

RAS 9003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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SERVED 12/20/04

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

December 17, 2004

MEMORANDUM and ORDER
(Need-to-Know Ruling on SECY Document)

Blue Ridge Environmental Defense League [BREDL] has appealed an NRC Staff Need-to-Know determination in this proceeding,¹ denying access to SECY-03-0215, a December 17,

¹This 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.

2003, Safeguards document on “Insider Threat Mitigation by Licensees.”² The NRC Staff responded to BREDL’s appeal, making various arguments why the document in question should not be provided, including grounds of relevance and privilege.³ BREDL replied to the Staff’s Response, asserting the raising of new issues not previously raised or discussed, requesting permission to file such reply.⁴ We grant such request, and make the following ruling on BREDL’s appeal:

We grant access to two portions of the document in question, and deny access to the remainder of the document. The two portions of the document to which we grant access concern two areas that the Commission specifically approved in a March 3, 2004, Staff Requirements Memorandum, which is designated as Safeguards Information. Those two portions at that point became Commission policy that is applicable to licensees including Duke, and are therefore relevant in the security portion of this proceeding. The remainder did not become Commission policy, are therefore are of remote relevance to this proceeding, if relevant at all. Moreover, all relevant and useful information concerning the document in question appears to be contained in the guidance document, access to which BREDL already has, that prompted the request for SECY-03-215. We note in this regard that the reference in the guidance document is to part, not all, of SECY-03-215.

Balancing all appropriate discovery- and security-related concerns, we find that providing the two portions of the document that address the areas approved by the

²[BREDL] Appeal of Adverse Need-to-Know Determination Regarding SECY-03-215 (Dec. 10, 2004). BREDL’s appeal followed the Staff’s December 3, 2004, determination in a letter from Antonio Fernández to Diane Curran. See *also* Letter from Diane Curran to Administrative Judges (Dec. 9, 2004).

³NRC Staff’s Response to BREDL’s Appeal of Staff’s Adverse Need-to-Know Determination Regarding SECY-03-215 (Dec. 15, 2004).

⁴[BREDL] Reply to NRC Staff’s Response to Need-to-Know Appeal (Dec. 15, 2004); [BREDL]’s Motion for Leave to Reply to NRC Staff’s Response to Need-to-Know Appeal (Dec. 15, 2004).

Commission, but denying access to other portions, to be the most appropriate course to follow with regard to BREDL's request.

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, 2004⁵

⁵Copies 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
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(Catawba Nuclear Station, Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (NEED-TO-W RULING ON SECY DOCUMENT) 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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Docket Nos. 50-413-OLA and 50-414-OLA
LB MEMORANDUM AND ORDER (NEED-TO-
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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