RAS 3343

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 08/29/01

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF ANSWER TO
GEORGIANS AGAINST NUCLEAR ENERGY'S
MOTION TO DISMISS LICENSING PROCEEDING OR,
IN THE ALTERNATIVE, HOLD IN ABEYANCE

I. INTRODUCTION

On August 13, 2001, petitioner Georgians Against Nuclear Energy ("GANE" or "Petitioner") filed a motion to dismiss the licensing proceeding or, alternatively, to hold the proceeding in abeyance claiming that the construction authorization application was submitted contrary to the regulations and that the safety and environmental reviews had been illegally truncated. Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance ("Motion"), at 2-3. Specifically, Petitioner argued that the Atomic Safety and Licensing Board ("Board") should dismiss the proceeding based on the grounds that: 1) Part 70 does not authorize the bifurcation of the licensing proceeding into construction and operation (Motion at 12-13, 15); 2) the National Environmental Policy Act ("NEPA") requires the staff to complete its technical safety review, as required by the Atomic Energy Act ("AEA"), before the issuance of an Environmental Impact Statement ("EIS") (Motion at 17); 3) litigation should not proceed until the hearing file includes the Safety Evaluation Report ("SER") and the EIS (Motion at 23-24); 4) litigation should await the completion of a Memorandum of Understanding ("MOU") between the

Department of Energy ("DOE" or Department) and the Nuclear Regulatory Commission ("NRC" or Commission) because it could affect standards for safe operation and the assessment of environmental impacts (Motion at 3, 24-25); and 5) the current hearing schedule is generally prejudicial to Petitioner's interests (Motion at 25-26).

For the reasons discussed below, the Staff opposes the motion and urges that it be denied.

II. BACKGROUND

On February 28, 2001, the applicant, Duke COGEMA Stone & Webster ("DCS" or "Applicant"), filed an application seeking to license the construction of a mixed oxide fuel fabrication facility ("MOX FFF") to be located on the DOE's Savannah River Site ("SRS") in South Carolina. The applicant has submitted a Construction Authorization Request ("CAR"), an Environmental Report ("ER"), and a Quality Assurance Plan ("QAP"). Currently, the Staff is reviewing the documents in order to determine whether they provide sufficient information to meet the construction authorization requirements found in 10 C.F.R. §§ 70.23(a)(7) and 70.23 (b).

On April 18, 2001, the NRC published in the *Federal Register* a "Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility." 66 Fed. Reg. 19,994 (2001) (hereinafter April 18 Notice). The April 18 Notice establishes a process in which an opportunity for hearing will be provided with respect to issuance of an authorization to construct the facility. As specified in the Notice, operation of the facility will be the subject of a separate notice of opportunity for hearing at a later date. Pursuant to the Notice, Petitioner, along with two other organizations and two individuals, petitioned for a hearing on the MOX FFF CAR.

III. ARGUMENT

Petitioner's motion is without merit. First, the Board lacks authority to review determinations made by the Commission in its Notice of Opportunity for Hearing and the subsequent referral order. *See generally* CLI-01-13, "Order Referring Petitions for Intervention and Requests for Hearing to

Atomic Safety and Licensing Board Panel," 53 NRC __ (hereinafter June 14 Order); April 18 Notice. Second, Petitioner's reading of Part 70 is incorrect and contrary to a reading of the regulation in its entirety. Third, Petitioner's understanding of the Staff's obligations pursuant to Part 51 is incorrect. Fourth, Petitioner erroneously interprets the 10 C.F.R. Part 2, Subpart L requirements concerning the timing of a Hearing File. Fifth, the unavailability of a hearing file does not provide a basis to dismiss the proceeding. Last, in support of their motion, Petitioner does not articulate any reasons aside from a vague sense that the current schedule will have a prejudicial effect on them. In sum, Petitioner fails to carry the burden on this matter and the Motion should be denied.

A. The Board Lacks Authority to Review the Commission's Determination to Bifurcate the Licensing Process

On June 14, 2001, the Commission issued an order referring the petitions for intervention in the instant case to the Board. *See* June 14 Order at 6. In the June 14 Order, the Commission adopted a bifurcated approach to licensing the MOX FFF and limited the hearing's goal to "issuance of an initial decision on the CAR." *Id*. at 8. Contrary to Petitioner's assertion, the Staff believes that the Commission's order more than suggested approval of a bifurcated review. In identifying the scope of the proceeding before the Board, the Commission, based on the pertinent regulations in 10 C.F.R. §§ 70.23 (a)(8) and 70.23 (b), foreclosed consideration of issues related to operation of the proposed facility by limiting the scope to issuance of construction authorization. *Id*. at 6. Further, the Commission directed the presiding officer to issue "an initial decision *on the CAR* within approximately two years." *Id.* at 7-8 (*emphasis added*). Last, in its "schedule of milestones," the Commission established the timing and scope of the proceeding and clearly sets out milestones that reflect a proceeding limited to issues concerning construction. *See id.* at 8-9.

