

May 2, 2005

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

May 10, 2005 (3:25pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S  
BRIEF IN RESPONSE TO CLI-05-10 REGARDING  
COMMISSION REVIEW OF LBP-05-10**

**I. INTRODUCTION**

Blue Ridge Environmental Defense League ("BREDL") hereby submits its brief in response to the question raised by the Commissioners of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") in CLI-05-10, Memorandum and Order (April 21, 2005) (hereinafter "CLI-05-10"). In CLI-05-10, the Commission asked the parties to "brief the issue of the necessity of" certain security-related conditions imposed by the Atomic Safety and Licensing Board ("ASLB") on the issuance of a license amendment to Duke Energy Corporation ("Duke") for the purpose of testing plutonium mixed oxide ("MOX") fuel assemblies in Duke's Catawba nuclear power plant. *Id.*, slip op. at 2. The ASLB set forth the conditions in LBP-05-10, Final Partial Initial Decision (Issues Relating to BREDL Security Contention 5) (March 10, 2005). (hereinafter "LBP-05-10"). A redacted version was issued on April 18, 2005. All citations to LBP-05-10 in this brief are to the redacted version.

BREDL respectfully submits that any questions or concerns the Commission may have had about LBP-05-10 are now moot. As announced by Duke and reported in the

press this past Friday, April 29, 2005, the four plutonium fuel assemblies have been shipped to the Catawba plant. If Duke has been true to its prior commitment to fulfill the ASLB's license conditions before receipt of the plutonium fuel at Catawba, then no live question remains regarding the appropriateness of the license conditions.

Moreover, even assuming for purposes of argument that there is some issue that meets an exception to the mootness doctrine, the Commission has not given adequate notice of the specific issue(s) that concern it. As discussed below, none of the parties to the case has appealed LBP-05-10. Under the circumstances, the Commission must give the parties "ample opportunity" to address any concerns it seeks to address on *sua sponte* review. *Offshore Power Systems* (Manufacturing License for Floating Nuclear Power Plants), ALAB-689, 16 NRC 887, 891 n.8 (1982) (hereinafter "*Offshore*"). BREDL does not believe the Commission has satisfied this standard, because its question is so vaguely phrased as to be capable of several different interpretations.

The most troubling interpretation of the Commission's question is as a general inquiry into the merits of the ASLB's decision. It is well-established that the Commission should exercise caution before disturbing a thoroughly reasoned decision by the ASLB. The Commission's very general and vaguely worded question does not satisfy this cautionary standard. Moreover, as a practical matter, such an inquiry would be extremely difficult to respond to, because it would require BREDL to summarize and defend hundreds of pages of testimony, exhibits, legal arguments, and decision text, without knowing exactly what aspect of the ASLB's decision is under question. BREDL respectfully submits that if, in fact, the Commission does have concerns about the merits of the ASLB's decision, and if it believes those concerns are not moot, it should provide

the parties with reasonable notice of the particular deficiencies in the ASLB's decision on which it seeks a briefing.

## II. FACTUAL BACKGROUND

On February 27, 2003, Duke filed a license amendment request seeking approval to test plutonium MOX fuel assemblies at the Catawba and McGuire nuclear power plants.<sup>1</sup> Duke's application included a Security Plan Submittal, which revised the existing Catawba Security Plan to add measures to protect the plutonium MOX fuel from theft or diversion, as required by 10 C.F.R. § 73.20. These proposed measures constituted incremental upgrades to the existing Security Plan, which contained measures for protection of the Catawba nuclear power plant fuel against sabotage.

In the same submittal, Duke sought exemptions from several security regulations applicable to facilities possessing formula quantities of SSNM, including requirements related to physical barriers for vital areas ("VAs") and Material Access Areas ("MAAs"), the requirement to establish a Tactical Response Team, requirements related to armed guards at MAA access points, requirements for search of personnel entering or exiting MAAs; and requirements for security clearances for personnel with unescorted access to MAAs and VAs. Duke did not, however, seek an exemption from the design basis threat ("DBT") for theft or diversion of formula quantities of strategic special nuclear material ("SSNM"). *See* LBP-04-10, Memorandum and Order (Ruling on Security-Related Contentions), 59 NRC 296, 311-12 (2004) (hereinafter "LBP-04-10").

BREDL submitted Security Contention 5, which asserted that Duke had not demonstrated that its proposed exemption from certain NRC regulations designed to

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<sup>1</sup> Duke later dropped McGuire from the application.

protect formula quantities of SSNM against the design basis threat for theft met the standards for exemptions in 10 C.F.R. §§ 73.5 and 11.9. Contention 5 argued that if the requested exemptions were granted, Duke would not be able to provide a high assurance that it could protect against the DBT for theft of formula quantities of SSNM. *Id.* at 17-18. The ASLB admitted Security Contention 5 in LBP-04-10.

