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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 DCS' PETITION FOR INTERLOCUTORY REVIEW

INTRODUCTION

On January 28, 2002, Duke Cogema Stone & Webster (DCS) filed "[DCS'] Petition For Interlocutory Review" (DCS Petition), asking the Commission to review the portions of the Atomic Safety and Licensing Board's December 6, 2001 ruling which admitted into this proceeding four contentions involving issues pertaining to (1) material control and accounting (MC&A); (2) physical protection; (3) designation of a "controlled area"; and (4) potential environmental impacts caused by terrorist acts.[1] DCS is not challenging the admission into this proceeding of four other contentions.

The Staff of the United States Nuclear Regulatory Commission (Staff) supports the DCS Petition, insofar as it seeks Commission review of the December 6 Ruling admitting the MC&A and

[1] *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __ (Dec. 6, 2001) (December 6 Ruling), at 22-29, 35-38, and 50-55, *reconsideration denied*, unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-04, 55 NRC __ (Feb. 6, 2002) (February 6 Decision). The Commission in its February 6 Decision decided to take interlocutory review of the terrorist act contention, but made no decision on whether to review the December 6 Ruling as it pertains to the MC&A, physical protection, or controlled area contentions -- questions which the Commission intends to address "in a subsequent order." February 6 Decision, slip op., at 2-3 and n.4. This Staff filing only addresses the MC&A and physical protection contentions. The Staff takes no position on the Board's admission of the controlled area contention.

physical protection contentions. As discussed in greater detail below, the December 6 Ruling did not establish any standard by which the merits of these contentions may be judged in this proceeding. The lack of an articulated standard pertaining to the MC&A and physical protection contentions would lead to a far-ranging and ill-defined inquiry on these contentions, which would cause an unwarranted delay in completing this adjudicatory proceeding. Since the decision whether the proposed mixed oxide fuel fabrication facility (MOX Facility) can safely be built involves matters of national importance, the portion of the December 6 Ruling which admitted these two contentions (*see* December 6 Ruling, slip op. at 22-29) should be reviewed now, pursuant to the Commission's general supervisory authority over adjudicatory proceedings.

BACKGROUND

As relevant to the DCS Petition, the Staff is reviewing a Construction Authorization Request (CAR) submitted by DCS in early 2001, in which DCS seeks authority to construct the MOX Facility at the United States Department of Energy's Savannah River Site in South Carolina. In May of 2001, Georgians Against Nuclear Energy (GANE) and other petitioners requested a hearing on the CAR. In its referral order, under which a three-member Atomic Safety and Licensing Board (Board) was established to rule on the CAR hearing requests, the Commission specified that 10 C.F.R. § 70.23(b) (this provision is discussed in Section B, *infra*) would help determine whether any proffered safety contentions met the 10 C.F.R. § 2.714(b)(2) standards for admitting contentions. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001).

On August 13, 2001, GANE submitted 13 contentions for the Board's consideration.[2] GANE designated its MC&A contention as Contention 1 (supplemented by a supporting basis discussion), and it states as follows:

> The [CAR] does not contain detailed information on [MOX Facility] design features relevant to the ability of DCS to implement material control and accounting (MC&A) measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 74, and there is no indication that MC&A considerations were taken into account in the [MOX Facility] design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP (Fundamental Nuclear Material Control Plan) that will meet or exceed the regulatory acceptance criteria in Section 13.2.4 [of the MOX Facility Standard Review Plan (SRP)]," SRP at 13.2.5.2A. Failure to adequately consider MP&A [sic] issues during the [MOX Facility] design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the [MOX Facility] in compliance with 10 CFR Part 74 without significant retrofitting (and may not be able to even with retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use [special nuclear material (SNM)] at the [MOX Facility]. Consequently, Chapter 13.2 of the CAR in its current form is grossly inadequate and should be rejected.

