

RAS 5057

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Duke Cogema Stone and Webster  
Savannah River MOX Fabrication Facility

DOCKETED  
USNRC

December 9, 2002 (11:18AM)

Docket Number: 70-3098-ML

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Location: (Telephone Conference)

Date: Wednesday, December 4, 2002

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Pages 1-51

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 -----x  
5 IN THE MATTER OF: :

6 DUKE COGEMA STONE AND : Docket No.

7 WEBSTER, : 70-3098-ML

8 (Savannah River Mixed Oxide :  
9 Fabrication Facility) :

10 -----x

11 Wednesday, December 4, 2002

12  
13 Teleconference

14 The above-entitled teleconference was conducted  
15 at 10:00 a.m.

16 BEFORE:

17 JUDGE THOMAS MOORE, Chairman

18 JUDGE PETER LAM

19 JUDGE CHARLES KELBER

20

21 PRESENT:

22 JOHN T. HULL, Esq.

23 DONALD SILVERMAN, Esq.

24 ALEX POLONKSY, Esq.

25 GLENN CARROLL

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1           PRESENT: (CONT'D)  
2           DIANE CURRAN, Esq.  
3           KATHLEEN MARTIN  
4           PETER HASTINGS, Esq.  
5           PATRICK ROADS

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## 1 APPEARANCES:

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1 P-R-O-C-E-D-I-N-G-S

2 10:00 a.m.

3 MR. HULL: -- for the Staff today. I have  
4 on the line with me Ed Yohanaman and Keith Everly,  
5 both with the Nuclear Security and Incident Response  
6 Office, Tom Martin with the Office of Administration,  
7 and Dave Brown with the Nuclear Material Safety and  
8 Safeguards. He's backup Project Manager for the MOX  
9 project.

10 JUDGE MOORE: Applicants?

11 MR. SILVERMAN: This is Don Silverman with  
12 Morgan, Lewis and Bockius.

13 MR. POLONSKY: Alex Polonsky with Morgan,  
14 Lewis.

15 MR. HASTINGS: And Peter Hastings with  
16 Duke Cogema Stone and Webster.

17 JUDGE MOORE: Intervenor, Ms. Carroll?

18 MS. CARROLL: This is Glenn Carroll from  
19 Georgians Against Nuclear Energy.

20 MS. CURRAN: This is Diane Curran, Legal  
21 Advisor to GANE.

22 JUDGE MOORE: I thank you. Court  
23 Reporter, did you --

24 MS. MARTIN: Your Honor, we have two more.

25 MR. ROADS: My name is Patrick Roads,

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1                   Department of Energy.

2                   MS. MARTIN: And I'm Kathleen Martin,  
3                   Department of Energy.

4                   JUDGE MOORE: I'm sorry, I didn't catch  
5                   the one before Ms. Martin.

6                   MR. ROADS: Roads, Patrick Roads is my  
7                   name.

8                   JUDGE MOORE: R-H-O-D-E?

9                   MR. ROADS: O-A-D-S.

10                  JUDGE MOORE: Thank you. You've all  
11                  received copies of the Board's November 20, 2002 order  
12                  and responded to it. The Board would like to go right  
13                  to our questions for you regarding that. The first  
14                  question dealt with the status of GANE's pro se status  
15                  with a legal advisor. The Board has considered all  
16                  the parties' answers to its first questions contained  
17                  in that November 20, 2002 order and concluded that  
18                  GANE's, quote, "legal advisor," unquote, must either  
19                  enter an appearance as counsel of record or if they  
20                  are -- if she is only to play a behind-the-scenes role  
21                  and in that case the Board will not entertain any  
22                  application for a security clearance for that legal  
23                  advisor. If that is not something that the GANE finds  
24                  suitable, they can find a way to appeal it to the  
25                  Commission.

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1 MS. CURRAN: Judge Moore?

2 JUDGE MOORE: Yes.

3 MS. CURRAN: This is Diane Curran. These  
4 regulations are a bit confusing, but it seems to us  
5 that applying a security clearance and applying for  
6 access to documents on a need-to-know basis are two  
7 different operations. Do you consider that it's the  
8 Board where we will be applying for a security  
9 clearance?

10 JUDGE MOORE: That's one of the things  
11 that we will be working through today, but, Ms.  
12 Curran, the Board is very concerned and has been  
13 concerned for some time with the neither fish nor fowl  
14 status, frankly, of you. In all my years on the  
15 Boards and in anyone else's knowledge here, we've  
16 never had a pro se intervenor with a legal advisor,  
17 and the parties did not raise an objection so the  
18 Board did not on its own raise it, but it comes to a  
19 head in the context of dealing with classified  
20 information and frankly safeguards information.

21 And the Board is no longer willing to deal  
22 with this novel approach and wishes to put things on  
23 a more traditional track that we're all used to  
24 dealing with, which is you must either be counsel of  
25 record or you're only a behind-the-scenes person,

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1       neither entitled to any service or anything else in  
2       this proceeding, and the Board will not consider  
3       because you are capable of becoming counsel of record  
4       allowing you to have classified information or  
5       safeguards information. If that ruling is not  
6       suitable to you, appeal it to the Commission.

7                   MS. CURRAN: All right.

8                   JUDGE MOORE: Next, I have a question for  
9       the staff to start this off. Mr. Hull, on Page 4 of  
10      your response to the Board's second question, you  
11      generally agreed with the Board's recitation of the  
12      steps necessary for GANE to gain security clearances  
13      for its designated representatives. Is that a correct  
14      reading of your response?

15                  MR. HULL: You're referring, Your Honor,  
16      to the paragraph that starts, "Notwithstanding the  
17      above"?

18                  JUDGE MOORE: The second question that set  
19      forth the Board's understanding of the steps that  
20      would be necessary for GANE to obtain security  
21      clearances.

22                  MR. HULL: Yes. My problem is that my e-  
23      mail copy of what I sent you on December 2 is not  
24      numbered, so you refer to a Page 4 but my pages are  
25      not numbered.

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1                   JUDGE MOORE: All right. It's Paragraph  
2     -- it would appear to be Paragraph 5 if I've properly  
3     counted, the paragraph beginning, "Notwithstanding the  
4     above."

5                   MR. HULL: Yes. I think your Question 2  
6     basically set forth the process and the correct order.  
7     The Board would first have to issue an order, pursuant  
8     to 2.905(b).

9                   JUDGE MOORE: Thank you, Mr. Hull, we  
10    understand that. Let me move now to the Applicant.  
11    Mr. Silverman?

12                  MR. SILVERMAN: Yes, sir.

13                  JUDGE MOORE: It appears from your answer  
14    on Page 3, your answer to the Board's second question,  
15    that you disagree with, one, the staff and, two, the  
16    Board's recitation of those steps. Now, specifically,  
17    do you agree or disagree?

