

December 22, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

In the Matter of

DUKE ENERGY CORPORATION

(Catawba Nuclear Station, Units 1 and 2)

Docket No's. 50-413-OLA,
50-414-OLA

December 22, 2004 (3:34pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S
OPPOSITION TO NRC STAFF'S MOTION FOR INTERLOCUTORY REVIEW
OF ASLB RULING AMENDING PROTECTIVE ORDER**

I. INTRODUCTION

Blue Ridge Environmental Defense League ("BREDL") hereby responds to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff's motion for interlocutory for review of an order by the Atomic Safety and Licensing Board ("ASLB") which amends the ASLB's Protective Order in this proceeding. 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 (December 21, 2004) (hereinafter "Staff Motion"). BREDL respectfully submits that the Staff's Motion should be denied because it fails to meet the Commission's test for interlocutory review. It also lacks merit.

II. FACTUAL BACKGROUND

In this proceeding, BREDL has challenged the adequacy of Duke Energy Corporation's ("Duke's") application for an amendment to the Catawba nuclear power plant operating license, which would allow Duke to test plutonium MOX fuel at

Catawba. The ASLB admitted both a safety contention and a security contention submitted by BREDL.

Duke's admitted security contention (Security Contention 5) challenges the adequacy of Duke's application for exemptions from various NRC regulations governing facilities that possess Category I quantities of strategic special nuclear material. The exemption requests were described in a portion of Duke's license amendment application labeled the "Security Plan Submittal." Because the Security Plan Submittal contained safeguards information, the parties negotiated the terms of a proposed Protective Order governing the handling of safeguards documents, which was then submitted to the ASLB by the NRC Staff. The ASLB approved the Protective Order in Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (December 15, 2003) (hereinafter "Protective Order"). The Protective Order identified undersigned counsel, Diane Curran, and BREDL's expert, Dr. Edwin S. Lyman, as individuals who are authorized to review safeguards documents.

As amended on September 27, 2004, the protective order and attached Nondisclosure Affidavit also stipulated that access by Ms. Curran and Dr. Lyman to Duke's Security Plan Submittal and other security-related documents would be restricted to a designated Duke facility or an office of the NRC Staff in Maryland; and that they ~~must store safeguards pleadings and other safeguards documents generated during the~~ litigation in a Security Storage Container, under certain security restrictions required by NRC regulations. BREDL's counsel then purchase a steel file cabinet and lock that met the NRC's regulatory requirements for safeguards document storage.

The parties have submitted their written pre-filed direct testimony on Security Contention 5, and the hearing is scheduled for January 10-14, 2005. During the second week of December, in the course of preparing to file their testimony, the parties had informal discussions regarding a number of logistical issues relating to the handling of safeguards documents. During those discussions, BREDL sought agreement by the NRC Staff to make a change to the Protective Order that would allow BREDL to store exhibits to the parties' testimony at the office of BREDL's counsel, so that BREDL's counsel and expert would be better able to prepare for the hearing. Counsel for the Staff informed BREDL's counsel that in order to be allowed to store safeguards exhibits documents at her office, BREDL's counsel would have to pass an inspection of her storage equipment, safeguards documents, and office procedures by a member of the NRC Staff.

BREDL's counsel agreed to the inspection, which was conducted by Bernard Stapleton on the morning of December 13, 2004. At the conclusion of the inspection, which took about an hour and a half, Mr. Stapleton informed BREDL's counsel that her storage equipment and procedures were adequate, and that he saw no reason to forbid her from storing safeguards exhibits at her office. On December 14, however, counsel for the Staff informed BREDL's counsel that the Staff had decided not to allow her to store the exhibits at her office. Therefore, on December 15, BREDL filed a motion with the ASLB, requesting an amendment to the Protective Order that would allow BREDL's counsel to store safeguards exhibits at her office between December 17, 2004 (the due date for pre-filed direct testimony) and February 4, 2004 (the due date for reply findings of fact and conclusions of law). Blue Ridge Environmental Defense League's Motion to Amend Protective Order (hereinafter "BREDL's Motion").

