RAS 3742

January 7, 2002
DOCKETED 01/07/02

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO DCS' MOTION FOR RECONSIDERATION

INTRODUCTION

On December 17, 2001, Duke Cogema Stone & Webster (DCS), the applicant in this proceeding, requested that the Atomic Safety and Licensing Board (Board) reconsider portions of its December 6, 2001 decision, in which the Board ruled on the May 2001 petitions for hearing submitted by Georgians Against Nuclear Energy (GANE), the Blue Ridge Environmental Defense League (BREDL), and others, regarding the DCS Construction Authorization Request (CAR) submitted to the NRC on February 28, 2001. *See* "Memorandum and Order (Ruling on Standing and Admissibility of Contentions)," LBP-01-35, 54 NRC __ (slip op.) (December 6 Decision). As discussed below, the Staff of the United States Nuclear Regulatory Commission (NRC) supports DCS's December 17 motion insofar as it requests that the Board reconsider the admission of GANE Contentions 1, 2, and 12. Should the Board decline to reject GANE's Contentions 1, 2, and 12, the Staff requests that questions related to those contentions be certified to the Commission.

BACKGROUND

As relevant to DCS's December 17 motion, DCS is challenging the portions of the December 6 Decision pertaining to the admission of GANE Contentions 1 and 2 (involving issues of material control and accounting (MC&A), and physical protection, respectively); GANE

Contention 5 (involving issues as to the proper designation of a "controlled area"); and GANE Contention 12 (involving issues as to whether environmental impacts caused by terrorist acts must be evaluated). Alternatively, DCS is requesting the Board to certify to the Commission questions related to these admitted contentions. *See* "Duke Cogema Stone & Webster Motion For Reconsideration Or, In The Alternative, For Certification To The Commission" (December 17 Motion). The December 17 Motion also pertains to admitted Contention 9A (regarding the designation of a "controlled area") submitted jointly by Donald J. Moniak and BREDL. As indicated above, the Staff takes no position here on the admission of GANE Contention 5, or on the arguments made by DCS in the December 17 Motion regarding the controlled area issues.

On August 13, 2001, GANE submitted 13 contentions covering 50 pages. *See* "[GANE's] Contentions Opposing a License for [DCS] to Construct a Plutonium Fuel Factory at [SRS]" (GANE's Contentions). The Staff filed its response to GANE's Contentions (and to those submitted by the other hearing petitioners) on September 12, 2001, and argued that GANE's Contentions 1, 2, and 12, among others, were not admissible. *See* "NRC Staff's Response to Contentions Submitted by Donald Moniak, [BREDL], [GANE], and Environmentalists, Inc." (Staff Contention Response), at 8-13, and 21-22. DCS filed its response to GANE's Contentions on September 13, 2001, arguing therein that none of GANE's contentions were admissible. *See* "Duke Cogema Stone & Webster's Answer to Proposed Contentions Filed by Georgians Against Nuclear Energy" (DCS Response to GANE Contentions). Following oral argument on the contentions heard by the Board during a September 21, 2001, pre-hearing conference, the Board issued its December 6 Decision.

GANE's Contention 1 (supplemented by a supporting basis discussion) concerns MC&A issues governed by 10 C.F.R. Part 74,[1] and states as follows:

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[1] GANE attached to its contentions a "Declaration of Dr. Edwin S. Lyman in Support of (continued...)

> The [CAR] does not contain detailed information on [MOX Facility] design features relevant to the ability of DCS to implement material control and accounting (MC&A) measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 74, and there is no indication that MC&A considerations were taken into account in the [MOX Facility] design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP (Fundamental Nuclear Material Control Plan) that will meet or exceed the regulatory acceptance criteria in Section 13.2.4 [of the MOX Facility Standard Review Plan (SRP)]," SRP at 13.2.5.2A. Failure to adequately consider MP&A [sic] issues during the [MOX Facility] design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the [MOX Facility] in compliance with 10 CFR Part 74 without significant retrofitting (and may not be able to even with retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use [special nuclear material] at the [MOX Facility]. Consequently, Chapter 13.2 of the CAR in its current form is grossly inadequate and should be rejected.

