RAS 3909

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	January 28, 2002
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

DUKE COGEMA STONE & WEBSTER'S
PETITION FOR INTERLOCUTORY REVIEW

I. INTRODUCTION

Duke Cogema Stone & Webster ("DCS") hereby petitions the Commission to review several important legal and policy decisions made by the Atomic Safety and Licensing Board ("Board") in admitting several contentions in this proceeding.

In a Memorandum and Order dated December 6, 2001, the Board ruled that Georgians Against Nuclear Energy ("GANE") and the Blue Ridge Environmental Defense League ("BREDL") have standing and admitted several contentions.[1] The Board's rulings on four of the admitted contentions raise novel legal and policy issues. Specifically:

- The Board ruled that, based upon the terrorist acts on September 11, 2001, DCS must evaluate the impacts of terrorist acts against the MOX Facility under the National Environmental Policy Act ("NEPA") (Contention 12).

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1 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, slip op. (Dec. 6, 2001) ("Memorandum and Order"). On December 17, 2001, DCS asked the Board to reconsider its decision with respect to four of these contentions or to certify the four contentions to the Commission. On January 7, 2002, the NRC Staff supported DCS' request with respect to three of the contentions and took no position on Contention 5. On January 16, 2002, the Board issued an unpublished order that denied DCS' requests.

- The Board ruled that material control and accounting ("MC&A") systems and physical security systems provide protection against natural phenomena and the consequences of accidents and therefore must be addressed in the Construction Authorization Request ("CAR") under 10 CFR §§ 70.22(f) and 70.23(b) (Contentions 1 and 2).

- The Board ruled that under 10 CFR § 70.61(f), the "controlled area" for the Mixed Oxide Fuel Fabrication Facility ("MOX Facility") could be co-extensive with the Savannah River Site ("SRS") boundary, only if the Department of Energy ("DOE") will cede to DCS the authority to close the SRS "for any reason" (Contention 5).

DCS respectfully requests that the Commission exercise its inherent supervisory authority to accept interlocutory review of these novel legal and policy issues.

The Commission clearly has the authority to accept interlocutory review at the request of a party in the exercise of its inherent supervisory authority.[2] DCS believes that such review is warranted given the unusual circumstances in this proceeding.[3]

First, with respect to Contention 12 on terrorism, the Board's ruling represents a departure from long-standing NRC and court cases, is inconsistent with three recent

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2 *See e.g., Hydro Resources Inc.* (299 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 120 (1998); *Consolidated Edison Co. of New York* (Indian Point, Unit 3), CLI-82-15, 16 NRC 27, 33-35 (1982); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 515-17 (1977); *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).

3 The Commission recently stated that it assigns considerable weight to a licensing board's decision on whether its ruling warrants immediate Commission review. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant License Termination Plan), CLI-01-25, 54 NRC ___, slip op. (December 5, 2001). In this case, however, the Board has declined to certify its ruling on these four contentions, not based upon the absence of any novel legal or policy issue, but instead upon the view that a licensing board should not certify novel issues if a party has chosen not to challenge the admission of all of the admitted contentions under 10 CFR § 2.1205(o). Memorandum and Order at 3 - 5 (Jan. 16, 2002). Contrary to the Board's apparent belief, DCS does not believe that Section 2.1205(o) is the exclusive remedy for raising issues before the Commission. DCS elected not to file an appeal under Section 2.1205(o) because to do so would have required it to contest all of the admitted contentions, including those that do not raise any significant legal or policy issues. Additionally, in ruling on an appeal pursuant to Section 2.1205(o), the Commission could uphold the Board's Memorandum and Order merely by finding that one contention is admissible, without addressing any of the significant legal and policy issues identified in this Petition. Therefore, such an appeal is neither necessary nor desirable under the current situation, and would be an inefficient use of the Commission's resources.

decisions by licensing boards in other proceedings, and has the effect of pre-empting the Commission's ongoing generic review of terrorism. Furthermore, the licensing boards in the three other proceedings have already certified their rulings on terrorism to the Commission. Given these circumstances, a contemporaneous Commission review of the admission of Contention 12 is clearly warranted.

