

December 19, 2001

DOCKETED
USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel
Fabrication Facility))

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY'S
REQUEST FOR STAY OF DISCOVERY PENDING RULING ON
MOTION TO DISMISS OR HOLD IN ABEYANCE**

Pursuant to 10 C.F.R. §§ 2.1237 and 2.730, Georgians Against Nuclear Energy ("GANE") hereby requests that the Atomic Safety and Licensing Board ("ASLB") stay the commencement of discovery in this proceeding, pending the ASLB's ruling on GANE's pending motion to dismiss the proceeding or hold it in abeyance. *See* Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, In the Alternative, Hold It In Abeyance (August 13, 2001) ("Motion to Dismiss"). GANE respectfully submits that such a ruling is necessary in order to avoid undue burden on GANE and to ensure the orderly, efficient, and fair conduct of this proceeding.

FACTUAL BACKGROUND

On April 18, 2001, the NRC issued a notice announcing an opportunity for a hearing on the issue of whether the NRC should approve the Construction Approval Request ("CAR") submitted by Duke Cogema Stone & Webster ("DCS") for construction, at the Savannah River Site, of a facility for fabrication of Mixed Oxide

("MOX") nuclear power plant fuel. Notice of Acceptance of Application for Docketing, and Notice of Opportunity for a Hearing, 66 Fed. Reg. 19,994. GANE requested a hearing on May 17, 2001. By order dated June 14, 2001, the NRC Commissioners assigned the case to this ASLB. CLI-01-13 also set out a series of "milestones" designed to serve as "guidance" to the ASLB in establishing a schedule for the litigation. *Id.*, slip op. at 8. CLI-01-13 included a milestone for the submission of contentions, and also contemplated that discovery against DCS would commence at the same time that contentions are admitted.

On August 13, 2001, GANE filed a set of contentions. Simultaneously, GANE also filed a motion to dismiss the proceeding or hold it in abeyance, on the grounds that the Construction Authorization Request ("CAR") filed by DCS does not constitute a valid license application under NRC regulations, that NRC Staff illegally docketed the CAR in lieu of insisting on a complete license application as required by NRC regulations, and that the NRC Staff has violated the National Environmental Policy Act ("NEPA") by proposing to issue an EIS for the proposed MOX facility before it has approved the adequacy of DCS's license application to ensure that the facility will be operated safely. The other parties responded to the motion, and the ASLB entertained further argument in a prehearing conference held in North Augusta, South Carolina, on September 21, 2001.

On December 6, 2001, the ASLB issued a decision ruling that GANE has standing, and admitting the majority of GANE's contentions. LBP-01-35, Memorandum and Order (Ruling on Standing and Admissibility of Contentions). On December 14, 2001, the ASLB issued another Order, which announced that the Presiding Officer will

hold a telephone conference with the parties on December 20, 2001, for the purpose of discussing a schedule for discovery.

ARGUMENT

Pursuant to 10 C.F.R. § 2.1209(a), the Presiding Officer has the authority to “regulate the course of the hearing” over which it presides. As the Commission has explained in a Statement of Policy on the Conduct of Licensing Proceedings:

The Commission’s Rules of Practice provide the [licensing] board with substantial authority to regulate hearing procedures. In the final analysis, the actions, consistent with applicable rules, which may be taken to conduct an efficient hearing are limited primarily by the good sense, judgment, and managerial skills of a presiding board which is dedicated to seeing that the process moves along at an expeditious pace, consistent with the demands of fairness.

CLI-81-8, 13 NRC 452, 453 (1981). The ASLB’s authority necessarily encompasses the establishment of a fair and efficient hearing schedule. In this case, although the NRC Commissioners gave the ASLB “guidance” for the litigation schedule in CLI-01-13, *see* slip op. at 8, they did not impose a rigid schedule on the ASLB. To the contrary, the Commissioners noted that in setting a schedule, they “do not expect the presiding officer to sacrifice fairness and sound decision-making.” *Id.* slip op. at 7. Thus, the ASLB retains the power to establish the litigation schedule in the first instance, taking into account the particular circumstances of the case.

GANE submits that it would be unfair to GANE, and an inefficient use of the parties’ resources, to proceed with discovery before a ruling is issued on the Motion to Dismiss. If the Motion to Dismiss is granted, the case will be dismissed or held in abeyance pending submission of a completed license application. It would be unduly burdensome on GANE to require it to go to the effort and expense of hiring experts, and

gathering and reviewing numerous documents regarding the CAR, when the hearing on the adequacy of the CAR as a stand-alone document may be dismissed or delayed.

