



“a materially different result” on Security Contention 5 would be reached if this speech is considered. Indeed, BREDL significantly mischaracterizes the content and import of the speech. Nothing in the Abraham speech addresses Catawba Nuclear Station (“Catawba”) or the mixed oxide (“MOX”) fuel program.<sup>2</sup> To consider evidence on this matter would impermissibly expand the scope of the proceeding to include generic Department of Energy (“DOE”) initiatives. It also could cause delay in the issuance of a decision, the timing of which may be critical to the schedule to utilize four MOX lead assemblies at Catawba.

When analyzed properly, BREDL’s Motion requests relief that the Licensing Board does not have jurisdiction to grant. What BREDL actually seeks is an amendment of NRC security regulations, which is properly the subject of a petition for rulemaking before the Commission and which this Licensing Board may not grant. Alternatively, the Motion is an improper request for reconsideration of the Commission’s holding in CLI-04-29 that “there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site.”<sup>3</sup> In either event, BREDL’s Motion must be denied.

Should the Board grant BREDL’s Motion and admit the DOE speech as evidence, Duke requests that the attached Affidavit of Steven Nesbit, which comments on the speech and the weight to be given to the speech, be admitted as evidence in this proceeding.

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<sup>2</sup> BREDL asserts (Motion, p. 1) that Secretary Abraham’s January 18 speech provides “conclusive support” for BREDL’s testimony that the four MOX fuel lead assemblies require the same level of security as “more concentrated forms of plutonium” at NRC Category I fuel facilities.

<sup>3</sup> *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC 417, 424 (2004).

II. BREDL'S MOTION FAILS TO MEET NRC STANDARDS FOR THE RE-OPENING OF THE RECORD IN THIS LICENSE AMENDMENT PROCEEDING

A. Legal Standard for Re-Opening of the Record

Because re-opening the record in an NRC licensing proceeding is an extraordinary action, the proponent of a motion to do so bears a heavy burden.<sup>4</sup> To prevail on a motion to re-open the record, the petitioner must meet each of the criteria in 10 C.F.R. § 2.734(a)-(b), and demonstrate that: (1) the motion is timely; (2) the motion raises a significant new safety or environmental issue; and (3) the new evidence, if considered initially in the hearing, might have materially affected the outcome of the proceeding or mandated a different result.<sup>5</sup> "Bare allegations" are not sufficient to meet these NRC standards. Rather,

At a minimum . . . the new material in support of a motion to re-open must be set forth with a degree of particularity in excess of the basis and specificity requirements contained in 10 C.F.R. 2.714(b) for admissible contentions. Such supporting information must be more than mere allegations; it must be tantamount to evidence . . . [and] possess the attributes set forth in 10 C.F.R. § 2.743(c) defining admissible evidence for adjudicatory proceedings. Specifically, the new evidence supporting the motion must be 'relevant, material, and reliable.'<sup>6</sup>

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<sup>4</sup> *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), CLI-86-1, 23 NRC 1, 5 (1986) (internal citations omitted) ("The burden of satisfying the re-opening requirements is a heavy one."); see also *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-94-9, 39 NRC 122, 123 (1994) ("For the record to be re-opened, stringent criteria must be satisfied.").

<sup>5</sup> *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-1, 35 NRC 1, 4 (1992); *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-936, 32 NRC 75, 78-79, 82 & n. 18 (1990); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), ALAB-738, 18 NRC 177, 180 (1983).

<sup>6</sup> *La. Power & Light Co.*, CLI-86-1, 23 NRC at 5, citing *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 363 (1981) and *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-775, 19 NRC 1361, 1366-67, *aff'd sub nom. San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *vacated in part and reh'g en banc granted on other grounds*, 760 F.2d 1320 (1985). (The Commission denied intervenors' motion to re-open the record on grounds that that a pending NRC OI investigations into allegations of employee harassment and falsification of records demonstrated a lack of management

A review of NRC precedent illustrates the stringent showing that a petitioner must make to succeed in re-opening the closed record in a licensing proceeding. One occurrence that met the re-opening standard was a major earthquake in California several weeks after the issuance of a licensing board decision approving the seismic design of the Diablo Canyon plant. Nothing like this is presented in the current Motion. The issuance of new NRC regulatory requirements has also been held to establish good cause for re-opening a record.<sup>7</sup> Conversely, more germane to the present situation, a showing that NRC requirements are in flux does not support a motion to re-open the record because a “continuing effort to improve reactor safety standards is neither novel nor unexpected.”<sup>8</sup> Similarly, motions to re-open the record in NRC proceedings have been denied in a variety of other situations.<sup>9</sup> At bottom, the “significant safety

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character and competence. Without more, the fact of the investigation did not constitute evidence of a significant safety issue. Nor was this the type of ‘relevant, material, and reliable’ new information required to re-open a record. 23 NRC at 5-6.).

