UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CLI-04-29

MEMORANDUM AND ORDER

This case arises from Duke Energy Corporation's application for a license amendment to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of its Catawba nuclear reactors. The Licensing Board recently ruled in favor of the intervenor, Blue Ridge Environmental Defense League (BREDL), on a "need-to-know" determination allowing BREDL to obtain two classified NRC staff documents during pre-hearing discovery.[1] The Board stayed the ruling and referred it to the Commission. We accept the referral, clarify the need-to-know standard for discovery, and reverse the result the Board reached.

I. BACKGROUND

The current dispute involves BREDL's discovery request for two classified NRC staff documents. Those documents provide guidance on how to apply NRC "design basis threat"

[1] *See* LBP-04-21, 60 NRC ___ (Sept. 17, 2004). *See also* unpublished "Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need to Know and Ordering Provision of Documents Sought by Intervenor in Discovery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) ("Discovery Order"). Duke requested that the Board certify its ruling to the Commission, and the NRC Staff seconded that request.

regulations governing theft and diversion of radioactive materials and radiological sabotage. BREDL says that it "needs to know" information in those documents to help substantiate its contention that the NRC should deny Duke's request for an exemption from certain security requirements. Before the Board, Duke opposed BREDL's discovery request, but the NRC staff did not object to it.

Four earlier Commission decisions in this proceeding[2] provide the backdrop of BREDL's "need-to-know" claim seeking discovery of classified (or safeguards) information. In those decisions, we concluded that "the touchstone for a demonstration of 'need to know' is whether the information is indispensable."[3] But we also said 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."[4] Under NRC discovery rules in effect for this case, discovery is generally available if information a party seeks is "reasonably calculated to lead to the discovery of admissible evidence."[5]

In its 25-page decision, the Board grappled with what it called the "delicate" question how to reconcile our narrow "indispensability" test and the broad "discovery" test.[6] The Board

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[2]*See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62 (2004) (providing guidance to licensing boards for their "need to know" determinations); CLI-04-11, 59 NRC 203 (2004) (accepting the Board's certified questions regarding a security contention); CLI-04-19, 60 NRC 5 (2004) (declining to revisit the "need to know" guidance provided in CLI-04-06); and CLI-04-21, 60 NRC 21 (2004) (providing guidance on expert witness qualifications in the safeguards/security arena).

[3]CLI-04-06, 59 NRC at 73.

[4]CLI-04-06, 59 NRC at 72.

[5] *See* 10 C.F.R. § 2.740(b)(1) (2004). The Commission's new adjudicatory rules do not apply to this case, which began prior to their promulgation. *See Final Rule, Changes to Adjudicatory Process*, 69 Fed. Reg. 2182 (Jan. 14, 2004).

[6]*See* LBP-04-21, 60 NRC at ___, Slip op. at 20.

said that the two tests were "effectively congruent and coextensive,"[7] but that it was also necessary to undertake an "appropriate balancing of the public safety and other factors unique to this case."[8] Finding that the "requested documents will permit BREDL to craft its scenarios [challenging Duke's exemption request] with relevant information that clarifies governing regulatory requirements," the Board granted BREDL's discovery request.[9] We accept the Board's referral of its ruling. We approve the discovery need-to-know standard the Board outlined, but we reverse the Board's substantive decision for the reasons we give below.[10]

II. DISCUSSION

A. "Need-to-know" Standard for Discovery

BREDL's submissions to the Board did not address the discovery standard *per se* as it applies to the two requested documents. Instead BREDL focused on the reason it needs the documents. BREDL said the documents "appear to constitute generic NRC guidance for compliance with NRC regulations for security of its licensed facilities, including protection against both theft and sabotage."[11] As such, argued BREDL, "they not only illustrate the NRC Staff's view of how to comply with NRC regulations, but are given 'considerable weight' in NRC adjudicatory proceedings."[12] Thus BREDL maintained that the documents are necessary for it

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[7] *Id.*

[8] *Id.*, Slip op. at 21.

[9] *Id.*, Slip op. at 22.

[10] To avoid unnecessary delay prior to hearing, we are not requesting special appellate briefs to supplement what the parties have already filed with the Board. In the case of any material misapprehensions of law or fact in our appellate decisions, our rules allow for reconsideration petitions. *See* 10 C.F.R. § 2.786 (e).

[11] Blue Ridge Environmental Defense League's Request for Need-To-Know Determination" at 2 (Aug. 26, 2004).

[12] *Id.* (citation omitted).

to evaluate whether Duke's Security Submittal is compatible with the NRC guidance.

For the discovery phase, both in the current controversy and in a prior dispute leading to the Board's August 13 Discovery Order,[13] Duke has consistently maintained that the "indispensability" standard for establishing need to know is more stringent than the general discovery standard of "reasonably calculated to lead to the discovery of admissible evidence."[14] Duke has maintained that BREDL does not need the requested documents because there is no indication that they are generically applicable to all Category I facilities.[15]

Before the Board the NRC Staff has said that discovery of sensitive safeguards (or classified) information requires examination of "two sources" – both the "general" discovery standard and the "narrow" indispensability standard. In effect, the NRC staff has maintained that the indispensability standard informs and limits the discovery standard:

> [T]he 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

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[13] *See* note 1, *supra*.