As a result of the Commission's expressed intention in issuing its June 14 Order and because the Board's jurisdiction in the instant case is limited to the issues delineated in the notice of hearing published on April 18, 2001, the Staff believes that the Board lacks the authority to review Petitioner's challenge to the bifurcation of the proceeding. In this case, as in all cases, the

Board may "exercise only those powers which the Commission has given [them]." *Pub. Serv. Co. of Indiana* (Marble Hill Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976) (*quoting Northern Indiana Pub. Serv. Co.* (Bailly Generating Station, Nuclear 1), ALAB-249, 8 AEC 980, 987 (1974)). The Board's jurisdiction is limited to the issues defined in the notice of hearing. *See, e.g., Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980) (affirming Board's decision to limit its jurisdiction solely to matters raised in the notice of opportunity for hearing); *Marble Hill*, 3 NRC at 171 (upholding Board's refusal to exercise jurisdiction over antitrust issues, which had been excluded from the notice of hearing); *Bailly Generating Station*, 8 AEC at 987. Consequently, as a result of the limited scope of the notice of opportunity for hearing issued by the Commission, the Board lacks jurisdiction to determine whether the Staff's bifurcated approach is inapposite to the requirements found in Part 70.

B. Alternatively, Part 70 Does Not Preclude Licensing the Proposed Plutonium Processing and Fuel Fabrication Facility Through a Two-step Process

Petitioner argues that Part 70 prevents the Staff from considering the issue of constructing a MOX FFF separately from the issue of operating the facility. It is not disputed that Part 70 requires an applicant for a MOX FFF to seek approval for both construction and operation. Under 10 C.F.R. § 70.21(f), the application must be submitted at least nine months prior to commencement of construction. The time period articulated in the rule is analogous to that found in the requirements for other materials licenses that may significantly affect the quality of the environment. *See, e.g.,* 10 C.F.R. § 30.32(f) (codifying the requirements imposed on applicants for a license to posses byproduct material); Prohibition of Site Preparation and Related Activities, 37 Fed. Reg. 5,745 (1972) (describing the Atomic Energy Commission's redefinition of the term "commencement of construction"). Part 70 imposes two main requirements before construction can commence. First, the NRC must determine 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." 10 C.F.R.

§ 70.23(b). Second, the NRC must conclude "after weighing the environmental, economic, technical, and other benefits against environmental costs ... that the action called for is the issuance of the proposed license." 10 C.F.R. § 70.23(a)(7) (citing the environmental regulations found in Part 51). Authorization for operation of a plutonium processing facility, however, requires the NRC to determine that "construction of the principal structures, systems, and components ... has been completed in accordance with the application." 10 C.F.R. § 70.23(a)(8).

The regulations thus clearly contemplate two separate actions—authorization to construct the facility and operation. *See* 10 C.F.R. §§ 70.23 (a)(8), 70.23 (b). But while the regulations do not specifically articulate any particular approval or hearing process, they, likewise, do not proscribe the review and approval of the license application in separate stages. Therefore, a bifurcated licensing approach is not foreclosed.

Petitioner argues that 10 C.F.R. § 70.22(f) specifically prohibits the Staff from bifurcating the licensing process and that the Staff has engaged in an "unlawful" act by bifurcating the process. *See* Motion at 2, 15-19. Since there is no distinction (between construction and operation) in the requirements articulated in 10 C.F.R. § 70.22(f), Petitioner argues that Part 70 clearly requires a single license application. The Petitioner, however, fails to explain how the language found in 10 C.F.R. § 70.22(f) (which merely sets out some of the requirements for the content of an application of a license to "posses and use special nuclear material") prohibits the staff from engaging in a two-step licensing process.