GANE's Contention 2 (also supplemented by a supporting basis discussion) concerns physical protection issues governed by 10 C.F.R. Part 73, and states as follows:

> The DCS [CAR] does not contain detailed information on [MOX Facility] design features relevant to the ability of DCS to implement physical protection measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 73, and there is no indication that physical protection considerations were taken into account in the [MOX Facility] design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's proposed design, location, construction technique and material for elements of the physical protection system and related commitments will lead to a physical protection plan that will meet or exceed the regulatory acceptance criteria in Section 13.1.4 [of the MOX SRP]. SRP, § 13.1.5.2A.
>
> Failure to adequately consider physical protection issues during the [MOX Facility] design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the [MOX Facility] in compliance with 10 CFR Part 73 without significant retrofitting (and may not be able to even with retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use SNM at the [MOX Facility]. Consequently, Chapter 13.1 of the CAR in its current form is grossly inadequate and should be rejected.

GANE's Contention 12 (also supplemented by a supporting basis discussion) concerns the evaluation of environmental impacts caused by terrorist acts, and states as follows:

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[1](...continued)
GANE's Contentions," in which Dr. Lyman provided general averments that he assisted in the preparation of GANE Contentions 1 and 2, among others.

> GANE contends that a license must not be given for construction and subsequently for operation of a plutonium fuel factory at the Savannah River Site which is situated on the border of Georgia on the Savannah River because it is vulnerable to malevolent acts such as terrorism and insider sabotage which could create an unacceptable beyond design basis accident. DOE did not analyze terrorism or insider sabotage in its Special Plutonium Disposition Environmental Impact Statement published in 1999. Neither did DCS in its 2000 Environmental Report which, while dismissing out-of-hand as inconsequential many credible scenarios, did not even acknowledge the real possibility of terrorism and insider sabotage (see Section 5.5 of the [DCS] Environmental Report). This deficiency may be terminal to this licensing effort. In any event, malevolent acts must be analyzed as a foreseeable environmental impact under NEPA. Lack of analysis of the malevolent acts scenario leads to failure to design safeguards and failure to plan for emergency response and mitigation measures.

The Board determined that each of the foregoing contentions (and others not addressed here) satisfied the Commission's 10 C.F.R. § 2.714(b) requirements. As summarized by the Board (*see* December 6 Decision, at 17-18), these contention requirements state that a contention must specify the precise issue of law or fact being raised; must contain an explanation of the contention bases; must identify the alleged facts or expert opinion supporting the contention, and provide references to those specific sources and documents which establish those facts or expert opinion; must contain sufficient information showing that a genuine dispute exists with the applicant on a material issue of law or fact, including references to the specific portions of the application being disputed, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each such failure; and, for issues arising under the National Environmental Policy Act (NEPA), the contentions must be based on the applicant's environmental report. *See* 10 C.F.R. § 2.714(b)(2)(i-iii). Additionally, the contention must be one which, if proven, would entitle the petitioner to relief. *See* 10 C.F.R. § 2.714(d)(2)(ii).

In response to the December 6 Decision, DCS filed its December 17 Motion. During a subsequent telephone conference on December 20, 2001, discussing discovery schedules (*see* December 14, 2001 order (unpublished)), the Board established January 7, 2002, as the date for all parties to respond to the December 17 Motion.

DISCUSSION

A. The December 6 Decision Articulates No Legal Basis for Applying the MC&A Part 74 Requirements, or the Physical Protection Part 73 Requirements, to DCS in the CAR Proceeding

In urging the Board to reconsider its admission of GANE Contentions 1 and 2, DCS argues in part that the purpose and scope of the 10 C.F.R. Part 74 MC&A requirements, and the 10 C.F.R. Part 73 physical protection requirements, are not included within the ambit of 10 C.F.R. § 70.23(b). *See* December 17 Motion, at 7-8. As discussed below, the Staff agrees with DCS on these points, and therefore supports the DCS request that the Board reconsider its admission of GANE Contentions 1 and 2.

