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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

(Confirming Matters Addressed and Ruled on at October 25, 2004, Closed Session)

During a closed session in this proceeding¹ held October 25, 2004, various discovery-related and scheduling matters were addressed, and the Licensing Board made one bench ruling. We confirm herein the actions taken during that session, and set forth the schedule for the remainder of this proceeding (found at the conclusion of this Order).

¹This 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.

Procedural Matters

With regard to certain Duke late-filed updated dose-related information correcting information in the LAR,² Staff counsel had previously, on October 4, indicated that Staff would review this information and report back within one month on its view of the impact of this information on the matters at issue with regard to Safety Contention 1; on October 14, the Staff provided its conclusion that the information had no impact on the litigation and resolution of Contention 1.³ During the October 25 session BREDL counsel indicated that BREDL did not intend to pursue any relationship of this information to Contention 1.⁴ The Board then informed the parties that, based on the preceding notifications, a decision on Contention 1 would be issued as soon as possible.⁵

The parties indicated that there were no disputes on redactions to a copy of the Catawba Security Plan, provision of which was previously ordered,⁶ nor were any disputes expected with regard to redactions to additional revisions to the plan, which would parallel those made to the earlier version. Tr. 3578-79.

The Licensing Board disclosed its knowledge of, and placed into the record as an exhibit to the transcript, a news article found in the "Nuclear News Stand," part of the NRC Internal website, about a visit to the Catawba plant.⁷

²See Letters from David A. Repka to Administrative Judges (Aug. 31, 2004; Sept. 20, 2004; Oct. 6, 2004).

³See Letters to Administrative Judges from Susan L. Uttal (Oct. 4, 14, 2004).

⁴Tr. 3575-77.

⁵Tr. 3577-78.

⁶Memorandum and Order (Confirming September 28, 2004, Bench Ruling Upholding Staff Need-to-Know Determination on Access to Security Plan Revision) (Oct. 15, 2004)

⁷See Tr. 3590 *et seq.*; 3745.

Argument and Bench Ruling on 1976 Document Relating to Separation of Mixed Oxide Blends

The Licensing Board heard argument, and issued a ruling from the bench, on BREDL's October 19 request for access to an "apparently classified letter" from George P. Fisher to Maurice Eisenstein, NRC (Aug. 25, 1976) (marked "Confidential"), Re: "conclusions from Meeting on the difficulty of Separating PuO₂ from Mixed Oxide Blends with Enclosure."⁸ BREDL made this request in response to our October 1 direction that the parties "attempt to complete all further discovery by agreement, informally, as much as possible, in order to further the goals of both allowing for meaningful discovery and moving forward in this proceeding as expeditiously as possible," and where agreement is not possible to bring any disputes to the attention of the Board as soon as possible.⁹

The Board ruled that the Staff should provide access to the letter in question, or do a need-to-know determination on the document as soon as possible. We based our ruling on several factors.¹⁰ These factors include the following: First, with regard to the issue of timing, there are several considerations we took into account. As stated in our October 1 Order, 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 in our October 25 session. This was done. This completes all discovery other than supplementation of prior responses. Thus, BREDL's request falls within our prior direction. In addition, BREDL has made several discovery requests in the past that might have resulted in production of this letter, including both a broad request and

⁸Letter from Diane Curran to Antonio Fernández and Susan Uttal (Oct. 19, 2004).

⁹Order (Confirming Scheduling and Other Matters Addressed at September 28, 2004, Closed Session) (Oct. 1, 2004) (unpublished) [hereinafter 10/1/04 Order]. We note BREDL's indication through counsel that the requests included in two letters dated October 19 and 20, 2004, from Diane Curran to Staff counsel and Duke counsel respectively, include all of BREDL's remaining requests for discovery, Tr. 3607-08, either formal or informal.

¹⁰Tr. 3666-67.

ones specifically relating to the attractiveness of special nuclear materials from a proliferation standpoint.

