

May 25, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO DCS' MOTION TO TERMINATE PROCEEDING

INTRODUCTION

On May 10, 2005, Duke Cogema Stone & Webster (DCS) filed a motion to terminate this proceeding (DCS Motion).¹ The staff of the Nuclear Regulatory Commission (NRC Staff) files this response pursuant to 10 C.F.R. §§ 2.1237(a) and 2.730(c).² The NRC Staff does not object to the DCS Motion, and takes no position on the issue of which DCS proprietary documents held by GANE must now be returned to the Board for disposal.³ Below, the NRC Staff discusses issues pertaining to the security clearances previously granted to two of GANE's representatives.

BACKGROUND

In December 2001, the Board admitted several of GANE's contentions, including

¹ Georgians Against Nuclear Energy (GANE), the lead intervenor, has not filed a response to the DCS Motion.

² Because this proceeding was initiated prior to the 2004 effective date of the amended 10 C.F.R. Part 2 hearing rules, the (former) provisions of 10 C.F.R. Part 2 Subpart L – together with the (former) Subpart G contention requirements – are applicable here. See CLI-01-13, 53 NRC 478, 479-80 (2001). Additionally, the Commission subsequently approved the use here of the (former) provisions of the 10 C.F.R. Part 2 Subpart I hearing procedures. See CLI-02-19, 56 NRC 143, 146 (2002).

³ See DCS Motion, at 2-3. See *also* GANE's letter to the Board and parties dated May 20, 2005; and Board's May 20, 2005 "Memorandum" (unpublished).

contentions 1 and 2 (titled “Lack of Consideration of Safeguards in Facility Design,” and “Lack of Consideration of Physical Protection in Facility Design,” respectively). See LBP-01-35, 54 NRC 403, 425-29 (2001). In contentions 1 and 2, GANE alleged that the lack of information in the DCS construction authorization request (CAR) regarding design features relevant to implementing (1) material control and accounting (MC&A) measures, and (2) physical protection measures, prevented the Staff from making findings necessary to approve the construction of the proposed MOX fuel fabrication facility. *Id.*, at 425. In admitting these contentions, the Board noted that in 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,” the Staff had stated that public disclosure of the details of the physical protection system for a MOX facility could affect common defense and security, and that such details would include classified information. See LBP-01-35, 54 NRC at 429.

The classified information originated by the NRC and sent to DCS was quite limited.⁴ Two NRC guidance documents were sent by the NRC Staff to DCS on March 13, 2000. These were: (1) “Design Basis Threat for Theft or Diversion Guidance,” and (2) “Design Basis Threat for Radiological Sabotage Guidance.”⁵ The March 13 cover letter states that these guidance documents are “to be used in the design of the mixed oxide fuel fabrication facility ... with

⁴ In its June 27, 2002 responses to GANE’s discovery requests, DCS provided proprietary design basis information pertaining to MC&A and physical security matters. But DCS stated it was not relying on any classified information to gain approval of the CAR, and no party sought the admission of any classified information into this proceeding. Throughout the proceeding, the Staff’s position was that any MC&A and physical security information of a classified nature was not needed to approve the construction of the proposed MOX fuel fabrication facility, because such an approval would not authorize the use of special nuclear material. See LBP-01-35, 54 NRC at 427 (summarizing the Staff’s argument against admitting GANE contentions 1 and 2).

⁵ These two NRC guidance documents are designated “Confidential.” Executive Order 12958 states that the “Confidential” designation is to be “applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.” Pursuant to Executive Order 12958, more sensitive classified information is designated as either “Top Secret” or “Secret.”

respect to safeguards and security.” The only other piece of classified information sent by the NRC Staff to DCS was an attachment to a Staff letter dated July 28, 2003, by which the confidential revised Design Basis Threat, which is classified as CONFIDENTIAL, was forwarded to DCS.⁶

On June 7, 2002, 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, attorney Diane Curran, and Dr. Ed Lyman. The June 7 Application did not reference any specific classified information sought by GANE, but sought clearances as a first step towards gaining access to classified and safeguards documents relevant to admitted contentions 1 and 2, which GANE anticipated would be generated in the adjudicatory proceeding. See June 7 Application, at 2.

