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USNRC

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C O U N S E L O R S A T L A W

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June 22, 2001

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Charles N. Kelber
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Peter S. Lam
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

**Subject: Duke Cogema Stone & Webster Proposed Protective Order
and Nondisclosure Affidavit**

Dear Members of the Licensing Board:

Attached, in accordance with the June 20, 2001 Order of the Atomic Safety and Licensing Board (Board) regarding the Duke Cogema Stone & Webster (DCS) Construction Authorization Request (CAR) for the mixed oxide fuel fabrication facility, is a proposed Protective Order and Nondisclosure Affidavit in a form that is acceptable to DCS. In accordance with the Board's recommendations in the June 19, 2001 telephone conference, DCS has adopted in large measure the language of the protective order and nondisclosure affidavit approved by the Atomic Safety and Licensing Board in the December 17, 1997 Memorandum and Order in Private Fuel Storage, LLC (Independent Spent Fuel Storage Installation), ASLBP No. 97-732-02 - ISFSI (1997) with some modifications.

During the June 19, 2001 telephone conference, the Board suggested that DCS reevaluate whether all of the proprietary information was properly designated and whether any of such information can be recategorized as non-proprietary. DCS has

Philadelphia Washington New York Los Angeles Miami Harrisburg Pittsburgh Princeton
London Brussels Frankfurt Tokyo

Template = SECY-049

SECY-02

reconfirmed that the proprietary information has been appropriately designated.¹ The proprietary information in the CAR and supporting documents can be characterized as either confidential financial or technical information. After issuance of the Protective Order, and after execution of the Nondisclosure Affidavit, DCS would be willing to give each Petitioner one copy of the financial information for its use in this proceeding.

It is critically important, however, that more robust and effective controls be established over the distribution and use of the proprietary technical process information contained in the CAR. This information discloses highly confidential details of the technology developed to manufacture MOX fuel in a fully automated plant environment. The Cogema MELOX facility represents a significant investment both in equipment and technology improvements that has produced over 95% of the MOX fuel assemblies fabricated worldwide. Significant patented and patentable technology and commercial trade secrets have evolved from both the design activities for this facility and the more than six years of successful fuel fabrication operation and facility maintenance. The MELOX facility design and Cogema's Plutonium Finishing plants design are being directly used by DCS in its current work on the MOX fuel fabrication facility at Savannah River and this information must be maintained in strictest confidence by DCS.

Protection of this technology and related commercial trade secrets, a portion of which is contained in the CAR, is of vital commercial importance in the world market. Cogema has undertaken preliminary negotiations in Japan and other countries to utilize this technology in the construction of MOX fuel fabrication facilities. As a consequence, the adverse impact would clearly be significant should this information be compromised by an inadvertent disclosure to the public.

Furthermore, if the information were to be disclosed publicly, there would likely be no adequate remedy for the commercial injury that could be incurred. This is particularly the case where, as here, the Petitioners may not have sufficient financial resources to compensate DCS, its partners or affiliates for such injury.²

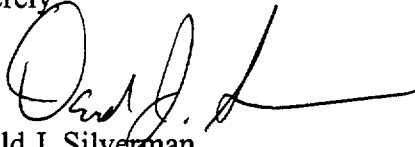
¹ DCS' position is supported by the NRC Staff. See letter dated May 4, 2001 from Michael F. Weber (NRC) to Robert H. Ihde (DCS).

² Furthermore, under the Board's June 20 Order, DCS would be providing this information to persons and organizations that have not yet demonstrated standing to participate in this proceeding and have not yet formulated one good contention. While we understand that the Board has interpreted the Commission's referral order (CLI-01-13) as requiring such a procedure at this early stage of the process, DCS is not aware of any case before the NRC adjudicatory boards in which persons not yet granted standing to participate as parties to a proceeding have been afforded access to an applicant's proprietary information. DCS believes that the non-proprietary version of the CAR contains ample and detailed information sufficient to formulate contentions.

With respect to the content of the attached Protective Order and Nondisclosure Affidavit, as stated earlier, DCS has adopted, with some modifications, the language approved in Private Fuel Storage. Of particular importance are the provisions taken from the Private Fuel Storage model that permit examination of the proprietary technical (as opposed to financial) materials only at designated DCS or Morgan Lewis & Bockius offices. Arrangements of this type have been approved in the past governing access to proprietary information (see Louisiana Energy Services, L.P. (Claiborne Enrichment Center), ASLBP 91-641-02-ML, 1994 WL 171910 (N.R.C.), in which the Licensing Board required that access to proprietary financial information be made available only at the Washington DC offices of applicant's counsel). In this case, to accommodate the Petitioners, we are willing to make the technical information available at DCS offices in Aiken and Charlotte, as well as at counsel's office in Washington, D.C.