Second, with regard to the 1976 date of the letter, we note the hiatus beginning when President Carter halted any further work on reprocessing, such that materials such as the letter take on added significance in light of the absence of any work on reprocessing and related subjects during such hiatus. We find this to be of significance in this proceeding. Finally, the fact that both Duke and BREDL see particular significance in the Commission's discussion of the attractiveness issue in its recent CLI-04-29,¹¹ making the information more "indispensable" to BREDL under the need-to-know standard defined by the Commission in CLI-04-06, supports our ruling herein.

Weighing these factors and considering as well the general desirability of providing us with as complete a record as possible on the subject matter of the exemption requests of Duke, including the significant issue of the ease of conversion of MOX fuel to a form usable by those with intent to do harm, we found, and hereby confirm our previous finding, that the Staff should make a timely "need-to-know" determination, along with any redactions, in light of our ruling. Staff counsel agreed to provide such determination by October 29, 2004.¹² The Staff's determinations, and any disputes on them, shall be brought to our attention as soon as possible, so as to facilitate the most expeditious resolution of this matter.¹³

¹¹CLI-04-29, 60 NRC ____ (Oct. 7, 2004) (slip op. at 8); see Tr. 3609, 3617-19, 3646; see also Tr. 3628, 3662.

¹²Tr. 3727.

¹³See Tr. 3667, 3665.

Additional Discovery-Related and Need-to-Know Matters

Staff counsel indicated, with regard to four more items in BREDL's October 19 letter to them, that a response to item number 7 would be provided¹⁴; that the Staff would review document 5 and provide BREDL with a response as soon as possible¹⁵; that the Staff would identify, with regard to document 6, the barriers that are relevant to Catawba and the performance information on those, which satisfied BREDL¹⁶; and that it would provide the information described in item 4 of BREDL's letter when Rev. 2 of the Security Plan was provided, which it expected to do by October 28, 2004.¹⁷ If after receipt of Rev. 2 any disputes remained concerning item 4, BREDL was to file any request relating to it by October 29, 2004.¹⁸

With regard to BREDL counsel's October 20 letter to Duke counsel, Duke counsel indicated that Duke had made need-to-know determinations on all requested items, and that they would be released subject to any further need-to-know determinations of the Staff, and subject further to required notification of NEI regarding certain personnel access data system information that is part of an agreement with NEI.¹⁹

Duke agreed to provide remaining requested discovery by October 29 or the beginning of the week of November 1,²⁰ and ultimately provided some items, and at the same time

¹⁴Tr. 3702.

¹⁵*Id.*, Tr. 3729.

¹⁶Tr. 3705.

¹⁷Tr. 3716.

¹⁸Tr. 3718.

¹⁹Tr. 3706-10.

²⁰Tr. 3719.

requested various need-to-know rulings by the Staff with regard to other items, on November 2, 2004.

Schedule for Hearing on Security-Related Contention(s)

With regard to the schedule for hearing and related deadlines regarding Security Contention 5, BREDL requested that the “fall-back” dates previously set be utilized.²¹ Over objection by the Staff and Duke, the Board ruled that, rather than hold the hearing during the December 13-17, 2004, time period, the hearing will be held the week of January 10-14, 2005. This schedule was selected in order to provide reasonable allowance for the making of any remaining requested need-to-know determinations (including those currently pending from both BREDL and Duke), as well as the exchange of remaining discovery materials and the taking of any necessary depositions; to accommodate the schedules of parties, just as schedules of other parties have been accommodated in the past; and, not least, to fulfill our responsibility to provide for a meaningful hearing on the matters at issue.²² We found that the standard we previously set for utilization of the January hearing dates — namely that “[i]f all matters requiring resolution have not been resolved, and all necessary discovery has not been completed, in a time frame that would allow for the [December hearing] schedule,” the January hearing dates and related deadlines would be used²³ — had been met so as to warrant using the January hearing and related dates.