In response to the June 7 Application, the Board issued an unpublished order on June 12, 2002, ordering DCS and the Staff to “present their views on the applicability of each regulatory provision referenced by GANE and indicate whether there are any other applicable regulations that the Board should consider.” June 12 order, at 2. Accordingly, in its July 5 response (at 3-5, and 9-13) to the June 7 Application, the Staff discussed the 10 C.F.R. Part 2 and 10 C.F.R. Part 25 regulations referenced by GANE, additional 10 C.F.R. Part 25 regulations not referenced by GANE, and noted that additional 10 C.F.R. Part 10 regulations would also be applicable in considering the June 7 Application. The Staff prefaced its discussion of the above regulations by noting that before any could become applicable in the MOX proceeding, the Commission would first have to authorize use of the 10 C.F.R. Part 2, Subpart I regulations, pursuant to 10 C.F.R. § 2.1209(k). See July 5 response, at 3. The Subpart I regulations govern access to classified information originated within the NRC, and

⁶ The NRC Staff sent copies of the decontrolled July 28 cover letter to the Board and parties on July 31, 2003.

provide a process for determining whether and to what extent participants in NRC adjudications can be allowed access to such information. The Staff also identified the March 13, 2000 letter to DCS and its enclosures as containing information which may be relevant in this proceeding, produced the March 13 cover letter -- but not the classified documents -- and designated the letter as Hearing File item # 5A. See July 5 response, at 2-3 and n.1.

After considering the DCS and Staff responses to the June 7 Application, the Board issued an unpublished order on July 18, 2002, in which the Board certified to the Commission the question of whether the Subpart I hearing procedures should be used in this Subpart L adjudication. The Commission approved the use of the Subpart I hearing procedures in this MOX proceeding, but expressed no opinion on GANE's "ultimate need for security clearances." CLI-02-19, 56 NRC 143, 146 (2002).

On December 18, 2002, the Board issued an unpublished order regarding GANE's June 7 Application, stating that to avoid potential hearing delays, the security clearance process should be initiated. See December 18 order, at 2-3. The Board found, pursuant to 10 C.F.R. § 2.905 (b)(1), "that it is likely that GANE may need access to Restricted Data or National Security Information in order to prepare its case," while noting that GANE had not based its June 7 Application "on the identification of any particular classified document." December 18 order, at 2. To begin the clearance process, the Board authorized GANE's counsel and Dr. Lyman (but not GANE Coordinator Glenn Carroll) to submit the necessary forms and processing fees to the NRC's Division of Facilities and Security (DFS). See *id.*, at 3-4. GANE's counsel and Dr. Lyman thereafter applied for and were granted security clearances by the NRC.

DISCUSSION

In accordance with 10 C.F.R. § 2.905(g):

On the conclusion of a proceeding, the Commission will terminate all orders issued in the proceeding for access to Restricted Data or National Security Information and all security clearances granted pursuant to them.

10 C.F.R. § 2.905(g) (emphasis added). To implement this requirement with respect to the security clearances issued, the Staff, unless otherwise directed by the Board, will, upon receipt of any Board order terminating this proceeding, initiate all actions necessary to terminate the NRC security clearances previously issued to GANE's counsel and Dr. Lyman. These security clearances were issued for the purpose of allowing GANE's counsel and Dr. Lyman access to classified information in order to help GANE prepare its case in this proceeding. Once this proceeding is terminated, the basis on which the security clearances were issued will no longer exist.

CONCLUSION

As stated above, the NRC Staff does not object to the DCS Motion to terminate this proceeding. Further, unless otherwise directed by the Board, the Staff, upon receipt of a Board order terminating this proceeding, will initiate all actions necessary to terminate the NRC security clearances previously issued to GANE's representatives.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DUKE COGEMA STONE & WEBSTER) Docket No. 0-70-3098-ML
)
Mixed Oxide Fuel Fabrication Facility)
(Construction Authorization Request))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO DCS' MOTION TO TERMINATE PROCEEDING" in the above captioned proceeding have been served upon the following persons, by electronic mail, and by U.S. mail, first class, or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution, this 25th day of May, 2005.

Thomas S. Moore, Chairman *
Administrative Judge
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: tsm2@nrc.gov

Peter S. Lam *
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: psl@nrc.gov

Charles N. Kelber *
Administrative Judge
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
Email: cnk@nrc.gov

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

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
E-mail: hrb@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
E-mail: dcurran@harmoncurran.com

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

Office of the Secretary *
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Donald J. Silverman, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
E-mail: dsilverman@morganlewis.com
apolonsky@morganlewis.com

/RA/

John T. Hull
Counsel for NRC Staff