Second, the MOX Facility will be the first facility approved under 10 CFR § 70.22(f), § 70.23(b), and the Commission's new regulations in Subpart H to 10 CFR Part 70. The Commission has recognized that this proceeding might involve novel legal or policy issues and stated:

> if rulings on the admission of contentions, or the admitted contentions themselves, raise novel legal or policy questions, the presiding officer should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.[4]

The Board's rulings on Contentions 1, 2, and 5 present legal and policy issues of first impression under Part 70. In accordance with the Commission's directions in this proceeding, such issues warrant review by the Commission early in this proceeding.

Third, with respect to Contentions 1 and 2, the Board's ruling on the MC&A and security systems expands the scope of the CAR proceeding and is clearly inconsistent with Section 70.23(b) and the Commission's April 18, 2001 Hearing Notice, which limit the scope of this proceeding to those systems that are needed to protect against natural

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[4] *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001) (emphasis added). This directive is in line with the Commission's general admonition that "boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998); *see also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-15, 53 NRC 563, 563 (2001) (stating a policy of "accept[ing] Board certifications and referrals where 'early resolution' of issues is desirable").

phenomena and the consequences of accidents. Furthermore, GANE has requested interlocutory review regarding the scope of information that must be contained in the CAR under Sections 70.22 and 70.23, and DCS has agreed that the Commission should accept such review. GANE's request is currently pending before the Commission. Given these circumstances, Commission review of Contentions 1 and 2 is warranted.

These circumstances supporting interlocutory review are discussed in more detail below.

II. DISCUSSION

A. Consideration of Terrorism Under NEPA

Contention 12 states that NEPA requires the analysis of foreseeable environmental impacts and argues that the environmental report ("ER") fails to analyze the foreseeable impacts of malevolent sabotage causing a beyond design basis accident. Both DCS and the NRC Staff opposed the admission of this contention, pointing to both NRC and court cases such as *Shoreham* and *Limerick Ecology Action* that held that the NRC need not conduct an environmental evaluation of the impacts of terrorism.[5] Nevertheless, the Board admitted this contention, stating that cases such as *Shoreham* are "inapposite" to the MOX Facility because such cases relied upon 10 CFR § 50.13, which applies to utilization facilities and not fuel fabrication facilities.[6]

For a number of reasons, the Board's ruling warrants Commission review. First, the Board's ruling represents a departure from previous rulings by both the courts and NRC. Although Section 50.13 applies to utilization facilities, the rationale for that regulation applies to all types of nuclear facilities. As stated in *Shoreham*, the rationale for excluding acts of terrorism from consideration under NEPA is: (1) the impracticality

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[5] *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989).

[6] *Memorandum and Order* at 52.

of anticipating such an attack and designing defenses against it; (2) the settled tradition of looking to the military to deal with this problem; and (3) the unavailability of relevant information.[7] Each of these rationales applies equally to fuel fabrication facilities as to utilization facilities. As a result, the Board's ruling on Contention 12 represents a departure from Commission policy.

Second, the Board's ruling is also inconsistent with recent decisions of the licensing boards in *Private Fuel Storage*, *Dominion Nuclear Connecticut,* and *Duke Energy Corp.*[8] Faced with very similar contentions, those licensing boards ruled that, despite the events on September 11, contentions regarding the environmental impacts of terrorist acts on nuclear facilities are not admissible. The decision in *Private Fuel Storage* is especially relevant to the MOX Facility, since that proceeding also involved a materials facility and not a utilization facility. Given the fact that the Board's ruling in this proceeding is now inconsistent with the recent rulings of three other licensing boards, the Commission should review Contention 12 to resolve this dispute.

Third, the Board's ruling is premature. The Commission has an ongoing generic "top-to-bottom review" of the extent to which terrorist acts should be considered in NRC proceedings. Given the ongoing nature of this review, it is premature for the Board itself to attempt to resolve this important matter. In effect, the Board is pre-empting the Commission's process for making a policy decision on the extent to which applicants and licensees need to consider terrorism.

In admitting Contention 12, the Board acknowledged the importance of this issue and the appropriateness of certifying this matter to the Commission:

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7 *Long Island Lighting Co.*, ALAB-156, 6 AEC at 851.

