RAS 3984

February 7, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Chairman
Charles N. Kelber
Peter S. Lam

DOCKETED
USNRC

February 28, 2002 (3:16PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of DUKE COGEMA STONE & WEBSTER (Savannah River Mixed Oxide Fuel Fabrication Facility)	Docket No. 70-3098-ML ASLBP No. 01-790-01-ML

Blue Ridge Environmental Defense League (BREDL) Response to:
***DUKE COGEMA STONE & WEBSTER* DUKE COGEMA STONE & WEBSTER'S 01/28/02 PETITION FOR INTERLOCUTORY REVIEW**

I. Introduction

The Atomic Safety and Licensing Board Panel (ASLBP, "Board") admitted Blue Ridge Environmental Defense League (BREDL) as a party to this intervention proceeding on December 6, 2001.[1] The Board accepted two BREDL contentions and consolidated these with similar contentions filed by Georgians for Nuclear Energy (GANE). [2]

Duke Cogema Stone and Webster (DCS) filed a *Motion For Reconsideration Or, In The Alternative, For Certification To The Commission* on December 17, 2001. The response deadline

[1] LBP-01-35, ASLBP No. 01-790-01-ML Ruling on Standing and Admissibility of Contentions for this proceeding on December 6.

[2] BREDL interprets §2.715a *Consolidation of parties in construction permit or operating license proceedings* as applying to the Hearing process itself, and not interlocutory reviews or other motions preceding discovery and the hearing, since 2.715 describes consolidation as being for the purpose of: "consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument.

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SECY-02

was extended--due to the holiday season--to January 7, 2002, and BREDL responded to this motion in a timely manner. The Board denied the 12/17/01 Motion in its January 16, 2002 ruling.

DCS submitted its petitioned for an interlocutory review to the Commission on January 28, 2002, nearly two months after the initial decision.

BREDL asks that the Commission deny the petition for the following reasons:

- Timeliness: The Commission chose to forego interlocutory review, DCS failed to submit a timely petition, and DCS failed to raise the "novel policy or legal questions" argument until after the Board's initial decision. This tactic functions only as a last resort to avoid litigation and places undue burden on petitioners;
- There are no novel policy or legal questions; and
- There are genuine points of dispute between DCS and parties.

Considering that DCS's January 28, 2002 appeal to the Commission is similar to identical to its December 17, 2001 Motion to the Board, BREDL requests that the Commission also refer to its January 7, 2002 response to the DCS Motion for Reconsideration in regard to the two latter reasons.

II. Timeliness

The two issues relating to timeliness relate to (1) when was DCS obligated to argue that contentions met the "novel legal and policy issue" standard; and (2)when was DCS was obligated to appeal to the Commission. BREDL argues that DCS failed in being timely on all counts. A third issue relates to the Commission's own review time, which substantiates that DCS was late.

1. DCS failed to identify contentions as potential "novel" issues until after the Board's initial unfavorable ruling. DCS is petitioning the Commission to "review several important legal and policy decisions made by the Atomic Safety and Licensing Board ("Board") in admitting several contentions in this proceeding."[3] DCS cites the Commission's guidance in this proceeding:

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[3] *DUKE COGEMA STONE & WEBSTER'S PETITION FOR INTERLOCUTORY REVIEW*, Page 1.
01/28/02

"if rulings on the admission of contentions, or the admitted contentions themselves, raise novel legal or policy questions, the presiding officer should readily refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted."[4]

DCS also wrote:

This directive is in line with the Commission's general admonition that "boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998);[5]

The facts in this proceeding are that

- DCS failed to cite this Commission guidance in its written or oral arguments prior to the Board's 12/6/01 ruling;
- DCS chose to argue that the contentions were not novel policy or legal issues and that they should be denied in their entirety;
- the applicant failed to identify these as novel legal or policy issues between the time contentions were admitted and the 12/6/01 ruling a period of four months;
- The only contention that the Board identified as potentially novel was GANE's Contention 13 regarding terrorism, which the Commission announced yesterday it had accepted for certification.

The Commission should rule that DCS cannot lay claim to NRC policy unless it adheres to the policy itself. In its 1998 policy statement on hearings, the Commission wrote, in regard to the responsibilities and obligations of parties, that:

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[4] *DUKE COGEMA STONE & WEBSTER'S PETITION FOR INTERLOCUTORY REVIEW*, Page 3. 01/28/02.

[5] Ibid. Footnote 4. Page 3.