18                  MR. SILVERMAN: With the Board's and  
19    Staff's recitation? We don't completely agree, Your  
20    Honor, so I guess --

21                  JUDGE MOORE: Well, now, let me ask the  
22    question, please.

23                  MR. SILVERMAN: Oh, I'm sorry, go ahead.

24                  JUDGE MOORE: Ten CFR 2.905(a) and (b), do  
25    you agree or disagree that 10 CFR Section 2.905(a) and

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1                   (b) indicates that the Board must upon proper  
2 application or appropriate application first make a  
3 determination that access to restricted data or  
4 national security information may be required for the  
5 preparation of a party's case?

6                   MR. SILVERMAN: Yes. And you used the  
7 word, "first." I think in our pleading we took the  
8 position that there are several steps in the process.  
9 There is a security clearance determination, a need-  
10 to-know determination by the appropriate agency and  
11 then this determination that you allude to by the  
12 Board, but I don't think the order is particularly  
13 important. So, yes --

14                  JUDGE MOORE: Did you say that the order  
15 is not particularly important?

16                  MR. SILVERMAN: I don't think so.

17                  JUDGE MOORE: That leads me to the next  
18 question. From Page 3 of your answer, as I read it,  
19 again, to your answer to the second question, it  
20 appears that you indicate that the Board has no role  
21 to play in this process until security clearances have  
22 already been granted, but if your position is that the  
23 order in which these steps are taken does not matter,  
24 then that would not be a correct reading of your  
25 answer.

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1                           MR. SILVERMAN: In all honesty, Your  
2 Honor, we set the answer out in the logical order that  
3 we thought made sense for our reading of the  
4 regulations. We thought that it made sense, first,  
5 for the appropriate cognizant security agency to make  
6 the security clearance determination. We felt that  
7 the need-to-know determination by the appropriate  
8 agency needed to be made. And then, as we set out in  
9 our answer, it made sense to then if those conditions  
10 are met, then you go into Subpart I if you're talking  
11 about information received by the NRC. I noticed --  
12 if I may, I noticed that the Staff answer seems to  
13 reverse that order, and I'm not sure we have any great  
14 objection to that.

15                          JUDGE MOORE: Well, my problem with your  
16 approach is how can anyone other than this Board make  
17 the determination whether a party needs, for the  
18 preparation of its case, this type of material?

19                          MR. SILVERMAN: Right. We think there are  
20 two different determinations to be made, Your Honor.  
21 We think that Subpart I does not obviate the need for  
22 the agency through its internal procedures and regular  
23 processes to make a need-to-know determination and  
24 that that is separate from this finding in Subpart I,  
25 which only comes into play with respect to information

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1 || that's in the possession of the NRC.

JUDGE MOORE: Correct. Now, let's shift gears a moment with information that -- let's back up even further. There's three classes of information, as we understand it. Information that is generated by the NRC and receives a classification. The second category would be information received by the NRC, and we'll get to what received means in a moment, that emanates from the applicant and/or, in this instance, DOE. And then a third category of information would seem to be information that's in DOE's and/or the applicant's sole possession and has not been received by the NRC. Are those the three possibilities we deal with?

15 MR. SILVERMAN: I think so, Your Honor,  
16 yes.

17 JUDGE MOORE: Okay. Looking at the third  
18 category, that is classified information that has not  
19 been received by the NRC, the Board's understanding  
20 from the parties' original filings and its readings of  
21 the regulations and the appropriate legislative  
22 history here is that that category of information, if  
23 the Intervenor were to seek it, for example, through  
24 the discovery process, that the Board would certify  
25 any such question to the Commission under the normal

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1 discovery rules, and it would then be in the  
2 Commission's bailiwick. Is that a current reading for  
3 those rules? Specifically, that's what the Commission  
4 said in the legislative history of the --

5 MR. SILVERMAN: Yes.

6 JUDGE MOORE: -- revision of Subpart I.

7 MR. SILVERMAN: Yes. I think that's  
8 right, Your Honor.

9 JUDGE MOORE: Now, if that's correct, then  
10 the material in your responses to our recent questions  
11 that say that's a matter solely within DOE's bailiwick  
12 may be true in the context of the Commission will have  
13 to deal with DOE in some manner or fashion, but it  
14 doesn't involve this Board.

15 MR. SILVERMAN: It doesn't involve the  
16 Board. I think that's right. And, of course, we  
17 think that information -- security clearance authority  
18 for that information rests with DOE as well as the  
19 need-to-know determination. Now, that's separate --

20 JUDGE MOORE: That's something that you  
21 and the Commission need to work out.

22 MR. SILVERMAN: Fair enough.

23 JUDGE MOORE: So the Board, as we read all  
24 of this, is out of that loop, if you will. Does the  
25 Staff agree with that?

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1                   MR. HULL: Yes, Your Honor. I think  
2                   that's the position we took in our July 5 filing.

3                   JUDGE MOORE: Ms. Curran, is that your  
4                   understanding of all of this?

5                   MS. CURRAN: Yes, with respect to that  
6                   third category of information.

7                   JUDGE MOORE: Okay.

8                   MS. CARROLL: Your Honor?

9                   JUDGE MOORE: Yes. Who's speaking,  
10                  please?

11                  MS. CARROLL: Glenn Carroll.

12                  JUDGE MOORE: Yes, Ms. Carroll?

13                  MS. CARROLL: To back up, I take it that  
14                  your order to strip us of pro se status is in effect?

15                  JUDGE MOORE: I have not stripped you of  
16                  pro se status. It's something solely within your  
17                  discretion as to how you wish to proceed.

18                  MS. CARROLL: But is your discomfort with  
19                  our pro se status linked to our request for a security  
20                  clearance?

21                  JUDGE MOORE: Yes, among others, but for  
22                  today's telephone conference, you are free to speak,  
23                  as is with Ms. Curran.

24                  MS. CARROLL: If we don't apply for a  
25                  security clearance, then are you willing to let us

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1 continue pro se for the time being?

2 JUDGE MOORE: Well, the Board's concern is  
3 deeper than just the security clearance. It goes to  
4 safeguards information and, frankly, proprietary. The  
5 Board has from the beginning been uncomfortable with  
6 a pro se status with a legal advisor. Pro se status  
7 is without counsel.

8 MS. CARROLL: It seems that --

9 JUDGE MOORE: But heed our ruling, Ms.  
10 Carroll, and the Board does not wish to discuss it  
11 further. You may appeal it to the Commission.

12 MS. CARROLL: Well, then we're still  
13 confused that you are intending to issue an order  
14 stripping us of our pro se status whether or not we  
15 apply for a security clearance.

16 JUDGE MOORE: Well, perhaps Ms. Curran can  
17 help you in your confusion. The matter is, for this  
18 telephone conference, now at rest.

