RAS 4014

February 6, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
DUKE COGEMA STONE & WEBSTER	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 01-790-01-ML

GEORGIANS AGAINST NUCLEAR ENERGY'S RESPONSE IN OPPOSITION TO DCS PETITION FOR INTERLOCUTORY REVIEW OF LBP-01-35

Georgians Against Nuclear Energy ("GANE") hereby responds to Duke Cogema Stone & Webster's Petition for Interlocutory Review (January 28, 2002) ("DCS Petition") in which DCS asks the Commission to take partial review of LBP-01-35 and reverse the Licensing Board's decision to admit four of GANE's contentions in this proceeding for review of DCS's Construction Authorization Request ("CAR"). As discussed below, DCS has failed to demonstrate that it meets any of the Commission's standards for interlocutory review.

Factual Background

GANE filed a set of 13 contentions in this proceeding on August 13, 2001. In a response dated September 13, 2001, DCS opposed the admission of all of them.[1] The

[1] Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Request for Hearing ("DCS Response to GANE Contentions").

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Atomic Safety and Licensing Board ("ASLB") held a prehearing conference in North Augusta, South Carolina, on September 21, 2001.

On December 6, 2001, the ASLB issued LBP-01-35, admitting GANE's Contentions 1 and 2 (Materials Control and Accounting), Contentions 5 and 8 (Designation of Controlled Area Boundary), and Contention 12 (Insider Sabotage and Malevolent Acts) [2] in addition to four others. On December 17, 2001, DCS filed a 28-page motion, requesting the ASLB to reconsider its rulings on four of GANE's admitted contentions (1, 2, 5/8 and 12); or to certify the rulings to the Commission.[3] The ASLB denied DCS's motion.[4] GANE responded on January 7, 2002.[5] After a "thorough review" of DCS's lengthy arguments in favor of reconsideration, and "putting aside any question whether DCS's arguments raise some new matters inappropriate for a reconsideration motion," the ASLB concluded that: "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." *Id.,* slip op. at 3.

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[2] At pages 1-2, DCS summarizes the ASLB's rulings on these issues in a very brief and sometimes misleading manner. The precise wording of the ASLB rulings admitting the contentions can be found at the following pages of the slip op. of LBP-01-35:
GANE Contentions 1 and 2 - Materials Control and Accounting, pages 22-29;
Contentions 5 and 8 - Designation of Controlled Area Boundary, pages 35-38; and
Contention 12 - Insider Sabotage and Malevolent Acts, pages 50-55, esp. page 54.

[3] Duke Cogema Stone & Webster Motion for Reconsideration, or, in the Alternative, for Certification to the Commission ("DCS Motion for Reconsideration").

[4] Memorandum and Order (Ruling on Motion to Reconsider) (January 16, 2002) ("January 16 Memorandum and Order").

[5] *See* Georgians Against Nuclear Energy's Response to DCS Motion for Reconsideration ("GANE Response to Motion for Reconsideration").

In addition, the ASLB declined to certify its ruling to the Commission. The ASLB found that certification was not appropriate because DCS had not repudiated its former position that Contentions 3, 6, 9, and 11 were inadmissible. The Board ruled that:

> In such circumstances, we do not believe that the directed certification provision of [10 C.F.R. §] 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. § 2.714(a), 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.

January 16 Memorandum and Order at 4-5.

Discussion

Interlocutory appeals to the Commission are generally forbidden under 10 C.F.R. § 2.730. The regulation provides only a limited exception, that the presiding officer can certify an issue to the Commission if it finds a prompt decision is necessary to "prevent detriment to the public interest" or "unusual delay or expense." *Id.*

In a recent decision, the Commission confirmed that it generally disfavors interlocutory review.[6] As the Commission explained in *Haddam Neck,* interlocutory review is generally reserved for those cases where the ruling:

> (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
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> (2) Affects the basic structure of the proceeding in a pervasive or unusual manner.

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[6] *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant License Termination Plan), CLI-01-25, slip op. at 3 (December 5, 2001) ("*Haddam Neck*").

Id. Even if a ruling is significant, or clearly in error, this is not sufficient by itself to warrant interlocutory review. *Id.*

Notably, DCS does not make any attempt to address the Commission's well-established regulatory criteria for interlocutory review. In fact, there are no reasonable grounds for believing that admission of GANE's four contentions would have a detrimental effect on the public interest, cause undue expense or delay, threaten DCS with irreparable harm, or affect the structure of this proceeding.

Instead of addressing these standards, DCS cites a statement made by the Commission in this proceeding, encouraging the Licensing Board to refer or certify "novel legal or policy questions" to the Commission on an interlocutory basis.[7] In *Haddam Neck,* however, the Commission emphasized that in applying the "novel legal or policy questions" standard, it assigns "considerable weight to a licensing board's decision on whether its ruling warrants immediate Commission review." *Id.,* slip op. at 3. DCS acknowledges this, but points out that the ASLB did not address the issue of whether certification is appropriate under the "novel legal or policy question" standard. DCS Petition at 2 note 3.[8]

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[7] *See* DCS Petition at 3, citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001). *See also Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 23 (1998).