DCS believes that the provisions contained in the attached Protective Order and Nondisclosure Affidavit are necessary to adequately protect the confidential nature of this information and do not impose any unreasonable restrictions on Petitioners.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald J. Silverman", with a long horizontal flourish extending to the right.

Donald J. Silverman

encl.

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As Proposed by DCS

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'01 JUN 26 P1:42

ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel
Fabrication Facility))

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

**PROTECTIVE ORDER GOVERNING
ACCESS TO DUKE COGEMA STONE & WEBSTER
CONSTRUCTION AUTHORIZATION REQUEST
PROPRIETARY INFORMATION**

This Protective Order, filed in conformance with the Atomic Safety and Licensing Board's Order of June 20, 2001, governs the disclosure and use of proprietary information (as defined in the attached Nondisclosure Affidavit), owned or possessed by Duke Cogema Stone & Webster ("DCS" or "Applicant") or its partners and affiliates,¹ and contained in the DCS Construction Authorization Request ("CAR") or in documents submitted to the U.S. Nuclear Regulatory Commission ("Commission" or "NRC") in support of the CAR, to and by persons and organizations who have requested a hearing on the DCS application for Construction Authorization ("Petitioners").

¹ DCS partners and affiliates include, but are not limited to, Duke Engineering & Services, Inc., Cogema S.A., Cogema, Inc., and Stone & Webster.

The proprietary information in the CAR and supporting documents can be generally characterized as either confidential financial or technical information, and this Protective Order treats them somewhat differently. A copy of the proprietary information of a confidential financial nature will be given to qualified Petitioners, while proprietary information of a confidential technical nature will be made available for viewing at certain locations.

Those persons who are qualified pursuant to this Protective Order, and have executed a nondisclosure affidavit, in the form attached to this Protective Order—the terms of which are hereby incorporated in this Protective Order—shall be permitted access to proprietary information under the following conditions:

A. Only those portions of the proprietary information that are both relevant to and necessary for the preparation or litigation of the Petitioners' contentions shall be available to Petitioners pursuant to this Protective Order. For the purpose of determining whether proprietary information is relevant and necessary for preparation of contentions, the Petitioner shall: 1) identify the subject matter of its contemplated contention; 2) show that the non-proprietary version of the document is insufficient for the Petitioner to formulate the contention; and 3) show that the Petitioner cannot formulate a contention on the matter without the proprietary information. Thereafter, the Licensing Board, after opportunity for response by the Applicant, will determine the relevance and necessity of the disclosure.

B. Once the provisions of paragraph A, above, are met, and the attached nondisclosure affidavit has been executed, the following persons will be afforded access

to proprietary information under this Protective Order for the purpose of preparing contentions:-

1. Donald Moniak
2. Glenn Carroll
3. Ruth Thomas
4. Edna Foster

Additions or substitutions to this list of individuals for whom access to proprietary information may be provided under this Protective Order must be made in accordance with the provisions of paragraph C, below. This does not waive any parties' objections to any proposed expert's qualifications to testify concerning matters in this proceeding.

C. 1. Other persons may have access to proprietary information only (a) on a "need to know" basis, (b) when they have been approved by the Licensing Board pursuant to this Protective Order, and (c) when they have executed the attached nondisclosure affidavit. The Petitioners shall advise DCS and the Licensing Board, in writing, of the names and qualifications of any additional persons, not named in paragraph B above, for whom access to proprietary information is sought.

2. To qualify an expert for access to proprietary information, a Petitioner must demonstrate that the expert possesses the technical competence necessary to evaluate the portions of the proprietary information that he or she may be shown. If a proposed expert's qualifications are challenged by the Applicant, the sponsoring party must demonstrate that the expert is qualified to evaluate the specific proprietary information that is to be reviewed by the expert. An expert's qualifications to review and evaluate portions of the proprietary information pursuant to this Protective Order may be

stipulated by written agreement between the Applicant and the Petitioner, and presented to the Licensing Board for approval, or, in the absence of such agreement, may be determined by further order of the Licensing Board.

D. Persons who receive any proprietary information (including transcripts of in camera hearings, filed testimony or any other document that reveals proprietary information) shall maintain the information's confidentiality as required by the attached nondisclosure affidavit.

E. Persons who receive any proprietary information shall use it solely for the purpose of participation in this proceeding before the Licensing Board and any further Commission or judicial appellate proceedings in this case directly involving the proprietary information, and for no other purpose.

F. Once granted access to the proprietary information, persons shall keep a record of all documents containing or discussing proprietary information in their possession or control and shall account for and ultimately deliver that information for disposal to the Licensing Board, the Commission, or DCS, in accordance with the nondisclosure affidavit attached hereto.

