RAS 3179

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/29/01

ATOMIC SAFETY AND LICENSING BOARD

SERVED 06/29/01

Before Administrative Judges:
Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of	Docket No. 070-03098-ML
DUKE COGEMA STONE & WEBSTER	ASLBP No. 01-790-01-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	June 29, 2001

PROTECTIVE ORDER

This protective order governs the disclosure and use of proprietary information by Petitioners, Blue Ridge Environmental Defense League, Donald Moniak, Environmentalists, Inc., and Georgians Against Nuclear Energy (Petitioners), in the proceeding on the application of Duke Cogema Stone & Webster (DCS or Applicant) to construct a mixed oxide fuel fabrication facility pursuant to 10 C.F.R. Part 70. These Petitioners are three environmental organizations and a private citizen doing business and located in the general vicinity of the Savannah River Site, and none of them are competitors of DCS. Specifically, this protective order governs the disclosure and use of non-safeguards, commercial proprietary information (as defined in the attached nondisclosure affidavit), owned or possessed by DCS, or its partners and affiliates, including, but not limited to, Duke Engineering & Services, Inc., Cogema S.A., Cogema, Inc., and Stone & Webster. The proprietary information is contained in the DCS

Construction Authorization Request (CAR) or in documents submitted to the United States Nuclear Regulatory Commission (Commission or NRC) in support of the CAR and is being provided to the Petitioners for use in this proceeding.[1]

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[1] The Licensing Board has not accepted the proposed protective order and affidavit of nondisclosure submitted by the Applicant at the Board's request because the Applicant apparently misapprehended the guidance provided by the Licensing Board at the June 19, 2001, prehearing conference in constructing such documents. At the conference, the Licensing Board cited and took steps to provide DCS with copies of two unpublished decisions, see Licensing Board Memorandum and Order, Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)(Protective Order and Schedule for Filing Security Plan Contentions) (Dec. 17, 1997) (unpublished);Licensing Board Memorandum and Order, Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)(Protective Order)(April 1, 1999)(unpublished) and stated that the Applicant should use these decisions as guides. As the Board noted at the conference, see Tr. 19-20, there is no safeguards information contained in the proprietary version of the CAR, only commercial proprietary information. Therefore, the Board indicated that, as is the normal practice in such circumstances, the proprietary version of the CAR would not need to be made available at locations under DCS' control. At the conference, the Applicant made no objection to this point. The Applicant's proposed protective order and nondisclosure affidavit, however, varies significantly in content from that discussed at the prehearing conference. The Applicant asserts that "the provisions contained in the attached protective order and nondisclosure affidavit are necessary to adequately protect the confidential nature of this information and do not impose any unreasonable restrictions on Petitioners," Letter from Donald J. Silverman to Licensing Board (June 22, 2001) at 3. As support, the Applicant cites Louisiana Energy Services, L.P. (Claiborne Enrichment Center)(Protective Order Governing Certain Proprietary Information (April 21, 1994)(unpublished), because the Board in that case required access to proprietary financial information be made available only at the Washington, D.C. offices of the applicant's counsel. The Applicant also notes that "DCS is not aware of any case before the NRC adjudicatory boards in which persons not yet granted standing to participate as parties to a proceeding have been afforded access to an applicant's proprietary information." Letter from D. Silverman at 2 n.2.

Contrary to the Applicant's assertions, its Claiborne example is inapposite. While it may be true that the petitioner had restricted access to the financial information in Claiborne, the Applicant fails to note that this provision was due to a negotiated consent agreement between the parties. Here, of course, the Petitioners vigorously object to such a provision. With regard to the Applicant's statement that it is unaware of any case before a licensing board where petitioners have been granted access to proprietary information before satisfying the requirements for admission as a party to the proceeding (i.e. standing and one admissible contention), the Applicant apparently overlooks the fact that in both Private Fuel Storage and in Shearon Harris , the petitioners were granted access to proprietary information before any ruling on their standing or the admissibility of their contentions. See Shearon Harris, LBP-99-25, 50 NRC 25 (1999); Private Fuel Storage, LBP-98-7,47 NRC 142 (1998). Furthermore,

This protective order shall remain in effect until specifically modified or terminated by the Licensing Board or the Commission. Nothing in this protective order precludes any Petitioner, Applicant, or the NRC Staff from seeking changes in it from the Licensing Board or the Commission as future circumstances warrant.

