

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION **DOCKETED 01/06/05**

RAS 9114

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges: **SERVED 01/06/05**

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 Nos. 50-413-OLA, 50-414-OLA

ASLBP No. 03-815-03-OLA

January 6, 2005

MEMORANDUM AND ORDER
(Regarding Provision of Exhibits to BREDL and
Change in Start Date of Hearing on Security Related Contention)

By motion dated December 15, 2004, intervenor Blue Ridge Environmental Defense League (BREDL) asked that the Licensing Board issue an additional amendment to the December 15, 2003 protective order governing the disclosure and use of safeguards information in this proceeding.¹ The sole purpose of the proposed amendment is to permit

¹ 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

(continued...)

BREDL's counsel to store exhibits to pre-filed testimony under appropriate protective measures in her office until the February 4, 2003 deadline for filing reply proposed findings of fact after the scheduled January 10-14, 2004 hearing on Security Contention 5. BREDL requested the change as "necessary to allow BREDL a sufficient opportunity to review exhibits in preparation for the hearing."² BREDL had earlier requested this relief during a closed session in this proceeding and the parties had attempted to work together to resolve the issue, but this effort was not successful.

In a December 17, 2004 order, the Board found that BREDL's request was a reasonable one if this proceeding is to be conducted without further delay. In that order, we requested that a member of the NRC's Office of Administration (OA) knowledgeable about physical security and the handling and storage of safeguards material be assigned to conduct an independent inspection of BREDL counsel's office. The objective of this inspection was to determine if BREDL counsel can, with the protective measures now in place supplemented with additional reasonable measures arrived at in consultation with BREDL counsel, effectively ensure that the exhibits in question are safeguarded in her law office. This OA inspection was conducted on December 21, 2004, and concluded that BREDL's counsel can ensure the effective protection of safeguards information.

¹(...continued)

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.

² [BREDL] Motion to Amend Protective Order (Dec. 15, 2004) at 1.

On December 20, 2004, the NRC Staff filed a motion with the Commission seeking interlocutory review and a stay of the Board's December 17, 2004 order.³ The Commission, which denied the Staff's stay request on December 21, 2004,⁴ yesterday affirmed the Board's December 17, 2004 order amending the protective order as requested by BREDL.⁵

As was discussed yesterday afternoon during a telephone conference with the parties, the Board requests that the Staff coordinate with applicant Duke Energy Corporation to ensure the immediate transfer of the material to BREDL counsel's office.

Additionally, as was noted above, the Board previously had scheduled the start of the closed hearing on the security-related contention for Monday, January 10, 2005.⁶ As a consequence of the matters discussed with the parties during yesterday afternoon's telephone conference, the closed hearing will now start on Tuesday, January 11, 2005, at 9:00 a.m.

³ NRC Staff's Motion for Stay Pending Interlocutory Review of the Licensing Board's December 17, 2004 Order Amending Protective Order (Dec. 20, 2004).

⁴ Commission Order (Dec. 21, 2004) (unpublished).

⁵ CLI-05-02, 61 NRC __ , __ (slip op. at 5-7) (Jan. 5, 2005).

⁶ Licensing Board Memorandum and Order (Confirming Matters Addressed and Ruled on at October 25, 2004, Closed Session) (Nov. 5, 2004) (unpublished).

Because of the matters discussed and resulting action, the Board takes no action on the January 4, 2005 request of BREDL's counsel to reschedule the start of the hearing.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 6, 2005⁷

⁷ Copies of this memorandum and order were sent this date by internet e-mail to counsel for all parties.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REGARDING PROVISION OF EXHIBITS TO BREDL AND CHANGE IN START DATE OF HEARING ON SECURITY RELATED CONTENTION) 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 (REGARDING
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IN START DATE OF HEARING ON SECURITY RELATED
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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of January 2005