

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 4806

**DOCKETED 09/04/02
SERVED 09/04/02**

COMMISSIONERS

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel)
Fabrication Facility))

Docket No. 70-3098-ML

CLI-02-19

MEMORANDUM AND ORDER

This case involves the application of Duke Cogema Stone & Webster ("DCS") for authorization to construct a mixed oxide ("MOX") fuel fabrication facility. On July 18, 2002, the Board certified to the Commission the question whether the appropriate provisions of 10 C.F. R. Part 2, Subparts I and G, concerning the procedures for dealing with classified and safeguards information should be applied in this modified Subpart L proceeding.¹ We accept the Board's certification.

¹ See unpublished Memorandum and Order (Certifying Question to the Commission) (July 18, 2002). Pursuant to 10 C.F.R. § 2.1209(k), a presiding officer has the power to recommend to the Commission that procedures other than those authorized under 10 C.F.R. Part 2, Subpart L, be used in a particular proceeding.

I. BACKGROUND AND DISCUSSION

As this case has been before the Commission several times, we have already described its background extensively and see no need to repeat that discussion here.² Recently, intervenor, Georgians Against Nuclear Energy ("GANE"), attempted to apply for security clearances for three individuals who will prepare GANE's evidentiary case.³ GANE anticipates that it will need the clearances in this proceeding to review as yet unidentified classified information.⁴ Because a security clearance takes months to obtain, GANE states that it cannot afford to wait until the documents are identified to proceed with its application. GANE also recognizes that some of the information may be classified by the Department of Energy ("DOE") rather than by the NRC, and the two agencies may have conflicting requirements for security clearances.⁵

²See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 212-13 (2002); CLI-02-09, 55 NRC 245, 247-48 (2002).

³See "Georgians Against Nuclear Energy's Application for Security Clearances" (June 7, 2002).

⁴The Board pointed out several months ago that § 13.1.4.3 of the Staff's Standard Review Plan for the MOX fuel fabrication facility stated that the details of the physical protection system for the MOX facility should be classified as Confidential National Security Information. See LBP-01-35, 54 NRC 403, 429 (2001).

⁵A Memorandum of Understanding ("MOU") between the NRC and the DOE is under development to resolve dual regulation concerns, including whether the NRC or the DOE should be responsible for granting security clearances for access to classified information regarding the MOX facility. The NRC Staff anticipates that an approved MOU will not be signed until at least the spring of 2003. See "NRC Staff's Response to Georgians Against Nuclear Energy's Application for Security Clearances" at 14 (July 5, 2002). The staff recently informed the Commission that the DOE has proposed that it take on this responsibility pending completion of the MOU. See Memorandum from Robert Pierson, NRC, Board Notification: 2002-02 (July 31, 2002), with attached letter from K. E. Baker, Acting Deputy Administrator, National Nuclear Security Administration, DOE, to W. D. Travers, Executive Director of Operations, NRC (July 17, 2002).

To ensure that all applicable regulatory provisions are identified and followed, the Board requested DCS and the NRC Staff to file responses to GANE's application.⁶ Both the Staff and DCS noted that 10 C.F.R. Part 2, Subpart I, dealing with special procedures applicable to adjudicatory proceedings involving restricted data and/or national security information, by its own terms is applicable only to 10 C.F.R. Part 2, Subpart G, proceedings. This proceeding, however, is a "modified" Subpart L proceeding.⁷ Since the Commission must approve the use of any non-Subpart L hearing procedures,⁸ the Board certified this threshold procedural issue to us. In its certification order, the Board recommended adoption of the procedures in 10 C.F.R. Part 2, Subpart I, along with the Subpart G procedures for dealing with safeguards information contained in 10 C.F.R. § 2.744(e), because Subpart L contains no procedures for dealing with classified and safeguards information.

We agree with the Board's recommendation. The MOX proceeding already contains some elements of Subpart G, and the procedures for handling classified and safeguards information in a Subpart G adjudication are appropriate here as well. The Commission expresses no opinion as to GANE's ultimate need for security clearances. We leave this and other issues raised by DCS and the Staff to the Board for its determination in the first instance.

⁶See unpublished Memorandum and Order (June 12, 2002).

⁷The Commission, in its order referring this case to the Chief Administrative Judge of the Atomic Safety and Licensing Board, determined that Subpart L, with the addition of certain enumerated enhancements from Subpart G, would govern this proceeding. See CLI-01-13, 53 NRC 478, 480-82 (2001).

⁸See *Safety Light Corp., et al.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 87 (1992); 10 C.F.R. § 2.1209(k).

II. CONCLUSION

The Commission *accepts* the Board's recommendations to apply 10 C.F.R. Part 2, Subpart I and 10 C.F.R. § 2.744(e) to the instant adjudicatory proceeding. The Commission also *directs* the NRC Staff to keep the Board apprised of changes in the status of the Memorandum of Understanding between the NRC and the Department of Energy regarding the two agencies' responsibilities for granting security clearances.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of September 2002

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-02-19) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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Dated at Rockville, Maryland,
this 4th day of September 2002