

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/18/04

COMMISSIONERS

SERVED 02/18/04

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
)
DUKE ENERGY CORPORATION)
)
(Catawba Nuclear Station,)
Units 1 and 2))
_____)

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

CLI-04-06

MEMORANDUM AND ORDER

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel in one of Duke Energy Corporation's Catawba commercial nuclear reactors, the Commission grants the NRC Staff's petition for interlocutory review. We reverse the Licensing Board's decision to provide a hearing petitioner, the Blue Ridge Environmental Defense League ("BREDL"), access to confidential NRC "safeguards" information. As we see the case, there has been no showing that BREDL has a "need to know" the information -- *i.e.*, no showing that access to the information is indispensable to BREDL's opportunity to frame litigable contentions.

We also take this opportunity to exercise our general supervisory authority to overturn a recent (unpublished) Board order, dated February 4, 2004, giving BREDL's representatives a right to attend a confidential, safeguards-related, meeting between the NRC staff and the licensee. NRC licensing boards have no power to superintend the NRC staff's regulatory reviews or, in particular, to direct the Staff to admit particular individuals or groups to non-adjudicatory meetings.

I. BACKGROUND

On February 27, 2003, Duke Energy Corporation filed a license amendment request to revise the McGuire and Catawba Technical Specifications to allow insertion of four mixed oxide (“MOX”)¹ lead test assemblies at either the McGuire or the Catawba Nuclear Station. After publication of a notice of opportunity for hearing in the *Federal Register*,² the Nuclear Information and Resource Service and BREDL filed petitions to intervene and requests for hearing. Neither Duke nor the NRC Staff contested the standing of the two organizations to seek a hearing.

To formulate contentions about security, BREDL’s counsel requested access to Duke’s September 15, 2003, security-related submittal to the NRC. This document, which contains confidential safeguards information,³ includes a revision to the Duke Energy Corporation Nuclear Security and Contingency Plan and a related request for exemption from certain requirements in 10 C.F.R. Parts 11 and 73 associated with the proposed use of MOX fuel at Catawba. It contains, in effect, the special security arrangements Duke plans to put in place during the time it is storing the unirradiated MOX test assemblies at Catawba.

¹MOX is a mixture of uranium and plutonium oxides. As a part of the United States - Russian Federation plutonium disposition program, the U.S. Department of Energy plans to dispose of weapons grade plutonium by converting it to MOX fuel and using the fuel in commercial nuclear reactors. Current plans are to test four assemblies by placing them into the 193-assembly core in one of the reactors at Catawba. After irradiation of the test assemblies, they will be tested to verify their properties. A later license amendment request is contemplated for “batch use” of the fuel.

²See “Duke Energy Corporation et al., Catawba Nuclear Station, Units 1 and 2; McGuire Nuclear Station, Units 1 and 2; Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing,” 68 Fed. Reg. 44,107 (July 25, 2003).

³ Safeguards information is protected from public disclosure under the authority of section 147 of the Atomic Energy Act, 42 U.S.C. § 2167. The designation covers, among other things, “security measures (including security plans, procedures and equipment) for the physical protection” of special nuclear material, byproduct material, source material, and safety-significant equipment at nuclear reactors. NRC regulations establish specific requirements for protecting and accessing safeguards-designated information. See 10 C.F.R. § 73.21.

Duke requested the Board to enter a protective order upon execution of non-disclosure affidavits by BREDL's attorney, Diane Curran, and expert witness, Edwin Lyman.⁴ The Board entered such an order on December 15, 2003,⁵ and Ms. Curran and Dr. Lyman thereafter viewed Duke's MOX-related security submittal.

Subsequently, the present controversy developed when BREDL's attorney requested access to additional safeguards and classified documents from the NRC Staff and the NRC Staff declined to provide them. BREDL sought, among other things, certain orders the NRC issued in 2003 to modify licenses at reactor facilities,⁶ including safeguards and classified information about the design basis threat for commercial nuclear reactors and individual Category I facilities.⁷

BREDL believes the safeguards information it requested is necessary to formulate contentions on Duke's MOX-related security plan submittal.⁸ BREDL considers the documents to contain the "law," or standard, on which to base its disputes with Duke. According to BREDL,

⁴NIRS's representative indicated that NIRS would not file any security-related contentions; thus, NIRS is not included in the protective order.

