

## ATOMIC SAFETY AND LICENSING BOARD PANEL

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

November 23, 2004

MEMORANDUM and ORDER  
(Granting in Part Motion for Interim Discovery Measures)

By letter dated October 25, 2004, counsel for the NRC Staff notified the Licensing Board and parties to this proceeding<sup>1</sup> that public access to the NRC's Agencywide Document Access and Management System (ADAMS), including documents related to this proceeding, had been

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<sup>1</sup>This proceeding involves Duke's February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station, as part of the U.S.-Russian Federation nuclear nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting it into MOX fuel to be used in nuclear reactors. Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003). In memoranda and orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information (SGI); redacted version issued May 28, 2004), the Licensing Board granted BREDL's request for hearing and admitted various non-security-related and security-related contentions. LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004); *see also* LBP-04-7, 59 NRC 259 (2004) (dismissing one contention admitted in LBP-04-4, on grounds of mootness); LBP-04-12, 59 NRC 388 (2004) (permitting Intervenor to utilize certain additional information in litigation of contention admitted in LBP-04-10). An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding. Tr. 2072-2708.

The matters addressed herein relate to the one admitted security contention of BREDL, Security Contention 5, which concerns a number of exemptions Duke seeks, as part of its application, from certain regulatory requirements found in 10 C.F.R. Part 73 for the physical protection of formula quantities of special nuclear material. The contention in question, in the form we admitted it in LBP-04-10, states:

Duke has failed to show, under 10 C.F.R. §§ 11.9 and 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1); (h)(3) and (b)(3)–(12); and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.

LBP-04-10, 59 NRC at 352.

blocked. The Board on November 10 approved an agreed consent order addressing certain measures being taken to compensate for the unavailability of ADAMS.<sup>2</sup> The parties were not able to agree on certain other measures proposed by Blue Ridge Environmental Defense League (BREDL), however, and BREDL has moved that we approve two such other measures. We herein approve, to an extent, one of these and deny the other, providing, however, for alternative methods in which to address the concerns associated with the latter.

The first measure BREDL requests is the following:

The NRC Staff shall send BREDL's counsel copies of all generic correspondence, reports, and notices that relate to security at Category I facilities. If any piece of correspondence, report, or notice contains Safeguards Information, Classified Information, or Official Use Only information, the Staff shall send BREDL the cover page or some other document that is sufficient to alert BREDL to the existence and the general content of the piece of correspondence, report, or notice.<sup>3</sup>

BREDL's second request is that we order "that the hearing on Contention 5 will not commence until ADAMS has been fully restored for at least two weeks."<sup>4</sup> In support of this request BREDL submits that "during the period between October 25 (when ADAMS was shut down) and the start of the hearing it is likely that the NRC Staff or licensees other than Duke may generate relevant security-related documents that will not be identified under the Consent Order." BREDL should therefore, it argues, be given a "reasonable opportunity to review ADAMS for such relevant documents and request access to them before the hearing" — such "reasonable opportunity" being a period of at least two weeks after full restoration of ADAMS, after which the hearing on Security Contention 5 might begin.<sup>5</sup>

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<sup>2</sup>Order (Approving Proposed Agreed Consent Order) (Nov. 10, 2004).

<sup>3</sup>[BREDL]'s Motion for Imposition of Interim Discovery Measures to Compensate for Unavailability of ADAMS (Nov. 5, 2004) at 3.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

BREDL considers the two measures it requests as “necessary for adequate access to NRC documents.” BREDL points out that due to the inaccessibility of ADAMS, “for an undetermined period of time, it will not be possible for BREDL to use ADAMS to identify or retrieve correspondence, reports, or other documents from the system.”<sup>7</sup> BREDL argues that this lack of access “threatens to seriously hamper BREDL’s ability to participate in this proceeding in a meaningful way.”<sup>8</sup> In particular, BREDL argues, its document discovery requests to the other parties “may not encompass all documents that are relevant to BREDL’s security contention,” giving as an example “NRC correspondence with licensees other than Duke regarding security issues similar to the issues at Catawba,” which it asserts “may prove to be relevant to this case,” but which it “now has no way of identifying.” In addition, BREDL states that it has also used ADAMS to identify important documents that should have been provided in discovery but were not, such as Revision 2 to Duke’s Security Plan.<sup>10</sup>

