

↓ RAS 8777

October 29, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

DOCKETED  
USNRC

In the Matter of  
  
DUKE ENERGY CORPORATION  
  
(Catawba Nuclear Station, Units 1 and 2)

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

November 8, 2004 (10:30AM)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S  
APPEAL OF NRC STAFF'S OCTOBER 27, 2004,  
NEED-TO-KNOW DETERMINATION**

Pursuant to paragraph C.2 of the Atomic Safety and Licensing Board's ("ASLB's") Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (December 15, 2003), Blue Ridge Environmental Defense League ("BREDL") hereby appeals a negative need-to-know determination made by the Staff of the U.S. Nuclear Regulatory Commission ("NRC") or ("Commission") on October 27, 2004. Letter from Susan L. Uttal to Ann Marshall Young (hereinafter "Uttal Letter"). The Staff subsequently corrected and amended the determination in an e-mail message. Message from Antonio Fernández to Administrative Judges re: Staff's Letter of October 17, 2004 (October 28, 2004) (hereinafter "Fernández E-mail").

The document in question consists of a May 14, 2004, report on the results of the NRC Staff's evaluation of lessons learned from the pilot expended force-on-force exercises. The document is referenced in a letter from Scott A. Morris, NRC, to Henry B. Barron, Duke Energy Corp., re: Security Plan Provisions for Enhanced Owner Controlled Area Surveillance and Response (TAC Nos. MC2936, MC2937, MC2902, MC 2903, MC2945, MC2946, and MC2957) (September 21, 2004). BREDL requested the NRC Staff to provide access to the document in a

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letter dated October 19, 2004. Letter from Diane Curran to Antonio Fernández and Susan L. Uttal, re: Informal Discovery Request for Security-Related Documents and Request for Need-to-Know Determination.

The Uttal Letter does not provide any description of the withheld document or any rationale for the Staff's determination, other than to refer the ASLB to the transcript of the closed session of October 25, 2004. The Fernández E-mail provides a short explanation of the decision as follows:

The basis for the Staff's determination, as argued in the closed session, is the generic nature of the information contained therein and the fact that the information concerns force-on-force exercises that have tested {sic} solely against the DBT for radiological sabotage (an issue that the Commission has repeatedly stated is beyond the scope of this proceeding).

BREDL respectfully submits that the Staff's rationale is insufficient to support its negative need-to-know determination. As BREDL argued during the closed session, the requested report is relevant to Contention 5 for two primary reasons. First, it may show vulnerabilities in licensee security plans that are applicable to the Catawba plant. Second, the report may provide important evidence regarding the usefulness of force-on-force testing in general. This is a key issue in this proceeding, because Duke has requested an exemption from force-on-force testing against theft scenarios.

Moreover, the fact that the report is generic does not diminish its relevance. Indeed, the cover letter from the Staff to Duke demonstrates that the Staff itself considers the report to be specifically useful to Duke for purposes of protecting the Owner-Controlled Area at Catawba. Nor is the relevance of the report diminished by the fact that the subject of the test was the effectiveness of protection against sabotage rather than theft. For purposes of demonstrating the usefulness and need for force-on-force testing to demonstrate the effectiveness of security

measures, no valid distinction can be made between the testing of theft scenarios and sabotage scenarios. The results of a force-on-force test against sabotage scenarios would provide a perfectly valid illustration of the usefulness and need for force-on-force testing against theft scenarios.

Accordingly, BREDL requests that the ASLB review the withheld document with these considerations in mind, and reverse the Staff's negative need-to-know determination with respect to the requested document.

Respectfully submitted,



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October 29, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2004, copies of Blue Ridge Environmental Defense League's Appeal of NRC Staff's October 27, 2004, Need-to-Know Determination were served on the following by e-mail and/or first-class mail, as indicated below.

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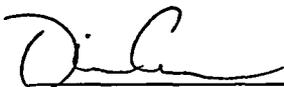
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