

RAS 3888

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

February 11, 2002 (2:51PM)
OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)	January 14, 2002
)	
DUKE COGEMA STONE & WEBSTER)	Docket No. 070-03098-ML
)	
(Savannah River Mixed Oxide Fuel Fabrication Facility))	ASLBP No. 01-790-01-ML
)	

**DUKE COGEMA STONE & WEBSTER'S ANSWER TO
GEORGIANS AGAINST NUCLEAR ENERGY'S
PETITION FOR INTERLOCUTORY REVIEW**

I. INTRODUCTION

On August 13, 2001, Georgians Against Nuclear Energy ("GANE") filed a motion with the Atomic Safety and Licensing Board ("Licensing Board") presiding over the hearing on the Mixed Oxide Fuel Fabrication Facility ("MOX Facility") Construction Authorization Request ("CAR"), requesting that that proceeding be dismissed or held in abeyance.¹ GANE's Motion to Dismiss was based upon the claim that the bifurcated construction authorization and possession and use licensing proceedings established by the Commission were improper.² The Licensing Board subsequently denied GANE's Motion to Dismiss, and declined to certify the issues raised in the Motion to the Commission.³ In that denial, the Licensing Board noted that the Commission had already decided the issues raised by GANE, and had endorsed the docketing and review of the

¹ Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance, August 13, 2001. ("Motion to Dismiss" or "Motion").

² See *id.*

Template = SECY-041

SECY-02

CAR, Environmental Report (“ER”) and Quality Assurance Plan (“QAP”) prior to the docketing and review of a full license application to possess and use special nuclear material.⁴

On January 4, 2002, GANE filed a Petition for Interlocutory Review, requesting that the Commission review and reverse the Licensing Board’s denial of GANE’s Motion to Dismiss.⁵ In its Petition, GANE explicitly asks the Commission to “revisit the directives” it has already issued in establishing a bifurcated process for the NRC licensing proceedings related to the MOX Facility.⁶ In the interest of certainty in the future conduct of this proceeding, DCS respectfully requests that the Commission summarily affirm the Licensing Board’s decision and reject, on the merits, GANE’s challenge to the Commission’s bifurcated hearing process for the construction and operation of the MOX Facility.

II. ARGUMENT

A. The Commission Has Already Decided the Fundamental Issue Raised by GANE

1. The Commission’s April 18 Hearing Notice Sets Forth a Bifurcated Hearing Process

The Commission has established a two-step process for the NRC licensing review and hearing regarding the MOX Facility.

³ Memorandum and Order (Ruling on Motion to Dismiss), December 20, 2001 (unpublished).

⁴ *See id.* at 2, 3 (citing the April 18, 2001 Hearing Notice and the Commission Referral Order (CLI-01-13)). In particular, the Licensing Board stated: “we need not parse the applicable regulatory provisions...to resolve GANE’s motion because the Commission already has effectively decided the issue raised by GANE”.

⁵ Georgians Against Nuclear Energy Petition for Interlocutory Review, January 4, 2002 (“Petition”).

⁶ *Id.* at 5. Thus, GANE appears to acknowledge that the Commission has already considered the issues GANE is now attempting to raise in its Petition.

The first part of the NRC's review commenced on April 18, 2001, when the Secretary of the Commission published a notice in the Federal Register, approving the docketing of the CAR and announcing the opportunity to request a hearing on the CAR for the MOX Facility ("Hearing Notice").⁷ The Commission's Hearing Notice explained that during this first phase, NRC would be conducting a detailed review of the CAR, the ER, and the QAP, and that the results of this review would be documented in a safety evaluation report ("SER") and an Environmental Impact Statement ("EIS").⁸ Pursuant to NRC regulations, construction of the MOX Facility may commence once the NRC finds, based upon this first phase review, that the "design bases of the [MOX Facility's] principal structures, systems, and components," together with its QAP, "provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents," and that based on environmental considerations, "the action called for is the issuance of the proposed license."⁹ The Commission emphasized that *only* issues pertaining to the CAR, the ER, and the QAP would be considered during this first phase.¹⁰ By accepting the CAR for docketing and specifying that "[c]ontentions shall be limited to matters within the scope of the DCS application for authority to construct a MOX fuel fabrication facility,"¹¹ the Commission made it clear that the CAR submitted by DCS was sufficiently complete for detailed technical review and that the scope of the

⁷ 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.* 19994 (April 18, 2001).

