

December 20, 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 STAY PENDING  
INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S  
DECEMBER 17, 2004 ORDER AMENDING PROTECTIVE ORDER

INTRODUCTION

Pursuant to 10 C.F.R. § 2.788(a), the staff of the Nuclear Regulatory Commission (Staff) hereby requests that the Commission issue an order staying the effect of an order issued by the Atomic Safety and Licensing Board (Board) on December 17, 2004,<sup>1</sup> pending review of a petition for interlocutory review to be filed tomorrow pursuant to 10 C.F.R. § 2.786(g)(1). The Board's Order amended the Protective Order in this matter in order to permit pre-filed testimony exhibits containing safeguards information ("SGI") to be stored at BREDL's counsel's office between December 17, 2004 and February 4, 2005.

The Staff submits that it is likely to prevail upon appeal. Granting a stay will not harm the Intervenor, and will not cause a delay in the hearing on this matter, but could possibly slightly lengthen the hearing. Such lengthening of the hearing, however, is outweighed by the possibility that the Board's ruling at issue may result in release of SGI.

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<sup>1</sup> See Memorandum and Order (Ruling on BREDL Motion to Amend Protective Order), December 17, 2004 (Board's Order).

### BACKGROUND

As part of its license amendment request, which is the subject of this proceeding, Duke Energy Corporation submitted a supplement to its security plan and asked for exemptions from certain regulatory requirements. See Letter from M.S. Tuckman, Re: Physical Security Plan and Request for Exemptions to Support MOX Fuel Use (Sept. 15, 2003) (Safeguards). Because the security plan and related documents contained SGI, a Protective Order was agreed to by the parties and issued by the Board. The Protective Order provided that the information protected by the Order, including the Physical Security Plan and any documents derived from or related to it and obtained in discovery, shall be made available to BREDL's counsel and witness only at the offices of the NRC staff or at the offices of Winston & Strawn, counsel for Duke. The only documents containing SGI that are permitted to be stored at BREDL's counsel's office are the pleadings filed in connection with the security contention<sup>2</sup> and the transcripts of the closed pre-hearing conferences. All parties and the Board have operated under these terms for over a year. Recently, however, BREDL changed its position and demanded that it be allowed to keep at its counsel's office SGI documents that it had only been allowed to inspect at Winston and Strawn or at the NRC.

BREDL requested that the Staff and Duke consent to the amendment. The Staff declined. Thereafter, BREDL filed its motion requesting that the Board amend the Protective Order. A telephone conference was held on December 17, 2004 to discuss BREDL's motion. After oral argument, but before making its decision, the Board contacted staff in the Office of Administration and requested that notwithstanding a Staff inspection conducted on December 13, 2004, they inspect the protective measures in place at the office of BREDL's counsel, in order to determine

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<sup>2</sup> Documents such as Board Orders, answers to interrogatories, motions and responses, etc.

whether they were sufficient to protect any exhibits containing SGI.<sup>3</sup> Arrangements were made between the Board and Buildings and Security staff regarding the inspection, which is now scheduled for Tuesday, December 21, 2004. Thereafter, the Board informed the parties of its actions during the break, granted BREDL's motion, and issued its Order amending the Protective Order to permit pre-filed testimony exhibits to be stored at BREDL's counsel's office between December 17, 2004 and February 4, 2005. The Order further provides that the inspection of BREDL's counsel's office will take place on Tuesday, December 21, 2004.

#### DISCUSSION

Filing an appeal or request for interlocutory review does not, in and of itself, stay the effect of a disputed ruling. See 10 C.F.R. § 2.730(g); cf. 10 C.F.R. § 2.786(f). Rather, a stay request must be filed under 10 C.F.R. § 2.788. Once the content of these safeguards documents is disclosed, the harm to the common defense and security cannot be undone. See, *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-06, 59 NRC 62 (2004). Specifically, in the event that, on subsequent review, the Commission reverses the Board's determination to amend the Protective Order and permit sensitive SGI documents to be stored at BREDL's counsel's office, it could then be too late to undo the damage if the SGI is released to the public.

Additionally, the instant motion meets the criteria set forth in 10 C.F.R. § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;

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<sup>3</sup> The NRC's Office of Administration is not responsible for such activities, which traditionally are within the purview of the Office of Nuclear Security and Incident Response (NSIR). The Staff (NSIR) previously performed such an inspection on December 13, 2004 and found that BREDL's counsel was complying with the requirements of the protective order in the instant case and that the SGI that she was allowed to have under the terms of the order was being appropriately protected. However, the Staff advised the Board that, in light of the fact that BREDL currently has access to the information sought at two locations and given the sensitivity of some of the exhibits, it would not be appropriate to modify the order to add any additional locations where this information would be available.

- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

10 C.F.R. §2.788(e)(1)-(4); see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224-25 (2002). The Staff, as the moving party, is likely to prevail upon appeal. Unnecessarily expanding the sites where SGI documents are located presents an additional threat that the information may be released. As the Commission itself reminded the parties and Board in the instant case, the dissemination of SGI should be as narrow as possible. See *Catawba*, 59 NRC at 73. Throughout the instant proceeding the Staff has attempted to zealously guard against unnecessary distribution of SGI. Pursuant to its statutory obligations that it protect safeguards information from improper distribution, the Staff agreed, and the protective order indeed provided, that the Intervenor solely be allowed access at its counsel's offices to SGI documents generated as a result of the proceeding (e.g., transcripts, pleadings, orders, etc.) and that access to any other documents should be at Duke counsel's offices or at the NRC headquarters. Specifically, 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. The information ordered to be stored at BREDL's counsel's offices, if disclosed, poses a significantly greater threat than the documents now being stored at BREDL's counsel's office.

Other than, arguably, possibly causing a brief delay in that portion of the proceeding concerning security issues,<sup>4</sup> the public interest will not be served by permitting safeguards

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<sup>4</sup> Notably, any delay that could be caused by following the procedures that the Board itself ordered over a year ago should have been identified earlier either by the Board or the Intervenor.

information to be stored at more sites than is absolutely necessary. The public interest lies in protecting the public health and safety and the common defense by protecting the integrity of nuclear security, including ensuring that SGI is not released. Therefore, the request for a stay pending appeal should be granted.

The Staff has consulted with counsel for Duke, who indicated that Duke supports the instant motion. The Staff counsel also consulted with counsel for BREDL, who indicated that BREDL intends to oppose the motion. Nonetheless, because of the extraordinary nature of this case and the time periods encompassed in the Board's Order, the Staff requests that the Commission grant the stay.

Lastly, given that the Board has requested that staff in the Office of Administration conduct an additional inspection tomorrow morning, the Staff requests that the Commission issue a "housekeeping stay"<sup>5</sup> of the Board's order effective immediately, pending review of the instant motion.

#### CONCLUSION

For the foregoing reasons, the Staff requests that the Commission stay the effectiveness of the Board's Order.

Respectfully submitted,

**/RA/**

Antonio Fernández  
Counsel for NRC staff

Dated in Rockville, Maryland  
This 20th day of December 2004

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<sup>5</sup> See, e.g., *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), 1996 WL 627640 (N.R.C.) (Oct. 2, 1996).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION FOR STAY PENDING INTERLOCUTORY REVIEW OF THE LICENSING BOARD'S DECEMBER 17, 2004 ORDER AMENDING PROTECTIVE ORDER" 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 20th day of December, 2004.

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