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NUCLEAR REGULATORY COMMISSION | **DOCKETED 10/06/04**

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ATOMIC SAFETY AND LICENSING BOARD PANEL

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)	October 6, 2004

MEMORANDUM and ORDER
(Ruling on Redactions to Documents 67 and 68)

We rule herein on certain disputed redactions in two documents containing Safeguards Information (SGI). The documents in question are part of Duke's security plan for the Catawba plant and contain certain security procedures for the plant; earlier in this proceeding we made a need-to-know determination regarding the documents themselves.[1] As we have previously done, we refer to them herein as documents 67 and 68, based on their identification as such in an attachment to Duke's response to certain BREDL discovery requests.[2]

Background

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

[1]Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need to Know and Ordering Provision of Documents Sought by Intervenor in Discovery) (Aug. 13, 2004) [hereinafter 8/13/04 Memorandum and Order].

[2]*See* 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.

nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting it into MOX fuel to be used in nuclear reactors.[3] By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as SGI; 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.[4] An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding.[5]

Our rulings herein relate to the one admitted security contention of BREDL,[6] on which

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

[4]LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004); *see also* LBP-04-7, 59 NRC 259 (2004) (dismissing one contention admitted in LBP-04-4, on grounds of mootness); LBP-04-12, 59 NRC 388 (2004) (permitting Intervenor to utilize certain additional information in litigation of contention admitted in LBP-04-10).

[5]Tr. 2072-2708.

[6]Security Contention 5, the contention at issue with regard to the current need-to-know request, 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.

LBP-04-10, 59 NRC at 352. The cited provisions from which Duke seeks exemption have been summarized as follows:

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

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] (SGI); [BREDL]'s Contentions on Duke's Security Plan Submittal (Mar. 3, 2004), at 15 [hereinafter BREDL Security Contentions] (citing Exemption Request at 9) (SGI);

the parties are now engaged in discovery. With one relevant difference — that our rulings herein deal with the "need to know" of BREDL's counsel and expert regarding information currently redacted from documents, rather than their "need to know" with regard to documents themselves — our rulings address the same sorts of "need-to-know" issues upon which we have previously ruled in this proceeding,[7] most of which have been in a discovery context,[8] and all but two of which[9] have involved Safeguards Information.

As indicated above, we previously addressed the documents containing the disputed redactions in an August 13, 2004, Memorandum and Order,[10] in which we confirmed a verbal bench ruling previously made on August 10, reversing an August 6 determination by Duke, as the holder of the documents, that BREDL had no "need to know" the contents of the

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LBP-04-10, 59 NRC at 336.

[7] *See*, *e.g.*, LBP-04-21, 60 NRC ___ (Sept. 17, 2004); Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need to Know and Ordering Provision of Documents Sought by Intervenor in Discovery) (Aug. 13, 2004) [hereinafter 8/13/04 Memorandum and Order]; LBP-04-13, 60 NRC 33 (July 2, 2004), *aff'd*, CLI-04-21, 60 NRC 21 (2004); Memorandum (Providing Notice of Granting BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions) (January 29, 2004) (unpublished) [hereinafter 1/29/04 Need-to-Know Ruling], *rev'd,* CLI-04-6, 59 NRC 62 (2004); Memorandum and Order (Ruling on BREDL Motion for Need to Know Determination Regarding Classified Documents) (Feb. 17, 2004) (unpublished) [hereinafter 2/17/04 Need-to-Know Ruling]; *see also* CLI-04-19, 60 NRC 5 (2004).

The regulatory requirement for such "need-to-know" determinations is found at 10 C.F.R. § 73.21(c), which provides that, "[e]xcept as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established 'need to know' for the information . . . ." The definition for "need to know" set forth at 10 C.F.R. § 73.2 states that this "means a determination by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary in the performance of official, contractual, or licensee duties of employment." The parties have agreed, in a protective order previously issued in this proceeding, that all disputes on need to know will be resolved by the Board. Memorandum and Order (Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal) (Dec. 15, 2003) (unpublished), at 4.

[8] Our 1/29/04 Need-to-Know Ruling and 2/17/04 Need-to-Know Ruling both addressed need-to-know questions in the stage of this proceeding after BREDL had been admitted as a party, with one safety-related contention admitted, prior to submission or admission of any security-related contentions.

[9] 2/17/04 Need-to-Know Ruling; LBP-04-21.