⁵See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, unpublished "Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal)" (Dec. 15, 2003).

⁶A public version of these orders appears in the *Federal Register*. See, e.g., *All Power Reactor Licensees, Order Modifying Licenses (Effective Immediately)*, 68 Fed. Reg. 24,517 (May 7, 2003). But, just as NRC regulations do not specify the precise number of intruders or type of weapons a facility must protect against (the design basis threat), neither do the public versions of the NRC's 2003 security orders. NRC security regulations, for the most part, contain general requirements that are implemented through details contained in confidential (safeguards) licensee security plans. See, e.g., 10 C.F.R. §§ 73.1, 73.55. Similarly, the NRC's security orders are accompanied by confidential, safeguards-designated attachments setting out sensitive security-related details. It is those details that BREDL seeks.

⁷Category I facilities are licensed to possess formula quantities of strategic special nuclear material. There currently are two such facilities in the United States. See "Final Rule: Material Control and Accounting Requirements," 67 Fed. Reg. 78,130-31 (Dec. 23, 2002).

⁸BREDL filed its non-security-related contentions on October 21, 2003.

Duke's exemption requests cannot be evaluated without consideration of the requirements from which the exemptions are sought or the substitute standard that Duke proposes to satisfy instead. Without obtaining access to the additional safeguards information it seeks (*i.e.*, information besides the safeguards Duke security submittal that BREDL already has), BREDL believes that it would have to base its security contentions on a "sheer guess" of what the standards might be.

The NRC staff and Duke opposed BREDL's request for additional documents. The Staff maintains that it will review Duke's security submittal on the basis of currently applicable standards only -- 10 C.F.R. §§ 73.5 and 11.9 -- which are available in the *Code of Federal Regulations*.⁹ The Staff represents that it will not itself use the requested safeguards documents in its planned review of Duke's license amendment application. Thus, says the Staff, BREDL does not need the material. Duke concentrates on the information in the security submittal itself and states that BREDL should be able to formulate security contentions from that submittal and the publicly available regulatory requirements.

On motion by BREDL, a quorum of the Board¹⁰ ordered the Staff to provide access to the requested safeguards documents, but not to the classified documents, by February 2, 2004.¹¹ The Board also granted BREDL an extension of time to file its security-related

⁹Exemptions for regulations dealing with physical protection of plants and materials appear at 10 C.F.R. § 73.5, and exemptions from criteria and procedures for determining eligibility for access to or control over special nuclear material appear at 10 C.F.R. § 11.9.

¹⁰The non-participating Board member was not available to attend the oral argument on the safeguards issue.

¹¹See unpublished "Memorandum (Providing Notice of Granting BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions)" (Jan. 29, 2004) (The unredacted version of the order is sealed because it contains safeguards information.) Specifically, the Board ordered the Staff to produce the following items:

- 1) Three Orders for Modification of License that the NRC issued for Catawba on
(continued...)

contentions, allowing them to be filed no later than 14 days after the Staff makes the disputed safeguards documents available for inspection. On Jan. 30, 2004, the NRC staff requested a temporary stay of the Board's order pending review of a petition for interlocutory review to be filed on the same day. The Commission granted a "housekeeping stay"¹² of the order until February 13, 2004, and later extended the stay to February 18, 2004.

In the meantime, on February 4, 2004, the Board issued an order (unpublished), at the request of BREDL, providing BREDL's attorney and expert access to a closed meeting between the NRC staff and Duke to discuss requests for additional information on Duke's security submittal. In reaction to the Board's February 4 order, the Staff canceled the proposed meeting.

On January 30, 2004, the Staff filed a petition for interlocutory review of the Board's January 29 "disclosure" order. Duke supports and BREDL opposes the Staff's petition. Just last week, on February 11, the Staff also sought review of the Board's February 4 "meeting" order. We grant review and reverse both of the Board's orders.