[14] *See* 10 C.F.R. § 2.740(b)(1). The scope of discovery is usually quite broad, as indicated on the face of our rules:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . . 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."

Id.

[15] Category I facilities are licensed to possess formula quantities of strategic special nuclear material. *See* Final Rule: "Material Control and Accounting Requirements," 67 Fed. Reg. 78,130-31 (Dec. 23, 2002). A formula quantity "means strategic special nuclear material in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium)." 10 C.F.R. § 73.2. Strategic special nuclear material is defined as "uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope), uranium-233, or plutonium." *Id.* Category I facilities are licensed to possess formula quantities of strategic special nuclear material. Catawba will be a Category I facility from the time it accepts delivery of the four MOX lead test assemblies until they are inserted into the reactor core.

> to lead to admissible evidence. Second, the Staff follows the Commission's admonition that "access to safeguards documents be as narrow as possible."[16]

In its August 13 Discovery Order, the Board expressly endorsed the NRC staff's "two source" interpretation of need to know.[17] It did so again in the September 17 Order before us today.[18] We find the NRC staff approach, now endorsed twice by the Board, a sensible application of need-to-know doctrine, for it starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information. Such information warrants tight control and enhanced precautions. As we said previously in this proceeding, "the likelihood of a security breach increases proportionately to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements."[19]

The Board's approach here is consistent with our views. It stated that "the traditional discovery standard of relevance and whether information is 'reasonably calculated to lead to the discovery of admissible evidence,' has . . . come to define what is 'necessary' and 'indispensable' to a party in preparing for litigation on any cause or issue."[20] But the Board at the same time acknowledged the "balancing inherent in many discovery rulings, 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

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[16]Letter from Margaret J. Bupp to Diane Curran (Aug. 3, 2004) at 1 (citation omitted).

[17]Discovery Order at 5.

[18]*See* LBP-04-21, 60 NRC ___, Slip op. at 21.

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

[20]LBP-04-21, 60 NRC at __, Slip op. at 20 (footnote omitted).

limitation or denial of discovery."[21] The Board concluded 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."[22] We find the Board's approach appropriate, and approve it.[23]

We expect the Board and the NRC staff to take a hard look at requests for sensitive security documents to make sure disclosure is truly useful in litigating admitted contentions, and not simply an exercise of curiosity or of a party's hope that something useful may turn up.

B. The Board's Substantive Decision

We turn next to the Board's substantive decision concerning BREDL's need for the two particular NRC staff guidance documents at issue here. Duke has stated that it did not rely on the documents – indeed, that it has not even seen them; however, that observation is not controlling. Contrary to Duke's position that the documents relate to a specific Category I facility (other than Catawba), the Board examined the guidance documents and found them generic – *i.e.*, applicable to all so-called "Category I" facilities.[24] The broad language in the guidance documents ostensibly supports this view. [25] The staff guidance, the Board found, "will

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[21]*Id.,* Slip op. at 20-21.

[22]*Id.*, Slip op. at 21 (emphasis added).

[23]Although at one point the Board incorrectly *characterized* the discovery and need-to-know standards as "effectively congruent and coextensive," the Board *in practice* applied the more restrictive standard we have articulated today. *See* LBP-04-21, 60 NRC at __, Slip op. at 20-21. Indeed, our reading of the record suggests that, at bottom, the parties actually agree on the standard to apply, for the differences in the parties' arguments appear to us to be more a matter of semantics than of substance. Duke would apply a stricter standard than the discovery standard. Both the NRC Staff and the Board nominally adhere to the discovery standard, but in fact temper it with caution for information in the safeguards/security arena. We see no practical difference between the two positions.

[24]*See* note 15, *supra.*

[25]*See* LBP-04-21, 60 NRC at __, Slip op. at 16-17.

permit BREDL to craft its scenarios [in support of its sole admitted security contention] with relevant information that clarifies governing regulatory requirements."[26]

Ordinarily we would be disinclined to second guess the Board's findings on this discovery dispute, for the Board is more familiar than we with the nature of BREDL's sole admitted security contention. Here, though, the Commission participated in the formulation of the guidance documents – which were issued in 2000 – and is therefore in a position to understand both their history and their scope, as well as the reasons for selecting particular design basis threats. As we are fully aware, and the Board perhaps was not, the guidance in question relates only to the design basis threats for sabotage and for theft or diversion of formula quantities of strategic special nuclear material at the Category 1 facilities in existence in 2000 – that is, the fuel fabrication facilities operated by Nuclear Fuel Services, Inc. (NFS) and BWX Technologies (BWXT).[27] At that time there was no Category I facility license that was similar to Catawba in terms of the form in which the material would be possessed or the activities for which the material would be used.

