

November 15, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

November 29, 2004 (1:35pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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

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

DUKE ENERGY CORPORATION'S RESPONSE TO BREDL MOTION FOR IMPOSITION  
OF INTERIM DISCOVERY MEASURES AND DELAY IN THE HEARING SCHEDULE

I. INTRODUCTION

On October 25, 2004, counsel for the Nuclear Regulatory Commission ("NRC") Staff notified the Atomic Safety and Licensing Board ("Licensing Board") and parties that the Commission has temporarily blocked public access to the Agencywide Document Access and Management System ("ADAMS"), to enable the Staff to review and remove "sensitive unclassified information." In response, the parties to this proceeding negotiated a "Consent Order Regarding Document Discovery," which establishes interim measures to accommodate Intervenor Blue Ridge Environmental Defense League ("BREDL") while ADAMS is unavailable.<sup>1</sup> However, BREDL has also filed a Motion<sup>2</sup> seeking further measures "to compensate" for the unavailability of ADAMS. BREDL seeks: (1) an order requiring the NRC

<sup>1</sup> This Consent Order was issued by the Licensing Board on November 10, 2004.  
<sup>2</sup> "Blue Ridge Environmental Defense League's Motion for Imposition of Interim Discovery Measures to Compensate for Unavailability of ADAMS," November 5, 2004 ("Motion").

Staff to send to BREDL “all generic correspondence, reports and notices that relate to security at Category I facilities;” and (2) to postpone the scheduled hearing on Security Contention 5 for at least two weeks after access to ADAMS is restored. Because the relief BREDL seeks is not warranted, Duke Energy Corporation (“Duke”) herein responds in opposition to Intervenor’s Motion.

## II. DISCUSSION

### A. The Requested Requirement Related to Generic Security Information for Category I Facilities is Not Necessary

BREDL’s Motion asserts that its current lack of access to ADAMS “threatens to seriously hamper BREDL’s ability to participate in this proceeding in a meaningful way.” (Motion, at 2). This claim is misleading and unfounded, and does not justify the BREDL demands. The Consent Order will ensure that BREDL has access to new NRC and Duke correspondence relating to the mixed oxide (“MOX”) fuel license amendment request and to Catawba Nuclear Station security issues. Any 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. Moreover, notwithstanding the Consent Order, Duke and the NRC Staff remain under a continuing obligation to supplement their discovery responses and to notify the Licensing Board and parties of significant new information that is relevant and material. Therefore, BREDL is adequately protected, notwithstanding the interim unavailability of ADAMS.

BREDL seeks to justify its first demand on grounds that its existing discovery requests “may not encompass all documents that are relevant to BREDL’s security contention.” (Motion, at 2). By way of example, BREDL suggests that “NRC correspondence with licensees other than Duke regarding security issues similar to the issues at Catawba *may* prove to be relevant to this case,” and that it “now has no way of identifying those documents.” (*Id.*, at 2)

(emphasis added). However, BREDL's specific request is for generic documents that relate to security at Category I facilities. For reasons previously discussed in this proceeding, these documents would ordinarily not be relevant to Catawba — a Part 50 reactor facility. If they were relevant, they would be sent to Duke and therefore would be made available to BREDL under the Consent Order. Moreover, if pre-existing NRC generic correspondence regarding "similar" security issues were in fact relevant to the litigation of Security Contention 5, then BREDL has already had ample opportunity over the 30 months since February 2003 to obtain such documents. Finally, the Commission has also specifically 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>3</sup> In total, BREDL's first demand should be denied.

B. No Delay in the Hearing Schedule for BREDL Security Contention 5 Is Warranted

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. Moreover, given the extensive discovery to date, as well as BREDL's prior access to ADAMS, no valid reason exists for the Licensing Board to suspend or delay any aspect of this licensing proceeding — including arbitrarily extending the commencement of the hearing on Security Contention 5 (as BREDL seeks to do) until weeks after ADAMS access is restored.<sup>4</sup>

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<sup>3</sup> See *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-29, 60 NRC \_\_\_\_ (Oct. 7, 2004 slip op. at 8-10); see also *Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2)*, CLI-04-19, 60 NRC 5, 11 (2004) ("NFS and BWXT are not the subject of this proceeding. . . . Moreover, the security needs at Catawba, on the one hand, and at NFS and BWXT, on the other, are visibly different.").

