RAS 5064

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

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

In the Matter of	)	December 2, 2002
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

DUKE COGEMA STONE & WEBSTER'S
ANSWERS IN RESPONSE TO THE
LICENSING BOARD'S NOVEMBER 20, 2002 ORDER

Duke Cogema Stone & Webster (DCS) hereby submits its answers to the questions raised in the Atomic Safety and Licensing Board's (Board) November 20, 2002 Order (Order) regarding Georgians Against Nuclear Energy's (GANE) requests for security clearances. The Board's Order required DCS to respond to question (1) and gave DCS the discretion to respond to questions (2) and (3). DCS provides below its answers to questions (1) and (2).

As background, in this proceeding there are two types of information access to which would require a security clearance: NRC-owned national security information (NSI), and DOE-owned NSI.[1] The NRC Staff and the Board have identified NRC-owned NSI contained in documents which have been referenced—but not placed—in the

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Hearing File.[2] The Board has also noted that the NRC Staff believes that "details of the physical protection system"—DOE-owned information generated by DOE's contractor, DCS—could be classified as NSI.[3] The procedures for allowing access to these materials are slightly different.

(1) **Should the Board Grant GANE's Legal Advisor Access to Restricted Data and National Security Information If She Is Otherwise Qualified to Receive a Security Clearance, Even Though She Is Not GANE's Counsel of Record?**

DCS assumes that the Board is primarily interested in whether there is a meaningful distinction—for purposes of acquiring security clearances and eventual access to NSI in this proceeding—between a counsel of record and a legal advisor. There is a meaningful distinction. A Board or the Commission (as applicable) may issue an order granting access to NSI under 10 CFR Part 2, Subpart I, to counsel for a party if counsel has the required clearance and a need-to-know. However, a legal advisor is not "counsel", but is instead an "additional person[]" or "other individual[]" under 10 CFR §§ 2.905(a) or (b). In addition to the prerequisites to acquire a security clearance and an affirmative need-to-know determination, GANE has the additional burden of demonstrating that its legal advisor requires a security clearance to prepare and present GANE's case. *See* 10 CFR §§ 2.905(a) and (b).

If GANE can demonstrate that Ms. Curran must have access to particular NSI in order to prepare and present GANE's case, the Board or Commission (as applicable)

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1 DCS does not anticipate handling Restricted Data (RD).

2 *See Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) Memorandum and Order (Certifying Question to the Commission) at 2 (July 18, 2002).

3 *See Id.* at 4.

could consider her application filed pursuant to 10 CFR § 2.905(e). (The same principles would apply to access to NSI by Dr. Lyman.) As discussed in the Duke Cogema Stone & Webster Response to Georgians Against Nuclear Energy's Application for Security Clearances at 9-10 (July 3, 2002) (July 3 Response), however, DCS does not believe that any individual has demonstrated that access to NSI is required for the preparation and presentation of GANE's case on the admitted contentions.

(2) **Are the Steps Set Forth By the Board for GANE To Obtain Access to NSI Correct, and If Not, What are the Correct Steps?**

DCS does not believe that the steps outlined by the Board are entirely correct. In summary, before the Board or Commission can entertain an application under 10 CFR Subpart I, GANE's representatives must have the required clearances, they must be determined to have a "need-to-know," and the information sought must be in the possession of the NRC. GANE's representatives must first acquire security clearances by submitting an application to the Cognizant Security Agency (CSA) as required by 10 CFR § 25.17(b). Even if the CSA grants the required clearances, an affirmative need-to-know determination must be made at the time GANE identifies the particular NSI to which it seeks access. The need-to-know determination must be made by the classifying agency, which is not necessarily the CSA. Even if the required clearance is given, and an affirmative need-to-know determination is made, if the particular information has not been received by the NRC, then Subpart I is not triggered.[4]

[4] DCS is aware that the Commission has instructed the Board to utilize Subpart I in this proceeding and DCS has no objection to the use of such procedures, assuming they apply in the particular circumstances. This point was not addressed by the Commission in CLI-02-19. *See Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fabrication Facility), CLI-02-19, ___NRC___ (Sept. 4, 2002) (Memorandum and Order). The

A. Subpart I Does Not Apply At All If the NSI Has Not Been "Received" By the NRC

As discussed in DCS's July 3 Response at 5-6, it is premature to apply Subpart I unless and until the information in question is in the possession of the NRC.[5] Until GANE seeks access to specific NSI in NRC's possession, there is no basis to apply Subpart I procedures.