In written expert testimony submitted on December 20, 2004, and in rebuttal testimony submitted on January 7, 2005, BREDL demonstrated that Duke has not satisfied the Commission's standards for granting the requested exemptions. BREDL and the other parties also submitted live testimony in a hearing on January 11-14, 2005.

Following the consideration of proposed findings of fact and conclusions of law, the ASLB issued its decision, LBP-05-10, on March 10, 2005. The decision, whose length exceeded 80 pages, addressed and weighed each of the parties' arguments regarding the exemption application. After "considering the parties' evidence and argument on the matters at issue," the ASLB concluded that:

*subject to Duke's fulfillment of certain conditions described below, that Duke has met its burden of showing by a preponderance of the evidence that its requested exemptions from the requirements of 10 C.F.R. Parts 11 and 73 are appropriate under 10 C.F.R. §§ 11.9 and 73.5, and that its physical protection system, with the requested exemptions, will, during the time MOX fuel at Catawba would be subject to certain security requirements as strategic special nuclear material (SSNM), provide high assurance that activities involving the MOX fuel will not be inimical to the common defense and security nor constitute an unreasonable risk to the public health and safety, as required at 10 C.F.R. § 73.20(a).*

*Id.*, slip op. at 2-3 (emphasis added) (footnote omitted).

The four conditions imposed by the ASLB required that before receiving the MOX fuel, Duke must (a) make certain modifications to its existing security procedures, (b) demonstrate its ability to counter an attempt at theft of the plutonium MOX fuel by

undertaking tabletop and force-on-force exercises, (c) ensure monitoring of a particular location on the site during the period when MOX fuel is on the site but has not yet been loaded into the core, and (d) ensure that all procedures and responsibilities identified during the hearing as being needed to support the receipt, inspection, placement and storage of the plutonium MOX fuel are “clearly defined, finalized, memorialized in writing, implemented, properly communicated and coordinated as necessary with all involved agencies, and actually accomplished in a timely manner.” *Id.*, slip op. at 79-80.

At the end of March 2005, BREDL learned that the four plutonium MOX fuel assemblies intended for testing at Catawba had arrived in the United States from France. On March 30, 2005, BREDL’s counsel wrote to the Secretary of the U.S. Department of Energy (“DOE”) to request that the plutonium fuel not be delivered to Catawba until the license conditions had been met. On April 14, 2005, Linton F. Brooks, Administrator of the National Nuclear Security Administration, responded in a letter which stated, *inter alia*, that “Duke Power assures us that it intends to fully comply with the license conditions prior to accepting delivery of the lead assemblies.” It is BREDL’s understanding that the DOE shipped the plutonium fuel to the Savannah River Site for storage until it could be received at Catawba.

On April 29, 2005, based on a Duke media advisory, various newspapers in the Catawba region reported that the plutonium fuel had been shipped to the nuclear power plant. Presumably, the delivery of the plutonium fuel to Catawba means that the ASLB’s license conditions have been met.

### III. ARGUMENT

#### A. The Commission's Inquiry is Moot.

As the Commission has explained, the doctrine of mootness “derives from the Constitution’s limitation on federal courts’ jurisdiction to ‘cases’ or ‘controversies.’” *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 NRC 181, 185 (1993), citing *Flast v. Cohen*, 392 U.S. 83, 94 (1968). Although the Commission is not strictly bound by the doctrine of mootness, “the agency’s adjudicatory tribunals have generally adhered to the principle.” *Id.*, citing *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 54 (1978), *remanded on other grounds, sub nom. Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). A case is moot when “there is no reasonable expectation that the matter will recur and that interim relief or intervening events have eradicated the effects of the allegedly unlawful action.” *Id.*, citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Here, there is no reason to expect that the NRC will receive another application to test plutonium MOX fuel. Moreover, if and when Duke applies for a license amendment to use larger “batch” quantities of plutonium fuel at Catawba over a more extended time period, the ASLB’s decision is unlikely to provide a useful precedent in the event that Duke continues to seek exemptions from NRC security regulations. This is because the security concerns posed by batch use of plutonium fuel for an extended period would be far more serious than the concerns posed by testing of four fuel assemblies over a relatively short period. Thus, any issues raised by Duke’s application for a license

amendment to test plutonium fuel have been mooted by the delivery of the fuel to Catawba and the presumed fulfillment of the license conditions.

**B. Even Assuming for Purposes of Argument That the Commission's Inquiry is Not Moot, the Commission's Question Is Unreasonably and Unfairly Broad.**

**1. Standard of review**

As the Commission has ruled, an ASLB's factual findings may not be overturned unless they are "clearly erroneous." *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 26 (2003). The clear error standard is "quite high," requiring a showing that the Board's findings were "not even 'plausible in light of the record viewed in its entirety.'" *Id.*, quoting *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995); *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985).

