

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONBEFORE THE COMMISSION

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 GANE'S MOTION FOR RECONSIDERATION OF CLI-01-28INTRODUCTION

On January 7, 2002, Georgians Against Nuclear Energy (GANE) filed "Georgians Against Nuclear Energy's Motion For Reconsideration of CLI-01-28" (Motion), asking the Commission to reconsider its December 28, 2001 denial of GANE's motion to suspend the above-captioned proceeding.¹ See CLI-01-28 ("Memorandum and Order"), 54 NRC ___, slip op. (December 28 Order). For the reasons discussed below, the Commission should deny the Motion.

BACKGROUND

As relevant to the Motion, the Secretary of the United States Nuclear Regulatory Commission (NRC or the Commission), in April 2001, published a docketing and hearing notice pertaining to the Construction Authorization Request (CAR) submitted by Duke Cogema Stone & Webster (DCS), seeking authority to construct a mixed oxide fuel fabrication facility (MOX Facility) at the United States Department of Energy's Savannah River Site in South Carolina. See 66 Fed. Reg. 19,994-96 (April 18, 2001). In May of 2001, GANE and other petitioners requested a hearing

¹ See "Petition by Georgians Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility," submitted to the Commission on October 10, 2001 (Petition to Suspend the CAR Proceeding).

on the CAR. Pursuant to the Commission's June 14, 2001 order (see *Duke, Cogema, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478 (2001)), a three-member Atomic Safety and Licensing Board (Board) was established to consider the hearing requests on the CAR.

On the basis of the September 11, 2001, terrorist attacks on New York City and the Pentagon, GANE filed its Petition to Suspend the CAR Proceeding, which the Staff and DCS opposed.² The grounds on which the Commission denied GANE's Petition to Suspend the CAR Proceeding may be summarized as follows: (1) assuming *arguendo* that the CAR is approved, DCS could not begin constructing the MOX Facility until late in 2002, and GANE failed to establish the presence of an immediate and specific threat to the health and safety of its members (see December 28 Order, at 5, *citing* Staff's Response, at 5); (2) the NRC has the authority -- either during the pendency of the CAR proceeding or later, in the event the MOX Facility is eventually authorized to operate -- to impose modifications made necessary by any new developments that occur as the result of the ongoing generic review of security issues (see December 28 Order, at 6 and n.12, *citing, inter alia*, 42 U.S.C. § 2201(b), and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a)); and (3) the strong public interest in reducing the nation's inventory of weapons-grade plutonium, coupled with the Commission's general history of not delaying NRC adjudications to await extrinsic actions. See December 28 Order, at 7, *citing* CLI-01-13, *supra*, 53 NRC at 484.

² See "NRC Staff's Response to Motion to Suspend Proceeding" (Staff's Response), dated October 29, 2001; and "[DCS's] Response to Petition by [GANE] and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility," dated October 22, 2001.

DISCUSSION

As discussed below, GANE has failed to establish that reconsideration of the December 28 Order is warranted. Accordingly, the Commission should deny the Motion.

A. Standards Applicable to Petitions for Reconsideration of Commission Decisions

Petitions for reconsideration must identify the allegedly erroneous aspects of the decision, and the relief sought. See 10 C.F.R. § 2.771(b). Additionally, such petitions may not be based on new arguments not previously relied upon.³ A petitioner must present some basis for reconsidering arguments made to and considered by the Commission in making its decision.⁴ Granting petitions for reconsideration is wholly within the Commission's discretion.⁵

B. GANE's Arguments Fail to Show That Reconsideration is Warranted Here

GANE's prediction that post-construction design changes to the proposed MOX Facility may, "as a practical matter," be foreclosed (Motion, at 2), is not sufficient to support reconsideration of the December 28 Order. Such a prediction that design changes may possibly be necessary in the future fails to show an immediate and specific threat to the health and safety of GANE's members. Licenses are subject to future modification if warranted. See, e.g., 10 C.F.R. §§ 70.32, and 70.81.

Next, GANE points to the Board's admission of several GANE contentions as supporting reconsideration of the December 28 Order. See Motion, at 3-4. But the admission of contentions

³ See *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997). See also *Central Electric Power Cooperative, Inc.* (Summer Nuclear Station, Unit No.1), CLI-81-26, 14 NRC 787, 790 (1981) (elaboration on, or refinement of, arguments previously made, is allowable).

⁴ See *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980).

⁵ See *Curators of the University of Missouri*, CLI-95-17, 42 NRC 229, 234 n.6 (1995).

only indicates the need for further inquiry, and does not mean that any determinations have been made that the contentions have technical merit.⁶

As further support for reconsidering the December 28 Order, GANE argues that the CAR has no legal basis, and should not have been docketed. See Motion, at 5. This argument attempts to insert into the consideration of the Motion matters being considered elsewhere.⁷ The September 11, 2001, terrorist attacks -- not the alleged illegality of the CAR -- was the basis of GANE's Petition to Suspend the CAR Proceeding, and led to the December 28 Order. The issue of the CAR's legality is not addressed in the December 28 Order, and thus should not be a factor in determining whether the Motion should be granted. See 10 C.F.R. § 2.771(b).

Finally, GANE argues in support of its request for reconsideration that the strong public interest in reducing the nation's inventory of weapons-grade plutonium (as stated in the December 28 Order, at 7), is balanced by the need to ensure the safety and physical protection of the proposed MOX Facility, and that allowing "construction and licensing" of such a facility requires that the terrorist threat be adequately faced. Motion, at 6. This argument mischaracterizes the CAR proceeding, which deals only with the construction of the proposed MOX Facility. See 66 Fed. Reg., *supra*, at 19,995 col.2 (request for licensed operation of the proposed MOX Facility to be the subject of a separate notice of opportunity for hearing). Concerns about licensed operation of the proposed MOX Facility do not belong in the CAR proceeding, and provide no basis to support

⁶ Having contentions admitted is not the same as proving one's case, and only indicates that further inquiry is appropriate. See *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

⁷ See "Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance," submitted to the Board on August 13, 2001 (August 13 Motion). The Board denied the August 13 Motion on December 20, 2001. See "Memorandum and Order (Ruling on Motion to Dismiss)," (unpublished) (December 20 Ruling). On January 4, 2002, GANE filed "Georgians Against Nuclear Energy's Petition For Interlocutory Review," asking the Commission to review the December 20 Ruling. As discussed in the "NRC Staff's Response to GANE's Request for Interlocutory Review" (January 14 Response), the CAR violates no legal requirements. See January 14 Response, at 5-7.

reconsideration of the December 28 Order. Moreover, the NRC has the specific authority to, at any future time, impose conditions as may be deemed necessary to promote the security of the MOX Facility. See 10 C.F.R. § 70.32(b)(1). GANE fails to establish that going forward now would in any way foreclose the implementation of any physical protection or other changes that might be necessitated in the future.

The Commission should, therefore, find that GANE's arguments in its Motion establish no basis for the Commission to reconsider its December 28 Order.

CONCLUSION

Accordingly, the Commission should deny GANE's Motion.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of January, 2002

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO GANE'S MOTION FOR RECONSIDERATION OF CLI-01-28" have been served upon the following persons this 22nd 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 system).

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