<sup>7</sup> See *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-81-5, 13 NRC 226, 233 (1981) (In a prehearing conference order, the licensing board re-opened the record on relevant pre-existing contentions to the extent needed to take into account the new NUREG-0737 and the new emergency planning rule).

<sup>8</sup> See *Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-598, 11 NRC 876, 885-887 (1980).

<sup>9</sup> See *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), CLI-86-6, 23 NRC 130, 133-34 (1986) (Motion to re-open the record based on a Licensee Event Report concerning the potential for flooding due to incorrect site grading was denied, where the licensee had taken corrective action including flood barriers, curbs, and new procedures.); *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-949, 33 NRC 484 (1991) (Denial of a motion to re-open based on the claim that the scope of a pre-licensing emergency preparedness onsite exercise must be synonymous with that of a full participation exercise under 10 CFR Part 50, App. E, § IV.F.1., was affirmed.); *Pub. Serv. Co. of New Hampshire*, ALAB-936, 32 NRC 75 at 80-83 (Denial of a motion to re-open based on a change to the emergency broadcast system where petitioners failed to demonstrate it did not make it impossible to fulfill the regulatory design objective was affirmed.); *Georgia Power Co.* (Vogtle Elec. Generating Plant, Units 1 and 2), ALAB-872, 26 NRC 127, 149-50 (1987) (Motion to re-open based on an NRC Information Notice concerning Limitorque motor operated valves was

issue” requirement cannot be met absent a tangible showing of a specific and substantial issue at the facility in question.

B. Analysis of BREDL’s Motion Under the Criteria of 10 C.F.R. § 2.734

The BREDL Motion does not come close to meeting the high standard for re-opening the record. The discussion of the 10 C.F.R. § 2.734 factors below follows the order utilized in BREDL’s Motion.

1. The Motion Is Not Based on a Significant New Safety Issue

Duke agrees that the question of whether the Motion raises a significant new safety issue is the primary consideration in the Licensing Board’s determination as to whether the record should be re-opened. BREDL has completely failed to meet its burden with regard to this important test. BREDL asserts that Mr. Abraham’s January 18, 2005 speech provides two bases for re-opening the record. However, neither basis demonstrates that a significant new security issue for Catawba has been raised.

First, BREDL claims that “DOE makes no distinction between Category I and Category II quantities of [strategic special nuclear material (“SSNM”)] for purposes of setting a standard for the quality of the armed response that is provided for its protection.” (Motion, at 5). That is simply not the case, and this position is not supported by either the speech directly or by

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denied, where none of the NRC documents imposed new requirements, mandated any licensee actions, or raised significant safety issues relating to valve performance, and the licensee had taken corrective action.); *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 337-340 (1978) (Denial of a motion to re-open the record to consider the alternative of converting the applicant’s existing gas-fired baseload capacity to coal, based on a letter from a licensee official to a customer, was affirmed.); *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-84-3, 19 NRC 282, 283-86 (1984) (Motion to re-open the record based on newspaper articles concerning allegations of deficiencies in the licensee’s quality assurance program was denied.).

Dr. Lyman's affidavit. The sole mention of Category I or II quantities of "Special Nuclear Material" appears at page 7 of the January 18 speech, where Mr. Abraham stated:

Upon the announcement of these security initiatives, I directed the NNSA and SSA to jointly review the options available to the Department to achieve the implementation of an elite force at DOE facilities possessing Category I or II quantities of Special Nuclear Material.

This excerpt does not state or imply that the implementation of the "elite force" initiative would be the same for DOE Category I or II facilities. Furthermore, the recommendation for a study regarding this matter, as set forth in the speech,<sup>10</sup> does not state or even imply that the protection at Category I or II facilities will be identical or even comparable.<sup>11</sup> Therefore, the basic premise of BREDL's Motion (that there is no DOE distinction between protection at Category I and Category II facilities) is without foundation.

