RAS 3228

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 (Savannah River Mixed Oxide Fuel Fabrication Facility)	Docket No. 70-3098-ML ASLBP No. 01-790-01-ML **June 26, 2001**

Blue Ridge Environmental Defense League and Donald Moniak
Response and Objections to the Proposed

PROTECTIVE ORDER AND NON-DISCLOSURE AFFIDAVIT GOVERNING ACCESS TO DUKE COGEMA STONE & WEBSTER CONSTRUCTION AUTHORIZATION REQUEST PROPRIETARY INFORMATION

In response to LB ORDER DATED 06/20/01, attorneys for Duke Cogema Stone and Webster (Applicant) filed a proposed protective order on June 22, 2001 that would govern access to "proprietary information" contained in the Construction Authorization Request (CAR).

I. **BREDL and Don Moniak (Petitioners) object to the entirety of the Applicant's proposal and request that the Panel craft a reasonable and fair order that provides equal protection and treatment for all Petitioners, timely access to information, and establishes a precedent that favors democratic practices.**

1. **The Applicant proposed Protective Order and Nondisclosure Affidavit fail to meet the criteria of being reasonable and relatively unintrusive**, criteria agreed to by all

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Petitioners during telephone conference of June 19, 2001 and ordered by the Panel on June 20, 2001 as follows:

"The proposed order and nondisclosure affidavit should be reasonable and as minimally intrusive as possible upon the Petitioners' ability to speak and write about the license application and underlying issues."

Petitioners find the Applicant's proposal to be the epitome of intrusiveness, unreasonable to the point of confusion and paranoia, and burdensome. Furthermore, any similarities to the Applicants proposal in the final Protective Order and Nondisclosure Affidavit would establish a dangerous precedent that can be used to further suppress democratic rights in future NRC cases.

a. The stipulation that "proprietary information of a confidential technical nature will be made available for viewing at certain locations,"[1] would be a burden upon the Petitioners and a bad legal precedent.

b. The stipulation in Part B that "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," defeats the purpose of a "timely and expeditious process," serves to waylay the formulation of contentions through unnecessary litigation techniques–that incidentally are being paid for with U.S. tax dollars–and is overly complicated. The Applicant is proposing that the burden of proof for determining relevance be placed on Petitioners that have no way of knowing the content of the proprietary information. How do we know what is relevant and necessary if we have not seen it?

c. The stipulation in Part C.2 that "to qualify an expert for access to proprietary

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[1] Page 2 of Proposed Protective Order, and Part G.2.

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," is unnecessary, burdensome, and incomplete. Because the Applicant fails to define the qualifications of an "expert," implementation of this stipulation would be overtly subjective and unfair, and would establish a bad legal precedent.

d. The Applicant placed burdensome restrictions on additional representatives of Petitioners gaining access to the proprietary information (Parts B, C, H.1.a). Other organizational representatives who are working on contentions and who are willing to sign the nondisclosure affidavit should simply be allowed to do so without interference from the Applicant. In contrast, the Protective Order governing access to proprietary information in the Matter of Carolina Power and Light Company (Shearon Harris Nuclear Power Plant, Docket No. 50-400-LA, ASLBP No. 99-762-02-LA) provides a wide range of objective definitions of "reviewing representative."

e. The Applicant severely attempts to limit access but maximize organizational liability by stipulating in Section J that "Organizations that are represented by persons who sign the attached nondisclosure affidavit will be bound by and jointly liable with the affiant [person making affidavit] for breach of the confidentiality obligations of the affiant." The burden of this requirement is compounded by its apparently infinite time scale.

f. The stipulation in footnote 3 prohibiting "facsimile or e-mail transmission to the Licensing Board or other parties of any document that contains or discusses proprietary information" borders on paranoia on the part of the Applicant. This prohibition would be extremely burdensome and establish a bad precedent. It is sadly ironic as well as puzzling to see high technology giants like Duke Energy, COGEMA, and Stone & Webster displaying a fear of the Internet and Fax machines while placing infinite faith in the U.S. Postal Service.

