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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	Docket No's. 50-413-OLA, 50-414-OLA
DUKE ENERGY CORPORATION	ASLBP No. 03-815-03-OLA
(Catawba Nuclear Station, Units 1 and 2)	November 22, 2004

MEMORANDUM and ORDER
(Ruling on BREDL Need-to-Know Appeal Regarding Lessons Learned Report)

Pending before us in this proceeding[1] is the appeal of Blue Ridge Environmental Defense League (BREDL) from a recent NRC Staff need-to-know determination regarding a

[1]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.

May 14, 2004, report on the results of the Staff's evaluation of lessons learned from certain force-on-force exercises.[2] No response to BREDL's appeal has been filed by either Duke or the Staff. The Staff notified the Board in a November 15 e-mail that it would not be filing a response to BREDL's appeal, but has, in letters dated October 27 and 29, and an e-mail dated October 28, provided its position on the document and the basis for its need-to-know determination.[3]

Positions of Parties

BREDL originally requested the Staff to provide access to the document in an October 19, 2004, letter to Staff counsel.[4] Argument was subsequently heard on various items listed in this letter during an October 25, 2004, closed session. Subsequent to oral argument Staff counsel filed the written communications referenced above.

Staff Need-to-Know Determination

In its post-October 25 written filings the following Staff positions are stated: that the document at issue is "unrelated to this proceeding due, *inter alia*, to its generic applicability"; that "redaction is not feasible"; that BREDL has not "demonstrated a need-to-know any of the

[2][BREDL]'s Appeal of NRC Staff's October 27, 2004, Need-to-Know Determination (Oct. 29, 2004) (hereinafter BREDL Appeal). BREDL notes that the report in question 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)." *Id.* at 1. The document in question is entitled "Final Report on the Pilot Expanded Force-on-force Exercise Program with Lessons Learned and Recommendations for Future Activities." The document was submitted to the NRC Commissioners by William D. Travers, Executive Director for Operations on May 14, 2004. It is marked as containing "Sensitive Information — Limited to NRC Unless the Commission Determines Otherwise." As indicated *infra*, the document contains both Safeguards Information and Official-Use-Only information.

[3]Letter from Susan L. Uttal to Administrative Judges (Oct. 27, 2004) (hereinafter Uttal 10/27-04 Letter); Letter from Antonio Fernández to Administrative Judges (Oct. 29, 2004) (hereinafter Fernández 10/29/04 Letter; E-mail from Antonio Fernández to Administrative Judges (Oct. 28, 2004).

[4]Letter to Antonio Fernández and Susan L. Uttal from Diane Curran (Oct. 19, 2004).

information contained in the [document and attachments";[5] and that the information in the document "concerns force-on-force exercises that have tested solely against the DBT for radiological sabotage (an issue that the Commission has repeatedly stated is beyond the scope of this proceeding)."[6] In addition, the Staff "reiterate[d] the arguments made at pages 3681 to 3697 of the transcript."[7] The Staff in its first written communication regarding the document in question also indicated that Enclosure 4, appended to the document at issue, was related to the proceeding, and by implication that the enclosure should be provided to BREDL.[8] In subsequent filings, however, the Staff stated that it had "incorrectly identified Enclosure 4 . . . as discoverable."[9]

Oral Argument

During the October 25 closed session in this proceeding, the Staff argued that the document is "a generic document regarding all force-on-force exercises that have been conducted under the pilot [program]," and that it is unrelated to the subject matter of this proceeding; if the document contained any insights necessary for Catawba to implement, these would, the Staff argued, be reflected in Catawba's physical security plan, which was to be made available to BREDL.[10] Duke concurred with the Staff's arguments.[11]

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[5]Uttal 10/27/04 Letter at 1.

[6]Fernández 10/29/04 Letter.

[7]Uttal 10/27/04 Letter at 2.

[8]*See id.* at 1-2.

[9]Fernández 10/28/04 E-Mail; Fernández 10/29/04 Letter.

[10]Tr. 3681 (sealed as Safeguards Information [SGI]).

[11]Tr. 3682 (SGI).

