

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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

Docket No. 070-03098

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In the Matter of)
)
DUKE, COGEMA, STONE & WEBSTER)
)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))
)
_____)

CLI-01-13

ORDER

**REFERRING PETITIONS FOR INTERVENTION AND REQUESTS FOR HEARING
TO ATOMIC SAFETY AND LICENSING BOARD PANEL**

I. Introduction.

On February 28, 2001, the consortium of Duke, Cogema, and Stone & Webster ("the Applicant") submitted an application for authorization to build a mixed oxide ("MOX") fuel fabrication facility, which would be located at the United States Department of Energy's Savannah River site in South Carolina. The NRC Staff published a notice in the *Federal Register* announcing receipt of this construction authorization request ("CAR") and the related environmental report and providing the public with information necessary to obtain a copy of each document. See 66 Fed. Reg. 13,794 (Mar. 7, 2001). Subsequently, the Commission published a Notice of Opportunity for a Hearing, 66 Fed. Reg. 19,994 (April 18, 2001), which also announced receipt of a related quality assurance plan. The Notice indicated that the hearing process would consist of an enhanced version of our Subpart L procedures. See 10 C.F.R. § 2.1201, *et seq.*

Four petitions to intervene and/or requests for hearing were timely filed. The four petitioners are: (1) Georgians Against Nuclear Energy; (2) Environmentalists, Inc.; (3) Blue Ridge Environmental Defense League; and (4) Charles and Edna Foster. This Order refers the intervention petitions and hearing requests to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. The Commission has determined that in this proceeding, the Chief Administrative Judge has the option of either appointing a three-member panel under 10 C.F.R. § 2.721 to serve as the presiding officer for the proceeding or designating a single administrative judge under 10 C.F.R. § 2.1207. Under 10 C.F.R. § 2.1209(j), a single presiding officer may appoint special assistants. In that case, the presiding officer should promptly notify both the Commission and the parties. Thus, for the purposes of this Order, the term "presiding officer" means a single presiding officer with duly appointed assistants, a single presiding officer alone, or a three-member panel. The presiding officer, in turn, will rule on the pending petitions to intervene and requests for hearing and preside in the event one or more requests is granted. If one or more hearing requests are granted, the presiding officer will consider the admitted contentions, evaluate the written presentations and testimony, and may conduct oral questioning of witnesses, pursuant to 10 C.F.R. § 2.1235, assisted by written questions submitted by the parties.

As we discuss below in Section II, and as described in the Notice of Opportunity for a Hearing, the Commission has decided to enhance the effectiveness of the ordinary Subpart L adjudicatory process by adding additional procedures, including the option for oral questioning of witnesses by the presiding officer as necessary, to supplement the record in this proceeding. In Section III, we provide guidance for conducting a proceeding if a hearing is granted, and a suggested schedule for the proceeding.

II. Use of Subpart L and Certain Subpart G Hearing Procedures.

This adjudicatory proceeding relates to the proposed issuance of a materials license; thus, the proceeding is governed by the informal hearing procedures contained in 10 C.F.R. Part 2, Subpart L. See 10 C.F.R. § 2.1201(a)(1). Accordingly, Subpart L procedures will govern, except as specified below. To enhance the effectiveness of this proceeding, the Commission is ordering the use of certain additional procedures in this proceeding in the exercise of its inherent

supervisory authority.⁽¹⁾ These additional procedures essentially track the proposed changes to Subpart L as reflected in the proposed rulemaking recently published by the Commission. See *Changes to Adjudicatory Process -- Proposed Rule*, 66 Fed. Reg. 19,610 - 71 (April 16, 2001). Had we not taken this step, the exclusive use of Subpart L procedures would most likely have led to an entirely paper proceeding in this case.

