

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Edward McGaffigan, Jr.
Jeffrey S. Merrifield
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Peter B. Lyons

In the Matter of)
DUKE ENERGY CORPORATION) Docket Nos. 50-413-OLA, 50-414-OLA
(Catawba Nuclear Station,)
 Units 1 and 2)
_____)

CLI-05-14

MEMORANDUM AND ORDER

I. BACKGROUND

This proceeding arises from Duke Energy Corporation's application for a license amendment to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of its Catawba nuclear reactors. On March 10, 2005, the Licensing Board issued its final partial initial decision (hereinafter "PID-Security")¹ on a security contention brought by the Blue Ridge Environmental Defense League ("BREDL"). BREDL's contention challenged certain exemptions Duke Energy Corporation sought for its Catawba facility during testing of MOX assemblies. Because the Board's decision contains protected safeguards information, the order has not been made public in its entirety. The Board did, however, issue a public notice of the decision, indicating that, *subject to certain conditions*, Duke had met its burden to show that

¹See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, unpublished "Final Partial Initial Decision (Issues Relating to BREDL Security Contention 5)" (Mar. 10, 2005)

its requested exemptions from the requirements of 10 C.F.R. Parts 11 and 73 are appropriate and that its physical protection system will “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.”² The Board later issued a public redacted version of PID-Security.³

PID-Security was the Board’s final order in this case, and none of the parties sought review of it under 10 C.F.R. § 2.786(b).⁴ Nevertheless, pursuant to 10 C.F.R. § 2.786(a), the Commission decided to review the Board’s order *sua sponte*.⁵ The Commission specifically requested the parties to brief the issue of the necessity of the conditions the Board imposed for purposes of receipt of the MOX lead test assemblies.⁶ The parties submitted their initial briefs on May 2, 2005, and their reply briefs on May 9, 2005.

In their initial briefs, Duke and the NRC Staff argued that none of the four license

²See “Notice of Final Partial Initial Decision (Issues Relating to BREDL Security Contention 5)” (Mar. 10, 2005). One day before the Board issued PID-Security, BREDL filed a petition for expedited discretionary review by the Commission of the NRC Staff’s No Significant Hazards Consideration determination. The Staff had issued Duke’s requested license amendment and regulatory exemptions on March 3, 2005. BREDL contended that the Staff’s decision was unlawful because it was made before the Board issued a decision on BREDL’s security contention. Under our rules, “No petition or other request for review of or hearing on the staff’s significant hazards consideration determination will be entertained by the Commission. The staff’s determination is final, subject only to the Commission’s discretion, *on its own initiative*, to review the determination.” 10 C.F.R. § 50.58(b)(6) (emphasis added). See *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-7, 53 NRC 113, 118 (2001). In any case, BREDL’s motion became moot when the Board issued PID-Security on March 10, 2005.

³See LBP-05-10, 61 NRC __ (Apr. 18, 2005) (“PID-Public”).

⁴ The Commission’s new adjudicatory rules do not apply to this case, which began before their promulgation. See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004). Hence, our references to our adjudicatory rules are to their former versions.

⁵See CLI-05-10, 61 NRC __ (Apr. 21, 2005).

⁶See *id.*

conditions the Board imposed was necessary. BREDL offered no substantive arguments about the conditions. Instead, BREDL insisted that the Commission's inquiry is moot; that the Commission's question is unreasonably and unfairly broad; and that the license conditions are appropriate to ensure that Duke's promises are fully enforceable.

Duke, in its reply brief, addressed the questions BREDL raised about mootness and the appropriateness of the Commission's *sua sponte* review. The NRC Staff replied to Duke's initial brief only to point out one topic the Staff considered beyond the Commission's request for briefs, and declined to reply to BREDL's initial brief. BREDL's reply brief sought to defend the conditions the Board imposed.⁷

II. DISCUSSION

Duke has already complied with the license conditions set by the Board. Duke's compliance may well render this matter moot, as BREDL claims, but it does not preclude the Commission from reviewing the conditions. Under both NRC rules and longstanding agency precedent, the Commission has the authority to review interlocutory and final Licensing Board decisions on its own motion.⁸ The Commission's practice is to address novel legal or policy

⁷On May 6, 2005, BREDL filed a motion to exceed the page limitation the Commission set in CLI-05-10 for the parties' reply briefs. Rather than presenting its main argument in the initial brief, BREDL has attempted to justify the Board's conditions belatedly in its reply brief. The Commission disapproves this tactic, which deprives Duke and the NRC Staff of an opportunity to reply directly to BREDL's substantive arguments about the license conditions. See *Louisiana Energy Services, L.P.*, CLI-04-25, 60 NRC 223, 225 (2004) ("new arguments may not be raised for the first time in a reply brief"); *Consumers Power Co. (Midland Plant, Units 1 and 2)*, ALAB-115, 6 AEC 257 (1973) (Petitioners failed to show why a document's contents could not have been furnished in a more timely fashion). Nevertheless, to ensure that we consider all perspectives, we do not reject BREDL's brief out of hand. We grant BREDL's motion and have considered the 14-page reply brief.

