasons similar to those discussed in the response to General Request for Inspection Nos. 2. This interrogatory would require identification of any future force-on-force exercises at Catawba and the schedule for their conduct and their nature. The advance knowledge of such a schedule and contents could not lead to admissible evidence. Duke has already committed to supplement prior discovery responses with regard to the results of any future exercises.

B. Specific Document Discovery Requests

DOCUMENT PRODUCTION REQUEST NO. 1: *Please provide copies of any implementing procedures that have been prepared in connection with Duke's Security Plan Submittal, including drafts.*

Duke objects to this production request only to the extent it would require the production of all drafts. Duke is in the process of modifying a number of procedures in conjunction with its response to certain Commission Orders which have a deadline of October 29, 2004. Completion of these procedures requires coordination and review by a number of individuals and organizations onsite. Individual procedures may undergo a number of stages of review prior to being finalized. It would be unreasonably burdensome to require Duke to attempt to preserve and copy each different version of each draft. In addition, because of the sensitive nature of this information, each draft will likely require an individual determination of its safeguards status, "need-to-know" review, redaction analysis and Licensing Board intervention in any disputes for each draft. The value of such an exercise would be marginal at best and would be unlikely to lead to admissible evidence, inasmuch as the final version of each procedure as it will be implemented at the Station would be provided to supplement previously produced discovery. The risk of proliferation of these drafts far outweighs any possible value. This request, to the extent it requests drafts of implementing procedures, should be denied.

DOCUMENT PRODUCTION REQUEST NO. 3: *Please provide any and all diagrams that show the numbering of the microwave locations, the numbering of the controlled access doors, and the numbering of the CCTV cameras at the Catawba nuclear power plant.*

Duke objects to providing "diagrams" that show the requested details. Such information is contained in strictly controlled documents whose distribution is strictly limited. Adversaries in force-on-force exercises are not given access to such material. The designated insider in the scenario posited by BREDL would clearly not have access to such information.

Thus, such information would not be part of the set of information which an attacker could utilize to challenge the security at Catawba. Given all of these factors, the request for such information should be denied. Moreover, BREDL would be able to observe placement of the microwave locations, controlled access doors and the CCTV cameras during any site tour.

IV. CONCLUSION

For the foregoing reasons, discovery to which objection was taken should be denied.

Respectfully submitted,



David A. Repka
Mark J. Wetterhahn
Anne W. Cottingham
WINSTON & STRAWN, LLP
1400 L Street, NW
Washington, D.C. 20005-3502

Timika Shafeek-Horton
DUKE ENERGY CORPORATION
422 South Church Street
Mail Code: PB05E
Charlotte, N.C. 28201-1244

ATTORNEYS FOR DUKE ENERGY
CORPORATION

Dated in Washington, District of Columbia
This 24th day of September, 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
(Catawba Nuclear Station,) 50-414-OLA
Units 1 and 2))
)
)

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S OBJECTIONS TO BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S SECOND SET OF DISCOVERY REQUESTS TO DUKE ENERGY CORPORATION REGARDING SECURITY PLAN SUBMITTAL," in the captioned proceeding, have been served on the following by deposit in the United States mail, first class, this 24th day of September, 2004. Additional e-mail service, designated by **, has been made this same day, as shown below.

Ann Marshall Young, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AMY@nrc.gov)

Anthony J. Baratta**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AJB5@nrc.gov)

Thomas S. Elleman**
Administrative Judge
5207 Creedmoor Road, #101
Raleigh, NC 27612
(e-mail: elleman@eos.ncsu.edu)

Office of the Secretary **
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Rulemakings and Adjudications Staff
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Uttal, Esq.**
Antonio Fernandez, Esq.**
Margaret J. Bupp**
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(e-mail: slu@nrc.gov)
(e-mail: axf2@nrc.gov)
(e-mail: mjb5@nrc.gov)

Diane Curran**
Harmon, Curran, Spielberg &
Eisenberg, LLP
1726 M Street, N.W.
Suite 600
Washington, DC 20036
(e-mail: dcurran@harmoncurran.com)


Mark J. Wetterhahn
Counsel for Duke Energy Corporation