As a prerequisite to approving construction of the MOX Facility, 10 C.F.R. § 70.23(b) requires the NRC to make a single finding, specifically, whether the "design bases of the principal structures, systems, and components" (principal SSCs) of the proposed MOX Facility, "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).[2] Thus, by its terms, this provision limits the scope of the Staff's required pre-construction design findings to the issue of whether the principal SSC designs adequately protect against the effects of natural events such as earthquakes, severe weather, and accidents. Even if MC&A and physical protection systems are regarded as being within the set of principal SSCs of the proposed MOX Facility,[3] neither

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[2] With respect to the quality assurance program, 10 C.F.R. § 70.23(b) contains the following footnote: "The criteria in appendix B of part 50 of this chapter will be used by the Commission in determining the adequacy of the quality assurance program." This provision is discussed *infra*, at 6-7.

[3] The Board discussed the issues of whether MC&A and physical protection systems fall within 10 C.F.R. § 70.23(b)'s phrase "principal structures, systems, and components of a plutonium processing and fuel fabrication plant" at the September 21 pre-hearing conference (*see* Tr., at 235-40), and DCS had discussed these issues generally in its written response to GANE's contentions. *See* DCS Response to GANE Contentions, at 9-10, 17-18, and 20. However, GANE had not identified these issues as supporting bases for GANE Contentions 1 or 2. Moreover, (continued...)

GANE in its contentions, nor the Board in its decision admitting the contentions, has articulated a basis for holding that either of these systems are within the set of principal SSCs which would protect against natural phenomena and the consequences of potential accidents. *See* December 6 Decision, at 26-29.[4]

In admitting GANE Contentions 1 and 2, the Board effectively reads out of 10 C.F.R. § 70.23(b) the phrase "provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents" (emphasis added). The starting point in construing this, or any other NRC regulation, is its "language and structure." *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997), *citing Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). Any regulatory interpretation must be consistent with the "plain meaning" of the regulatory wording at issue, and the entire provision must be given effect. *Shoreham, supra*, 28 NRC at 288 (citations omitted).

As discussed above, the Board, in its December 6 Decision, does not give effect to the entire wording of 10 C.F.R. § 70.23(b). In particular, the Board does not take into account the footnoted reference in 10 C.F.R. § 70.23(b) to the 10 C.F.R. Part 50 Appendix B criteria, which pertain to how the adequacy of the proposed MOX Facility's quality assurance program is to be judged in determining whether the CAR should be approved. The Board's omission is particularly evident when the Board's primary reason for rejecting the DCS argument about the confined scope

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[3](...continued)
GANE did not establish that the 10 C.F.R. Part 70 regulations set forth any standard by which the CAR is to be judged, other than the standard stated in 10 C.F.R. § 70.23(b).

[4] In discussing the general legal standards developed by NRC case law on contentions, the Board recognized that an admissible contention cannot be based on requirements additional to those that are imposed by the applicable regulation. *See* December 6 Decision, at 19-20 (citing cases). As discussed *infra*, the Board's rationale for admitting GANE Contentions 1 and 2 is based on requirements additional to those that are imposed by the applicable regulation.

of 10 C.F.R. § 70.23(b) (*see* December 17 Motion, at 7-8) is examined in the following excerpt from the December 6 Decision:

> Nor is there merit in DCS's argument that the design bases of MC&A and physical protection systems of the [MOX Facility] need not be considered at the construction authorization stage under section 70.23(b) because these systems do not protect against natural phenomena and accidents, but instead are intended to prevent the loss and theft of special nuclear material. As the plain meaning of the regulation itself indicates, section 70.23(b) is not as limited as DCS's argument would have it. Indeed, DCS's argument would effectively read out of the regulation the requirement of a reasonable assurance determination for the quality assurance program. That program also does not protect against natural phenomena and accidents, but instead is intended to provide confidence that other structures, systems, and components (SSCs) will perform satisfactorily. In much the same manner, the MC&A and physical protection systems are interrelated and interdependent upon other facility SSCs and ... the design bases of the MC&A and physical protection systems must retain their functionality to make a reasonable assurance determination of protection against natural phenomena and the consequences of potential accidents. Accordingly, the design bases of the MC&A and physical protection systems of the [MOX Facility] are not precluded from consideration under section 70.23(b) ...

