

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Richard A. Meserve, Chairman  
Greta Joy Dicus  
Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
 )  
DUKE COGEMA STONE & WEBSTER )  
(Savannah River Mixed Oxide Fuel Fabrication )  
Facility) )  
\_\_\_\_\_) )  
)

Docket No. 070-03098-ML

CLI-02-02

MEMORANDUM AND ORDER

In our recent denial order, we recited the background for GANE's petition to suspend. *See id.*, slip op. at 1-3. We also pointed out that we had instituted a full-scale review of our terrorism-related rules and policies. We concluded that "the pendency of that review does not call for a halt in licensing proceedings, particularly where (as here) the proceeding is at an early stage and no actual licensing action is imminent."<sup>(1)</sup> *Id.* at \_\_\_, slip op. at 1. On January 7, 2002, GANE filed its Motion for Reconsideration of CLI-01-28 ("Motion"). DCS and the NRC Staff filed responses opposing GANE's Motion.<sup>(2)</sup>

II. DISCUSSION

Reconsideration motions "are an opportunity to request correction of [an] error by refining an argument, or by pointing out a factual misapprehension or a controlling decision or law that was overlooked. New arguments are improper."<sup>(3)</sup> GANE offers four arguments in its Motion. None of them persuades us, under this standard, to reconsider our decision in CLI-01-28.

GANE first asserts that the Commission apparently overlooked the schedule for the MOX facility. Pointing to the NRC Staff's projected September 30, 2002 date for its Safety Evaluation Report, GANE states that it is possible for construction of the MOX facility to begin in less than 9 months. GANE says that this possibility contradicts our statement that "there will be no construction or operation there for years, even assuming DCS gains the NRC's approval of the license application." *See CLI-01-28*, 54 NRC at \_\_\_, slip op. at 5. But GANE ignores the context of our statement, particularly the clarification of the contested language in the very next sentence: "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." *Id.* The Commission is and was fully aware of the MOX schedule. Our point was that the proposed facility would not actually accept any radioactive feedstocks until 2005. Hence, we reasoned, we faced no immediate health and safety issue warranting a delay in proceedings. We adhere to that view today.<sup>(4)</sup>

Second, GANE suggests that our statement that the MOX proceeding will require resolution of many issues having nothing to do with terrorism is in error. *See CLI-01-28*, 54 NRC at \_\_\_, slip op. at 6. GANE attempts to connect almost every issue with terrorism because the construction authorization proceeding involves "basic questions about the physical design of the proposed MOX facility" and it is "difficult to imagine how issues relating to the adequacy of the plant's design for protection against a terrorist attack can be separated from issues relating to the overall safety of the design." Motion at 3. As a result, according to GANE, it will be inefficient to go ahead with the litigation. *Id.* at 4. We do not agree with GANE's expansive view of the position terrorism considerations hold in this proceeding.

The Licensing Board did admit one contention, GANE contention 12, which focuses on terrorism -- specifically, that DCS has failed in its environmental report to analyze the impacts of malevolent acts of terrorism and insider sabotage causing a beyond design basis accident. However, the Board also admitted contentions regarding the material control and accounting and physical security systems, seismic design, designation of the controlled area, safety analysis of accidents with bounding consequences, cost comparison with other alternatives, and the waste stream from the aqueous polishing step.<sup>(5)</sup> *See LBP-01-35*, 54 NRC \_\_\_ (2001). Although terrorism considerations may bear peripherally on some of these

contentions, the gravamen of each has little or nothing to do with the threat of terrorism at the MOX fuel fabrication facility. The parties can litigate these contentions efficiently now. <sup>(6)</sup>

Third, claiming that the Commission may have lost sight of the paramount consideration of safety and security of the proposed MOX facility, GANE discounts the Commission's responsibility to license and regulate nuclear facilities and materials in a timely and efficient manner. Says GANE, "[t]o 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." Motion at 6. As we noted in [CLI-01-28](#), the Commission has directed the NRC Staff to perform a comprehensive review of all aspects of our security requirements in light of the events of September 11, 2001. [CLI-01-28](#), 54 NRC \_\_\_, slip op. at 6. That review might lead to rules or policies affecting the proposed MOX facility. If it does, we have time enough to act.

Under current NRC regulations, we have authority to require DCS to make any necessary modifications to the facility. <sup>(7)</sup> The Commission will not hesitate to require licensees and applicants to change construction plans or operations when the health and safety of workers or the public are at stake. Accordingly, the Commission does not agree that its consideration of the application in this proceeding fails to adequately consider its health and safety mission.

Lastly, GANE reiterates its objection to the bifurcated licensing review of the MOX facility. The Board recently denied GANE's August 13, 2001 "Motion to Dismiss Licensing Proceeding, or, in the Alternative, Hold It in Abeyance," which challenged the validity and legality of the two-part review of applications for the MOX facility that we outlined in a notice of opportunity for hearing. See unpublished Memorandum and Order (Ruling on Motion to Dismiss) (Dec. 20, 2001); 66 Fed. Reg. 19,994 (Apr. 18, 2001). Review of this issue here is not appropriate. The Commission currently is separately considering whether to accept GANE's petition for interlocutory review on the two-part review question.

In summary, GANE has offered nothing in its refined or restated arguments that the Commission had not already considered when we issued [CLI-01-28](#). Further, GANE has not demonstrated any factual or legal error in [CLI-01-28](#) that warrants our reconsideration of the order.

### III. CONCLUSION

For the foregoing reasons, the Commission *denies* GANE's Motion for Reconsideration of [CLI-01-28](#).

IT IS SO ORDERED.

1. In two related decisions the same day, we denied similar petitions to suspend, dismiss, or hold in abeyance other proceedings as a result of the September 11 terrorist attacks in the United States. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), [CLI-01-26](#), 54 NRC \_\_ (2001) and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), [CLI-01-27](#), 54 NRC \_\_ (2001).
2. See "NRC Staff's Response to GANE's Motion for Reconsideration of [CLI-01-28](#)" (Jan. 22, 2002); "Duke Cogema Stone & Webster's Answer Opposing Georgians Against Nuclear Energy's Motion for Reconsideration of [CLI-01-28](#)" (Jan. 17, 2002).
3. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), [CLI-00-21](#), 52 NRC 261, 264 (2000) (affirming Licensing Board's holding); LBP-98-17, 48 NRC 69, 73-74 (1998). See also *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 139-40 (1994).
4. As discussed below, the NRC will not hesitate to require changes to the construction plan where necessary to protect public health and safety. Thus, there is no reason to conclude, as GANE asserts, that such changes, if necessary, would be foreclosed.
5. In a motion for reconsideration before the Board, DCS challenged the Board's admission of contention 12, as well as the contentions dealing with the controlled area boundary and with material control and accounting and physical security as principal systems. The Board recently denied DCS's motion. See unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).
6. As we stated in [CLI-01-28](#), our hearing rules contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding. See [CLI-01-28](#), 54 NRC \_\_\_, slip op. at 6.
7. See 42 U.S.C. § 2201(b) and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).