RAS 3773

January 14, 2002
DOCKETED 01/14/02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 70-03098-ML
DUKE COGEMA STONE & WEBSTER	)	
	)	
Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

NRC STAFF'S RESPONSE TO GANE'S REQUEST FOR INTERLOCUTORY REVIEW

INTRODUCTION

On January 4, 2002, Georgians Against Nuclear Energy (GANE) filed "Georgians Against Nuclear Energy's Petition For Interlocutory Review" (January 4 Petition), asking the Commission to review the Atomic Safety and Licensing Board's denial of GANE's motion to dismiss the above-captioned proceeding.[1] *See* "Memorandum and Order (Ruling on Motion to Dismiss)," dated December 20, 2001 (unpublished) (December 20 Ruling). The Commission should deny the January 4 Petition for the reasons discussed below.[2]

BACKGROUND

As relevant to the January 4 Petition, the Secretary of the United States Nuclear Regulatory Commission (NRC or the Commission) in April 2001 published a docketing and hearing notice pertaining to the Construction Authorization Request (CAR) submitted by Duke Cogema Stone & Webster (DCS), seeking authority to construct a mixed oxide fuel fabrication facility (MOX Facility)

[1] *See* "Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance," submitted to the Board on August 13, 2001 (August 13 Motion).

[2] Concurrent with the January 4 Petition, GANE also filed "Georgians Against Nuclear Energy's Request For Stay of Hearing On Construction Authorization Request Pending Ruling on Petition for Review." Because the January 4 Petition has no merit, the Commission should also deny GANE's related stay request for the same reasons as those discussed below.

at the United States Department of Energy's Savannah River Site in South Carolina. *See* 66 Fed. Reg. 19,994-96 (April 18, 2001) ("Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility"). The Commission stated therein that a separate notice of opportunity for a hearing would be provided at a later date with respect to operation of the proposed MOX Facility, and that the question of whether the CAR should be approved would be governed by the provisions of 10 C.F.R. §§ 70.23(a)(7), and 70.23(b).[3] *See* 66 Fed. Reg., *supra*, at 19,995, col. 2. In May of 2001, GANE and other petitioners requested a hearing on the CAR.

Pursuant to the Commission's June 14, 2001 order (*see Duke, Cogema, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478 (2001)), a three-member Atomic Safety and Licensing Board (Board) was established to consider the hearing requests on the CAR, and GANE submitted its August 13 Motion to the Board. The Staff opposed the August 13 Motion on August 28, 2001. *See* "NRC Staff Answer to [GANE's] Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold in Abeyance" (August 28 Response). The Board denied the August 13 Motion on the grounds that the Commission had already "clearly outlined the course for this proceeding;" had set out the necessary findings to approve the CAR; and had stated that any DCS request for operating authority would be subject to a second notice of opportunity for hearing. *See* December 20 Ruling, at 2-3, *citing* 66 Fed. Reg., *supra*, at 19,994-95, and CLI-01-13, *supra*, 53 NRC at 484. The Board found that the Commission, in taking these actions, had "necessarily determined that DCS may appropriately file an application

[3] As part of approving the CAR and allowing construction of the proposed MOX Facility to begin, the Staff is required to conclude, after weighing the costs and benefits of the proposed action pursuant to 10 C.F.R. Part 51, "that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values." 10 C.F.R. § 70.23(a)(7). Additionally, in order to approve the CAR, the Staff is required to make the safety finding that the "design bases of the principal structures, systems, and components" of the proposed MOX Facility, "and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." 10 C.F.R. § 70.23(b).

limited solely to construction," and that the Board, as the Commission's delegate in the hearing process, must adhere to the Commission's directives. December 20 Ruling, at 3. In so ruling, the Board effectively adopted the Staff's primary argument opposing the August 13 Motion. *See* August 28 Response, at 3-4.

DISCUSSION

As discussed below, GANE's January 4 Petition is of questionable procedural validity, and in substance fails to establish any legal errors in the December 20 Ruling warranting interlocutory review by the Commission. Accordingly, the Commission should deny the January 4 Petition.

