

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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 OPPOSING  
GEORGIANS AGAINST NUCLEAR ENERGY'S REQUEST FOR  
STAY OF HEARING ON CONSTRUCTION AUTHORIZATION REQUEST  
PENDING RULING ON PETITION FOR REVIEW**

**I. INTRODUCTION**

On January 4, 2002, Georgians Against Nuclear Energy ("GANE") filed a motion to stay this proceeding pending the Commission's review of a simultaneously-filed interlocutory appeal.<sup>1</sup> As discussed below, GANE has not applied the criteria set forth in 10 CFR § 2.788 to justify the extraordinary relief it seeks. Application of those criteria weighs heavily in favor of denying GANE's Stay Request. Therefore, Duke Cogema Stone & Webster ("DCS") opposes the Stay Request, and respectfully requests that it be denied.<sup>2</sup>

On August 13, 2001, GANE filed a "Motion to Dismiss" with the Atomic Safety and Licensing Board ("Licensing Board") in this proceeding.<sup>3</sup> GANE alleged that the

<sup>1</sup> Georgians Against Nuclear Energy's Request for Stay of Hearing on Construction Authorization Request Pending Ruling on Petition for Review, January 4, 2002 ("Stay Request"); Georgians Against Nuclear Energy's Petition for Interlocutory Review, January 4, 2002.

<sup>2</sup> DCS simultaneously is filing a separate Answer to GANE's Petition for Interlocutory Review.

<sup>3</sup> Georgians Against Nuclear Energy's Motion to Dismiss Licensing Proceeding or, In the Alternative, Hold It In Abeyance (August 13, 2001) ("Motion to Dismiss").

docketing of a Construction Authorization Request (“CAR”) independently of a 10 CFR Part 70 possession and use license application is inconsistent with NRC regulations.

On December 20, 2001, the Licensing Board denied GANE’s Motion to Dismiss, and declined to certify the issues raised in that motion to the Commission.<sup>4</sup> In that decision, the Licensing Board specifically noted that the Commission had already endorsed docketing of a CAR prior to docketing of a full application for a license to possess and use special nuclear material, and had endorsed separate opportunities for hearings.<sup>5</sup>

In response, on January 4, 2002, GANE filed two motions with the Commission. The first was a petition for interlocutory review, asking the Commission to review and reverse the Licensing Board’s December 20, 2001 denial of GANE’s Motion to Dismiss. The second—which this Answer opposes—was a request to stay the entire proceeding pending the Commission’s review of the interlocutory appeal.

## II. ARGUMENT

“An interlocutory stay is an extraordinary equitable remedy, and no tribunal will be disposed to grant such relief to a party failing to meet the standards for ordinary equitable relief.”<sup>6</sup> GANE has the burden of persuasion that a stay should be granted.<sup>7</sup> It has failed to meet that burden.

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<sup>4</sup> Memorandum and Order (Ruling on Motion to Dismiss), December 20, 2001 (unpublished).

<sup>5</sup> See *id.* at 23 (citing the April 18, 2001 Hearing Notice and the Commission Referral Order (CLI-01-13)).

<sup>6</sup> *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977).

<sup>7</sup> *Alabama Power Co.* (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 796 (1981).

**A. GANE Applies the Wrong Standard**

Requests for a stay of any Licensing Board order in Subpart L proceedings are governed by 10 CFR § 2.1263 which, in turn, incorporates by reference the four-factor test specified in 10 CFR § 2.788(e):

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties;  
and
- (4) Where the public interest lies.

As discussed in Section B below, GANE's Stay Request should be denied based upon application of this four-factor test. GANE is not likely to prevail on the merits, GANE acknowledges that it will not be irreparably harmed, and DCS and the public will be adversely affected if the stay is granted.

Apparently recognizing that it cannot prevail under the four-factor test specified in Section 2.788, GANE argues that Section 2.788 is inapplicable in this case, and that its Stay Request should be judged under different standards: "fairness and efficiency," "undue burden," and Federal Rule of Civil Procedure ("FRCP") 12(b)(6).<sup>8</sup> However, none of these standards are applicable to a request for stay. Instead, the Commission

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<sup>8</sup> GANE also states that its Stay Request is being filed pursuant to 10 CFR §§ 2.1237 and 2.730. These provisions, however, govern the filing of "motions" and are not specific to motions for a stay.

expects compliance with 10 CFR § 2.788 from any party seeking a stay.<sup>2</sup> Thus, 10 CFR § 2.788 is the only mechanism available to request a stay of a Licensing Board order.<sup>10</sup>

**1. “Fairness and Efficiency”**

GANE asks that the Commission grant the stay “in the exercise of its power to ensure a fair and efficient conduct of the hearing process.”<sup>11</sup> The Commission has rejected requests based on similar inherent authority in the past. In *Public Service Co. of New Hampshire*, an intervenor sought a stay from the Commission. Instead of invoking 10 CFR § 2.788, the intervenor directed its request to the Commission’s “inherent supervisory authority over the conduct of proceedings.”<sup>12</sup> The Commission stated that this authority was to be used in “unusual cases” and “was not designed to permit parties to ignore applicable rules.”<sup>13</sup>

**2. “Undue Burden”**

GANE next invokes 10 CFR § 2.740(c) to request the Commission to “protect the parties from ‘undue burden’ in the discovery process.”<sup>14</sup> However, 10 CFR § 2.740(c) governs the discretion of the Presiding Officer—here the Licensing Board—to issue protective orders in the context of an ongoing discovery process. It is not applicable to requests for a stay.

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<sup>2</sup> *Public Service Co. of New Hampshire*, 6 NRC at 716 n. 1.