19 The Board has an additional question for  
20 the Staff. Mr. Hull, in Footnote 5 of COI-02-09,  
21 that's the Commission September 4, 2002 Memorandum in  
22 Order directing the application of the 10 CFR Part 2  
23 Subpart I procedures for this proceeding, the  
24 Commission states in regard to security clearances in  
25 Footnote 4 -- I'm sorry, in Footnote 5 that, and I

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1 quote, "The Staff recently informed the Commission  
2 that the DOE has proposed that it take on this  
3 responsibility pending the completion of the MOU,"  
4 unquote. What information did the Staff impart to the  
5 Commission so that we can determine what the  
6 indefinite pronoun "it" refers to in that Footnote?  
7 And in this regard the Board understands that at least  
8 one draft of that MOU that we have seen places the  
9 responsibility for granting security clearances for  
10 the MOX Facility on the NRC.

11 MR. HULL: This reference in Footnote 5  
12 that the Commission made was to the Board notification  
13 that the Staff issued I believe it was in late July  
14 following the Staff's receipt of a letter from the DOE  
15 addressed to Mr. Traverse, the EDO, that that DOE  
16 letter was dated July 17, 2002.

17 JUDGE MOORE: Well, what does "it" refer  
18 to in the Commission's footnote, DOE or the Staff?

19 MR. HULL: As I read it, Your Honor, the  
20 "it" would refer back to DOE.

21 JUDGE MOORE: Okay. So the underlying  
22 information that the Staff imparted to the Commission  
23 was that DOE had proposed that DOE take on the  
24 responsibility of issuing security clearances for the  
25 MOX Facility.

1                   MR. HULL: As stated in DOE's letter dated  
2                   July 17, 2002.

3                   JUDGE MOORE: Okay. Thank you. What is  
4                   the current status of the MOU, Mr. Hull?

5                   MR. HULL: We have also been under the  
6                   obligation, Your Honor, of the Commission's early  
7                   September order which directed that the Subpart I  
8                   hearing procedures be applied to the MOX proceedings.  
9                   The Commission had requested the Staff to keep the  
10                  Board informed about any progress between the NRC and  
11                  the DOE on finalizing the Memorandum of Understanding  
12                  that's still in draft form, and there has been no  
13                  progress to date on that, and that is why we had not  
14                  advised the Board or parties as yet. The Staff is  
15                  mindful of that Commission request, but there's no  
16                  progress to report as yet.

17                  JUDGE MOORE: Okay. Now, if DOE is  
18                  responsible for security clearances with respect to  
19                  the MOX Facility, of my categories 1, 2 and 3 of  
20                  potential classified information, what, if any, of  
21                  those categories is DOE going to be issuing security  
22                  clearances for, assuming all the other hoops have been  
23                  jumped through?

24                  MR. HULL: Well, I think it's correct to  
25                  say that DOE has been responsible for issuing any

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1 necessary security clearances to its DCS contractors.  
2 Those security clearances would obviously be necessary  
3 in order for its DCS representatives to be able to  
4 handle any classified information. But I'm not sure  
5 that it's been determined that the DOE has any role at  
6 this point in issuing security clearances to anybody  
7 else.

8 JUDGE MOORE: Mr. Silverman?

9                   MR. SILVERMAN: Your Honor, our position  
10          is that whoever the cognizant security agency is is  
11          responsible for issuing security clearances regardless  
12          of the nature of the information.

13 JUDGE MOORE: So categories 1, 2 and 3  
14 that I set forth, in your view, the CSA is currently  
15 DOE and DOE must issue all security clearances?

16 MR. POLONSKY: This is Mr. Polonsky. I  
17 think we'd like to make a distinction between security  
18 clearance and then access need to know to the three  
19 types of classified information you've identified. If  
20 DOE is the CSA, then the application for security  
21 clearances would go from the intervenors to DOE.  
22 However, the need to know --

JUDGE MOORE: Stop right there.

24 || MR. POLONSKY: Okay.

25 JUDGE MOORE: For Category 1?

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1                   MR. POLONSKY: Well, again, Category 1  
2 security clearance is just security clearance in  
3 general. The answer is yes, but they would need to  
4 identify --

5                   JUDGE MOORE: I'm sorry, there were two  
6 speaking. Your answer is for Category 1 information  
7 --

8                   MR. SILVERMAN: For the security clearance  
9 only, Your Honor, Category 1, 2 and 3 information, for  
10 all three categories the security clearance itself  
11 would be granted by the cognizant security agency. If  
12 it's DOE, it would be DOE.

13                  JUDGE MOORE: Even if it's NRC-generated  
14 classified information, such as the two documents that  
15 the Staff has not placed in the hearing record but for  
16 the fact that they're classified?

17                  MR. POLONSKY: Your Honor, yes. We're  
18 distinguishing there's two steps in this process. One  
19 is the granting of a security clearance, and that's  
20 what I'm referring to now. That's the processing of  
21 the application to get an L clearance, for example.  
22 That in and of itself does not give an individual the  
23 right to access any particular piece of information.  
24 They must also get --

25                  JUDGE MOORE: Know that much, but other

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1 than that much, I'm not sure we do know, Mr. Polonsky.  
2 Frankly, you're not helping us clear up the confusion  
3 here.

4 MR. HULL: Your Honor, this is John Hull  
5 for the Staff. I think one of the problems here is  
6 that there is no CSA at this point for the proposed  
7 MOX Facility.

8 JUDGE MOORE: How do we remedy that?

9 MR. HULL: That's a good question.

10 MS. CARROLL: Memorandum of Understanding.

11 JUDGE MOORE: I'm sorry.

12 MS. CARROLL: Memorandum of Understanding.

13 JUDGE MOORE: Who's speaking, please?

14 MS. CARROLL: Glenn Carroll.

15 JUDGE MOORE: All of you please identify  
16 yourself before you speak. Yes, Ms. Carroll, but it's  
17 not a perfect world, and the Board has no power to  
18 either direct a time nor the substance of an MOU  
19 between NRC and DOE.

20 MS. CURRAN: This is Diane Curran. I'd  
21 like to ask a question, and that is I would guess this  
22 kind of problem comes up in other contracts. Do the  
23 DOE and the NRC recognize each other's security  
24 clearances such that the Board could choose one and  
25 have some kind of an agreement to recognize the other

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1 agency's clearance?

2 JUDGE MOORE: Applicant, is that doable?

3 MR. POLONSKY: I think that question ought  
4 to be directed to the Staff, Your Honor. We really  
5 don't know the answer to that.

6 JUDGE MOORE: Mr. Hull?

7 MR. HULL: Going back to something you  
8 said earlier, Your Honor, about the three -- you would  
9 split the possible types of classified information  
10 into three parts, I think the focus needs to be on  
11 which agency originated the classified information as  
12 opposed to which agency has possession of the  
13 information. As I read 2.905(h), the critical point  
14 is which agency has originated the classified  
15 information. That agency has control over to whom  
16 access to that information is given. If it's NRC-  
17 originated information, the NRC has control; if it's  
18 DOE information or if it's DCS information that's been  
19 classified, pursuant to derivative authority obtained  
20 from DOE, the DOE would have the call on whether a  
21 given individual would be able to have access to that  
22 information.