G. 1. DCS will provide one copy per Petitioner of proprietary information of a confidential financial nature, and there shall be a limit of one transcript per Petitioner for any proceeding conducted on the record in which proprietary information is disclosed or discussed. Such confidential financial information and such transcripts may only be reviewed by persons qualified to have access to proprietary information in accordance with the provisions of paragraph C, above, and who have

executed the attached nondisclosure affidavit. Petitioners shall not reproduce or photocopy these transcripts or confidential financial information.

2. DCS will not provide Petitioners with copies of proprietary information of a technical nature. Such technical information is highly confidential and will only be available for viewing at the designated locations listed in the attached nondisclosure affidavit. Petitioners will be able to take notes of this information.

H. In addition to the requirements specified in the attached nondisclosure affidavit, all pleadings and correspondence in this proceeding (including testimony) that contain or discuss any proprietary information shall:

1. be segregated and served only –
 - a. on counsel for DCS, the Assistant for Rulemakings and Adjudications in the Office of the Secretary,² the NRC Staff, a representative of each Petitioner who has signed the nondisclosure affidavit attached hereto, and the individual members of the Licensing Board;
 - b. by U.S. Postal Service registered, express, or certified mail; by messenger-courier or overnight delivery service (e.g., Federal Express); or by personal delivery; and
 - c. in two sealed envelopes including (i) an outer mailing envelope bearing the name and address of the addressee and the statement “PRIVATE. TO BE OPENED BY ADDRESSEE ONLY” and (ii) an inner sealed envelope with the statement “CONTAINS CONFIDENTIAL PROPRIETARY INFORMATION.”

² The original of the pleading or correspondence containing the proprietary information (without additional copies) should be directed to Emile L. Julian, Assistant for Rulemakings and Adjudications, Rulemakings and Adjudications Staff, Office of the Secretary.

Addressees shall take all necessary precautions to ensure that they alone will open envelopes so-marked. The outer envelope will contain the intended recipient's name and address, and will bear no marking or indication that the document within contains or discusses proprietary information.³

2. include an attached cover letter or memorandum that briefly describes the contents of the pleading or correspondence without reference to any proprietary information such that the cover letter or memorandum can be placed in the public docket of this proceeding.

I. Persons who have reason to suspect that documents containing or discussing proprietary information may have been lost or misplaced (for example, because an expected paper has not been received) or that proprietary information has otherwise become available to unauthorized persons, shall notify the Licensing Board promptly of those suspicions and the reasons for them.

J. Organizations that are represented by persons who sign the attached nondisclosure affidavit will be bound by and jointly liable with the affiant for breach of the confidentiality obligations of the affiant.

³ Notwithstanding the procedure that has been established for the service of copies of documents in this proceeding, because of the subject matter the Petitioners shall not make any facsimile or e-mail transmission to the Licensing Board or other parties of any document that contains or discusses proprietary information. With this restriction in mind, and to facilitate the Licensing Board's preparation of an electronic hearing database, the parties should submit to the Board copies of documents that contain or discuss proprietary information only on a 3.5 inch diskette or CD-ROM transmitted in accordance with the provisions of paragraph H.1 above, and suitably marked in accordance with paragraph 9 of the appended nondisclosure affidavit.

APPENDIX A

NONDISCLOSURE AFFIDAVIT

I, _____, being duly sworn, state:

1. As used in this nondisclosure affidavit,

(a) "Proprietary information" is (i) any information that is exempt from public disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and 10 CFR § 2.790(a)(4), and/or (ii) any information obtained by virtue of these proceedings which is not otherwise a matter of public record and which deals with or describes details of the proprietary information.

(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 proprietary information; (ii) a person who, at the invitation of the Atomic Safety and Licensing Board ("Licensing Board"), has executed a copy of this affidavit; or (iii) a person employed by or on behalf of the Applicant and authorized by it in accordance with NRC regulations to have access to proprietary information.

(c) A "document" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer software, 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 June _____, 2001 Licensing Board Protective Order issued in this proceeding and will comply in all respects with its terms and conditions regarding the proprietary information produced in connection therewith. I will protect and keep confidential proprietary information in accordance with the terms of this affidavit.

3. I will not disclose proprietary information to anyone except an authorized person. I will protect documents containing or discussing proprietary information in written or recorded form (including any portions of transcripts of in camera hearings, filed testimony or any other documents that contain or discuss such proprietary information), so that the proprietary 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 documents that contain or discuss proprietary information by any means, except (for example, with regard to pleadings) to the extent necessary to make required service on the Licensing Board, the Office of the Secretary, or other party authorized under the Protective Order to receive such service. I understand that I may take notes concerning such proprietary information, and that I will be given (a) one copy of proprietary information of a confidential financial nature, and (b) one copy of each transcript of proceedings in which proprietary information is discussed, subject, however, to the terms of this affidavit and the Licensing Board's June _____, 2001 Protective Order. So long as I possess proprietary information, I will

continue to take these precautions until further order of the Licensing Board or the Commission:

5. Upon reasonable notice, I will have access to the proprietary version of the CAR—that contains highly confidential technical information—during regular business hours at the following locations: (i) DCS' offices located at 900 Trail Ridge Road, in Aiken, S.C.; (ii) DCS's offices located at 400 S. Tryon St, in Charlotte, North Carolina; and (iii) Morgan Lewis & Bockius, LLP's office located at 1800 M. Street, N.W., in Washington D.C. At these locations, I will be able to view and take notes of this proprietary information.

