

March 6, 2003

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers **/RA/**
Executive Director for Operations

SUBJECT: MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S.
DEPARTMENT OF ENERGY AND THE U.S. NUCLEAR
REGULATORY COMMISSION CONCERNING SECURITY OF
THE PROPOSED MIXED OXIDE FUEL FABRICATION FACILITY

Since the late 1990's, the Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) have worked to resolve issues related to the licensing and subsequent regulation of the proposed Mixed Oxide Fuel Fabrication Facility (MFFF). In SECY-99-177, "Current Status of Legislative Issues Related to NRC Licensing a Mixed Oxide Fuel Fabrication Facility," the Commission was informed that NRC and DOE staffs proposed to develop a Memorandum of Understanding (MOU) to avoid dual regulation in controlling access to classified and sensitive unclassified information and granting security clearances. Several developments since then have resulted in the MOU not being completed as originally envisioned. These developments include: the creation of the National Nuclear Security Administration (NNSA) within DOE; NNSA's assumption of security oversight of the MFFF; and the heightened security awareness resulting from the terrorist attacks of September 11, 2001.

The staff has regularly interacted with DOE to develop and finalize the MOU. Most recently, on October 15, 2002, the Executive Director for Operations (EDO) sent a letter to DOE's Acting Deputy Administrator of Defense Nuclear Nonproliferation, providing a copy of the latest draft of the MOU and requesting that our respective staffs meet as early as possible to complete any negotiations needed to prepare a final MOU. The follow-up meeting was held at NRC headquarters on November 26, 2002. At this meeting, NNSA management stated that they do not believe the MOU is needed in the near term, and they did not provide a projected time frame for completing the MOU.

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The current draft of the MOU addresses the following issues:

- DOE will serve as Cognizant Security Agency (CSA) until such time as the MFFF operating license may be issued, when that responsibility would change to the NRC. The CSA has the lead for conducting security inspections, granting foreign ownership, control, and influence (FOCI) approvals, and issuing facility clearances.
- If an MFFF operating license is issued, NRC would be responsible for administering security clearances and access for the MFFF.
- DOE would maintain operational responsibility for MFFF physical protection. The licensee would have to meet NRC and DOE physical protection requirements; where requirements overlap, the licensee would adhere to the most restrictive requirement.
- During any construction or operation of the MFFF, NRC and DOE would plan to conduct joint physical security inspections to avoid dual regulation and oversight.

The staff agrees with NNSA that, up to now, the lack of an MOU has not impeded the MFFF licensing process because most of the issues addressed in the draft MOU would become germane only if the NRC issues an MFFF operating license. The staff continues to believe that -- assuming the MFFF is eventually licensed to operate -- an MOU would then be needed. If the pending MFFF construction authorization request (CAR) is approved, the staff would then reopen negotiations with NNSA and attempt to finalize the MOU's wording. The MOU would then be ready to go into effect if the NRC later issues an MFFF operating license (the application for such a license has not yet been submitted).

In connection with the ongoing hearing on the CAR, the Atomic Safety and Licensing Board in December authorized two intervenor representatives to submit to the NRC's Division of Facilities and Security the necessary fees and forms to initiate the security clearance process. Classified information that may be relevant in the CAR hearing may be generated by either NRC or DOE, and decisions regarding access to that information, including need-to-know determinations, may need to be made if either of the intervenor representatives obtain security clearances.

The potential for these intervenor representatives gaining access to classified information as part of the CAR hearing process has been identified to DOE in a letter from the EDO dated October 15, 2002, and discussed with DOE during the November 26, 2002, meeting mentioned above. NRC has stated that any DOE-generated classified information that may later be identified as being relevant in the CAR hearing could not be disseminated to any third party without DOE consent.

Conclusion:

Staff will terminate the current effort to develop an MOU, but will continue to coordinate security matters with DOE and NNSA over the next few years. If the CAR is approved, the staff will reopen negotiations with NNSA and resume development of an MOU in the areas of classified and sensitive unclassified information and granting of security clearances.

Additionally, the Office of Nuclear Material Safety and Safeguards will remain engaged with the Office of Administration, Office of Nuclear Security Incident Response and the Office of General Counsel on the matter of processing security clearance requests as part of the CAR hearing.

cc: SECY
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