July 5, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

# NRC STAFF'S RESPONSE TO GEORGIANS AGAINST NUCLEAR ENERGY'S APPLICATION FOR SECURITY CLEARANCES

## INTRODUCTION

On June 7, 2002, Georgians Against Nuclear Energy (GANE) submitted to the Atomic Safety and Licensing Board "[GANE's] Application For Security Clearances" (June 7 Application), seeking Level L security clearances for three GANE representatives: Coordinator Glenn Carroll; legal adviser Diane Curran; and one of GANE's expert witnesses, Dr. Edwin Lyman. The Board has directed Duke Cogema Stone and Webster (DCS) and the staff of the United States Nuclear Regulatory Commission (NRC Staff) to file responses to the June 7 Application by July 5, 2002, and to address therein several specific items. *See* "Memorandum and Order" (unpublished), dated June 12, 2002 (June 12 Order), at 2. These items are addressed in Section B, below.

However, as discussed below in Section A, before taking any other action on the June 7 Application, the Board should certify to the Commission, pursuant to 10 C.F.R. § 2.1209(k), the Board's recommendation on the extent to which the hearing procedures set forth in 10 C.F.R. Part 2, Subpart I (*see* 10 C.F.R. §§ 2.900 through 2.913), and other hearing procedures relevant thereto, should be used in this adjudication. Additionally, Section A sets forth the NRC Staff's rationale for using selected Subpart I procedures here.

## BACKGROUND

In December, 2001, the Board admitted several of GANE's contentions, which generally oppose the DCS construction authorization request pertaining to the proposed mixed oxide (MOX) fuel fabrication facility. *See* LBP-01-35, 54 NRC 403 (2001). In admitting GANE's contentions 1 and 2 (titled "Lack of Consideration of Safeguards in Facility Design," and "Lack of Consideration of Physical Protection in Facility Design," respectively), the Board recognized the possibility of using the Subpart I hearing procedures when it stated as follows:

> Although neither DCS nor the staff has brought this matter to the attention of the Licensing Board, section 13.1.4.3 [of NUREG-1718, the "Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility"] states that the 'NRC has determined that public disclosure of the details of the physical protection system for a MOX facility could affect common defense and security and should be classified as Confidential National Security Information.' Thus, these two contentions may require invocation of the procedures of 10 C.F.R. Part 2, Subpart I, even though this proceeding is being conducted pursuant to 10 C.F.R. Part 2, Subpart L, not Subpart G.

LBP-01-35, *supra*, 54 NRC at 429. The Board recognized, though that by its terms, Subpart I's applicability is limited to proceedings conducted under Subpart G. The Commission previously decided in its referral order (under which this Board was established) that this adjudication on the DCS construction authorization request would be a Subpart L proceeding. *See* CLI-01-13, 53 NRC 478, 480 (2001).

As reflected above, the Board noted, in LBP-01-35, that NUREG-1718 reflects the Staff's determination that information regarding the physical security system for a MOX facility will be classified as "Confidential" National Security Information. The only classified information of this type identified to date which may be relevant to GANE's admitted contentions is contained in two NRC guidance documents, both of which were sent to DCS along with a cover letter dated March 13, 2000.[1] Due to the classified information contained in the two NRC guidance documents,

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[1] NRC Staff counsel recently became aware of this March 13 cover letter -- sent by the NRC (continued...)

they are not being made part of the publicly-accessible MOX hearing file. To the NRC Staff's knowledge, the withheld guidance documents are the only MOX-related classified information held by the NRC at this time.

To the extent that the June 7 Application also pertains to unclassified safeguards information (*see, e.g.*, June 7 Application, at 2), the only MOX-related safeguards information held by the NRC at this time is referenced in hearing file item 69 -- cover letter dated November 8, 2001, sent by the NRC (A. Persinko) to DCS (P. Hastings). This cover letter was accompanied by a "Safeguards Advisory for Power Reactors, Decommissioning Reactors, Category 1 Fuel Facilities and Gaseous Diffusion Plants," dated October 6, 2001. Pursuant to 10 C.F.R. § 73.21(c), this Safeguards a Advisory document was not made part of the publicly-accessible hearing file. Issues pertaining to the production of safeguards information are discussed in Section A, *infra.*