On December 17, 2004, the ASLB held an oral argument over the telephone, in which counsel for the Staff argued that Mr. Stapleton's inspection had only established that BREDL's counsel's security measures were adequate to protect the safeguards documents that BREDL's counsel was already storing, and that the Staff did not believe it appropriate for BREDL's counsel to be allowed to store allegedly more sensitive documents such as Duke security procedures and diagrams showing security features of the Catawba site. Later that afternoon, the ASLB issued an order granting BREDL's Motion under the condition that BREDL's counsel must undergo an inspection of her office by a knowledgeable member of the NRC Administration Staff from the Division of Facilities and Security, and that the Staff member must find that BREDL's 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.

Id., slip op. at 5.

On December 21, 2004, BREDL's counsel's office was inspected by Mark D. Lombard, Chief of the Security Branch in the Office of Administration; and Sandra I. Schoenmann, Senior Facilities Security Specialist in the Office of Administration. At the conclusion of the inspection, Mr. Lombard and Ms. Schoenmann reported to BREDL's counsel that they had found her security measures for protecting safeguards information to be generally adequate to protect safeguards information. They also requested that she implement several additional specific measures, and said that they would get back to her about whether she needed to do more. BREDL's counsel agreed to implement the requested measures, and said she would also cooperate with any further requests unless they were completely unreasonable.

III. ARGUMENT

A. The Staff Has Failed to Demonstrate Irreparable Harm

The Staff argues that interlocutory review is warranted because implementation of the ASLB's Order would cause "serious, immediate, and irreparable harm." Staff Motion at 4. The Staff does not claim that any harm would arise from the continued storage of "derivative" safeguards documents, *i.e.*, pleadings and notes containing safeguards information, at BREDL's counsel's office. Rather, the Staff contends that "serious, immediate, and irreparable harm" will occur if BREDL's counsel is allowed to store "primary" safeguards documents such as the Catawba Security Plan, procedures for armed response, and the locations of armed responders. Staff Motion at 5. *See also id.* at 4, 6.

The Staff's only basis for making this claim is its concern that if the Order is implemented, safeguards documents will be disseminated to an "additional site" besides the offices of Duke and the NRC Staff. By itself, however, the addition of a site where safeguards information is stored does not rise to a level of "serious, irreparable and immediate harm," especially in light of the fact that BREDL's counsel's offices have now been inspected *twice* and found adequate for the storage of safeguards information.

Moreover, no support can be found in the NRC's regulations for the Staff's asserted distinction between "derivative" safeguards information and an allegedly more "sensitive" class of "primary" safeguards documents. The equipment and procedures required of BREDL's counsel for protection of safeguards information are based on NRC regulations, which apply to all safeguards information no matter what degree of sensitivity it possesses. If BREDL's counsel's security measures are good enough to

protect some safeguards information, they should be good enough to protect all safeguards information.

In addition, the Staff makes no attempt to address the countervailing concern, expressed by the ASLB, regarding the security risk posed by requiring BREDL's counsel to carry her own litigation files, including safeguards documents, back and forth from her office to Duke's office while she is preparing for the hearing and drafting proposed findings of fact and conclusions of law. *See* Order at 4. By allowing BREDL's counsel to keep one set of safeguards document under secure conditions at her office, the ASLB's Order is clearly designed to offset the risk of losing another set of safeguards documents in the course of transporting them.

The Staff also ignores the fact that the temporal limitations built into the ASLB's Order mitigate any harm claimed by the Staff. Counsel for BREDL will be allowed to store safeguards exhibit at her office for a limited period of only seven weeks, while she and Dr. Lyman are preparing for the hearing and drafting proposed findings of fact and conclusions of law.

Thus, the Staff has failed to show that any serious, irreparable or immediate harm would be caused by implementation of the ASLB's Order.

