

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

Before Administrative Judges:

Thomas S. Moore, Chairman  
Dr. Charles N. Kelber  
Dr. 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

July 18, 2002

MEMORANDUM AND ORDER  
(Certifying Question to the Commission)

In its referral order regarding the construction authorization request of Duke Cogema Stone & Webster (DCS) to build a mixed oxide fuel fabrication facility, the Commission found that the proceeding is governed by the informal hearing procedures of 10 C.F.R. Part 2, Subpart L. See CLI-01-13, 53 NRC 478, 480 (2001). The Commission also specified the use of several 10 C.F.R. Part 2, Subpart G, procedures "[t]o enhance the effectiveness of this proceeding" but it did not address what procedures should be used in dealing with classified and safeguards information. Because Subpart L contains no provisions for dealing with this type of information, the Licensing Board, pursuant to 10 C.F.R. § 2.1209(k), recommends to the Commission that the procedures for dealing with classified information contained in 10 C.F.R. Part 2, Subpart I, which by its terms is applicable only to Subpart G proceedings (see 10 C.F.R.

§ 2.901), be adopted. Further, the Board recommends that the Subpart G procedures for dealing with safeguards information contained in 10 C.F.R. § 2.744(e) also be adopted.

Therefore, in accordance with 10 C.F.R. § 2.1209(d), the Board certifies to the Commission the question whether the appropriate provisions of Subparts I and G concerning the procedures for dealing with classified and safeguards information should be applied in this modified Subpart L proceeding. See Safety Light Corp. (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 87 (1992) ("In Subpart L proceedings, presiding officers are limited to using the procedures in that subpart unless they recommend and receive Commission approval for the application of other procedures.").

This certified question is necessitated by the fact that on June 7, 2002, Intervenor Georgians Against Nuclear Energy (GANE) filed an application for security clearances for its coordinator, Glenn Carroll, legal advisor, Diane Curran, and expert witness, Dr. Edwin S. Lyman. See Georgians Against Nuclear Energy's Application for Security Clearances (June 7, 2002) [hereafter GANE Application]. In its application, GANE states that it seeks the security clearances "to review classified information that has not yet been identified, but which GANE anticipates will be generated in this proceeding" relevant to GANE contentions 1 and 2, dealing with the insufficiency of information in DCS's construction authorization request on the design features of the material control and accounting and physical protection systems. GANE Application at 2. Further, GANE asserts that, because it takes months to obtain security clearances, GANE cannot afford to wait until any such documents are identified to apply for clearances, especially in light of the fact that "it has been many years since the NRC processed a request for a security clearance in a licensing case" and "there is no well-worn path for obtaining the clearances that GANE seeks." Id.

In accordance with the Licensing Board's order of June 12, 2002, the NRC Staff and DCS filed responses addressing, inter alia, certain matters requested by the Board. See NRC

Staff's Response to Georgians Against Nuclear Energy's Application for Security Clearances (July 5, 2002) [hereinafter Staff Response]; Duke Cogema Stone & Webster Response to Georgians Against Nuclear Energy's Application for Security Clearances (July 3, 2002) [hereinafter DCS Response]. The Staff argues that, before taking any action on GANE's application, the Board should certify to the Commission its recommendation that the hearing procedures set forth in 10 C.F.R. Part 2, Subpart I, and 10 C.F.R. § 2.744(e) for dealing with classified and safeguards information be adopted for this proceeding. See Staff Response at 1, 6-7. In its response, the Staff states that, to date, it has withheld from the hearing file two potentially relevant NRC guidance documents containing classified information and a safeguards advisory document. See id. at 2-3. With respect to the remainder of GANE's application, the Staff generally argues that, until the Commission determines the applicability of subject provisions, the application is premature. See id. at 7-8.

For its part, DCS states that it has no objection to the Board certifying the question of the extent the procedures for dealing with classified information in Subpart I should be applied here, although it also requests that the Board certify several additional questions such as how the procedures of Subpart I should be applied to classified information not yet possessed by the NRC. See DCS Response at 6-7. DCS does not address if the Board should also certify whether the Subpart G procedures for dealing with safeguards information should be applied to this proceeding. With respect to GANE's application for security clearances, DCS generally argues that the Intervenor does not need access to either classified or safeguards information to litigate contentions 1 and 2 and, therefore, it has no need to know such information. See id. at 8-10, 12.

In its decision admitting GANE contentions 1 and 2 dealing with the design bases of DCS's material control and accounting and physical protection systems, we stated that

[a] final cautionary note concerning these contentions is in order. Although neither DCS nor the Staff has brought this matter to the attention of the Licensing Board, section 13.1.4.3 of the Staff's SRP for the MFFF states that the "NRC has determined that public disclosure of the details of the physical protection system for a MOX facility could affect common defense and security and should be classified as Confidential National Security Information." Thus, these two contentions may require invocation of the procedures of 10 C.F.R. Part 2, Subpart I, even though this proceeding is being conducted pursuant to 10 C.F.R. Part 2, Subpart L, not Subpart G.

LBP-01-35, 54 NRC 403, 429 (2001). Because it is imperative that classified and safeguards information be properly controlled and Subpart L contains no procedures for dealing with such information, we fully concur with the Staff's position that the question of the applicability to this proceeding of the procedures in Subparts I and G for dealing with classified and safeguards information must be certified to the Commission as the logical first step in addressing GANE's application. The Subpart I and G procedures provide a ready framework -- indeed the sole

procedural vehicle in the Commission's Rules of Practice -- for handling classified and safeguards information in an agency adjudication. Accordingly, the Board recommends that these procedures be adopted here.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>1</sup>

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Thomas S. Moore  
ADMINISTRATIVE JUDGE

*/RA/*

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Charles N. Kelber  
ADMINISTRATIVE JUDGE

*/RA/*

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Peter S. Lam  
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 18, 2002

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<sup>1</sup>Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) DCS; (2) the NRC Staff; (3) GANE; and (4) BREDL.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
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DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-3098-ML
	)	
(Savannah River Mixed Oxide Fuel	)	
Fabrication Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CERTIFYING QUESTION TO THE COMMISSION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML  
LB MEMORANDUM AND ORDER (CERTIFYING  
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of July 2002