## DISCUSSION

### A. Applicability of Subpart I and Other Hearing Procedures

Notwithstanding 10 C.F.R. § 2.901, the NRC Staff believes, for the reasons discussed below, that with minor exception, all of the hearing procedures set forth in 10 C.F.R. Part 2, Subpart I, should be made applicable to this adjudicatory proceeding, and should govern access to any classified information held by the NRC which may be relevant to the admitted contentions. However, as indicated above, before any Subpart I procedures may be used in this Subpart L proceeding, the Board, pursuant to 10 C.F.R. § 2.1209(k), should certify to the Commission the Board's recommendation on the extent to which the Subpart I hearing procedures (and others relevant thereto) should be used here. In Subpart L proceedings such as this one, the general rule

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[1](...continued)
(M. Weber) to DCS (P. Hastings) -- and a copy of it is attached hereto. Pursuant to 10 C.F.R. § 2.1231, this cover letter is being added to the MOX hearing file submitted in December 2001. For purposes of sequentially numbering hearing file items, the NRC Staff is designating this cover letter as hearing file item 5A.

is that the Commission must approve the use of any non-Subpart L hearing procedures. *See Safety Light Corp., et al.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 87 (1992), *citing* 10 C.F.R. § 2.1209(k).

Except for 10 C.F.R. §§ 2.901 and 2.909,[2] the NRC Staff urges that the hearing procedures set forth in 10 C.F.R. Part 2, Subpart I, be used in this adjudication. Regarding 10 C.F.R. § 2.901, the NRC Staff notes that the wording of this provision has remained the same since Subpart I was amended in its entirety in 1976 (*see* note 1, supra, and 41 Fed. Reg. 53328 *et seq.* (December 6, 1976)), at which time the hearing procedures of 10 C.F.R. Part 2, Subpart L, had not yet been established. Thus, had this MOX proceeding then been held, it would have been a Subpart G proceeding - the only hearing procedures then in place. Moreover, the Commission has already required that the Subpart G contention procedures (10 C.F.R. § 2.714(b)) be used here, and also specifically authorized the use of certain Subpart G discovery methods -- 10 C.F.R. § 2.740a depositions and 10 C.F.R. § 2.740b interrogatories.[3] *See* CLI-01-13, *supra*, 53 NRC at 480-82. Thus, this Subpart L proceeding already carries some of the attributes of a Subpart G proceeding. Furthermore, in the aftermath of the September 11 terrorist attacks, the NRC Staff maintains it is particularly important to ensure proper control over classified information, and Subpart I is a ready and logical framework to use in achieving this end.

Accordingly, notwithstanding 10 C.F.R. § 2.901, the use of Subpart I procedures here would do no violence to the general intent of Subpart I (nor, for that matter, to the conduct of this

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[2] The NRC Staff believes that applying the provisions of 10 C.F.R. § 2.909 -- which authorize the suspension of proceedings -- would introduce potential, unwarranted hearing delays, and would conflict with the Commission's previously-stated goal of completing this adjudication in a timely and efficient manner. *See* CLI-01-13, *supra*, 53 NRC at 484.

[3] In its 1976 rulemaking, the NRC stated that with respect to classified information held by or under the control of applicants (such as DCS) or other persons or agencies, discovery of such information was to be governed by these same methods, among others. *See* 41 Fed. Reg., *supra*, at 53328.

proceeding in general, under Subpart L), and the use of such procedures may prove helpful to the parties in addressing questions concerning any relevant classified information in the NRC's possession.[4]

Additionally, as discussed below, the use of various Subpart I procedures here would provide a framework for addressing any classified information which may be relevant. Sections 2.905(a-b) set forth parallel methods of addressing classified information depending on whether such information has been introduced into the proceeding,[5] and both sections must be read in conjunction with 10 C.F.R. § 2.905(h). Under both 10 C.F.R. §§ 2.905(a) and (b), regardless of whether a party's representatives have security clearances, classified information originated by the NRC may still be withheld upon the Commission's finding that the release of such information would be "inimical to the common defense and security." 10 C.F.R. § 2.905(h)(1). In NRC adjudications where the classified information originated in another federal agency and is held by the NRC,[6] the originating agency must be consulted, and a party may gain access to such information only if the originating agency provides its written consent. *See* 10 C.F.R. § 2.905(h)(2). Accordingly, under the above-referenced Subpart I regulations, neither Ms. Carroll, Ms. Curran, nor Dr. Lyman, would have any assurance of obtaining access to some or all of any MOX-related classified information, even if GANE's June 7 Application is later granted in whole or in part.