The Board therefore should first determine, before applying the procedures of Subpart I, whether GANE seeks information received by the NRC. If GANE seeks access to the NRC-owned NSI referenced in the Hearing File, Subpart I procedures would appear to apply. If GANE seeks access to DOE-owned NSI (including DCS-generated NSI), which has not been received by the NRC, then access to such information is governed exclusively by DOE's security clearance and need-to-know procedures.

B. If the Information Has Been Received By NRC, Then the Next Question is Whether DOE or NRC Is the CSA

The decision as to which agency is the CSA for all circumstances must be decided before any issues under Subpart I even arise. The CSA is responsible for processing the requests for security clearance, *see* 10 CFR §§ 25.17(b) and 25.19, and the regulations contemplate that there will be only one CSA for any given facility. *See* 10 CFR § 25.5 (definition of Cognizant Security Agency).

Commission's directive to the Board should not be construed to require the Board to use Subpart I procedures when they do not on their face apply to the relevant circumstances.

[5] *See also NRC Staff Response to GANE's Application for Security Clearances*, at n.9 (July 5, 2002); *see also Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data or Other National Security Information*, 41 Fed. Reg. 55328 (Dec. 6, 1976).

The Board's Order appears to presume that NRC is the CSA. In particular, step (2)(c) states that GANE would request appropriate security clearances "directly from the Commission ...." Order at 3. We think this presumption is not correct.

DCS does not believe that the issue of who is the CSA for the MOX Facility has been decided between the DOE and the NRC. However, it appears that between the NRC and DOE, DOE is currently the CSA for the MOX Facility to be located at the Savannah River Site. Among other things, DOE has issued security clearances and otherwise qualified DCS—under DOE requirements and procedures—to hold NSI.

If DOE is the CSA, then GANE must apply for and obtain security clearances from DOE under DOE procedures. *See* 10 CFR § 25.17(a) ("If the NRC is not the CSA, the request will be submitted to the CSA in accordance with procedures established by the CSA"). If NRC is the CSA, then GANE must apply for and obtain security clearances from it, under Parts 25, 10 and 95. *See Id.*

Regardless of who is the CSA, the "need-to-know" determination must be made by the owner of the information pursuant to its own procedures. *See* 10 CFR §§ 25.5 (definition of "need-to-know"); 25.15(a) and (b). Accordingly, if GANE seeks access to NRC-owned NSI, then the NRC would make the need-to-know determination. DOE would make the determination for information owned by DOE, such as information generated by DCS (its contractor), or DOE-owned information utilized by NRC (which may be derivatively classified).

If the request for security clearances is denied or if an adverse need-to-know determination is made, then Subpart I procedures do not even come into play. This is clear in the express language of Subpart I. In particular, 10 CFR § 2.905(a) states that

NSI will be made available to any interested party "having the required security clearance ...." Similarly, 10 CFR § 2.905(b) states that an order granting access to NSI will be issued to a person "upon his obtaining the required security clearance ...." These provisions take as their premise that the relevant agency administrative procedures for the granting of a security clearance have already been successfully exercised before Subpart I comes into play. (Subpart I itself does not contain the standards and criteria needed to make a determination as to whether to grant an individual a security clearance. Both DOE and NRC have established specific administrative procedures and criteria to process such requests.)