A. Contentions.

As discussed in the Notice of Opportunity for a Hearing, any petitioner found to have standing will be required to submit contentions, which the presiding officer will evaluate using the "contention" standards in 10 C.F.R. § 2.714(b)(2) in lieu of the provisions relating to "areas of concern" found in Subpart L (See, e.g., 10 C.F.R. §§ 2.1205(e)(3); and 2.1205(h)). Furthermore, if the parties submit late-filed contentions, the presiding officer should evaluate them using the factors specified in 10 C.F.R. § 2.714(a)(1). Access to the proprietary version of the CAR, for purposes of submitting any contentions based upon withheld information, will be subject to later determination by the presiding officer, after rulings on standing are made.

B. Discovery.

Following the admission of any contentions and the submission of the hearing file under 10 C.F.R. § 2.1231, the presiding officer will allow limited discovery by either deposition or interrogatory (or both) pertaining to admitted contentions from non-NRC sources and will permit the use of information gained thereby as evidence if admissible under 10 C.F.R. § 2.743(c). Discovery will be governed by 10 C.F.R. §§ 2.740a(a)-(i), and 2.740b. Document discovery should not be necessary, given the inclusiveness of the hearing file requirements of 10 C.F.R. § 2.1231(b)-(c). To avoid burdening the record with extraneous and unsupported documents, any documents not part of the hearing file will be admissible as evidence only if sponsored by an appropriate witness. In ruling on any discovery matters, the presiding officer will use the standards of 10 C.F.R. § 2.740. Thus, the provisions of 10 C.F.R. § 2.1231(d) will not be applicable in this case.

Similar to the practice under current Rule 26 of the Federal Rules of Civil Procedure, the presiding officer should order the parties to exchange certain information without waiting for the initiation of formal discovery, such as the names, addresses, and opinions of any expert witnesses, any documents not already part of the Hearing File that those experts rely on for their opinions, and any other information relevant to the admitted contentions which the presiding officer may require in its discretion. Consistent with 10 C.F.R. § 2.1209, we expect the presiding officer to place reasonable limits on the amount of discovery in order to avoid delay. For example, the presiding officer may designate "lead parties" for any admitted contentions and limit the number of depositions and interrogatories addressing each contention. See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 242-45 (1998).

Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h) and 2.740, will be suspended until after issuance of the required final Safety Evaluation Report ("SER") and the Final Environmental Impact Statement ("EIS"). This approach will allow the Staff to complete its safety and environmental reviews without undue delay, while at the same time making the Staff available to participate in discovery and in the hearing at the appropriate time. Any discovery against the Staff shall be by the same methods and subject to the same limits as discussed above, absent good cause shown or unforeseen circumstances.

C. Written and Oral Presentations.

Following discovery on any admitted contentions, and after the final SER and EIS are issued, the parties will submit simultaneous written presentations pursuant to 10 C.F.R. § 2.1233. These written presentations must include any testimony on which that party relies. Written presentations for each party will be subject to a 50-page limitation (excluding testimony), absent good cause shown by a party for exceeding this page limitation. The parties will then submit simultaneous responses to the written presentations, which will be subject to a 30-page limitation (excluding testimony), absent good cause shown. In submitting written presentations, or responses to written presentations, any party wishing to present testimony must do so by affidavit or declaration, using a question and answer format in the form of a direct examination. Any party presenting such testimony must agree to make the witness available, in person, for questioning by the presiding officer, in the event the presiding officer decides such questioning is necessary to create an adequate record for decision. After submitting responses to written presentations, the parties will have the opportunity to submit (to the presiding officer only) lists of proposed questions for the presiding officer's potential use in questioning the witnesses.

Following the receipt of written presentations and any responses, Subpart L allows the presiding officer to submit written questions to the parties. See 10 C.F.R. § 2.1233(a). But in this proceeding, if the presiding officer finds that additional questioning is necessary to ensure an adequate record for decision, the presiding officer shall conduct an oral presentation session pursuant to 10 C.F.R. § 2.1235 to supplement the written record, rather than submitting written questions to the parties. Thus, the parties will have the opportunity to propose to the presiding officer a list of questions they wish to have propounded to the witnesses, see 10 C.F.R. § 2.1235(a), and the presiding officer will have the discretion to question some or all of the witnesses to obtain any further information needed to create an adequate record for decision. Absent some unforeseen complexity in this case, the oral presentation session should not exceed ten (10) days. Finally, the presiding officer should request the parties to submit simultaneous Findings of Fact and Conclusions of Law after the close of the oral presentation session.