⁸ *Id.* at 19995.

⁹ 10 CFR § 70.23(b); 10 CFR § 70.23(a)(7).

¹⁰ *See, e.g.*, 66 *Fed. Reg.* at 19996 ("Contentions are expected to focus on the CAR, the December 2000 environment report, and/or the January 2001 quality assurance plan submitted by DCS").

¹¹ *Id.*

proceeding on the CAR would be limited to the issues raised by the CAR, the ER and the QAP.

2. The Commission's Referral Order Reaffirmed the Bifurcated Hearing Process

The Commission's decision regarding the scope of the hearing was reiterated in its Order referring intervenor requests for hearing to the Licensing Board ("Referral Order").¹² In the Referral Order, the Commission provided guidance regarding the scope of the proceeding as follows:

To grant the construction authorization request, the Staff must find that the proposed design bases of the MOX fuel fabrication facility's "principal structures, systems, and components," together with the quality assurance program submitted by Applicant, "provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." Additionally, to meet the NRC's responsibilities under the National Environmental Policy Act (NEPA), the Staff's environmental review must conclude "that the action called for is the issuance of the proposed license."¹³

The second phase of the NRC's licensing review and hearing process will begin when DCS requests its license to possess and use special nuclear material ("SNM") at the MOX Facility and submits the balance of the information required by 10 CFR § 70.23.¹⁴ Thus, the Commission itself has established the procedures for the conduct of the MOX Facility proceedings, and therefore GANE's position should be summarily rejected, on the merits, on that basis alone.

¹² *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001).

¹³ *Id.* at 483 (citations omitted). The Commission further explained that contentions may only address information contained in the CAR or ER. *Id.* at 483, n. 2.

¹⁴ *See id.*

B. The Process Established by the Commission Fully Comports with the Atomic Energy Act and NRC Regulations

GANE claims that the CAR “is not a lawful or valid application” and should not have been docketed.¹⁵ There is no basis for such a claim in either the Atomic Energy Act (“AEA”) or the NRC regulations.

The two-step review and hearing process established by the Commission is permissible under the broad statutory scheme of the AEA.¹⁶ Section 57 of the AEA only requires an applicant to obtain a license for possession or use of SNM. The requirement to obtain authorization for construction of a plutonium fuel fabrication facility is an additional measure that was promulgated at the discretion of the Commission, pursuant to its statutory authority to establish requirements “necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.”¹⁷ Nothing in the AEA prohibits this two-step review process, and the process is actually more rigorous and restrictive than required by Section 57 of the AEA.

GANE references the legislative history of Part 70 in support of its claim that the CAR is not permitted by NRC regulations. In particular, GANE states that the purpose of the 1971 amendments to Part 70 (applicable to plutonium fuel fabrication facilities) was to “provide for Commission review of the site and design bases ... prior to the beginning

¹⁵ Petition at 8.

¹⁶ See generally, *State of Ohio v. NRC*, 868 F.2d 810, 813 (6th Cir. 1989) (noting that the AEA creates ‘a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the [NRC], free of close prescription in its charter as to how it shall proceed in achieving the statutory objections.’) quoting *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968).

¹⁷ 42 USC § 2201.

of plant construction” and to “strengthen” rather than “provide a shortcut” of the NRC’s safety review process.¹⁸

Prior to the 1971 changes to the regulations, plutonium fuel fabrication facility license applicants were only required to obtain approval to possess and use SNM. They could begin construction on their own initiative without any prior NRC safety review. Thus, the 1971 regulatory changes clearly did “strengthen” the review process for plutonium facilities, by adding the requirement for a separate construction authorization.¹⁹ The bifurcated process adopted in the MOX Facility proceeding fully complies with this regulatory change, by requiring the review and approval of the design basis information and QAP prior to construction.