The Board's step (2)(c) refers to 10 CFR § 2.905(c) which states that the "Commission will consider requests for appropriate security clearances in reasonable numbers pursuant to this section." DCS does not believe that this section is intended to obviate the standard procedures and safeguards employed by DOE and NRC in processing security clearance requests. In fact, Part 25 was intended to "be followed to process access authorizations needed by persons involved in licensing hearings involving such information under 10 CFR Part 2, Subpart I."[6]

If the applicable CSA grants the requisite clearance, and an affirmative "need-to-know" determination is made, then Subpart I does come into play with respect to any information in the NRC's possession. Under these circumstances, the following Subpart I procedures apply:

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[6] *Access to and Protection of National Security Information and Restricted Data*, 44 Fed. Reg. 38534 (July 2, 1979).

1. GANE must file an "application" with the Board seeking access to NSI and must make the showing required by those provisions.[7] 10 CFR §§ 2.905(a), (b), (e) and (f). (This step is the same, as step (2)(a) in the Board's Order.)
2. If GANE makes the requisite showing, the Board must next determine if the requested NSI has been "received by the Commission from another Government agency ...." 10 CFR § 2.905(e).
3. If the information has not been received from another Government agency, then the Board may proceed to step 6 below. 10 CFR § 2.905(e)(1).
4. If the information has been received from another Government agency, then the request for access must be referred to the Commission. 10 CFR § 2.905(e)(2).
5. If the information has been received from another Government agency, then the Commission must "consult the originating agency prior to granting access ...." If the originating agency "determines in writing that access should not be granted" then access "will not be granted by the Commission ...." 10 CFR § 2.905(h)(2).[8]
6. If the information has not been received from another Government agency (see step 3 above), then the Board, upon a finding that access to such information is needed for adequate preparation or presentation of GANE's case, must issue an order to that effect. 10 CFR § 2.905(a) and (b). (This step is the same as step 2(b) in the Board's Order.)

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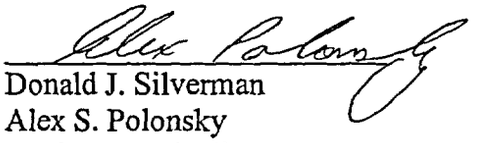
[7] DCS continues to believe that GANE does not require access to NSI in order to effectively pursue its admitted contentions. *See DCS's July 3 Response.*

[8] The Commission must also make a non-"inimicality" finding before authorizing access to specific information. 10 CFR § 2.905(h)(1).

7. Finally, if the Board issues such an order granting access, it should include in such order appropriate conditions, as necessary, to safeguard the confidentiality and protection of the NSI in the licensing proceeding. (This step is comparable to step (2)(d) in the Board's Order.) However, such conditions must be supplementary to existing, applicable non-disclosure requirements imposed by statute and regulation on any person who possesses NSI.

Dated: December 2, 2002

DUKE COGEMA STONE & WEBSTER



Donald J. Silverman
Alex S. Polonsky
Marjan Mashhadi
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 739-5502
Facsimile: (202) 739-3001

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Answers In Response to the Licensing Board's November 20, 2002 Order" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

Secretary of the Commission*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff
(E-mail: HEARINGDOCKET@nrc.gov)

Administrative Judge
Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: tsm2@nrc.gov)

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: psl@nrc.gov)

John T. Hull, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: jth@nrc.gov)

Administrative Judge Charles N. Kelber
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: cnk@nrc.gov)

Dennis C. Dambly, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: dcd@nrc.gov)

Glenn Carroll
Georgians Against Nuclear Energy
P.O. Box 8574
Atlanta, Georgia 30306
(E-mail: atom girl@mindspring.com)

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, S.C. 29802
(E-mail: donmoniak@earthlink.net)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hrb@nrc gov)

Mitzi A. Young, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: may@nrc.gov)

Louis Zeller
Blue Ridge Environmental Defense League
PO Box 88
Glendale Springs, N.C. 28629
(E-mail: BREDL@skybest.com)

Original and 2 copies

Alex Polonsky