B. The Staff Has Failed to Justify Reversal of the ASLB's Order.

As the Appeal Board observed in *Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1406 (1977), the decision of where and when sensitive security documents may be examined rests in the discretion of the Licensing Board. While it "may appear" to be "desirable" to limit the locations at which an intervenor may examine security-related documents, the Licensing

Board must also take into account the potential delaying effect such a limitation might have on the hearing. *Id.* Thus, “in the last analysis, the Licensing Board is in the best position to determine the most appropriate circumstances in which the plan may be viewed.” *Id.*

In this case, the ASLB has struck a careful and appropriate balance between the goal of limiting the number of sites at which safeguards documents can be reviewed, and ensuring that the hearing is not substantially delayed. As the ASLB noted in its Order, it has “consistently endeavored” to move this proceeding forward “without undue delay,” in part to accommodate Duke’s planning and schedule with regard to the proposed plutonium MOX lead test assemblies. Order at 3. As a result, the parties must follow a very tight hearing schedule, which includes the passage of only a weekend between the deadline for filing written rebuttal testimony (January 7, 2005) and the date when the hearing commences (January 10, 2005); as well as only two weeks after the close of the hearing on January 14 for the preparation of proposed findings (January 21) and one week for the preparation of reply findings (January 29). In order to avoid having to build in extra time for BREDL’s counsel and expert to review documents at some other location than BREDL’s counsel’s office, the ASLB reasonably ordered that BREDL’s counsel may keep exhibits at her office during this “critical” period of short deadlines and intense demands. *Id.* at 4.

In the single paragraph that it devotes to attacking the merits of the ASLB’s decision, the Staff makes no mention of the *Diablo Canyon* case or any other legal authority governing the ASLB in this situation. *See* Staff Motion at 6. Instead, the Staff merely states that it “believes the Protective Order, as originally issued, establishes a set

of graded controls that appropriately considered the highly sensitive nature of certain documents in this proceeding . . .” *Id.* The Protective Order is not a higher authority that binds that ASLB, however. It was issued by the ASLB, and can be changed by the ASLB as the circumstances of the case require. Just as it was within the ASLB’s discretion to approve the proposed terms of the Protective Order that were submitted by the parties in late 2003, so it is now within the ASLB’s discretion to modify the Protective Order for the purpose of ensuring that the upcoming hearing will be both meaningful and efficient. The Staff has not suggested any reason to disturb the ASLB’s discretion.¹

IV. CONCLUSION

Accordingly, for the foregoing reasons, the Staff’s Motion for Interlocutory Review should be denied.

Respectfully submitted,



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¹ BREDL also respectfully submits that contrary to the Staff’s suggestion at page 5 n.5, the ASLB did not exceed its authority by requesting Mr. Lombard and Ms. Schoenmann to inspect BREDL’s counsel’s office. The question of whether BREDL’s counsel has adequate security measures to protect safeguards information has nothing to do with the contested issues in this case, and should not be decided by the NRC Staff’s hearing counsel. In order to resolve the question, it was both necessary and appropriate for the ASLB to consult knowledgeable technical staff members who are not involved in this litigation.

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2004, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S OPPOSITION TO NRC STAFF'S MOTION FOR INTERLOCUTORY REVIEW were served on the following by e-mail and/or first-class mail, as indicated below:

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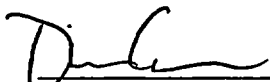
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Date: Wed, Dec 22, 2004 3:49 PM
Subject: Correction to Filing in Catawba-LTA Case

Dear Commissioners and parties,

I am writing to make a correction to BREDL's Opposition to NRC Staff's Motion for Interlocutory Review, which was filed this afternoon. On page 7, the third sentence of the first full paragraph should be corrected to note that the litigation schedule allows only two weeks between the close of the hearing (January 14) and the filing of proposed findings of fact and conclusions of law (January 28) and one week for the preparation of reply findings (February 4).

I apologize for any confusion caused by this error.

Sincerely,
Diane Curran

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