6. When not under my direct control or the direct control of another individual authorized to have access thereto, I will keep and protect all documents containing or discussing proprietary information (including, without limitation, transcripts, pleadings that I may generate, and any notes that I may take) in a safe or other locked storage container. Access to the safe or other storage container will be positively controlled by use of keys or other comparable means. Keys and/or knowledge of lock combinations protecting the proprietary information shall be limited to authorized persons.

7. Any secretarial or administrative work performed at my request or under my supervision will be performed by personnel who also have been qualified for such access and who also have executed a nondisclosure affidavit.

8. To the extent that I generate or revise documents that contain or discuss proprietary information by computer, such computers shall be operated as stand-alone or free-standing equipment, not connected to any other equipment by means of a Local Area

Network (LAN) or Wide Area Network (WAN) or other data-sharing system. The generated or revised documents shall only be saved to disks (not to a hard drive), which shall be stored in a locked storage container or safe. When the information has been saved to disk, all temporary electronic files that are automatically generated on the hard drive must be deleted. At the earlier of (a) the conclusion of this proceeding (including any related Commission or judicial appeals), (b) the conclusion of my participation in this proceeding, or (c) the sale, transfer, use of the computer used to generate or revise documents that contain or discuss proprietary information to or by a person not qualified under the Licensing Board's June 20, 2001 Protective Order, I will permanently destroy proprietary information that may be stored on that computer's hard drive by using Semantec's "Wipe Info," or similar software.⁴

9. Each document that contains or discusses proprietary information shall be marked "Contains Confidential Proprietary Information" in a conspicuous manner.

10. I shall use proprietary information only for the purpose of preparation for proceedings in this case dealing with the proprietary information, and for no other purpose.

11. I shall keep a record of all documents containing or discussing proprietary 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 (including any related Commission or judicial appeals), or at the conclusion of my participation in this proceeding (whichever comes first), I shall both (a) account to the Licensing Board for all the documents or other materials containing or discussing proprietary information in my possession or control, and (b) submit such documents (including any and all portions of

⁴ DCS will supply such software to me at DCS' expense.

any notes taken in connection with review of the documents) by United States Postal Service registered mail to the Licensing Board for destruction.

12. 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 an expert's qualifications to testify concerning the proprietary information; and

(c) Either during this proceeding or after this proceeding has terminated, I will not publicly discuss or disclose any proprietary information that I receive by virtue of this proceeding, and will not, outside this proceeding, corroborate the accuracy or inaccuracy of proprietary information by using or referring to such information, or using my knowledge thereof, gained through the hearing process.

13. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's June ____, 2001 Protective Order, which incorporates the terms of this affidavit, may result in the imposition of such sanctions on me or the organization I represent, as the Licensing Board or the Commission may deem to be appropriate. I further acknowledge that any unauthorized disclosure of proprietary information or breach of the Protective Order issued in this proceeding may be grounds for (a) the imposition of civil and/or criminal penalties, as set forth in Chapter 90 of Title 18 to the United States Code, and sections 223 and 234 of the Atomic Energy Act of 1954, as

amended (42 U.S.C. §§ 2273, 2282) and/or (b) civil liability to DCS, its partners, or affiliates.

WHEREFORE, I do solemnly agree to protect and keep confidential such proprietary information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit. I clearly understand that my obligations to protect and keep confidential such proprietary information survive the termination or expiration of this affidavit and this NRC proceeding.

(Name and Organization)

Subscribed to and sworn before me this ____ day of _____, 2001.

Notary Public

My commission expires: _____

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam**

In the Matter of)
)
)

DUKE COGEMA STONE & WEBSTER)

Docket No. 070-03098-ML

(Savannah River Mixed Oxide Fuel)
Fabrication Facility))
_____)

ASLBP No. 01-790-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Protective Order Governing Access to Duke Cogema Stone & Webster Construction Authorization Request Proprietary Information" and accompanying "Nondisclosure Affidavit" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail, with the exception of Environmentalists, Inc, which was served by overnight mail.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff
(E-mail: HEARINGDOCKET@nrc.gov)

Administrative Judge Charles N. Kelber
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: cnk@nrc.gov)

Administrative Judge
Thomas S. Moore, Chairman
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Chief Administrative Judge
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* Original and 2 copies


Alex S. Polonsky

6/22/01
Date