Moreover, if the Motion to Dismiss is granted, and DCS later submits a completed license application, the substantive nature of the underlying application on which any hearing regarding the MOX Facility is based will change substantially. A complete license application necessarily will integrate information regarding both the design and the operation of the facility. GANE may find that some of the deficiencies in the CAR that are raised in its admitted contentions have been resolved by the submission of additional details in a completed license application. GANE may also find that it wishes to raise additional concerns regarding the adequacy of the completed license application, which overlap issues that have already been litigated in the CAR approval proceeding. The result is that if the Motion to Dismiss is granted, the upcoming discovery process regarding the CAR is likely to be found to have wasted a great deal of GANE's limited time and resources.

Moreover, no amount of discovery will add or detract in the slightest from GANE's central argument in the Motion to Dismiss: that the license application submitted by DCS is facially incomplete, and, therefore, NRC's decision to docket the application and put out a notice of hearing is fundamentally defective.

GANE submits that while there is no NRC regulation that specifically governs this situation, its Motion to Dismiss is similar to a motion to dismiss under F.R.C.P. 12(b)(6), because both would in effect challenge the sufficiency of the initial filing of a party. The purpose of Rule 12(b) is to "enable defendants to challenge the legal sufficiency of the complaint's allegations against him, without first subjecting himself to

discovery procedures.” *Rutman Wine Co. v. E&J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987), citing *Greene v. Emersons, Ltd.*, 86 F.R.D. 66, 73 (S.D.N.Y. 1980), *aff’d*, 736 F.2d 29 (2nd Cir. 1984). As the Court noted in *Rutman*,

“if the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility.” It is sounder practice to determine whether there is any reasonable likelihood that plaintiffs can construct a claim before forcing the parties to undergo the expense of discovery.

829 F.2d at 738, quoting *Havoco of America, Ltd. V. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

Here, GANE has established in its Motion to Dismiss that there is no “reasonable likelihood” that the CAR should have been docketed or should now be under review in this hearing. *See Rutman, supra*, 829 F.2d at 738. As discussed in detail in GANE’s Motion to Dismiss, the conduct of an NRC licensing review on the design and construction of the facility alone, without the benefit of information about the operation of the facility, violates the plain language of the NRC’s regulations, which require the submission of a single license application that encompasses both construction and operation. It also violates the regulations’ underlying purpose, which is to increase the rigor of review of plutonium processing applications because of their unique hazards. Moreover, the license review process established by the NRC Staff violates NEPA, by providing for issuance of an Environmental Impact Statement and litigation of all NEPA issues before the operating license application has been approved. In addition, the CAR approval proceeding is inconsistent with the NRC’s Subpart L procedures, which require the completion of a hearing file before a hearing can go forward. Any one of these

grounds constitutes a sufficient basis for dismissal or delay of this proceeding in its entirety.

Under Fed.R.Civ.P. 26(c), which is substantially similar to 10 CFR 2.740(c), a court may stay discovery “when it is convinced that a plaintiff will be unable to state a claim for relief.” *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981), *cert denied*, 455 U.S. 942 (1982); *Turner Broadcasting Sys. Inc. v. Tracinda Corp.*, 175 F.R.D. 554 (D.C. Nev. 1997). As GANE has demonstrated conclusively and in detail in its Motion to Dismiss, this is a case in which the DCS application is facially inadequate and the NRC’s decision to docket the application is clearly far outside the bounds of NRC regulations. DCS and NRC will be unable to cure their procedural failings without substantial efforts. This is not a case in which DCS can easily make the case ripe for discovery simply by repairing simple technical defects. *See Howard v. Galesi*, 107 F.R.D. 348, 350 n.4 (S.D.N.Y 1985). To require GANE to proceed with the effort and expense of discovery before addressing GANE’s legitimate claims regarding the illegality of the Staff’s actions, would undermine GANE’s ability to participate in a meaningful and effective way in this proceeding, and would be unduly burdensome and fundamentally unfair.

Conclusion

For the foregoing reasons, GANE respectfully requests that the ASLB stay the commencement of discovery in this proceeding, pending resolution of GANE's Motion to Dismiss. If the ASLB certifies the Motion to Dismiss to the Commission, GANE requests that discovery be stayed pending resolution of the Motion by the Commission.

Respectfully submitted,

A handwritten signature in cursive script that reads "Glenn Carroll".

Glenn Carroll¹
for Georgians Against Nuclear Energy
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Dated December 19, 2001
in Decatur, Georgia

¹ This stay request was prepared with substantial assistance from GANE's legal adviser, Diane Curran.

CERTIFICATE OF SERVICE
by Georgians Against Nuclear Energy
(Docket # 70-3098, ASLBP # 01-790-01-ML)

I hereby certify that on December 19, 2001, copies of GANE's Request for Stay of Discovery Pending Ruling on Motion to Dismiss or Hold in Abeyance and Proposed Discovery Schedule were sent to the following list via e-mail with paper copies served via U.S. Postal Service First Class Mail as follows:

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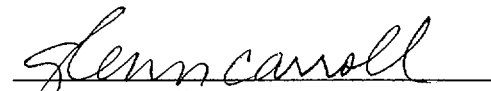
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Respectfully submitted,


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