

From: John Hull
To: Byrd, Helen; Carroll, Glenn; Curran, Diane; Kelber, Charles; Lam, Peter; Lyman, Edwin; Moore, Thomas; Polonsky, Alex; Silverman, Donald J.; Zeller, Lou
Date: 12/2/02 11:55AM
Subject: Re: NRC staff email response to Board's 11/20 order

the subject response is attached.

In accordance with the Board's order dated November 20, 2002, the NRC Staff provides the Board and parties the following responses in electronic format to the Board's questions set forth below.

- (1) In the absence of an objection by DCS or the Staff, the Board has not raised the issue of GANE's participation pro se with a "legal advisor." Assuming GANE's "legal advisor" is otherwise qualified to receive a security clearance and in the context of Restricted Data and National Security Information, should the Board consider granting access to such information to a "legal advisor" as opposed to a party's counsel of record who has clearly defined legal and ethical responsibilities and obligations?

Staff's Response:

The Staff had not previously considered this question. In describing the individuals who may be eligible to obtain security clearances for purposes of participating in NRC adjudications in which classified information has been introduced, 10 C.F.R. § 2.905(a) uses the term "counsel for an interested party." Similarly, the term "counsel for the party" is used in 10 C.F.R. § 2.905(b), in describing individuals eligible to obtain security clearances for purposes of participating in NRC adjudications in which classified information has not yet been introduced. Both terms strongly imply that the NRC contemplated the existence of a traditional attorney-client relationship before a party's "legal advisor" would be eligible to obtain a security clearance. As the Board points out, a party's counsel of record has more clearly defined professional responsibilities and obligations than does a "legal advisor."

Accordingly, the Staff's view is that with respect to GANE's "legal advisor," the Board should **not** issue 10 C.F.R. § 2.905(a) or 10 C.F.R. § 2.905(b) orders. To be within the scope of such orders, an attorney should be a party's counsel of record.

- (2) It appears to the Licensing Board that the following sequential steps must occur in order for GANE to be able to obtain access, in appropriate circumstances, to Restricted Data or National Security Information.
- (a) GANE must file an application (such as its June 7, 2002 filing) with the Board seeking an order granting access to such information (see 10 C.F.R. § 2.905(a), (b), and (f));
 - (b) The Board, upon a finding that access to such information is needed for adequate preparation or presentation of its case, must issue an order to that effect (see 10 C.F.R. § 2.905(a) & (b));
 - (c) GANE, upon issuance of such an order, “requests” appropriate security clearances directly from the Commission (see 10 C.F.R. § 2.905(c));
 - (d) In the event the requested clearances are granted, the Board (see 10 C.F.R. § 2.905(e)(1)), or in appropriate circumstances the Commission (see 10 C.F.R. § 2.905(e)(2) & (h); 10 C.F.R. § 2.740-42; 41 Fed. Reg. 53,328 (Dec. 6, 1978)), may, upon an appropriate application, grant access with appropriate conditions to Restricted Data or National Security Information.

If the Board has misapprehended the necessary regulatory steps, detail the precise steps and sequence (and the regulatory authority for each step) that GANE must follow to obtain access to appropriate Restricted Data or National Security Information.

Staff’s Response:

In CLI-02-19, the Commission authorized for use in this proceeding the NRC hearing procedures set forth in the 10 C.F.R. Part 2, Subpart I regulations. These regulations govern access to classified information originated within the NRC, and provide a process for determining whether and to what extent participants in NRC adjudications can be allowed access to such information. Before responding directly to the Board’s process-related question set forth above, the Staff maintains for the following reasons that questions pertaining to gaining access to classified information are strictly academic ones at this point.

GANE’s requests for security clearances relate to its contentions 1 and 2 (covering the issues of material control and accounting (MC&A); and physical security, respectively), wherein GANE alleged that the lack of information provided by DCS prevented the Staff from making findings necessary to approve the construction of the proposed MOX fuel fabrication facility. DCS has since, in its June 27, 2002 responses to GANE’s discovery requests, provided proprietary design basis information pertaining to MC&A and physical security matters, but no

classified information has yet been introduced in this proceeding. The Staff maintains, pursuant to 10 C.F.R. §70.23(b), that any MC&A and physical security information of a classified nature is not needed to approve the construction of the proposed MOX fuel fabrication facility, since such an approval would not authorize the use of special nuclear material. See LBP-01-35, 54 NRC 403, at 427 (summarizing the Staff's previous argument but admitting GANE contentions 1 and 2). In this regard, the Commission, while denying the DCS petition for interlocutory review of LBP-01-35 with respect to the admission of contentions 1 and 2, stated that the Board should proceed "in a manner that refines and specifies the standards by which these design basis issues will be deemed appropriately litigated and resolved." CLI-02-9, 55 NRC 245, 249 n.15. Until the Board clarifies how the hearing process is to proceed on this point, and in the absence of any ruling that DCS will have to submit additional MC&A and/or physical security information for purposes of having its construction authorization request (CAR) approved, questions pertaining to gaining access to classified information are premature. GANE has the same proprietary MC&A and physical security information that the Staff holds. In short, no classified information is needed to determine the legal question of whether construction of the proposed MOX fuel fabrication facility can be authorized pursuant to 10 C.F.R. §70.23(b) based on the present MC&A and physical security information submitted by DCS in its June 27, 2002 discovery responses.