On its face, 10 C.F.R. § 70.22(f)[1] does not prohibit the bifurcation of the licensing process

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[1]10 C.F.R. § 70.22(f) states:

"Each application for a license to possess and use special nuclear material in a plutonium processing and fuel fabrication plant shall contain, in addition to the other information required by this section, a description of the plantsite, a description and safety assessment of the design bases of the principal structures, systems, and components of the plant, including provisions for protection against natural phenomena, and a description of the quality assurance program to be applied to the design, fabrication, construction testing and

(continued...)

for the MOX FFF. The purpose of 10 C.F.R. § 70.22(f) is to denote the contents of applications. The section in no way describes the licensing process for the construction and operation of a plutonium processing and fuel fabrication facility. Therefore, it cannot be regarded as a statement that the Commission intended to consider construction and operation solely during a single licensing proceeding.

The correct approach to understanding 10 C.F.R. § 70.22(f) would be to consider it *in pari materia* with other regulations that address the same subject matter. Although Petitioner failed to address how the other sections in Part 70, which address separate standards for reviewing operation and construction, can be read together with their narrow interpretation of 10 C.F.R. § 70.22(f), the regulations can be reconciled to support the Commission's bifurcated approach. *See, e.g.,* 10 C.F.R. §§ 70.23 (a)(8), 70.23 (b). As noted previously, although none of the sections expressly authorize a bifurcated approach, none proscribe it either. The sections that establish the standards for review codify separate standards for construction and operation. *Id.* 10 C.F.R. § 70.22, on the other hand, establishes the contents of an application for a license for the possession and use of special nuclear material ("SNM"). Therefore, when read in tandem, the regulations in Part 70 allow for a separate review of construction and operation issues. For the specific purpose of obtaining an SNM license, however, the rules prescribe the specific contents for the application. 10 C.F.R. § 70.22(f). Consequently, since the Applicant is not currently seeking an SNM license and 10 C.F.R. § 70.22(f) merely denotes the contents of an SNM license application, the bifurcated process is an acceptable approach within the scope of Part 70.

C. Part 51 Does Not Require the Staff to Complete its Safety Review Prior to Issuing an EIS

The NRC codified its methods for complying with NEPA in 10 C.F.R. Part 51. In the instant case, the Staff has abided by the requirements found in Part 51 (*i.e.,* conducting scoping meetings

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[1](...continued)
operation of the structures, systems, and components of the plant."

and issuing a Scoping Summary Report).[2] The Petitioner, however, argues that NEPA requires the Staff to conclude its safety review prior to issuance of an environmental impact statement ("EIS"). Petitioner states that in order for the Commission to take its requisite "hard look" at the environmental impacts arising from the action proposed, the Staff needs to have conducted its safety review of the facility.[3] Motion at 20-21. Nevertheless, Petitioner does not cite any regulations to support its argument that the Staff is required to conduct such a review prior to issuance of an EIS.[4]

Part 51 sets out the requirements for the timing of an EIS in 10 C.F.R. § 51.70(a) and 51.71(d). Specifically, the rules state that the Staff "will prepare a draft [EIS] as soon as practicable after publication of the notice of intent to prepare an environmental impact statement." 10 C.F.R. § 51.70(a). Further, in stating the requirements for the analysis section of an EIS, the rules state that "[w]hile satisfaction of Commission standards and criteria pertaining to radiological effects will be necessary to meet the licensing requirements of the Atomic Energy Act, the analysis will, for the purposes of NEPA, consider the radiological effects of the proposed action and alternatives." 10 C.F.R. § 51.71(d). Thus, the requirements on the timing and scope of an EIS are independent from the Commission's obligations under the AEA. Therefore, Petitioner is incorrect

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[2]The Scoping Summary Report for the MOX FFF, for example, addresses the concerns raised by Petitioner. *See* "Environmental Impact Statement Scoping Process, Scoping Summary Report" at 19-22 (August 2001), Attachment A. In the report, the Staff commits to addressing issues regarding the "Human Health Impacts" of the facility. *Id.* at 21. Specifically, the report states that the radiological impacts arising out of normal operations and accidents will be evaluated. *Id.* Therefore, the Staff will be fulfill the NRC's NEPA obligations, as codified in Part 51.

[3]Petitioner relies on *Citizens for Safe Power v. NRC*, 524 F.2d 1291 (D.C. Cir. 1975) and *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003 (1973) to support their argument. However, neither case stands for the proposition that a facility's safety review is a prerequisite to the issuance of an EIS.