Although the consent order referenced above addresses some of the problems argued by BREDL, the Staff has not agreed on BREDL’s first request at issue herein, for “copies of any NRC Staff correspondence, reports or notices relating to Category I facilities.” According to BREDL, the Staff has agreed to provide documents of which the Staff members assigned to the Catawba case happen to be aware, but “would not commit to taking steps to assure that relevant documents are identified.”<sup>11</sup> BREDL argues that “[t]his is not a sufficient assurance that relevant documents will be identified.”<sup>12</sup> “Because Catawba will become a Category I facility if and when it possesses plutonium MOX fuel,” BREDL asserts, “such documents clearly are relevant and should be

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<sup>6</sup>[BREDL] Motion for Imposition of Interim Discovery Measures to Compensate for Unavailability of ADAMS (Nov. 5, 2004), at 1.

<sup>7</sup>*Id.* at 1-2.

<sup>8</sup>*Id.* at 2.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 2-3.

identified to BREDL.”<sup>13</sup> Whether or not BREDL is later determined to have a “need to know” with respect to the documents is a separate question, BREDL contends, that should not be confused with the relevance standard under which it is “entitled to know of their existence so that it can request access to them.”<sup>14</sup>

The Staff opposes both of BREDL’s requests on the grounds that they are unnecessary.<sup>15</sup> Specifically with regard to the first, the Staff argues (1) that BREDL has had “ample opportunity to search ADAMS for documents that are deemed to be relevant”; (2) that “all new correspondence between the NRC and Duke relating to the MOX license amendment request and to security at Catawba will be sent to BREDL’s counsel”; (3) that Duke and the Staff are already under a duty to supplement their discovery responses; (4) that BREDL’s asserted reasons for its request are “not valid” since the Staff and Duke will already be providing “full answers to BREDL’s discovery requests” and therefore what BREDL seeks is “relief based on BREDL’s deficiencies in the drafting of discovery requests”; (5) that BREDL’s request in not being limited to discoverable information is a mere “exercise in curiosity” with regard to “sensitive security” documents with regard to which such an exercise is not appropriate; and (6), citing Commission statements in CLI-04-29,<sup>16</sup> that “much of the information relating to security at Category I facilities is beyond the scope of this proceeding and is, therefore, irrelevant and not subject to discovery.”<sup>17</sup>

“For the same reasons,” the Staff contends, BREDL’s second request should be denied.<sup>18</sup> According to the Staff, “the suspension of public access to ADAMS does not rise to the level of the ‘extreme and compelling

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<sup>13</sup>*Id.* at 3.

<sup>14</sup>*Id.* at 3 n.1.

<sup>15</sup>NRC Staff Response to BREDL Motion for Imposition of Interim Discovery Measures to Compensate for Unavailability of ADAMS (Nov. 22, 2004).

<sup>16</sup>CLI-04-29, 60 NRC \_\_ (Oct. 7, 2004).

<sup>17</sup>*Id.* at 3-5.

<sup>18</sup>*Id.* at 5-6.

circumstances' that would require a postponement of the hearing." The Staff cites as well the potential for late filed contentions and motions to reopen as alternatives to the relief BREDL seeks.

Duke in response to BREDL's first request makes arguments similar to those of the Staff, submitting that BREDL's first request is not necessary, because "[a]ny generic security documents that the NRC issues that are applicable to Part 50 reactors will be sent to Duke and therefore also will be sent to BREDL."<sup>19</sup> Moreover, Duke notes, both it and the Staff remain under a continuing obligation to supplement their discovery responses and notify the Licensing Board and parties "of significant new information that is relevant and material," which ensures that BREDL is "adequately protected."<sup>20</sup> Duke states that documents that relate generically to security at Category I facilities "would ordinarily not be relevant to Catawba — a Part 50 reactor facility." If they were relevant, Duke repeats, "they would be sent to Duke and therefore would be made available to BREDL under Consent Order."<sup>21</sup> In this regard, Duke notes that the Commission has "highlighted in this case the differences between Catawba and Category I fuel cycle facilities and has determined that certain Category I guidance is beyond the scope of this licensing proceeding."<sup>22</sup> For whatever might be relevant, Duke insists, "BREDL has already had ample opportunity over the 30 months since February 2003 to obtain such documents."<sup>23</sup> Thus, Duke contends. BREDL's first demand should be denied.

