

RAS 8634

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USNRC

October 15, 2004 (9:31AM)

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:

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

SERVED October 15, 2004

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA, 50-414-OLA

ASLBP No. 03-815-03-OLA

October 15, 2004

MEMORANDUM and ORDER
(Confirming September 28, 2004, Bench Ruling
Upholding Staff Need-to-Know Determination on Access to Security Plan Revision)

During a closed session in this proceeding¹ held September 28, 2004, this Licensing Board made a verbal bench ruling, upholding an NRC Staff need-to-know determination relating to the most recent revision to Duke's physical security plan for the Catawba plant.² We confirm herein this ruling. The origin of the matter at issue was BREDL's September 7 motion to compel, seeking production of "Revision 17" of Duke's security plan, currently under review by

¹This 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 into MOX fuel, to be used in nuclear reactors. Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003). By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information; redacted version issued May 28, 2004), the Licensing Board granted Blue Ridge Environmental Defense League [BREDL]'s request for hearing and admitted various non-security-related and security-related contentions. LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004). An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding. Our ruling herein addresses the one security-related contention currently admitted in the proceeding.

²Tr. 3529 (Safeguards Information [SGI]).

the NRC Staff.³ As explained by Duke in its “Opposition” to BREDL’s motion, it has actually designated the document at issue as “Revision 0” of the plan, in light of the scope of the changes in it, proposed in response to certain post 9/11 Commission orders issued to Duke.⁴ Numerous subsequent references to the document have been to “Rev. 0,” and we will use this designation herein as well.

BREDL sought access to “Rev. 0” after learning of it at the September 1 closed session in this proceeding, having previously requested access to Duke’s security plan and all revisions to it.⁵ BREDL argued that Rev. 0 is “relevant, and indeed indispensable, to the meaningful litigation of [its] Contention 5.”⁶ Because Duke intends to rely for protection of the MOX fuel on the same security force in place to protect Catawba against sabotage, BREDL argued that it was crucial that it be given access to the version of the plan that would actually be in effect when the MOX fuel is present.⁷

Duke objected to provision of Rev. 0, relying on the Commission’s statement at the contentions stage of this proceeding that the proceeding “has nothing to do with the post-September 11 general security orders,” and arguing that Rev. 0 “represents the direct progeny of the post-September 11 general security orders.”⁸ In addition, Duke argued that BREDL had

³[BREDL]’s Motion to Compel Production of Revision 17 of Security Plan for Catawba Nuclear Power Plant (Sept. 7, 2004), at 1 [hereinafter BREDL Motion to Compel].

⁴[Duke]’s Opposition to [BREDL Motion to Compel] (Sept. 17, 2004), at 1 [hereinafter Duke Opposition]. As pointed out by BREDL in its Motion to Compel, the Commission order in question was published at 68 Fed. Reg. 24, 517 (May 7, 2003), and required licensee power plants to revise their physical security and other security-related plans by April 29, 2004, and to implement them by October 29, 2004. BREDL Motion to Compel at 3.

⁵See BREDL Motion to Compel at 2-3.

⁶*Id.* at 3.

⁷*Id.* at 4.

⁸Duke Opposition at 3 (citing CLI-04-6, 59 NRC 62, 72 (2004)).

been and would continue to be provided with other information and materials that would render Rev. 0, in effect, of little use, and negate any need of BREDL for it.⁹ Asserting that the proper balancing of security considerations, including the sensitive nature of the information in Rev. 0, mitigated against provision of it, Duke urged denial of BREDL's motion.¹⁰

On September 21, Staff counsel informed the parties that it had determined that BREDL's counsel and expert should have access to Rev. 0, with appropriate redactions.¹¹ Thereafter, in response to the Board's proposed agenda for the September 28 closed session, Duke counsel indicated that it wished its prior opposition to BREDL's motion to compel to be treated as an appeal of the Staff's determination.¹²

During the September 28 session, Duke counsel requested a ruling from the Board on BREDL's need-to-know with regard to Rev. 0,¹³ and, at the request of the Board,¹⁴ Staff counsel stated that the considerations that went into the Staff's need-to-know determination on Rev. 0 included the following: Duke's representations that it was going to rely on "everything available to them in responding to any scenarios posed by BREDL"; that Duke had relied on its current security force as justification for the exemptions from certain regulatory requirements it seeks herein; that, regardless of whether the Staff approves or disapproves Rev. 0 as written, the measures therein are, on October 29, "going to become effective" at Catawba; and that the Commission at the time it issued CLI-04-6 "did not have specifically before it a proposal from

⁹See *id.* at 4-6.

