

November 22, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA
) 50-414-OLA
)
(Catawba Nuclear Station)
Units 1 and 2)

NRC STAFF RESPONSE TO BREDL MOTION FOR IMPOSITION
OF INTERIM DISCOVERY MEASURES TO
COMPENSATE FOR UNAVAILABILITY OF ADAMS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.730(c), the staff of the Nuclear Regulatory Commission (Staff) herein answers the motion of intervenor, Blue Ridge Environmental Defense League (BREDL) to impose interim discovery measures and to suspend this proceeding in light of NRC's temporary suspension of access to the Agencywide Documents Access and Management System (ADAMS).¹ For the reasons set forth below, the Staff submits that the Motion should be denied.

BACKGROUND

On October 25, 2004, the NRC initiated an additional security review of publicly available documents to ensure that potentially sensitive information is removed from public access on the agency Web site.² As a result, during this review, ADAMS is, and will continue to be, temporarily unavailable to the public. The review, when complete, is intended to ensure that documents that

¹ See Blue Ridge Environmental Defense League's Motion for Imposition of Interim Discovery Measures to Compensate for Unavailability of ADAMS, dated November 5, 2004 (Motion).

² See Letter from Antonio Fernandez to Administrative Judges, dated October 25, 2004.

might be useful to terrorists will be inaccessible, while maintaining public access to information regarding NRC activities. The agency has not announced when public access to ADAMS can be restored.³ However, the agency has recently restored access to portions of the Electronic Hearing Docket located on the NRC website,⁴ including the hearing docket related to this license amendment request.⁵ In addition, documents pertaining to the license amendment request under consideration in the instant case and to security issues at Catawba will continue to be served on counsel for BREDL, pursuant to the consent order issued by the Licensing Board on November 10, 2004.⁶

On November 5, 2004, BREDL filed the instant Motion seeking an order requiring the Staff to send to BREDL's counsel "all copies of generic correspondence, reports, and notices that relate to security at Category I facilities."⁷ BREDL also seeks a delay of the hearing pending resumption of access to ADAMS. The Staff opposes both requests.

³ On November 4, 2004, the NRC issued a press release in which it stated that public access to certain documents pertaining to the Licensing Support Network (in connection with a possible application for a high-level waste repository) had been restored. See Press Release, "NRC Restores Various Documents Removed from Web Site for Security Review," dated November 4, 2004. In that press release, the NRC also stated that the agency expects to restore the remaining documents, in the following order, over the next few weeks: (1) additional hearing-related documents (*i.e.*, non-high-level waste); (2) time-sensitive documents related to opportunities for hearing or needed for public review and comment, including license amendment applications; and (3) other nuclear reactor documents, and other documents not related to specific facilities, in ADAMS. As stated in our October 25, 2004, letter to the Administrative Judges, the Staff will update the Licensing Board and the parties to this proceeding as this effort progresses.

⁴ See Press Release, "NRC Restores Additional, Hearing-Related Documents to its Web Site," issued November 16, 2004, located at: www.nrc.gov/reading-rm/doc-collections/news/2004/04-144.html.

⁵ See Letter from Antonio Fernandez to Licensing Board members, dated November 17, 2004.

⁶ Order (Approving Proposed Agreed Consent Order), November 10, 2004.

⁷ BREDL also requests that if the documents contain Safeguards, Classified or Official Use Only information, that it be sent something that would alert it to the existence and general content of the document.

DISCUSSION

In the Motion, BREDL argues that lack of access to ADAMS threatens to “seriously hamper” its ability to participate in the hearing in a meaningful way. Motion at 2. In particular, BREDL states that it will have no way to access either generic NRC documents regarding security issues relating to Category I facilities or NRC correspondence with licensees other than Duke regarding security issues at other sites, both of which, it claims, could prove relevant to this case. *Id.* For these reasons, BREDL requests that the Licensing Board 1) order the staff to send copies of all generic documents relating to security at Category I facilities to BREDL’s counsel and 2) delay the hearing until two weeks after the ADAMS system is restored in its entirety. *Id.* at 3. As discussed below, these requests are unnecessary, and should be denied.

A. The Request that the Staff Be Ordered to Provide Generic Documents Related to Security at Category I Facilities is Unnecessary and Beyond the Scope of this Proceeding.

There are several reasons why BREDL’s motion should be denied. First, BREDL has had ample opportunity to search ADAMS for documents that are deemed to be relevant by its counsel or expert witness. Duke filed its application for the license amendment in February 2003 and filed its supplemental security plan in September 2003. The Board admitted BREDL’s security contention on April 12, 2004.⁸ Second, all new correspondence between the NRC and Duke related to the MOX license amendment request and to security at Catawba will be sent to BREDL’s counsel under the terms of the consent order issued on November 10, 2004. Third, pursuant to the Commission’s regulations, both the Staff and Duke are under an obligation to update their responses to discovery and to inform the Board and parties of any significant, relevant, and new information. *See, e.g.*, 10 C.F.R. § 2.740(e).