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[4] For example, pursuant to 10 C.F.R. § 2.904, on request of the Board or any party, the Commission will designate a representative to assist the Board and parties regarding security classification of information and the safeguards to be observed. Pursuant to 10 C.F.R. §§ 2.907(b-c), parties must provide early notice of the intent to introduce classified information into NRC proceedings. Other Subpart I provisions which would be useful in addressing the June 7 Application are discussed in Sections B.1 and B.2, *infra*.

[5] Pursuant to 10 C.F.R. § 2.906, parties are obligated to avoid, where practicable, the use of classified information in NRC proceedings.

[6] On requests for access to classified information held by the NRC, in situations where the information originated in another agency, the Commission itself -- rather than the Board -- acts on such requests. *See* 10 C.F.R. § 2.905(e)(2).

As indicated above, the June 7 Application also pertains to obtaining MOX-related safeguards information. Unlike classified information, the NRC has previously determined that, consistent with Section 147 of the Atomic Energy Act (42 U.S.C. § 2167), a party need not obtain security clearances to view safeguards information.[7] GANE's potential access to any relevant safeguards information in this proceeding thus should be governed by a 10 C.F.R. Part 2, Subpart G hearing procedure -- 10 C.F.R. § 2.744(e) -- which states in pertinent part as follows:

> In the case of requested ... Safeguards Information ... whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order ... may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding ... and to their qualified witnesses and counsel. ... The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons ... [V]iolation of an order pertaining to the disclosure of Safeguards Information ... may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act [42 U.S.C. § 2273], as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act [42 U.S.C. § 2201(b)].

In promulgating 10 C.F.R. § 2.744(e), the NRC's intent was to leave to the presiding officer's discretion decisions regarding the extent to which protective orders would specify potential penalties, and that a rule of reason would be exercised in applying 10 C.F.R. § 2.744(e).[8] As with the 10 C.F.R. Part 2, Subpart I hearing procedures discussed above, the NRC Staff urges that 10 C.F.R. § 2.744(e) be made applicable to this proceeding, and, as with respect to the previously

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[7] *See* 45 Fed. Reg. 85459 (December 29, 1980 Statement of Considerations to proposed rule, "Protection of Unclassified Safeguards Information"), at 85460 col. 3. *See also* NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program."

[8] *See* 46 Fed. Reg. 51718 (October 22, 1981 Statement of Considerations to final rule, "Protection of Unclassified Safeguards Information"), at 51720.

noted provisions of 10 C.F.R. Part 2, Subpart I, the Staff requests the Board to make such a recommendation to the Commission for approval, pursuant to 10 C.F.R. § 2.1209(k).[9]

B. Items in June 12 Order

The June 12 Order, at 2, directs the NRC Staff to address the items specified below. To the extent that Section A has not already addressed these items, they are addressed below:

1. Board Request That Staff Address Each Question, Request and Issue Raised by GANE's June 7 Application (Together With Any Other Matters Relevant Thereto)

In its June 7 Application, GANE sets forth the following requests: (a) that the Board certify the June 7 Application to the Commission, pursuant to 10 C.F.R. § 2.905(e)(2); (b) that at the proper time, the Board consider a proposed memorandum of understanding (MOU) between the NRC and the United States Department of Energy (DOE); (c) that the Board provide direction to GANE regarding how it should submit information required by 10 C.F.R. § 25.17; and (d) that the Board order the NRC Staff to identify any non-public category of MOX-related documents for which neither Level L security clearances nor 10 C.F.R. § 2.744(e) protective orders would be sufficient to provide GANE with access to the documents. *See* June 7 Application, at 1-2, and 6-7. These GANE requests are discussed below.

a. Certification Request Pursuant to 10 C.F.R. § 2.905(e)(2)

Based on its anticipated need to access unspecified information classified by the DOE, GANE requests that the Board certify its security clearance applications to the Commission. *See* June 7 Application, at 1-2, *citing* 10 C.F.R. § 2.905(e)(2). But GANE's certification request rests on the unfounded assumption that 10 C.F.R. § 2.905(e)(2) has already been made applicable to this proceeding. *See* June 7 Application, at 1-2, and 6. Moreover, GANE does not identify any DOE-originated information held by the NRC. As stated in Section A, *supra*, the Confidential

[9] The Staff notes that both Subpart I and Section 2.744(e) only apply to documents in the possession of the NRC.