23 JUDGE KELBER: This is Judge Kelber. Mr.  
24 Hull, what we're trying to determine right now is  
25 where does the security clearance get granted. For

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1 example, you sent NRC-generated information to DCS.  
2 Presumably, the DCS people did not have clearances  
3 obtained from the NRC, they have them from DOE or so  
4 we've heard. Nevertheless, you sent the information.  
5 Is it necessary for -- do they have to get their  
6 clearances from NRC as well?

7 MR. HULL: No, they had clearances from  
8 the DOE, Your Honor.

9 JUDGE KELBER: So that was good enough.

10 JUDGE MOORE: So you recognize the DOE's  
11 security clearance as to that NRC-generated secure  
12 classified information.

13 MR. HULL: Yes. We would not have sent  
14 any classified information to DCS if they had not had  
15 security clearances.

16 JUDGE MOORE: From whom?

17 MR. HULL: From DOE.

18 JUDGE MOORE: But not from you.

19 MR. HULL: To my knowledge, the Staff has  
20 not issued any security clearances -- I'm sorry, the  
21 NRC has not issued any security clearances to DCS.

22 JUDGE MOORE: Okay. Mr. Hull, and I'm not  
23 in any way intending to put you on the spot, but did  
24 the question ever come up as to who needed to have  
25 issued that security clearance for NRC-generated?

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1                   MR. HULL: All I can say, Your Honor, is  
2                   that I was not directly involved with when NRC, and I  
3                   believe it was Mike Weber, sent the classified  
4                   information to DCS. As I think I indicated in an  
5                   earlier filing, I did not become even aware of that  
6                   document until several months after the fact, so I do  
7                   not have any information as to what considerations  
8                   were made at that time. I can only assume that the  
9                   necessary verification was made that the DCS had the  
10                  necessary security clearances. And I'm getting  
11                  confirmation here from Keith Everly that that  
12                  confirmation was made.

13                  JUDGE MOORE: So that would seem to imply  
14                  that a security clearance by either agency is  
15                  sufficient and readily recognized by each agency for  
16                  their own classified information; that is, information  
17                  they generate.

18                  MR. HULL: I think that's correct, Your  
19                  Honor, but, again --

20                  JUDGE MOORE: Stop right there, Mr. Hull.

21                  MR. HULL: What's that?

22                  JUDGE MOORE: Stop right there.  
23                  Applicant, is that your understanding?

24                  MR. POLONSKY: The understanding from the  
25                  facts that you've presented are that the NRC would

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1 accept a DOE clearance, but the Applicant doesn't have  
2 an opinion on whether DOE would accept --  
.

3 JUDGE MOORE: Well, now wait a minute,  
4 Applicant. How can you accept classified information  
5 from another agency if it's not properly to be in your  
6 hands? I mean it would seem to the Board that you  
7 can't have it both ways here.

8 MR. POLONSKY: I understand, Your Honor.  
9 We don't know -- to answer your question, we don't  
10 know how -- whether it's a reciprocal.

11 JUDGE MOORE: All right. Is there any  
12 chance, for purposes of this proceeding, and is there  
13 any way in which the NRC and DOE can reach some kind  
14 of an agreement, and we're not talking about the  
15 Memorandum of Understanding, for dealing with this  
16 specific problem of how we're going to deal with  
17 security clearances? Can we have, for purposes of  
18 this proceeding, an agreement among the parties on how  
19 it will be handled in the same way the parties would  
20 present to the Board in a situation not involving  
21 classified information an agreed upon procedure for  
22 handling something?

23 MR. HULL: Your Honor, my concern here, I  
24 would say, yes, I would hope that something could be  
25 worked out. I do not want to see this hearing process

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1       delayed unnecessarily by this dispute. I'm advised by  
2       Tom Martin here that there is a reciprocity between  
3       the NRC and DOE in terms of recognizing each other's  
4       -- each agency's security clearances.

5                     JUDGE MOORE: All right. Would you file  
6       that with the Board immediately, Mr. Hull?

7                     MR. HULL: Yes, but let me add something  
8       that I tried to add earlier, Your Honor. We're  
9       focusing here on security clearances, but, again, I  
10      think you also need to keep in mind that with respect  
11      to any particular piece of classified information,  
12      need-to-know determination still has to be made by the  
13      originating agency.

14                  JUDGE MOORE: The Board is well aware of  
15       that, Mr. Hull, and that's spelled out in that  
16       sequence of steps that we put forth in our questions.

17                  MR. HULL: Very well.

18                  JUDGE MOORE: Judge Kelber has a number of  
19       questions in this regard.

20                  JUDGE KELBER: Okay. This is Judge  
21       Kelber. I have a set of questions, first, for the  
22       Applicant and then for the Staff, and then I'm going  
23       to come back to the Applicant. And forgive me if it's  
24       a little bit repetitious of some of the material  
25       that's already been discussed.

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1                   To the Applicant, in your brief dated July  
2                   3 of this year you stated, and I quote, "GANE has no  
3                   need for access to classified information to litigate  
4                   Contention 1." To cite various sets of information  
5                   illustrating that finding, you state, "Even DCS'  
6                   fundamental Nuclear Material Control Plan is not  
7                   expected to be classified." Then you go off and state  
8                   similar reasoning with respect to Contention 2. You,  
9                   however, concede that some of GANE's interrogatories  
10                  illicit, or try to illicit, classified information.  
11                  So I'm going to ask, do DCS or DOE possess restricted  
12                  data or national security information which might  
13                  reasonably be expected to be relevant to a decision on  
14                  the adequacy on the design basis of the physical  
15                  security of the facility or the material controller  
16                  and accounting provisions, given the questions raised  
17                  to date?

18                  MR. SILVERMAN: Your Honor, this is the  
19                  Don Silverman for the Applicant. Our position is that  
20                  there is, to this date, no classified information that  
21                  is needed to litigate those two contentions as they  
22                  have been admitted by the Board.

23                  JUDGE KELBER: But my question concerns  
24                  expectations.

25                  MR. SILVERMAN: Okay.

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1                   JUDGE KELBER: Do you possess restricted  
2                   data or national security information which might  
3                   reasonably be expected to be relevant?

4                   MR. SILVERMAN: Our position is no. There  
5                   is no such information that we possess that we would  
6                   reasonably expect to be relevant to the contention.

7                   JUDGE KELBER: All right. Now, in that  
8                   regard, is there that same category of information  
9                   that it could be reasonably be expected that the Staff  
10                  will need to reach a determination on these questions?

11                  MR. SILVERMAN: No, Your Honor, not in our  
12                  view. W, for example, have submitted voluntarily  
13                  design basis information in the revision to the CAR.  
14                  None of that is classified, and we've taken the  
15                  position, and continue to adhere to the position,  
16                  that, one, we are not required to provide that  
17                  information under the regulations, and, two, the  
18                  contentions are limited to the lack of design basis  
19                  information in the CAR not the adequacy of any  
20                  information we may have recently put into the CAR.

21                  JUDGE LAM: This is Judge Lam. Mr.  
22                  Silverman, in that regard, if the Board takes your  
23                  position to say that no security clearances is  
24                  necessary for the Intervenor, would you anticipate any  
25                  delay in this proceeding if you're wrong?