December 6 Decision, at 28-29 (emphasis added).

The Board's reasoning here, however, does not account for the fact that unlike the quality assurance program -- the adequacy of which is to be judged by the 10 C.F.R. Part 50 Appendix B criteria -- 10 C.F.R. § 70.23(b) provides no outside reference to any standard for judging the adequacy of the principal SSC designs. In deciding whether the CAR should be approved, the adequacy of the principal SSC designs is determined by whether they are found sufficiently protective against "natural phenomena and the consequences of potential accidents," as stated in 10 C.F.R. § 70.23(b). Thus, contrary to the Board's reasoning, DCS's argument about the limited scope of 10 C.F.R. § 70.23(b) does not "effectively read out of the regulation the requirement of a reasonable assurance determination for the quality assurance program." The effect of the Board's determination is that no standard for assessing the merits of the MC&A and physical protection concerns expressed in GANE Contentions 1 and 2 would exist in this CAR proceeding, other than by reference to the requirements of 10 C.F.R. Parts 73 and 74. But as discussed below,

these requirements are only properly applicable when operation -- as opposed to construction -- of the proposed MOX Facility is being considered. To consider the 10 C.F.R. Part 73 and 74 requirements during the CAR proceeding would not be consistent with 10 C.F.R. § 70.23(b).[5]

In failing to discuss how the MC&A requirements of 10 C.F.R. Part 74, and the 10 C.F.R. Part 73 physical protection requirements, can be applied in the CAR proceeding, the Board did not address the Staff's primary arguments against admitting GANE Contentions 1 and 2, namely, that these contentions lacked an adequate legal basis.[6] *See* Staff Contention Response at 9-10, and n.14 (opposing the admission of GANE Contention 1); and 11-12, and n.16 (opposing the admission of GANE Contention 2). As the Staff stated there in discussing the bases proffered by GANE in support of Contentions 1 and 2, GANE did not establish that any Part 74 or Part 73 provisions now apply to DCS in this CAR proceeding.[7] For example, the purpose and scope section of the NRC's physical protection regulations describes two design basis threats which are to be used in designing safeguards systems which will (1) "protect against acts of radiological sabotage," and (2) prevent the theft of special nuclear material (SNM). 10 C.F.R. § 73.1(a). The first design basis threat is "radiological sabotage" (*see* 10 C.F.R. § 73.1(a)(1), which describes this

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[5] The brief statement of considerations issued by the Commission in 1971 pertaining to the promulgation of 10 C.F.R. § 70.23(b) contains no indications that MC&A or physical protection issues were to be considered within its scope. *See* 36 Fed. Reg. 17573 (September 2, 1971).

[6] The Board only referenced the Staff's secondary arguments opposing the admission of GANE Contentions 1 and 2 -- *i.e.*, that the topics discussed in these contentions were outside the scope of the CAR proceeding. *See* December 6 Decision, at 26, *citing* Staff Contention Response, at 8-13.

[7] Once DCS submits an application for authority to operate the proposed MOX Facility, the requirements of Subpart E of 10 C.F.R. Part 74 will be applicable, since such operation would involve the possession and use of "strategic special nuclear material," as defined in 10 C.F.R. § 74.5. *See also* CAR Section 13.2 (committing DCS adherence to 10 C.F.R. Part 74, Subpart E, requirements, as part of its application for operating authority). Similarly, DCS, in Section 13.1 of the CAR, stated that its physical security plan will be filed as part of its future application for a special nuclear materials license to operate the MOX Facility, and that its plan will meet the 10 C.F.R. § 73.20 requirements, and other applicable 10 C.F.R. Part 73 provisions.