Those persons who are qualified pursuant to this protective order and have executed a nondisclosure affidavit in the form attached to this protective order—the terms of which are hereby incorporated in this protective order—shall be permitted access to proprietary information under the following conditions:

A. The following persons[2] will be afforded access to proprietary information under this protective order for the purposes of this proceeding:

1. Donald Moniak
2. Glenn Carroll
3. Ruth Thomas

Additions or substitutions to this list of individuals for whom access to proprietary information may be provided under this protective order must be made in accordance with the provisions of paragraph B below. The grant of access to proprietary information does not waive any participant's objections to the qualifications of any proposed witness to testify concerning matters in this proceeding.

B. 1. Other persons may have access to proprietary information only (a) on a "need to know" basis, (b) when they have been approved by the Licensing Board

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although the petitioner in Private Fuel Storage had restricted access to the proprietary information, the information contained safeguards information, and was under control of the petitioner at all times.

[2] Petitioner Edna Foster indicated to the Licensing Board in a June 19, 2001 telephone conference that she did not wish to sign any affidavit of nondisclosure to obtain proprietary information. Accordingly, Ms. Foster shall not receive any proprietary information in this proceeding.

pursuant to this protective order, and (c) when they have executed the attached nondisclosure affidavit. The Petitioners shall advise DCS and the Licensing Board, in writing, of the names of any additional persons, not named in paragraph A above, for whom access to proprietary information is sought along with the showing required in Paragraph B.2. below.

2. To qualify for access to proprietary information, a Petitioner must demonstrate that the designated individual is a legal advisor or other individual necessary for the preparation of materials for this proceeding or possesses the requisite competence necessary to evaluate all or portions of the proprietary information that he or she may be shown. The Applicant may challenge the need for, or the requisite competence of, the sponsoring party's designee within one business day of receipt of the Petitioner's filing. A Petitioner's need for its designee or a designee's requisite competence to review and evaluate all or portions of the proprietary information pursuant to this protective order may be stipulated by written agreement between the Applicant and the Petitioner, and presented to the Licensing Board for approval, or, in the absence of such agreement, may be determined by further order of the Licensing Board.

C. Persons who receive any proprietary information (including transcripts of in camera hearings, filed testimony, or any other document that reveals proprietary information) shall maintain the information's confidentiality as required by the attached nondisclosure affidavit.

D. Persons who receive any proprietary information shall use it solely for the purpose of participation in this proceeding before the Licensing Board and participating in any further Commission or judicial proceedings in this case, and for no other purpose.

E. Once granted access to the proprietary information, persons shall keep a record of all documents containing or revealing proprietary information in their possession or control and shall account for and ultimately deliver that information for disposal to the Licensing Board, in accordance with the nondisclosure affidavit attached hereto.

F. DCS will provide one copy per Petitioner of proprietary information and there shall be a limit of one transcript per Petitioner of any proceeding conducted on the record in which proprietary information is revealed. Such proprietary information and such transcripts may only be reviewed by persons qualified to have access to proprietary information in accordance with the provisions of paragraphs A and B above, and who have executed the attached nondisclosure affidavit. Petitioners shall not electronically reproduce or photocopy the copy of the proprietary information provided by DCS or any transcripts containing proprietary information without the express prior approval of the Licensing Board.