GANE designated its physical protection contention as Contention 2 (supplemented by a supporting basis discussion), and it states as follows:

> The DCS [CAR] does not contain detailed information on [MOX Facility] design features relevant to the ability of DCS to implement physical protection measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 73, and there is no indication that physical protection considerations were taken into account in the [MOX Facility] design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's proposed design, location, construction technique and material for elements of the physical protection system and related commitments will lead to a physical protection plan that will meet or exceed the regulatory acceptance criteria in Section 13.1.4 [of the MOX SRP]. SRP, § 13.1.5.2A.
>
> Failure to adequately consider physical protection issues during the [MOX Facility] design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the [MOX Facility] in compliance with 10 CFR Part 73 without significant retrofitting (and may not be able to even with

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[2] *See* "[GANE's] Contentions Opposing a License for [DCS] to Construct a Plutonium Fuel Factory at Savannah River Site" (GANE's Contentions). Attached to GANE's Contentions was a "Declaration of Dr. Edwin S. Lyman in Support of GANE's Contentions," in which Dr. Lyman provided general averments that he assisted in the preparation of GANE Contentions 1 and 2, among others.

> retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use SNM at the [MOX Facility]. Consequently, Chapter 13.1 of the CAR in its current form is grossly inadequate and should be rejected.

In its response, the Staff concluded that GANE's Contentions 1 and 2 -- among others -- were not admissible,[3] but that GANE contentions pertaining to seismology, the required safety analysis,[4] and DCS' economic cost analysis,[5] were admissible. *See* Staff Contention Response, at 13-14, 16-17, and 19-20, respectively.[6]

In addition to admitting GANE Contentions 1, 2, the terrorist act contention, and the controlled area contention, the Board in its December 6 Ruling admitted GANE's seismology, safety analysis, and economic cost analysis contentions (*see* December 6 Ruling, at 29-33, 39-43, and 44-46, respectively), as well as a GANE contention pertaining to the DCS environmental analysis of a liquid waste stream that operation of the proposed MOX Facility would generate. *See id*., at 47-50.

Before seeking Commission review of the December 6 Ruling, DCS requested the Board to reconsider its admission of GANE Contentions 1, 2, the terrorist act contention, and the controlled area contention, and, in the alternative, requested that questions related to these four contentions be certified to the Commission. *See* "[DCS] Motion For Reconsideration or, in the Alternative, for Certification to the Commission" (December 17 Motion). In its December 17 Motion,

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[3] *See* "NRC Staff's Response to Contentions Submitted by Donald Moniak, Blue Ridge Environmental Defense League, [GANE], and Environmentalists, Inc." (Staff Contention Response), at 8-11, and 11-13, respectively.

[4] *See* 10 C.F.R. §§ 70.61 and 70.62, describing these requirements.

[5] *See* 10 C.F.R. § 51.45(c), requiring that an applicant's environmental report address economic costs.

[6] In its September 13, 2001, response to GANE's Contentions, DCS argued that none of GANE's contentions were admissible. *See* "Duke Cogema Stone & Webster's Answer to Proposed Contentions Filed by Georgians Against Nuclear Energy" (DCS Response to GANE Contentions), at 16-43.

DCS chose not to challenge the Board's admission of GANE's seismology, safety analysis, economic cost analysis, and liquid waste stream contentions. In its response to the December 17 Motion, the Staff supported reconsidering the admission of GANE Contentions 1, 2, and the terrorist act contention, and took no position on the Board's admission of GANE's "controlled area" contention.[7] The Board denied the December 17 Motion, and refused to certify any questions to the Commission. *See* unpublished Memorandum and Order (Jan. 16, 2002).

DISCUSSION

DCS argues that the Commission should accept interlocutory review of the December 6 Ruling using its "inherent supervisory authority." DCS Petition, at 2. The Staff agrees, for the reasons discussed in Section B, *infra*. The DCS Petition does not discuss the standard interlocutory review criteria set forth in 10 C.F.R. § 2.786(g)(1-2). Before reaching the question of whether the Commission should accept interlocutory review of the December 6 Ruling based on its more general authority, the Staff finds it appropriate to first discuss the standard interlocutory review criteria, which are presented in Section A, below.