In its question 2 above, the Board references *inter alia* 10 C.F.R. §§ 2.905(a-b). Since no classified information has yet been introduced in this proceeding, only 10 C.F.R. § 2.905(b) is now applicable. Pursuant thereto, GANE must show that access to classified information may be required to prepare its case. In this regard, GANE stated that it "appears likely" that the DOE "is responsible for classifying some or all of the classified information that GANE seeks" (GANE's "Application for Security Clearances," dated June 7, 2002, at 1), and that the classified information GANE seeks relates to its admitted contentions 1 and 2 (material control and

accounting; and physical security, respectively). See June 7 Application, at 5. As reflected in 10 C.F.R. § 2.905(h)(1-2), different criteria for obtaining access to classified information are applied to parties in NRC adjudications, depending on whether such information is NRC-originated, or originated in another government agency. For any classified information originated by the DOE, or originated by DCS under classification authority derived from the DOE, the Commission would not be able to grant access to such information, unless the DOE first provided its written consent to do so. See 10 C.F.R. § 2.905(h)(2).

Notwithstanding the above, if the Board finds that GANE has made the required showings under 10 C.F.R. §§ 2.905(b)(1), and (f), the Board could issue an order granting access to NRC-originated classified information, contingent upon one or more of GANE's representatives thereafter obtaining the required security clearances. If the Board issued the necessary order under 10 C.F.R. § 2.905(b), GANE would then request security clearances from the Commission pursuant to 10 C.F.R. § 2.905(c). But, as indicated above, even if GANE then obtained security clearances, access to any DOE/DCS classified information could not be granted without the DOE's written consent.

Additionally, the Staff notes that, pursuant to CLI-02-19, the 10 C.F.R. Part 25 regulations are now applicable in this proceeding. See "NRC Staff's Response to Georgians Against Nuclear Energy's Application for Security Clearances," dated July 5, 2002 (July 5 Response), at 8-13. As stated there, the provisions of 10 C.F.R. § 25.21 set forth criteria for determining whether NRC applicants for security clearances should be found initially eligible for access authorization, and incorporate the regulations in 10 C.F.R. Part 10. See 10 C.F.R. § 25.21(a). 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 individual should be deemed eligible for access to NRC 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. The Staff notes that 10 C.F.R. Part 10's scoping provisions, unlike those in 10 C.F.R. Part 25, do not reference persons subject to the hearing procedures set forth in the 10 C.F.R. Part 2, Subpart I regulations. In the Staff's view, if the Board issues a favorable 10 C.F.R. § 2.905(b) order to GANE, and GANE then requests, pursuant to 10 C.F.R. § 2.905(c), security clearances from the Commission for any NRC-originated classified information that may later be established as relevant in this proceeding, GANE's representatives would then fall within the 10 C.F.R. § 10.2(d) category of other persons designated by the Deputy Executive Director for Management Services as needing a determination of eligibility for NRC access authorizations.

Assuming one or more of GANE's representatives obtain security clearances pursuant to 10 C.F.R. Parts 10 and 25, before they could access any particular item of classified information originated by the NRC, it would need to be specifically established that such representatives have 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.

Other applicable Part 25 requirements are referenced below in responding to Board questions 3 and 4.

- (3) Assuming the steps and sequence outlined above are generally correct, what specific form and information should GANE's "request" to the Commission for security clearances include?

Staff's Response:

The initial filing and processing of applications to the NRC for access authorization (*i.e.*, security clearances) to classified information originated by the NRC are governed by 10 C.F.R. §§ 25.17 and 25.19. Assuming the NRC could now process such applications from GANE's representatives pertaining to classified information relevant to the proposed MOX facility, 10 C.F.R. § 25.17(c) states that applicants must submit NRC Form 237. Pursuant to 10 C.F.R. § 25.17(d), each of GANE's representatives seeking security clearances would also have to submit the following completed forms: SF-86, Parts 1 and 2; two standard FD-258 fingerprint cards; NRC Form 176; and SF-312, "Classified Information Nondisclosure Agreement." All applicants are provided with detailed instructions to complete the above forms, together with a "Notification of Intent to Obtain a Credit Report," and a "Privacy Act Statement."

- (4) Assuming the steps and sequences outlined above are generally correct, with whom should GANE's "request" be filed and what fee must accompany GANE's request?

Staff's Response:

Assuming the NRC could now process security clearance applications from GANE's representatives pertaining to classified information relevant to the proposed MOX facility, such applications would be sent to the NRC's Division of Facilities and Security for initial processing. See 10 C.F.R. § 25.19. A fee of \$145.00 is charged for each level L security clearance requested. See 10 C.F.R. § 25.17(f).