We also, however, noted that, absent extreme and compelling circumstances, such as critical injury or death or similar circumstance, the January hearing and related dates would not be extended. In addition, we indicated that, if Contention 6 is not settled, we would include that

²¹Tr. 3720 *et seq.*; see 10/1/04 Order.

²²Tr. 3727-31.

²³10/1/04 Order at 4.

in the January hearing, and we moved forward the previously-set deadlines for proposed findings of fact and conclusions of law, and responses thereto, to January 28 and February 4, 2005, respectively. Moving the hearing back to the first week of January was considered, but because of holiday schedules, including the unavailability of key Staff, this course was not followed.²⁴

The parties were directed to cooperate on finishing all outstanding need-to-know and discovery issues, including the scheduling of any depositions, and to contact the Board or Board chair as soon as possible with any disputes. In addition, the parties will work out among themselves, as much as possible, an appropriate manner in which to handle demonstrative evidence and other exhibits, including any photographs, as well as any site visit during the hearing. For the latter purpose, the date of January 14, 2005, was set aside for any potential visit during the hearing.²⁵

To summarize relevant scheduling matters in addition to above-recounted dates for provision of various need-to-know and discovery-related matters, the following dates were set for the remaining portions of this proceeding:

The parties are currently considering possible settlement of BREDL Security Contention 6. If the parties are not able to reach a settlement of this contention, they shall so notify the Board by November 22, 2004, and shall be prepared to conduct oral argument on the contention during a closed session held November 23, 2004, at 1:00 p.m., continuing as late as necessary to address all matters then requiring attention.

The parties shall hold open December 13, 2004, for another closed session, if required to address any security-related issues.

²⁴Tr. 3736.

²⁵Tr. 3741-45.

A site visit will be held at the Catawba plant on December 17, 2004, in the same manner as the last site visit. Prior to the visit, Duke will provide any necessary directions to all participants.

The parties shall simultaneously file their prefiled direct testimony December 17, 2004.

The parties shall simultaneously file their prefiled rebuttal testimony January 7, 2005.

The hearing on Security Contention 5, and, if admitted, Security Contention 6, shall be held January 10-14, 2005.

If another, on-the-record or other, site visit during the hearing is determined to be appropriate, it shall be done January 14, 2005.

The parties shall simultaneously file their proposed findings of fact and conclusions of law January 28, 2005.

The parties shall simultaneously file their reply findings of fact and conclusions of law February 4, 2005.

Timing of Initial Decision on Security Contention(s)

Since setting the preceding schedule, the Board has received from Duke counsel a letter indicating that, for various reasons relating to the schedule for the next operating cycle at Catawba Unit 1 and related refueling, the core design for this cycle, the manufacturing and transportation of the MOX fuel assemblies, and receipt and storage of the assemblies at Catawba should the application be approved, Duke wishes us to issue our ruling on Security Contention 5 in March 2005.²⁶ BREDL counsel has also filed a letter, responding to Duke and arguing that for various reasons Duke counsel had overstated the urgency of a decision in March.²⁷ Duke counsel has countered with another letter, standing by the information

²⁶Letter from David A. Repka to Administrative Judges (Oct. 28, 2004); *see id.* at 3.

²⁷Letter from Diane Curran to Administrative Judges (Oct. 29, 2004).

previously provided.²⁸ The Board will endeavor to issue a ruling on Security Contention 5 (and, if necessary, Contention 6) in March 2005, taking into account all appropriate considerations.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 5, 2004²⁹

²⁸Letter from David A. Repka to Administrative Judges (Nov. 2, 2004).

²⁹Copies 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 (CONFIRMING MATTERS ADDRESSED AND RULED ON AT OCTOBER 25, 2004, CLOSED SESSION) 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
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MATTERS ADDRESSED AND RULED ON AT
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of November 2004