

# HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

1726 M Street, NW, Suite 600 Washington, DC 20036  
December 13, 2005

(202) 328-3500 (202) 328-6918 fax

BY FEDERAL EXPRESS  
Nils J. Diaz, Chairman  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Rockville, MD 20852

Roy P. Zimmerman, Director  
Office of Nuclear Security and Incident Response  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike Rockville, MD 20852

SUBJECT: *Request for Meeting Regarding Generic Security Issues*

Dear Commissioner Diaz and Mr. Zimmerman,

Dr. Edwin S. Lyman of the Union of Concerned Scientists (“UCS”) and I would like to meet with you to discuss certain concerns we have regarding NRC’s program for regulating physical protection at nuclear power plants. These concerns arose through our recent involvement in the licensing proceeding for the possession and use of plutonium mixed oxide (“MOX”) lead test assemblies (“LTAs”) at the Catawba nuclear power plant.

During the Catawba-LTA licensing proceeding, in reviewing NRC guidance documents for the implementation of the agency’s security regulations, we became aware of certain inconsistencies or inadequacies in the NRC’s post-9/11 security guidance which we would like to discuss with you. In general, our concerns relate to the generic definition of “armed responders,” the role of subject matter expert contractors in force-on-force exercises, the NRC’s policy on insiders, and the role of 10 C.F.R. Part 100 in assessing the performance of nuclear power plant security programs against sabotage. We are unable to discuss these concerns in any greater detail here, because they involve safeguards information. If you would like us to provide you with a written summary of our concerns, we would be happy to do that. In doing so, we obviously would comply with the NRC’s requirements for protection of safeguards information during preparation, storage and transit. My law firm’s facilities have been approved for compliance with the regulations.

Dr. Lyman and I request that attendance at this meeting be limited to the four principals and any NRC staff members you wish to invite. We do not believe it is necessary or appropriate to include nuclear industry representatives at the meeting, for two reasons. First, the industry does not have an established “need to know” the concerns we seek to discuss with the Commission in order to perform its “official, contractual, or licensee duties of employment.” 10 C.F.R. §§ 73.2, 73.21(c). Second, we think that meeting without nuclear industry officials present will help to focus the discussion on our

Messrs. Diaz and Zimmerman

December 13, 2005

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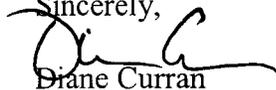
concerns, just as you so often focus exclusively on the nuclear industry's security concerns by meeting alone with nuclear industry representatives.

Before we meet, Dr. Lyman and I require your written permission to discuss safeguards information which we obtained through the discovery process in the Catawba-LTA license amendment proceeding. Under Paragraph E of the December 15, 2003, Protective Order issued by the Atomic Safety and Licensing Board in that proceeding, Dr. Lyman and I are limited to using any "protected information" that we obtained in that proceeding, including the NRC guidance documents that we wish to discuss with you, for the purposes of the litigation. (A copy of the Protective Order is attached.) Although the Catawba-LTA proceeding has ended, we believe that we are still governed by that requirement.

We believe that by entertaining our concerns in a closed meeting, you would be acting in a manner consistent with the general purpose of the Protective Order, which is to ensure that Dr. Lyman and I do not disclose safeguards information to unauthorized individuals. Neither Dr. Lyman nor I propose to discuss safeguards information with any party other than the two of you and any other NRC officials that attend the meeting. As decision-makers at the highest level of the Commission, you are not only authorized to consider the safeguards information contained in our concerns, but we respectfully submit that you have a statutory obligation to consider the implications of our concerns with respect to the adequacy of the NRC's security program. Therefore, we believe it is appropriate to waive the requirements of Paragraph E of the Protective Order in this case.<sup>1</sup>

Thank you for your consideration. I look forward to hearing from you at your earliest convenience.