> "Although the Commission expects its licensing boards to set and adhere to reasonable schedules for the various steps in the hearing process, the Commission recognizes that the boards will be unable to achieve the objectives of this policy statement unless the parties satisfy their obligations. The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 CFR Part 2 for filing and the scheduling orders in the proceeding. As set forth in the 1981 policy statement, the licensing boards are expected to take appropriate actions to enforce compliance with these schedules. The Commission, of course, recognizes that the boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances."

DCS had an obligation to file its petition in a timely manner and it had an obligation to identify issues as novel long before the Board's decision. DCS instead chose to undertake a laborious two-part appeals process that wastes our time and resources and attempts to undermine the legitimacy of this process. The Commission should deny this petition simply because DCS has shown bad faith in adhering to the rules of NRC proceedings.

2. The DCS petition was late. According to 10 CFR 2.786(b), a party has fifteen days to appeal a full or partial initial decision by a presiding officer; while 10 CFR 2.1205(o) and 10 CFR 74.1 allow ten days. According to 10 CFR 2.786(b), the filing of a petition for review "is mandatory for a party to exhaust its administrative remedies before seeking judicial review." DCS was obligated to file its petition to the Commission by December 21, 2001 at the latest.

DCS instead chose to file a motion with the Board to dismiss most of the admitted contentions, or in the alternative, have them certified to the Commission[6], essentially attempting to work as many sides of the regulatory fence as possible while dumping additional burdens on the petitioners. DCS contradicted itself in its 12/17/01 motion by arguing that most admitted contentions were dismissible on clear legal grounds while simultaneously attempting to argue for certification to the Commission as "novel legal and policy issues."

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[6] DCS Motion for **RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION TO THE COMMISSION**. December 17, 2001.

DCS argues in this petition that it declined to appeal the Board's initial decision because it did not want to waste the Commission's resources:

> "DCS elected not to file an appeal under Section 2.1205(o) because to do so would have required it to contest all of the admitted contentions, including those that do not raise any significant legal or policy issues. Additionally, in ruling on an appeal pursuant to Section 2.1205(o), the Commission could uphold the Board's Memorandum and Order merely by finding that one contention is admissible, without addressing any of the significant legal and policy issues identified in this Petition. Therefore, such an appeal is neither necessary nor desirable under the current situation, and would be an inefficient use of the Commission's resources."[7]

This argument should be rejected. The rules for filing appeals of initial decisions--10 CFR 2.1205(o) in Subpart L and 10 CFR 2.714a in Subpart G--are nearly identical in wording and *appear* identical in terms of legal intent. The fact is that DCS chose to cite the Commission's policy statement on Licensing Board hearings, which referenced 2.714a, and apply it within a narrow and misleading context.

DCS only cited the excerpt that "boards are encouraged to certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding."[8] However, the entire paragraph in the Commission's policy statement from which the DCS soundbite is derived states:

> "Currently, 10 CFR 2.714a allows a party to appeal a ruling on contentions only if (a) the order wholly denies a petition for leave to intervene (i.e., the order denies the petitioner's standing or the admission of all of a petitioner's contentions) or (b) a party other than the petitioner alleges that a petition for leave to intervene or a request for a hearing should have been wholly denied. Although the *regulation reflects the Commission's general policy to minimize interlocutory review,* under this practice, some novel issues that could benefit from early Commission review will not be presented to the Commission. For example, matters of first impression involving interpretation of 10 CFR Part 54 may arise as the staff and licensing board begin considering applications for renewal of power reactor operating licenses. *Accordingly, the Commission encourages the licensing boards to refer rulings or certify questions on proposed contentions involving novel issues to the Commission in accordance with 10 CFR 2.730(f) early in the proceeding.* In addition, boards are encouraged to

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[7] 1/28/02 DCS Petition. Footnote 3. Page 2.

[8] IBID. Footnote 4. Page 3.

> certify novel legal or policy questions related to admitted issues to the Commission as early as possible in the proceeding. The Commission may also exercise its authority to direct certification of such particular questions under 10 CFR 2.718(i). The Commission, however, will evaluate any matter put before it to ensure that interlocutory review is warranted."[9](emphasis added)

Both the Commission's order of June 2001 and the 1998 policy statement leave open the option of both post and pre-decisional certification of contentions. In addition, the 1998 policy statement suggest the following:

- The Commission emphasizes certification early in the process although it fails to define "early;"
- The Commission's typically ambiguous wording leaves plenty of wiggle room for appeals that are not all-or-nothing, particularly if those appeals involve novel legal or policy issues; and
- The Commission *appears* acceptable to appeals on parts of decisions if there are novel issues.