8 *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __, slip op. (Dec. 13, 2001); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC ___, slip op. (Jan 24, 2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC ___, slip op. (Jan. 24, 2002).

> [this contention] raises an extremely important policy question. In such circumstances, the Board normally would certify the question of the admissibility of this contention to the Commission pursuant to 10 C.F.R. § 1209(d).[9]

Yet the Board declined to certify the contention because it expected DCS to raise the issue in an appeal pursuant to Section 2.1205(o).[10] However, as discussed above, nothing in Part 2 requires DCS to file an appeal under Section 2.1205(o), and such an appeal is not the exclusive process for DCS to seek review of the Board's ruling on specific legal or policy issues that warrant prompt attention by the Commission. Since the Board itself recognized that the issue on terrorism is appropriate for resolution by the Commission, the Commission should take review of this issue using its inherent supervisory authority.

In this regard, DCS notes that the licensing boards in *Private Fuel Storage, Dominion Nuclear Connecticut,* and *Duke Energy Corp.*[11] have already certified to the Commission their rulings denying similar contentions on terrorism. DCS believes that the Commission should accept certification of the issues identified by those licensing boards and, at the same time, review the admission of Contention 12 in this proceeding. Early Commission review will ensure that the security, environmental, regulatory, and policy implications of this issue will be addressed as a coherent part of the Commission's overall review effort, rather than in an *ad hoc* manner by separate licensing boards.

B. MC&A and Physical Security

Contentions 1 and 2 argue that the CAR does not contain sufficient information regarding design features of the MC&A and physical security measures. DCS and the NRC Staff both opposed the admission of these two contentions on the grounds that they

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9 *Memorandum and Order* at 54.

10 *Id.*

11 *Private Fuel Storage*, LBP-01-37, slip op.; *Dominion Nuclear Connecticut, Inc.*, LBP-02-05, slip op.; *Duke Energy Corp.*, LBP-02-04, slip op.

are outside the scope of the proceeding.[12] DCS, in particular, stated that the standard established in 10 CFR § 70.23(b) for approval of the CAR limits the scope of the proceeding to whether "the design bases of principal structures, systems, and components and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents."[13] DCS stated that MC&A and physical security measures are intended to prevent the loss, theft, or sabotage of special nuclear materials, and are not intended to protect against natural phenomena and accidents. Therefore, these systems fall outside the scope of Section 70.23(b), and there is no requirement to describe the design bases for the MC&A and physical protection function in the CAR. Instead, the design of these systems should be addressed in the possession and use license application proceeding related to the MOX Facility.

The Board admitted these contentions, concluding that:

> the design bases of the MC&A and physical protection systems must retain their functionality to make a reasonable assurance determination of protection against natural phenomena and the consequences of potential accidents. Accordingly, the design bases of the MC&A and physical protection systems of the MFFF are not precluded from consideration under section 70.23(b), and GANE contentions 1 and 2 are within the scope of the proceeding.[14]

The Board did not explain how or why MC&A and physical security systems must continue to function in order to protect against natural phenomena hazards or potential accidents. Such systems are neither designed nor intended to provide such protection. Instead, under 10 CFR Parts 73 and 74, the purposes of such systems are to protect

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12 DCS' Answer to Proposed Contentions Filed by GANE at 17-20 (Sept. 13, 2001) and NRC Staff's Response to Contentions Submitted by GANE at 8-13 (Sept. 12, 2001).

13 *Id.* Environmental issues under NEPA are also within the scope of the proceeding pursuant to 10 CFR § 70.23(a)(7).

14 *Memorandum and Order* at 28-29.

against "acts of radiological sabotage and to prevent the theft of special nuclear material," and to control and account for special nuclear material and avoid loss or theft of such material.[15] Therefore, DCS believes that the Board's ruling is clearly erroneous, impermissibly broadens the scope of the CAR proceeding, and could establish an inappropriate precedent for future proceedings under 10 CFR § 70.23(b). For these reasons alone, the Commission should accept review of these contentions.

