

December 21, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S MOTION FOR INTERLOCUTORY REVIEW OF
THE LICENSING BOARD'S DECEMBER 17, 2004 ORDER AMENDING
THE PROTECTIVE ORDER AND REQUEST FOR EXPEDITED REVIEW

INTRODUCTION

Pursuant to 10 C.F.R. § 2.786(g)(1), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission grant expedited interlocutory review of the Order issued by the presiding Atomic Safety and Licensing Board (Board) on December 17, 2004, amending the Protective Order in this matter to permit counsel for the intervenor, Blue Ridge Environmental Defense League (BREDL), to store the exhibits for the pre-filed testimony at her office, under protective measures, from December 17, 2004 to February 4, 2005. For reasons more fully discussed below, the Order will cause immediate and irreparable harm on the Staff and the public that is not amenable to subsequent relief.¹

BACKGROUND

The instant case arises out of Duke Power Corporation's (Duke) license amendment request (LAR) to irradiate four mixed oxide (MOX) lead test assemblies (LTAs) at the Catawba nuclear power plant. As further described in the Staff's separate request for a stay filed yesterday, the Board presiding over the case below has issued an Order amending the Protective Order in this

¹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-08, 55 NRC 222 (2002).

matter to permit exhibits to the pre-filed testimony containing safeguards information (SGI) to be stored at the office of counsel for BREDL. See Memorandum and Order (Ruling on BREDL Motion to Amend Protective Order) (December 17, 2004) (Board's Order). Pursuant to the request filed herein, the Staff requests that the Commission grant expedited interlocutory review of the Board's Order and reverse such order.

STATEMENT OF FACT

A Protective Order was entered in this case on December 15, 2003 (Protective Order). Seeking to prevent the release of the sensitive documents that contain SGI, the parties agreed and the Protective Order limited BREDL's access to the documents to two locations—NRC headquarters and the offices of Duke's counsel, Winston and Strawn, LLP. For over a year, access to the security plan submittal and related documents has been maintained in accordance with that provision. Documents subsequently requested during discovery and for which, as a result of a need-to-know determination by either the Staff or the Board, BREDL had access were also controlled in accordance with the provisions of the Protective Order. The only documents containing SGI that were permitted to be stored at BREDL's counsel's office were the pleadings filed in connection with the security contention² and the transcripts of the closed pre-hearing conferences.

Recently, however, BREDL sought to modify the terms of the Protective Order to allow the storage of exhibits to the pre-filed testimony containing SGI at the office of BREDL's counsel. Acting upon BREDL's request, the Staff conducted an audit of Ms. Curran's office and determined that she was in fact appropriately storing and handling the SGI already in her possession—a necessary prerequisite to further consideration of BREDL's request to amend the Protective Order. Tr. at 3797. The Staff subsequently informed Ms. Curran that it would not agree to her request to

² Documents such as Board Orders, answers to interrogatories, motions and responses, etc.

expand the locations permitted to have SGI not generated as a result of the instant case (e.g., documents identified through the discovery process). Duke declined BREDL's request as well.³ Thereafter, BREDL filed a motion requesting that the Board amend the Protective Order in the instant case and expand the locations where SGI could be stored.

The Board then held a prehearing telephone conference to hear argument from the parties on BREDL's motion to amend the Protective Order. During the conference, the Staff informed the Board that its audit found that Ms. Curran was complying with the Protective Order with regard to the documents that were already in her possession. Tr. at 3793-97. The Staff, however, also informed the Board that, in light of the heightened risk posed by the disclosure of the information contained in the documents that could be used as exhibits in the instant proceeding, it had refused to consent to adding an additional site where these documents could be stored. Tr. at 3797. Further, Duke argued that, given the proximity of Ms. Curran's office to the offices of Duke's counsel⁴ and that the limitation on the situs of these documents had not affected the conduct of the proceeding in any perceptible manner, the Board should decline to expand the locations for storage of these documents. Tr. at 3805-06. In sum, the Staff argued that when balancing BREDL's ease of access to the documents at its counsel's office against the particular risk posed by adding an additional situs for this information, that the balance should be struck in favor of maintaining the existing controls in the Protective Order.

After hearing from the Staff, Duke and BREDL, the Board recessed the telephone conference. As the parties were later informed, the Board contacted staff in the Office of

³ However, as indicated by counsel for Duke during the December 17th telephone conference, counsel for BREDL has been and will continue to be given access to the documents at Winston & Strawn from 6am to 6pm weekdays, and on the weekends and in the evenings if feasible and if requested by BREDL.

⁴ The offices of BREDL's counsel are located at 1726 M Street, NW, Washington, DC and Winston and Strawn is located at 1440 L Street, NW, Washington, DC.

Administration (ADM),⁵ Tr. at 3820-21, and determined that, subject to an additional inspection to be performed by ADM staff, BREDL shall have access to the SGI documents offered as exhibits to the pre-filed testimony in the instant proceeding. The SGI documents that the Board has ruled should now be stored at Ms. Curran's offices include, *inter alia*, the most recent version Physical Security Plan and Safeguards Contingency Plan for Catawba, McGuire and Oconee Nuclear Stations, procedures for armed response, and the locations of armed responders. Following the Board's Order modifying the Protective Order, the Staff moved to stay the effectiveness of the Board's Order on December 20, 2004; the Commission, however, denied that motion on December 21, 2004. The Staff now requests that the Commission reverse the Board's Order.