[10] *See* note 1, *supra*

documents. We found — based on the nature of the documents, Duke's potential reliance on them, and BREDL's need for access to them in order to postulate scenarios for pointing out vulnerabilities in Duke's security plan — that the documents were needed by BREDL under both the relevant discovery standard and the "necessity" or "indispensability" standard for making need-to-know determinations, and concluded that they should therefore be made available to BREDL.[11] Subsequently, there occurred a series of mutually inconsistent determinations on the part of the Staff and Applicant Duke on whether any redactions should in fact be made to the documents, thereby causing some delay in the proceeding.[12] Ultimately, the Staff and Duke, at the Staff's direction, determined that the unredacted documents would not be provided to BREDL, and that certain redactions should be made to the documents, in response to which BREDL disputed these determinations and asked the Board to review the redactions.[13]

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[11] *See* 8/13/04 Order; Tr. 2968-69. A summary of our ruling in our 8/13/04 Order is found in LBP-04-21, 60 NRC at __ (slip op. at 7-14).

[12] As we indicated in LBP-04-21, 60 NRC at __ (slip op. at 13-14 n.54), in originally 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 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 (SGI). 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 (SGI). 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) [hereinafter 9/3/04 Wetterhahn letter]; Letter from Antonio Fernández to Administrative Judges (Sept. 3, 2004) [hereinafter 9/3/04 Fernández Letter]. *See also* Tr. 3240-81; Letter from Diane Curran to Antonio Fernández and Susan L. Uttal (Sept. 7, 2004) (SGI) [hereinafter 9/7/04 Curran Letter]; Letter from Margaret J. Bupp to Diane Curran (Sept. 7, 2004) [hereinafter 9/7/04 Bupp Letter].

[13] *See* 9/3/04 Wetterhahn Letter; 9/3/04 Fernández Letter; 9/7/04 Curran Letter; *see also* 9/7/04 Bupp Letter.

Standard for Ruling on Disputed Redactions

Although at first blush it might seem that a different standard might apply to the resolution of disputes between parties on redactions that any party, as the holder of a document, may have made to such a document, we find that it is appropriate to utilize the same standard as that used in making need-to-know determinations on whole documents themselves, at least insofar as the determinations are made in the same context — in this instance in the context of the discovery stage of the proceeding. In both situations what is at issue is information that is sensitive in some way. In this case, the information in the documents as a whole is in part SGI; the redactions constitute SGI that Duke and/or the Staff view as particularly sensitive and therefore appropriate to redact, and have argued as well that BREDL has no need to know with regard to the redacted information. Although, in making determinations on disputed redactions, arguments on the relative sensitivity of various pieces of information should, of course, be given serious and substantial consideration, there is no different classification of information involved. Moreover, no party has suggested that we should apply any different standard than that used in ruling on access to sensitive documents themselves, either as a general rule or with specific regard to the documents containing the redactions now at issue.

In making any need-to-know determination, we start with the "necessity" standard set forth in the definition for "need to know" found at 10 C.F.R. § 73.2.[14] The Commission has explained this standard, in CLI-04-6, by noting that this requires more than a mere "desire" — "the touchstone for a demonstration of 'need to know' is whether the information is *indispensable*."[15] The Commission has also stated, however, that "a party's need to know may

[14] *See* note 7 *supra.*

[15] CLI-04-6, 59 NRC at 73 (emphasis added).

be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information."[16] CLI-04-6 dealt with the stage of this proceeding after BREDL was admitted as a party, but prior to submission of its security contentions.

In contrast, at this point BREDL's Security Contention 5 has been admitted, and we are currently in the discovery stage of this proceeding on that contention, leading up to an evidentiary hearing on it in the near future.[17] As the Staff has observed, and as we have agreed, deferring to and adopting the Staff's position, in the discovery phase of a proceeding the need-to-know "indispensability" standard is effectively *defined by* the discovery standard.[18] This is appropriate in light of the purposes of discovery, including that of providing a means for parties to prepare their cases for hearing in an efficient and meaningful manner, which minimizes surprise at the hearing as well as the expenditure of additional time at that point to address concerns that may arise based on a party's prior failure to provide relevant information to an opposing party.[19]

Thus, as we noted in LBP-04-21, the discovery and need-to-know standards are effectively congruent and coextensive in the discovery stage of a proceeding, given that the traditional scope-of-discovery standard has come to effectively define what is "necessary" and "indispensable" to a party in preparing for litigation on any cause or issue.[20] Both the "necessity/indispensability" need-to-know standard and the discovery standard involve a

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[16] *Id.* at 72.

[17] *See* Order (Confirming Scheduling and Other Matters Addressed at September 28, 2004, Closed Session) (Oct. 1, 2004) (unpublished).

[18] *See* LBP-04-21, 60 NRC at __ (slip op. at 10-12).

[19] As we have previously noted, Duke counsel has agreed that if Duke relied in the future on any such information, that "there exists the possibility that . . . at some point we'd have to give it to [BREDL]." Tr. 2931 (SGI); *see* 8/13/04 Memorandum and Order; LBP-04-21, 60 NRC __ (slip op. at 9 n.29).

[20] *See* LBP-04-21, 60 NRC at __ (slip op. at 20).