National Security Information sent to DCS on March 13, 2000 is the only MOX-related classified information which the NRC Staff is aware of at this time, and to the Staff's knowledge, the NRC possesses no MOX-related classified information originated by the DOE. Thus, even if 10 C.F.R. § 2.905(e)(2) had already been made applicable to this proceeding, there would be no basis for certifying the June 7 Application to the Commission pursuant thereto. Accordingly, GANE's certification request should be denied.

b. Proposed MOU between NRC and DOE

As indicated above, the proposed MOU is still in draft form, and has not been approved by either the NRC or the DOE. This adjudication's progress towards completion should not be made dependant on the finalization of the draft MOU. As discussed in Section B. 5, *infra*, the MOU completion date is dependant on factors unrelated to the June 7 Application.

c. Information Required by 10 C.F.R. § 25.17

GANE's request for Board direction on how GANE should submit information required by 10 C.F.R. § 25.17 is premature. As indicated in its title ("Access Authorization For Licensee Personnel") and scoping provision (*see* 10 C.F.R. § 25.3), the regulations in 10 C.F.R. Part 25 are directed primarily towards how the employees of NRC licensees are to obtain security clearances, and the applicability of 10 C.F.R. Part 25 to GANE's representatives depends upon whether the 10 C.F.R. Part 2, Subpart I hearing procedures are made applicable here. *See* 10 C.F.R. § 25.1.[10] GANE does not address this preliminary issue. *See* June 7 Application, at 2, and 6. Until it is

[10] As stated in the Statement of Consideration to the proposed 10 C.F.R. Part 25, these regulations establish security clearance procedures to follow in NRC adjudications being conducted "under 10 CFR Part 2, Subpart I." 44 Fed. Reg. 38533, at 38534 col. 3 (July 2, 1979) (emphasis added). Since it remains to be determined whether any of Subpart I's provisions apply in this proceeding, the Board is not yet in a position to state how the provisions of 10 C.F.R. § 25.17 should be applied here. These provisions, and other potentially applicable 10 C.F.R. Part 25 regulations, are discussed in Section B. 2, *infra*.

determined whether the Subpart I hearing procedures are applicable here, GANE's request for Board direction pertaining to 10 C.F.R. § 25.17 is premature.

d. Requested Discovery Order

The NRC Staff opposes this GANE request on the grounds that it is not yet subject to any discovery,[11] and that requests for production of documents are generally not applicable in this proceeding. *See* CLI-01-13, *supra*, 53 NRC at 481. However, the NRC Staff voluntarily states that any non-public, but unclassified, category of MOX-related documents could be made subject to 10 C.F.R. § 2.744(e) protective orders, thereby providing GANE with potential access to such documents.

2. Board Request That Staff Present Its Views on Applicability of Each Regulatory Provision Referenced by GANE, and Any Other Potentially Applicable Regulations

The NRC Staff, in Sections A and B.1, *supra,* has already set forth its views on many of the regulatory provisions referenced by GANE. Other regulations referenced in the June 7 Application are addressed below, together with additional requirements which may become applicable, but which GANE did not address.

Among the other regulations referenced by GANE are various 10 C.F.R. Part 2, Subpart I provisions relevant to how the June 7 Application may be addressed, and which the Staff advocates should be made applicable in this proceeding. Pursuant to 10 C.F.R. § 2.905(f), to the extent practicable, applications for security clearances must describe the subjects of protected information to which access may be required; the classification level of the protected information; why access is being requested; the names of persons for whom clearances are requested; and the reasons why such specific persons should be issued clearances. The June 7 Application appears to meet these requirements. However, since no classified information has yet been

[11] *See* "Memorandum and Order" (unpublished), dated April 30, 2002, at 2, ¶ 2.

introduced into this proceeding, parties seeking security clearances must also show that access to such information may be required for case preparation purposes. *See* 10 C.F.R. § 2.905(b)(1). GANE has not addressed this requirement. Pursuant to 10 C.F.R. § 2.905(c), the NRC will "consider requests for appropriate security clearances in reasonable numbers," and will assess a "reasonable charge" for the cost of processing security clearance requests.[12] As stated in Section A, *supra*, parties are obligated to avoid, where practicable, the use of classified information in NRC proceedings. *See* 10 C.F.R. § 2.906. However, the Statement of Considerations accompanying the Subpart I revisions emphasized that this obligation "in no way detracts from the concomitant obligation of parties to come forward with relevant and material documents whether or not classified." 41 Fed. Reg., *supra*, at 53328. Thus, if during GANE's discovery against DCS, DCS identifies any classified information generated by it or by DOE, which is relevant and material to one or more of GANE's admitted contentions, the NRC Staff expects the existence of such information would be made known. The NRC Staff would further expect that any significant discovery disputes pertaining to such classified information would be certified by the Board to the Commission for resolution.[13]