g. Unless other Petitioners desire access to proprietary financial data in the Construction Authorization Request,[2] we recommend that any discussion on financial information should be struck in its entirety from the protective order and the nondisclosure affidavit. Applicant was informed during the June 19th teleconference that there was no interest in the financial information. By including this in its proposal the Applicant unnecessarily burdened the process with a non-issue.

h. Item 6 of the Nondisclosure Affidavit requiring Petitioners to keep all proprietary information and notes on proprietary information in a safe or other locked storage container is unnecessary because Petitioners keep offices in homes with locks. The language "secure place," as stated in the aforementioned Carolina Power and Light Protective Order, is sufficient. In the case of Donald Moniak, four watchdogs are loose on the property and prevent trespassers, solicitors, and other unwanted visitors from entering the property.

i. The stipulation (Item 8 of the Nondisclosure Affidavit) that electronic documents that "contain or discuss proprietary information" must be saved only to a "disk" and not on computer hard drives is unnecessary and another indication of paranoia on the part of the Applicant. Furthermore, the Applicant failed to recognize that many modern computers do not have disk drives, and that many people consider the hard drive version of working documents to be the backup version of those documents. All these requirements should be struck. Finally, given the bad faith shown to date by the Applicant, the notion of using software provided by the Applicant to erase hard drive files on personal computers is comical.

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[2] The Financial Statement was submitted separately from the Construction Authorization Request and only made available through the NRC's ADAMS electronic library system. The Financial Statement, which contains some proprietary information, was attached to letter DCS-NRC-the February 27, 2001 letter from DCS to NRC

k. The stipulation (Item 11 of the Nondisclosure Affidavit) that Petitioners keep an inventory of proprietary information is unnecessary, redundant and burdensome. The Applicant has stressed the importance of the information and must be expected to keep a log of all transactions/transmittals of proprietary information, and such log should be signed by both parties and provided to the Licensing Board.

2. The proposed Protective Order and Nondislosure Affidavit places maximum liability on Petitioners and minimum accountability on the Applicant. As such, Petitioners object to all Applicant proposed statements regarding liability and penalties.

a. The Applicant failed to identify any competitors and claimed in its June 22, 2001 Cover Letter that "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." If this is true, the market for MOX fuel is more aptly described at this time as a monopolistic enterprise, not as a competitive enterprise. Since the NRC rules state that withholding proprietary information involves testing whether disclosure would "cause substantial harm to the competitive position of the owner of the information," (10CFR2.790.(b).(4).(v)) the question must be posed: can a monopolistic enterprise–subsidized in this case by the French Government–incur substantial harm from disclosure of allegedly proprietary information?

b. The Applicant failed to specify the sections of the Construction Authorization Request that are "proprietary." In contrast, the aforementioned Carolina Power and Light Protective Order specified what is and what is not "protected material." The Applicant left no leeway for the publication of what the Applicant is calling "protected" information by means other than disclosure in violation of the protective order.

c. The Applicant failed to define an avenue or forum for disputes involving the use of proprietary information.

d. While claiming that disclosure would cause harm, the Applicant has consistently failed, in affidavits, proposals, and discussions, to specify the "the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others," which are requirements NRC must consider under 10CFR 2.790.(b).(4).(5) in determining whether the information should be held as proprietary and confidential.

e. The Applicant wrote in its June 22, 2001 Cover Letter that "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." However, at no time has the Applicant specified how well its technologies are protected by standard patent law.

f. The Applicant inappropriately invoked criminal and civil sanctions imposed by the Atomic Energy Act of 1954. Petitioners object strongly to the stipulation in Part 13 of the Nondisclosure Affidavit to "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 amended (42 U.S.C. §§ 2273, 2282) and/or (b) civil liability to DCS, its partners, or affiliates."

This language is heavy-handed, serves only as a blatant but meek attempt to intimidate Petitioners, and would establish a bad legal precedent deterring future democratic processes in NRC matters. Sections 223 and 224 of the Atomic Energy Act are entirely inapplicable in this case. Section 223 refers to "Violations of Sections Generally" and appears applicable only to activities of the Applicant. Section 224 refers to "**Communication of Restricted Data**," which is defined in Section 11 as "all data concerning (1)design,

manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142. and Section 224." The issue in this case is proprietary information, not restricted data.