In response to BREDL's second request, Duke states that the "Commission has given no indication that it views the precautionary suspension of access to ADAMS as mandating suspension or delay in ongoing licensing proceedings." In addition, providing for any further access to ADAMS so as to "suspend or delay any aspect of this licensing proceeding" is not warranted, according to Duke, "given the extensive discovery to date, as well

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<sup>19</sup>[Duke]'s Response to BREDL Motion for Imposition of Interim Discovery Measures and Delay in the Hearing Schedule (Nov. 15, 2004), at 2.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 3.

<sup>22</sup>*Id.* (citing CLI-04-29, 60 NRC at \_\_\_ (slip op. at 8-10); CLI-04-19, 60 NRC 5, 11 (2004)).

<sup>23</sup>*Id.* at 3.

BREDL's prior access to ADAMS."<sup>24</sup> Characterizing BREDL's request as "presum[ing], without any basis, that will be denied relevant material," a claim which it terms "pure supposition," Duke suggests that BREDL is "adequately protected by the NRC's regulations related to new information, should such information ever arise." Duke cites 10 C.F.R. § 2.714(a)(1) in this regard. It would be "illogical to delay the scheduled hearing against unfounded speculation that more relevant documents *might* be located in the indefinite future when ADAMS is restored."<sup>26</sup>

Finally, Duke argues that the "procedural posture of this case, and the time-sensitive nature of the MOX fuel license amendment application, also weigh heavily against the requested postponement."<sup>27</sup> Noting our previous ruling that "absent extreme and compelling circumstances, such as critical injury or death or similar circumstance, the January hearing and related dates would not be extended," Duke submits that "BREDL's request for delay does not satisfy the standard set by the Licensing Board."<sup>28</sup>

#### Ruling on First BREDL Request

Notwithstanding the arguments of the Staff and Duke, we find BREDL's arguments in support of its first request to have some merit. We note that neither the Staff nor Duke argues that *no* generic Category I-related documents would be relevant in this proceeding. This is not surprising, since the exemptions at issue that Duke seeks are from requirements *applicable to Category I facilities*. Whether a particular document might or might not be relevant to Catawba when MOX fuel is present as special nuclear material (SNM) is not, it seems to us, such a simple matter as the Staff and Duke argue. Nor would it be appropriate for us to delegate our duty to rule on issues of relevance, to the Staff, as Duke would in effect have us do in arguing that anything relevant

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<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 4.

<sup>26</sup>*Id.* (emphasis in original).

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

would be “sent to Duke and therefore made available to BREDL under the Consent Order.” This in no way discounts the Staff’s role or expertise in the matter, but rather distinguishes our role and responsibility to be independent, impartial and neutral decision-makers in this proceeding, and to resolve disputes that may arise among the parties on issues such as relevance — whether in a discovery, hearing or other context — taking in consideration the positions of *all* parties.

In this light we consider BREDL’s first request. BREDL is satisfied that the Staff will provide documents falling within the scope of BREDL’s request of which it is aware. It wishes, however, the Staff to go further and to take some “steps to assure that relevant documents are identified.”

There is no question that *some* “generic correspondence, reports, and notices that relate to security at Category I facilities” *may be* relevant in this proceeding — this possibility cannot be completely excluded, as we note above. There is also no question that the shutting down of ADAMS is a major event, prompting not only a significant number of NRC efforts to minimize the harm caused by such closing down of information that was previously in the public record,<sup>29</sup> but also reports and articles in national news media. Entities such as BREDL both as litigants and as members of the public, must and do rely on ADAMS for access to information in the public record. And the NRC has recognized this in its efforts to ensure that the consequences of the ADAMS shutdown are mitigated as much as possible.

In this context, we note that the Staff does still have access to the internal NRC version of ADAMS. With such access, and utilizing ADAMS’ search capability, the Staff should be able, with a reasonable expenditure of effort and time, undertaken in good faith, to identify documents of the sort BREDL seeks without being unduly burdened. We do not find placing such a responsibility on the Staff to be inequitable or unreasonable in view of the highly unusual circumstances occasioned by the ADAMS shutdown.