Second, BREDL asserts that: "Secretary Abraham's speech shows that the DOE is significantly upgrading its requirements for armed responders at both Category I and Category II facilities." (Motion, at 5). This is an overstatement. The January 18, 2005 speech is a policy speech — no more, no less. Aside from a general exhortation that DOE "must continue to proceed with the implementation of these and other protective force recommendations," there is no indication from former Secretary Abraham whether any of these recommendations would be fully or partially funded — or, if so, what the schedule for implementation of these suggestions would be.<sup>12</sup> Moreover, as indicated by other parts of the speech, such improvements, if

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<sup>10</sup> See January 18, 2005 speech (Motion, Attachment 2), at 7-8.

<sup>11</sup> See Nesbit Affidavit, ¶¶ 3-4.

<sup>12</sup> Indeed, Secretary Abraham admits that: "[t]here will be significant hurdles to overcome." Speech, at 8. Clearly, the DOE initiatives will not be completed in the timeframe at issue here — which is the next several months during which the MOX lead assemblies will be delivered to Catawba.

implemented, are merely part of an iterative process begun after the events of September 11, 2001.<sup>13</sup>

In any event, the protection to be afforded DOE facilities is simply not an issue in this proceeding. There is good reason for that. DOE facilities are not governed by the same standards as NRC facilities. The DOE standards for protection of Category I and Category II material are never described in the Secretary's speech, and there is no demonstrated correlation between facilities for which DOE has responsibility and those regulated by the NRC.<sup>14</sup> DOE facilities are generally larger in size, more complex, handle different kinds of Special Nuclear Material than Catawba, and may perform extensive processing of that material. The Commission in this proceeding has specifically found that even the Category I fuel cycle facilities that NRC regulates (much less DOE facilities) involve circumstances that are not comparable to the situation at Catawba.<sup>15</sup> Secretary Abraham does not define his expectations for an "elite force" at DOE facilities, and no conclusions can be drawn regarding how that force might differ from or be more effective than the armed responders at Catawba.

BREDL is yet again, in effect, seeking an amendment to NRC security requirements and/or reconsideration of the Commission's approach in this adjudication. Dr. Lyman believes that, because DOE is considering some actions at its facilities, NRC requirements must be increased to be consistent with such proposed changes.<sup>16</sup> Such an

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<sup>13</sup> See, e.g., January 18, 2005 speech, at 1-6. This appears to be similar to the way that the NRC responded following the events of September 11, 2001.

<sup>14</sup> See Nesbit Affidavit, ¶ 7.

<sup>15</sup> See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-19, 60 NRC 5, 11 (2004).

<sup>16</sup> Lyman Affidavit at ¶ 10.

argument is in the wrong forum. This is a classic example of a proposal for a rulemaking which belongs before the Commission; the Board has no authority to act on it.<sup>17</sup> Further, the Commission has already held that “there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site.”<sup>18</sup> A petition for reconsideration is also in the wrong forum.

Finally, contrary to BREDL’s assertion (Motion, at 3), Duke and the NRC Staff have not argued that “Duke should be permitted to completely avoid the requirement for a TRT composed of a minimum of five people.” What Duke and the NRC Staff have both argued, and proven, is that the armed response force at Catawba provides a level of protection against theft that is (i) clearly adequate for preventing theft of four MOX fuel lead assemblies and (ii) at least equivalent to that of a tactical response team (“TRT”). Duke and the NRC Staff have further shown that the measures to be taken to protect the MOX fuel warrant the issuance of the requested exemptions related to a TRT.

In sum, BREDL has failed to demonstrate that the January 18, 2005 speech raises any new issue that is significant from a security perspective. For this reason, its Motion should be denied.

2. *BREDL’s Motion Is Not Timely*

BREDL also has not been timely in bringing this matter to the attention of the Licensing Board. There is absolutely nothing of substance in this speech that was not in a prior

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<sup>17</sup> See, e.g., *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 417 (1989) (Challenge to Commission’s regulation regarding emergency response plans is impermissible under the Commission’s regulations, citing 10 C.F.R. § 2.758).

<sup>18</sup> CLI-04-29, 60 NRC 417, 424.

speech by Secretary Abraham of May 7, 2004.<sup>19</sup> There is simply nothing new here (and clearly nothing which points to a significant safety issue) to support re-opening the closed record to admit the January 18, 2005 speech as additional evidence in this proceeding.

