

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

January 16, 2002

MEMORANDUM AND ORDER
(Ruling on Motion to Reconsider)

In LBP-01-35, 54 NRC __ (slip op. Dec. 6, 2001), the Licensing Board ruled on the four intervention petitions filed in this Commission-modified Subpart L proceeding on the application of Duke Cogema Stone & Webster (DCS) to construct a mixed-oxide fuel fabrication facility on the Department of Energy's Savannah River Site in South Carolina. The Board found that Petitioner Edna Foster lacked standing to intervene in the proceeding and denied her intervention petition. Although finding that Petitioners Environmentalists, Inc. (EI) and Georgians Against Nuclear Energy (GANE) as well as Joint Petitioners Blue Ridge Environmental Defense League and Donald J. Moniak (collectively BREDL) all had established standing, the Board found that none of EI's 22 proffered contentions were admissible so it also denied EI's intervention petition. Because the Board found that 8 of GANE's 13 proffered contentions (i.e. GANE contentions 1, 2, 3, 5 (consolidated with 8), 6, 9, 11 (in part) and 12)

and 2 of BREDL's 32 proffered contentions (i.e. BREDL contentions 1E (in part and consolidated with GANE contention 11) and 9A (consolidated with GANE contention 5)) were admissible, it granted the intervention petition of GANE and the joint petition of BREDL and Donald J. Moniak and admitted them as parties to the proceeding.

DCS has now filed a motion for reconsideration or, in the alternative, for certification to the Commission. See Duke Cogema Stone & Webster Motion for Reconsideration or, in the Alternative, for Certification to the Commission (Dec. 17, 2001) [hereinafter DCS Motion]. In its motion, DCS argues that the Board erred in admitting GANE contentions 1 and 2 concerning the insufficiency of information in DCS's application on the design features of the material control and accounting and physical protection systems, GANE contention 5 (consolidated with GANE contention 8 and BREDL contention 9A) concerning DCS's designation of the entire SRS as the controlled area for the facility, and GANE contention 12 concerning DCS's failure to analyze in its ER the foreseeable impacts of acts of terrorism causing a beyond design basis accident. See DCS motion at 4-24. The NRC Staff supports DCS's motion with respect to GANE contentions 1, 2, and 12 and "takes no position here on the admission of GANE contention 5, or on the arguments made by DCS in the December 17 Motion regarding the controlled area issues." NRC Staff's Response to DCS' Motion for Reconsideration (Jan. 7, 2002) at 2. For its part, GANE opposes the DCS motion. See Georgians Against Nuclear Energy's Response to DCS Motion for Reconsideration (Jan. 7, 2002). Similarly, BREDL opposes DCS's motion insofar as DCS seeks reconsideration of BREDL contention 9A. See Blue Ridge Environmental Defense League (BREDL) Response to: Duke Cogema Stone & Webster Motion for Reconsideration or, in the Alternative, for Certification to the Commission (12/17/01) (Jan. 7, 2002).

With respect to each of the admitted contentions challenged in the reconsideration motion, DCS argues at length that the Board erred in its earlier ruling and, in general, DCS merely elaborates upon arguments initially presented to the Board in opposing the admission of these contentions. After a thorough review of DCS's arguments and the other parties' responses and, putting aside any question whether DCS's arguments raise some new matters inappropriate for a reconsideration motion, the Board is not persuaded that its earlier ruling admitting GANE contentions 1, 2, 5 (consolidated with 8 and BREDL contention 9A), and 12 should be disturbed. Accordingly, DCS's motion is denied.

In its motion, DCS also requests that, in the event the Board does not reverse its earlier ruling, the Board certify the questions of the admissibility of the challenged contentions to the Commission. See DCS Motion at 2, 8-9, 20-21, 24-26. DCS argues that because the challenged contentions raise novel or significant policy or legal issues, the Board should certify its rulings in accordance with the Commission's invitation contained in the referral order for the proceeding. See CLI-01-13, 53 NRC 478, 483 (2001). It states that DCS has chosen not to seek Commission review of the Board's ruling admitting GANE, and presumably BREDL, as parties because the admitted contentions DCS has not challenged in its motion do not raise novel or significant policy or legal issues warranting review at this time, and review of all the admitted contentions would be an inefficient use of the resources of both DCS and the Commission. See DCS Motion at 24-25.

DCS's alternative certification request is also denied. As the Board noted in its ruling on the intervention petitions, DCS has the right pursuant to 10 C.F.R. § 2.1205(o) to take an interlocutory appeal from the Board's grant of the GANE and BREDL petitions. DCS, however, has eschewed that right claiming that the admitted contentions it has not challenged in its reconsideration motion do not raise novel or significant policy or legal issues so as to warrant

Commission review at this time and that such review would be inefficient. But the “novel or significant policy or legal issues” and “efficiency” standards recited by DCS are not the applicable tests under section 2.1205(o) for review of the Board’s ruling granting the GANE and BREDL intervention petitions. In its motion, DCS has not confessed error or otherwise conceded that its positions before the Board regarding the other admitted contentions (i.e. GANE contentions 3, 6, 9, 11 (in part) and BREDL contention 1E consolidated with GANE contention 11) were incorrect and that these contentions are therefore admissible. Thus, there is no legal impediment to DCS exercising its interlocutory appeal right to challenge the Board’s ruling on the admitted contentions, including those it challenges in its reconsideration motion. Rather, DCS has made the deliberate choice not to exercise its appeal rights and instead asks that the Board invoke its discretion on behalf of DCS and certify its ruling on six admitted contentions. In such circumstances, we do not believe that the directed certification provision of section 2.1205(o) or the Commission’s Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 23 (1998), explaining the workings of the parallel interlocutory appeal provision in 10 C.F.R. § 2.714a, envision that the Board should exercise its discretion to certify issues to the Commission on behalf of a party who voluntarily chooses not

to exercise its own right to appeal to protect its own interests. Indeed, the Commission's policy statement appears to contemplate the result reached here. Accordingly, DCS's request for alternative relief is also denied.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 16, 2002

¹Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) DCS; (2) the NRC Staff; (3) GANE; and (4) BREDL.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
)	
DUKE COGEMA STONE & WEBSTER)	Docket No. 70-3098-ML
)	
(Savannah River Mixed Oxide Fuel)	
Fabrication Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO RECONSIDER) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Thomas S. Moore, Chairman
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Charles N. Kelber
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Peter S. Lam
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

John T. Hull, Esq.
Antonio Fernández, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Donald J. Silverman, Esq.
Marjan Mashhadi, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis & Bockius LLP
1800 M Street, NW
Washington, DC 20036-5869

Docket No. 70-3098-ML
LB MEMORANDUM AND ORDER
(RULING ON MOTION TO RECONSIDER)

Ruth Thomas, President
Environmentalists, Inc.
1339 Sinkler Road
Columbia, SC 29206

Glenn Carroll
Georgians Against Nuclear Energy
P.O. Box 8574
Atlanta, GA 30306

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, SC 29802

Edna Foster
120 Balsam Lane
Highlands, NC 28741

Diane Curran, Esq.
Harmon, Curran, Spielberg
& Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 16th day of January 2002