¹¹(...continued)

April 29, 2003, including the revised Design Basis Threat (DBT) for radiological sabotage, the training order and the fatigue order; 2) The access authorization order that the NRC issued for Catawba on January 7, 2003; and 3) Any regulatory guidance associated with these orders.

Id., slip op. at 3, 16-17. (The Board also issued a public version of this order. See "Memorandum (Providing Notice of Granting BREDL Motion for Need to Know Determination and Extension of Deadline for Filing Security-Related Contentions)" (Jan. 29, 2004)).

¹²See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 1996 WL 627, 640 (NRC) (Oct. 2, 1996).

II. DISCUSSION

A. Interlocutory Review

The Commission's longstanding general policy disfavors interlocutory review.¹³ But we do undertake such review when a Board ruling either threatens "immediate and serious irreparable impact" or "affects the basic structure of the proceeding in a pervasive or unusual manner."¹⁴ And sometimes we review interlocutory decisions as an exercise of our inherent supervisory authority over ongoing adjudicatory proceedings.¹⁵

The NRC Staff filed its petition for interlocutory review of the Board's January 29 disclosure order on the ground that the disputed ruling threatens serious and irreparable impact which could not be alleviated through a petition for review of the Board's final decision.¹⁶ The Staff states that this case warrants interlocutory review to avoid irreparable harm to the public and to the nation's common defense and security because compliance with the Board's order -- unnecessarily and unlawfully -- would provide BREDL access to documents that cover much of the Commission's post-September 11, 2001 work in the area of nuclear security. Further, says the Staff, the requested documents reveal sensitive information that is pertinent to all operating nuclear power plants. Duke agrees with the Staff and adds that release of the documents will

¹³See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-00-11, 51 NRC 297, 299 (2000).

¹⁴10 C.F.R. § 2.786(g). See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 214 n. 15 (2002); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994).

¹⁵See, e.g., *Advanced Medical Systems, Inc.* (One Factory Row, Geneva OH 44041), ALAB-929, 31 NRC 271, 279 (1990).

¹⁶See 10 C.F.R. § 2.786(g)(1). This provision applies to certified questions and rulings referred by the presiding officer. Even absent a referral or certification, the Commission will consider a petition for interlocutory review if one of the standards in 10 C.F.R. § 2.786(g) is met.

also have a pervasive effect on the proceeding by opening the door to contentions which will needlessly broaden the proceeding. BREDL opposes the Staff's petition for review.

As disclosure of the safeguards information at issue here would be effectively irreversible later, the Commission agrees that review is necessary now. Review at the end of the case would be meaningless because the Commission cannot later, on appeal from a final Board decision, rectify an erroneous disclosure order.¹⁷ A bell cannot be unrung. "Because the adverse impact of that release would occur now, the alleged harm is immediate."¹⁸ Accordingly, we will review the Board's decision now. The Staff's petition for review, and the parties' briefs in response to it, discuss the issues adequately. No additional briefs are necessary.

As for the Staff's petition for review of the Board's February 4 "meeting" order, we are convinced that the Board lacked authority to issue the order. That order has already had the effect of canceling the meeting to which it was originally addressed. A failure by the Commission to review the February order now could lead to a continuing impact on how the Staff conducts its non-adjudicatory duties related to review of the license amendment that is the subject of this proceeding. Hence, for the reasons we give near the end of this opinion, we exercise our general supervisory authority over adjudications to summarily reverse the February 4 order.

B. "Need to Know"

To obtain access to safeguards information, a person must have an "established need to know"¹⁹ and must provide assurance of trustworthiness. Here, BREDL's attorney and its expert have security clearances beyond the minimum requirement for access to safeguards

¹⁷ See *Vogtle*, CLI-94-5, 39 NRC at 193.

¹⁸ *Id.*

¹⁹ See 10 C.F.R. § 73.21(c).

information. Thus, the NRC staff was not reluctant to give them access to Duke's safeguards-protected security submittal outlining Duke's security proposals for its MOX amendment.

Hence, there is no question here of clearances or trustworthiness. The only issue is BREDL's "need to know" the additional safeguards information it seeks.