BREDL indicated through counsel and its expert, Dr. Edwin Lyman, that it wished to see "evaluations of post-9/11 preparedness," given that "the central aspect of [its] case is going to be that . . . credible force-on-force exercises are going to be needed to test the MOX theft scenarios for [the Board] to be able to make a determination whether the exemption should be authorized."[12] In response to Staff argument that nothing in this proceeding relates to force-on-force exercises, BREDL pointed out that Security Contention 5 relates, among other things, to Duke's request for exemption from 10 C.F.R. § 73.46(b)(9) (which concerns the conducting of tactical response team and guard exercises).[13]

Staff and Duke counsel argued that the exemption requested would exempt Duke from the requirement to exercise a tactical response team, but that Duke would still have its otherwise-required Part 50 armed response force, with regard to which it would still be required to conduct exercises.[14] When asked — in the sense of past practice being an indicator of future performance — whether the Board would need to understand any lessons learned on prior weaknesses in force-on-force testing performance in order to rule on the requested exemption, Staff counsel responded that "the answer . . . is 'perhaps.'"[15] Counsel responded further, however, that the needed information is already in Catawba's physical security plan, and that therefore BREDL has no "need-to-know" regarding the document in question.[16] Staff counsel then asked the Board to review the document in making a decision on the issue.[17]

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[12]Tr. 3684 (SGI).

[13]Tr. 3687 (SGI).

[14]*Id.* at 3687-88 (SGI).

[15]Tr. 3691-93 (SGI).

[16]Tr. 3693 (SGI).

[17]Tr. 3697 (SGI).

BREDL Appeal

In its Appeal, BREDL submits that the Staff's rationale as provided in its October 27-29 letters and e-mail communications is "insufficient to support its negative need-to-know determination."[18] BREDL argues that 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."[19]

BREDL also argues that "the fact that the report is generic does not diminish its relevance." Referring to a cover letter to the document from the Staff to Duke, BREDL suggests that this "demonstrates that the Staff itself considers the report to be specifically useful to Duke for purposes of protecting the Owner-Controlled Area at Catawba."[20] Nor, contends BREDL, 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."[21] "For purposes of demonstrating the usefulness and need for force-on-force testing to demonstrate the effectiveness of security measures," BREDL argues, "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."[22]

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[18]BREDL Appeal at 2.

[19]*Id.*

[20]*Id.*

[21]*Id.*

[22]*Id.* at 2-3.

Based on the preceding arguments, BREDL requests that we review the withheld document with these considerations in mind, and reverse the Staff's need-to-know determination with respect to the requested document.[23]

Board Ruling

As requested by the Staff and BREDL, we have reviewed the document in question in order to make the ruling now called for, and have determined that the document primarily addresses methods to improve the *process* for reviewing force-on-force exercises; it does not, for the most part, address the exercises themselves in such a direct way. The phrase in the title, "Recommendations for Future Activities," addresses activities that would improve future reviews, not activities that would directly address the exercises. The document would, therefore, impact the conduct of force-on-force exercises more indirectly, for example, by an improved review process somehow leading to an alteration of the subsequent exercises.[24]

One exception to the preceding statement is Enclosure 4 to the document, which does appear to contain information more directly related to observed deficiencies in force-on-force exercises. We find that this information would, as argued by BREDL, be relevant to BREDL Security Contention 5. We find no indication of the Staff's reason for its change of position with regard to Enclosure 4, but disagree with the Staff's suggestion that the information in it somehow relates *solely* to "the DBT for radiological sabotage" or that it is necessarily beyond the scope of this proceeding, given its relevance, most specifically, to the exemption Duke requests and BREDL challenges, from the regulatory provisions at 10 C.F.R. § 73.46(b)(9) for a tactical response team and related requirements, including "guard exercises."

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[23] *Id.* at 3.

[24] We note in this regard that there are other ways in which security forces are evaluated, including the physical fitness standards included in the regulations that members of the guard force must meet.

We have previously quoted Duke's description of those parts of 10 C.F.R. § 73.46(b)(9) from which it seeks exemption, as follows:

> § 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in Section 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in 10 C.F.R. 73.55.[25]

Section 73.46(b)(9) contains the following language:

> (9) The licensee shall conduct Tactical Response Team and guard exercises to demonstrate the overall security system effectiveness and the ability of the security force to perform response and contingency plan responsibilities and to demonstrate individual skills in assigned team duties. . . . . The licensee shall use these exercises to demonstrate its capability to respond to attempts to steal strategic special nuclear material. During each of the 12-month periods, the NRC shall observe one of the force-on-force exercises which demonstrates overall security system performance. . . . The licensee shall retain the documentation of each exercise as a record for three years after each exercise is completed.