A. Review Criteria of 10 C.F.R. § 2.786(g)

Although 10 C.F.R. § 2.786(g) references certifications and referred rulings made to the Commission by a licensing board, the Commission will also consider a party's petition to review an interlocutory order[8] if the ruling at issue either:

> (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or
>
> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

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[7] *See* "NRC Staff's Response to DCS' Motion for Reconsideration" (Staff's Reconsideration Response), at 1-2, and 5-14.

[8] *See Sequoyah Fuels Corporation and General Atomics* (Gore, Oklahoma Site) CLI-94-11, 40 NRC 55, 59 (1994).

10 C.F.R. § 2.786(g)(1-2).[9] Under these criteria, a ruling which merely expands the issues to be considered by a board, or a ruling admitting or rejecting particular issues, usually does not support the Commission's interlocutory review.[10] The fact that matters of first impression are involved will not, by itself, support the Commission's taking interlocutory review, nor does mere legal error in a board's ruling necessarily justify Commission review.[11] The Commission has recently emphasized that establishing the requisite harm to support interlocutory review is particularly difficult where other contentions remain before a board for adjudication. *See Connecticut Yankee Atomic Power Company* (Haddam Neck Plant License Termination Plan), CLI-01-25, 54 NRC __ (2001), slip op., at 5-6.

As reflected above, the Commission "has a longstanding policy disfavoring interlocutory review," and undertakes such review "only in the most compelling circumstances." *Sequoyah, supra,* 40 NRC at 59. Here, since four GANE contentions would remain before the Board for adjudication regardless of how the DCS Petition is ultimately resolved, the Staff believes that DCS has not met the interlocutory review criteria of 10 C.F.R. § 2.786(g)(1-2).

B. Commission's Supervisory Review Authority Over Adjudicatory Proceedings

The Commission has long held that its "inherent supervisory authority over the conduct of adjudicatory proceedings" includes the authority to issue rulings on the admissibility of contentions

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[9] These criteria apply to interlocutory rulings made in 10 C.F.R. Part 2, Subpart L proceedings. *See Hydro Resources, Inc.,* CLI-98-8, 47 NRC 314, 320 and n.3 (1998).

[10] *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-4 (1994).

[11] *See Hydro Resources, supra,* 47 NRC at 320.

while a proceeding is still ongoing before a licensing board.[12] The Commission views its inherent authority as a way to meet its regulatory responsibility of avoiding undue delay, and has made clear that -- unlike an appellate court -- it need not wait until the trial phase of an adjudication is complete before acting.[13] More recently, the Commission stated that its inherent authority applies equally in 10 C.F.R. Part 2, Subpart L proceedings, and that it may "consider a matter even if the party seeking interlocutory review" has not met the 10 C.F.R. § 2.786(g)(1-2) criteria. *Hydro Resources, supra,* 47 NRC at 320 n.3.

Moreover, in the Introduction to its *Statement of Policy on Conduct of Adjudicatory Proceedings*, the Commission stated that such proceedings should be conducted efficiently, with the goal of reducing the time needed to complete them.[14] With this goal in mind, the Commission then expressed its intent to exercise its inherent supervisory authority over future adjudications, and declared that such authority includes the "power to assume part or all of the functions" of a board. Policy Statement, 48 NRC at 20. Soon thereafter, the Commission used this authority in *sua sponte* reversing a presiding officer's admission of an area of concern, even though several other areas of concern remained pending. *See Hydro Resources, Inc.,* CLI-98-16, 48 NRC 119, 120 (1998).

Additionally, in this CAR proceeding, the Commission has stressed the importance of efficiently resolving contested issues. *See Duke Cogema Stone & Webster, supra*, 53 NRC at 484

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[12] *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant) CLI-76-13, 4 NRC 67, 75-6 (1976) (citing cases). This authority is reflected in the NRC's procedural regulations governing adjudications. *See, e.g.*, 10 C.F.R. § 2.786(a) (Commission may review board rulings "on its own motion"); and 10 C.F.R. § 2.1209(d) (Commission may direct a board to certify questions to it). *Cf*. 10 C.F.R. § 2.1251(a) (Commission may take *sua sponte* review of a board's initial decision).