Sincerely,



Diane Curran

Enclosure: Protective Order  
Cc w/Encl: David A. Repka, Esq.  
Winston & Strawn  
1700 K Street N.W.  
Washington, D.C. 20006

Susan L. Uttal, Esq.  
Office of General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555

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<sup>1</sup> Because Duke Energy Corporation and the NRC Staff were parties to the protective order, I am copying them with this letter.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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 No's. 50-413-OLA, 50-414-OLA

ASLBP No. 03-815-03-OLA

December 15, 2003

MEMORANDUM AND ORDER  
(Protective Order Governing Duke Energy Corporation's  
September 15, 2003 Security Plan Submittal)

This Protective Order governs the disclosure and use of "Protected Information" contained in or concerning the September 15, 2003 submittal of Duke Energy Corporation ("Duke") to the U.S. Nuclear Regulatory Commission ("NRC"). The submittal consisted of a transmittal letter and 7 attachments, including revision 16 to the Duke Energy Corporation Nuclear Security and Contingency Plan and a related request for exemption (the "Security Plan Submittal"). This Security Plan Submittal was filed in connection with Duke's plans to use mixed oxide ("MOX") fuel in the reactors at McGuire and Catawba Nuclear Stations. Duke's Security Plan Submittal was filed with the NRC as proprietary information related to physical protection, which Duke sought to withhold from public disclosure under 10 C.F.R. § 2.790(d)(1). Subsequently, the NRC determined that Attachments 1 through 3 and 5 through 7 to the Security Plan Submittal include Safeguards Information that is subject to the requirements in 10 C.F.R. Part 73.<sup>1</sup>

<sup>1</sup> This Protective Order is issued pursuant to 10 C.F.R. § 73.21(c)(1)(vi). This memorandum and order does not limit access to Protected Information by persons authorized to receive such information pursuant to 10 C.F.R. § 73.21(c)(1)(i).

As used in this Protective Order and in the Nondisclosure Affidavit included as the Appendix to this order, "Protected Information" includes: (1) the September 15, 2003 Security Plan Submittal or any supplements or amendments thereto, including Requests for Additional Information ("RAIs") or responses to RAIs relating to that submittal; and (2) any information obtained, developed, or created by virtue of these proceedings, in any form, that is not otherwise a matter of public record and that deals with or describes details of the Security Plan Submittal.

Counsel, representatives, and consultants for Duke Energy Corporation, the Blue Ridge Environmental Defense League ("BREDL"), and other petitioners in this proceeding, as well as support personnel and court reporters, who have executed a Nondisclosure Affidavit in the form attached as the Appendix to this order shall be permitted access to Protected Information under the following conditions:<sup>2</sup>

A. Only the Protected Information, as defined herein, shall be disclosed pursuant to this order, and only for the purpose of preparing proposed contentions or litigating any admitted contentions in this proceeding.

B. Notwithstanding any other provisions set forth herein, and without waiving any objections the parties may have to any proposed consultant's qualifications to testify concerning matters in this proceeding, the following persons have completed trustworthiness reviews satisfactory to the NRC Staff and may be afforded access to Protected Information under this Protective Order for the purpose of preparing and/or responding to contentions and further litigation in this proceeding:

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<sup>2</sup> In addition to BREDL, the Nuclear Information and Resource Service ("NIRS") has also petitioned for leave to intervene in this proceeding. At this time, NIRS has not requested access to the Security Plan Submittal.

1. BREDL

Diane Curran, Esq.  
Edwin Lyman (consultant)  
Rebecca Gaiser (legal secretary)  
Elva Lovoz (legal secretary)

2. Duke Energy Corporation

David A. Repka, Esq.  
Mark J. Wetterhahn, Esq.  
Anne W. Cottingham, Esq.  
Sharlene Hawkins (legal secretary)

Additions or substitutions to this list of individuals for whom access to Protected Information may be provided under this Protective Order should be made in accordance with the provisions of paragraph C. below.

C. 1. Only individuals who are identified in paragraph B of this Protective Order and who have executed a Nondisclosure Affidavit may have access to Protected Information on a "need to know" basis pursuant to this order. Upon execution of a Nondisclosure Affidavit in the form attached hereto, and transmission to the Atomic Safety and Licensing Board ("Licensing Board") of the executed affidavit,<sup>3</sup> such persons shall have access to Protected Information if they can demonstrate a "need to know" with respect to that information.