<sup>10</sup> *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2)*, CLI-78-3, 7 NRC 307, 308 (1978).

<sup>11</sup> Stay Request at 5.

<sup>12</sup> *Public Service Co. of New Hampshire*, 6 NRC at 715 n. 1.

<sup>13</sup> *Id.*

<sup>14</sup> Stay Request at 7. GANE claims that “there is no NRC regulation that specifically governs this situation.” *Id.* at 6.

GANE would not prevail even if arguments related to “undue burden” were applicable to a request for a stay. GANE states that continuing the proceeding would be “unduly burdensome” because it would incur litigation costs.<sup>15</sup> This is not a legally cognizable burden.<sup>16</sup>

### 3. FRCP 12(b)(6)

GANE also invokes FRCP 12(b)(6). That rule of federal civil procedure provides a mechanism to dismiss a claim for “failure to state a claim upon which relief can be granted.” FRCP 12(b)(6). Citing various federal court of appeals decisions, GANE argues that its Motion to Dismiss is like a 12(b)(6) motion, and that GANE should not be subjected to discovery before the Commission has ruled on its Motion to Dismiss this proceeding.<sup>17</sup> Accordingly, GANE argues, that a stay is required. FRCP 12(b)(6), of course, is not applicable to NRC proceedings, and there is no comparable NRC rule.

#### B. The Stay Request Should Be Denied Under the Four-Factor Test

As stated previously, 10 CFR § 2.788 is the only mechanism available to request a stay of a Licensing Board’s order. Consideration of the four factors in 10 CFR § 2.788(e) in this case weighs heavily in favor of denying GANE’s Stay Request.

First, GANE has not made a strong showing that it is likely to succeed on the merits. The Licensing Board has already considered and rejected GANE’s substantive arguments. Furthermore, actions already taken by the Commission in this proceeding demonstrate that the extraordinary relief requested is not warranted. The Commission’s

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<sup>15</sup> GANE prefers to defer the “effort and expense of hiring experts, and gathering and reviewing numerous documents regarding the CAR . . .” Stay Request at 5.

<sup>16</sup> See, e.g., *Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma Site)*, CLI-94-9, 40 NRC 1, 8 (1994).

most recent order in this proceeding acknowledged that “the Board recently denied GANE’s earlier Motion, which challenged the legality of the two-part review of the applications for the MOX facility that the Commission outlined in the Commission’s Notice of Opportunity for hearing.”<sup>18</sup> Because the Commission itself has established a bifurcated process in both its April 18, 2001 Hearing Notice and its Referral Order (CLI-01-13), and for the reasons stated in DCS’ Answer to GANE’s Petition for Interlocutory Review, GANE is not likely to prevail on the merits.<sup>19</sup>

Second, GANE will not suffer irreparable injury. This is the most crucial factor,<sup>20</sup> and “a stay application which does not even attempt to make a showing on that factor is virtually assured of failure.”<sup>21</sup> The only injuries GANE alleges are litigation costs. As GANE itself acknowledges,<sup>22</sup> such costs do not constitute irreparable injury.<sup>23</sup>

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<sup>17</sup> Stay Request at 5, 7.

<sup>18</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, *slip op.* at 5 (emphasis added).

<sup>19</sup> Nor is GANE likely to succeed on the merits on its arguments that the Hearing File is incomplete and that the Staff’s review and litigation schedule would fail to satisfy NEPA’s “hard look” requirements. Stay Request at 9. The Commission’s Referral Order specified that the Hearing File would be distributed 10 days after the Licensing Board makes a decision on standing and contentions, not after DCS submits the application to possess and use special nuclear material. See CLI-01-13, *slip op.* at 13. In addition, it is the Commission’s litigation schedule, not the Staff’s, that requires issuance of the Environmental Impact Statement before the possession and use license has been approved. See *id.*

<sup>20</sup> *Public Service Co. of New Hampshire*, 6 NRC at 716; *Philadelphia Elec. Co.* (Limerick Generating Station, Unit 1), ALAB-835, 23 NRC 267, 270 (1986).

<sup>21</sup> *Public Service Co. of Oklahoma et al.* (Black Fox Station, Units 1 and 2), ALAB-505, 8 NRC 527, 530 (1978).

<sup>22</sup> Stay Request at 1, n. 1.

<sup>23</sup> “Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.” *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977) (sitting for the Commission, see CLI-77-7, 5 NRC 501, (1977)) (citing *Renegotiation Board v. Bannerkraft*, 415 U.S. 1, 24 (1974)).

Finally, DCS and the public will be harmed if the Stay Request is granted. In the context of this proceeding, the Commission has stated that “[p]ermitting unnecessary delays would contravene the Commission’s fundamental duties to the general public, as well as to applicants and licensees.”<sup>24</sup> The Commission has also stated:

the Commission believes that this proceeding should be completed in a timely and efficient manner because the Applicant is seeking authorization to build a facility that would implement a significant objective of national security and policy . . . .<sup>25</sup>

Thus, both the applicant’s interests and the public’s interest weigh against a stay.

In summary, each of the relevant factors weighs against a stay. Accordingly, GANE’s Stay Request should be denied.

### III. CONCLUSION

For the foregoing reasons, DCS requests that GANE’s January 4, 2002 Stay Request be denied.

Respectfully submitted,

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<sup>24</sup> *Duke Cogema Stone & Webster*, CLI-01-28, *slip op.* at 6, 7.

<sup>25</sup> *Id.* at 7 (citing CLI-01-13, 53 NRC at 484 (2001)).

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Duke Cogema Stone & Webster's Answer Opposing Georgians Against Nuclear Energy's Request For Stay of Hearing on Construction Authorization Request Pending Ruling on Petition For Review" were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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