G. In addition to the requirements specified in the attached nondisclosure affidavit, all pleadings and filings in this proceeding (including testimony) that contain or reveal any proprietary information shall:

1. be segregated and served only –

a. on lead counsel for DCS, the Assistant for Rulemakings and Adjudications in the Office of the Secretary,[3] the NRC Staff, a representative of each Petitioner who has signed the nondisclosure affidavit attached hereto, and the individual

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[3] The original of the pleading or correspondence containing the proprietary information (without additional copies) should be directed to Emile L. Julian, Assistant for Rulemakings and Adjudications, Rulemakings and Adjudications Staff, Office of the Secretary.

members of the Licensing Board;

b. by U.S. Postal Service registered, express, or certified mail; by messenger-courier or overnight delivery service (e.g., Federal Express); or by personal delivery; and

c. in two sealed envelopes including (i) an outer mailing envelope bearing the name and address of the addressee and the statement “PRIVATE. TO BE OPENED BY ADDRESSEE ONLY” and (ii) an inner sealed envelope with the statement "CONTAINS PROPRIETARY INFORMATION.” Addressees shall take all necessary precautions to ensure that they alone will open envelopes so marked. The outer envelope will contain the intended recipient’s name and address, and will bear no marking or indication that the document within contains or reveals proprietary information.

2. include an attached cover letter or memorandum that briefly describes the contents of the pleading or correspondence without reference to any proprietary information such that the cover letter or memorandum can be placed in the public docket of this proceeding.

H. Persons who have reason to suspect that documents containing or revealing proprietary information may have been lost or misplaced (for example, because an expected paper has not been received) or that proprietary information has otherwise become available to unauthorized persons, shall notify the Licensing Board promptly of those suspicions and the reasons for them.

I. An organization that is represented by one or more of its members who sign the attached nondisclosure affidavit will be bound by and jointly liable with the affiant for any unauthorized disclosure of proprietary information. Any violation of this protective

order and any violation of a provision of the nondisclosure affidavit executed hereunder shall constitute a violation of an order of the Commission.

J. Nothing in this protective order prevents any Petitioner from seeking public disclosure of information designated as proprietary information in accordance with NRC regulatory procedures.

K. Nothing in this protective order restricts the Applicant's right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of protected materials.

L. All affidavits of nondisclosure shall be filed with the Licensing Board and served on the Applicant, the NRC Staff, and all other Petitioners.

M. Upon receipt of a properly executed affidavit of nondisclosure by an individual approved by the Licensing Board as eligible to receive proprietary information, DCS shall have one business day to object to any matter involving the execution of the affidavit of nondisclosure. Absent an objection by DCS relating to the execution of the affidavit of nondisclosure, DCS has one business day to transmit by overnight delivery service the proprietary information to the affiant.

It is so ORDERED.

For the Atomic Safety and Licensing Board

/RA/

_____
Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 29, 2001

NONDISCLOSURE AFFIDAVIT

I, _____, being duly sworn, state:

1. As used in this nondisclosure affidavit:

(a) "Proprietary information" is (i) any information that is properly exempt from public disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and 10 C.F.R. § 2.790(a)(4), or (ii) any information obtained by virtue of these proceedings which is not otherwise a matter of public record and which reveals the proprietary information.

(b) Proprietary information does not include any information or document contained in the files of the Commission, any other federal or state agency, or any federal or state court, unless the information or document has been determined to be protected by such agency or court.

(c) An "authorized person" is (i) an employee, consultant, or contractor of the United States Nuclear Regulatory Commission (Commission or NRC) entitled to access to the proprietary information; (ii) a person who, at the invitation of the Atomic Safety and Licensing Board (Licensing Board), has executed a copy of this affidavit; or (iii) a person employed by or on behalf of the Applicant and authorized by it in accordance with NRC regulations to have access to proprietary information.

(d) A "document" means any audio or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer software, computer disks or diskettes, computer storage devices or any other medium, and

includes, without limitation, books, reports, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

2. I have read the June 29, 2001 Licensing Board protective order issued in this proceeding and will comply in all respects with its terms and conditions regarding the proprietary information produced in connection therewith. I will protect and keep confidential proprietary information in accordance with the terms of this affidavit.

3. I will not disclose proprietary information to anyone except an authorized person. I will protect documents containing or revealing proprietary information in written or recorded form (including any portions of transcripts of in camera hearings, filed testimony, or any other documents that contain or reveal such proprietary information), so that the proprietary information contained therein remains at all times under the control of an authorized person and is not revealed to anyone else.

