

RAS 9112

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 01/05/05

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

In the Matter of)

DUKE ENERGY CORP.)

(Catawba Nuclear Station, Units 1 & 2))
_____)

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

CLI-05-02

MEMORANDUM AND ORDER

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 December 21, 2004, the NRC Staff filed a "Motion for Interlocutory Review" of the Licensing Board's December 17th order amending the Protective Order issued a year ago in this adjudication.¹ The amendment permits Ms. Diane Curran, counsel for intervenor Blue Ridge Environmental Defense League (BREDL), to store at her office the exhibits for the pre-filed testimony addressing BREDL's Security Contention 5.² These exhibits contain safeguards information relevant to the Catawba plant as well as to

¹ See unpublished "Memorandum and Order (Ruling on BREDL Motion to Amend Protective Order" (Dec. 17, 2004) ("Board Order"). On December 20, 2004, the NRC Staff filed a Motion for Stay Pending Interlocutory Review of the Board's December 17, 2004 Order (NRC Staff's Motion for Stay"). The Staff also requested that the Commission issue a "housekeeping stay" of the Board Order, effective immediately, pending review of the Staff's Motion for Stay. NRC Staff's Motion for Stay at 5. On Dec. 21st the Commission denied the Staff's Dec. 20th request for a "housekeeping" stay.

² Security Contention 5 challenges the adequacy of Duke Energy Corporation's (Duke) application for exemptions from various NRC regulations governing facilities that possess formula quantities of strategic special nuclear material.

Duke's other nuclear power reactors. Duke supports the Staff's Motion and BREDL opposes it. We deny the Staff's Motion.

I. BACKGROUND³

The protective order, prior to its amendment, permitted Ms. Curran access to certain safeguards documents⁴ at either the Commission headquarters or the offices of Duke's counsel (Winston & Strawn). The Protective Order also permitted Ms. Curran to store in her own office certain other safeguards documents.⁵ The set of documents in Ms. Curran's office contained information derived from primary safeguards documents, while the set of documents at NRC headquarters and Winston & Strawn were themselves the primary documents.

Although Ms. Curran was able to work under this "cumbersome" process⁶ for a while, she concluded this autumn that the limited access was impeding her preparation for the upcoming hearing (January 10-14, 2005) on security issues, and would also impede her subsequent preparation of post-hearing pleadings (the last of which is due on February 4, 2005). She initially raised the issue informally with the NRC Staff and sought its agreement for

³ During litigation about BREDL's security contention, the Commission has dealt with several issues involving BREDL's access to and use of sensitive safeguards information. See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62 (2004) (providing guidance for "need to know" determinations); CLI-04-11, 59 NRC 203 (2004) (accepting certified questions regarding security contention); CLI-04-19, 60 NRC 5 (2004) (declining to revisit "need to know" guidance provided in CLI-04-06); CLI-04-21, 60 NRC 357 (2004) (expert witness qualifications for safeguards/security issues); CLI-04-29, 60 NRC 417 (2004) (setting standard for "need to know" in discovery); and CLI-04-37, 60 NRC __ (Dec. 8, 2004) (denying motion for reconsideration of CLI-04-29).

⁴ These documents include "the most recent version of the Physical Security Plan and Safeguards Contingency Plan for Catawba, McGuire and Oconee Nuclear Stations, procedures for armed response, and the locations of armed responders." NRC Staff's Motion for Interlocutory Review at 4.

⁵ These documents are pleadings and Board orders related to BREDL's security contention, and also the transcripts of closed pre-hearing conferences. NRC Staff's Motion for Stay, dated Dec. 20, 2004, at 2 & n.2.

⁶ BREDL's Motion to Amend Protective Order, dated Dec. 15, 2004, at 3.

her to store the additional documents in her office from December 17th through February 4th. The Staff, to inform its response, arranged for NRC's Office of Nuclear Security and Incident Response (NSIR) to conduct a security audit of Ms. Curran's office on December 13th. NSIR's representative found that the measures there to protect safeguards information were adequate.⁷ The Staff nonetheless refused to agree to BREDL's request. The Staff reasoned that storage of the "primary" safeguards documents at yet another site would unacceptably heighten the risk of their disclosure.

Ms. Curran's next step was to file with the Board a "Motion to Amend Protective Order." The requested amendment to the Protective Order would permit her to store in her office until February 4, 2005, the exhibits to pre-filed testimony that include primary safeguards documents. The Staff objected, arguing that the increased risk of disclosure outweighed Ms. Curran's need for ready access to those documents. Duke concurred, arguing that its own counsel's offices were only about four blocks from those of Ms. Curran, and that the existing limitation on the sites of these primary documents had apparently not had an adverse effect on the conduct of the proceeding.⁸

The Board was not convinced and, on December 17th, granted BREDL's Motion to Amend (subject to one condition summarized below). The Board generally concluded that BREDL's request was reasonable and would assist in the expeditious handling of the proceeding.⁹ The Board found that the temporal and locational restrictions were too onerous a burden to impose on Ms. Curran when she is preparing for a hearing or drafting post-hearing

⁷ Board Order, slip op. at 2.

⁸To effectuate the terms of the Protective Order, Duke's counsel recently agreed to make those documents available at its offices between 6:00 a.m. and 6:00 p.m., Monday through Friday, and on evenings and weekends "if feasible and if requested by BREDL." NRC Staff's Motion for Interlocutory Review at 3 n.3.

