

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

2002 FEB 12 PM 3: 38

BEFORE THE COMMISSION

OFFICE OF THE SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

\_\_\_\_\_  
In the Matter of )

) January 17, 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  
MOTION FOR RECONSIDERATION OF CLI-01-28**

**I. INTRODUCTION**

Based on the terrorist attacks of September 11, 2001, Georgians Against Nuclear Energy ("GANE") and the Nuclear Control Institute ("NCI") filed with the Commission a petition to suspend this proceeding to authorize construction of a mixed oxide fuel fabrication facility ("MOX Facility").<sup>1</sup> On December 28, 2001, the Commission denied that petition.<sup>2</sup> In that denial, the Commission stated that it "has instituted a full-scale review of its terrorism-related rules and policies," but that the "pendency of that review does not call for a halt in the licensing proceedings, particularly where (as here) the proceeding is at an early stage and no actual licensing action is imminent."<sup>3</sup>

<sup>1</sup> *Petition by Georgians Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility* (October 10, 2001).

<sup>2</sup> *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, \_\_ NRC \_\_ (December 28, 2001).

<sup>3</sup> *Id.*, slip op. at 1.

GANE is now requesting that the Commission reconsider its denial of the petition to suspend this proceeding.<sup>4</sup> In its Motion for Reconsideration, GANE provides no factual or legal basis for reconsideration. Accordingly, Duke Cogema Stone & Webster (“DCS”) opposes the Motion for Reconsideration and requests that it be denied.

## II. ARGUMENT

“Motions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced.”<sup>5</sup> However, if no new information is presented to suggest that the result previously reached was incorrect, the Commission should either not entertain the motion, or review and deny it.<sup>6</sup> GANE’s Motion for Reconsideration offers only arguments that were already considered and rejected by the Commission when it issued CLI-01-28. Accordingly, GANE’s Motion provides no reason for the Commission to alter its earlier judgment.

It appears that GANE raises two basic issues for reconsideration: (1) the Commission allegedly overlooked the NRC Staff’s licensing review schedule which could allow construction of the MOX Facility to begin in September 2002; and (2) the Commission allegedly erred by separating issues relating to the adequacy of the MOX Facility’s design to protect against a

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<sup>4</sup> *Georgians Against Nuclear Energy’s Motion for Reconsideration of CLI-01-28* (January 7, 2002) (“Motion for Reconsideration”).

<sup>5</sup> *Central Electric Power Cooperative, Inc.* (Virgil C. Summer Nuclear Power Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981)

<sup>6</sup> *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-88-03, 28 NRC 1 (1988).

terrorist attack from the facility's overall design for safety.<sup>7</sup> As demonstrated below, these issues are not sufficient to justify reconsideration or alteration of the Commission's decision.

A. **The Commission Did Not Overlook the NRC Staff's Licensing Review Schedule**

GANE first argues that the Commission overlooked "critical factual information."<sup>8</sup> Specifically, GANE argues that "one of the Commission's principal grounds for refusing to stay the proceeding" was that "there will be no construction or operation [at the MOX Facility] for years . . ."<sup>9</sup> GANE claims that this is inconsistent with the NRC Staff's schedule for reviewing the Construction Authorization Request ("CAR"). That schedule—a copy of which GANE attaches to its Motion—shows that construction of the MOX Facility could begin as early as September 2002. Consequently, GANE argues that "it is possible that construction of the MOX Facility will begin in less than nine months, rather than 'years' from now."<sup>10</sup>

GANE has taken the Commission's statement out of context. While the Commission stated that "there will be no construction or operation there for years", the very next sentence of the Commission's decision acknowledges that the Staff's schedule would allow construction to begin as early as September 2002: "DCS would not begin construction of the MOX Facility until late in 2002 and will not even *file* its application for possession and use of special nuclear material until July 2002."<sup>11</sup> The Commission was well aware of the actual schedule and properly focused on the potential impact to the public from plutonium and uranium, which DCS cannot

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<sup>7</sup> Motion for Reconsideration, at 2-3.

<sup>8</sup> *Id.* (citing *Private Fuel Storage, LLC* (Independent Fuel Storage Installation), LBP-00-31, 52 NRC 340, 342 (2000)).