Surprisingly, DCS failed to capitalize on the Commission's tendency to issue decisions favorable to industry/licensees and issued its petition one month later than allowable. DCS expressed concern for conserving the Commission's resources should be weighed against wasting the resources of petitioners and the Board as a result of its own legal indecisiveness and timidity. Other parties should not be penalized because DCS counsel could not decide *when* an appeal to the Commission was appropriate.

The fact is that the Board moved expeditiously after its initial decision and issued its first order for a teleconference on discovery on December 14, 2001.[10] DCS filed its appeal on December 17, 2001, and the first teleconference on discovery was held December 20, 2001. When DCS filed its appeal, it could have placed it before the Commission at that time with the stipulation that it was not appealing the entire decision, instead of using that as an excuse one month later.

An argument could be made that a timely appeal (by December 21, 2001) to the Commission would have met the "early in the process" standard, this current appeal was filed nearly six weeks

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[9] Federal Register: August 5, 1998 (Volume 63, Number 150)]
[Page 41872-41875] NUCLEAR REGULATORY COMMISSION: Policy on Conduct Of Adjudicatory Proceedings; Policy Statement.

[10] ASLBP No. 01-790-01-ML December 14, 2001

after the appeal deadline and is anything but "early in the process." **Therefore the Commission should deny the appeal/petition simply because DCS filed it too late.**

Furthermore, as the company contractually obligated to the Federal Government to undertake this multibillion dollar plutonium fuel scheme, DCS has a stated interest in timeliness and an expeditious process, an interest that is apparently absent if a legitimate challenge is upheld. Its failure to pursue timeliness means it is failing in its obligations as a party while wasting taxpayer resources and creating undue burden upon parties.

3. The Commission did not choose to review the decisions on an interlocutory basis. According to 10CFR2.786(a), *Review of decisions and actions of a presiding officer,* the Commission grants itself a forty day period following a licensing board decision or action to review the decision or action on its own motion.[11] It is also Commission policy to monitor these proceedings and provide guidance as necessary:

"the Commission intends to monitor its proceedings to ensure that they are being concluded in a fair and timely fashion. The Commission will take action in individual proceedings, as appropriate, to provide guidance to the boards and parties and to decide issues in the interest of a prompt and effective resolution of the matters set for adjudication."[12]

However, the Commission is not mandated to issue rulings when it chooses to be inactive. Considering the fact that DCS has submitted a precedent-setting proposal but one that is funded and managed by the U.S. Department of Energy (DOE), BREDL naturally assumes that the Commission is placing inordinate attention to this multi-billion dollar taxpayer-funded program, particularly in light of DOE's notorious history of financial boondoggles. So BREDL interprets the Commission's appearance of inaction as a silent endorsement of Licensing Board Panel LBP-01-35, and not as

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[11] 10CFR2.786(a) "Within forty (40) days after the date of a decision or action by a presiding officer, or within thirty (30) days after a petition for review of the decision or action has been filed under paragraph (b) of this section, whichever is greater, the Commission may review the decision or action on its own motion, unless the Commission, in its discretion, extends the time for its review."

[12] Federal Register: August 5, 1998 (Volume 63, Number 150)]
[Page 41872-41875] NUCLEAR REGULATORY COMMISSION: Policy on Conduct Of Adjudicatory Proceedings; Policy Statement.

inattentiveness to the proceeding effecting tens of tonnes of military plutonium stockpiles and billions of dollars in taxpayer funds.

The fact in this case is that the timeline for Commission review extended until January 15, 2002 and the Commission did not choose to review the Board's December 6, 2001 ruling by that time. Therefore the Commission should deny the DCS petition, especially since it raises no new issues since the 12/17/01 appeal.

Respectfully submitted,

Don Moniak
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dated February 7, 2001 in Aiken, SC

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CERTIFICATE OF SERVICE
by Blue Ridge Environmental Defense League
(Docket # 70-3098, ASLBP # 01-790-01-ML)
February 8, 2002

I hereby certify that copies of:
1. BREDL's Response to DCS Petition for Interlocutory Review, 1/28/02, were sent to the following list via e-mail with paper copies served via U.S. Postal Service First Class Mail; and .
2. *BREDL's Response to DCS Motion for Reconsideration*, 12/17/01; and
BREDL Additional Comments on DCS Motionfor Reconsideration, 12/17/01 were sent to the following list via e-mail. Paper copies were served via U.S. Postal Service First Class Mail only on the NRC Commissioners and Office of Secretary.

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