Timeliness is measured differently at each stage of the hearing.<sup>20</sup> Where the record has been closed and all parties are aware of the critical timing of a decision in this matter, it is incumbent upon a party not to wait 18 days before even notifying the Licensing Board and parties that it intended to attempt to re-open the record. Nothing prevented BREDL from at least disclosing this and transmitting Secretary Abraham's speech to the parties so that they could prepare to respond.<sup>21</sup> Secretary Abraham's May 2004 speech contains essentially the same information regarding Category I and Category II materials as his January 18, 2005 speech, on which BREDL seeks to rely. However, BREDL never produced a copy of the earlier Abraham speech during discovery, apparently not believing that it was related in any respect to an admitted issue in this proceeding.<sup>22</sup>

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<sup>19</sup> See the May 7, 2004 speech (Motion, Attachment 3), at 10: "And it may mean establishing a special, elite federal force for protection of Category I and II SNM."

<sup>20</sup> As the Commission stated in the *Seabrook* proceeding: "The Commission cannot overemphasize the obligation of intervenors to raise contentions at the earliest possible time. The Commission reasonably demands that contentions filed after the hearing is underway — let alone concluded — be filed promptly after receipt of the information needed to frame these contentions." *Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-6, 31 NRC 483, 487 (1990) (citations omitted).

<sup>21</sup> As it is, Duke and the NRC Staff must respond within 8 calendar days after BREDL took 18 days to prepare and file its Motion.

<sup>22</sup> The earlier Abraham speech would appear to be within the scope of one or more Duke discovery requests. See "Duke Energy Corporation's First Set of Interrogatories and Requests for Production of Documents to Blue Ridge Environmental Defense League on BREDL Security Contention 5" (June 21, 2004), Interrogatory 5 (p. 8) and Document Production Request 2 (p. 25).

BREDL argues that, even if not timely, the Motion presents an “exceptionally grave safety issue” (Motion, at 7), and Dr. Lyman’s declaration also asserts that the speech raises “grave” issues. The basis offered to support this claim, however, is nothing more than a rehash of positions taken at the hearing and addressed in BREDL’s proposed findings.<sup>23</sup> For the reasons discussed above, BREDL has failed to identify a significant new issue, let alone one that meets the “exceptionally grave” exception to the timeliness requirement of 10 C.F.R. § 2.734(a)(1).

3. *BREDL’s Motion Fails to Show that Consideration of the Speech Would Lead to a Materially Different Result in this Proceeding*

BREDL’s argument that a materially different result would be likely if the newly proffered DOE speech is considered initially is based upon the premise that “all parties have offered DOE’s security program as a guidepost for the ASLB’s decision in this case . . . .” (Motion, at 7). In fact, as discussed above, the standards for security at DOE facilities and how DOE implements its own requirements (which are not public) have not been at issue in this proceeding. No party addressed this issue in its testimony or proposed findings.<sup>24</sup>

In any event, the standard for re-opening is that the Motion must demonstrate that a materially different result would be or would have been likely had the newly proffered evidence been considered initially.<sup>25</sup> BREDL has not provided any analysis of the evidence of record to meet this burden. The matters in the speech are so generic and so peripheral to the

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<sup>23</sup> These include BREDL’s assertion that the consequences of successful theft could be severe if a nuclear weapon were detonated. The record in this case does not support any conclusion that this is a credible concern that can be linked to MOX fuel lead assemblies.

<sup>24</sup> See Nesbit Affidavit at ¶ 8.

<sup>25</sup> From the formulation of the standard in the regulation, it was the expectation of the Commission that the movant would have to address this issue even if the decision on the matter had not yet been issued.

central issue in this proceeding (*i.e.*, whether the NRC standards for issuance of the requested exemptions have been met), the speech could not possibly produce a materially different result.

4. BREDL's Motion Is Not Supported by An Appropriate Affidavit

The affidavit of Dr. Lyman in support of BREDL's Motion to re-open is deficient for the reasons discussed above. Moreover, in accordance with 10 C.F.R. § 2.734(b), evidence contained in the affidavit supporting a motion to re-open must meet the admissibility standards in Section 2.743(c).<sup>26</sup> Contrary to that standard, the Abraham speech is neither relevant nor material to this licensing proceeding. It is simply a statement of the outgoing Secretary regarding various initiatives that may lead to changes in the future. The language in the speech cited by BREDL is general at best, and no further specificity is given. Given that, the proffered evidence is not probative and should not be admitted.