We find that the subject matter of Enclosure 4 — observed deficiencies in prior force-on-force exercises — is relevant to the issue of whether Duke should be granted the exemption from § 73.46(b)(9). Although the exercises may relate to sabotage scenarios, such scenarios can, as we have previously discussed, be relevant in the context of any diversionary tactic(s) in a theft scenario. Certainly, the weight to be given to any such evidence is yet to be determined, and would depend on, among other things, the other evidence presented at the hearing on Security Contention 5. But as to its relevance, we cannot conclude that such information has no relevance to whether the exemption should be granted, nor can we conclude that BREDL has no need for it that is outweighed by other pertinent considerations. To the contrary, balancing all relevant discovery and public safety and security-related factors, we find BREDL's

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[25] *See* Letter from M.S. Tuckman, Duke Energy Corporation, to Document Control Desk, NRC, Attachment 7, Request for Exemptions from Selected Regulations in 10 C.F.R. Part 11 and Part 73 (Sept. 15, 2003) at 9 [hereinafter Exemption Request] (SI); *see also* LBP-04-21, 60 NRC at ___ (slip op. at 4); [BREDL]'s Contentions on Duke's Security Plan Submittal (Mar. 3, 2004), at 15 [hereinafter BREDL Security Contentions] (citing Exemption Request at 9) (SI); LBP-04-10, 59 NRC at 336.

need for this specific enclosure to the document at issue to outweigh relevant countervailing considerations.

In addition, we note that the document at issue contains significant portions that are non-Safeguards Information, but that are designated as "OUO," or for "Official Use Only." As such they do not disclose DBT or other similar information of the same level of sensitivity. Although there are no rules specifically addressing disclosure of OUO information,[26] the Commission has in a management directive handbook stated that OUO documents are to be distributed only to those who have a need-to-know to conduct official business.[27] The handbook provides that participants in hearings may be authorized access to sensitive unclassified information including both SGI and OUO, and also refers to the protective order provisions of 10 C.F.R. § 2.740(c).[28]

We find that the OUO portions of the document at issue provide information relating to the force-on-force exercises that would be helpful to BREDL in preparing its case, and for which

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[26]Were this proceeding covered by the new NRC Rules of Practice at 10 C.F.R. Part 2, *see* 69 Fed. Reg. 2,182 (Jan. 14, 2004), it might be argued that the new rule at 10 C.F.R. § 2.390, which governs "Public inspections, exemptions, requests for withholding," applies here. That rule provides that, with certain exceptions that would not appear to apply to the document now in question, "final NRC records and documents . . . shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available . . . ." 10 C.F.R. § 2.390(a). The title of the document at issue, as noted above, begins with the words "Final Report." The cover of the report indicates that a Safeguards information determination has been made with regard to it, and also that it is "Sensitive Information – Limited to NRC Unless the Commission Determines Otherwise." Although the Safeguards determination could be construed as constituting a "determination of a compelling reason for nondisclosure" as to the SGI in the document, the same would not seem to apply to the OUO parts of the document, given that those parts are *specifically* indicated as *not* being SGI, and are clearly of a lower level of sensitivity than SGI. In any event, with regard to SGI, the same standards and process that we have previously used in making "need to know" determinations, and that the Commission has upheld, *see* CLI-04-29, 60 NRC ___ (Oct. 7. 2004), would still seem to apply, and we have applied these herein with regard to the entire document at issue, including the OUO information.

[27]NRC Sensitive Unclassified Information Security Program, Handbook 12.6, at 6 (approved June 2, 1998; revised Dec. 20, 1999).

[28]*Id.* at 22-23.

it thus has a need, in order to conduct the official business of preparing for and participating in the hearing in this proceeding. And, as with Enclosure 4, it may be said that BREDL has a more direct need for this information than it does for the remaining portions of the document. Balancing then, again, all relevant discovery and security-related factors with regard to this information, we find BREDL's need for it to outweigh factors that would mitigate against providing access.

Therefore, in conclusion, 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,[29] we rule as follows:

BREDL may not have access to the complete document in question. The Staff shall, however, in accordance with procedures previously defined by protective order, provide BREDL with access to a copy of the document that has all Safeguards Information redacted but that retains non-Safeguards headings and Official-Use-Only (OUO) marked portions intact.

[29] *See* CLI-04-29, 60 NRC at ___ (slip op. at 5-6).

Access to the enclosures to the document shall not be provided, except for Enclosure 4, access to which shall be provided. BREDL shall comply with all relevant protective order provisions with regard to the information provided pursuant to this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[30]

/RA/

_____
Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

_____
Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 22, 2004[31]

[30]Judge Elleman was not available to sign or approve signing of this order, but was, prior to becoming unavailable, in agreement with the action taken herein by the quorum of the board consisting of Judges Young and Baratta.

[31]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	)	
	)	
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 (RULING ON BREDL NEED-TO-KNOW APPEAL REGARDING LESSONS LEARNED REPORT) 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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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of November 2004