threat in detail), and the Part 73 definition of the term "radiological sabotage" states, in part, that it "means any deliberate act." 10 C.F.R. § 73.2. The second design basis threat is "theft or diversion of formula quantities of strategic special nuclear material," and while the terms "theft" and "diversion" are not defined in Part 73, the detailed description of this second design basis threat leaves no doubt that it involves intentional acts. *See* 10 C.F.R. § 73.1(a)(2).[8] The general performance objective in establishing a physical protection system requires, in part, that the system be designed to protect against the two above-described design basis threats. *See* 10 C.F.R. § 73.20(a). These Part 73 regulations thus clearly pertain to designing systems capable of protecting against the effects of intentional, malevolent acts. Design considerations applicable to systems protecting against "natural phenomena and the consequences of potential accidents" (*i.e.*, the types of systems covered by 10 C.F.R. § 70.23(b), which says nothing about intentional acts) will be different. Accordingly, there is no legal basis requiring that 10 C.F.R. Part 73 physical protection design findings be made part of the CAR design findings required by 10 C.F.R. § 70.23(b).

As the Staff previously noted (*see* Staff Contention Response at 12 n.16), rather than relying on any specific Part 73 regulations in support of Contention 2, GANE referenced portions of NUREG-1718, the "Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility" (SRP). *See* GANE's Contentions, at 12.[9] But GANE did not

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[8] MC & A requirements also pertain to intentional acts. *See* 10 C.F.R. § 74.11(a) (requirement to report loss or theft of SNM).

[9] Section 13.1.5.2A of the SRP states that in performing a safety evaluation for construction approval, the Staff should establish that DCS' "proposed design, location, construction technique and material for elements of the physical protection system" will lead to an acceptable physical protection plan. GANE similarly relied on the SRP as support for Contention 1. As summarized by the Board, GANE had asserted that because the CAR lacks sufficient information on design features relevant to implementing MC&A measures capable of meeting or exceeding the Commission's MC&A requirements, the CAR does not provide any basis for the NRC to find that DCS's MC&A design basis will lead to a Fundamental Nuclear Material Control Plan (FNMCP) that

(continued...)

establish that SRP statements -- rather than the Part 73 regulations -- should be regarded as mandatory.[10] The Staff also argued that the Board should not accept GANE's vague references to Part 73 as being adequate, recognizing the Commission's admonition that parties in this proceeding would be required to support their assertions "by appropriate and accurate references to legal authority." *See* Staff Contention Response at 12, *quoting Duke, Cogema, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 486 (2001).

The Staff therefore concluded -- and still concludes -- that GANE's Contentions 1 and 2 failed to identify any disputes with DCS on material legal issues, as required by 10 C.F.R. § 2.714(b).

Rather than showing, in Contentions 1 or 2, that the MC&A or physical protection requirements are applicable in the CAR proceeding, the Staff pointed out that GANE instead concluded that there is a "fundamental flaw" in the MOX Facility licensing process, which GANE alleged was improperly partitioned into separate phases. *See* Staff Contention Response, at 10,

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[9](...continued)
will meet the regulatory acceptance criteria stated in SRP Section 13.2.4. *See* December 6 Decision, at 23-24, *citing* GANE Contentions, at 3. GANE had concluded that a reasonably complete description of the safeguard strategies for the MOX Facility must be submitted at the design stage, and asserted that this same approach is recommended by the Staff in its SRP guidance applicable to the CAR, which states that the "reviewer should establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP that will meet or exceed the regulatory acceptance criteria in Section 13.2.4." *See* December 6 Decision, at 23-24, *citing* GANE Contentions, at 5. In this regard, GANE noted that the Staff's SRP defines "design bases" as "the information that identifies the specific functions to be performed by an SSC of a facility, and the specific values or ranges of values chosen for controlling parameters as reference bounds for design." *See* December 6 Decision, at 24, *citing* GANE Contentions, at 5 (quoting SRP at xviii).