[13] *See Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977).

[14] *See* CLI-98-12, 48 NRC 18, 18-19 (1998) (Policy Statement).

and n3., *citing* the Policy Statement. In further discussing the Policy Statement, the Commission more recently stated that while a board's view of whether rulings merit immediate review has "considerable weight," in appropriate circumstances the Commission will undertake discretionary interlocutory review "at the request of a party in the exercise of its inherent supervisory authority." *Haddam Neck, supra*, slip op., at 6.

Appropriate circumstances are present here warranting Commission review of the December 6 Ruling as it pertains to GANE Contentions 1 and 2. Leaving aside for now the questions raised by the Staff regarding the legal validity of admitting these two contentions,[15] the Board in its December 6 Ruling has not established any standard by which the merits of these contentions are to be judged in the CAR proceeding. The December 6 Ruling fails to articulate how the MC&A requirements of 10 C.F.R. Part 74, and the physical protection requirements of 10 C.F.R. Part 73, are to be applied in making the 10 C.F.R. § 70.23(b) safety finding required to approve the CAR.[16] The lack of any standard threatens to produce a far-ranging and ill-defined

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[15] *See* Staff's Reconsideration Response, at 5-12. The standards of 10 C.F.R. § 2.786(b)(4) -- which include whether a ruling's legal conclusions are contrary to established law, and whether a ruling raises substantial and important policy or legal questions -- are applicable when the Commission reviews interlocutory matters on the merits, but not when the Commission is, as here, deciding whether to undertake such review. *See Oncology Services Corporation*, CLI-93-13, 37 NRC 419, 420-21 (1993).

[16] To approve construction of the MOX Facility, the NRC must make the safety finding that the design bases of its "principal structures, systems, and components, 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). The requirements in 10 C.F.R. Parts 73 and 74 applicable to physical protection and MC & A systems do not require that such systems in a fuel fabrication facility be designed to protect against the effects of natural phenomena and accidents. *See, e.g.*, 10 C.F.R. §§ 73.1(a)(1), and 73.1(a)(2), describing the design basis threats of "radiological sabotage" and "theft or diversion of formula quantities of strategic special nuclear material." *See also* 10 C.F.R. § 74.11(a) (requirement to report loss or theft of SNM).

inquiry on these contentions,[17] and is contrary to the Commission's previous guidance in this proceeding that 10 C.F.R. § 70.23(b) establishes the parameter in determining whether proffered safety contentions are admissible under 10 C.F.R. § 2.714(b)(2). *See Duke Cogema Stone & Webster, supra*, 53 NRC at 483.

Moreover, as recently emphasized by the Commission, the CAR proceeding on whether a MOX Facility can be safely built relates to the significant objective of reducing the nation's plutonium inventory, and the lack of an articulated standard by which to judge GANE Contentions 1 and 2 works against the stated goal of completing the CAR proceeding "in a timely and efficient manner."[18]

Accordingly, Commission intervention is warranted now on the question of whether MC&A design issues, and physical protection design issues, fall within the scope of the findings required by 10 C.F.R. § 70.23(b) in this CAR proceeding.

CONCLUSION

For the reasons stated above, the Commission should grant the DCS Petition as it pertains to GANE Contentions 1 and 2.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of February, 2002

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[17] Preventing such ill-defined inquiries was one of the reasons why the NRC's contention rule -- 10 C.F.R. § 2.714 -- was amended in 1989. *See Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999) (revised rule promulgated, in part, to help prevent hearing delays caused by poorly defined or supported contentions).

[18] *Duke Cogema Stone & Webster,* CLI-01-28, 54 NRC __, slip op. at 7, *quoting Duke Cogema Stone & Webster, supra*, 53 NRC at 484.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO DCS' PETITION FOR INTERLOCUTORY REVIEW" have been served upon the following persons this 7th day of February, 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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