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1                   MR. SILVERMAN: I imagine that the  
2 potential for some delay would exist if there were  
3 later a determination that access to classified  
4 information was required. I can't quantify it but  
5 there would probably be some.

6                   JUDGE MOORE: Mr. Silverman, now you  
7 understand what one of our concerns is, if your  
8 position as an advocate is found not to be the case  
9 downstream, and yet we accept your position today, the  
10 delay is inevitable, and that delay is on your head.  
11 Is that something you're willing to accept in light of  
12 what we are told in your previous filings that this is  
13 a national interest and national security that this  
14 program move forward with all deliberate speed?

15                  MR. SILVERMAN: Your Honor, the answer is  
16 yes, our position is reflected in the pleadings we've  
17 filed to date on the subject.

18                  JUDGE MOORE: So your position is that you  
19 are perfectly willing to accept the delay if your  
20 position proves to be wrong that we need to stop this  
21 process in the middle so that security clearances can  
22 be obtained if there is such information.

23                  MR. SILVERMAN: Your Honor, I don't know  
24 -- like I said, I can't quantify the delay and I  
25 haven't sat down and tried to figure out the what ifs

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1       of perhaps a Commission determination a year from now  
2       or whenever that there was error in not providing  
3       classified information to the Intervenors. I haven't  
4       laid that out. We don't want delay. We're interested  
5       in moving this forward as quickly as possible. We  
6       would like to do everything possible for that to  
7       occur, but we adhere to the position that as the  
8       contentions have been admitted we haven't yet heard  
9       any reason why classified information would be needed  
10      to pursue those contentions.

11                  JUDGE MOORE: In that regard, Mr.  
12                  Silverman, what is the downside risk to having these  
13                  security clearances processed and granted or denied so  
14                  that we would not have any delay if it arises that  
15                  there is a need for the parties to prepare their cases  
16                  if they need this information?

17                  MR. SILVERMAN: Your Honor, there's -- I  
18                  guess we don't really have a problem with that. The  
19                  reason that we raised the issue of whether this  
20                  information is needed at all was really to possess a  
21                  potential way of dealing with this issue that avoids  
22                  all the complicated questions we're coming across now  
23                  on this whole issue of security clearances. We're  
24                  simply making the point that it may be premature to  
25                  get into all this. But we can't disagree with you

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1       that, and I think we've even said in our pleadings in  
2       the past that, and our interest is, if clearances are  
3       needed, they should be processed as promptly as  
4       possible, and the GANE should apply as soon as  
5       possible.

6                     JUDGE MOORE:    Judge Kelber, go ahead,  
7       please.

8                     JUDGE KELBER: Okay. I have a follow-on  
9       question to the Staff, and then I have some others.  
10      Mr. Hull, if either a request for additional  
11     information or the answer thereto includes restricted  
12     data or national security information, how will that  
13     exchange be handled? Will there, for example, be an  
14     unclassified redacted version?

15                  MR. HULL: I imagine there would be, Your  
16       Honor, and keep in mind that under the Subpart I  
17     provisions, which we're now operating under, the  
18     parties are obligated to try and avoid introducing  
19     classified information into proceedings.

20                  JUDGE KELBER: We understand that, and we  
21       hope that that's the case, but we can't take the  
22       chance because of the delays involved. But there  
23       would be a redacted version is your understanding.

24                  MR. HULL: Yes, Your Honor.

25                  JUDGE KELBER: Okay. I have some further

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1       questions. You stated in your filing of July 5 that

2       --

3                     JUDGE MOORE: Judge Kelber, let me  
4       interrupt you just one moment. Mr. Hull, do you agree  
5       with Mr. Silverman's assessment that, if I'm fairly  
6       paraphrasing him now, that it would be prudent to go  
7       ahead and take whatever steps are necessary to have  
8       the security clearances in place now so that if  
9       eventualities arise that it's necessary to determine  
10      or it's necessary that for the parties to prepare  
11      their cases that they need classified information, the  
12      steps that take the most time are already out of the  
13      way?

14                    MR. HULL: I think it would be prudent to  
15      process the security clearances, Your Honor, for the  
16      very fact that down the road we might avoid a  
17      substantial delay. It's my understanding, and the  
18      other gentlemen here can correct me if I'm wrong, that  
19      at a minimum it will take four months to process a  
20      Level L security clearance request.

21                    JUDGE MOORE: Okay.

22                    MR. HULL: And so that because of that, I  
23      think we do need to take steps to avoid the  
24      possibility of substantial delay down the road.

25                    JUDGE MOORE: Judge Kelber, go ahead.

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1                             JUDGE KELBER: Let me go on. You stated  
2 in your filing that the only classified information of  
3 this type and identified to date which may be relevant  
4 to GANE's admitted contention is contained in two NRC  
5 guidance documents, both of which were sent to DCS  
6 along with a cover letter dated March 13, 2000. Now,  
7 we've gone over that earlier. In your response of  
8 December 12 you state, "The Staff maintains, pursuant  
9 to 10 CFR 70,23(b), that any MYNA and fiscal security  
10 information of a classified nature is not needed to  
11 approve the construction of the proposed MOX Fuel  
12 Fabrication Facility, and such an approval would not  
13 authorize the use of special nuclear material.

14                             So my question is why was the classified  
15 material sent to DCS on March 13, 2000 if it is not  
16 needed? What was DCS' need to know at that time?

17                             MR. HULL: Your Honor, as I said before,  
18 I was not directly involved in sending that March 2000  
19 information to DCS, so I'm really not in a position to  
20 answer that question at this point.

21                             JUDGE KELBER: Well, Mr. Hull, you need to  
22 get yourself in a position to answer that question,  
23 because it seems to directly contradict what you've  
24 stated in your filing with us. It strikes the Board  
25 as these materials from the NRC sent to DCS are in

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1 fact highly relevant to a determination of the  
2 adequacy of the design bases for physical security and  
3 material control of the county because they  
4 essentially deal with, we gather from the description  
5 that you have of them, of what your designing against.

6 MR. HULL: I myself have not looked at  
7 that classified information, so I really -- I can't  
8 say anything at this point as to how relevant they  
9 might be to --

10 JUDGE KELBER: Well, let me put it this  
11 way -- this is Judge Kelber again -- had the Staff  
12 approved the construction of the facility, had access  
13 to the classified documents? If so, what was their  
14 need to know in as much as they do not require such  
15 information at this time? I mean this is the thing  
16 that's bothering us is that these documents were sent.  
17 Presumably, the Staff is familiar with them, it's in  
18 their minds, and how can they approve the construction  
19 without classified information? I mean they have it,  
20 they're using it, I think. If they don't need it, why  
21 did they get it?

22 MR. HULL: Your Honor, I was looking for  
23 that July 5 file, and I know I have it here somewhere,  
24 but I believe I stated in the footnote there that this  
25 was a March 2000 document.

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1                   JUDGE KELBER: Oh, I understand that, and  
2                   that that happens before this --

3                   MR. HULL: Happens a year before we even  
4                   received the construction authorization request.

