UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
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In the Matter of DUKE ENERGY CORPORATION (Catawba Nuclear Station, Units 1 and 2)	Docket Nos. 50-413-OLA, 50-414-OLA

CLI-04-37

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. In CLI-04-29, we recently clarified the "need-to-know" standard for discovery and reversed a Licensing Board decision allowing the Blue Ridge Environmental Defense League (BREDL) to obtain two classified documents during pre-hearing discovery.[1] BREDL has moved for reconsideration of CLI-04-29. We deny the motion.

I. BACKGROUND

We will not repeat the procedural and factual background of this case, which we provided in CLI-04-29.[2] BREDL has requested that the Commission reconsider CLI-04-29, and

[1] *See Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-29, 60 NRC __ (Oct. 7, 2004) (reversing LBP-04-21, 60 NRC 357 (2004)).

[2] *See* CLI-04-29, 60 NRC at __, slip op. at 1-3.

Duke opposes BREDL's motion.[3] The NRC Staff has not taken a position on BREDL's motion.

According to BREDL, our decision "unlawfully reaches the merits of the case before an evidentiary hearing has been conducted"[4] and thus prejudices BREDL's right to a full and fair hearing. BREDL says the Commission has refused it access to documents "based on a set of factual determinations that go straight to the merits of this case."[5]

As examples, BREDL cites Commission statements (1) that plutonium in the form of MOX fuel assemblies is difficult for a terrorist to acquire and transport; and (2) that because of the composition of the MOX fuel, its form, and its low plutonium concentration, the MOX fuel is "not nearly as attractive to potential adversaries" as the material at the two existing Category I facilties.[6] BREDL asserts that the following passage in the Commission decision "even contains the ultimate legal conclusion that stems from the Commission's factual determinations regarding

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[3]Duke also requests that we offer guidance now on: (1) the "attractiveness" of MOX fuel to an assault by terrorists or thieves, and (2) the applicable "design basis threat." *See* "Duke Energy Corporation's Response to Motion for Reconsideration of CLI-04-29" at 14-16 (Oct. 28, 2004). Neither BREDL nor the NRC Staff sought leave to respond to Duke's request. On December 6, 2004, Duke repeated its request in a letter from Attorney David A. Repka to Annette L. Vietti-Cook, Secretary of the Commission. With the case in its current posture – on the eve of a Licensing Board hearing on BREDL's remaining security contention – we think it best to await the Board's development of a full record, and its final decision, before considering the "attractiveness" or "design basis threat" issues. The Catawba MOX license amendment is *sui generis.* Issues surrounding it are not easily reduced to generic guidance.

[4]"Blue Ridge Environmental Defense League's Motion for Reconsideration of CLI-04-29" at 1 (Oct. 18, 2004) ("Motion").

[5]Motion at 5.

[6]Category I facilities are licensed to possess formula quantities of strategic special nuclear material. The existing Category I facilities, Nuclear Fuel Services (NFS) and BWX Technologies (BWXT), are fuel cycle facilities. Catawba will be a Category I facility only from the time it accepts delivery of the four MOX lead test assemblies from the U.S. Department of Energy until they are inserted into the reactor core. *See* CLI-04-29, 60 NRC at __, slip op. at 4 n.15.

the attractiveness of MOX fuel to thieves":[7]

> [I]t is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site. Therefore, dissemination to the intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.[8]

BREDL says that these conclusions amount to merits determinations on issues its security contention raises. In a related vein, BREDL also disputes the Commission's ruling that the requested guidance documents are not relevant because they apply to large fuel cycle facilities, which are different from the Catawba nuclear power plant.

II. DISCUSSION

The Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions.[9] Here, while we see no basis for revisiting our need-to-know determination, we believe it useful to offer a few observations on BREDL's claim that, by means of certain statements in CLI-04-29, we have prejudged the security issues before the Board. We have carefully reexamined CLI-04-29, and find no support for the prejudgment claim.

The ultimate security question in this adjudication as framed by the Board is whether the regulatory exemptions Duke has requested should be granted. The Board reworded and admitted one of BREDL's security contentions:

> 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);

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[7]Motion at 5.

[8]Motion at 5, citing CLI-04-29, 60 NRC at __, slip op. at 9. BREDL's motion notes that it omitted a footnote in the quoted passage. That footnote, appearing in CLI-04-29 after the word "site," is: "We leave it to the Board to determine whether the specific measures Duke has proposed are adequate to protect the public health and safety." CLI-04-29, 60 NRC at __, slip op. at 9 n.34.

[9]*See Curators of the Univ. of Missouri*, CLI-95-8, 41 NRC 386, 390-91 (1995).

> 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.[10]

In essence, Duke maintains that its proposed arrangements are sufficient, while BREDL contends that the arrangements are inadequate and Duke won't be able to defend the MOX material if the requested exemptions are granted.

