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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 11/24/04  
SERVED 11/24/04

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 24, 2004

MEMORANDUM and ORDER  
(Confirming Actions Taken at November 23, 2004, Closed Session)

During a closed session in this proceeding<sup>1</sup> held November 23, 2004, certain matters relating to litigation of BREDL Security Contention 5 were addressed. We now confirm herein a verbal bench ruling made during the session, as well as other actions then taken.

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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.

### Confirmation of Board Bench Ruling on Attendance at Force-on-Force Exercises

With regard to BREDL's request to attend any force-on-force exercises done at Catawba for the NRC, the Board ruled that the results of the exercises would be relevant for the same reasons previously discussed,<sup>2</sup> but that actual attendance at the exercises would not be appropriate in view of the interruption and distraction that attendance of outside persons would present, and the need for the Duke security force not only to participate in the exercises but also to continue their primary duty of protecting the plant. The previous attendance of Congressional members and staff at certain other force-on-force exercises as part of their oversight function was not found to mandate providing for attendance in this instance, as providing any reports on the results of the exercises would sufficiently address BREDL's need for the information, taking into account and balancing all appropriate discovery- and security-related factors. The Staff shall therefore provide, in a timely manner, reports on the results of any force-on-force exercises it conducts at Catawba during the pendency of this proceeding, but BREDL will not attend any such exercises.

### Withdrawal of Security Contention 6

BREDL counsel indicated that BREDL would be withdrawing Security Contention 6, based on an agreement reached with Duke on matters relating to the subject matter of the contention; written confirmation of this will be filed the week of November 29.

### Updates on DOE Progress on MOX Fuel, ADAMS Shutdown

Updates on the progress of DOE with regard to the MOX fuel, and the ADAMS shutdown, were provided. The first was reported to be on schedule; with regard to the latter, it was still uncertain when full public access to ADAMS would be restored.

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<sup>2</sup>See Memorandum and Order (Ruling on BREDL Need-to-Know Appeal Regarding Lessons Learned Report) (Nov. 22, 2004); see *also* Memorandum and Order (Ruling on Objections of Duke and Staff to BREDL Discovery Requests) (Oct. 6, 2004).

Status of Pending Need-to-Know Determinations

Staff counsel indicated that all pending need-to-know determinations had been made, except for three documents identified by BREDL after recently examining certain Safeguards information. The Staff will complete determinations with regard to these documents no later than December 3 and preferably sooner, in order to avoid any delay related to them.

Deposition and Site Visit December 7, 8, 2004

The site visit previously scheduled for December 17 was changed to December 8, 2004. BREDL will take the deposition of Duke security employee Billy Williams on December 7.

December 13, 2004, Closed Session

All parties will continue to hold December 13 starting at 1:00 p.m. open for another closed session in the proceeding. Parties should be prepared at the December 8 site visit to indicate whether they have items to address at the December 13 session and whether there is still a need to hold this session.

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 24, 2004<sup>3</sup>

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<sup>3</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 )  
)  
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 ACTIONS TAKEN AT NOVEMBER 23, 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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LB MEMORANDUM AND ORDER  
(CONFIRMING ACTIONS TAKEN AT  
NOVEMBER 23, 2004, CLOSED SESSION)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 24<sup>th</sup> day of November 2004