C. The Instant Motion Does Not Meet the "Little or No Burden" Test

BREDL relies upon a *Shearon Harris* case<sup>27</sup> for the proposition that evidence should be admitted upon a motion to re-open if "this can be accomplished with little or no burden upon the parties." However, that case is clearly distinguishable from the situation at hand. In the *Shearon Harris* proceeding, it was the licensing board that moved *sua sponte* to re-open the record. As the board said in that case: "We are not adversaries; our responsibilities are broader. The timeliness test of *Vermont Yankee* [relating to the standards for re-opening the record] does not apply to the Board with the same force that it would apply to parties."<sup>28</sup>

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<sup>26</sup> Section 2.743(c) provides that: "Only relevant, material, and reliable evidence which is not unduly repetitious will be admitted. Immaterial or irrelevant parts of a admissible document will be segregated and excluded so far as is practicable."

<sup>27</sup> *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), LBP-78-2, 7 NRC 83, 85 (1978).

<sup>28</sup> *Id.*

Moreover, the *Shearon Harris* proceeding was related to the issuance of a construction permit, where the licensing board has broader responsibilities.<sup>29</sup> In any event, in the *Shearon Harris*, proceeding, where there was disagreement between the applicant and intervenors as to whether a document affected a matter in evidence, the board reverted to the *Vermont Yankee* test, which is similar to that found in 10 C.F.R. § 2.734.<sup>30</sup> The *Shearon Harris* case therefore supports Duke's position, rather than that of BREDL. As discussed above, to complicate this record at this time with material that is marginal at best and that would perhaps increase the time until issuance of the decision in this time-critical matter would place an extreme burden on Duke.

### III. CONCLUSION

BREDL's Motion is a transparent attempt to divert the attention of the Licensing Board and to delay the resolution of the single admitted security contention in this case. After extensive discovery, four days of hearings, and thorough briefing of the issues, BREDL is attempting to introduce into evidence a speech of a former Secretary of Energy on a generic policy matter affecting DOE facilities that is completely immaterial to the ultimate issue raised by Security Contention 5: the issuance of the requested exemptions at an NRC-licensed power reactor. The material in the Abraham speech is, at most, cumulative; the positions of the parties as to the classification of material into DOE Category I and Category II requirements have been fully ventilated on the record. The proffered new material adds nothing to that issue.

Moreover, as is revealed even by a perusal of the speech, BREDL and its affiant have mischaracterized statements in the speech and have cited those statements out of context. Secretary Abraham is addressing a future DOE initiative, clearly stretching into years, which

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<sup>29</sup> 10 C.F.R. § 2.104(b).

<sup>30</sup> *Shearon Harris*, LBP-78-2, 7 NRC at 86-87.

may or may not ever be funded, and therefore may never be realized. Nowhere does Secretary Abraham address Catawba or MOX fuel lead assemblies. Likewise, nowhere does he state that the protection for DOE Category I and II material need be or would be equivalent. Nor does the speech define in some meaningful way what "elite force" means, so as to have any evidentiary significance for this proceeding. At bottom, the Motion must be dismissed because it lacks probative value and raises issues that should have been addressed in a petition for rulemaking or a motion for reconsideration of CLI-04-29.

In sum, BREDL's motion to re-open the record fails to fulfill the standards in 10 C.F.R. § 2.734 and should be denied.

Respectfully submitted,



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Dated in Washington, District of Columbia  
This 15<sup>th</sup> day of February, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,  
Units 1 and 2)

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Docket Nos. 50-413-OLA  
50-414-OLA

CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S RESPONSE TO THE BREDL MOTION TO RE-OPEN THE RECORD ON SECURITY CONTENTION 5" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 15<sup>th</sup> day of February, 2005. Additional e-mail service, designated by \*, has been made this same day, as shown below.