III. Commission Guidance.

A. Scope of Proceeding.

To grant the construction authorization request, the Staff must find that the proposed design bases of the MOX fuel fabrication facility's "principal structures, systems, and components," together with the quality assurance program submitted by the Applicant, "provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." 10 C.F.R. § 70.23(b). Additionally, to meet the NRC's responsibilities under the National Environmental Policy Act (NEPA), the Staff's environmental review must conclude "that the action called for is the issuance of the proposed license." 10 C.F.R. § 70.23(a)(7). The presiding officer shall be guided by these safety and environmental regulations in determining whether proffered contentions are admissible under the 10 C.F.R. § 2.714(b)(2) standards. The petitioners must demonstrate that a genuine dispute exists between it and the Applicant and that the dispute lies within the scope of the proceeding. It is the responsibility of all petitioners to provide the necessary information to show that their contentions satisfy the requirements for admission.⁽²⁾ If rulings on the admission of contentions, or the admitted contentions themselves, raise novel legal or policy questions, the presiding officer should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of the proceeding but not put into controversy by the parties will be considered by the presiding officer only where the presiding officer finds that those matters raise serious safety, environmental, or common defense and security issues. Such consideration should be exercised only in extraordinary circumstances. If the presiding officer decides to raise a matter on its own initiative, a copy of the ruling, setting forth the reasons in general terms, must be transmitted to the Commission. The presiding officer should not proceed to consider such *sua sponte* issues unless the Commission approves the presiding officer's proposal to do so.

B. Proposed Schedule.

The Commission believes that this proceeding should be completed in a timely and efficient manner because the applicant is seeking authorization to build a facility that would implement a significant objective of national security and policy: reducing the inventory of plutonium in the nation's nuclear weapons' inventory in accordance with the U.S. -- Russian Federal Plutonium Disposition Agreement. Accordingly, the Commission directs the presiding officer to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of an initial decision on the CAR within approximately two years from the date that the NRC received the request. The Commission believes that this goal may be reasonably achieved under the current rules of practice -- as modified by this order -- and by our understanding of the Staff's current schedule for completing its safety and environmental reviews. In issuing and implementing a schedule, we do not expect the presiding officer to sacrifice fairness and sound decision-making. Furthermore, we recognize that any schedule will be subject to revision depending upon the number and complexity of the contentions admitted. However, we do expect the presiding officer to use the techniques specified in this order and in the Commission's 1998 policy statement on the conduct of adjudicatory proceedings to ensure the efficient resolution of contested issues.⁽³⁾

We have provided a series of milestones as guidance for the presiding officer in developing a schedule. The presiding officer should use these milestones as guidelines for conclusion of significant steps in the adjudicatory proceeding. We have listed the milestones in two phases that assume that the Final EIS and SER will not be available until some time after the presiding officer has ruled on the petitioners' standing and the admissibility of any proposed contentions. Obviously, if the SER and EIS are issued on a different schedule, the presiding officer will have to modify the schedule accordingly. As in all matters of scheduling, the presiding officer will necessarily be guided by events as they arise.

The schedule of milestones the presiding officer should apply is as follows:

Phase 1:

10 days from date presiding officer appointed:	Simultaneous answers to hearing requests filed by the Applicant and NRC staff.
45 days from date presiding officer appointed:	Petitioners submit proposed contentions and any additional filings on standing.
75 days from date presiding officer appointed:	Simultaneous responses to contentions filed by the Applicant and NRC staff.
85 days from date a presiding officer appointed:	Prehearing conference on standing and contentions.
130 days from date presiding officer appointed:	Decision on standing and admissibility of proposed original contentions; start of discovery against non-NRC Staff parties.
140 days from date presiding officer appointed:	Distribution of hearing file.

