

RAS 9002

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

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

December 17, 2004

MEMORANDUM and ORDER
(Ruling on BREDL Motion to Amend Protective Order)

Blue Ridge Environmental Defense League {BREDL} has moved that we issue an additional amendment to a protective order issued in this case on December 15, 2003, governing the disclosure and use of protected information in this proceeding.¹ The sole

¹[BREDL]'s Motion to Amend Protective Order (Dec. 15, 2004) [hereinafter BREDL Motion].

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.

purpose of the proposed amendment is for BREDL's counsel to store exhibits to pre-filed testimony under appropriate protective measures in BREDL counsel's office between December 17, 2004, and February 4, 2003 — the first of these dates being the deadline for the filing of prefiled direct testimony and the second being the deadline for the filing of reply proposed findings of fact after the hearing on Security Contention 5, to be held January 10-14, 2004. BREDL requests the change, stating that it is "necessary to allow BREDL a sufficient opportunity to review exhibits in preparation for the hearing. . . ."2 BREDL had earlier requested this during a closed session in this proceeding, and the parties had attempted to work together to resolve the issue, but this effort has not been successful.

With regard to BREDL's original request to keep the exhibits in counsel's office, Mr. Bernard Stapleton of the Staff performed an inspection of BREDL counsel's office to determine the adequacy of measures taken there to protect Safeguards information, and found that the measures are adequate.³ Subsequent to this inspection, however, NRC Staff counsel informed BREDL that its counsel would not be permitted to keep the exhibits at her office, and BREDL's motion now under consideration was then filed.⁴ During a telephone conference held December 17, 2004, the NRC Staff and Duke Energy Company [Duke] objected to BREDL's motion, emphasizing the especially sensitive nature of the documents at issue, and citing the case of *Pacific Gas and Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1406 (1977), for the proposition that in some cases, in addition to

LBP-04-10, 59 NRC at 352.

²BREDL Motion at 1.

³See BREDL Motion at 2; see also Transcript of December 17, 2004, morning telephone conference.

⁴See BREDL Motion at 3.

measures adequate for the protection of Safeguards Information, it may be desirable to limit locations at which an intervenor may examine sensitive documents.⁵

After hearing the arguments of counsel, we find that BREDL's request is a reasonable one, if this proceeding is to be conducted without further delay. We have consistently endeavored in this proceeding to move forward without undue delay, both to further the general desirability of conducting adjudication proceedings in a timely and efficient manner, and to accommodate as much as possible Duke's planning and schedule with regard to the proposed MOX lead test assemblies. The decision in *Diablo Canyon* indeed recognizes, in addition to indicating that it may be desirable to limit locations where sensitive materials may be examined, that this may "result in a lengthened hearing."⁶ The Appeals Board in the case also noted that "the Licensing Board is in the best position to determine the most appropriate circumstance in which [a document] may be viewed," and left it to the Board to "formulate the exact terms and conditions of the order."⁷

We make our ruling in this matter in light of the concerns discussed in *Diablo Canyon* — i.e., in view of the goals of protecting the security of very sensitive materials as well as taking into account the possibility of any lengthening of the hearing in this matter or any related delays — and recognizing also the very reasonable and legitimate need of counsel to prepare its case adequately in order to participate in the proceeding and evidentiary hearing in a meaningful way. To be in a position of not being able to examine exhibits in preparation for the hearing or

⁵See Transcript of December 17, 2004 morning telephone conference.

⁶*Diablo Canyon*, 5 NRC at 1406.

⁷*Id.*

of proposed findings during evening hours as needed,⁸ and having to carry voluminous amounts of documents — many of a sensitive nature themselves — back and forth to opposing counsel’s office in order to prepare for the hearing and prepare proposed findings of fact and conclusions of law, would seem obviously to compromise BREDL’s ability to prepare timely and meaningfully in this proceeding with regard to the litigation of Security Contention 5. BREDL has prepared up to this point using Duke counsel’s office for examination of relevant documents, and has requested that during the critical time period preceding, during and after the evidentiary hearing up through the preparation of proposed findings, it have more ready and meaningful access to the documents. We make our ruling taking into consideration the realities and need underlying this request, as well as the need to protect the very sensitive information at issue, and the need and desirability of ensuring that this proceeding can be litigated and concluded in a timely manner without further delay.

Part of the concern for proper handling of the security of sensitive materials that particularly concerns us with regard to BREDL’s request is the desirability of avoiding risks associated with repeated transport of sensitive safeguards materials now in BREDL’s possession back and forth to opposing counsel’s office. Transport back and forth of such material increases the likelihood of losing control of sensitive material — and yet such transport, as argued by BREDL counsel, will be necessary if BREDL is to prepare for hearing and prepare proposed findings while having to examine relevant exhibits at opposing counsel’s office rather than in BREDL counsel’s own office, where other materials are kept and where most preparation will obviously occur.

⁸Although Duke counsel, at whose office the examination of such sensitive documents as are now at issue is currently conducted by BREDL counsel, has offered to make the office available on at least one weekend for BREDL counsel, no evening hours past 6:00 p.m. are provided, which, in view of customary counsel preparation practices on the part of many lawyers prior to evidentiary hearings, we find to be unreasonably limiting.

Thus, to fulfill these three goals — proper handling and protection of the security of very sensitive materials, avoiding delay, and permitting the meaningful participation of Intervenor BREDL in this proceeding — we herein order, with regard to BREDL's request, amendment of the Protective Order to allow the holding of the exhibits at the law office of BREDL's counsel during the time period requested, with the following proviso:

A member of the NRC Administration Staff from the Division of Facilities and Security who is knowledgeable in physical security and handling and storage of safeguards material and who has been assigned to conduct an independent inspection of BREDL counsel's office, finds, after such inspection and consultation with BREDL counsel, that BREDL counsel can effectively, with measures now in place along with any additional reasonable measures arrived at in consultation with BREDL counsel, ensure the effective safeguarding of the exhibits in question in her law office. The Board is informed that such a person will be able to perform the inspection in question on Tuesday morning, December 21, 2004.

The Board requests the Staff to coordinate this activity, and expects that in doing so the Staff will operate in good faith to ensure that appropriate measures are taken to separate the functions of the independent inspector from those of the Staff working on the Catawba proceeding, and that this, along with the provision to the inspector of the parties' agreed description of the documents in question, will be sufficient to assure the appropriateness of the inspection. We expect BREDL and Duke counsel to cooperate with NRC Staff counsel in producing such a description of all parties' anticipated exhibits. We also expect BREDL counsel to operate in good faith to accommodate the inspection, and to work with the inspector regarding any reasonable additional recommended measures to ensure appropriate protection of the exhibits.

Finally, we expect that all parties will cooperate in this matter as we have described, in order to avoid delay and ensure the meaningful furtherance of this proceeding, including the evidentiary hearing and related preparation for it and of proposed findings of fact and conclusions of law.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

/RA/

Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA/

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 17, 2004⁹

⁹Copies 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 MOTION TO AMEND PROTECTIVE ORDER) 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 (RULING ON
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of December 2004