The Commission has indeed said, both in CLI-04-29 and previously,[11] that MOX-related security needs at Catawba are different from security needs at other Category I facilities. But this is not the same as saying that nothing needs to be done at Catawba compared with other commercial reactors – the inference BREDL has apparently drawn from the statements it now contests. The Commission and all of the parties, including Duke, recognize that when the unirradiated MOX fuel assemblies are onsite, Catawba must implement security measures that are qualitatively better or greater than those required for a commercial nuclear reactor employing standard uranium fuel assemblies.[12] It is the nature of the MOX-related extra measures that is at issue in this adjudication. We have expressly left it to the *Board* to determine whether the specific security measures Duke has proposed in its application are

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[10]LBP-04-10, 59 NRC 296, 352 (2004).

[11]*See* notes 16-19, *infra*, and accompanying text.

[12]The unpublished portion of Duke's license amendment application (to which BREDL's attorney and expert witness are privy) details the measures Duke intends to add to enhance security during the critical time period when the unirradiated MOX fuel assemblies are present at Catawba. The application also details the measures Duke believes are unnecessary, compared to other facilities that possess strategic quantities of special nuclear material, and requests exemptions from these requirements. "In doing so, Duke recognizes that it does need to do something more, compared to measures taken for standard uranium fuel assemblies, to handle the fresh MOX assemblies." *See* CLI-04-19, 59 NRC 5, 8 (2004). (The unpublished portions of the application have been withheld from the public domain because they contain safeguards information.)

adequate.[13]

Moreover, we made the security-related comments that BREDL dislikes in the course of deciding a need-to-know dispute that was before us. Pursuant to 10 C.F.R. § 2.905(d), the Board, as it did here, "may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information" arising in an adjudicatory context.[14] To resolve such questions, we sometimes must consider matters that arguably touch on the merits.[15] An actual merits decision comes only after an adequate record is developed.

Our need-to-know decision in CLI-04-29 depended on whether the guidance documents in question had any applicability in the present circumstances. In an earlier decision in this case, we had already stated that the security needs at Catawba are "visibly different" from NFS and BWXT.[16] Similarly, addressing the need to prevent unnecessary disclosure of classified security information, we said in CLI-04-29:

> Catawba simply does not share the underlying conditions, or potential hazards, precipitating the classified security guidance we issued in 2000 that was intended to deal with the general type of Category I facilities then in existence. That guidance does not extend to Catawba. Catawba is not a large-scale fuel facility; rather, it is a commercial nuclear reactor that will, for a short time, possess more plutonium than other commercial reactor sites. As we stated earlier in this case, "[a]t 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." Guidance applicable to an entirely

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[13] *See* CLI-04-29, 60 NRC at __, slip op. at 9 n.34, and note 8, *supra*.

[14] 10 C.F.R. § 2.905(d). The Commission's new adjudicatory rules do not apply to this case, which began before their promulgation. *See* "Final Rule: Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004).

[15] *Cf. Nuclear Engineering Co., Inc.* (Sheffield, Illinois Low-Level Radioative Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980) (reconsideration of order ruling on intervenor's motion for emergency action); *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986) (ruling on stay request).

[16] *See* CLI-04-19, 60 NRC at 11.

different type of facility is not useful in evaluating the Catawba MOX security proposal.[17]

There is no real dispute over certain facts regarding use of the MOX material at Catawba: (1) that the plutonium concentration in MOX is low compared to other sources of formula quantities of strategic special material; (2) that plutonium oxide particles in MOX are dispersed in a ceramic matrix of depleted uranium oxide with a plutonium concentration of less than six weight percent; (3) that the plutonium oxide will be housed in fuel assemblies that are over 12 feet long and weigh approximately 1500 pounds; and (4) that a large quantity of MOX fuel and an elaborate extraction process would be required to yield enough material for use in an improvised nuclear device or weapon.[18] BREDL sought no reconsideration of the Commission's earlier statement (in CLI-04-19), based largely on these facts, that the security needs at Catawba are "visibly different" from those at the Category I fuel cycle facilities.[19] Such Commission statements merely point out the obvious. They do not resolve the ultimate question here – the adequacy of Catawba's MOX-related security arrangements. The Commission would, of course, review a Board decision on the merits with an open mind.

In summary, the Commission statements BREDL now challenges were intended to help explain why BREDL had no need-to-know with respect to the dispute before us. They were based on information available at that stage of the proceeding and on the Commission's knowledge about the history and purpose of the documents BREDL requested. Significantly, all parties to this proceeding agree that Duke must enhance security measures at Catawba to

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[17]CLI-04-29, 60 NRC at __, slip op. at 9 (citations omitted).

[18]We recited these very facts in an earlier decision in this case. *See* CLI-04-19, 60 NRC at 11-12. CLI-04-19 ruled inadmissible a BREDL security contention that called on Duke to meet the same enhanced security standards that the NRC imposed on other Category I facilities in the wake of the 9/11 terrorist attacks.

[19]More than three months elapsed between this statement and BREDL's request for reconsideration of similar statements in CLI-04-29.

accommodate unirradiated MOX fuel. We have expressly left it to the Board to determine the ultimate issue in this case – whether the specific incremental measures Duke has proposed are adequate. We are confident that the Board is able to determine the issues fairly on the basis of the full record the parties will develop and unencumbered by any perception of Commission prejudgment.

III. CONCLUSION

For the foregoing reasons, we *deny* BREDL's motion for reconsideration of CLI-04-29.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004