[10] NUREGS such as the SRP may guide the Staff in performing its technical reviews, but do not establish minimum or maximum regulatory requirements; thus, when the wording in such documents "conflict or are inconsistent with a regulation," the wording of the regulation prevails. *Shoreham, supra*, 28 NRC at 290 (citations omitted). *Accord, Curators of the University of Missouri,* CLI-95-8, 41 NRC 386, 397 (1995) (statements in NRC regulatory guides and NUREG documents do not impose legal requirements on the NRC).

citing GANE's Contentions, at 9 (pertaining to GANE Contention 1); and Staff Contention Response, at 12, *citing* GANE's Contentions, at 13 (pertaining to GANE Contention 2). As authority for the Staff's position that GANE's "fundamental flaw" argument was not a valid basis to support a contention -- GANE's argument regarding the structure of the MOX adjudicatory process clearly constituted a challenge to the licensing provisions of 10 C.F.R. §§ 70.23(a)(7), 70.23(a)(8), and 70.23(b) -- the Staff cited *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999) (contentions must focus on the contents of the subject application, as opposed to adjudicatory process issues), and 10 C.F.R. § 2.1239. The Board in its December 6 Decision did not address the Staff's argument.

Indeed, the Board itself, in subsequently denying GANE's August 13, 2001, motion to dismiss the CAR proceeding (*see* "Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance"), stated as follows:

> 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.

"Memorandum and Order (Ruling on Motion to Dismiss)," dated December 20, 2001 (unpublished) (December 20 Decision), slip op. at 3. The bifurcation of the MOX licensing process into two phases (*i.e.*, GANE's "fundamental flaw" argument) thus provides no support for GANE Contentions 1 and 2, as the Board has now implicitly recognized in its December 20 Decision.

Accordingly, unless on reconsideration the Board rejects GANE Contentions 1 and 2, the Staff requests the Board to certify to the Commission for its consideration the question of whether MC&A design issues, and physical protection design issues, fall within the scope of the findings required by 10 C.F.R. § 70.23(b) in this CAR proceeding. The lack of an articulated basis as to how the MC&A requirements of 10 C.F.R. Part 74, and the physical protection requirements of 10 C.F.R. Part 73, are to be applied in this CAR proceeding threatens a far-ranging and ill-defined

inquiry regarding GANE Contentions 1 and 2 which runs counter to the purposes for which 10 C.F.R. § 2.714 was amended in 1989. As previously discussed (*see* Staff Contention Response, at 5-6), the 1989 revised contention rule raised "the threshold bar for an admissible contention" in order to "ensure that only intervenors with genuine and particularized concerns participate in NRC hearings," and to help prevent "serious hearing delays caused in the past by poorly defined or supported contentions." *Oconee, supra,* CLI-99-11, 49 NRC at 334. The revised contention rule helps ensure that the hearings process will not continue in the absence of a petitioner "able to proffer at least some minimal factual and legal foundation" in support of the contentions asserted. *Id*. The toughened contention rule is meant to preclude consideration of disputes over NRC regulations or policies (*id*.), and contentions must accordingly focus on the contents of the subject application, as opposed to adjudicatory process issues. *Id*., at 342. Additionally, disputes over NRC regulations are specifically prohibited in adjudications governed by the 10 C.F.R. Part 2, subpart L procedures. *See* 10 C.F.R. § 2.1239(a). For these reasons, certification to the Commission is warranted, on the question of whether MC&A design issues, and physical protection design issues, fall within the scope of the findings required by 10 C.F.R. § 70.23(b) in this CAR proceeding.

B. The Board Should Reconsider its Admission of GANE Contention 12

As summarized by the Board, GANE's Contention 12 was based on the premise that the proposed MOX Facility would be vulnerable to a beyond design basis accident caused by malevolent acts such as terrorism and insider sabotage, and the contention stated that (1) the CAR's lack of analysis of such acts means that DCS failed to design safeguards, and failed to properly plan for emergency response and mitigation measures; and (2) the CAR improperly failed to analyze the environmental impacts of foreseeable terrorist acts which could cause a beyond design basis accident. *See* December 6 Decision, at 50-51. As discussed below, the Staff supports the DCS request that the Board reconsider its admission of GANE Contention 12.