A. GANE's January 4 Petition is Procedurally Questionable

GANE states that the Commission's interlocutory review of the Board's December 20 Ruling is warranted pursuant to "10 C.F.R. §§ 2.786(b) and (g)." January 4 Petition, at 6. The December 20 Ruling is not an "initial decision" in this 10 C.F.R. Part 2, Subpart L proceeding,[4] and would thus normally not be subject to the 10 C.F.R. § 2.786 review procedures. Instead, the procedural provisions arguably applicable to the December 20 Ruling are those found in 10 C.F.R. §§ 2.730 (a)-(g) (which are made applicable to motions in Subpart L proceedings pursuant to 10 C.F.R. § 2.1237(a)). Significantly, for purposes of how the January 4 Petition could fairly be viewed, 10 C.F.R. § 2.730(f) states in pertinent part that "[n]o interlocutory appeal may be taken to the Commission" from a Board ruling. The January 4 Petition, as indicated by its title, is clearly an interlocutory appeal, and the Board declined to refer its December 20 Ruling to the Commission. *See* December 20 Ruling, at 3-4. If the January 4 Petition, therefore, is viewed in this light, there would be no procedural basis supporting the Commission's interlocutory review of the Board's December 20 Ruling. However, since the Commission has broad discretion to consider petitions

[4] *See* 10 C.F.R. § 2.1251 (describing initial decisions in 10 C.F.R. Part 2, Subpart L proceedings). As the Commission has stated, even though certain procedures found in 10 C.F.R. Part 2, Subpart G, are being used here, the CAR proceeding is nonetheless a 10 C.F.R. Part 2, Subpart L proceeding. *See* CLI-01-13, *supra*, 53 NRC at 480.

for review under 10 C.F.R. § 2.786(b)(4), and in the interests of expediting this proceeding, the Staff addresses the merits of the January 4 Petition below.

B. GANE's January 4 Petition Establishes No Legal Error in the December 20 Ruling

1. Standards Applicable to Petitions for Commission Review

Pursuant to 10 C.F.R. § 2.1253, the standards governing the Commission's exercise of its discretion to grant or deny petitions to review a board's decisions in Subpart L proceedings are those set forth in 10 C.F.R. § 2.786(b)(4)(i-v).[5] In order to justify Commission review, a "substantial question" must be raised regarding at least one of the following five areas of consideration: (1) whether a finding of material fact in the contested decision is clearly erroneous; (2) whether a necessary legal conclusion in the contested decision departs from or is contrary to established law; (3) whether the petitioner identifies any substantial and important policy or legal questions; (4) whether the petitioner identifies any prejudicial procedural error in the proceeding to date; or (5) whether the petitioner identifies any other consideration which the Commission may deem to be in the public interest. *See* 10 C.F.R. § 2.786(b)(4)(i-v).

In addition to the above-stated substantive requirements, 10 C.F.R. § 2.786(b)(2) contains procedural requirements which a review petition must meet. A review petition must contain, *inter alia,* a concise summary of the decision for which Commission review is sought; and citations to the record, to demonstrate that the factual and legal issues raised in the review petition were also raised before the presiding officer. *See* 10 C.F.R. § 2.786 (b)(2)(i-ii). These provisions may fairly be read to require that a petitioner accurately summarize the presiding officer's findings which are being challenged in the review petition. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998) (parties are obligated to ensure that their arguments are supported by accurate references and citations to the record).

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[5] *See Babcock and Wilcox Company* (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995).

Under these standards, a petitioner has the burden "to raise questions that are sufficiently substantial to justify Commission review." *Babcock and Wilcox, supra*, 41 NRC at 251. To emphasize the discretionary nature of Commission review, NRC regulations provide that if a review petition is granted, the Commission will specify the issues to be briefed on appeal. *See* 10 C.F.R. § 2.786(d).

GANE's January 4 Petition neither addresses nor adheres to the above requirements, and on this basis alone the Commission should deny GANE's request to review the December 20 Ruling.

2. GANE's Arguments Fail to Show That Commission Review is Warranted Here

Although GANE vaguely charges that the CAR proceeding "is being conducted far outside the bounds of law," and that the Board's December 20 Ruling and CLI-01-13[6] "violate both the letter and the spirit of the Atomic Energy Act and its implementing regulations" (January 4 Petition, at 6), GANE establishes no legal error either in the Board's December 20 Ruling, or in the underlying licensing process, which warrants Commission review.