In addition, there is another unusual circumstance in this proceeding that supports review by the Commission. The Commission has before it GANE's Petition for Interlocutory Review (January 4, 2002). That Petition asks the Commission to review GANE's challenge to the bifurcated hearing process established by the Commission, and inherently involves issues related to the appropriate scope of the CAR proceeding. As stated in our response to GANE's Petition, we believe that the Commission should accept GANE's request for interlocutory review and rule on the merits of GANE's arguments.[16] Contentions 1 and 2 constitute one part of the larger issue raised by GANE's Petition. Therefore, if the Commission decides to entertain GANE's Petition, there is an added reason for it to accept review of the Board's ruling on Contentions 1 and 2.

C. Definition of the Controlled Area Boundary

The CAR designates the SRS boundary as the controlled area boundary for the MOX Facility, and states that DCS will enter into a protocol or agreement with DOE to limit access to the SRS in the event of an emergency at the MOX Facility. Contention 5 alleges that DCS incorrectly designated the SRS boundary as the controlled area

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15 10 CFR §§ 73.1, 74.1, 74.2.

16 DCS' Answer to GANE's Petition for Interlocutory Review at 2.

boundary for purposes of 10 CFR § 70.61, in part because DCS cannot control access to the entire SRS "for any reason," including reasons unrelated to a radiological emergency at the MOX Facility. Both DCS and the NRC Staff opposed the admission of this contention. The Board ruled that under 10 CFR § 70.61(f) the "controlled area" for the MOX Facility could be co-extensive with the SRS boundary, only if the DOE will cede to DCS the authority to close the entire SRS "for any reason."[17]

This is the first time a licensing board has interpreted 10 CFR § 70.61(f). The Board's interpretation is inconsistent with the Commission's statement of consideration on Part 70 (which explicitly recognizes that the controlled area could include nearby DOE facilities),[18] and is also inconsistent with the way the controlled area boundary is treated at existing nuclear facilities licensed under other provisions in the Commission's regulations.[19] The Board's ruling on this contention also could have substantial design and cost implications for fuel cycle facilities, because the location of the controlled area boundary affects the allowable source term, which in turn affects the design.

Therefore, given the novel legal and policy issue involved, the inconsistency of the Board's ruling with the NRC's treatment of analogous facilities, and the potential

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17 *Memorandum and Order* at 38.

18 Domestic Licensing of Special Nuclear Material; Possession of a Critical Mass of Special Nuclear Material, 65 *Fed. Reg.* 56211, 56212 (Sept. 18, 2000).

19 For example, the Gaseous Diffusion Plants ("GDPs") are operated by USEC but are located on DOE sites with activities and personnel not regulated by the NRC. The controlled area at the GDPs is coincident with the boundary of the DOE reservations and the controlled area at the Paducah GDP includes the West Kentucky Wildlife Management Area, which is open to the public for recreation, including hunting. Safety Analysis Report for Paducah GDP, §§ 2.1.2, 2.1.2.4, and 2.1.3.3, and Figures 2.1-4, 2.1-5, and 2.1-6. Similarly, the WNP-2 (now called Columbia) nuclear plant is located on land leased from DOE on its Hanford Site. For WNP-2, the exclusion area boundary extends beyond the WNP-2 property lines and includes land that is owned and controlled by the DOE (including roads, railroads, and a electrical substation controlled by the Bonneville Power Administration). NRC Safety Evaluation Report for WNP-2, § 2.1.2.; Final Safety Analysis Report for WNP-2, § 2.1.2.1.

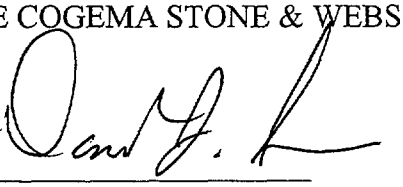
implications of the Board's decision for other Part 70 facilities, the Commission should accept review of this issue.

III. CONCLUSION

For the foregoing reasons, DCS respectfully requests that the Commission exercise its inherent supervisory authority to accept review of the important legal and policy issues raised by the Board's ruling on Contentions 1, 2, 5, and 12.

Respectfully submitted,

DUKE COGEMA STONE & WEBSTER



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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Duke Cogema Stone & Webster's Petition for Interlocutory Review" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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