2. An individual must have a "need to know" the Protected Information that he or she may be shown. In this regard, "need to know" means a determination by the holder of the Protected Information that the proposed recipient's access to the Protected Information is necessary in the performance

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<sup>3</sup> A copy of the executed Nondisclosure Affidavit shall also be provided to counsel for Duke and counsel for the NRC.

of official, contractual, or employment duties with respect to the litigation in this proceeding. If a dispute arises regarding any "need to know" determination under this Protective Order, the determination of "need to know" will be made by the Licensing Board.

3. Any party to this proceeding seeking to add to or substitute for the individuals listed in paragraph B of this Protective Order shall file a motion to modify this Protective Order accordingly. Any such individual shall complete a trustworthiness review satisfactory to the NRC Staff and would be subject to all requirements of paragraph C of this order.

D. Individuals who have executed a Nondisclosure Affidavit and who receive any Protected Information (including transcripts of *in camera* hearings, filed testimony or any other document that reveals Protected Information) shall maintain its confidentiality as required by 10 C.F.R. § 73.21 and the annexed Nondisclosure Affidavit, the terms of which are hereby incorporated in this memorandum and order.

E. Individuals who have executed a Nondisclosure Affidavit and who receive any Protected Information shall use it solely for the purpose of participation in this proceeding before the Licensing Board in matters directly pertaining to the Security Plan Submittal, and any further Commission or judicial appellate proceedings in this case directly involving security matters, and for no other purpose. Nothing in this Protective Order, however, shall preclude those individuals from seeking public disclosure of Protected Information on the ground that protection of the information is not warranted or appropriate. Such application shall be made to the NRC Executive Director for Operations or his designee.

F. Individuals who have executed a Nondisclosure Affidavit shall keep a record of

all documents containing Protected Information in their possession and shall account for and deliver that information for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to (1) the Licensing Board or the Commission, (2) a Commission employee designated by the Board or the Commission, or (3) a person authorized to receive Protected Information on behalf of Duke, in accordance with the Nondisclosure Affidavit attached hereto.

G. In accordance with 10 C.F.R. § 73.21, Protected Information may be reproduced to the minimum extent necessary consistent with need.

H. In addition to the requirements specified in the Nondisclosure Affidavit appended to this Protective Order, all pleadings and correspondence in this proceeding (including testimony) that contain any Protected Information shall:

1. Be segregated;
2. Be served only on lead counsel,<sup>4</sup> the Assistant for Rulemakings and Adjudications in the Commission's Office of the Secretary,<sup>5</sup> and the individual members of the Licensing Board;
3. Be served only by: (i) United States first class, registered, express, or certified mail, (ii) internal NRC mail, (iii) messenger-courier or overnight delivery service (e.g., Federal Express), or (iv) personal delivery by an individual

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<sup>4</sup> The following attorneys shall be considered "lead counsel" for service purposes: David A. Repka (Duke), Lisa F. Vaughn (Duke), Diane Curran (BREDL), and Antonio Fernandez (NRC Staff).

<sup>5</sup> The original of the pleading or correspondence containing the Protected Information (without any additional copies) should be directed to Emile L. Julian, Assistant for Rulemakings and Adjudications, Rulemakings and Adjudications Staff, Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

who otherwise is authorized access pursuant to 10 C.F.R. § 73.21(c) or an order issued by the Board or the Commission in this proceeding; and

4. Be transmitted in two sealed envelopes or wrappers, including: (i) an outer mailing envelope, and (ii) a heavy, opaque inner envelope bearing the name and address of the addressee and the statement "PRIVATE. TO BE OPENED BY ADDRESSEE ONLY." Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope or wrapper will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains Protected Information.

5. Include an attached cover letter or memorandum, which shall be served on the other participants to the proceeding by United States Postal Service first-class mail, that briefly describes the contents of the pleading or correspondence without reference to any Protected Information such that the cover letter or memorandum can be placed in the public docket of the proceeding.

I. Notwithstanding the procedure that has been established for the service of copies of documents in this proceeding (see "ORDER (Setting Deadlines, Schedule, and Guidance for Proceedings)," September 23, 2003 (slip op. at 3-4)), because of the subject matter, the parties shall not make any facsimile or e-mail transmission to the Licensing Board or other parties of any document that contains or discusses Protected Information.

J. Counsel, representatives, consultants and any other individual who has reason to suspect that documents containing Protected Information may have been lost or misplaced (for example, because an expected paper has not been received) or that Protected Information has otherwise become available to unauthorized persons, shall notify the Licensing Board promptly of those suspicions and the reasons for them.