NRC regulations define "need to know," in the safeguards setting, as a finding that it is *necessary* for a recipient to have the safeguards information to perform official duties (here, to participate in an NRC hearing):

Need-to-know means a determination made by a person having responsibility for protecting Safeguards Information that a proposed recipient's access to Safeguards Information is necessary to the performance of official, contractual, or licensee duties of employment.²⁰

Plainly, under this "necessity" definition, "need to know" is a much narrower standard than general relevance. A party's mere desire to have information or its belief that the information is needed to provide context or background may have little or no bearing on a "need-to-know" determination, which must distinguish between "wants" and needs. Also, a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information.

In this case, we have examined Duke's security submittal and we find that BREDL does not require access to the additional information it seeks to formulate security contentions. In other words, the mandatory "necessary" element of "need to know" is missing here. This proceeding has a limited scope, focusing on the lawfulness and safety of Duke's proposed MOX amendment. Duke has already provided its security plan for implementing that amendment, including safeguards information. More general security information related to the

²⁰ 10 C.F.R. § 73.2. In 10 C.F.R. § 95.5, "need to know" is defined, for purposes of *classified* information, as allowing access when a person "requires" it to perform or assist in a government function. The Board order that we are reviewing indicates that the Board will later have to make a decision about some classified information that BREDL has requested.

Catawba plant-at-large -- the kind of information in the NRC orders that the Board has ordered disclosed to BREDL -- is not, in our judgment, “necessary” to allow BREDL to participate meaningfully in this license amendment proceeding.

The current proceeding has nothing to do with the NRC’s post-September 11 general security orders.²¹ It is not those orders, but Duke’s MOX-related security submittal, that details the particular security measures that will be taken as a consequence of the presence of the MOX fuel assemblies at issue here. Duke’s security submittal seeks exemptions from certain requirements of 10 C.F.R. §§ 73.45 and 73.46, and it provides explanations for those exemption proposals. Duke’s MOX-related security proposal and its exemption request may be appropriate subjects for BREDL’s security contentions. In requesting the amendment at issue in this proceeding, Duke has not asked for an exemption from any of the terms of the orders that are the subject of this dispute. We see no reason why BREDL cannot evaluate Duke’s proposed incremental changes to its security plan related to the presence of MOX fuel assemblies and decide whether to challenge Duke’s proposed security arrangements as inadequate to accommodate the use of MOX fuel at Catawba.

The Board’s need-to-know determination is flawed because it succumbs to BREDL’s general argument that it needs more information about the context, or baseline, against which it will measure Duke’s security submittal. But a desire to obtain safeguards materials for “context” is an insufficient basis for access to safeguards information. Rather, the touchstone for a demonstration of “need to know” is whether the information is indispensable. Here, as the pleadings before us represent, neither Duke nor the NRC staff has any intention of measuring Duke’s security arrangements for MOX against last year’s general security orders issued to

²¹ Cf. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation, LBP-03-05, 57 NRC 233 (2003) (license applications are measured against regulatory standards, not against enforcement orders).

reactors. Indeed, those orders do not impose immutable requirements, but are subject to change depending on updated assessments of the terrorist threat. All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke's Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That's not at issue in this MOX license amendment case. At stake here is the appropriate increment -- the appropriate heightening of security measures -- necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site. While these security enhancements are safeguards information, BREDL has been given access to that information and thus is in a position to measure Duke's security proposals against the requirements of Part 73. After doing so, BREDL (or its technical expert) should be able to identify credible vulnerabilities, if any, and present corresponding contentions to the Board.

As a policy matter, the Commission has a strong interest in limiting access to safeguards and security information. We must limit distribution of safeguards information to those having an actual and specific, rather than a perceived, need to know. Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone's best efforts to comply with safeguards requirements.²² The Commission is well aware of the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission. In this case, however, we find BREDL's lack of "need to know," within the meaning of our regulations, determinative. Thus, we grant the Staff's petition for review and reverse the Board's January 29 order directing disclosure of safeguards documents.

²²See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 356 (2002).