We therefore direct the Staff to make a reasonable and expeditious effort to make itself aware of any

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<sup>29</sup>See, e.g., Letter to Administrative Judges from Antonio Fernández (Oct. 25, 2004); NRC News, No. 04-140, *NRC RESTORES VARIOUS DOCUMENTS REMOVED FROM WEB SITE FOR SECURITY REVIEW* (Nov. 4, 2004); Letter to Administrative Judges from Susan L. Uttal (Nov. 17, 2004).

documents falling within the description quoted above, at least weekly until public access to ADAMS is restored and either to provide any such documents to BREDL, or in the alternative to provide BREDL with non-sensitive cover pages or other identifying documents sufficient to alert BREDL to the existence and general content of all correspondence, report, or notice falling within the above-quoted description, but of a sensitive nature and with regard to which the Staff finds no need to know on BREDL's part. In addition, in the spirit of moving this proceeding forward in the most efficient and meaningful manner possible, if Duke or BREDL become aware of the existence of any other such documents, they shall notify the other parties, providing similar appropriate identifying information or the documents themselves if appropriate.

#### Ruling on Second BREDL Request

We do not find delaying the hearing in this proceeding to be an appropriate course of action, in light of several factors, including (1) the time-sensitive nature of the subject matter of this hearing and an ultimate ruling on it, which we have previously discussed with the parties; (2) the measures already taken by the Staff to address the unavailability of ADAMS; (3) our ruling above on BREDL's first request; and (4) the availability of alternative methods for addressing BREDL's concern.

Alternative methods for addressing BREDL's concern include, as suggested by the Staff and Duke, filing a motion to reopen under 10 C.F.R. § 2.734;<sup>30</sup> late-filing a contention or contentions under 10 C.F.R. § 2.714(a)(1);<sup>31</sup> and also filing a motion to reconsider the initial decision,<sup>32</sup> the basis for any of such actions being

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<sup>30</sup>See, e.g., *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B and 2B), ALAB-463, 7 NRC 341, 352 (1978); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1-4), LBP-78-2, 7 NRC 83, 85 (1978); see also, e.g., *Houston Lighting & Power Co.* (South Texas Project, Units 1 & 2, ALAB-381, 5 NRC 582 (1977); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-00-25, 52 NRC 355, 357 (2000).

<sup>31</sup>See, e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996), LBP-96-15, 44 NRC 8, 26 (1996); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045, 1048 (1983); *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), OBP-01-4, 53 NRC 121, 127 (2001).

<sup>32</sup>See, e.g., *Consolidated Edison Co. Of N.Y.* (Indian Point Station, Unit 3), ALAB-281, 2 NRC 6 (1975); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, (continued...)



any newly-discovered information obtained from ADAMS when it is restored. One or the other of these course of action, or, in addition, holding the record open to allow for late-filed evidence during a reasonable period of time after the hearing and prior to the deadlines for filing of proposed findings, might be appropriate, depending upon when full restoration of ADAMS occurs. The following framework shall be followed in this regard:

(A) If ADAMS is restored by December 27, two weeks before the first day of hearing on Security Contention 5, the matters relating to BREDL's second request shall be rendered moot.

(B) If restoration occurs after December 27 but prior to December 31, then any evidence obtained as a result of such restoration may be proffered during the January 10-14 hearing and will be admitted if relevant, so long as notice of intent to do so, along with copies of the proposed evidence, is provided to the Staff and Duke Energy as soon as possible after actual discovery of the information. Any request(s) for documents and need-to-know determinations in such circumstance shall be made on a timely basis, as shall responses to any such requests.

(C) If restoration occurs after December 31 but prior to January 14, BREDL may proffer the evidence during the hearing if it is actually discovered at a time that would reasonably allow for this. BREDL may alternatively submit any such material as late-filed evidence before or on January 28, 2005, the deadline for proposed findings of fact and conclusions of law. Any submitted material must be shared with the other parties as soon as is reasonably possible after it is actually discovered. Other parties may submit and address any such evidence, and any other evidence in response to it, during the scheduled hearing and/or with and in its response to the findings.