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It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Ann Marshall Young, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
December 15, 2003

## Appendix A

### NONDISCLOSURE AFFIDAVIT

I, \_\_\_\_\_, being duly sworn, state:

1. As used in this Nondisclosure Affidavit,

(a) "Protected Information" is (1) the September 15, 2003, submittal of Duke Energy Corporation ("Duke") to the NRC, Docket Nos. 50-369, 50-370, 50-413, and 50-414, which includes revision 16 to the Duke Energy Corporation Nuclear Security and Contingency Plan and a related request for exemption from certain NRC requirements in 10 C.F.R. Parts 11 and 73 (the "Security Plan Submittal"), or any supplements or amendments thereto, including Requests for Additional Information ("RAIs") or responses to RAIs relating to that submittal; and (2) any information obtained, developed, or created by virtue of these proceedings, in any form, that is not otherwise a matter of public record and that deals with or describes details of the Security Plan Submittal.

(b) An "Authorized Person" is (i) an employee, consultant or contractor of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") entitled to access to the Protected Information described herein; (ii) a person authorized to have access under the Atomic Safety and Licensing Board ("Licensing Board") December 15, 2003, Protective Order and who has executed a copy of this affidavit, which has been transmitted to the Licensing Board and Duke Energy Corporation counsel; or (iii) a person employed by or on behalf of Duke and authorized by it in accordance with 10 C.F.R. § 73.21(c)(1) to have access to the Protected Information.

(c) A "Document" means any audio or video tape recording or digital or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices or any other medium, and includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

2. I have read the Protective Order issued by the Licensing Board in this proceeding on December 15, 2003, and will comply in all respects with its terms and conditions regarding the Protected Information produced in connection therewith. I will safeguard Protected Information in accordance with the terms of this affidavit.

3. I will not disclose Protected Information to anyone except an Authorized Person, unless that information has previously been disclosed in the public record of this proceeding. I will safeguard Documents containing Protected Information in written or recorded form (including any portions of transcripts of *in camera* hearings, filed testimony or any other documents that contain such information), so that the Protected Information contained therein remains at all times under the control of an Authorized Person and is not disclosed to anyone else.

4. I will not reproduce or copy any Protected Information by any means except to the minimum extent necessary consistent with need in accordance with 10 C.F.R. § 73.21(f)(1). I will only destroy Protected Information by methods that assure complete destruction of the Protected Information in accordance with 10 C.F.R. § 73.21(f)(2). I understand that I may take

notes concerning such Protected Information, subject, however, to the terms of this affidavit and the Licensing Board's December 15, 2003, Protective Order. So long as I possess Protected Information, I will continue to take these precautions until further order of the Licensing Board or the Commission.

5. I will safeguard and hold in confidence any data, notes, or copies of Protected Information and all other papers that contain any Protected Information in accordance with 10 C.F.R. Part 73.

(a) Access to the Security Plan Submittal will be at a facility provided for use by designated counsel, representatives, and consultants in (1) a designated Duke facility or (2) an office of the NRC Staff in Rockville, MD. Any such facility is to be located in a controlled access building which is either attended around the clock or locked at night, or as otherwise specified in 10 C.F.R. § 73.2 ("Security Storage Containers").

(b) When not under my direct control or the direct control of another Authorized Person, I will keep and safeguard all Documents containing Protected Information (including, without limitation, any notes that I may take) in a Security Storage Container as defined in 10 C.F.R. 73.2 in a controlled access building that is either attended around the clock or locked at night. Access to the Security Storage Container will be positively controlled by use of keys or other comparable means. Keys and/or knowledge of lock combinations protecting Protected Information shall be limited to Authorized Persons.

(c) Any secretarial or administrative work performed at my request or under my supervision to participate in this case, including preparation of

Documents, will be performed only by personnel authorized pursuant to paragraph B of the Licensing Board's December 15, 2003, Protective Order, who have executed a Nondisclosure Affidavit and agreed to abide by the terms of the order and affidavit.

