

January 4, 2002

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

**DOCKETED
USNRC**

BEFORE THE COMMISSIONERS

2002 FEB 14 AM 11:48

In the Matter of)

DUKE COGEMA STONE & WEBSTER)

(Savannah River Mixed Oxide Fuel
Fabrication Facility))

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Docket No. 0-70-03098-ML

ASLBP No. 01-790-01-ML

**GEORGIANS AGAINST NUCLEAR ENERGY'S
REQUEST FOR STAY OF HEARING ON CONSTRUCTION
AUTHORIZATION REQUEST PENDING RULING ON
PETITION FOR REVIEW**

Pursuant to 10 C.F.R. §§ 2.1237 and 2.730, Georgians Against Nuclear Energy ("GANE") hereby requests that the Commission stay the pending hearing on the Construction Authorization Request ("CAR") submitted by Duke Cogema Stone & Webster ("DCS") for the proposed Mixed Oxide ("MOX") fuel fabrication facility, pending the Commission's ruling on GANE's petition for review of the Atomic Safety and Licensing Board's ("ASLB's") Memorandum and Order (Ruling on Motion to Dismiss) (December 20, 2001), which was filed today. 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.¹

¹ GANE does not believe it is appropriate to apply the "irreparable harm" standard in 10 C.F.R. § 2.788 to the ASLB's order in this proceeding. The loss of time and money incurred in a wasteful and futile discovery process is not generally regarded as "irreparable harm" by the NRC or the Courts. As discussed below, however, both the Commission and the Courts recognize the existence of circumstances in which action is

FACTUAL BACKGROUND

On April 18, 2001, the NRC noticed the docketing of something called a "Construction Authorization Request" that had been filed on February 28, 2001, by DCS.² The CAR contained information related to the design and construction of the proposed MOX Facility, but did not address NRC requirements for operation. The notice does not refer to the CAR as a license application. Indeed, the NRC Staff subsequently clarified that: "the Applicant is not currently seeking an SNM license."

The April 18 notice also announced an opportunity for a hearing on the issue of whether the NRC should approve the CAR. GANE requested a hearing on May 17, 2001.

On May 25, 2001 the NRC Staff issued a revision to a detailed proposed schedule for the MOX Facility review³ and published the schedule on its former MOX website:

February 28, 2002	Staff issues Draft EIS for public comment
April 30, 2002	Staff issues draft Safety Evaluation Report ("SER") for construction of MOX Facility
July 31, 2002	DCS submits license application for operation of MOX Facility
September 30, 2002	Staff issues Final EIS
September 30, 2002	Staff issues SER for construction of MOX Facility
July 31, 2004	Staff issues final SER for operating license
October 31, 2004	Hearing on operating license begins

This schedule shows that the Staff intends to allow construction to begin two months after DCS submits its license application, rather than the nine months required by 10

appropriate to ensure the fair and orderly conduct of hearings, and to protect parties from undue burdens in the discovery process.

² See Notice of Acceptance of Application for Docketing, and Notice of Opportunity for a Hearing, 66 Fed. Reg. 19,994, 19,995. In addition, the NRC docketed an Environmental Report and Quality Assurance plan submitted by DCS.

³ A hard copy of the schedule is attached as Exhibit 3 to the Motion to Dismiss.

C.F.R. § 70.21(f). It also shows that the Staff does not intend to begin, let alone complete, the safety review for operation of the MOX plant until after the EIS is issued.

By order dated June 14, 2001, the NRC Commissioners assigned the CAR review case to the ASLB. *Duke, COGEMA, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478 (2001). CLI-01-13 also set out a series of scheduling “milestones,” which contemplated that discovery against DCS would commence at the same time that contentions are admitted. *Id.*, 53 NRC at 484-86.

On August 13, 2001, GANE filed a set of contentions. *See Georgians Against Nuclear Energy Contentions Opposing a License for Duke COGEMA Stone & Webster to Construct a Plutonium Fuel Factor at Savannah River Site*. 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 the 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. *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”).

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). The admitted

contentions challenge the insufficiency of the MOX Facility design to address Material Control and Accounting and physical security requirements, incorrect designation of the controlled area, the inadequate seismic design, the inadequate cost comparison in the Environmental Report ("ER"), the ER's inadequate discussion of aqueous polishing waste stream impacts, and the ER's failure to analyze the impacts of malevolent acts of terrorism. GANE expects that it will require both expert and legal assistance to litigate all of these contentions, and that the discovery and case preparation process will involve considerable expenditures of time and money.

On December 14, 2001, the ASLB issued another Order, which announced that the Presiding Officer would hold a telephone conference with the parties on December 20, for the purpose of discussing a schedule for discovery. In response to the December 14 Order, GANE filed with the ASLB a Request for Stay of Discovery Pending Ruling on Motion to Dismiss or Hold in Abeyance (December 18, 2001). This motion was effectively mooted by the ASLB's issuance, on December 20, of a decision denying GANE's Motion to Dismiss. *See* Memorandum and Order (Ruling on Motion to Dismiss).

On December 20, 2001, the ASLB held a telephone conference with the parties, for the purpose of discussing a schedule for discovery. At the end of the telephone conference, the Presiding Officer stated that although he would subsequently issue a discovery scheduling order, the parties should consider that discovery has begun.

Today, January 4, 2002, GANE filed with the Commissioners a petition for interlocutory review of the ASLB's decision to deny GANE's Motion to Dismiss. *See* Georgians Against Nuclear Energy's Petition for Interlocutory Review ("Petition"). The

instant motion requests a stay of the CAR hearing while the Commission considers GANE's Petition.

