

December 15, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 RESPONSE TO BREDL'S APPEAL  
OF STAFF'S ADVERSE NEED-TO-KNOW  
DETERMINATION REGARDING SECY-03-215

INTRODUCTION

On November 22, 2004, the Blue Ridge Environmental Defense League (BREDL) requested a need-to-know determination from the Staff of the Nuclear Regulatory Commission (Staff) for two safeguards documents, namely NRC RIS 2002-12-A, "Power Reactors Threat Advisory and Protective Measures Systems," and SECY-03-0215, "Insider Threat Mitigation by Licensees" (SECY-03-0215). In a letter dated December 3, 2004, the Staff concluded that BREDL does not have a need-to-know regarding either of the documents and, as a result, denied access to both. See Letter to BREDL from Antonio Fernández dated December 3, 2004. On December 10, 2004, BREDL appealed the Staff's determination regarding SECY-03-0215.<sup>1</sup> See BREDL's Appeal dated December 10, 2004. The Staff hereby responds to that appeal.

In the Staff's December 3<sup>rd</sup> response, two grounds for denying BREDL access to the requested document were articulated. First, that "SECY-03-0215 is the precursor to the guidance already provided to BREDL regarding the insider mitigation program" and second, that the

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<sup>1</sup> BREDL did not appeal the adverse need-to-know determination on RIS 2002-12-A.

safeguards document “would merely provide contextual information unrelated to Catawba” and is not subject to disclosure.<sup>2</sup> See Letter to BREDL from Antonio Fernández dated December 3, 2004. As the Commission recently ruled, BREDL is entitled to access to safeguards information *only* if: 1) in light of the traditional discovery standard of relevance, the information sought is reasonably calculated to lead to the discovery of admissible evidence; and 2) upon consideration of the public safety and other factors unique to the case, BREDL should have access to the information. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC \_\_ (October 7, 2004). BREDL’s request must first meet the test of general discovery and then the Staff will make a decision regarding its safeguards need-to-know status. Therefore, as explained below, the instant appeal must be denied because SECY-03-0215 is both privileged under general discovery standards and also does not meet the additional requirements for safeguards disclosure.

#### DISCUSSION

Under standard discovery rules, “[p]arties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the proceeding.” 10 C.F.R. § 2.740(b)(1).<sup>3</sup> For safeguards documents, however, the approach is “defining the need-to-know “indispensability” standard by reference to the discovery standard, *with appropriate balancing of public safety and other factors unique to the case*, is the proper course to follow.” *Catawba*, CLI-04-29, 60 NRC at \_\_, Slip. op. at 6 (emphasis in original)(quoting LBP-04-21, 60 NRC at \_\_, Slip op. at 21). The

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<sup>2</sup> The Staff would note that its determination is entitled to considerable deference from the Board. As the Commission instructed the Board in CLI\_04-06, “it is appropriate for NRC Staff experts to make the initial ‘need to know’ decisions. When a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment *should give considerable deference to the Staff’s judgments.*” *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 75 (2004) (emphasis added).

<sup>3</sup> All references to 10 C.F.R. Part 2 are from the former Part 2, prior to its amendment on January 14, 2004.

document in question is both privileged and unrelated to the subject matter; therefore, BREDL is not entitled to its discovery.

1. BREDL Is Not Entitled to Discovery of SECY-03-0215 Because It Is Protected by the Deliberative Process Privilege

The deliberative process privilege is found in 10 C.F.R. § 2.790(a)(5). As explained by the Commission, this privilege protects “intra-agency communications ‘reflecting advisory opinions, recommendations and deliberation comprising part of a process by which governmental decisions and policies are formulated.’” *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 198 (1994) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)); *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

The privilege applies to documents that are predecisional and deliberative. “A document is predecisional if it was prepared *before* the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision.” *Vogtle*, CLI-94-5, 39 NRC at 197 (emphasis in original) (citations omitted). Deliberative communications reflect a consultative process. *Id.* at 198.

Protected documents can include analysis, evaluations, *recommendations*, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency. Deliberative documents “relate[] to the process by which policies are formulated.” However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. A document providing “opinions or recommendations regarding facts” may also be exempt under the privilege.

*Id.* (emphasis added) (internal citations omitted). The purpose of the privilege is to “encourage frank discussions within the government regarding the formulation of policy and the making of decisions.” *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1164 (1982); *see also Shoreham*, ALAB-773, 19 NRC at 1346-47.

SECY-03-0215 fits squarely within the communications protected by the privilege. As the Staff stated in its letter to BREDL, the document is the precursor to the guidance issued by the Commission regarding the insider mitigation program (which BREDL has already received). The document contains the Staff's preliminary recommendations to the Commission. Accordingly, the document meets all requirements necessary to invoke the privilege; it is predecisional, deliberative and an intra-agency communication and is therefore entitled to protection from disclosure.