<sup>9</sup> *Id.* at 2 (citing CLI-01-28, slip op. at 5).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> CLI-01-28, slip op. at 5 (emphasis in original).

use or possess at the MOX Facility until the NRC issues a license to possess and use such material. The Commission has correctly stated that a stay is not necessary “where (as here) the proceeding is at an early stage and no actual licensing action is imminent.”<sup>12</sup> Therefore, this issue does not justify the Commission’s reconsideration.

GANE also alleges that “if changes to the design are foreclosed by the completion of construction”, GANE cannot protect its interest “in assuring the adequacy of the MOX design to protect public health and safety.”<sup>13</sup> However, the Commission specifically addressed “whether moving forward with the adjudication will jeopardize public health and safety . . .”<sup>14</sup> The Commission correctly ruled that it would not, since the Commission has the authority to order whatever design changes are necessary for adequate protection of safety, regardless of their cost to DCS.<sup>15</sup>

GANE similarly believes that the Commission has overlooked the “basic premise of the MOX program, of reducing the threat of nuclear weapons proliferation in a manner that is ‘safe’ and ‘secure.’”<sup>16</sup> GANE argues that “to allow construction and licensing of a facility that does not provide effective protection against a terrorist threat would not meet the ultimate goals of the MOX disposition program.”<sup>17</sup> This challenge also impermissibly assumes that the Commission will ignore its mandate to protect the public health and safety. This challenge fails to identify an

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<sup>12</sup> *Id.*, slip op. at 1.

<sup>13</sup> Motion for Reconsideration, at 2.

<sup>14</sup> CLI-01-28, slip op. at 5.

<sup>15</sup> CLI-01-28, slip op. at 6 (*citing* 42 USC § 2201(b) and 10 CFR §§ 2.202, 70.32(b), 70.76, and 70.81(a)).

<sup>16</sup> Motion for Reconsideration, at 6.

<sup>17</sup> *Id.*

immediate and specific threat at the proposed MOX Facility site to warrant a stay of the proceedings.

**B. The Commission Did Not Err in Directing the Proceeding to Continue Pending Any Potential Future Changes to NRC Policies**

GANE's second argument is that the Commission erred by separating issues relating to the adequacy of the MOX Facility's design to protect against a terrorist attack from the facility's overall design for safety, and allowing the proceeding to continue. GANE cites to one brief excerpt from the CAR, and to several of the admitted contentions to argue that the proceeding should not continue until the NRC's review of its terrorism policies is complete.

GANE states that it would be "grossly inefficient to go ahead with litigation of these issues."<sup>18</sup> The Commission, however, already stated that "the cost and inconvenience of litigating challenges to the DCS application are not the kind of injury that warrants postponing the licensing proceeding."<sup>19</sup> The Commission also correctly concluded that the proceeding should move forward because it will "require resolution of issues having nothing to do with terrorism."<sup>20</sup> Accordingly, the information in the Motion for Reconsideration would not alter the Commission's decision to deny GANE's petition to suspend the proceeding.

GANE speculates that the Commission's review of its terrorism-related rules and policies will require significant MOX Facility design changes to protect against terrorism. This

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<sup>18</sup> Motion for Reconsideration, at 4.

<sup>19</sup> CLI-01-28, slip op. at 5-6.

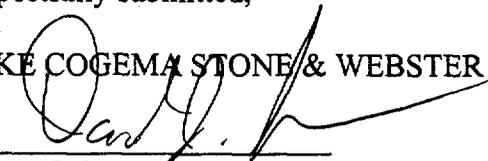
<sup>20</sup> *Id.*, slip op. at 6.

proceeding should not be suspended based upon speculation as to the results of ongoing or future Commission deliberations and their possible impact on the MOX Facility in particular.<sup>21</sup>

### III. CONCLUSION

For the foregoing reasons, DCS requests that the Commission deny GANE's Motion for Reconsideration.

Respectfully submitted,

  
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<sup>21</sup> GANE also reiterates an argument currently before the Commission in GANE's Petition for Interlocutory Review—that "the proceeding for approval of the CAR has no basis in the law, and the CAR should never have been docketed." Motion for Reconsideration, at 5. This argument is clearly incorrect in light of the Commission's April 18, 2001 Hearing Notice (66 *Fed. Reg.* 19, 994 (Apr. 18, 2001)) and Referral Order to the Licensing Board (CLI-01-13, 53 NRC 478 (2001)), both of which acknowledge the appropriateness of docketing the CAR independent of docketing the application for license to possess and use special nuclear material.

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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 Motion For Reconsideration Of CLI-01-28" 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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Jan. 17, 2002  
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