5                   JUDGE KELBER: Oh, I understand that. The  
6                   question that we face is are these documents relevant,  
7                   is this classified information relevant? And you  
8                   state in your December 12 that it isn't needed, and  
9                   yet Staff has used it. If it isn't relevant, why does  
10                  the Staff use it? Why does the Staff need it? I've  
11                  handled classified information for many years, and you  
12                  don't have it unless you need to have it.

13                  JUDGE MOORE: I don't think we're going to  
14                  get a satisfactory answer to your question today, Your  
15                  Honor.

16                  JUDGE KELBER: Well, perhaps we ought to  
17                  get it soon.

18                  JUDGE MOORE: In that regard, Mr. Hull,  
19                  but for the classified nature of those documents, they  
20                  would have been in the hearing file, would they not?

21                  MR. HULL: Well, I'd have to look at that  
22                  information before I could answer that question, Your  
23                  Honor.

24                  JUDGE LAM: This is Judge Lam. Regarding  
25                  the last question Judge Kelber and Judge Moore asked,

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1       Mr. Hall, would you be able to find the answer and  
2       provide it to us at a later time? I understand you  
3       are not able to answer them today.

4                   MR. HULL: I can certainly check with Mr.  
5       Weber and if there's certain information that's not  
6       classified that can be revealed, I will see what I can  
7       do in that regard.

8                   JUDGE MOORE: That's not the question.  
9       The question is, most simply, but for the classified  
10      nature of those documents, would they have been in the  
11      hearing file?

12                  MR. HULL: And, again, I can't answer that  
13      question without looking at the classified material.

14                  JUDGE MOORE: Why did you then put the  
15      correspondence to have those attached or have stated  
16      that -- have put that in the hearing file?

17                  MR. HULL: Well, because I think the  
18      standard for material that's supposed to be in the  
19      hearing file is that if there's any potential that it  
20      could be relevant, you put it in, but that's not to  
21      say that it is relevant.

22                  JUDGE MOORE: No. The standard, if you'll  
23      look at the regulations, is that all correspondence  
24      between the applicant and the Staff dealing with the  
25      subject at the hand and any reports is to be in the

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1 hearing file.

2 MR. HULL: Okay.

3 JUDGE MOORE: And because it is, I  
4 believe, assumed by the regulations that it's relevant  
5 or you wouldn't be corresponding about it.

6 MR. HULL: The problem is here, Your  
7 Honor, we don't know if it's relevant or not, because,  
8 again, that information was sent before we even had  
9 the CAR in hand.

10 JUDGE MOORE: Can you tell us the nature  
11 of what's in those documents?

12 MR. HULL: I can't, Your Honor, because I  
13 haven't seen those documents.

14 JUDGE MOORE: All right. You have a  
15 number of people that are sitting with you who have  
16 because they sent them. Without revealing the  
17 classified information, in the same way that a  
18 classified document has to have a title that  
19 essentially describes its nature, can you describe the  
20 nature of those for us?

21 MR. HULL: I'm going to put you on mute  
22 for a minute and then confer with the others here.  
23 Hold on.

24 JUDGE MOORE: That's fine.

25 (Pause.)

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1                   MR. HULL: Hello. This is the Staff  
2                   Counsel, am I on the line again?

3                   JUDGE MOORE: Yes, you are.

4                   MR. HULL: I mistakenly cut us off. I  
5                   just meant to put you on mute. None of the gentlemen  
6                   here at the table with me have any knowledge of what  
7                   that classified information was that was sent by Mr.  
8                   Weber back in March of 2000. We're surmising that at  
9                   that point we anticipated getting a single application  
10                  from DCS that would cover both the construction and  
11                  operation of the proposed facility. It was at some  
12                  point later on that we learned that initially DCS  
13                  would only be requesting authority to construct the  
14                  proposed facility. So it's quite possible that this  
15                  information, while being relevant to operating the MOX  
16                  Facility, is not relevant to whether to authorize  
17                  construction of the MOX Facility.

18                  JUDGE MOORE: Okay. Mr. Hall, we've done  
19                  some digging and we have what we believe you sent to  
20                  us is the cover letter to that material which you're  
21                  apparently going to include in the cover letter anyway  
22                  included in the hearing file. It's marked  
23                  confidential but it says, "Upon removal of enclosure,  
24                  this document is not classified," and there are no  
25                  enclosures that were sent to us.

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1                   MR. HULL: I recall that as being the  
2 case, Your Honor.

3                   JUDGE MOORE: Okay. Now, that is  
4 entitled, "Subject: Design Basis Threat Guidance  
5 Applicable to the Mixed Oxide Fuel Fabrication  
6 Facility." And the under enclosures, Enclosure 1 was  
7 Design Basis Threat or Theft or Diversion of Guidance,  
8 Confidential," and Number 2, "Design Basis Threat for  
9 Radiological Sabotage Guidance, Confidential." Those  
10 titles in and of themselves indicate that the subject  
11 matter of the material that was sent in those guidance  
12 documents dealt with the design basis threat that  
13 would have to be designed against.

14                  The thing that concerns the Board is it  
15 would appear from these two documents alone that for  
16 Contentions 1 and 2 that the Intervenors need this  
17 information to adequately prepare for their case  
18 because how do they know whether you have fulfilled --  
19 that the Applicant has fulfilled its responsibility  
20 and the Staff has fulfilled its responsibility without  
21 knowing what the design basis needed to be designed  
22 to, if I can be unartful and state it that way?

23                  MR. HULL: Your Honor, if indeed the  
24 supposition turns out to be correct in that there is  
25 relevant information in that classified material,

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1 since the document was an NRC-originated document, the  
2 GANE representatives would first need to obtain the  
3 necessary security clearances and a need-to-know  
4 determination would need to be made by the NRC as to  
5 whether GANE's representatives could be given access  
6 to those classified documents.

7                   JUDGE MOORE: Applicant, in your earlier  
8 filings on Page 9 of the July filing, cover page, you  
9 state, "The design bases will not include any  
10 classified information with the exception of the  
11 specific attributes of the design basis threat  
12 mandated by the NRC under 10 CFR Part 73." The same  
13 basic question I'm addressing now to you that I just  
14 addressed to Mr. Hull: Doesn't that in and of itself  
15 indicate that there is classified information that  
16 will be needed by these Intervenors under Contentions  
17 1 and 2 to determine whether the design bases that the  
18 Applicant has put forward meet the regulations?

19                   MR. SILVERMAN: Your Honor, of the  
20 Contentions admitted, we don't think the answer -- we  
21 think the answer to that question is no. It's the  
22 lack of information in the CAR, it's not the adequacy  
23 of information that was not there. And, you know, we  
24 have --

25                   JUDGE MOORE: Have you amended your

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1 application to provide any new information?

2 MR. SILVERMAN: We have amended our  
3 application to include our proposed design bases for  
4 MYNA and physical security, yes.