[8] DCS argues that the ASLB erroneously ruled that 10 C.F.R. § 2.1205(o) is the "exclusive remedy for raising issues before the Commission." DCS Petition at note 3. This argument misconstrues the ASLB's ruling. The ASLB correctly pointed out that DCS, having failed to alter its previously stated position that GANE Contentions 3, 6, 9, and 11 are inadmissible, was entitled to appeal LBP-01-35 under 10 C.F.R. § 2.1205(o). Under the circumstances, the ASLB found that the Policy Statement in CLI-98-12 does not appear to envision that the Board "should exercise its discretion to certify issues to

GANE respectfully submits that the record provides ample indication that the ASLB did not consider it necessary or appropriate to certify any of the admitted contentions to the Commission, except for Contention 12.[9] The ASLB has had two separate opportunities to certify the contentions to the Commission: when it issued LBP-01-35, and when it ruled on the Motion for Reconsideration. Apart from its statement about Contention 12 in LBP-01-35, the ASLB said nothing about the need for Commission review of any issue. Instead, the ASLB provided thorough and well-reasoned opinions regarding the admissibility of each of the contentions. Thus, the Commission may reasonably infer from the record that with the exception of Contention 12, the ASLB does not believe that Commission review of any of the admitted contentions would "simplify . . . its job." *See Haddam Neck,* slip op. at 7.

In any event, DCS has failed to demonstrate anything more than a set of disagreements with the ASLB regarding the proper interpretation of the law governing plutonium processing plants. DCS claims that the Commission should review these disagreements with the ASLB because the issues are "novel." While the contentions do concern regulations that have not previously been interpreted by the ASLB, this is likely to be true for many of the issues raised in the MOX CAR approval proceeding, because a plutonium facility has not been licensed in many years. The fact that the ASLB has not

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the Commission on behalf of a party who voluntarily chooses not to exercise its own right to appeal to protect its own interests." January 16 Memorandum and Order at 4-5.

[9] With respect to Contention 12, the ASLB stated that under normal circumstances, it would have referred the contention to the Commission; but did not see the need to do so, given DCS's right of appeal. *See* LBP-01-35, slip op. at 54. As discussed below, this issue was mooted earlier today by the issuance of CLI-02-04 and the Commission's review acceptance of GANE's Contention 12 (NEPA requires DCS to analyze effects from insider sabotage and malevolent acts).

previously interpreted a regulation is not sufficient grounds for obtaining interlocutory review; otherwise, the Commission would be compelled to continually interfere with the ASLB in this unprecedented MOX case. Instead, as in *Haddam Neck,* the Commission must look to whether Commission review would provide necessary assistance to the ASLB, or whether there is some impact on the proceeding that must be remedied. No such showing has been made here.[10]

The separate contentions are discussed below.

Contentions 1 and 2 (Inadequate Materials Control & Accounting)

In LBP-01-35, the Licensing Board admitted GANE Contentions 1 and 2, which challenge the adequacy of the CAR to demonstrate compliance with the NRC's physical security and material control and accounting requirements. DCS argues that physical security and material control and accounting fall outside the scope of 10 C.F.R. § 70.23, which provides that:

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[10] As discussed above, it would be inappropriate for the Commission to take review here based solely on alleged legal errors committed by the ASLB. However, it is worth noting that DCS has had an ample opportunity to persuade the ASLB of the correctness of DCS's position regarding the inadmissibility of the contentions, in both the initial briefing on admissibility, the oral argument on September 21, 2001, and the Motion for Reconsideration.

GANE also notes that space constraints do not permit GANE to fully address herein the arguments advanced by DCS in its Petition regarding alleged legal errors committed by the ASLB in deciding that the contentions are admissible. GANE refers the Commission to the transcript of the oral argument on September 21, 2001, as well as GANE's Response to DCS's Motion for Reconsideration, for a discussion of the reasons that DCS's position on these issues is incorrect.

> The Commission will approve construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant on the basis of information filed pursuant to § 70.22(f) when the Commission has determined that the design bases of the principal structures, systems and components, and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.

DCS argues that "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," and that "[s]uch systems are neither designed nor intended to provide such protection." DCS Petition at 7. Accordingly, 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)." *Id. at* 8. DCS has offered no valid grounds for interlocutory review.[11]

DCS happens to disagree with the ASLB regarding the question of what components and systems are covered by 10 C.F.R. § 70.23(b). As the Commission ruled in *Haddam Neck,* however, a mere allegation of legal error does not constitute sufficient grounds for taking review. *Id.,* slip op. at 4. In any event, contrary to DCS's argument, the ASLB explained at length the logical reasoning behind its conclusion that MC&A and physical security issues are related to design issues. *See* LBP-01-35, slip op. at 25-28. DCS's claim of legal error is all the weaker, given that DCS has already attempted and

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[11] The Commission also should reject out of hand DCS's vague conjecture that a decision in this case will affect other proceedings. Even if the claim could be substantiated, it is irrelevant: "[t]he threat of future widespread harm to the general population of NRC licensees is not a factor in interlocutory review." *Haddam Neck,* slip op. at 4.