¹⁰*Id.* at 6.

¹¹Letter from Antonio Fernández to Diane Curran (Sept. 21, 2004).

¹²E-mail from Judge Young to parties (Sept. 27, 2004) (copy attached); e-mail from Mark Wetterhahn to Judge Young (Sept. 27, 2004) (copy attached).

¹³Tr. 3339-40.

¹⁴Tr. 3504.

the Licensee which clearly pulled into the proceeding, at least to the extent that they rely on their current security force, what their current force is, [which] will change . . . on October 29.”¹⁵ Given these considerations and the fact that Rev. 0 expressed what Duke believed “would be adequate to meet the new orders,” the Staff determined that the document should be released to BREDL.¹⁶ The Staff indicated through counsel that it was “very aware of what the effects of releasing this information are,” and that its deliberations took these implications into account “at the highest levels of the agency,” carefully concluding, after considering all the issues, that BREDL had a “need to know” for the information.¹⁷

Thereafter, after considering the Staff’s rationale for its determination, along with the arguments of Duke and BREDL,¹⁸ the Board provided its ruling from the bench. The Board adopted the analysis of the Staff, as set forth above, noting in particular the fact that Rev. 0 will be the plan that will be in force during the time period at issue while the MOX fuel is in the plant, Duke’s reliance on its existing security force with regard to the MOX fuel, and the considerations taken into account at the highest levels of the NRC Staff, all of which, we agree, demonstrate BREDL’s need to know with regard to Rev. 0.¹⁹ Moreover, in confirming our ruling today, we note the Commission’s recent ruling in CLI-04-29, in which it clarified and approved

¹⁵Tr. 3504-06.

¹⁶Tr. 3506.

¹⁷Tr. 3507.

¹⁸See Tr. 3504; 3506.

¹⁹We recognize, as noted by Staff counsel, that the Staff may not approve Rev. 0 as is, and that there may be subsequent revisions to it as a result. The same analysis applied herein would also apply to any such future revisions, absent circumstances materially different than the current situation, which we do not anticipate.

the need-to-know standard for discovery developed in this proceeding, as stated in LBP-04-21.²⁰

In CLI-04-29, the Commission, noting its previous statements that the “touchstone for a demonstration of ‘need to know’ is whether the information is indispensable,” and 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,” considered how we defined the need-to-know standard in the discovery context of this proceeding, in which the “reasonably calculated to lead to the discovery of admissible evidence” discovery standard applies.²¹ Observing that we had in LBP-04-21 expressly endorsed the Staff’s “two source” interpretation of need to know in a discovery context — relying on both the traditional discovery standard and the Commission’s admonition that “access to safeguards documents be as narrow as possible” — the Commission found that this was a “sensible application of the 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.”²² The Commission found our approach, of “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,*” to be appropriate.²³

We find that the Staff’s determination, adopted by us on September 28, is consistent with this approach, and specifically conclude that a balancing of all of the public safety and other factors unique to this case warrants granting BREDL access to the documents.

²⁰CLI-04-29. 60 NRC ____ (Oct. 7, 2004); *see* LBP-04-21, 60 NRC ____ (Sept. 17 2004).

²¹CLI-04-29. 60 NRC at ____ (slip op. at 2).

²²*Id.* at ____ (slip op. at 5).

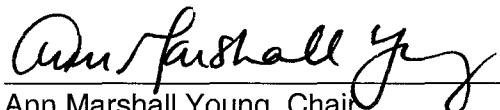
²³*Id.* at ____ (slip op. at 6) (emphasis in original).

We note that the Staff on September 29 provided to Duke counsel copies of the unredacted portions of Rev. 0 with regard to which it determined BREDL has a need to know, asking counsel to make these documents available to BREDL's counsel and expert pursuant to previously adopted procedures for BREDL's examination of certain SGI.²⁴ We note as well Duke's indication through counsel that it does not intend to appeal our ruling,²⁵ and hope as a result of this and other recent activity in this proceeding that we will be able to proceed expeditiously toward a timely hearing on security contention 5.