5 JUDGE MOORE: Why wasn't that included  
6 originally in your application?

7 MR. SILVERMAN: We don't believe it was  
8 required, we still don't believe it was required, but  
9 we made the decision on a voluntary basis to include  
10 that information in the supplement to the CAR. And we  
11 believe in fact that, if I remember correctly, the  
12 Staff SER, draft SER, on the subject acknowledges that  
13 that information isn't needed for construction  
14 authorization, and certainly we believe it's not  
15 needed for processing of the contentions, as admitted.

16 JUDGE MOORE: Okay. Thank you. Judge  
17 Kelber, you have some more questions.

18 JUDGE KELBER: Let me continue now with  
19 Mr. Hull. And we may go around the same bar as we  
20 have previously, but if this -- you said that the  
21 Staff don't need to refer to any classified  
22 information, but if the Staff were to approve  
23 construction to need the classification information  
24 now, since they have it and they thought that somebody  
25 else needed it, but will not refer to such information

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1       in their approval documents, how are review bodies  
2       such as the ACRS, the EDO and the Commission to  
3       conduct their reviews?

4                    MR. HULL: I'm sorry, Your Honor, I didn't  
5       quite follow your question there.

6                    JUDGE KELBER: Well, basically, the Staff  
7       has got access to these design basis documents. They  
8       may feel that they can approve it without referring to  
9       that information, but they have the information. Now,  
10      how do the ACRS, the EDO and the Commission review  
11      what the Staff has set forth without that information,  
12      without that same information?

13                  MR. HULL: What the Agency would be  
14       approving, Your Honor, is what DCS has submitted to us  
15       in its application. If DCS has made the determination  
16       that no classified information is necessary to approve  
17       the CAR, that is what the NRC would be evaluating.  
18       The NRC is not necessarily evaluating information that  
19       we gave DCS but that DCS did not make part of its  
20       application.

21                  JUDGE KELBER: In other words, you're  
22       saying that the Agency could approve a design whose  
23       basis may or may not conform to regulations?

24                  MR. HULL: No, I'm not saying that, I'm  
25       just saying that we -- the NRC approves applications

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1       that are submitted to us. If those applications don't  
2       contain classified information, then there's no need  
3       to know that classified information in order to  
4       approve the application.

5                     JUDGE KELBER: Let me use a homemade  
6       example, Mr. Hull, to try and get my point across. I  
7       say to you, "Design m a physical security system for  
8       my plant." And you say, "What threat do you want to  
9       design against?" I say, "I can't tell you that, it's  
10      classified." So you come up with a design calling for  
11      a chain link fence with a gate and a padlock and a  
12      sign, "Keep Out." I say, "No, that's not good  
13      enough." So you come back with another design which  
14      has multiple walls, moats, mine fields and all the  
15      rest, and you say, "Gee, that's overdone." Do you see  
16      my point? Somebody knows what you're designing  
17      against, what the design basis is, and you're using  
18      that in making the approval.

19                  MR. HULL: Your Honor, you are correct in  
20      that interaction does go on while a license  
21      application is being considered, and the interaction  
22      I'm referring to is requests for additional  
23      information that the Staff makes of applicants. If  
24      the Staff receives the CAR or any other application  
25      and determines it needs more information before it can

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1        approve the application, it sends out a request for  
2        additional information to the applicant. That's been  
3        done here to a very extensive extent, but to date, at  
4        least to my knowledge, the Staff has not said to DCS  
5        in any RAI that, "Well, you need to submit classified  
6        information in order for us to approve the design  
7        basis."

8                   JUDGE KELBER: No, I understand that.  
9        They could come up with a design which clearly meets  
10      the design basis, which they know. And the Staff  
11      could say to themselves, yes, it meets the design  
12      basis but they don't have to say what the design is.  
13      because it's classified. Is that your point, that  
14      they can keep this all under their hat?

15                  MR. HULL: I don't believe there's been  
16      any -- the point has not been established yet, Your  
17      Honor, that any classified information is necessary in  
18      order to approve the CAR. Both DCS and the Staff,  
19      think, have been consistent in stating that in our  
20      various pleadings.

21                  JUDGE KELBER: In other words, the design  
22      basis issued by the NRC is irrelevant to this entire  
23      proceeding?

24                  MR. HULL: No, Your Honor, but hang on --

25                  JUDGE KELBER: How is it relevant?

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1                   MR. HULL: Hang on a second, please.

2                   (Pause.)

3                   MR. HULL: Your Honor?

4                   JUDGE MOORE: Yes, go ahead, Mr. Hull.

5                   MR. HULL: Okay. We have just been  
6                   conferring here amongst ourselves to try to answer  
7                   Judge Kelber's question. There may very well be down  
8                   the road classified information that will be relevant,  
9                   but it will be relevant to whether there should be an  
10                  operating license issued to DCS. There's no  
11                  information at this point of which the Staff is aware  
12                  that would be relevant to the question of whether the  
13                  Construction Authorization Request could be granted.  
14                  No classified information is needed in order to make  
15                  that determination.

16                  JUDGE KELBER: Okay. Let me ask a  
17                  question now of DCS and then I'm going to come back to  
18                  you, Mr. Hall. Mr. Silverman, if the Staff visits  
19                  DCS or DOE and there reviews classified information,  
20                  has NRC received the information?

21                  MR. SILVERMAN: Oh, Your Honor, I'll be  
22                  honest with you, I haven't thought through that one  
23                  before. I don't think so, but I certainly can't cite  
24                  you precedent on that. I've read received to mean  
25                  information in the physical possession of the NRC, but

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1       --

2                     JUDGE KELBER: The question in my mind, I  
3 go back quite a ways in handling secure information,  
4 and in my days, if it was in your mind, you had  
5 received it. But I must say that I think we would  
6 appreciate any information people can cite to us on  
7 what the meaning of the term "received" is. I  
8 continue until then to think that if it's in your  
9 mind, you've received it. But, well, maybe Mr. Hull  
10 has got some view on that.

11                  MR. HULL: Judge Kelber, I think I touched  
12 on this earlier today where I think the key thing we  
13 need to focus on is what agency originated the  
14 classified information, not so much as who has  
15 received it or not.

16                  JUDGE KELBER: Well, the regulations call  
17 for -- do discuss the question of information received  
18 by the NRC. That's why this question was put.

19                  MR. HULL: But if you refer to 2.905(a),  
20 it talks about which agency originated the classified  
21 information.

22                  MR. SILVERMAN: Your Honor, if I may, I  
23 think this is right, I understand where you're coming  
24 from on the receipt issue, and I'm not a security  
25 expert but my understanding is you can't even be told

1 about classified information, and we're not talking  
2 about written information, but you can't be told  
3 without a clearance. So for purposes of whether you  
4 must have a clearance or not, and whether you have a  
5 need to know, I think someone does receive information  
6 when they are told of it. But received in the context  
7 of that Subpart I is different. It's not do you have  
8 to have a clearance, it is what procedure is used for  
9 the clearance process?