failed, in its Motion for Reconsideration, to convince the ASLB that its admission of Contentions 1 and 2 was in error.[12]

Finally, DCS has not suggested any reason why the issues presented by Contentions 1 and 2 are "novel" and cannot be resolved by the ASLB. *Id.,* slip op. at 6. Clearly, many issues in this case will be new to the ASLB, because a plutonium processing plant has not been licensed for many years. By itself, however, this does not constitute sufficient grounds for interlocutory review; otherwise, virtually every issue that arises in this MOX case would have to be referred to the Commission. Additionally,

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[12] Moreover, DCS's argument is disingenuous, because it fails to acknowledge the fact that the CAR itself takes credit for MC&A and physical security measures in the design of the MOX Facility. *See also* GANE's Contention 2 and LBP-01-35, slip op. at pages 25-26. For example, Section 5.5.2.7.6.2 of the CAR states that:

> [t]he impacts of explosions in the F Area are bounded by the impacts accounted for in the MFFF structures for safeguards and security reasons. Thus no new principal SSCs are required for this event.

Notably, although DCS takes credit for safeguards and security design features in evaluating the adequacy of the design to protect against accidental explosions, it has provided no information whatsoever about the safeguards and security design features on which it relies.

Other examples of the relationship between design safety, safeguards and security can also be found in the CAR. *See,* for example, Section 6.3.3.2.4, which states that the "use of qualified nondestructive assay (NDA) measurement systems is also acceptable in establishing compliance with the double contingency principle," for criticality prevention. Qualified NDA measurement systems are commonly used for material control and accounting. Thus, the CAR relies on MC&A measures to demonstrate the adequacy of the MOX Facility design for criticality prevention.

DCS has not demonstrated any valid reason why these particular contentions would "benefit from early review." *See Haddam Neck,* slip op. at 6.[13]

GANE Contentions 5 and 8, BREDL Contention 9A

(Designation of Controlled Area Boundary)

DCS seeks interlocutory review of the ASLB's decision to admit GANE Contentions 5 and 8 and BREDL Contention 9A, which challenge DCS's designation of the controlled area as essentially contiguous with the boundary of the entire Savannah River Site (SRS). DCS Petition at 8-10. GANE contends that because DCS does not have control over the SRS, the SRS site boundary is inappropriate for demarcation of the controlled area. The issues raised by this contention received ample briefing and considered attention by the ASLB.[14]

DCS argues that "this is the first time a licensing board has interpreted 10 CFR § 70.61(f)." DCS Petition at 9. As discussed above, if the standard for interlocutory review were whether the ASLB had to interpret a regulation for the first time, then this entire case would be in front of the Commission continually. The only remotely

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[13] DCS argues that if the Commission accepts GANE's Petition for Review of the ASLB's decision to deny GANE's Motion to Dismiss, it should also take review of the ASLB's decision to admit Contentions 1 and 2, because these contentions "are part of the larger issue raised by GANE's Petition." DCS Petition at 8. GANE believes the issues are related, but only in the sense that if the Commission grants GANE's Petition for review and holds that NRC regulations contemplate the submission of a single license application that integrates design and operational issues, then DCS's petition for review may well become moot.

[14] Having entertained written and oral arguments from all sides regarding the admissibility of this contention, the ASLB issued a detailed opinion regarding its admissibility. Subsequently, the ASLB considered lengthy additional arguments in DCS's Motion for Reconsideration, and confirmed its initial decision in the January 16 Memorandum and Order.

plausible reason that DCS has provided for taking interlocutory review is that the issue of the appropriate placement of the controlled area boundary is important to the design of the facility, and will affect the cost. DCS Petition at 9. GANE agrees, and should the ASLB render a decision that mandates DCS to have to spend a great deal more money than it is willing to achieve public safety, DCS has the option of appealing that decision at the end of the case. DCS has offered no reason for the Commission to intervene in the case at this juncture.

GANE Contention 12

(Evaluation of Effects of Insider Sabotage and Malevolent Acts under NEPA)

DCS also asks the Commission to take directed certification of the ASLB's decision to admit Contention 12, which challenges the failure of DCS's Environmental report to address the consequences of insider sabotage or malevolent acts. We have just received an order taking certification of this issue, and therefore DCS's argument is moot.

CONCLUSION

For the foregoing reasons, the Commission should deny DCS's Petition for Review.

Respectfully submitted,

Glenn Carroll

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for Georgians Against Nuclear Energy

[15] This motion was prepared with substantial assistance from GANE's legal adviser, Diane Curran.

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Dated February 6, 2002
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CERTIFICATE OF SERVICE
by Georgians Against Nuclear Energy
(Docket # 70-3098, ASLBP # 01-790-01-ML)

I hereby certify that copies of GANE's Response in Opposition to DCS Petition for Interlocutory Review were sent to the following by e-mail with paper copies served via U.S. First Class Mail.

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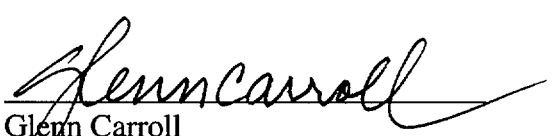

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