

I. BACKGROUND

On February 28, 2001, the DCS consortium submitted an application for authorization to construct a MOX fuel fabrication facility at the Department of Energy's Savannah River, South Carolina site. The MOX facility, if approved and constructed, will convert surplus weapons-grade plutonium to MOX fuel, a blend of uranium and plutonium oxides, that commercial nuclear power stations can use to generate electricity.

Recently, we upheld the lawfulness of a two-step MOX licensing process -- an initial construction review and a later operating review.³ Intervenor, Georgians Against Nuclear Energy ("GANE"), had contested the propriety of the two-step process. But, after reviewing our regulations at length, we found it permissible to limit the current initial hearing process to contentions pertinent to DCS's construction authorization request, environmental report, and quality assurance plan.⁴ Hence, construction authorization requires discrete findings related to construction:

(1) a safety finding "that the design bases of the proposed MOX fuel fabrication facility's principal structures, systems, and components, together with the DCS quality assurance plan, 'provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.' 10 CFR 70.23(b);" and (2) an environmental finding, after a review under the National Environmental Policy Act ("NEPA"), that "the action called for is the issuance of the proposed license.' 10 CFR 70.23(a)(7)."⁵

The agency will consider operation of the MOX facility later, subject to a separate hearing notice and another opportunity for public participation.

The Board admitted several of GANE's contentions in the construction authorization hearing, along with one contention and part of another contention of the Blue Ridge

³See CLI-02-07, 55 NRC __ (Mar. 7, 2002).

⁴*Id.*, slip op. at 2-3 (citations omitted).

⁵*Id.*, slip op. at 2 (citations omitted).

Environmental Defense League (“BREDL”).⁶ DCS requested the Board to reconsider its decision to admit GANE contentions 1 and 2, relating to consideration of material control and accounting and physical security issues; GANE contentions 5 and 8 and BREDL contention 9A, relating to the definition of the “controlled area” for the MOX fuel fabrication facility; and GANE contention 12, regarding the analysis of the impacts of terrorist acts under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Alternatively, DCS requested that the Board certify the issues to the Commission. GANE and BREDL opposed the motion. The NRC Staff took no position as to contentions 5 and 8, but supported DCS’s motion as to the remaining contentions. The Board denied both reconsideration and certification.⁷

Subsequently, DCS filed with the Commission a petition for interlocutory review. In an earlier order, we granted DCS’s request to review the terrorism contention and set a briefing schedule on that issue, but made no decision regarding the remainder of the petition.⁸ Today, we address the remainder of DCS’s petition for interlocutory review.

II. DISCUSSION

As a general matter, the Commission disfavors interlocutory review. Nevertheless, the Commission in this case recently granted interlocutory review of GANE’s terrorism contention and also accepted review of similar issues in three other ongoing NRC adjudications. Those contentions are exceptional because they arise from the unprecedented terrorist acts of September 11, 2001; they involve issues that impact many other ongoing and future adjudicatory proceedings; and two Licensing Board panels reached different conclusions about

⁶See LBP-01-35, 54 NRC 403 (2001).

⁷See unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).

⁸See CLI-02-04, 55 NRC __.

the admissibility of the contentions. None of the other contentions for which DCS requests review rise to that extraordinary level of significance.

Nor do the contentions meet the criteria in 10 C.F.R. § 2.786(g), which reflect the limited circumstances in which interlocutory review may be appropriate: where the Board's ruling either threatens a party with immediate and serious injury which cannot be remedied by a later appeal or "[a]ffects the basic structure of the proceeding in a pervasive or unusual manner."⁹ DCS does not claim immediate or serious injury, and none is obvious. Inappropriate admission of a contention, without more, does not meet our review criteria, for a party cannot use an interlocutory appeal merely to narrow the scope of a hearing.¹⁰ Admission of contentions that expand the issues for consideration do not affect the proceeding in a pervasive or unusual way.¹¹

The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceeding...¹²

Accordingly, we generally deny petitions for interlocutory review of Board orders.¹³ We follow that practice here.

⁹See CLI-02-07, 55 NRC at ___, slip op. at 4-5, n. 15; *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998)

¹⁰See *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 18-19 (2001).

¹¹See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), 39 NRC 91, 93 (1994).

¹²*Id.* at 94, quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987).

¹³See CLI-02-04, 55 NRC at ___, slip op. at 4. Of course, an applicant may appeal, as of right, an order granting an intervention petition on the ground that the petition should have been wholly denied. See 10 C.F.R. § 2.714a(c).

Although we deny review, we add a cautionary note. We purposefully set boundaries for the subject matter of the MOX hearings. Under our two-step approach, the present Board's jurisdiction extends only to construction authorization issues.¹⁴ Therefore, the Board must limit litigation of all contentions to design bases, quality assurance program, and environmental review issues.¹⁵ Operation-related issues come into play later, after the receipt of the complete license application and the announcement of a new opportunity for a hearing on these issues.

III. CONCLUSION

For the foregoing reasons, the Commission *denies* DCS's petition for interlocutory review as it relates to GANE contentions 1, 2, 5, and 8 and BREDL contention 9A.

IT IS SO ORDERED.

For the Commission¹⁶

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of April 2002

¹⁴See CLI-02-07, 55 NRC at ___, slip op. at 9-10.

¹⁵We note in passing that there is a substantial disagreement among the parties as to, *inter alia*, whether physical protection and material control and accounting systems are within the intended scope of the "principal structures, systems, and components" referenced in 10 C.F.R. § 70.23(b). We also note that there are alleged to be several ways in which such design bases may be associated with the safety finding under § 70.23(b), and that the Board's bottom line is that the "design bases of the MC&A and physical protection systems of the [MOX fuel fabrication facility] are not precluded from consideration under section 70.23(b)." LBP-01-35, 54 NRC at 429 (2001). As we find an insufficient case for interlocutory review at this point, we are not deciding the extent to which the design bases of these two systems will be relevant or should be judged at this stage. However, we expect the Board to go forward in a manner that refines and specifies the standards by which these design bases issues will be deemed appropriately litigated and resolved.

¹⁶ Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.