C. Board Authority over Staff Meetings

The Board's effort, in its February 4 order, to grant BREDL a ticket of admission to a closed meeting between the NRC staff and Duke was inappropriate. Our licensing boards have wide powers over adjudications, as for example, when they determine who can participate in hearings, where and when such hearings should take place, and which issues are litigable. But NRC staff reviews, which frequently proceed in parallel to adjudicatory proceedings, fall under the direction of Staff management and the Commission itself, not licensing boards. If, as the Board here apparently believed, the NRC staff unreasonably has closed a meeting, or has acted in violation of Commission open meeting policies, that is a matter to be addressed through normal agency channels, outside the adjudication. We long have held that licensing boards do not sit to correct NRC staff misdeeds or to supervise or direct NRC staff regulatory reviews.²³

The licensing boards' sole, but very important, job is to consider safety, environmental, or legal issues raised by license applications. Licensing boards simply have no jurisdiction over non-adjudicatory activities of the Staff that the Commission has clearly assigned to other offices unless the Commission itself grants that jurisdiction to Board. In this case the Commission has made no extraordinary grant of authority to the Board beyond the routine authority to oversee the adjudicatory aspects of Duke's amendment application. Accordingly, we summarily reverse the Board's February 4 order opening to outsiders a confidential meeting that the NRC staff decided to close in order to protect safeguards information.

D. General Guidance

²³ See e.g., *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121 (1995).

The Commission notes that the number and types of security issues that intervenors or hearing petitioners have raised continue to increase in the wake of the September 11, 2001 terrorist attacks. This is understandable, and we by no means wish to discourage citizens or groups from raising their security concerns before NRC licensing boards or before the Commission itself. But there is a potential for licensing boards to reach inconsistent conclusions regarding the need for dissemination of safeguards information. Accordingly, to promote both uniformity of decisions and fairness to litigants as well as to protect information, we take this opportunity to offer guidance to licensing boards (and presiding officers) in their “need to know” determinations.

First, as is evident from the text of our regulations,²⁴ it is appropriate for NRC Staff experts to make the initial “need to know” decisions. When a licensee or intervenor disputes those decisions, licensing boards, while exercising their own judgment, should give considerable deference to the Staff’s judgments. The Commission has confidence in our Staff, which is well trained and is experienced in NRC licensing and enforcement proceedings, and intimately familiar with both NRC safeguards regulations and the licensing or enforcement matter at hand.

Second, if a licensing board does overturn a Staff need-to-know finding, it is imperative that access to safeguards documents be as narrow as possible. Again, we rely on the text of our regulations, which says that the disclosure must be “necessary” or “required.”²⁵ This standard entails thorough examination of safeguards materials and, at times, release of only

²⁴ See 10 C.F.R. §§ 73.2, 73.21, 95.5.

²⁵ See 10 C.F.R. §§ 73.2, 73.21, 95.5.

portions of documents or redacted versions of documents; *i.e.*, a “sanitized” version of a document.²⁶

Finally, it is important in some cases (although not this one) that the Board assure itself of the reliability of the requestor of the safeguards information.²⁷ This ordinarily requires special procedures for attorneys and experts. Boards therefore should restrict access to qualified, “cleared” representatives of intervenors.²⁸ And boards should stress that such representatives may handle the confidential information only under the conditions and restrictions laid out in NRC regulations.

²⁶See, *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1405, *review denied*, CLI-77-23, 6 NRC 455 (1977). Facially, the Board's disclosure order in the instant case appears overbroad, even if it were otherwise justifiable, because it directs that BREDL's representatives be given access to entire documents.

²⁷BREDL has requested access to the security information only for its attorney and its technical advisor, both of whom hold “L”-level security clearances.

²⁸*Id.* at 1406.

III. CONCLUSION

For the foregoing reasons, the Commission: (1) *reverses* the Board's January 29 order granting BREDL's motion for "need to know" determination and the Board's February 4 order granting BREDL access to a closed meeting; (2) *directs* BREDL to file any security-related contentions no later than March 3, 2004; and (3) *provides* that responses to any such contentions shall be filed no later than 14 days after the contentions are filed.²⁹

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of February, 2004

²⁹The NRC Staff also requested a stay pending disposition of its petition for review. Because of time constraints, we granted an emergency housekeeping stay to enable our review of the Staff's motion and its petition for review. In view of our decision to grant the petition for review, and to reverse the Board, we need take no further action on the Staff's stay motion.