ARGUMENT

GANE respectfully requests that the Commission stay the hearing on the CAR while it considers GANE's petition for review of the ASLB's December 20, 2001, decision denying GANE's Motion to Dismiss. GANE asks that the Commission grant this stay in the exercise of its power to ensure the fair and efficient conduct of the hearing process. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19 (1998) (Commission's goals include providing a "fair hearing process," with "reasonable schedules and discovery management," and a "meaningful hearing that focuses on real issues and genuine disputes").

GANE submits that it would be unfair to GANE, and an inefficient use of all of the parties' resources, to proceed with discovery or any other aspect of this hearing, until the Commission has reviewed GANE's serious and legitimate claims that the CAR review proceeding is being conducted far outside the bounds of the law. If the Commission grants GANE's Petition and the underlying request for relief, 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 Commission dismisses or suspends this case 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 significantly. 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, as well as the time and resources of the ASLB and the other parties.⁴

Finally, 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, the Commission's regulations provide for the issuance of orders to protect

⁴ For example, GANE's Contentions 1 and 2 challenge the adequacy of the MOX Facility design to comply with NRC safeguards and physical security requirements. A key claim, in both these contentions, is that DCS has not submitted enough information about its plans for the operation of the facility to allow a meaningful review of the adequacy of the design to satisfy safeguards and physical security requirements. This is in part because DCS has postponed submitting any details about its safeguards or security plants until it submits a license application, which is not expected to be filed until July of 2002. It is entirely possible that the concerns raised in Contentions 1 and 2 would be addressed by the submission of the additional information related to the operation of the plant. Thus, it would be extremely wasteful of the parties' resources to go forward now

parties from “undue burden” in the discovery process. *See* 10 C.F.R. § 2.740(c). In this case, the discovery process is likely to last through the fall of 2002, when the Staff is expected to issue the Environmental Impact Statement and the Safety Evaluation Report for construction of the MOX Facility. It is reasonable to delay the discovery process for the period of weeks necessary to resolve the issues raised by GANE’s Petition for Review.

Moreover, GANE’s request that this proceeding be dismissed or held in abeyance 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). 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

to litigate issues that may be resolved by the submission of additional operation-related information.

U.S. 942 (1982); *Turner Broadcasting Sys. Inc. v. Tracinda Corp.*, 175 F.R.D. 554 (D.C. Nev. 1997).

Here, as outlined in GANE's petition for review and further detailed in its Motion to Dismiss, 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. There is no such thing, in NRC regulations, as a "Construction Authorization Request" that seeks non-licensing approval of construction of a plutonium processing plant. The only thing that is permitted by the NRC's regulations is the submission, at least nine months before construction begins, of a completed license application that addresses both construction/design and operational issues. *See* 10 C.F.R. §§ 70.21(f), 70.22, and 70.22(f). The conduct of a non-licensing review on the design and construction of the facility alone, without the benefit of information about the operation of the facility, not only violates the plain language of the NRC's regulations, but also violates their purpose, which is to increase the rigor of review of plutonium processing applications because of their unique hazards. *See* Proposed Rule, Plutonium Processing and Fuel Fabrication Plants, 36 Fed. Reg. 9,786 (May 28, 1971); Final Rule, Plutonium Processing and Fuel Fabrication Plants, 36 Fed. Reg. 17,573, 17,574 (September 2, 1971).

Moreover, the piecemeal review of construction and design, completely separate from operational issues, undermines the safety of the design of the proposed facility. Without the benefit of details about the proposed operation and procedures, it is difficult to fully assess the manner in which natural phenomena may affect the plant, and what kinds of accidents may occur. As a result, it is difficult, if not impossible, to make a full

and fair determination regarding the adequacy of the plant's design under 10 C.F.R. § 70.23(b).

Furthermore, 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. The NRC Staff cannot possibly be deemed to have taken a "hard look" at the impacts of the proposed MOX Facility that is required by NEPA, *see Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972), if its environmental evaluation does not include a rigorous assessment of whether the applicant will minimize risks to public health and the environment by complying with safety and safeguards regulations during operation. *See Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975) (the requirements of the Atomic Energy Act cannot "be viewed separate and apart from NEPA considerations"). In addition, the CAR approval proceeding is inconsistent with the NRC's Subpart L procedures, which require the completion of a hearing file, including all information related to the license application, before a hearing can go forward. The CAR hearing is proceeding years before the Staff's safety and NEPA reviews of the license application is completed. Any one of these grounds constitutes a sufficient basis for dismissal or delay of this proceeding in its entirety.

As GANE has outlined in its Petition and 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. It is not a case involving a "minimally flawed" application, *see Curators of the University of Missouri*, (TRUMP-S Project), CLI-95-8, 41 NRC 386,

395 (1995), nor is it 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). DCS and NRC will be unable to cure their procedural failings without substantial efforts. To require GANE to proceed with the effort and expense of discovery before addressing GANE's legitimate claims regarding the illegality of the process for the CAR review, 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 Commission stay discovery and all other aspects of the proceeding below, until it has resolved GANE's petition for review of the ASLB's decision denying GANE's Motion to Dismiss.

Respectfully submitted,



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Dated January 4, 2002
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⁵ 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 copies of GANE's Petition for Interlocutory Review and Request for Stay of Hearing were sent to the following by e-mail with paper copies served via U.S. First Class Mail.

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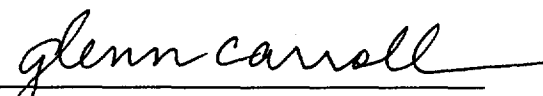
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