GANE's argument II. A in its January 4 Petition may be summarized as stating that since the CAR and the NRC's licensing process for it are illegal under various 10 C.F.R. Part 70 provisions,[7] the docketing and hearing notice should not have been published, and that the Board's December 20 Ruling erred in not addressing these claims. *See* January 4 Petition, at 5 and n.10; and 7-9. GANE's argument II. A has no merit for several reasons. First, this argument misapprehends the portion of the Board's December 20 Ruling which states that the Board, as the

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[6] GANE's time for seeking reconsideration, or judicial review, of CLI-01-13, *supra* (issued by the Commission on June 14, 2001), has long since expired, and any requirements imposed on the CAR proceeding by CLI-01-13 form no independent basis supporting review of the December 20 Ruling.

[7] GANE relies on various 10 C.F.R. Part 70 provisions, including 10 C.F.R. §§ 70.21, 70.22(a), 70.22(f), 70.23(a), and 70.23(b). *See*, *e.g.*, January 4 Petition, at 1-2, and 7-9.

Commission's delegate in the CAR hearing process, must adhere to the Commission's directives. *See* December 20 Ruling, at 3. As discussed above, in denying the August 13 Motion, the Board correctly found that the Commission had previously determined that (1) the question of whether the CAR should be approved would be governed by the provisions of 10 C.F.R. §§ 70.23(a)(7), and 70.23(b) (*see* December 20 Ruling, at 3, *citing* 66 Fed. Reg., *supra*, at 19,995); and (2) "DCS may appropriately file an application limited solely to construction." December 20 Ruling, at 3. *See also* CLI-01-13, *supra*, 53 NRC at 484 (hearing on CAR limited to issue of whether DCS should be authorized to build the proposed MOX Facility, and proposing a schedule for issuing an initial adjudicatory decision on the CAR within two years of the CAR's receipt). Additionally, GANE's argument here fails to address the fact that the Commission itself -- rather than the Staff as is normally the case -- published the docketing and hearing notice on the CAR, evidencing the Commission's involvement in the process. *See* 66 Fed. Reg., *supra*, at 19,996, col. 3 (hearing notice issued by the Secretary of the Commission). The record of this proceeding thus contradicts GANE's claim (*see* January 4 Petition, at 5 n.10) that, unbeknownst to the Commission, the Staff docketed the CAR and initiated an illegal two-step licensing process without first determining whether these actions violated legal requirements.

Moreover, GANE's argument II. A fails to show that 10 C.F.R. § 70.22(f), and the other 10 C.F.R. Part 70 regulations cited, prohibit the bifurcation of the MOX licensing process.[8] As

[8] In this regard, GANE fails to explain how any of the 10 C.F.R. Part 70 regulations require a single licensing review process that covers "both construction/design and operation." January 4 Petition, at 8. For example, GANE cites 10 C.F.R. § 70.22(a)(8) (requiring that a description of procedures be included as part of the contents of applications for Part 70 special nuclear material licenses, but saying nothing about design findings), and argues that this provision must be considered together with the requirements of 10 C.F.R. § 70.23(b) (describing design findings required to approve the construction of plutonium processing and fuel fabrication facilities) in determining whether DCS has adequately identified and described the design bases of the proposed MOX Facility. *See* January 4 Petition, at 9. However, GANE fails to show any link here between the separate requirements of the cited provisions, or how these provisions support its request for Commission review of the December 20 Ruling.

previously discussed in the Staff's August 28 Response, although the 10 C.F.R. Part 70 regulations do not expressly authorize a bifurcated licensing process, they, likewise, do not proscribe such a process. *See* Staff's August 28 Response, at 5-6. For example, while 10 C.F.R. § 70.22(f) describes the required contents of applications for Part 70 special nuclear material licenses, and is specific to applications for the construction and operation of plutonium processing and fuel fabrication facilities (such as the proposed MOX Facility), this provision neither describes the licensing process applicable to such facilities, nor limits such a process to a single licensing proceeding. *See* Staff's August 28 Response, at 6.

