

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

December 20, 2001

MEMORANDUM AND ORDER
(Ruling on Motion to Dismiss)

Before us is the motion of Georgians Against Nuclear Energy (GANE) to dismiss, or alternatively, to hold in abeyance, this 10 C.F.R. Part 70 proceeding on the construction authorization request (CAR) of Duke Cogema Stone & Webster (DCS) to build a mixed oxide fuel fabrication facility (MFFF). See Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance (Aug. 13, 2001) [hereinafter GANE Motion]. In a nutshell, GANE argues that the proceeding should be dismissed because the Commission's regulations contain no provision for the separate docketing of an application for construction authorization. Id. at 1. According to GANE, "this case involves an unlawful decision by the Nuclear Regulatory Commission ("NRC") Staff to allow DCS to submit a construction permit application in lieu of the complete construction/operating license application required by the regulations, and to conduct an illegally truncated safety and environmental review based on an incomplete record." Id. at 2. Or, as GANE states in its reply pleading,

GANE does not contend that the NRC is barred from approving construction before it approves operation. Obviously, the regulations contemplate that the Commission will approve construction before it approves operation, and that operation will not be licensed until the adequacy of construction has been approved. The separation of construction and operation approval functions within the licensing review process, however, does not mean that DCS is entitled to seek NRC approval of construction before it has submitted a complete application for construction and operation.

Georgians Against Nuclear Energy's Reply to DCS and NRC Staff's Oppositions to Motion to Dismiss Licensing Proceeding (Sept. 7, 2001) at 4.

DCS and the NRC Staff both oppose GANE's motion. They argue, in effect, that although nothing in the Atomic Energy Act or the Commission's 10 C.F.R. Part 70 regulations authorizes a two-step licensing approach for the MFFF, neither does anything prohibit it, thus permitting the NRC to establish a two-step approach. Additionally, they both assert that GANE's interpretation of the 10 C.F.R. Part 70 regulations would establish procedural requirements that serve no useful purpose. See Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance (Aug. 21, 2001); NRC Staff Answer to Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold in Abeyance (Aug. 28, 2001).

In the circumstances presented, we need not parse the applicable regulatory provisions, see 10 C.F.R. §§ 70.22 & 70.23, to resolve GANE's motion because the Commission already has effectively decided the issue raised by GANE. In its notice of opportunity for hearing initiating this proceeding, the Commission clearly outlined the course for this proceeding. See 66 Fed. Reg. 19,994 (Apr. 18, 2001). The Commission stated that the agency had accepted DCS's CAR for docketing and was providing an opportunity for hearing on the application to construct the MFFF. See id. at 19, 995. Further, the Commission set out the findings that the

agency must make to approve the CAR, stated that DCS would subsequently file a separate request for authority to operate the facility, and indicated that the separate request for operating authority would be subject to a second notice of opportunity for hearing. See id.; see also CLI-01-13, 53 NRC 478, 484 (2001). In setting out the course of the proceeding in its hearing notice, the Commission necessarily determined that DCS may appropriately file an application limited solely to construction, that a decision on the authorization of construction is to be based upon the CAR, and that a separate opportunity for hearing will be provided on DCS's subsequently filed application for operating authority. Having made these determinations in connection with the hearing notice, the Licensing Board, as the Commission's delegate in the hearing process, must follow the Commission's directives and cannot abrogate them as GANE's motion requests. Whether the issue raised by GANE's motion is viewed, on the one hand, as a matter beyond the Licensing Board's jurisdiction or viewed, on the other hand, as a matter of the Board's duty to follow the directives of a superior tribunal, the result is the same. Accordingly, GANE's motion to dismiss the proceeding or, alternatively, to hold it in abeyance until DCS files a complete license application is denied.

GANE also requests that its motion to dismiss the proceeding be certified to the Commission in the event the motion is denied. See GANE Motion at 27. We find no

basis for certifying the motion to the Commission. We note, however, that GANE may itself seek directed certification from the Commission of our denial of its motion.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

December 20, 2001

¹Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) GANE; (2) BREDL; (3) DCS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)	
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DUKE COGEMA STONE & WEBSTER)	Docket No. 70-3098-ML
)	
(Savannah River Mixed Oxide Fuel)	
Fabrication Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION TO DISMISS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML
LB MEMORANDUM AND ORDER
(RULING ON MOTION TO DISMISS)

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of December 2001