

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. 070-03098
DUKE COGEMA STONE & WEBSTER)	
)	
Mixed Oxide Fuel Fabrication Facility)	
(Construction Authorization Request))	

NRC STAFF'S RESPONSE TO MOTION TO SUSPEND PROCEEDING

INTRODUCTION

On October 10, 2001, petitioner Georgians Against Nuclear Energy (GANE), and the Nuclear Control Institute (NCI), filed a joint motion with the Commission, requesting that it step in and suspend the adjudicatory proceeding pending before the Atomic Safety and Licensing Board. See "Petition By [GANE] And [NCI] To Suspend Construction Authorization Proceeding For Proposed Plutonium Fuel (MOX) Fabrication Facility" (October 10 Motion).¹

The request to immediately suspend this proceeding is predicated on the September 11 terrorist attacks, which are said to have created an ongoing threat of additional attacks which must be evaluated before this proceeding should continue. See October 10 Motion, at 1-2. GANE has not provided any reason to believe that an immediate suspension of this proceeding is required in order to protect public health and safety. For the reasons discussed below, the Commission should deny the October 10 Motion.

¹ NCI has not requested a hearing pursuant to 10 C.F.R. § 2.1205, and has not otherwise sought permission to participate as a non-party in this proceeding. See 10 C.F.R. § 2.1211. NCI thus has no status to request that any action be taken in this proceeding, and, to this extent, the October 10 Motion should be summarily denied. Hereafter, the Staff will only refer to GANE in discussing the October 10 Motion.

BACKGROUND

The United States Nuclear Regulatory Commission (NRC or the Commission) in April 2001 published 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" (Notice) in the Federal Register. See 66 Fed. Reg. 19,994-96 (April 18, 2001). In May of 2001, pursuant to the Notice, GANE and other petitioners requested a hearing on the Construction Authorization Request (CAR), dated February 28, 2001, submitted by Duke Cogema Stone & Webster (DCS), regarding a proposed mixed oxide fuel fabrication facility (MOX Facility) at the United States Department of Energy's (DOE's) Savannah River Site (SRS) in South Carolina. Whether the CAR should be granted is governed by the technical requirements contained in 10 C.F.R. Part 70, the set of regulations which controls the possession and use of special nuclear material (SNM). See Notice, 66 Fed. Reg. at 19,995, col. 2.

On June 14, 2001, the Commission referred the hearing requests on the CAR to the Atomic Safety and Licensing Board Panel for appointment of a presiding officer. See CLI-01-13, "Order Referring Petitions For Intervention and Requests For Hearing to Atomic Safety and Licensing Board Panel," 53 NRC 478 (2001) (June 14 Order). A three-member Atomic Safety and Licensing Board (Board) was appointed as the presiding officer on June 15, 2001. Pursuant to subsequent scheduling orders, GANE submitted contentions to the Board on August 13, 2001. At the same time, GANE filed a "Motion to Dismiss Licensing Proceeding, Or, In The Alternative, Hold It In Abeyance" (August 13 Motion).² After DCS and the NRC Staff filed responses to the contentions and the August 13 Motion, a pre-hearing conference was held on September 21, 2001, at which time the Board heard oral argument on the contentions and the pending motion to dismiss. These

² GANE requested that the August 13 Motion be referred to the Commission, if the Board determined that it lacked authority to rule on the motion. To date, the Board has not ruled on the August 13 Motion.

matters remain pending before the Board, as does the question of whether GANE and the other petitioners have standing. The Board's decision on standing, the admissibility of contentions, and whether the pending hearing requests on the CAR should be granted, is expected shortly.³

DISCUSSION

I. Necessary Legal Basis to Support Suspension is Lacking

GANE has not established that the immediate suspension of the adjudicatory proceeding on the CAR is required to protect public health and safety,⁴ or to avert irreparable injury or substantial prejudice.⁵ See October 10 Motion, at 6.⁶ The Atomic Energy Act (AEA) provisions GANE cites (sections 53 (e)(7) and 161b, 42 U.S.C. §§ 2073(e)(7) and 2201(b)) do not provide a

³ Pursuant to scheduling guidance provided in the June 14 Order, the Board's decision on standing, contentions, and the pending hearing requests, was due 130 days from the date a presiding officer was appointed (*i.e.*, by October 23, 2001, calculating from the June 15 appointment date). See CLI-01-13, *supra*, 53 NRC at 484-486.