Additionally, GANE again fails to explain why the provisions of 10 C.F.R. §§ 70.23(b), and 70.23(a)(8), which codify in separate sections the safety standards for approving the construction and operation of plutonium processing and fuel fabrication facilities, are inconsistent with a bifurcated MOX licensing process. *See* Staff's August 28 Response, at 6. In sum, GANE has still failed to explain how any of the 10 C.F.R. Part 70 regulations prohibit the two-step licensing process being used for the proposed MOX Facility. GANE's argument II. A thus has no merit, and provides no basis for Commission review of the Board's December 20 Ruling.

Likewise, GANE's argument II. B provides no support for Commission review of the Board's December 20 Ruling. GANE's argument II. B -- which entirely ignores the Board's December 20 Ruling -- may be summarized as stating that before the Staff could properly approve the CAR, the Staff must conduct an environmental review of information DCS will submit later this year in support of its request to operate the proposed MOX Facility, and that the Staff must, pursuant to the National Environmental Policy Act (NEPA), issue an environmental impact statement (EIS) in conjunction with making its safety findings concerning operation of the proposed MOX Facility. *See*

January 4 Petition, at 9-10. GANE cites no NEPA provisions in support of this argument.[9] Similarly, GANE's argument II. B does not cite any of the NRC's 10 C.F.R. Part 51 environmental regulations. The only NRC regulation GANE cites in support (*see* January 4 Petition, at 9) is 10 C.F.R. § 70.22(a)(7) (requiring that a description of safety equipment and devices be included as part of the contents of applications for Part 70 special nuclear material licenses), which has nothing to do with required environmental reviews.[10]

Moreover, GANE's argument here fails to address the Staff's previous discussion concerning these same environmental issues. The requirements on the timing and scope of an EIS (*see* 10 C.F.R. §§ 51.70(a) and 51.71(d)) are independent from the NRC's obligations under the Atomic Energy Act, and GANE therefore errs in again asserting that the Staff, before issuing an EIS, must perform a safety review of information concerning operation of the proposed MOX Facility. *See* Staff's August 28 Response, at 7-8. Moreover, since GANE's NEPA argument here fails to cite any of the NRC's 10 C.F.R. Part 51 environmental regulations pertaining to the timing and scope of an EIS, the January 4 Petition, like GANE's August 13 Motion, may fairly be viewed as an attack on those regulations, which is prohibited by 10 C.F.R. § 2.1239.[11] As before, GANE

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[9] The two NEPA cases GANE cites are not on point. *See* January 4 Petition, at 10 n.17. The portion of *Natural Resources Defense Council v. Morton* which GANE relies on (458 F.2d 827, 838 (D.C. Cir. 1972)), states that the federal courts do not, under NEPA, alter choices of actions to be taken, so long as the approving federal government agency has taken the requisite "hard look" at the environmental consequences of the proposed action and its alternatives. Likewise, the portion of *Citizens for Safe Power v NRC* which GANE cites (524 F.2d 1291, 1299 (D.C. Cir. 1975), stating that the Atomic Energy Act and NEPA are to be viewed in *para materia*), says nothing about the timing of when environmental findings and conclusions must be made.

[10] The Staff believes that GANE meant to cite 10 C.F.R. § 70.23(a)(7), which, as noted above, requires the Staff to conclude, after weighing the costs and benefits of the proposed action pursuant to 10 C.F.R. Part 51, "that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values." 10 C.F.R. § 70.23(a)(7). This provision says nothing about having to wait until after all safety information is submitted before making environmental conclusions.

[11] *See* Staff's August 28 Response, at 8 n.5.

in effect asserts here that NEPA requires the Staff to go beyond its Part 51 requirements and conclude that an NRC safety review of MOX Facility operation is a condition precedent to preparation of an EIS. As discussed above, no NRC regulations require the Staff to wait until after all safety information is submitted before making environmental conclusions about the proposed MOX Facility. GANE's argument II. B thus has no merit, and provides no basis for Commission review of the Board's December 20 Ruling.

The Commission should therefore find that GANE's arguments in its January 4 Petition establish no legal error either in the Board's December 20 Ruling, or in the underlying licensing process, which warrants Commission review.

CONCLUSION

Accordingly, for the reasons stated above, the Commission should deny GANE's January 4 Petition and its related stay request.

Respectfully submitted,

John T. Hull **/RA/**
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of January, 2002

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO GANE'S REQUEST FOR INTERLOCUTORY REVIEW" have been served upon the following persons this 14th day of January, 2002, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution system).

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