

July 1, 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 BOARD'S ORDER

INTRODUCTION

On June 15, 2005, the Board issued an order directing the staff of the Nuclear Regulatory Commission (NRC Staff) to provide further information pertaining to the security clearances previously issued by the NRC Staff to representatives of Georgians Against Nuclear Energy (GANE), the lead intervenor in this proceeding. See "Order" (unpublished), at 1-2 (June 15 Order).¹ Specifically, the Board requested the following information: (1) the date GANE applied for the security clearances; (2) the date the clearances were granted by the NRC Staff; (3) the fees charged for each clearance application; and (4) an estimate of the NRC's cost to process and investigate each application. *Id.*, at 2. Additionally, the Board requested the NRC Staff's views on whether the security clearances (which were granted to GANE's counsel Diane Curran and GANE's technical consultant Dr. Ed Lyman) "may be maintained by the NRC until it can be determined whether the clearances will be needed for the operating license proceeding." *Id.*, at 1.

¹ The Board's Order arises from the earlier motion to terminate this proceeding, filed by Duke Cogema Stone & Webster (DCS) on May 10, 2005; the "NRC Staff's Response To DCS' Motion To Terminate Proceeding" (Staff's Response To DCS Motion), dated May 25, 2005; and a GANE letter to the Board (GANE did not file a formal response to the DCS motion to terminate) dated May 27, 2005.

Below, the NRC Staff provides the requested information, and sets forth its views on the above-quoted question.

DISCUSSION

A. Response to Request for Information

1. Date GANE Applied for Clearances

The required NRC form requesting security clearances for Ms. Curran and Dr. Lyman was signed by Ms. Curran on July 21, 2003, and was received by the NRC's Security Branch on July 24, 2003.

2. Date Clearances Granted by the NRC Staff

Dr. Lyman's security level L clearance was granted on September 24, 2003. Ms. Curran's security level L clearance was granted on October 17, 2003. Both individuals were notified on October 17, 2003, that their clearances had been granted.

3. Fees Charged for Each Clearance Application

The total charged for each clearance was \$145. This was the fee charged by the Office of Personnel Management (OPM), the agency that conducts the required access authorization background investigations for the NRC.

4. Estimate of NRC's Cost to Process and Investigate Each Application

The NRC Staff is unable to provide an exact figure for what it cost the NRC to process the two applications at issue beyond the fee charged by OPM. However, the Staff notes that amendments to 10 C.F.R. § 25.17(f) and Appendix A to Part 25 became effective on November 5, 2003 (shortly after the clearances to Ms. Curran and Dr. Lyman were issued), and a discussion of how NRC security clearance fees are calculated – based on OPM billing rates – accompanies the rulemaking. See 68 Fed. Reg. 62509 *et seq.* (November 5, 2003). Currently, the NRC's in-house processing fee is 11.6% of the OPM billing rate, or \$17 for an initial level L clearance investigation.

B. Views on Whether the Security Clearances Must be Terminated

Referencing a letter from GANE's counsel, the Board notes GANE's stated intent "to participate in the upcoming operating license proceeding in which GANE may raise security issues requiring access to classified information," and GANE's desire to keep its security clearances "until it can be determined whether the clearances are needed for the operating license proceeding." June 15 Order, at 1. In finding GANE's suggestions about its security clearances to be sensible ones, the Board further notes GANE's wish to avoid "the expense of re-applying for security clearances," and any related potential delays in the operating license proceeding. *Id.*

The NRC Staff's view is that upon the termination of this proceeding on the DCS construction authorization request (CAR), the security clearances granted to Ms. Curran and Dr. Lyman must be terminated pursuant to 10 C.F.R. § 2.905(g). This regulation states in relevant part as follows:

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). The terms of this requirement on their face provide no discretion in the matter. The only possible doubt in the Staff's view is whether termination of this CAR proceeding may fairly be viewed as "the conclusion of a proceeding," given the two-step nature of the overall licensing process for the proposed mixed oxide (MOX) fuel fabrication facility described in the notice of opportunity for hearing on the CAR. See 66 Fed. Reg. 19994, 19995 col. 2 (April 18, 2001) (CAR consideration only the first step in process potentially leading to later issuance of a materials license authorizing MOX facility operation). But any doubt on this point was later resolved by the Commission. In its June 2001 referral order, the scope of this proceeding is described in terms of whether the CAR should be granted, and the schedule for this proceeding set the goal of issuing a decision on the CAR in a timely manner.

See CLI-01-13, 53 NRC 478, 483-84 (2001). Moreover, the Commission later specifically found it had authority “to establish separate construction authorization and operating license reviews (and hearings) for licensing a MOX facility” under the Atomic Energy Act. CLI-02-7, 55 NRC 205, 215 (2002) (emphasis added). “The NRC can, therefore, confine its initial adjudicatory hearing to only the construction issues” subject to decision at this stage of the overall licensing process. *Id.*, at 217.