In addition to the Subpart I provisions discussed above, GANE generally referenced various 10 C.F.R. Part 25 regulations. *See* June 7 Application, at 4, *citing* 10 C.F.R. §§ 25.15, 25.17, and

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[12] Should the Commission decide that 10 C.F.R. § 2.905(c) is applicable here, it may determine what fee GANE is to be charged for the processing of its three level L security clearance requests. The standard processing fee is now $145.00 for each level L security clearance requested, and the fee is $212.00 for each "expedited" security check. However, NRC Staff counsel is advised that while under the higher fee certain parts of the clearance process may be expedited, the entire clearance process usually takes the same amount of time to complete regardless of what fee is paid.

[13] *See* 41 Fed. Reg., *supra*, at 53328 ("Commission expects that any significant questions" on discovery of classified information would be certified by the Board to the Commission).

25.19.[14] Below, the NRC Staff discusses these regulations in more detail, as well as other requirements which would govern in this proceeding, if the Commission decides that specified Subpart I hearing procedures should be made applicable here. The NRC Staff first notes that a level L security clearance -- rather than a level Q security clearance -- would, as a general matter, be sufficient to view MOX-related classified information, if it is further specifically established that one or more of GANE's representatives has a "need-to-know" such information. *See* 10 C.F.R. § 25.15(b). A "need-to-know" determination -- made by the holder of the classified information at issue -- is a finding that the "prospective recipient requires access to a specific classified information" [sic] in order to perform "a lawful and authorized governmental function under the cognizance of the Commission." 10 C.F.R. § 25.5.

Regarding 10 C.F.R. § 25.17, GANE appears to have accurately summarized its potentially applicable provisions -- insofar as they would apply to GANE's representatives if the Commission later decides that the Subpart I hearing procedures are to be generally applied here -- and the NRC Staff would have no objection, in that event, to GANE's request for a protective order pertaining to personal information it may provide. *See* June 7 Application, at 6. Also, as noted above, a fee of $145.00 is charged for each level L security clearance requested. *See* 10 C.F.R. § 25.17(f).

Section 25.19 governs the initial processing of security clearance applications, and requires that such applications be submitted to the "Cognizant Security Agency" (CSA).[15] Due to delays in

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[14] GANE also references 10 C.F.R. § 95.35, noting that pursuant thereto, a level Q or L security clearance is required before a person may be granted access to classified information. *See* June 7 Application, at 4. While 10 C.F.R. § 95.35 controls access to classified information in the manner stated, the NRC Staff notes that Part 95 in general only applies to those requesting facility security clearances (*see* 10 C.F.R. § 95.1), and contains no references to the 10 C.F.R. Part 2, Subpart I, hearing procedures. *Cf.* 10 C.F.R. § 25.1. Accordingly, unlike the Part 25 regulations, a decision to make the Subpart I hearing procedures applicable to this proceeding would not thereby make any of the Part 95 regulations applicable here.

[15] Under an executive order, certain federal agencies (*i.e.*, the Department of Defense, DOE, the Central Intelligence Agency, and the NRC) have established the National Industrial (continued...)

finalizing the draft MOU between the NRC and the DOE (as discussed in Section B. 5, *infra*), a CSA for the proposed MOX fuel fabrication facility has not yet been designated. For the limited purpose of processing the June 7 Application, the NRC Staff proposes that the NRC process the applications.[16] Accordingly, if the Commission authorizes the use of selected Subpart I hearing procedures in this proceeding -- and does not otherwise object to the above proposal -- the Commission could direct the Board to forward the June 7 Application to the NRC's Division of Facilities and Security for initial processing.