"delicate balancing" of concerns. With regard to the former, the concerns include security and the protection of the public, as well as the need of parties such as BREDL, as part of the public, for access to information in order to litigate contentions in NRC adjudicatory proceedings in a meaningful manner and thereby help the NRC discharge its mission of protecting the public.[21] In discovery rulings, the concerns to balance include relevance, whether information is "reasonably calculated to lead to the discovery of admissible evidence," as well as such factors as "embarrassment, oppression, [and] undue burden or expense."[22]

We will therefore apply the same standard, and undertake the same sort of delicate balancing, as we have previously used, as we now look to whether BREDL has a "need to know" with regard to the specific information in the currently redacted portions of Documents 67 and 68, and whether such information should therefore be disclosed.

Redactions at Issue — Descriptions and Rulings

The redactions in question fall into three categories. The first is a series of paragraphs in document 67, under section 5.7.2 of the document, at pages 10 and 11. The information in these paragraphs defines an additional responsibility of certain security officers, in an area of the plant involving monitoring of certain equipment. The second set of redactions is found in certain "enclosures" to the main part of document 67, which itself is identified as "SP #213" — enclosures 7.1, 7.1A, 7.2, and 7.5. The information redacted in these instances generally refers to specific areas and locations in the plant, with one — that in Enclosure 7.5 — referring to one of the responsibilities of one security officer. The third category of redacted information is in document 68, and concerns the sixth of six actions that are to be taken, "*if time permits*," in

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[21] *See* LBP-04-21, 60 NRC at __ (slip op. at 19-20); CLI-04-06, 59 NRC at 73; CLI-04-21, 60 NRC at __ (slip op. at 9-10).

[22] *See* LBP-04-21, 60 NRC at __ (slip op. at 19-21).

a "Security Emergency." The "if time permits" actions are the third of five categories of actions under the "Security Emergency" section of document 68.

We find that, with one exception, all of the information in the first two categories of redactions should be provided, unredacted, to BREDL, in the appropriate manner that has previously been determined, but that the third category of information should remain redacted.

The first category of information relates to additional responsibilities of certain guards who, as BREDL has pointed out in its September 7 letter, also have responsibility under another section of the document for "interdict[ing] adversaries if attempts are made to reach the top of SFP" — the spent fuel pool. Given this relationship to security regarding the spent fuel pool, where the MOX lead test assemblies are to be stored for a period of time, we find that the information in the first category described above is, with one exception described below, relevant as well as "reasonably calculated to lead to the discovery of admissible evidence," "necessary," and "indispensable" to BREDL in preparing its case in this proceeding.

The one exception to the previous finding concerns two references, in the fourth line of section 5.7.2.1, on page 10 of document 67, which we find are neither relevant to the duties of the guards in question, nor necessary or indispensable to BREDL in the preparation of its case, and the only arguable relevance of which, we find, is outweighed by the sensitivity of the information in question. We would thus leave redacted the first word and number of the line in question, as well as the word in quotation marks in the same line.

With regard to the second category of information, relating to particular locations in the plant, we find that this sort of information is clearly relevant with regard to the scenarios Duke has asked BREDL to provide, in their relationship to paths through the plant in connection with possible diversionary tactics that might be part of any such scenarios. Although Duke and the Staff have argued that these relate to "target sets" consisting of particular pieces of equipment, they in fact concern not equipment that would constitute part of target sets, but rather locations

and areas of the plant, and, in the case of the redaction in Enclosure 7.5, one of the responsibilities of one of the guards.[23] Duke has stated that it intends to rely on its "existing security force" in protecting the MOX fuel, and thus the responsibilities of the guards in such force, and the locations in the plant where they are to fulfill their responsibilities, constitute information that is quite relevant, as well as "necessary" and "indispensable" to BREDL in preparing its case in a manner that does not handicap it and place it at a distinct disadvantage in litigation of its case. In this light we find no ground for redacting the particular information in the second category discussed above, regarding plant areas and locations and the responsibility of one of the Catawba security guards, and thus conclude it should be provided.

As should be evident from our description of the third category of redacted material, however, the information at issue in it is, by its very designation as the last of several actions to take in the event of a security emergency "if time permits," not only of relatively less usefulness but also obviously cannot be assumed to occur in any security emergency, as it is the last of several things that would be done *only* "if time permits." In addition, the information does include a reference to a piece of equipment, to which no particular guard is assigned.

[23]Although there was also some argument about areas of interest with regard to the redactions, *see* Tr. 3241-80 (SGI), we find that this aspect of any of the various redactions is outweighed by the considerations discussed in the text of this memorandum and order.

In light of these factors, we find any arguable relevance of the information in the third category to be so outweighed by its sensitivity that we find that the redaction should remain.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

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Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
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Rockville, Maryland
October 6, 2004[24]

[24]Copies of this document 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 (RULING ON REDACTIONS TO DOCUMENTS 67 AND 68) 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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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of October 2004