In its opposition to the admission of GANE's Contention 12, DCS cited *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 743-44 (3d Cir. 1989) for the proposition that the discussion of sabotage and terrorism in its environmental report was not required. *See* DCS Response to GANE Contentions, at 41, and n. 108. The Board's conclusion that the accidents analyzed by DCS in its environmental report and CAR "are not similar to a beyond design basis accident caused by terrorist acts of the type recently witnessed" on September 11, 2001 (December 6 Decision, at 54), and that Contention 12 is thus admissible, is not consistent with *Limerick.*

In *Limerick,* the court found there is no rational means by which a decision-maker can reasonably predict or foresee that any given facility will be the subject of intentional malevolent acts such as terrorism or insider sabotage; it was on this basis that the court found that the risk of sabotage need not be considered in an environmental impact statement, since risk assessment techniques are subject to a great deal of uncertainty, and the sabotage risk could therefore not be meaningfully assessed. *See Limerick, supra*, 869 F. 2d at 743-44. The *Limerick* court upheld an NRC appeal board's finding that there was no known basis upon which the NRC could make a "reasonable prediction of ... the kind of stochastic human behavior displayed in an act of sabotage," and that sabotage therefore need not be considered in an environmental impact statement. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985),[11] *pet. for review denied*, CLI-86-5, 23 NRC 125 (1986). The fact that truly horrific acts of terrorism occurred on September 11, 2001, does not now render such intentional acts susceptible of meaningful evaluation.

Additionally, as argued by DCS, admitting GANE Contention 12 is tantamount to requiring that a "worst case" analysis be performed, contrary to the United States Supreme Court decision

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[11] This ALAB decision was also cited by DCS in arguing against the admission of GANE Contention 12. *See* DCS Response to GANE Contentions, at 41 n. 108. In the time since this ALAB decision was issued in 1985, risk assessment techniques have still not advanced to the point where intentional acts can be adequately factored into an environmental analysis.

in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989) (ruling that NEPA does not require such analyses, and noting that the Council on Environmental Quality had modified its NEPA regulations to delete requirements for such analyses). *See* December 17 Motion, at 22.

For these reasons, the Board should reconsider its admission of GANE's Contention 12. Unless on reconsideration the Board rejects GANE Contention 12, the Staff requests the Board to certify to the Commission, pursuant to 10 C.F.R. § 2.1209(d), the question of whether GANE Contention 12 is admissible. The Board has already stated the rationale for doing so:

> Even though GANE contention 12 raises the issue of a terrorist-caused beyond basis accident as an environmental contention under NEPA, and not as a safety contention, it nonetheless raises an extremely important policy question. In such circumstances, the Board normally would certify the question of the admissibility of this contention to the Commission pursuant to 10 C.F.R. § 2.1209(d).

December 6 Decision, at 54.

Moreover, the recent licensing board decision in the *Private Fuel Storage* proceeding[12] (rejecting a contention based on the terrorist events of September 11, but certifying its ruling to the Commission) supports certifying to the Commission the question of whether GANE Contention 12 is admissible. Additionally, as also argued by DCS, certifying this question to the Commission will better ensure that the policy implications involved here will be addressed in a manner consistent with the ongoing top-to-bottom review of the NRC's security requirements, a review being conducted in light of the events of September 11. *See* December 17 Motion, at 25. *See also* CLI-01-28, "Memorandum and Order," 54 NRC __, slip op. at 6 (December 28, 2001) (denying GANE's motion to suspend the CAR proceeding).[13]

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[12] *See Private Fuel Storage*, LBP-01-37, 54 NRC __, slip op. at 14.

[13] *See* "Petition by Georgians Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility," dated October 10, 2001, which was based on the terrorist attacks of September 11, 2001.

CONCLUSION

For the reasons stated above, on reconsideration of its December 6 Decision, the Board should reject GANE Contentions 1, 2, and 12. In the alternative, pursuant to 10 C.F.R. § 2.1209(d), the Board should certify to the Commission the questions as specified by the Staff herein.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of January, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO DCS' MOTION FOR RECONSIDERATION" have been served upon the following persons this 7th day of January, 2002, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution).

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