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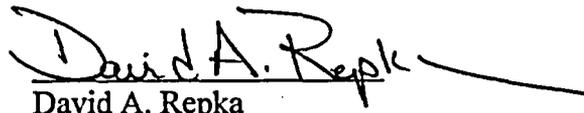
Office of the Secretary\*  
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3. In Paragraph 4 of his declaration, Dr. Lyman states that the January 18, 2005 speech by Secretary Abraham shows "that the distinction (between DOE Category I and Category II SSNM) is not relevant for purposes of the quality of the armed response that DOE would deem necessary for protection of the MOX fuel." In fact, the speech states nothing of the kind. The speech does not discuss any details of security measures at DOE Category I or Category II facilities. The speech does not compare the attributes of security for the two types of materials. At most, the speech implies that an ongoing DOE initiative related to DOE security forces is considering facilities with either Category I or Category II material. This does not prove or even imply an equivalence of security measures at the two types of facilities.

4. In Paragraph 5 of his declaration, Dr. Lyman states "Secretary Abraham also announced that the elite force would be used at both Category I or Category II facilities," implying that the use of these forces would be the same for both these classes of facilities, referencing p. 7 of the January 18, 2005 Abraham speech. In fact, Secretary Abraham did not make such a statement or otherwise define an "elite force." Certainly, the speech is not reliable evidence of any protection strategies used by DOE at its Category I or Category II facilities.

5. In Paragraph 8 of his declaration, Dr. Lyman states that "the [January 18, 2005] speech demonstrates that DOE makes no distinction between Category I and Category II quantities of SSNM for purposes of setting a standard for the quality of the armed response that is provided for its protection." That statement is untrue, as discussed above. Simply because DOE appears to be considering certain upgrades for security forces at both Category I and Category II facilities does not demonstrate that the standards for both are or will be the same or that the type and number of "elite" units would be identical at the different types of facilities.

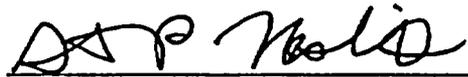
6. In Paragraph 9 of his declaration, Dr. Lyman states that the [January 18, 2005] speech "shows that the DOE is significantly upgrading its requirements for armed responders at both Category I and Category II facilities." Actually, the speech does not demonstrate that point. The speech discusses the recommendations based upon a review; at most, it could be implied that implementation of some of the recommendations is underway. No detail is given on the scope or schedule of such implementation. Based on the speech, there is no basis for comparing the armed response force at Catawba Nuclear Station ("Catawba") to DOE protective forces either prior to, or following, the implementation of the recommendations.

7. In Paragraph 10 of his declaration, Dr. Lyman states that Duke armed responders at Catawba should be required to have comparable capabilities to protective forces at DOE facilities. This is a new issue as well as being an unsupported assertion. Nowhere in Dr. Lyman's entire presentation at the evidentiary hearing on Security Contention 5 was this issue addressed. The argument is not persuasive because NRC requirements, not DOE requirements, govern physical security at Catawba. Furthermore, there is no basis for the Licensing Board to evaluate this issue, because there is no evidence in the record concerning the characteristics of the protective forces at DOE facilities. The Secretary's speech, even if admitted as evidence, does not contain such information, and such information is undoubtedly classified.

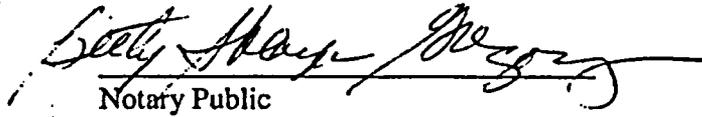
8. In Paragraph 12 of his declaration, Dr. Lyman states that "all parties have offered DOE's security program as a guidepost for the Atomic Safety and Licensing Board's decision in this case." That statement is also clearly untrue. There is no such "guidepost." No party offered testimony related to DOE's security program. The only DOE-related testimony offered by the NRC Staff concerned categorization, *i.e.*, that DOE would place MOX fuel in Category II, not Category I. The Abraham speech does not bear on DOE categorization; in fact, it uses the words

Category I and Category II only once, when describing the study ordered by former Secretary Abraham.

9. The timing of the decision in this case is critical, as Duke has pointed out to the Licensing Board and all parties, if the schedule for receipt and use of MOX fuel lead assemblies is to be achieved. Introduction of additional evidence at this time would only serve to delay further the Board's decision.

  
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Steven P. Nesbit

Sworn and subscribed to before me this 14<sup>th</sup> day of February 2005.

  
\_\_\_\_\_  
Notary Public

My Commission expires: 3/9/05

