

RAS 8770

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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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

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

November 5, 2004

MEMORANDUM and ORDER  
(Ruling on BREDL Access to NRC Guidance Document)

During a closed session in this proceeding<sup>1</sup> held October 25, 2004, various discovery-related and scheduling matters were addressed, and two need-to-know determinations were taken under advisement. We rule herein on one of those pending matters.

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<sup>1</sup>This proceeding involves 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). In memoranda and orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information (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. 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). An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding. Tr. 2072-2708.

The matters addressed herein relate to the one admitted security contention of BREDL, Security Contention 5, which 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.

This matter involves BREDL's request for a May 8, 2004, NRC Guidance document on "Implementation of the April 2003 Revised Design Basis threat," which the Staff has referenced in its most recent interrogatory responses to BREDL.<sup>2</sup> BREDL asserts that this document is relevant to its case "because it provides information regarding the manner in which the April 2003 revised design basis threat should be implemented," and "because it appears to contain recommendations that are not reflected in Duke's Security Plan." During the October 25 session counsel stated that BREDL's primary interest in the document in question has to do with the concept of a "critical group."<sup>3</sup>

The Staff during the October 25, 2004, closed session in this proceeding stated through counsel that it had made a determination that BREDL does not have the required "need-to-know" for this document, finding that "[t]he portions that [BREDL does] have a 'need-to-know' for were made available to them in response to interrogatories" posed by BREDL to the Staff,<sup>4</sup> that BREDL already "has the specific measures that are going to be in place at Catawba as reflected in the physical security plan," and "given that they have the specifics, it's unnecessary for them to have access to what may be some possible guidance the staff may have on the matter."<sup>5</sup>

In the context of BREDL's indication that its primary interest in the guidance document has to do with the "critical group" concept, when asked whether it would be possible for the Staff to prepare a redacted version of the document that doesn't compromise information on the DBT but does respond to BREDL's concerns, Staff counsel responded that it would be

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<sup>2</sup>Letter from Diane Curran to Antonio Fernández and Susan L. Uttal (Oct. 19, 2004); see Tr. 3672-73.

<sup>3</sup>Tr. 3677-78.

<sup>4</sup>Tr. 3671.

<sup>5</sup>Tr. 3674.

possible to do this, but again pointed out that “the information [BREDL] is seeking is already contained in the physical security plan that they have access to, with regard to the critical group.”<sup>6</sup> Duke counsel clarified that the physical security plan “may not use the language ‘critical group,’ but it describes exactly what’s being done.”<sup>7</sup>

Based upon the parties’ arguments, and our review of the guidance document in question along with certain parts of the Catawba physical security plan, both of which documents were provided Staff counsel to the Board for *in camera* review, we make the following ruling:

First, as we note in another Order issued today, with regard to the issue of timing, there are several considerations we have taken into account. In a scheduling order issued in this proceeding October 1,<sup>8</sup> we directed the parties in effect to get all remaining discovery matters out “on the table” as soon as possible, in order that we could address them during our October 25 session. BREDL did this, including with regard to the document herein at issue. This completes all discovery other than supplementation of prior responses. Thus, BREDL’s request falls within our prior direction.

More substantively, we note that the document at issue provides general insights into the philosophy used in the defense of structures or materials within structures and presents specific guidance on the actions or defenses that need to be employed to provide adequate protection, issues relevant to the requested exemptions at issue in Contention 5. It includes some discussion of strategies and methods, as well as diversionary tactics, and presents possible interpretations of the objectives of attackers in challenging particular structures. As

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<sup>6</sup>Tr. 3678.

<sup>7</sup>Tr. 3679.

<sup>8</sup>Order (Confirming Scheduling and Other Matters Addressed at September 28, 2004, Closed Session) (Oct. 1, 2004) (unpublished).

defined by its name, it is a "guidance" document that can be employed in developing a specific plan, and thus, as indicated above, provides insights into the sorts of issues involved in Contention 5.

Based on the preceding considerations, we find that the document is relevant; that BREDL has shown a need to know with regard to the guidance, at least insofar as it addresses the "critical group" concept referenced by BREDL counsel; and that portions of the document relating to this concept — or direction to corresponding information in other documents — should therefore be provided to BREDL. The document is relevant in explaining aspects of the physical security plan, which has already been provided to BREDL and is itself relevant to the question whether the requested exemptions should be granted, and the document is also "reasonably calculated to lead to the discovery of admissible evidence."

Balancing all relevant discovery-related as well as public safety and security-related factors, and ordering provision in a manner that is as narrow as possible consistent with these factors,<sup>9</sup> we rule that the Staff shall provide BREDL with access to a copy of the document in question, redacting any compromising information on the DBT, but leaving all portions related to the critical group concept. Alternatively, the Staff shall, no later than November 12, 2004, provide copies of the two documents in question to the Board, providing specific citation (through highlighting or like method) of the parallel provisions in the guidance document and the physical security plan that are asserted to constitute or contain the same information, as the Board was unable with the documents as previously provided to ascertain such correspondence between the two documents.<sup>10</sup> Further, for each set of parallel provisions, unless the language

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<sup>9</sup>See CLI-04-29, 60 NRC \_\_\_\_ (Oct. 7, 2004) (slip op. at 5-6).

<sup>10</sup>We note that the second document, access to which we understand BREDL already has, is a specific plan for a specific facility that appears in effect to derive from the guidance document at issue. It appears to us that it might be possible in some instances to infer from the specific actions in the second (continued...)

of one closely and obviously tracks that of the other, the Staff shall provide the rationale for asserting that one parallels the other. Thereafter, the Board will issue a further ruling defining whether, and the extent to which, any more-specifically-redacted document should be provided.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Ann Marshall Young, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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Anthony J. Baratta  
ADMINISTRATIVE JUDGE

*/RA/*

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Thomas S. Elleman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 5, 2004<sup>11</sup>

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<sup>10</sup>(...continued)

document what the guidance rationale is in the first document, but that this would be quite difficult in most instances. The two documents quite obviously meet separate objectives. Based on what the Board has been provided, both might be viewed as necessary to a clear understanding of the planned defenses for Catawba and support providing BREDL with access to the first document, redacted as noted. However, should the Staff wish to provide the requested information, and be able to do so in a timely manner, we will consider this in making any further ruling on the document.

<sup>11</sup>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 )  
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DUKE ENERGY CORPORATION ) Docket Nos. 50-413-OLA  
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(Catawba Nuclear Station, Units 1 and 2) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON BREDL ACCESS TO NRC GUIDANCE DOCUMENT) 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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LB MEMORANDUM AND ORDER (RULING ON  
BREDL ACCESS TO NRC GUIDANCE DOCUMENT)

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[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 5<sup>th</sup> day of November 2004