[4]Petitioner also fails to address how they reconcile their position with other Commission regulations that allow issuance of an EIS prior to finalizing the safety review for a facility. For example, under Part 52 an applicant can request and the Staff can issue and early site permit for construction of a nuclear power plant when an EIS has been done before a safety review has been finalized. 10 C.F.R. §§ 52.15(a), 52.18.

in asserting that the Staff must complete its safety review before it can issue an EIS.[5]

D. The Unavailability of Hearing File Does Not Provide a Basis to Dismiss the Proceeding

Petitioner next argues that "Subpart L regulations clearly preclude informal hearings from going forward until the hearing file is complete." Motion at 24. Subpart L's requirements that the Staff compile a hearing file, however, does not now compel the result Petitioner requests. The Staff's duty to generate a hearing file arises within 30 days of the entry of an order granting a request for a hearing. 10 C.F.R. § 2.1231. Since there has not as yet been such order, the Staff is not now obligated to create a hearing file. Further, if intervention is granted, 10 C.F.R. § 2.1231, the Staff is merely required to create a file composed of the documents available at the time and has a duty to maintain the file current as new documents become available. 10 C.F.R. § 2.1231(a), *et seq.* Therefore, Petitioner's argument is without merit.

E. The Lack of an MOU Between NRC and DOE Is Not an Appropriate Ground to Dismiss this Proceeding

Petitioner argues that as a result of a lack of an MOU between the NRC and DOE the licensing proceeding cannot go forward. Motion at 24-25. The MOU, which is under current discussion between the NRC Staff and DOE, is intended to address areas where, under the Atomic Energy Act, DOE and the NRC have overlapping jurisdiction. Although the document remains to be finalized, the NRC still is in a position to exercise its regulatory authority under the Act. Petitioner, however, failed to present any regulatory requirements in Part 70 or elsewhere that would require that such an MOU be completed as a prerequisite to going forward with actions for which the NRC is responsible. Therefore, the outcome of ongoing negotiations with DOE would

[5]The Motion may also be viewed as an impermissible attack on the regulations. *See* 10 C.F.R. § 2.1239. Petitioner, in effect, asserts that NEPA requires the Staff to go beyond Part 51 requirements and conclude that an NRC safety review is a condition precedent to preparation of an EIS. Part 51, however, contains no provision that a safety review must be completed prior to the issuance of an EIS. *See* 10 C.F.R. §§ 51.70(a), 51.71(d). Therefore, the Board should dismiss Petitioner's claim as a veiled attack on the Commission's regulations. 10 C.F.R. § 2.1239.

not affect the licensing of the facility. If an MOU is executed, the Staff will make it available to the Board and parties to the proceeding;[6] the extent to which such MOU may affect the regulatory framework, so as to provide a basis for late-filed contentions, is a matter for another day.

F. A Generalized Argument That the Current Hearing Schedule Will Have Prejudicial Effect on the Petitioner Is Not an Appropriate Ground to Dismiss this Proceeding

Petitioner also argues that the current hearing schedule will have a prejudicial effect on their participation in this proceeding. Motion at 25-27. Nevertheless, Petitioner failed to cite any authority that would warrant dismissal of a licensing proceeding merely because the schedule was, in a petitioner's view, prejudicial. Their argument, is however, based on their misperception that the preceeding cannot go forward only on matters related to construction. As established above, however, such position is not warranted. Petitioner has shown no prejudice in going forward with respect to the construction authorization. Thus, the Board should not grant Petitioner's request to dismiss the proceeding merely because of Petitioner's generalized articulation of the prejudicial effects of the current hearing schedule.

IV. CONCLUSION

For the foregoing reasons, the NRC Staff urges that the Motion be denied.

Respectfully submitted,

/RA/

Antonio Fernández
Counsel for NRC Staff

Dated at Rockville, Maryland
this 28th day of August, 2001

[6]Availability of the MOU may be subject to appropriate constraints because of safeguards information.

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DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-03098-ML
	)	
(Savannah River Mixed Oxide Fuel Fuel Storage Installation)	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Respectfully Submitted,

/RA/

Antonio Fernández
Counsel for NRC Staff

Date at Rockville, Maryland
this 27th day of August, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-03098-ML
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(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION TO DISMISS LICENSING PROCEEDING OR, IN THE ALTERNATIVE, HOLD IT IN ABEYANCE" and "NOTICE OF APPEARANCE" for Antonio Fernández in the above captioned proceeding have been served on the following persons this 28th day of August, 2001, by electronic mail, and U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution); or as indicated by double asterisks (**), solely by express overnight mail.

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Dated at Rockville, Maryland
this 27th day of August, 2001