Accordingly, the Staff’s view is that termination of this CAR proceeding will constitute “the conclusion of a proceeding” as that phrase is used in 10 C.F.R. § 2.905(g). The Board seems to recognize this in phrasing its question in terms of whether the two security clearances issued in 2003 “will be needed for the operating license proceeding.” June 15 Order, at 1.

In addition to the fact that the terms of 10 C.F.R. § 2.905(g) are stated in mandatory fashion, GANE identifies no independent legal basis, policy considerations, or other good cause factors which could serve to override the regulation, or otherwise weigh in favor of allowing GANE’s representatives to keep their security clearances under the facts presented here. Apart from the requirements of 10 C.F.R. § 2.905(g), there are several important considerations weighing against allowing GANE’s representatives to keep their security clearances once this proceeding is terminated. One such consideration is that if GANE’s representatives are permitted to retain the clearances granted, those clearances would be open-ended in terms of their duration, because there are large uncertainties with respect to if and when DCS might apply for a MOX facility operating license. Another such consideration is the uncertainty that GANE’s representatives will ever need their security clearances. Even if GANE later seeks party status in a MOX facility operating license proceeding, and then gains admittance as a party, it would be little more than conjecture at this time to conclude that (a) Ms. Curran and Dr. Lyman will in fact continue to serve in their respective capacities for GANE at that time; (b) any GANE security issues requiring access to classified information will be admitted; and

(c) even if one or more such contentions are admitted, a Board would find, pursuant to 10 C.F.R. § 2.905 (b)(1), that access to Restricted Data or National Security Information might then be required for GANE to prepare its now hypothetical case. While in this proceeding the Board made such a finding (*i.e.*, “it is likely that GANE may need access to Restricted Data or National Security Information in order to prepare its case”²), how a Board in a future proceeding would rule on this point cannot now reasonably be predicted – even assuming it was called upon to do so. The finding would have to be made at some future point in time in the context of now unknown documents or information.

GANE’s interest in avoiding the future expenses of re-applying for security clearances, and any potential delays in the operating license proceeding, should be viewed in light of the applicable 10 C.F.R. § 25.29 provisions.³ Security clearances may be reinstated if no more than 24 months have elapsed since the clearance was terminated. See 10 C.F.R. § 25.29 (a)(1). This regulation further states, in pertinent part, that clearances may be reinstated if there is no known information adverse to the reinstatement, the most recent security investigation was performed less than 10 years ago (for level L clearances), and the most recent investigation meets the required scope for the desired new access authorization. See 10 C.F.R. § 25.29 (a)(3-5). Additionally, any reinstatement fees would be limited to the fees charged for the 2003 clearances (*i.e.*, \$145 for each clearance), and this fee would be assessed “only if a new or updating investigation by the NRC is required.” 10 C.F.R. § 25.29 (b).

² “Order,” dated December 18, 2002 (unpublished), at 2.

³ The general applicability of 10 C.F.R. Part 25 requirements to the issuance of security clearances is discussed in the “NRC Staff’s Response to [GANE’s] Application for Security Clearances,” dated July 5, 2002, at 10-12.

In light of the above provisions, and assuming these requirements are met, there would not be an extensive delay in any future MOX facility operating license proceeding caused by the reinstatement of the subject security clearances. Further, there would either be no cost, or limited cost, to GANE's representatives for reinstatement of their clearances, if such clearances are found to be necessary. Accordingly, GANE's interest in avoiding future expenses and potential delays is outweighed by the considerations discussed above, which argue against allowing GANE's representatives to keep their security clearances once this CAR proceeding is terminated.

Thus, as the Staff previously stated, to implement 10 C.F.R. § 2.905(g), it will, upon receipt of any Board order terminating this proceeding, initiate all actions necessary to terminate the NRC security clearances previously issued to Ms. Curran and Dr. Lyman. These security clearances were issued for the purpose of allowing them access to classified information in order to help GANE prepare its case in this proceeding. See "Order," dated December 18, 2002 (unpublished), at 2. Once this CAR proceeding is terminated, the basis on which the security clearances were issued will no longer exist. See Staff's Response To DCS Motion, at 5.

CONCLUSION

For the reasons stated above, the security clearances granted to Ms. Curran and Dr. Lyman should be terminated. Therefore, the NRC 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 by Tyson R. Smith for/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of July, 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 BOARD'S ORDER" 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 1st day of July, 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 by Tyson R. Smith for/

John T. Hull
Counsel for NRC Staff