GANE argues that DCS should have to submit its entire application for an SNM possession and use license at the same time as the CAR.²⁰ The 1971 amendment to the regulations clearly does not require the NRC to review and approve the full license application prior to commencement of construction (*see* 10 CFR § 70.23(b)), and there is no reason to believe that the Commission intended to require an applicant to submit information at the pre-construction stage that is not relevant to its decision on construction authorization.

¹⁸ Petition at 6-8.

¹⁹ *See* Final Rule, Special Nuclear Material, Plutonium Processing and Fuel Fabrication Plants, 26 *Fed. Reg.* 17,573 (Sept. 2, 1971).

²⁰ GANE also refers to the language of 10 CFR § 70.21(f), which states that “the completed license application must be submitted at least nine months before construction begins.” Petition at 2. However, the purpose of this section, as the regulatory history makes clear, was to provide for “Commission *environmental* review prior to commencement of construction....” *See* Final Rule, Prohibition of Site Preparation and Related Activities, 37 *Fed. Reg.* 5745-46 (Mar. 21, 1972). Since DCS submitted its ER well in advance of the anticipated date of commencement of construction, it has fully complied with 10 CFR § 70.21(f). *See also*, Letter from Andrew Persinko to Peter S. Hastings (Jan. 17, 2001) (stating that DCS’ submittal of the CAR and ER complies with the 9 month requirement of 10 CFR § 70.21(f)).

Thus, such an interpretation would establish a procedural requirement that would serve no useful purpose. The NRC need only review the CAR, the ER, and the QAP in order to authorize construction. In fact, no other issues may be addressed during the hearing on the MOX Facility CAR.²¹ To construe the regulations to require the submittal of information beyond the scope of the findings to be made by the NRC in approving construction would be illogical.²²

Accordingly, GANE's argument that DCS was required to submit all of the information required for the issuance of a possession and use license prior to the issuance of construction authorization is incorrect.

C. The Commission's Litigation Schedule Fully Complies With NEPA

GANE next alleges that "in conducting its environmental review for the proposed MOX Facility...the NRC Staff apparently has no intention of reviewing DCS's compliance with NRC requirements for safe operation of the MOX Facility."²³ GANE also states that it would violate NEPA for the NRC to complete its environmental review before completion of its safety evaluation. GANE apparently believes that the Staff environmental review and issuance of the EIS will not or can not address the impacts of MOX Facility operation.

²¹ See 66 Fed. Reg. at 19996; CLI-01-13, 53 NRC at 483.

²² GANE's interpretation of the regulations also would produce nonsensical consequences. Under that interpretation, DCS would be required at the pre-construction stage to submit concurrently: (1) a complete license application under 10 CFR § 70.22; and (2) a CAR under 10 CFR § 70.22(f). However, the information required by Section 70.22(f) is more general and less detailed than the information required in a complete license application. It would make no sense for an applicant to submit the information for a CAR under Section 70.22(f), if the applicant at the same time was required to submit more detailed and complete information on the same topics in its license application.

²³ Petition at 9.

NRC regulations *require* completion of the environmental review before construction of the facility may begin.²⁴ Furthermore, under 10 CFR § 51.92, the NRC will be required to supplement its EIS if “there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”

Furthermore, contrary to GANE’s assertions, it is possible to conduct a complete and adequate environmental review prior to completion of a safety evaluation of operation. DCS’ ER (Section 5.2) provides information on the impacts of MOX Facility operation, and the NRC’s Environmental Impact Statement Scoping Summary Report clearly states that the EIS will address such impacts.²⁵ Thus, the environmental impacts of operation can and will be addressed prior to completion of the Staff’s safety evaluation of operations.