A key 10 C.F.R. Part 25 provision not referenced by GANE is 10 C.F.R. § 25.21, which sets forth the criteria for determining whether security clearance applicants should be found eligible for access authorization.[17] Should the Commission later decide that selected Subpart I hearing procedures are applicable here -- thereby making the 10 C.F.R. Part 25 provisions applicable -- the regulations in 10 C.F.R. Part 10 would also become applicable. *See* 10 C.F.R. § 25.21(a) (stating in pertinent part that "questions as to initial or continued eligibility [for access authorization] will be determined in accordance with part 10 of chapter I").[18] Subpart B of 10 C.F.R. Part 10 contains the regulations of primary importance with respect to whether GANE's representatives would be able to obtain security clearances, as these regulations set forth the criteria for determining whether an

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[15](...continued)
Security Program to safeguard classified information given to industrial concerns (such as DCS), and, for facilities within this security program, one of the above-referenced agencies is designated as the CSA. The CSA exercises primary authority to protect any classified information to be held at an industrial facility. *See* 10 C.F.R. § 25.5 (definition of CSA).

[16] If the NRC is the CSA, security clearance applications would have to be submitted to the NRC's Division of Facilities and Security. *See* 10 C.F.R. § 25.19

[17] The term "access authorization" is defined in 10 C.F.R. § 25.5, and denotes whether an individual should be found "eligible for a security clearance for access to classified information."

[18] The 10 C.F.R. Part 10 regulations contain the "substantive criteria and administrative review procedures" used in processing security clearance requests. *See* 44 Fed. Reg., *supra*, at 38534 cols. 1-2.

individual should be deemed eligible for access to classified information, how such criteria are to be applied, and the procedures for conducting any follow-up interviews or other additional investigation, based on information obtained in the initial security investigation. *See* 10 C.F.R. §§ 10.10, 10.11, and 10.12.

3. Board Request that Staff Address Role, if any, Protective Orders and Affidavits of Non-disclosure Should Play Regarding Types of Protected Information Involved

As discussed in Section A, *supra*, if 10 C.F.R. § 2.744(e) is made applicable here, protective orders and affidavits of non-disclosure could be used as necessary to limit the disclosure of any safeguards information (or other types of unclassified, but protected, information) to the parties in this proceeding. Access to such types of unclassified information could be given to a party (including a party's qualified witnesses and counsel) upon the Board's finding that disclosure of the information is necessary to a proper decision in this proceeding. *See* 10 C.F.R. § 2.744(e). Thus, protective orders and affidavits of non-disclosure could have a role in this proceeding with respect to the control of safeguards information, and other types of similarly-protected information.[19] However, as reflected in Section B.2, *supra*, a separate set of requirements would be applicable in determining whether one or more of GANE's representatives would be granted access to any MOX-related classified information, with respect to which 10 C.F.R. § 2.744(e) orders would not be applicable. Thus, protective orders and affidavits of non-disclosure could have no role in this proceeding with respect to providing GANE access to any MOX-related classified information.

4. Board Request that Staff Indicate what Federal Criminal and Civil Statutes are Potentially Applicable in Circumstances Presented

As stated in Section A, *supra*, violations of 10 C.F.R. § 2.744(e) protective orders which involve the disclosure of safeguards information may subject the violator to a civil penalty imposed

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[19] 10 C.F.R. 73.21)e) provides that access to Safeguards Information may be granted to individuals under Section 2.744(e).10 C.F.R. 73.21(d) sets forth the requirements applicable to protecting and storing Safeguards Information made available under Section 2.744(e).

pursuant to 10 C.F.R. § 2.205. As reflected in 10 C.F.R. § 2.205, such civil penalties are imposed under the authority of section 234 of the Atomic Energy Act (42 U.S.C. § 2282). Additionally, those who improperly reveal safeguards information in violation of 10 C.F.R. § 2.744(e) protective orders may be made subject to the criminal penalties set forth in section 223 of the Atomic Energy Act (42 U.S.C. § 2273). As stated in 10 C.F.R. § 2.744(e), this is accomplished by deeming these protective orders to have been issued under section 161b of the Atomic Energy Act (42 U.S.C. § 2201(b)). Persons wrongfully revealing classified information are similarly made subject to the Atomic Energy Act's section 223 criminal penalties. *See* 10 C.F.R. § 25.39.

