

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 070-03098
DUKE COGEMA STONE & WEBSTER)	
)	
Mixed Oxide Fuel Fabrication Facility)	
(Construction Authorization Request))	

NRC STAFF'S COMMENTS ON DRAFT PROTECTIVE ORDER

This proceeding concerns the Construction Authorization Request (CAR) submitted by Duke Cogema Stone & Webster (DCS) regarding a proposed mixed oxide fuel fabrication facility (MOX Facility). On June 19, 2001, the Presiding Officer conducted a telephone conference in which counsel for the Staff, counsel for DCS, and the hearing petitioners¹ participated. The chief topic discussed was how the petitioners could gain access to proprietary information in the CAR for purposes of formulating contentions, and it was agreed that DCS would draft a proposed protective order and affidavit. By unpublished order dated June 20, 2001 (June 20 Order), the Presiding Officer directed DCS to submit its drafts by June 25, and requested the Staff and petitioners to file any comments or objections to the drafts by June 27. See June 20 Order, at 1-2. The Presiding Officer also established July 30, 2001, as the deadline for the hearing petitioners to file their contentions. See *id.*, at 3.

On June 22, DCS submitted its proposed protective order and affidavit. On June 26, 2001, the Presiding Officer conducted another telephone conference in which counsel for the Staff,

¹ Donald J. Moniak on behalf of himself and on behalf of Blue Ridge Environmental Defense League (BREDL); Glenn Carroll on behalf of Georgians Against Nuclear Energy (GANE); Ruth Thomas on behalf of Environmentalists, Inc. (EI); and Edna Foster participated in the June 19 telephone conference.

counsel for DCS, and the hearing petitioners (with the exception of Mrs. Foster) participated. During the call, the Presiding Officer reiterated the June 27 deadline to file any comments or objections to the proposed protective order and affidavit, and indicated that a protective order and affidavit would be issued by July 2, 2001.

As indicated during the June 26 telephone conference, the Staff has a concern regarding the DCS proposal that the hearing petitioners be required to make certain showings as a prerequisite to gaining access to the proprietary information in the CAR. In this regard, the June 22 DCS draft protective order states as follows:

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.

Draft order, at 2. The Staff views this proposal as being unworkable and unfair to the petitioners, as it would require them to in effect guess at the nature of the proprietary information without having seen it. Additionally, as pointed out by the Presiding Officer during the June 26 telephone conference, adopting this proposal would have the effect of shortening the time in which the petitioners must formulate their contentions, and would distract them from the task of formulating contentions based on the CAR's non-proprietary information. Moreover, while this DCS proposal is based on similar wording found in an order which the Presiding Officer had suggested could be used as a guide,² that order involved safeguards information, which the Staff views as being more sensitive than the type of technical information DCS seeks to protect here.

² The subject unpublished order is dated December 17, 1997, and was issued by the licensing board in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation).

Accordingly, the Staff recommends that the above-quoted excerpt from the June 22 DCS draft protective order not be adopted in whatever order the Presiding Officer issues.

Respectfully submitted

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of June, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S COMMENTS ON DRAFT PROTECTIVE ORDER" have been served upon the following persons this 27th day of June, 2001, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution); or as indicated by double asterisks (**), solely by express overnight mail.

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Dated at Rockville, Maryland
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