4. I will not transmit by electronic or facsimile transmission any material containing proprietary information. In addition to pleadings and filings, any transmissions of material containing proprietary information will be transmitted utilizing the identical method set forth in Paragraph G.1. b. and c. of the Licensing Board's June 29, 2001 protective order.

5. When not under my direct control or the direct control of another individual authorized to have access thereto, I will keep and protect all documents containing or revealing proprietary information (including, without limitation, transcripts, pleadings that

I may generate, and any notes and copies that I may make) in a secure locked place such as a filing cabinet, closet, or other storage container.

6. Any secretarial or administrative work performed at my request or under my supervision will be performed by personnel who also have been qualified for such access and who also have executed a nondisclosure affidavit.

7. To the extent that I use a computer to generate or revise documents that contain or reveal proprietary information, the generated or revised documents shall only be saved to disks (not to a hard drive), which disks shall be stored in a locked storage container or safe. When the information has been saved to disk, all temporary electronic files that are automatically generated on the hard drive must be deleted. At the earlier of (a) the conclusion of this proceeding (including any related Commission or judicial proceedings), (b) the conclusion of my participation in this proceeding, or (c) the sale or transfer of the computer used to generate or revise documents that contain or reveal proprietary information to or by a person not qualified under the Licensing Board's June 29, 2001 protective order, I will permanently destroy proprietary information that may be stored on that computer's storage media, whether permanent hard drive or removable, by using Symantec's "Wipe Info," or similar software, provided by Applicant at the Applicant's expense.

8. Each document that contains or reveals proprietary information shall be marked "Contains Proprietary Information" in a conspicuous manner.

9. I shall use proprietary information only for the purpose of preparation for this proceeding (including any related Commission or judicial proceedings).

10. I shall keep a record of all documents containing or revealing proprietary information in my possession, including any copies of those documents or portions

thereof made by me or on my behalf. At the conclusion of this proceeding (including any related Commission or judicial proceedings), or at the conclusion of my participation in this proceeding (whichever comes first), I shall both (a) account to the Licensing Board for all the documents or other materials containing or revealing proprietary information in my possession or control, and (b) submit such documents (including any and all portions of any notes taken in connection with review of the documents) by U.S. Postal Service registered, certified, or express mail to the Licensing Board for destruction.

11. Either during or after this proceeding, I will not publicly reveal any proprietary information that I receive by virtue of this proceeding as long as the information remains proprietary and is not otherwise a matter of public record.

12. I acknowledge that any violation of the terms of this affidavit or the Licensing Board's June 29, 2001 protective order, which incorporates the terms of this affidavit, may result in the imposition of such sanctions on me or the organization I represent, as the Licensing Board or the Commission may deem to be appropriate. I further acknowledge that any unauthorized disclosure of proprietary information or violation 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 10 C.F.R. § 70.91, sections 223 and 234 of the Atomic Energy Act of 1954, as amended (42 U.S.C. §§ 2273, 2282), Chapter 90 of Title 18 to the United States Code and/or (b) civil liability to DCS, its partners, or affiliates.

WHEREFORE, I do solemnly agree to protect and keep confidential such proprietary information as may be disclosed to me in this proceeding, in accordance with the terms of this affidavit. I clearly understand that my obligations to protect and keep confidential such proprietary information survive the termination of this proceeding and remain in effect until such time as the information is no longer proprietary or is a matter of public record.

_____
(Name and Organization)

Subscribed to and sworn before me this _____ day of _____, 2001.

_____
Notary Public

My commission expires: _____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
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 PROTECTIVE ORDER, DATED 06/29/01 have been served upon the following persons by U.S. mail, first class, as indicated by an asterisk (*) or through the Nuclear Regulatory Commission's internal distribution as indicated by double asterisks (**), with copies by electronic mail or fax as indicated.

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Docket No. 70-3098-ML
LB PROTECTIVE ORDER, DATED 06/29/01

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[Original signed by Adria T. Byrdsong]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of June 2001