Finally, we will expect the parties to report to us as soon as possible, at or before the next scheduled closed session in this proceeding on October 25, on all outstanding security-related matters still in dispute, including any progress on settlement of BREDL's recent late-filed security contention.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁶



Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE



Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 15, 2004

²⁴Letter from Antonio Fernández to Mark Wetterhahn (Sept. 29, 2004).

²⁵E-mail from Mark Wetterhahn to Board and Parties (Sept. 30, 2004) (copy attached).

²⁶This Memorandum and Order is issued by Judges Young and Baratta as a quorum of the board, based on the current unavailability of Judge Elleman to read or sign it. We note, however, that Judge Elleman concurred in the ruling as stated from the bench on September 28, and this document merely confirms the ruling then made.

From: Ann Young
To: ACottingham@winston.com; AJB5@nrc.gov; AMY@nrc.gov; AXF2@nrc.gov; dcurran@harmoncurran.com; drepka@winston.com; elleman@eos.ncsu.edu; FIY@nrc.gov; HEARINGDOCKET@nrc.gov; JMC3@nrc.gov; mjb5@nrc.gov; mwetterhahn@winston.com; SLU@nrc.gov; tshafeek@duke-energy.com
Date: 9/27/04 3:14PM
Subject: Issuance in Catawba proceeding; issues for tomorrow's closed session

Attached please find Addendum 5 to the December 15 Protective Order.

Also, for tomorrow's closed session, which will begin at 9:30 a.m. and the preparation and procedures for which will be the same as for our last session, please be prepared to address the following issues, among any other appropriate matters for our consideration and discussion:

First, everyone bring your calendars, along with those of any other pertinent individuals, for the next six months or so, so that we can do some planning with regard to the schedule for the remainder of this proceeding.

Next, we would ask the Staff to assure that one or more of your client personnel, with authority to speak for the staff on any substantive, security and other pertinent matters, be present during the session.

We will hear oral argument on Duke's and the Staff's objections to BREDL's discovery requests, and would like to get on the table any other discovery issues.

We would like to hear reactions from the Staff and BREDL, to the extent possible, on the perceived impact on this proceeding of Duke's updated information provided on September 20.

We will also discuss issues relating to BREDL's recent late-filed contention, including any scheduling matters.

We assume that Mr. Fernandez's letter of September 21 renders moot BREDL's motion to compel regarding proposed Rev. 0 to the security plan; if this is not correct, please so inform.

We look forward to seeing you all tomorrow.

Administrative Judge Ann Marshall Young
Chair, Atomic Safety and Licensing Board

From: "Wetterhahn, Mark" <MWetterhahn@winston.com>
To: "Ann Young (E-mail)" <AMY@nrc.gov>
Date: 9/27/04 3:42PM

Dear Judge Young:

With regard to the last item on your agenda, Mr. Fernandez's letter of September 21, 2004, Duke requests that its prior opposition to the motion to compel be treated as an appeal of the NRC's "need-to-know" determination for the reasons stated therein. We will be prepared to discuss this issue tomorrow.

For Duke Energy Corporation
Mark J. Wetterhahn

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Date: 9/30/04 2:59PM
Subject: Licensing Board Order Regarding Access to Proposed Security Plan

Dear Board and Parties:

Duke Energy Corporation has decided that it will not appeal at this time the Licensing Board's order set forth on the record of the September 28, 2004 conference that permitted access to Duke's Proposed Security Plan, as redacted by the NRC Staff.

Mark J. Wetterhahn
For Duke Energy Corporation

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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 (CONFIRMING SEPTEMBER 28, 2004, BENCH RULING UPHOLDING STAFF NEED-TO-KNOW DETERMINATION ON ACCESS TO SECURITY PLAN REVISION) 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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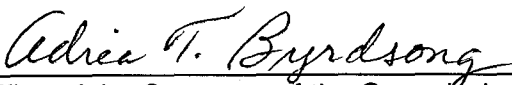
Docket Nos. 50-413-OLA and 50-414-OLA
LB MEMORANDUM AND ORDER
(CONFIRMING SEPTEMBER 28, 2004,
BENCH RULING UPHOLDING STAFF
NEED-TO-KNOW DETERMINATION ON
ACCESS TO SECURITY PLAN REVISION)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of October 2004