Fourth, the underlying reasons given by BREDL regarding its need for the information are

⁸ See unpublished “Memorandum and Order (Ruling on Security-Related Contentions)” (April 12, 2004).

not valid. BREDL states that its discovery requests may not produce all documents that are relevant to its security contention. See Motion at 2. Since the Staff and Duke are compelled to provide full answers to BREDL's discovery requests, this argument is unavailing as it seeks relief based on BREDL's deficiencies in the drafting of discovery requests. Moreover, the example cited by BREDL in support of its motion (NRC correspondence with other licensees regarding security issues "similar" to those in this case) would not be captured by the request itself, which asks for generic documents related to Category I facilities.

Fifth, the Staff is only required to disclose discoverable documents and information to parties. In this regard, the Staff must disclose information that is relevant or reasonably calculated to lead to admissible evidence.⁹ To the extent that BREDL is seeking disclosure of "sensitive security" documents, the request must be given a "hard look" to ensure disclosure is truly necessary to litigating admitted contentions, and "not simply an exercise of curiosity or of a party's hope that something useful may turn up." *Catawba*, slip op. at 6. BREDL's request, which does not limit itself to discoverable information, is, in fact, "an exercise of curiosity," and should not be granted.

As a litigant, BREDL may obtain discovery from the Staff, but the discovery is limited to "relevant" information, that is, reasonably calculated to lead to admissible evidence. There is no right to require the Staff to produce or search for information that is not ordinarily discoverable because some unnamed, unknown document, unrelated to the facility or contention in litigation, *may* be relevant. In fact, BREDL did not, in its Motion, identify a need for any particular document that it has been unable to obtain; rather, the Motion makes only a sweeping, general complaint that

⁹ With regard to safeguards information, the Staff is required to disclose information for which there is a need-to-know, that is; information that is "reasonable calculated to lead to admissible evidence," and limited by the "appropriate balancing of the public safety and other factors unique to this case." *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC __, __ (2004), slip op. at 4-6.

there may be something out there.

Finally, much of the information relating to security at Category I facilities is beyond the scope of this proceeding and is, therefore, irrelevant and not subject to discovery. As the Commission pointed out in CLI-04-29:

the circumstances at Duke's Catawba reactor, even [during the time it will have the unirradiated MOX fuel assemblies and will technically be a Category I facility] will be very different from the two existing Category I facilities. . . . Because of its composition, form and low plutonium concentration, the MOX material is not nearly as attractive to potential adversaries from a theft and diversion standpoint as the material at the existing . . . facilities.

* * * *

. . . [I]t is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security that is already existing at the reactor site.

* * * *

At stake here is the appropriate increment - the appropriate heightening of security measures - necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.

Catawba, CLI-04-29, slip op. at 7-9. The Commission left to the Board whether the specific measures proposed by Duke would be adequate. *Id.* at 9, n. 34. Thus, the request, insofar as it seeks generic information regarding security at Category I facilities that are not Part 50 reactors temporarily possessing Category I material, is beyond the scope of this proceeding, and therefore, should not be entertained.

In sum, there is no basis for granting BREDL's request that the Staff be compelled to provide it with generic information relating to security at Category I facilities. Therefore, the request should be denied.

B. The Request for a Delay of the Hearing in this Matter Should be Denied.

For the same reasons cited in section A of this response, the request that the hearing be

delayed until two weeks after public access to ADAMS has been restored should be denied. Moreover, there have been two completed rounds of discovery regarding security issues. BREDL has not demonstrated that there are any relevant, discoverable documents to which it has not been given access. Finally, the suspension of public access to ADAMS does not rise to the level of the “extreme and compelling circumstances” that would require a postponement of the hearing.¹⁰ See Memorandum and Order (Confirming Matters Addressed and Ruled on at October 25, 2004, Closed Session), November 5, 2004, slip op. at 6. Therefore, the request for delay of the hearing should be denied.

CONCLUSION

For the reasons set forth above, the Motion should be denied.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC staff

Dated at Rockville, Maryland
this 22nd day of November, 2004

¹⁰ The provisions of 10 C.F.R. § 2.714(a)(1) with respect to the submission of late-filed contentions take into account the unavailability of information upon which a new or amended contention may be based. Provided that BREDL is able to make the requisite showing under that provision, it will have an opportunity to pursue issues based on previously unavailable information. See *also* 10 C.F.R. § 2.734, Motions to reopen.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO BREDL MOTION FOR IMPOSITION OF INTERIM DISCOVERY MEASURES TO COMPENSATE FOR UNAVAILABILITY OF ADAMS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; and by e-mail as indicated by a double asterisk (**), this 22ND day of November, 2004.

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