⁸ See, e.g., *Curators of the University of Missouri*, CLI-91-7, 33 NRC 295 (1991); *Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-87-2, 25 NRC 267 (1987). See also 10 C.F.R. §2.786 (former rules). Under the Commission's new adjudicatory procedural rules, 10 C.F.R. § 2.341 provides for Commission *sua sponte* review.

issues and to provide appropriate guidance.⁹ The Commission will do so even in moot cases if necessary to clarify important issues for the future. The Commission is not subject to the constitutional “case or controversy” requirement that prevents federal courts from deciding moot questions.¹⁰

As is clear from the record in this proceeding, the issue in this case is not whether Catawba must counter the design basis threat (DBT) outlined in 10 C.F.R. § 73.1. As Duke explained in its brief before the Commission, as a Part 50 licensed reactor, Catawba unquestionably is required to protect against the “radiological sabotage” DBT defined in 10 C.F.R. § 73.1(a)(1).¹¹ Additionally, as Duke also recognized, “[t]here is no argument that for the period of time from receipt until the MOX fuel lead assemblies are irradiated, the DBT in 10 C.F.R. § 73.1(a)(2) for theft will apply.”¹² In fact it is precisely because Duke would be required to meet various regulatory provisions in support of the “theft” DBT that the licensee found it necessary to request exemptions from some of these requirements. Therefore, the precise issue in this case was not whether the DBT applied, but whether or not the evidence

⁹See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20, 23, 25 (1998).

¹⁰See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983), *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). We ordinarily do not decide moot questions – see, e.g., *Advanced Medical Systems, Inc.*, CLI-93-8, 37 NRC 181, 184-85 (1993) – but we do so here to avoid any implication that we approve the Board-imposed security conditions in this case.

¹¹ See “Duke Energy Corporation’s Brief on Review of the Licensing Board’s Final Order Addressing Security Contention 5”, May 2, 2005, pg. 7 [Brief is Designated as Safeguards Information].

¹² *Id.* at 8.

established that the regulatory standard for authorizing exemptions was satisfied.¹³ That standard provides that an exemption may be granted if it is “authorized by law and will not endanger life or property or the common defense and security, and [is] otherwise in the public interest.”¹⁴ Based on our review of the record, the Commission believes that the Board accorded insufficient weight to the compelling arguments presented by Duke and the NRC staff detailing why the granting of the requested exemptions met this regulatory standard and would not endanger life or property or the common defense and security.¹⁵

It appears that, in large part, the Board was unpersuaded by the NRC staff’s and Duke’s arguments regarding the assurances provided in the wake of the exemption requests because the Board determined that the MOX fuel material could be an attractive target for terrorists.¹⁶ We have some difficulty with this attractiveness determination. First, we find the Board’s generalized assumptions about the relatively strong attractiveness of the MOX fuel as a target in contradiction to the weight of the evidence established in the record demonstrating otherwise.¹⁷

Second, the central issue in this case is not whether there would be any interest in stealing the material – our regulations assume there is – but whether, as our exemption rule requires, the licensee presented sufficient evidence to support the assurance of the protection of public health and safety in light of the theft risk. Based upon our review of the record, the

¹³ See CLI-04-6, 59 NRC 62, 72 (2004); CLI-04-19, 60 NRC 5, 8, 10-11 (2004).

¹⁴ 10 C.F.R. § 73.5.

¹⁵ See *id.*

¹⁶ See “Final Partial Initial Decision (Issues Relating to BREDL Security Contention 5) at 19-24, 35-38, 72 [Decision is designated Safeguards Information].

¹⁷ See Hearing Transcript at 7-8, 3884-3885, 3976-3977, 5112-5147, 5273-5275, 4260-4263; Staff Findings at 21-25. [Transcript and Findings are designated Safeguards Information].

licensee and staff did just that by demonstrating, for example, that the licensee's security measures and forces could thwart either of BREDL's two formulated attack scenarios. The Board did not need to go further and offer its own interpretation of our DBT regulations.

Therefore, we find the additional security conditions imposed by the Board unnecessary to ensure compliance with the exemption standard. As our order today is public, we do not discuss in detail the Board-imposed security conditions. It suffices to say that we view the conditions as unnecessary to support the requested exemptions. In future cases, any legal questions about the interpretation of the DBT regulatory requirements which arise in the course of considering the admission of contentions or later in the adjudication should be referred to the Commission for appropriate guidance in lieu of needless speculation and misinterpretation.¹⁸

III. CONCLUSION

For the reasons above, we disapprove the four license conditions imposed by the Board in its March 10 PID-Security decision.

¹⁸See 10 C.F.R. §§ 2.718(g) and 2.730(f) under the regulations applicable to the present case, and, see 10 C.F.R. §§ 2.319(l) and 2.323(f) for future cases operating under the revised provisions of Part 2. The Commission encourages Boards and presiding officers to certify novel legal or policy questions early in a proceeding. See *Statement of Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).

IT IS SO ORDERED.

For the Commission¹⁹

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June 2005

¹⁹ Commissioners McGaffigan and Lyons were not present for affirmation of this Memorandum and Order. Had they been present, they would have affirmed their prior votes.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-14) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal distribution on June 21, 2005.

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Docket Nos. 50-413-OLA and 50-414-OLA
COMMISSION MEMORANDUM AND ORDER
(CLI-05-14)

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June 2005