⁴ See, *e.g.*, *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (suspension of license transfer proceeding was not warranted in the absence of "immediate threats to public health and safety requiring such a drastic course of action").

⁵ See, *e.g.*, *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-09, 41 NRC 404, 405 (1995) (the Commission may stay a parallel proceeding to avert "substantial prejudice," such as where discovery would compromise an OI investigation).

⁶ GANE does not make clear whether it also seeks to have the Staff's technical review of the CAR suspended. Regardless, GANE has established no basis to believe that the Staff's continued review would have an adverse impact on public health and safety. Since it has not yet been determined whether GANE has standing to participate as a party in this proceeding, its right to request any suspension is open to question.

legal foundation for GANE's suspension argument,⁷ nor do the general provisions of 10 C.F.R. § 70.23 that GANE also cites.⁸ The NRC case law GANE relies on is similarly irrelevant with respect to the question of whether the ongoing threat of additional terrorist attacks warrants the immediate suspension of the CAR proceeding.⁹ Nevertheless, the Staff does not dispute that the Commission's inherent supervisory authority over ongoing adjudicatory proceedings -- which includes its power to fully or partially assume the functions of a board -- also includes the right to suspend a proceeding should it find that such action is warranted. See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998).

The AEA confers broad responsibility and authority on the NRC in regard to implementing the statute's provisions, giving the NRC wide latitude on how best to meet the objectives set forth by Congress. See *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968), citing *Power Reactor Development Co. v. International Union of Electrical, etc. Workers*, 367 U.S. 396 (1961). The

⁷ Section 53 of the AEA (see October 10 Motion, at 6) states that any SNM licenses are subject to the Commission's safety standards (*i.e.* regulations promulgated by the Commission), which are to protect health and minimize danger to life or property. See 42 U.S.C. § 2073(e)(7). Section 161 provides the Commission with the general authority to establish regulations governing the possession and use of SNM. See 42 U.S.C. § 2201(b). While these provisions broadly authorize the Commission to establish appropriate substantive requirements governing the possession and use of SNM, neither provides support for the relief GANE seeks here -- the Commission's intercession in and suspension of the proceeding.

⁸ GANE does not explain how 10 C.F.R. § 70.23 -- which specifies the technical findings necessary to approve an application for a Part 70 license -- pertains to whether the Commission should suspend a specific, individual adjudicatory proceeding. See October 10 Motion, at 6.

⁹ The cases cited by GANE (see October 10 Motion, at 6 and n.5) pertain to situations where the Commission was requested to halt either the ongoing construction or operation of nuclear reactor facilities. See, e.g., *Yankee Atomic Electric Co.* (Yankee Rowe Nuclear Power Station), CLI-91-11, 34 NRC 3, 6 (1991) (requesting the immediate shut down of an operating reactor over concerns regarding the integrity of its pressure vessel); *Petition for Emergency and Remedial Action*, CLI-80-21, 11 NRC 707, 708 and n.2 (1980) (request for emergency relief seeking the shut down of all operating reactors and a halt to ongoing construction of all new reactors); and *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 404 (1978) (discussing ongoing Commission obligations after an operating license is issued). None of the cases cited by GANE involved a request to suspend adjudication of a proceeding analogous to this CAR proceeding.

Commission is fully aware of the events of September 11, and is taking action to assess the need to take those events into consideration as they may affect the licensing and regulation of nuclear facilities and materials.¹⁰ But GANE has provided no reason to believe that any imminent danger to public health and safety would result from a continuation of adjudicatory proceedings relating to the proposed MOX Facility. For national security concerns to justify the extraordinary step of immediately suspending this CAR proceeding, a showing must be made that such concerns constitute an immediate and specific threat at the site of the proposed MOX Facility. GANE has not established that such a threat now exists. Suspending the proceeding now is not warranted, given that the Commission has not yet determined whether DCS should even be allowed to begin constructing the proposed MOX Facility; nor has DCS yet applied for a Part 70 license to possess and use SNM. Merely raising hypothetical and prospective safety questions does not create the type of urgent situation which might justify the immediate suspension of the CAR proceeding (which, as discussed above, is still in its early stages).