(d) Protected Information shall not be discussed by telephone or communicated by email or facsimile transmission unless the Protected Information is transmitted through the use of an encryption system that the National Institute of Standards and Technology has validated as conforming either to Federal Information Processing Standard 140-1 or to Federal Information Processing Standard 140-2, or as otherwise acceptable to the NRC.

(e) If Protected Information is processed on or with automated data processing, computerized word processing equipment, or a personal or laptop computer, access to such equipment shall require the use of an entry code for access to stored Protected Information. If use of an entry code is not feasible, Protected Information may be processed on, but shall not be stored in, such equipment. Additionally, any such word processing equipment, data processing equipment, or computer that is used to process or store Protected Information shall be operated as stand-alone or free-standing equipment, not connected to any other such equipment by means of a Local Area Network (LAN) or Wide Area Network (WAN) or other data-sharing system in accordance with 10 C.F.R. § 73.21(h). Further, if any Protected Information is backed up or stored on a computer hard drive or other device, that drive or device shall be capable of being removed and shall be stored in the security storage container referred to in paragraph 5(b) above, when not in use. If a typewriter is used to process

Protected Information, the ribbon to the typewriter shall be stored and safeguarded as Protected Information in accordance with this affidavit, or promptly destroyed pursuant to 10 C.F. R. § 73.21(f)(2).

(f) Each document that has been determined by the NRC to contain Safeguards Information, as defined in 10 C.F.R. § 73.2, shall be marked "Safeguards Information" in a conspicuous manner to indicate the presence of Protected Information, as set forth in 10 C.F.R. § 73.21(e).

(g) To the extent any portion of the Security Plan Submittal is determined not to constitute Safeguards Information, and is readily segregable from Safeguards Information, paragraphs 5(a), 5(b), 5(d), and 5(e) shall not apply to such portions of the Protected Information that is not Safeguards Information. All other conditions and limitations of this Nondisclosure Affidavit shall continue to apply to any such information. Additionally, the parties shall comply with Section H. (1), (2), and (3) and Section I of the Protective Order in transmitting pleadings and correspondence containing or referring to these portions of the Security Plan Submittal.

6. I shall use Protected Information only for the purpose of preparation for any proceedings in this case dealing with Duke's Security Plan Submittal, and for no other purpose.

7. I shall keep a record of all Documents containing Protected Information in my possession, including any copies of those Documents or portions thereof made by me or on my behalf. At the conclusion of this proceeding, I shall account to the Licensing Board or the Commission, or to a Commission employee designated by the Board or the Commission, for all the Documents or other materials containing Protected Information in my possession and

deliver them as provided herein. When I have finished using the Protected Information they contain, but in no event later than the conclusion of this proceeding (including any related Commission or judicial appeals), I shall deliver those Documents and materials for disposal or safekeeping, as may be determined to be appropriate by the Licensing Board or the Commission, to (a) the Licensing Board or the Commission, (b) a Commission employee designated by the Licensing Board or the Commission, or (c) a person authorized to receive Protected Information on behalf of Duke.

8. I make this agreement with the following understandings:

(a) I do not waive any objections that any other person may have to executing an affidavit such as this one;

(b) I do not waive any objections that I may have or raise at a subsequent time in this proceeding, concerning a consultant's qualifications to testify concerning security plan issues; and

(c) I will not publicly discuss or disclose any Protected Information that I receive by virtue of this proceeding, and will not corroborate the accuracy or inaccuracy of information obtained outside this proceeding by using Protected Information, or my knowledge thereof, gained through the hearing process.

9. I acknowledge that any violation of the terms of this Nondisclosure Affidavit or the Licensing Board's December 15, 2003, Protective Order, which incorporates the terms of this affidavit, may result in the imposition of sanctions as the Licensing Board or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate disciplinary authorities. I further acknowledge that any unauthorized disclosure of Protected Information or breach of the Protective Order issued in this proceeding may be grounds for

damages or injunctive relief from state or federal courts or for the imposition of civil and/or criminal penalties by the NRC, as set forth in 10 C.F.R. § 2.744(e) and sections 223 and 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2273, 2282.

WHEREFORE,

I do solemnly agree to safeguard such Protected Information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit.

\_\_\_\_\_  
(Name)

Subscribed to and sworn before me  
this \_\_\_\_ day of \_\_\_\_\_, 2003

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

My commission expires \_\_\_\_\_