

February 25, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SAFETY LIGHT CORPORATION)	Docket Nos. 30-5980-MLA, 30-5982-MLA
Bloomsburg, Pennsylvania Site)	30-5980-EA and 30-5982-EA
)	
(Materials License Amendment and)	ASLBP Nos. 04-833-07-MLA and
Materials License Suspension))	05-835-01-EA

NRC STAFF MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

Pursuant to 10 C.F.R. § 2.323(e), the NRC Staff (Staff) hereby submits to the Board a motion for leave to file a motion for reconsideration of the Board's February 18, 2005 Order. See Order (Directing Staff to Assess Factual Issues Implicating National Defense), dated February 18, 2005 (unpublished), slip op. (February 18 Order). The Staff has contacted the other parties in this proceeding, as required by 10 C.F.R. § 2.323(b). The Pennsylvania Department of Environmental Protection and Safety Light Corporation have indicated that they do not object to the filing of the motion.

Section 2.323(e) provides, in pertinent part, that motions for reconsideration "may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid." 10 C.F.R. § 2.323(e). The Staff's motion (attached) demonstrates the existence of compelling circumstances, such that the Board should permit the motion and reconsider the February 18 Order.

For the foregoing reasons, the Board should grant the Staff leave to file the attached motion for reconsideration.

Respectfully submitted,

/RA/

Michael A. Woods
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of February, 2005

February 25, 2005

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MOTION FOR RECONSIDERATION OF ORDER DIRECTING THE
STAFF TO ASSESS CLAIMS MADE BY DEFENSE CONTRACTORS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(e), the NRC Staff (Staff) hereby submits this motion for reconsideration of the Board's February 18, 2005 Order. See Order (Directing Staff to Assess Factual Issues Implicating National Defense), dated February 18, 2005 (unpublished), slip op. (February 18 Order). As required by 10 C.F.R. § 2.323(b), the Staff has contacted the other parties in this consolidated proceeding. The Pennsylvania Department of Environmental Protection and Safety Light Corporation (SLC) have indicated that they do not object to the filing of the motion.

As discussed more fully below, the Staff submits that compelling circumstances exists such that reconsideration is appropriate, because the February 18 Order erroneously shifts the burden of proof in the license renewal proceeding to the Staff, and further requires the Staff to conduct an analysis of information not routinely collected or maintained by the NRC.

BACKGROUND

On January 18 and 26, 2005, Safety Light Corporation SLC forwarded to the Board and to the Staff letters from Communications and Power Industries (CPI), and Northrop Grumman Corporation, respectively, two SLC customers who are in the defense industry.¹ See Letter from Don Coleman to Frank Costello (Jan. 11, 2005); Letter from Katie Gray to Nils J. Diaz (Jan. 25, 2005). In the letters, these defense contractors summarily assert that SLC is the sole source of certain critical components used by the defense contractors in military and civilian applications, and that the Staff's denial of SLC's applications for license renewal has the potential to cause shortages that would adversely impact our national defense and homeland security. See February 18 Order, slip op. at 2. One contractor also asserts that it "would take several years" to develop a suitable replacement supplier for these components. See Letter from Katie Gray to Nils J. Diaz at 1.

SLC, in its written presentation, reiterates that it recently learned that it is the sole supplier of these components, and alleges that if SLC is not permitted to continue operations pursuant to its license, there will be an adverse impact on our national defense and security. See Written Presentation of Safety Light Corporation, dated February 16, 2005, at 32-33, 45 (SLC Presentation). In support of these claims, SLC cites to the letters from CPI and Northrop Grumman Corporation (Attachments 1 and 2 to Affidavit of William E. Lynch, Jr., dated February 16, 2005), and states that SLC recently learned of the importance of these components to the defense contractors and the national defense. See SLC Presentation, Affidavit of William E. Lynch, Jr., ¶ 8.

By order dated February 18, 2005, the Board directed the Staff to provide an assessment, in its written response due March 2, 2005, of the accuracy of the factual assertions by these

¹ As the Board noted, the assertions made in the letters from the defense contractors were not presented to the NRC until after the denial of the license renewal and after the issuance of the suspension order and could not possibly have been considered before the Staff took those actions. See February 18 Order, slip op. at 3

Department of Defense (DOD) contractors that: (1) SLC “is the sole provider of critical components installed on numerous Government radar systems used by the Department of Defense and FAA; (2) it would take several years to develop an alternate supplier for these components; and (3) if [SLC] is unable to continue manufacturing these components, our military will soon suffer shortages, thus jeopardizing our national defense and homeland security.” February 18 Order, slip op. at 4-5. In addition, the Board directed the Staff to address how national defense and homeland security concerns (assuming that it is appropriate to consider such factors in evaluating the appropriateness of enforcement measures and in evaluating a licensee’s exemption request) apply in light of the Staff’s factual assessments. *Id.* at 5.

Additionally, on February 22, 2005, the Commission exercised its supervisory authority over licensing and enforcement proceedings, and lifted the immediate effectiveness of the December 10, 2004 Suspension Order issued by the Staff that is the subject of the enforcement component of this consolidated proceeding. *See Safety Light Corp.* (Materials License Suspension), CLI-05-07, 60 NRC __, __ (2005), slip op. at 2. By letter dated today, February 25, 2005, the Staff informed SLC that the Staff is withdrawing the Suspension Order. *See* Letter from Samuel J. Collins to Mr. William E. Lynch, Jr. (Feb. 25, 2005) (attached).