3. The Applicant's proposal is misleading in regards to fundamental safety issues and the essential nature of the proprietary information withheld from the non proprietary version of the CAR. The Applicant stated in Footnote 2 of its June 22, 2001 cover letter that it "believes that the non-proprietary version of the CAR contains ample and detailed information sufficient to formulate contentions." Putting aside the issue that this decision is not one for the Applicant to make, the Applicant's claim is inaccurate and should not be considered.

a. The technical information being withheld as "proprietary" is contained exclusively, or nearly so, in the following sections of the Chapter 11 of the CAR, *Plant Systems.*

- Section 11.1, *Civil Structural Systems*
- Section 11.2, MOX Process Description
- Section 11.3, Aqueous Polishing Process Description,

b. The Applicant has described Chapter 11 as the basis for the hazard and accident analysis.

i. "This chapter describes the Mixed Oxide (MOX) Fuel Fabrication Facility (MFFF) plant and systems, along with the design basis for each system. In addition,

the chapter provides design, operational, and process flow information to support the hazard and accident analysis provided in Chapter 5, as well as to assist in understanding the overall design and function of the MFFF plant and systems. Therefore, both non-principal and principal structures, systems, and components (SSCs) are discussed." (CAR. Section 11.0, Page 11.0-1).

ii. Each of the 12 sections in Chapter 11 contain discussions of system functions, descriptions, major components, control concepts, system interfaces, design basis for non-principal SSCs, and design basis for Principal SSCs.

b. Just as it would be impossible for the NRC staff to draft a realistic safety analysis review without this basic information, it is equally unreasonable to expect Petitioners to submit valid contentions regarding safety of the MFFF without access to the proprietary information.

i. Whereas external hazards are presented in Section 1, hazards within the facility are identified in Section The remainder of the document is an analysis and presentation of the risks from these hazards and how Applicant proposes to mitigate these hazards through engineering and administrative safety measures in order to protect workers, government property, the public, and our environment from being harmed by these hazards. As such, the proprietary information is hopelessly intertwined with the non proprietary version throughout. .[3] The essential nature of the proprietary information in relation to the

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[3]

Safety/Hazard Analysis is illustrated by the three examples from the MFFF Construction Authorization Request:

i. "*The first step of the Safety Assessment is to identify the hazards applicable to the MFFF. The identification of hazards is based on the MFFF preliminary design (Chapter 11).*" Section 5.4 *Safety Assessment of Design Basis Methodology.* Page 5.4-1

ii. "To facilitate the hazard identification process, the MFFF was divided into workshops and further subdivided into process units within each workshop....The grouping of process units by workshop is presented in Section 5.5.1 and the process units are described in Chapter 11." . Section 5.4.1.1 *Hazard Identification.* Page 5.4-2..

iii. "The first step in the evaluation of the unmitigated consequences is to determine the source term." The key source term variable is called "Material at Risk (MAR)," and this key variable is contained within Tables that are deemed proprietary.

c. "Integrated Safety Analysis," which is the safety philosophy embraced by the NRC and allegedly adopted by Applicant in the CAR, is defined by the NRC as "a systematic analysis to identify facility and external hazards and their potential for initiating accident sequences, the potential accident sequences, their likelihood and consequences, and the items relied on for safety. As used here, integrated means joint consideration of, and protection from, all relevant hazards, including radiological, nuclear criticality, fire, and chemical.

However, with respect to compliance with the regulations of this part, the NRC requirement is limited to consideration of the effects of all relevant hazards on radiological safety, prevention of nuclear criticality accidents, or chemical hazards directly associated with NRC licensed radioactive material. An ISA can be performed process by process, but all processes must be integrated, and process interactions considered."

An Integrated Safety Analysis cannot be performed without this data.

Sincerely,

Donald J. Moniak

Individual

and

Representative of Blue Ridge Environmental Defense League.

UNITED STATES OF AMERICA
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	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-3098-ML
	)	ASLBP No. 01-790-01-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	**June 26, 2001**

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER DATED 06/20/01 have been served upon the following persons by U.S. mail, first class and by electronic mail, with the exception of Ms. Ruth Thomas of Environmentalists Inc., who is being served only by next day mail.

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Docket No. 70-3098-ML
LB ORDER DATED 06/20/01

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of June 2001