5. Board Request That Staff Address Applicability, Status, and Expected Approval and Effective Dates of Proposed MOU Between NRC and DOE, Regarding Security of Proposed MOX Fuel Fabrication Facility

The need to develop such an MOU with the DOE became apparent following Congress's 1998 legislative grant of authority to the NRC, giving the NRC general licensing and related powers over the proposed MOX fuel fabrication facility. In SECY-99-177, "Current Status of Legislative Issues Related to NRC Licensing a Mixed Oxide Fuel Fabrication Facility," the NRC Staff set forth a number of issues, including whether the DOE or the NRC should be responsible for granting security clearances for access to classified information under 10 C.F.R. Parts 25 and 95. *See* SECY-99-177, Attachment, at 4, Issue 14. As stated there, the NRC could exercise its regulatory authority under those regulations, but since the DOE has similar regulatory authority to protect classified information under the Atomic Energy Act, an MOU was seen as the best way of resolving dual regulation concerns. As reflected in Attachment 2 of the June 7 Application (a September 17, 2001 memorandum from the Executive Director for Operations to the Commissioners), a series of delays related to the creation of the National Nuclear Security Administration (NNSA) within the DOE extended the MOU completion date to July 31, 2002. Subsequent considerations resulting from the September 11, 2001 terrorist attacks indicate that an approved MOU will not be signed until at least the Spring of 2003. by February 28, 2003. No further information is available at this

time as to when the draft MOU may be approved by the NRC and the DOE, and thereby be made effective.

6. Board Request that if Staff Agrees with GANE that its June 7 Application Should be Certified to Commission, that Staff Address Timing of such Certification, and that Parties Should Submit Joint Proposed Certification Order to Board

For the reasons discussed in Section B.1(a), *supra*, the NRC Staff does not agree with GANE that its June 7 Application should be certified to the Commission pursuant to 10 C.F.R. § 2.905(e)(2). The NRC Staff has, therefore, not consulted with GANE about submitting a joint proposed certification order to the Board. However, as discussed in Section A, *supra*, certification to the Commission is required pursuant to 10 C.F.R. § 2.1209(k), so that the Commission may consider the Board's recommendations on the extent to which the Subpart I hearing procedures (and others relevant thereto) should be used in this adjudicatory proceeding. The NRC Staff urges the Board to certify its recommendations to the Commission as soon as practicable.

## CONCLUSION

For the reasons discussed above, the NRC Staff requests the Board to: (1) certify to the Commission, pursuant to 10 C.F.R. § 2.1209(k), the Board's recommendation on the extent to which the hearing procedures set forth in 10 C.F.R. Part 2, Subpart I, should be used in this proceeding; (2) certify to the Commission, pursuant to 10 C.F.R. § 2.1209(k), the Board's recommendation on whether the 10 C.F.R. § 2.744(e) procedures should be used in this proceeding; (3) find that there is no present basis, pursuant to 10 C.F.R. § 2.905(e)(2), to certify the June 7 Application to the Commission; (4) with respect to GANE's request for Board direction

pertaining to information required by 10 C.F.R. § 25.17, find that this request is premature; (5) deny GANE's request for a discovery order against the NRC Staff; and (6) refuse linking the June 7 Application to issues pertaining to when the draft MOU may be approved by the NRC and the DOE.

Respectfully submitted,

**/RA/**

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of July, 2002

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
CONFIDENTIAL

March 13, 2000

Duke Engineering & Services, Inc.
ATTN: Mr. Peter Hastings
P. O. Box 20091
Charlotte, NC 28202

SUBJECT: DESIGN BASIS THREAT GUIDANCE APPLICABLE TO THE MIXED OXIDE FUEL FABRICATION FACILITY

Dear Mr. Hastings:

Enclosed are the U.S. Nuclear Regulatory Commission's (NRC) guidance documents for the design basis threat (DBT) for theft or diversion and the DBT for radiological sabotage to be used in the design of the mixed oxide fuel fabrication facility (MOX FFF) with respect to safeguards and security.

Both documents are classified as confidential and should be treated accordingly.

If you have any questions, please call the MOX FFF Project Manager, Mr. Andrew Persinko, at (301) 415-6522.

Sincerely,

Michael F. Weber, Director
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Material Safety
and Safeguards

Docket: 70-3098

Enclosures:
1) Design Basis Threat For Theft
or Diversion Guidance (confidential)
2) Design Basis Threat For
Radiological Sabotage Guidance
(confidential)

Upon removal of
Enclosure, this document
is not classified.

CONFIDENTIAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO GEORGIANS AGAINST NUCLEAR ENERGY'S APPLICATION FOR SECURITY CLEARANCES" have been served upon the following persons this 5th day of July, 2002, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution system).

Administrative Judge *
Thomas S. Moore, Chairman
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555

Administrative Judge *
Charles N. Kelber
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
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Office of the Secretary *
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**/RA/**

John T. Hull
Counsel for NRC Staff