Phase 2.

30 days from issuance of EIS and SER:	Deadline for intervenor(s) to submit late-filed contentions or amended contentions on environmental issues in accordance with 10C.F.R.
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	2.714(b)(2)(iii)
40 days from issuance of EIS and SER:	Responses to late-filed contentions by applicant and the Staff.
45 days from issuance of EIS and SER:	Completion of discovery against the NRC staff on admitted contentions from Phase 1.
50 days from issuance of EIS and SER:	Decision on admissibility of late-filed contentions by presiding officer. If any late-filed contentions are admitted, start discovery period against all parties on these contentions alone.
80 days from issuance of EIS and SER	Completion of discovery on any admitted late-filed contentions
90 days from issuance of EIS and SER	Simultaneous written presentations regarding any admitted contentions from Phases 1 and 2.
105 days from issuance of EIS and SER:	Simultaneous responses to written presentations.
120 days from issuance of EIS and SER	Submission of proposed questions for presiding officer's potential use under 10 C.F.R. §2.1235.
125 days from issuance of EIS and SER:	Decision on whether to held oral presentation under 10 C.F.R. §2.1235.
135 days from issuance of EIS and SER:	Start of oral presentation session.
20 days from conclusion of oral session:	Simultaneous filing of proposed findings of fact and conclusions of law by all parties.
80 days from conclusion of oral session:	Presiding officer to render initial decision on all admitted contentions.

To meet the above milestones, the presiding officer shall direct the participants to serve all filings by electronic mail (to be considered timely, such filings must be received by the presiding officer and the parties no later than midnight Eastern Time (either Daylight or Standard) on the date due, unless otherwise designated by the presiding officer), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the presiding officer should adopt other expedited methods of service, such as express mail, which would ensure prompt receipt. If pleadings are filed by electronic mail, or other expedited methods of service that ensure receipt on the due date, the additional period provided in 10 C.F.R. § 2.710 for responding to filings served by first-class mail or express delivery shall not be applicable. To avoid unnecessary delays, the presiding officer should not grant requests for extensions of time absent unavoidable and extreme circumstances. Moreover, unless otherwise justified, the presiding officer shall require the parties to file all submittals simultaneously where appropriate. See 10 C.F.R. § 2.1233(a).

Furthermore, parties are obligated in all of their filings to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

Finally, if a hearing is granted, the Commission directs the presiding officer to inform the Commission promptly, in writing, if any single milestone appears likely to be missed by more than 30 days. The presiding officer should include an explanation of why that milestone cannot be met and the measures that will be taken to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

IV. Conclusion.

The Commission directs the presiding officer to conduct this proceeding in accordance with the guidance specified in this order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the presiding officer and participants, and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission

/RA/

Annette Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of June, 2001.

1. Pursuant to 10 C.F.R. § 2.1209(k), the Commission may approve the use of procedures other than those specified in Subpart L in a particular Subpart L proceeding. See *Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 87 (1992). See generally *Baltimore Gas & Electric Company* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39 (1998), *aff'd sub nom. National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 121 S.Ct. 758 (2001).

2. Contentions must be based on information (or the alleged lack thereof) contained in either the Applicant's CAR or its

environmental report. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 363 (1993) (intervention petitioners must reference specific parts of application or accompanying environmental report believed to be inadequate). In filing contentions, petitioners must evaluate the applicant's submittals, and not simply wait for the Staff to issue its SER or EIS before formulating contentions. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045-49 (1983) (even if a Staff SER or EIS contains information not found in an applicant's submittals, contentions based on such differences are not automatically admissible, but are evaluated using the criteria of 10 C.F.R. § 2.714(a)(1)). See also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 (1996); *Rancho Seco*, 37 NRC at 362-63. Contentions must be specific and accompanied by appropriate factual, documentary, or expert support. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-35 (1999).

3. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998). See also Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).