In litigation, the privilege is qualified and may be waived. The agency's interest in confidentiality must be balanced against the interest of the litigant in obtaining the information. *Vogtle*, CLI-94-5, 39 NRC at 198; *Shoreham*, ALAB-773, 19 NRC at 1341. The burden of demonstrating that the privilege is properly invoked rests with the agency, while the party seeking disclosure bears the burden of showing need that is "overriding" or involving "special circumstances" in order to defeat a valid claim of this privilege. *Shoreham*, ALAB-773, 19 NRC at 1343 (noting that the desire to use such documents to find weaknesses in the opposing party's case does not demonstrate a "compelling need for the material."). BREDL already has access to the information that governs the program at the Catawba facility and it has not shown the requisite overriding or compelling need for disclosure of the requested information

Moreover, within its appeal, BREDL states that they are also appealing "the Staff's failure to identify or disclose any other documents that may be referenced in SECY-03-0215, which contain further guidance on the Commission's view of the characteristics of the insider threat." See BREDL's Appeal at 1. It follows from that statement that BREDL believes that Commission opinions and views are reflected within the SECY paper requested. This is simply not the case. The document in question is not a reflection of the Commission's views, rather it contains solely the Staff's recommendations; BREDL has already received the Commission's Guidance on insider threat information pertinent to the Catawba facility, which constitutes the implementation of the Commission's decisions on the recommendations in SECY-03-0215. Therefore, BREDL's need

cannot be considered compelling (particularly in light of the fact that the Commission's guidance has already been provided).

2. SECY-03-0215 Is Not Indispensable to the Proceedings and Is Therefore Not Discoverable Under the Need-To Know Standard

In the course of discovery, in order to have access to safeguards information, BREDL must show: first, that under the traditional discovery standard, that information is discoverable (i.e. it is reasonably calculated to lead to admissible evidence); and second, the "access to safeguards documents [should] be as narrow as possible." *Catawba*, CLI-04-29, 60 NRC at \_\_\_, Slip op. at 5 (citing *Catawba*, CLI-04-06, 59 NRC at 75).

The subject matter in the instant proceeding is limited to the security programs at the Catawba facility that will be in place when the MOX LTA's are received at Catawba. The documents describing the security programs currently in place at Catawba and those programs proposed by Duke to accommodate for the presence of MOX fuel have already been disclosed to BREDL in discovery. Given that BREDL has already been granted access to information pertinent to their contention, pre-decisional safeguards information in the form of Staff recommendations to the Commission on general practices have no bearing on the programs at that facility and are not relevant to BREDL's case. Accordingly, the opinions contained within the document in question are not relevant.

Moreover, BREDL argues that "SECY-03-0215 clearly is relevant to Contention 5, because it appears to contain the Commission's views regarding the characteristics and likely effectiveness of the active violent insider." See BREDL Appeal at 4. Both BREDL's factual argument and standard for disclosure are erroneous. The document does not contain the Commission's views, rather, as discussed above, it reflects the opinions of the Staff in the form of recommendations to the Commission.

BREDL contends that the information contains “contextual information’ [and] is highly relevant and helpful”. BREDL Appeal at 5. That argument does not meet the threshold standard to require production of safeguards material. Earlier in this proceeding, the Commission clearly stated that “a desire to obtain safeguards materials for ‘context’ is an insufficient basis for access to safeguards information.” *Catawba*, CLI-04-06, 50 NRC at 72. BREDL did not demonstrate that the information met the higher two-tiered standard required for disclosure of safeguards documents and, as a result, the Staff correctly determined that BREDL did not have a need-to-know.

In sum, the Staff has already made available to BREDL the guidance applicable to Catawba concerning the insider threat. The guidance that BREDL has access to is the final Commission statement on the insider threat issue. Therefore, granting access to SECY-03-0215 would not only involve the disclosure of predecisional information, but it would grant access to safeguards information solely for the purpose of giving BREDL “context” – an insufficient purpose for disclosure of safeguards material. *Catawba*, CLI-04-06, 59 NRC at 73.

#### CONCLUSION

For the foregoing reasons, SECY-03-0215 is protected from disclosure in these proceedings. Therefore, the Board should defer to the Staff’s adverse need-to-know determination and BREDL’s appeal should be denied

Respectfully submitted,

**/RA/**

Shana Zipkin  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 15<sup>th</sup> day of December, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO BREDL'S APPEAL OF STAFF'S ADVERSE NEED-TO-KNOW DETERMINATION REGARDING SECY-03-215" 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 15<sup>th</sup> day of December, 2004.

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