In addition, there is no statutory or regulatory basis for the assertion that NEPA will be violated if the Staff does not complete its safety review of MOX Facility operations and issue its Safety Evaluation Report (“SER”) for operations before the EIS is completed. Nothing in NEPA or NRC regulations requires such a serial process. In fact, the scope and timing of NRC’s responsibilities under NEPA are legally independent from the timing of its reviews under the AEA. All that is required by NEPA is that NRC complete its environmental review before authorizing any action that would have a significant environmental impact.

²⁴ See 10 CFR § 70.23(a)(7).

²⁵ See “Environmental Impact Statement Scoping Process, Scoping Summary Report” (August 2001), Attachment A, section 4.3.

The environmental review process underway in this proceeding is, in fact, consistent with several other NRC regulations that contemplate that the NRC Staff will complete its environmental reviews before it completes its safety evaluation. For example, Subpart A of 10 CFR Part 52 establishes a procedure for the issuance of “early site permits” for nuclear power plants. Under 10 CFR § 52.15(a), an early site permit application may be filed “notwithstanding the fact that an application for a construction permit or a combined license has not been filed” Under 10 CFR § 52.18 in particular, an early site permit may be issued after the NRC has prepared an EIS addressing “the environmental effects of construction and operation of” the reactor. The Part 52 regulations thus explicitly contemplate conduct of the NRC’s environmental review, and issuance of an EIS covering the full impacts of reactor construction and operation, before the applicant has even filed its construction permit application or combined license application. Therefore, no SER on either the construction or operating aspects of the facility is a prerequisite to the issuance of the EIS covering the full environmental impacts of the facility.

Similarly, 10 CFR § 50.10(e)(i) allows the Staff to permit certain early site work to be undertaken at a proposed reactor site (often referred to as a “Limited Work Authorization”) after an EIS on a construction permit application is issued. Typically, Limited Work Authorizations have been issued before the Staff’s SER on the construction permit application has been issued. Otherwise, there would likely be no need to seek the Limited Work Authorization in the first place, since issuance of a favorable SER and EIS on construction would permit full construction to commence.

Thus, the Limited Work Authorization process provides another example of the permissibility of issuing an EIS prior to completion of NRC's safety review.

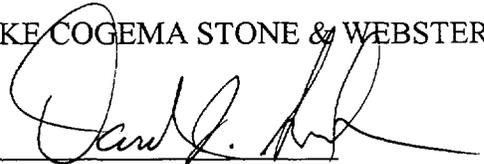
Accordingly, GANE's assertion that an SER on MOX Facility operations must precede issuance of an EIS should be rejected.

III. CONCLUSION

The bifurcated licensing review and hearing process established by the Commission for the MOX Facility is clearly reasonable, practical, and consistent with applicable statutory and regulatory requirements. Accordingly, DCS requests that the Commission summarily affirm the Licensing Board's denial of GANE's Motion to Dismiss and reject on the merits GANE's challenge to the MOX Facility licensing and hearing process.

Respectfully submitted,

DUKE COGEMA STONE & WEBSTER



Donald J. Silverman
Alex S. Polonsky
Marjan Mashhadi
Morgan, Lewis & Bockius LLP
1800 M Street, N.W.
Washington, DC 20036

Telephone: (202) 467-7502
Facsimile: (202) 467-7176

Dated: January 14, 2002

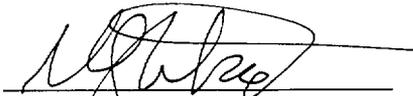
Glenn Carroll
Georgians Against Nuclear Energy
P.O. Box 8574
Atlanta, Georgia 30306
(E-mail: atom.girl@mindspring.com)

Donald J. Moniak
Blue Ridge Environmental Defense League
P.O. Box 3487
Aiken, S.C. 29802
(E-mail: donmoniak@earthlink.net)

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: hrb@nrc.gov)

Mitzi A. Young, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(E-mail: may@nrc.gov)

* Original and 2 copies



Marjan Mashhadi



Date