DISCUSSION

1. Interlocutory Review of the Board's Order is Appropriate Because the Order Threatens Irreparable Harm to the Staff and the Public

In accordance with 10 C.F.R. §2.786(g), interlocutory review is appropriate "where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001), *citing* 10 C.F.R. § 2.786(g); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998). *See also Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62 (2004). The instant case warrants interlocutory review of the Board's Order to avoid such irreparable harm to the Staff, to the public and to the Nation's common

⁵ The Board's actions in this regard are of particular concern to the NRC Staff. During the course of the telephone conference, the Board informed the parties that it was attempting to reach a resolution on BREDL's request, but that it did not want to tell the parties what it was considering. Upon reconvening the telephone conference, the Board informed the parties that the Board contacted staff in ADM and asked them to conduct an inspection on the Board's behalf. The NRC Staff is concerned that the Board asked the Staff to conduct an inspection on its behalf on a matter already addressed by the Staff in the proceeding and for which the Staff had primary responsibility. *See Catawba*, CLI-04-6, 59 NRC at 74 (stating that "[i]n this case the Commission has made no extraordinary grant of authority to the Board ...").

defense and security. If the Commission denies the instant request, BREDL's counsel will store sensitive SGI at her office, thus disseminating the documents to an additional site for storage. Should the documents in question be compromised while stored at BREDL's counsel's office, the harm to the Staff, the licensee and to the public, will be irreversible and cannot otherwise be remedied. Specifically, the Staff's position is that the documents that the Board ordered to be kept at BREDL's counsel's office are documents that relate to security at the Catawba Nuclear Station and other nuclear power plants and contain information that, if disclosed, could significantly challenge Catawba's security and the security of other nuclear power plants. Further, the Staff opines that the information allowed to be stored at BREDL's counsel's offices, if disclosed, poses a significantly greater risk than the documents now being stored at BREDL's counsel's office. The Staff submits that the more significant the information, the more locations that SGI is stored, and the more copies made, the more risk of compromise of this information is increased.

The Board's Order threatens the public with "immediate and serious irreparable impact that, as a practical matter, could not be alleviated through a petition for review of the [Board's] final decision," and thus the decision is appropriate for review by the Commission. *See, e.g., Catawba*, CLI-04-6, 59 NRC at 71; *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 193 (1994). *See also, Private Fuel Storage (Independent Spent Fuel Storage Installation)*, CLI-00-13, 52 NRC 23, 28-29 (2000). If the Board's order is not reversed, BREDL's counsel would store documents that cover specific details of the security and protective strategy at Catawba, including the procedures for armed responders. In the Staff's view, if such information is compromised, security at Catawba could be severely impacted. In addition, due to the sensitivity of certain exhibits, if the information were compromised it could have adverse impacts on the security posture at Catawba and other nuclear power plants. Once the content of these documents

is disclosed, the harm to the common defense and security cannot be undone.⁶ In the event that, acting on the Staff's appeal, the Commission, at a later time, reversed the Board's determination it might be too late to undo any harm. Because the adverse impacts arising from a potential compromise of the information could occur now, the alleged harm is immediate. *Catawba*, CLI-04-6, 59 NRC at 71, (citing *Vogtle*, CLI-94-5, 39 NRC at 193).

Moreover, the Staff believes that the Protective Order, as originally issued, establishes a set of graded controls that appropriately considered the highly sensitive nature of certain documents involved in this proceeding (*i.e.*, differentiating between derivative documents stored at BREDL's office versus primary SGI documents that concern security at Catawba, along with other nuclear power plants currently stored at NRC headquarters and the office of Duke's counsel). The maintenance of these provisions will provide appropriate measures to minimize the risk of compromise for the duration of the proceeding. Therefore, the Staff requests that the Board's Order be reversed and that the measures that have already been in place in this proceeding for over a year be reinstated.

CONCLUSION

For the foregoing reasons, the Staff submits that the Commission should take review of the Board's Order of December 17, 2004.

Respectfully submitted,

/RA/

Antonio Fernández
Counsel for NRC Staff

Dated in Rockville, Maryland
This 21st day of December 2004

⁶ Indeed, given the level of detail regarding the specific physical security measures at Catawba and, potentially, other nuclear power plants, the information in the exhibits containing SGI is of greater sensitivity than the information already held by BREDL counsel.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE 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 "NRC STAFF'S MOTION FOR INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S DECEMBER 17, 2004 ORDER AMENDING THE PROTECTIVE ORDER AND REQUEST FOR EXPEDITED REVIEW" 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 21st day of December, 2004.

Ann Marshall Young, Chair * **
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AMY@nrc.gov)

Anthony J. Baratta * **
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: AJB5@nrc.gov)

Thomas S. Elleman **
Administrative Judge
Atomic Safety and Licensing Board
5207 Creedmoor Rd #101
Raleigh, NC 27612
(E-mail: elleman@eos.ncsu.edu)

Office of the Secretary * **
ATTN: Docketing and Service
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555
(E-mail: HEARINGDOCKET@nrc.gov)

Office of Commission Appellate
Adjudication*
Mail Stop: O-16C1
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board
Adjudicatory File*
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555

Diane Curran, Esq. **
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036
(E-mail: dcurran@harmoncurran.com)

Timika Shafeek-Horton, Esq.**
Lisa F. Vaughn, Esq.**
Legal Department
Mail Code - PB05E
Duke Energy Corporation
426 S. Church Street (EC11X)
Charlotte, NC 28201-1006
(E-mail: lfVaughn@duke-energy.com
tshafeek@duke-energy.com)

David A. Repka, Esq. **
Anne W. Cottingham, Esq. **
Mark Wetterhahn, Esq. **
Winston & Strawn, L.L.P.
1400 L Street, NW
Washington, DC 20005-3502
(E-mail: drepka@winston.com
acotting@winston.com
mwetterhahn@winston.com)

/RA/

Antonio Fernández
Counsel for NRC Staff