<sup>4</sup> BREDL Security Contention 5 was proposed, argued, and reformulated and admitted by the Licensing Board while ADAMS was available. BREDL has conducted extensive discovery on this contention since June 2004, during which time ADAMS was available continuously until October 25, 2004.

BREDL's Motion simply presumes, without any basis, that it will be denied relevant material.<sup>5</sup> Such a claim is pure supposition, particularly given the Consent Order in place. In any event, however, BREDL is adequately protected by the NRC's regulations related to new information, should such information ever arise. *See, e.g.*, 10 C.F.R. 2.714(a)(1). It would be illogical to delay the scheduled hearing against the unfounded speculation that more relevant documents *might* be located in the indefinite future when ADAMS is restored.

The procedural posture of this case, and the time-sensitive nature of the MOX fuel license amendment application,<sup>6</sup> also weigh heavily against the requested postponement. After allowing an ample opportunity for discovery, the Licensing Board has scheduled a hearing on BREDL Security Contention 5 during the week of January 10, 2004. The Licensing Board has established 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."<sup>7</sup> BREDL's request for delay does not satisfy the standard set by the Licensing Board.

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<sup>5</sup> See Motion, at 3: "[D]uring 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."

<sup>6</sup> See the October 28, 2004 and November 2, 2004 letters in this proceeding from David Repka, counsel for Duke, to NRC Administrative Judges Ann M. Young, Anthony J. Baratta, and Thomas E. Elleman.

<sup>7</sup> "Memorandum and Order (Confirming Matters Addressed and Ruled On at October 25, 2004, Closed Session)," Nov. 5, 2004, slip op. at 6.

III. CONCLUSION

For the reasons discussed above, BREDL's Motion should be denied.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right.

David A. Repka  
Mark J. Wetterhahn  
Anne W. Cottingham  
WINSTON & STRAWN LLP  
1400 L Street, NW  
Washington, D.C. 20005-3502  
(202) 371-5726

Timika Shafeek-Horton  
DUKE ENERGY CORPORATION  
422 South Church Street  
Mail Code: PB05E  
Charlotte, N.C. 28201-1244

ATTORNEYS FOR DUKE ENERGY  
CORPORATION

Dated in Washington, District of Columbia  
This 15<sup>th</sup> day of November, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "DUKE ENERGY CORPORATION'S RESPONSE TO BREDL MOTION FOR IMPOSITION OF INTERIM DISCOVERY MEASURES AND DELAY IN THE HEARING SCHEDULE" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 15<sup>th</sup> day of November, 2004. Additional e-mail service, designated by \*, has been made this same day, as shown below.

Ann Marshall Young, Chairman\*\*  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: AMY@nrc.gov)

Anthony J. Baratta\*  
Administrative Judge  
Atomic and Safety Licensing Board  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
(e-mail: AJB5@nrc.gov)

Thomas S. Elleman\*  
Administrative Judge  
5207 Creedmoor Road, #101  
Raleigh, NC 27612  
(e-mail: elleman@eos.ncsu.edu)

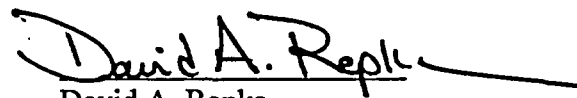
Office of the Secretary\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
Attn: Rulemakings and Adjudications Staff  
(original + two copies)  
(e-mail: HEARINGDOCKET@nrc.gov)

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Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

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U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Susan L. Uttal, Esq.\*  
Antonio Fernandez, Esq.\*  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
(e-mail: slu@nrc.gov)  
(e-mail: axf2@nrc.gov)

Diane Curran\*  
Harmon, Curran, Spielberg &  
Eisenberg, LLP  
1726 M Street, N.W.  
Suite 600  
Washington, DC 20036  
(e-mail: dcurran@harmoncurran.com)

  
David A. Repka  
Counsel for Duke Energy Corporation