DISCUSSION

The grant of a motion for reconsideration requires a showing of “compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.” 10 C.F.R. § 2.323(e). The Commission has indicated that a reconsideration petition should address an error in a decision, “based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification.” *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003).

Legal principles, and the fact that certain information is not readily available to the Staff, demonstrate that the requisite compelling circumstances exist such that the Board should reconsider the February 18 Order. In the Staff's view, the February 18 Order improperly assigns to the Staff (instead of SLC) the task of substantiating generalized, unsupported and unsworn claims of defense industry contractors,² including the assertion that the SLC manufacturing process is highly specialized and would take several years to replace. The February 18 Order also implicitly calls into question the adequacy of the Staff's review of SLC's license renewal applications, by directing the Staff to consider post-denial information (not included as part of SLC's applications for renewal) in evaluating whether an exemption pursuant to 10 C.F.R. § 30.11(a), and thus the applications for license renewal, should be granted. See February 18 Order, slip op. at 4 n.1. It is well settled, however, that licensing boards have no authority to direct the Staff in the performance of its safety review of an application. *Curators of Univ. of Mo. (Trump-S Project)*, CLI-95-1, 41 NRC 71, 121 (1995) (and cases cited therein).

Moreover, it is incumbent upon SLC, and not the Staff, to provide the Board with sufficient information to assess the veracity of claims made on SLC's behalf,³ as SLC bears the burden of proof on the issue of whether the requested exemption and renewals should be granted. *Id.* "Consequently, the adequacy of [the] Staff's safety review is, in the final analysis, not determinative

² Arguably, these government contractors are not disinterested, objective entities, since they have an interest in maintaining any competitive advantage afforded by existing contractual arrangements with SLC.

³ The Staff notes that SLC offered no sworn testimony by the contractors or DOD representatives in this regard. See *generally* Written Presentation of Safety Light Corporation, dated February 16, 2005. Without such evidence, the contractors' letters merely show that these contractors are concerned, and the veracity of their statements remains unverified. Although hearsay evidence is generally admissible in NRC administrative hearings, so long as it is reliable, relevant, and material, see *Oncology Servs. Corp.* (EA-93-006), LBP-93-20, 38 NRC 130, 135 n.2 (1993), these unsworn statements are not sufficient to establish a prima facie case that SLC is entitled to an exemption and the renewal of its licenses and thus to shift the burden on this issue to the Staff.

of whether the application should be approved.” *Id.* See also *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 56 (1985) (In a proceeding on an application for a license, “the applicant’s license application is in issue, not the adequacy of the staff’s review of the application. . . . This follows logically from the fact that it is the applicant that ultimately bears the burden of proving its entitlement to the privilege of . . . [a] license.”) (citations omitted). Given the burden of proof that lies with SLC, the onus of substantiating the defense contractors’ assertions should also rest squarely upon SLC.

Finally, the Board’s February 18 Order requires the Staff to assess information that is not within the Staff’s purview. The Board incorrectly presumed that the Staff has the in-depth knowledge to be able to address the questions propounded and that this information, which would have to be obtained from DOD, could be provided by March 2, 2005. The NRC Staff can only provide information on which NRC and Agreement State licensees are authorized to produce and distribute tritium foil sources. The Staff is simply not in a position to assess the accuracy of the general statements made by these defense contractors, as it does not have access to information on: (1) whether SLC provides critical components to numerous DOD and FAA radar systems; (2) whether, even if SLC is the sole provider of such components, equivalent or substitute products are available in U.S. markets; (3) whether SLC’s tritiation process is highly specialized; (4) the amount of time that would be required for development of an alternative source for such components; (5) which government contracts, with contract numbers and specifications, involve SLC components; or (6) whether a cessation of SLC’s operations would adversely impact the national defense and homeland security. Such information would have to be obtained from the DOD and FAA, on a schedule that those agencies could support, if at all.⁴ While the Staff can

⁴ Preliminary contacts with the Office of General Counsel, Department of the Air Force, indicate that to verify these national defense claims, identifying information about the contracts at issue, such as the contract numbers, would be necessary. The Staff does not have such
(continued...)

make a good faith effort to consult with DOD and other government agencies, the Order's filing deadline is not binding on these agencies. Obtaining this information would require extensive discovery, which is not contemplated by the hearing procedures of 10 C.F.R. Part 2, Subpart L. See 10 C.F.R. §§ 2.336, 2.1203; Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,189 (Jan. 14, 2004).

CONCLUSION

For the reasons stated above, the Board should reconsider the February 18 Order.

Respectfully submitted,

/RA/

Mitzi A. Young
Counsel for NRC Staff

/RA/

Michael A. Woods
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of February, 2005

⁴(...continued)
information to convey to the Air Force for them to conduct their search.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION" and "MOTION FOR RECONSIDERATION OF ORDER DIRECTING THE STAFF TO ASSESS CLAIMS MADE BY DEFENSE CONTRACTORS" in the above-captioned proceeding have been served on the following by deposit in the United States mail or by deposit in the Nuclear Regulatory Commission's internal system, or by electronic email as indicated by a single asterisk (*) on this 25th day of February, 2005.

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