⁹ Board Order, slip op. at 3.

pleadings.¹⁰ The Board particularly noted that the Protective Order (as it then read) would require Ms. Curran to carry voluminous documents containing safeguards information back and forth between her own office and that of Winston & Strawn. This result would, according to the Board, not only compromise her ability to prepare for the hearing and draft the post-hearing documents, but it would also “increase[] the likelihood of losing control of sensitive material.”¹¹ The Board therefore granted BREDL’s Motion to Amend, subject to an independent inspection by the NRC’s Office of Administration (OA), Division of Facilities and Security, to confirm that Ms. Curran’s office can “ensure the effective safeguarding of the exhibits in question in her law office.”¹² On December 21st, the Chief of OA’s Security Branch and OA’s Senior Facility Security Specialist conducted this inspection, which resulted in another apparent finding of the adequacy of Ms. Curran’s security measures for protecting safeguards information.¹³

The NRC Staff now seeks expedited discretionary Commission review of the Board’s interlocutory order. The Staff argues that we should grant its Motion because the Board’s ruling threatens “serious, immediate and irreparable harm” -- one of the grounds for granting discretionary interlocutory review pursuant to 10 C.F.R. § 2.786(g).¹⁴ The claimed “serious ...

¹⁰ *Id.* at 4. The Board also acknowledged holding the parties to a tight hearing schedule to accommodate Duke’s plans for the proposed MOX lead test assemblies. *Id.* at 3.

¹¹ *Id.*

¹² *Id.* at 5. This inspection was to be conducted December 21st. *Id.*

¹³ The inspectors did request that Ms. Curran implement several additional security measures, which she agreed to do. The Staff questions the Board’s authority to require an OA inspection, but because the inspection has already taken place, we do not address the issue. As a general matter, though, our boards may not exercise supervisory authority over the Staff. *See, e.g., Metropolitan Edison Co.* (Three Mile Is. Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1263 (1984), *rev’d on other grounds*, CLI-85-2, 21 NRC 282 (1985).

¹⁴ By its terms, this standard applies to the Commission’s discretionary review of certified questions and referred rulings. We have, however, applied the standards of section 2.786(g) to discretionary interlocutory appeals as well. *See, e.g., Private Fuel Storage, LLC* (ISFSI),

(continued...)

harm” is the purportedly increased risk that the security of the primary documents could be compromised while in Ms. Curran’s office, thereby increasing the vulnerability of Duke’s nuclear power stations. The Staff also asserts that these “primary” safeguards documents are more sensitive than the “secondary” safeguards documents (*i.e.*, those containing information derived from the primary documents) already in Ms. Curran’s possession and that their release would therefore create a significantly greater security risk. Finally, the Staff argues that the harm would be both “immediate and irreparable” upon any release of the information.

II. DISCUSSION

While we appreciate and share in the Staff’s concern regarding the risk of an inadvertent release of safeguards information, we are not convinced that the Board-ordered change in the Protective Order unacceptably heightens the risk of a security breach in this instance. Most notably, the Board, in amending the protective order, has continued to ensure that the Commission’s regulations regarding the protection of safeguards information have been appropriately applied. As envisioned by 10 C.F.R. § 2.744(e), the parties agreed to operate under a protective order when disclosure of safeguards information is required and a need-to-know is established, as is the case with regard to access by Ms. Curran and BREDL’s expert witness to the documents at issue. As is also required by section 2.744(e), this protective order, in turn, compels the parties to protect the information in a manner consistent with the requirements outlined in 10 C.F.R. § 73.21. The Board-ordered amendment to this protective order does not remove any of these regulatory requirements, but simply allows Ms. Curran’s office to maintain additional safeguards documents - for a limited period - in the same protective fashion that the office maintains other safeguards documents. Thus, it is difficult for us to find

¹⁴(...continued)

CLI-01-1, 53 NRC 1, 5 (2001). The instant case arises under our “old” Part 2 procedural rules, not the revised version promulgated at Final Rule, “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004).

“serious, immediate and irreparable harm” where, as here, there is no evidence that the Board order has strayed from the Commission’s regulations regarding the protection of safeguards information.

Moreover, although there arguably is always some increased risk when an additional storage location is authorized for safeguards information, the Board reasonably considered a number of factors in addressing the views of the parties. First, there is ample evidence that Ms. Curran’s office is employing adequate measures to protect safeguards information. Both NSIR and OA have inspected Ms. Curran’s office, and the staff does not contend that the measures fail to meet our requirements for storing and handling safeguards information. Additionally, the Board-ordered amendment to the protective order conservatively allows Ms. Curran’s office to store the “primary” safeguards documents only for a brief period of time corresponding to the hearing and the associated post-hearing filings. Finally, there exists the Board’s sensible concern that the continued application of the pre-December 17th version of the Protective Order would pose its own risks of a loss of control over safeguards information from the continuation of Ms. Curran’s current practice of transporting the secondary safeguards documents between offices -- a practice compelled by her need to do much if not all of her hearing preparation and post-hearing pleading preparation at the offices of Winston & Strawn.

The fact is that, during the intense time period surrounding an adjudicatory hearing, all counsel may need equal access to critical documents. As our Appeal Board indicated many years ago, it may well be “desirable” to limit the sites at which parties may examine security-related documents.¹⁵ But our Boards may also take into account the practical concerns and delays that may stem from such limitations in individual cases. “In the last analysis, the

¹⁵ *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1406 (1977), *review denied*, CLI-77-23, 6 NRC 455 (1977).

Licensing Board is in the best position to determine the most appropriate circumstances in which [safeguards information] may be viewed.”¹⁶

For the reasons set forth above, the NRC Staff’s Motion for Interlocutory Review is *denied*.¹⁷

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of January, 2005.

¹⁶ *Diablo Canyon*, ALAB-410, 5 NRC at 1406.

¹⁷ Because the Commission denied the Motion for Interlocutory Review, the Motion for Stay is moot.