

RAS 9067

December 22, 2004

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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

December 22, 2004 (2:52pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,  
Units 1 and 2)

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Docket Nos. 50-413-OLA  
50-414-OLA

RESPONSE OF DUKE ENERGY CORPORATION TO NRC STAFF'S MOTION  
FOR EXPEDITED INTERLOCUTORY REVIEW

On December 21, 2004, the NRC Staff filed a motion<sup>1</sup> seeking expedited interlocutory review of an order issued by the Atomic Safety and Licensing Board ("Licensing Board") in this matter on December 17, 2004.<sup>2</sup> The Board Order at issue — and currently in effect — amends the protective order previously established in this matter to allow the intervenor Blue Ridge Environmental Defense League ("BREDL") to have possession of (and store), for a defined period of time, additional documents classified as Safeguards Information.<sup>3</sup> Specifically, BREDL's counsel would be allowed to take possession of testimony exhibits offered by all

<sup>1</sup> "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," dated December 21, 2004 ("Staff Appeal").

<sup>2</sup> "Memorandum and Order (Ruling on BREDL Motion to Amend Protective Order)," December 17, 2004 ("Board Order").

<sup>3</sup> The Board Order and protective order amendment were made subject to completion of an inspection at BREDL's counsel's office by certain NRC personnel, as directed and arranged by the Licensing Board. Board Order, at 4-5.

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parties in this case. Absent the amendment to the protective order, BREDL would have access to those documents, but could not make or keep copies.

Duke Energy Corporation ("Duke") concurs in the recitation of facts as outlined in the Staff Appeal. As explained there, Duke did object to the amendment of the protective order during the Licensing Board's telephone conference call of December 17, 2004. Like the NRC Staff, Duke is very concerned regarding the creation of additional copies of, and additional offsite storage locations for, very sensitive security documents.<sup>4</sup> For example, at this time the proposed exhibits in this proceeding already include the complete Duke Power Physical Security Plan and the complete, detailed armed response implementing procedure for the Catawba Nuclear Station. These documents obviously, and quite explicitly, reveal the capabilities of and strategies for physical security at Catawba. These documents also could implicitly reveal similar information for Duke's other nuclear plants and for other nuclear plants nationwide.<sup>5</sup>

In regard to control of Safeguards Information, Duke also defers to the judgment of the NRC Staff. In the past in this case the Commission itself has noted (in a slightly different security context) that: "The Commission has confidence in our Staff, which is well trained and is experienced in NRC licensing and enforcement proceedings, and intimately familiar with both NRC safeguards regulations and the licensing or enforcement matter at hand." *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 75 (2004) (explaining that licensing boards "should give considerable deference" to the Staff's judgments on "need to

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<sup>4</sup> Irrespective of the outcome of the inspection arranged by the Licensing Board, there have in fact been in this case a number of non-compliances (previously noted to the parties) by BREDL's representatives with respect to the appropriate controls for Safeguards Information. This history only serves to increase Duke's sensitivity to expansion of BREDL's rights under the protective order.

<sup>5</sup> In addition, it is not possible to even know at this time what, if any, additional exhibits will be offered with rebuttal testimony due next month.

know” determinations). In this instance, the Staff’s judgment is that implementing the Board Order threatens the public with “immediate and serious irreparable impact” because this information, if compromised, could adversely affect security both at Catawba and at other nuclear power plants.<sup>6</sup>

Duke, of course, also has no desire for delay in this proceeding. As we have noted in the past, the license amendment at issue is part of an important Department of Energy nuclear non-proliferation initiative. The mixed oxide fuel lead assemblies at issue are presently being fabricated in France for anticipated delivery to Catawba prior to the Unit 1 spring 2005 refueling outage, and therefore issuance of the proposed amendment and/or completion of this hearing is extremely time-sensitive.<sup>7</sup> BREDL has, for some time, had access to the documents now at issue, and will continue to have access to those documents before and during the scheduled evidentiary hearing, both at the NRC and at the offices of Winston & Strawn LLP. Obviously, every reasonable accommodation can and will be made to facilitate BREDL’s participation in the hearing. For those reasons, Commission action to reverse the Board Order should not, in Duke’s view, lead to either a delay in the scheduled hearing or any significant increase in the length of the hearing.

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<sup>6</sup> Staff Appeal, at 5-6.

<sup>7</sup> See the October 28, 2004 and November 2, 2004 letters in this proceeding from David Repka, counsel for Duke, to NRC Administrative Judges Ann M. Young, Anthony J. Baratta, and Thomas S. Elleman. The Licensing Board has established that the current January hearing date will not be extended absent “extreme and compelling circumstances, such as critical injury or death or similar circumstances. . . .” See “Memorandum and Order (Confirming Matters Addressed and Ruled On at October 25, 2004, Closed Session),” November 5, 2004, slip op. at 6.

Subject to satisfaction of the condition precedent established in the Board Order, and absent a stay, Duke will of course comply with the Board Order pending Commission review.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is underlined with a horizontal line.

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ATTORNEYS FOR DUKE ENERGY  
CORPORATION

Dated in Washington, District of Columbia  
This 22<sup>nd</sup> day of December, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF DUKE ENERGY CORPORATION TO NRC STAFF'S MOTION FOR EXPEDITED INTERLOCUTORY REVIEW" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 22<sup>nd</sup> day of December, 2004. Additional e-mail service, designated by \*, has been made this same day, as shown below.

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