Our security regulations, by design, lack specificity in describing the adversary characteristics for a licensee to use to evaluate and implement its physical protection programs.[28] The regulations provide general security information to the public that is not sensitive and would not provide specific details of the adversary against which a licensee's

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[26] *Id.*, Slip op. at 22.

[27] The guidance documents are *potentially* applicable to the mixed oxide fuel fabrication facility that Duke Cogema Stone & Webster has proposed for the Department of Energy's Savannah River site. This fuel fabrication facility, if built, will be a Category I facility that will have more in common with NFS and BWXT than does Catawba.

[28] *See* 10 C.F.R. §§ 73.1(a)(1) and 73.1(a)(2), which prescribe requirements for the establishment and maintenance of a physical protection system for special nuclear material. The former section describes requirements to prevent radiological sabotage and the latter, theft or diversion of formula quantities of strategic special nuclear material.

system are designed to protect; *i.e.*, the design basis threat.[29] The guidance documents BREDL requested provide clarification by fleshing out the description of the adversary's characteristics. Guidance documents are, by nature, only advisory.[30] They need not apply in all situations and do not themselves impose legal requirements on licensees.

Duke has never seen our 2000 design basis threat guidance on Category 1 facilities and does not now need to see them. Nor does BREDL, for these guidance documents do not pertain to this proceeding. If Duke receives the current license amendment, it will, technically, be a Category I facility during the time it possesses the four unirradiated MOX test assemblies.[31] But, as we already have held in this proceeding, the circumstances at Duke's Catawba reactor, even at that time, will be very different from the two existing Category I facilities (the NFS and BWXT plants).[32] Because of its composition, form and low plutonium concentration, the MOX material is not nearly as attractive to potential adversaries from a theft and diversion standpoint as the material at the existing NFS and BWXT facilities. Those facilities engage in fuel processing and possess larger quantities of highly enriched uranium in more accessible forms.[33] When the NRC issued its guidance documents in 2000, it did not

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[29]The design basis threat itself can change to comport with the nature of the threat environment, and the Commission sometimes issues orders, including interim compensatory measures, to *individual* nuclear facilities. *See, e.g.,* "In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately)," 68 Fed. Reg. 26,675 (May 16, 2003) and "In the Matter of Nuclear Fuel Services Inc., Erwin, TN; Order Modifying License (Effective Immediately)," 68 Fed. Reg. 26,676 (May 16, 2003). We held earlier as a matter of law that our NFS and BWXT post-9/11 security orders do not apply to Catawba. *See* CLI-04-19, 60 NRC at 11.

[30]*See Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 397 (1995).

[31]*See* CLI-04-19, 60 NRC at 8, n.11.

[32]*See id.* at 11.

[33]*See id.*, citing "Safety Evaluation by the Office of Nuclear Security and Incident Response, Renewed Facility Operating License NPF-35 and Renewed Facility Operating

(continued...)

intend those guidance documents to cover or address a power reactor licensee's possession and use of already fabricated MOX fuel. Indeed, not only would MOX fuel assemblies be difficult for a terrorist to acquire and transport, but using such an assembly to create a radiological dispersion device would be impractical and ineffectual. For these reasons, it is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site.[34] Therefore, dissemination to the intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.

We are obliged to guard zealously against unnecessary disclosure of classified security information. Catawba simply does not share the underlying conditions, or potential hazards, precipitating the classified security guidance we issued in 2000 that was intended to deal with the general type of Category I facilities then in existence. That guidance does not extend to Catawba. Catawba is not a large-scale fuel facility; rather, it is a commercial nuclear reactor that will, for a short time, possess more plutonium than other commercial reactor sites.[35] As we stated earlier in this case, "[a]t stake here is the appropriate increment – the appropriate heightening of security measures – necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site."[36] Guidance applicable to an entirely different type of facility is not useful in evaluating the Catawba MOX security proposal.

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[33](...continued)
License NPF-52, Duke Energy Corporation, et al., Catawba Nuclear Station, Units 1 and 2, Docket Nos. 50-413 and 50-414" at 2 (May 5, 2004).

[34]We leave it to the Board to determine whether the specific measures Duke has proposed are adequate to protect the public health and safety.

[35]Earlier in this docket we said that all parties may assume that the Catawba facility will comply with all applicable general security requirements *for reactors*. *See* CLI-04-06, 59 NRC at 73.

[36]*Id.*

In short, the guidance documents interpreting the application of 10 C.F.R. §§ 73.1(a)(1) and 73.1(a)(2) to large Category 1 fuel cycle facilities are so remote from the security issues surrounding the proposed Catawba MOX amendment that it is not "indispensable" for BREDL to obtain those documents in discovery, particularly in view of their classified nature. BREDL does not have a "need to know" the requested guidance documents at any phase of this adjudication.

III. CONCLUSION

For the foregoing reasons, we *accept* the Board's referral, *approve* the Board's discovery standard, and *reverse* the Board's decision in LBP-04-21 to provide BREDL access to the documents it requested.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October, 2004.

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 COMMISSION MEMORANDUM AND ORDER (CLI-04-29) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal distribution on October 8, 2004.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2004