

RAS 9518

WINSTON & STRAWN LLP

External
Letter

1400 L STREET, N.W., WASHINGTON DC 20005-3502
202-371-5700

35 W. WACKER DRIVE
CHICAGO IL 60601-9703
312-558-8600

200 PARK AVENUE
NEW YORK, NY 10166-4193
212-294-6700

38TH FLOOR, 333 SOUTH GRAND AVE
LOS ANGELES, CA 90071-1843
213-618-1700

101 CALIFORNIA STREET
SAN FRANCISCO CA 94111-5894
415-891-1000

43 RUE DU RHONE
1204 GENEVA, SWITZERLAND
41-22-317-78-78

21 AVENUE VICTOR HUGO
75116 PARIS, FRANCE
33-1-53-64-82-82

BUCKLEBURY HOUSE
3 QUEEN VICTORIA STREET
LONDON, ENGLAND EC4N 8BH
44-020-7429-0000

March 3, 2005

DOCKETED
USNRC

March 7, 2005 (1:08pm)

Emile L. Julian
Assistant for Rulemakings & Adjudications
Office of the Secretary
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: **In the Matter of Duke Energy Corporation, Catawba Nuclear
Station Units 1 and 2 (Docket Nos. 50-413-OLA, 50-414-OLA)**

Dear Mr. Julian:

Enclosed please find the original of the Affidavit of Steven P. Nesbit, submitted in support of Duke Energy Corporation's Response to the Blue Ridge Environmental Defense League's Motion to Re-Open the Record on Security Contention 5, on February 15, 2005. Please contact me if you have any questions on this matter.

Yours truly,

Anne W. Cottingham
Counsel for Duke Energy Corporation

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.



Steven P. Nesbit

Sworn and subscribed to before me this 14th day of February 2005.



Notary Public

My Commission expires: 3/9/05