(D) If restoration occurs between January 14 and 28, BREDL may file any proposed late-filed evidence before or on January 28, so long as the material is shared with the other parties as soon as is reasonably possible after it is actually discovered. In this case, any argument on the evidence shall be filed with BREDL's proposed

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<sup>32</sup>(...continued)

139 (1994); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation, LBP-98-17, 48 NRC 69 (1998), LBP-01-38, 54 NRC 490, 493 (2001); *Ralph L. Tetrack* (Denial of Application for Reactor Operator License), LBP-97-6, 45 NRC 130, 131 (1997); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit No. 2), ALAB-579, 11 NRC 223, 225-26 (1980).

findings; any responses to the evidence, whether in the form of additional evidence or argument, shall be filed with any other party's response findings; and reply findings may be allowed to the extent shown to be appropriate.

(E) If restoration occurs within a reasonably short period of time after January 24 but BREDL is unable to reasonably submit late-filed evidence by the time it files its proposed findings on January 28, it may alternatively identify any proposed late-filed evidence within one (1) working day after it is discovered, and file a subsequent argument on its relevance within one (actual) week of its discovery. In this case, any responses to the evidence shall be filed within one (actual) week of submission of BREDL's argument on the relevance of such evidence.

(F) If restoration occurs so late that any submission of late-filed evidence and argument could not be considered by the Board in its initial decision due to a lack of time prior to issuance of the decision, BREDL may submit, as appropriate under the circumstances, a motion to reopen or to reconsider, or a late-filed contention. Assuming any such filing is made to the Board while this proceeding is still within its jurisdiction, the Board will be inclined to consider relevant timeliness/good cause requirements to have been met if the filing is submitted within two weeks of discovery of such evidence.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Ann Marshall Young, Chair  
ADMINISTRATIVE JUDGE

*/RA/*

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Anthony J. Baratta  
ADMINISTRATIVE JUDGE

*/RA/*

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Thomas S. Elleman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 23, 2004<sup>33</sup>

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<sup>33</sup>Copies of this document were sent this date by internet e-mail to counsel for all parties.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (GRANTING IN PART MOTION FOR INTERIM DISCOVERY MEASURES) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Ann Marshall Young, Chair  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Anthony J. Baratta  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Administrative Judge  
Thomas S. Elleman  
Atomic Safety and Licensing Board Panel  
5207 Creedmoor Rd., #101  
Raleigh, NC 27612

Susan L. Uttal, Esq.  
Antonio Fernández, Esq.  
Office of the General Counsel  
Mail Stop - O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Henry B. Barron, Executive Vice President  
Nuclear Operations  
Duke Energy Corporation  
526 South Church Street  
P.O. Box 1006  
Charlotte, NC 28201-1006

Mary Olson  
Director of the Southeast Office  
Nuclear Information and Resource Service  
729 Haywood Road, 1-A  
P.O. Box 7586  
Asheville, NC 28802

Diane Curran, Esq.  
Harmon, Curran, Spielberg  
& Eisenberg, L.L.P.  
1726 M Street, NW, Suite 600  
Washington, DC 20036

Docket Nos. 50-413-OLA and 50-414-OLA  
LB MEMORANDUM AND ORDER (GRANTING IN PART  
MOTION FOR INTERIM DISCOVERY MEASURES)

David A. Repka, Esq.  
Anne W. Cottingham, Esq.  
Mark J. Wetterhahn, Esq.  
Winston & Strawn LLP  
1400 L Street, NW  
Washington, DC 20005

Paul Gunter  
Nuclear Information and Resource Service  
1424 16<sup>th</sup> St., NW, Suite 404  
Washington, DC 20036

Lisa F. Vaughn, Esq.  
Duke Energy Corporation  
Mail Code - PB05E  
422 South Church Street  
P.O. Box 1244  
Charlotte, NC 28201-1244

Timika Shafeek-Horton, Esq.  
Duke Energy Corporation  
Mail Code - PB05E  
422 South Church Street  
Charlotte, NC 28242

[Original signed by Evangeline S. Ngbea]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 23<sup>rd</sup> day of November 2004