Procedural protections also attach to any Commission decision to exercise *sua sponte* review under 10 C.F.R. § 2.786(a). The Commission has made it a "consistent practice" to ensure that the parties have "ample opportunity" to address any concerns that it raises on *sua sponte* review. See *Offshore, supra*, 16 NRC at 891 n.8 and cases cited therein. The purpose of this notice is to ensure that the Commission does not decide matters without the benefit of a fully developed record. Ample notice and a cautious approach are especially important where the Commission's concerns involve issues that have not been put into controversy by the parties. *Virginia Electric & Power Co.* (North Anna Nuclear Power Station, Units 1 & 2), ALAB-491, 8 NRC 245, 247 (1978).

**2. The Commission's question is too vague to allow a meaningful response.**

It is not at all clear what concerns the Commission has asked the parties to address in CLI-05-10. BREDL believes there are at least three reasonable interpretations of the Commission's request that the parties "brief the issue of the necessity of the conditions the Board imposed for purposes of receipt of the MOX lead test assemblies." *Id.*, slip op. at 2.

One possible interpretation is that the Commission is questioning whether commitments made by Duke in the course of the hearing can be relied on without turning them into license conditions. This reasonably narrow question is addressed below in Section C.1. Another plausible interpretation is that the Commission wants to know whether it is necessary to require that the conditions must be fulfilled before receipt of the plutonium MOX fuel at Catawba, or whether they could be fulfilled after receipt of the fuel. This question, which is similarly reasonably narrow, is addressed below in Section C.2.

Finally, the Commission's request in CLI-05-10 could be interpreted to generally question the merits of the ASLB's entire decision. If this is indeed the subject of the Commission's concern, the question is far too broad and vague to give the kind of notice that is contemplated in *Offshore* and other NRC cases. The license conditions stem from the ASLB's consideration of hundreds of pages of written pre-filed testimony and exhibits, as well as four days of live testimony. Each of the parties' own distillations of the evidence and legal arguments presented during the hearing, which are contained in their proposed and reply findings of fact and conclusions of law totaled approximately 250 pages. The ASLB's decision ran to over 80 pages.

If in fact the Commission does have concerns about the merits of the ASLB's decision, it is not possible to discern them with any specificity from CLI-05-10.

Assuming the Commission believes that its concerns have not been mooted by the delivery of the plutonium fuel to Catawba and the presumed fulfillment of the license conditions, the Commission should give the parties fair and reasonable notice of its specific questions regarding the merits of the decision.

**C. Even Assuming for Purposes of Argument That the Commission's Inquiry is Not Moot, LBP-05-10 Should be Sustained.**

**1. The license conditions are necessary in order to ensure compliance.**

One possible interpretation of the Commission's query is that the Commission would like to know whether, if Duke has made clear commitments to fulfill the license conditions, it is superfluous to incorporate those commitments as license conditions. *See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-35, 52 NRC 364, 409 (2000).*

BREDL does not recall whether any such commitments were made on the record, and leaves it to Duke to identify any such commitments and defend their clarity. Even if such commitments were made, however, BREDL respectfully submits that license conditions are appropriate "in order to eliminate any question about whether these promises are fully enforceable." *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 32 (2000), citing Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308-09 (1997).*

License conditions are also appropriate to the extent that they are "intended to address a particular situation that required a specific remedy." *Curators of the University*

of Missouri, CLI-95-1, 41 NRC 71, 158-63 (1995) (approving license conditions related to prevention of fire hazards). As in *Curators*, in this case the ASLB's license conditions contain very specific requirements that are intended to address particular deficiencies in Duke's security program for the protection of plutonium MOX fuel.

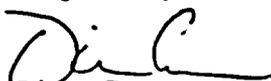
**2. The license conditions must be fulfilled before the arrival of plutonium MOX fuel at Catawba.**

The Commission's question may also be read to ask whether the ASLB's license conditions reasonably could be fulfilled sometime after the plutonium MOX fuel is received at Catawba. The answer to that question is "no." The crucial period from a security standpoint is the period that starts the moment the plutonium fuel changes hands from the DOE to Duke, to the time when the plutonium fuel is put into the core.

**IV. CONCLUSION**

For the foregoing reasons, the Commission should find that its inquiry has been mooted by the shipment of the plutonium MOX fuel to Catawba and the fulfillment of the ASLB's license conditions. In the alternative, the Commission should either sustain the ASLB's decision or provide a more specific explanation of its concerns.

Respectfully submitted,



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May 2, 2005

## CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2005, copies of the foregoing BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE'S BRIEF IN RESPONSE TO CLI-05-10 REGARDING COMMISSION REVIEW OF LBP-05-10 were served on the following by e-mail and/or first-class mail, as indicated below:

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