10 JUDGE KELBER: Well, for the need to know,  
11 anyhow.

12 MR. SILVERMAN: Yes. So I think there's  
13 a distinction there.

14 JUDGE KELBER: Okay. Thank you. Now,  
15 back to Mr. Hull. Are there regulations regarding  
16 safeguards physical security and MYNA stable, at least  
17 as far as this facility is concerned, or are there  
18 likely to be changes over the next year?

19 MR. HULL: I think in response to the  
20 September 11, 2001 terrorist attacks, the design basis  
21 threat, the whole design basis threat issue has been  
22 under review. So it's quite possible that we could be  
23 seeing some changes in that. But at this point, I  
24 don't have any idea what those changes could be.

25 JUDGE MOORE: Okay. Thank you very much

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1 for pairing up with me. Although the Board is trying  
2 to admit that in this area we have not had previous  
3 occasion to have to wrestle with these, and we  
4 understand the parties' difficulty in also wrestling  
5 with this because this is not an area that we often  
6 have to get into, however, we do feel a bit like the  
7 dentist having to deal with a great number of impacted  
8 wisdom teeth in trying to extract this information  
9 today.

10 Be that as it may, let's switch to  
11 schedules. Mr. Hull, are there any changes that you  
12 know of today in the Staff's schedule?

13 MR. HULL: You're talking in terms of when  
14 the draft Environmental Impact Statement and draft SER  
15 will be issued?

16 JUDGE MOORE: Yes or anything else that  
17 will impact the time in which it will take to complete  
18 this case.

19 MR. HULL: I'm aware of no such schedule  
20 change at this point, Your Honor. The Staff still  
21 intends to issue the draft EIS in February of 2003,  
22 and we'll issue the next draft SER in April of 2003.

23 JUDGE MOORE: Mr. Silverman, are there any  
24 changes that the Applicant is aware of or that your  
25 colleagues at DOE are aware of that will be impacting

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1           the schedule?

2                            MR. SILVERMAN: I can only speak for us,  
3                           Your Honor, and as far as we know, the schedule is  
4                           holding at this time.

5                           JUDGE MOORE: We, like you, read the  
6                           newspapers and the trade press, and we were somewhat  
7                           astounded, frankly, to see that DOE is proposing a new  
8                           plutonium pit facility. Will that impact your needs  
9                           to do a revised ER in this case? And, Mr. Hull, will  
10                          that affect your draft or final EIS in this case?

11                         MR. HULL: I'm advised that it will not,  
12                         Your Honor, although I have not -- I don't think I've  
13                         seen this DOE announcement you seem to be referring  
14                         to.

15                         MR. SILVERMAN: I don't believe there is  
16                         any impact on our environmental report, Your Honor.

17                         MS. CARROLL: Your Honor, if I may, this  
18                         is Glenn Carroll, and we participated at both EIS  
19                         processes, and David Brown, who's part of the team  
20                         doing the NRC EIS on the MOX Facility, said that if  
21                         Savannah River Site is chosen for the pit facility,  
22                         and I believe the DOE will be publishing its draft EIS  
23                         in May, then they would have to look at that question.  
24                         Although they may find no impact, they would have to  
25                         look at it, so it would mean they would have to revise

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1                   the EIS for the MOX Facility.

2                   JUDGE MOORE: Did you say May of this  
3                   coming year?

4                   MS. CARROLL: I believe that's correct.

5                   JUDGE MOORE: Thank you. Okay.

6                   MS. CARROLL: That's in the Federal  
7                   Register Notice. I don't have it at my fingertips.

8                   JUDGE MOORE: The Board would finally like  
9                   to let the parties know that they're in full agreement  
10                  with Ms. Curran's correspondence by letter in response  
11                  to the Applicant's correspondence to the Board by  
12                  letter concerning narrowing Contentions 1 and 2, and  
13                  that if the Applicant wishes these contentions to be  
14                  narrowed from the way in which they were admitted, it  
15                  should file appropriate pleadings, such as a Motion  
16                  for Summary Disposition, in the Board's view.

17                  MR. SILVERMAN: We understand, Your Honor.

18                  JUDGE MOORE: Or whatever other  
19                  appropriate pleadings is necessary.

20                  MR. SILVERMAN: Okay. Very good.

21                  JUDGE MOORE: Do the parties have anything  
22                  further that they would like to bring to our  
23                  attention?

24                  MS. CURRAN: Judge Moore, this is Diane  
25                  Curran. I just wanted to briefly comment on something

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1       that I think Mr. Silverman said earlier, that the  
2       supplemental CAR contains design basis information on  
3       security and MYNA. I think you said that, right, Don?

4                    MR. SILVERMAN: Yes.

5                    MS. CURRAN: We have reviewed that  
6        information, and we don't believe it satisfies the  
7        concerns in our contention, so I just wanted to make  
8        that clear.

9                    JUDGE MOORE: All right. Is there  
10      anything else?

11                  MS. CARROLL: This is Glenn Carroll and  
12        I'm a little blown away by some unexpected turn of  
13        events like the question of our pro se status. And I  
14        just would like to express that I would feel that this  
15        group of parties should have had an opportunity to  
16        discuss it formally. GANE should have an opportunity  
17        to defend its reasons for conducting a pro se  
18        intervention ideally prior to your issuing an order  
19        about it and us being thrown into what looks to be a  
20        very lengthy process to have the Commission consider  
21        these things so that it would -- it looks to me like  
22        we might lose our pro se status for several months at  
23        best without ever having had an opportunity to even  
24        address the question before now.

25                  And I want to reiterate that if we can

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1 establish which agency we should apply for a clearance  
2 to, it seems to me that there's nothing threatening  
3 about applying for a clearance, and the real question  
4 is it a need at the time when we attempt to get a  
5 document. And it even would seem to me that any bozo  
6 could step up to the plate and say, "Hey, I'd like a  
7 security clearance."

8 JUDGE MOORE: The Board will be issuing an  
9 order in due course, and we believe that our rendition  
10 and our questions in our previous order setting forth  
11 the sequence of events is generally correct, and it is  
12 on that basis in which the Board will proceed. And if  
13 the Board determines that there appears at this point  
14 to be a need for the parties to be able to prepare  
15 their case to need security clearances, we will issue  
16 an order which as we read these regulations is a first  
17 step. Then the parties seeking the clearances will  
18 need to make the formal application, and we will tell  
19 you where that formal application should be made in  
20 our order.

21 Is there anything else? Hearing nothing  
22 else, then we thank you for your participation today.  
23 We're sorry it took this long, but the Board had a  
24 number of questions in trying to wrestle with this,  
25 and we appreciate your best efforts in trying to

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1 answer them. Again, we apologize for tying you up  
2 this long. Hearing nothing further, we'll say good  
3 day and we'll be issuing an order in due course.

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This is to certify that the attached proceedings  
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Name of Proceeding: Duke Cogema Stone and  
Webster Savannah River MOX  
Fabrication Facility

Docket Number: 701-3098-ML

Location: (Telephone Conference)

were held as herein appears, and that this is the  
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