In short, GANE has identified no legal basis adequately supporting its request that the Commission immediately suspend the adjudicatory proceeding on the CAR, and has provided no reason to believe that a continuation of adjudicatory proceedings on the CAR will result in any harm to GANE, or result in any other general detriment to the public health and safety. The October 10 Motion should therefore be denied.

¹⁰ While the Commission has directed the Staff to review the NRC's safeguards and physical security program in light of the September 11 terrorist attacks, it is appropriate that the Commission should also continue to perform its statutory responsibilities for the licensing and regulation of nuclear facilities and materials in a timely and deliberate manner. See, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 339 (1999), citing *Duke Power Co.* (Catawba Nuclear Station), CLI-83-19, 17 NRC 1041, 1048 (1983) (finding "a substantial public interest in efficient and expeditious administrative proceedings"). The NRC's review and adjudication of pending applications should not be disrupted -- particularly where, as here, GANE has not established that adjudication of the CAR proceeding would have any adverse impact on public health and safety. Cf. 10 C.F.R. §§ 2.788(e) and 2.1263 (to stay a decision or action of a presiding officer, movant must show irreparable harm or likelihood of success on the merits).

II. Most of the Relief GANE Requests is Not Available in an Adjudicatory Proceeding

In addition to its request that the Commission immediately suspend the CAR proceeding, GANE requests that the Commission announce that henceforth it “will not license any nuclear facility without first examining the consequences of a terrorist attack.” October 10 Motion, at 11. This generic request strays far beyond the bounds of this proceeding and would require changes in NRC policies and regulations.¹¹ A petitioner in an NRC adjudicatory proceeding cannot challenge generic decisions which are the proper subject of rulemaking.¹² See *North Atlantic Energy Services Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999). See also *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

Moreover, in the event that the Commission’s review of the September 11 attacks leads to any policy or regulatory changes, DCS and/or the proposed MOX Facility would be subject to such changes to the extent necessary or appropriate. See, e.g., AEA Section 161b, 42 U.S.C. § 2201(b); and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).

Accordingly, insofar as the October 10 Motion makes generic requests for relief, those requests should be denied.

¹¹ Similarly generic is GANE’s demand that “the NRC’s longstanding refusal to consider the consequences of such attacks in its Environmental Impact Statements (“EIS’s”) must be reversed.” October 10 Motion, at 2. GANE also states in this regard that in light of the September 11 terrorist attacks, NRC regulations are clearly inadequate and must be changed in at least three respects: (1) add a requirement for “protection of nuclear facilities against a direct assault by a fully fueled jet aircraft” (*id.*, at 8); (2) references in NRC regulations to an attacking force of “several persons” for sabotage, and to “a small group” for theft of SNM “are inappropriate” since at least 19 persons were actively involved in the September 11 attacks (*id.*, at 9, *citing* 10 C.F.R. §§ 73.1(a)(1)(i) and 73.1(a)(2)(i)); and (3) add a provision to the 10 C.F.R. Part 70 regulations requiring offsite emergency preparedness. See October 10 Motion, at 10.

¹² Should GANE seek to pursue its request that any particular policy or regulation not be applied in this proceeding, it must make a *prima facie* showing to the Board that special circumstances exist, in which event the Board would refer the matter to the Commission for a decision. See 10 C.F.R. § 2.1239(b). The other course open to GANE would be to file a petition for rulemaking, pursuant to 10 C.F.R. § 2.802.

III. The October 10 Motion is Procedurally Defective

GANE's request that the Commission suspend the CAR proceeding is also defective insofar as it argues points raised in its motion to dismiss which is still pending before the Board. See October 10 Motion, Section C, at 11-12, *citing* the August 13 Motion. In the absence of a Board certification to the Commission pursuant to 10 C.F.R. § 2.1209(d), any issues raised in the August 13 Motion should first be ruled upon by the Board. In the event the Commission is inclined to address this issue at this juncture, however, the Staff asks that it be permitted to separately address the matter in a subsequent pleading.

CONCLUSION

For the reasons discussed above, the Commission should deny the October 10 Motion.

Respectfully submitted,

/RA/

John T. Hull
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Dated at Rockville, Maryland
this 29th day of October, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of)
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)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO MOTION TO SUSPEND PROCEEDING" have been served upon the following persons this 29th day of October, 2001, by electronic mail, and by United States 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 29th day of October, 2001