

October 8, 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

October 15, 2003 (11:35AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

DUKE ENERGY CORPORATION

(Catawba Nuclear Station,
Units 1 and 2)

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

MOTION FOR PROTECTIVE ORDER

Duke Energy Corporation ("Duke") and the Nuclear Regulatory Commission ("NRC") Staff herein move that the Atomic Safety and Licensing Board ("Licensing Board") grant, for good cause shown, a Protective Order to govern and limit the disclosure and handling of certain security information that Duke previously submitted to the NRC in connection with its February 27, 2003 mixed oxide ("MOX") fuel lead assembly license amendment application. The information in question is Duke's September 15, 2003 security-related submittal to the NRC. This submittal, in the form of a transmittal letter and 7 attachments thereto, includes revision 16 to the Duke Energy Corporation Nuclear Security and Contingency Plan ("security plan revision") and a related request for exemption from certain NRC requirements in 10 C.F.R. Parts 11 and 73. The security plan revision and exemption are needed to support the proposed use of MOX fuel at the Catawba Nuclear Station.

Legal counsel for petitioner Blue Ridge Environmental Defense League ("BREDL") contacted Duke's counsel to request access to the September 15, 2003 security submittal described above. Counsel for BREDL indicated that she intends to provide this Duke document to Mr. Edwin Lyman, a consultant to BREDL, for purposes of preparing proposed

contentions in this proceeding. Other than the transmittal letter, the entire security submittal is, at a minimum, proprietary to Duke and constitutes confidential information related to physical protection that Duke has sought to withhold from public disclosure under 10 C.F.R. § 2.790(d)(1). In addition, subsequent to Duke's submittal and to the request by BREDL for access to the submittal, the NRC Staff has determined that the security plan revision and other portions of the submittal contain protected Safeguards Information under 10 C.F.R. Part 73.

To expedite this proceeding, and to allow the petitioners to meet the established deadlines for filing proposed contentions, Duke and the NRC Staff do not oppose the disclosure of this designated information to BREDL, or any other petitioner in this proceeding who so requests it, provided that disclosure is governed and limited by an appropriate Protective Order and Nondisclosure Affidavit. Consequently, Duke and the NRC Staff jointly request an appropriate Protective Order. Attached hereto is a copy of the proposed Protective Order, which includes a form of Nondisclosure Affidavit to be executed by any person seeking access to the protected information.

The proposed Protective Order and Nondisclosure Affidavit follow NRC precedent in other recent licensing proceedings involving security plans and Safeguards Information. *See, e.g., Private Fuel Storage* (Independent Spent Fuel Storage Installation), Memorandum and Order (Protective Order and Schedule for Filing Security Plan Contentions), December 17, 1997; Memorandum and Order (Modified Protective Order for Security Plan Contentions and Aircraft Crash Consequences Safeguards Protected Information), June 26, 2003. Additionally, the NRC Staff has determined that the proposed Protective Order and Nondisclosure Affidavit are sufficient to meet the requirements of Part 73 with respect to Safeguards Information. Further, Duke considers the proposed controls sufficient to govern and

limit access to the confidential proprietary information related to physical security that is included in the submittal but that is not Safeguards Information. Counsel for BREDL has reviewed the proposed Protective Order and Nondisclosure Affidavit and has indicated agreement with this motion.

To expedite BREDL's access to the document and to support the schedule established by this Licensing Board for submittal of proposed contentions — presently due October 21, 2003 — Duke and the NRC Staff ask that the Board consider this request and grant this motion as promptly as possible, with a target date of no later than October 10, 2003.

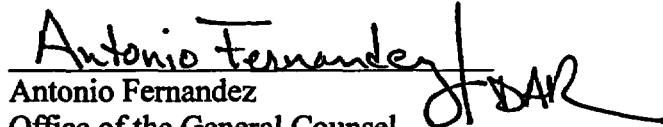
Respectfully submitted,



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Antonio Fernandez
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ATTORNEY FOR U.S. NUCLEAR
REGULATORY COMMISSION STAFF

Dated in Washington, District of Columbia
This 8th day of October 2003

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

As used in this Protective Order and in the Nondisclosure Affidavit included as the Appendix to this order, "Protected Information" includes: (1) Attachments 1 through 3 and 5 through 7 to the September 15, 2003 submittal of Duke Energy Corporation 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"); and (2) any information obtained 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, including Attachment 4 to the Security Plan Submittal.

Security Plan Submittal was filed with the NRC as proprietary and confidential 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 has 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 73.²

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:³

A. Only the Security Plan Submittal, 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 may be afforded access to Protected Information under this memorandum and order for the purpose of preparing and/or responding to contentions and further litigation in this proceeding:

² 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).

³ 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 memorandum and 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 memorandum and order and who have executed a Nondisclosure Affidavit may have access to Protected Information on a "need to know" basis pursuant to this memorandum and order. Upon execution of a Nondisclosure Affidavit in the form attached hereto, and transmission to the Board of the executed affidavit,⁴ such persons shall have access to Protected Information. Additionally, any party to this proceeding seeking to add to or substitute for the individuals listed in this memorandum and order shall file a motion to modify this memorandum and order accordingly.

2. A consultant 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 counsel for the party or petitioner who has responsibility for protecting the Protected Information that the

⁴ A copy of the executed affidavit shall also be provided to counsel for Duke and counsel for the NRC.

proposed recipient's access to the Protected Information is necessary in the performance of official, contractual, or employment duties with respect to the litigation in this proceeding.

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.

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 the Licensing Board or the Commission (or to a Commission employee designated by the Board or the Commission), or to 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 memorandum and 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,⁵ the Assistant for Rulemakings and Adjudications in the Commission's Office of the Secretary,⁶ 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 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

⁵ The following attorneys shall be considered "lead counsel" for service purposes: David A. Repka (Duke), Lisa Vaughn (Duke), Diane Curran (BREDL), and Antonio Fernandez (NRC Staff).

⁶ 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.

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, or 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 Board promptly of those suspicions and the reasons for them.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Ann Marshall Young, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October __, 2003

APPENDIX A
NONDISCLOSURE AFFIDAVIT

I, _____, being duly sworn, state:

1. As used in this nondisclosure affidavit,

(a) "Protected Information" is (1) Attachments 1 through 3 and 5 through 7 of the September 15, 2003 submittal of Duke Energy Corporation 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"); and (2) any information obtained 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, including Attachment 4 to 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 who has executed a copy of this affidavit, which has been transmitted to the Atomic Safety and Licensing Board (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 Atomic Safety and Licensing Board in this proceeding on October __, 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 October __, 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 safeguards information shall be limited to Authorized Persons.

(c) Any secretarial or administrative work performed at my request or under my supervision will be performed only by personnel who have executed a Nondisclosure Affidavit pursuant to the Licensing Board's October __, 2003 Protective Order.

(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. If I prepare Documents containing Protected Information to participate in further proceedings in this case, I will assure that any secretary or other individual who must receive Protected Information to help me prepare those Documents has read and executed an affidavit like this one and has agreed to abide by its terms. Copies of any such affidavit will be filed with the Licensing Board, counsel for the NRC Staff, and counsel for Duke promptly upon execution.

7. 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.

8. 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 the Licensing Board or the Commission, to a Commission employee designated by the Board or the Commission, or to a person authorized to receive Protected Information on behalf of the Applicant.

9. 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.

10. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's October __, 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 _____

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD


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

**Adjudicatory File
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
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