

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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

In the Matter of)
)
)
DUKE COGEMA STONE & WEBSTER) Docket No. 070-03098-ML
)
)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))
)

CLI-01-28

MEMORANDUM AND ORDER

On October 10, 2001, Georgians Against Nuclear Energy (“GANE”) and the Nuclear Control Institute (“NCI”) filed a petition, based on the terrorist attacks of September 11, 2001, to suspend this proceeding to authorize construction of a mixed oxide (“MOX”) fuel fabrication facility. We deny the petition. The Commission has instituted a full-scale review of its terrorism-related rules and policies. But, as we explain in detail in another decision issued today,¹ 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.

I. BACKGROUND

On February 28, 2001, the consortium of Duke Cogema Stone & Webster (“DCS”) submitted an application for authorization to construct a MOX fuel fabrication facility at the U.S.

¹*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC __ (2001). See also *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-01-27, 54 NRC __ (2001).

Department of Energy's Savannah River, South Carolina, site. After appropriate notices,² the Commission received four petitions to intervene, from GANE, Environmentalists, Inc., Blue Ridge Environmental Defense League ("BREDL"), and Charles and Edna Foster. NCI did not seek to intervene. We referred the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. See CLI-01-13, 53 NRC 478 (2001). All petitioners except the Fosters subsequently filed contentions. In addition, GANE filed with the Board a "Motion to Dismiss Licensing Proceeding, or, in the Alternative, Hold It in Abeyance" ("Motion") on Aug. 13, 2001. The Board heard oral argument on standing, admissibility of contentions, and the Motion. On December 6, 2001, the Board issued its order ruling on standing and admissibility of contentions. See LBP-01-35, 54 NRC ___ (2001). The Board granted the intervention petitions of GANE and BREDL and denied intervention of the remaining petitioners. Subsequently, the Board denied GANE's Motion. See unpublished Memorandum and Order (Ruling on Motion to Dismiss) (Dec. 20, 2001) ("Dec. 20 Order).

On October 10, 2001, GANE and NCI filed, directly with the Commission, a joint petition, requesting that we suspend this proceeding as a result of the September 11, 2001, terrorist attacks on New York City and the Pentagon.³ GANE and NCI further requested that we suspend proceedings for construction of all new facilities⁴ until the NRC Staff completes the

²The NRC Staff announced receipt of the construction authorization request ("CAR") and environmental report. See 66 Fed. Reg. 13,794 (Mar. 7, 2001). Later, the Commission published a Notice of Opportunity for a Hearing under a modified version of our Subpart L procedures. See 66 Fed. Reg. 19,994 (Apr. 18, 2001).

³See "Petition by Georgians Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility (Oct. 10, 2001) ("Petition").

⁴The only other pending application for a new facility is the Private Fuel Storage, LLC application to construct and operate an independent spent fuel storage installation in Utah. The State of Utah has filed a petition for immediate relief suspending licensing proceedings in the Private Fuel Storage matter similar to GANE's petition here. Today we have also denied Utah's petition, along with a similar request by the Blue Ridge Environmental Defense League in a

regulatory review we mandated. DCS and the NRC Staff opposed the Petition,⁵ and GANE and NCI filed a reply.⁶ No other party responded to the GANE-NCI Petition.

II. PRELIMINARY MATTERS

As an intervention petitioner in the MOX CAR adjudicatory proceeding, GANE was within its rights to bring to the Commission's attention any matters that are ripe for Commission, rather than Board, action.⁷ This is true regardless of the Board's ultimate ruling that GANE has fulfilled the requirements for standing and raised an admissible contention in order to become a formal party to this proceeding. The filing of a timely petition to intervene provided GANE with the requisite status to take additional actions in this proceeding.⁸

license renewal matter. See decisions cited in note 1, *supra*.

⁵See "Duke Cogema Stone & Webster's Response to 'Petition by Georgians Against Nuclear Energy and Nuclear Control Institute to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility'" (Oct. 22, 2001) ("DCS Brief") and "NRC Staff's Response to Motion to Suspend Proceeding" (Oct. 29, 2001) ("Staff Brief"), respectively.

⁶See "Georgians Against Nuclear Energy and Nuclear Control Institute's Reply to Responses of NRC Staff and Duke Cogema Stone & Webster to Petition to Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility" (Nov. 1, 2001).

⁷As a general rule, the Commission does not encourage participants in adjudicatory proceedings to seek to bypass the Board by filing motions or petitions directly with the Commission.

⁸DCS argued that GANE's motion is improper because the Board had not yet granted standing to the organization at the time GANE and NCI filed the Petition. See DCS Brief at 3. We find this argument unpersuasive. We repeatedly have considered petitions or motions filed by persons or groups who have not yet attained formal "party" status through a finding of standing. See, e.g., *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45 (1998); cf. *Metropolitan Edison Co., et al.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 330 (1983) (*untimely* intervention petitioner has no status to file second motion concurrently, to disqualify commissioner). Moreover, this issue became moot when the Board granted GANE's intervention petition. See LBP-01-35, 54 NRC

NCI, however, has neither made a hearing request pursuant to 10 C.F.R. § 2.1205 nor sought permission to participate in this adjudication on any other basis. Therefore, NCI has no legitimate place in this proceeding. Consequently, we shall hereafter refer only to GANE as the petitioner.

III. DISCUSSION

A. GANE's Petition

In the wake of the September 11, 2001, terrorist attacks on New York City and the Pentagon, GANE alleges that the magnitude of the terrorist threat is substantially greater than previously assumed, that additional attacks are foreseeable, and that reactors and fuel cycle facilities are highly vulnerable because they were not designed to withstand severe attacks such as deliberate airborne assaults and attacks by large groups of individuals. See Petition at 1, 7. GANE maintains that current NRC regulations are inadequate to protect against a terrorist threat; thus, GANE concludes that the Commission should suspend proceedings in which applicable standards are inadequate to ensure protection of public health and safety until the regulatory review the Commission has mandated is complete.⁹ In short, GANE believes the Commission should not proceed with construction approval review until we have evaluated the adequacy of our regulations to ensure reasonably sufficient protection against a substantial terrorist threat and that our evaluation should include the "entire array of potential credible terrorist scenarios." See *id.* at 7-8.

GANE also requests reversal of the Commission's "longstanding refusal" to consider terrorist attacks in environmental impact statements. See *id.* at 2. GANE argues that events such as a crash of an aircraft into the facility can no longer be considered highly unlikely.

⁹We will consider GANE's request to suspend *this* proceeding; however GANE's request to suspend other proceedings is not cognizable in this individual adjudicatory proceeding.

Further, GANE states that it has challenged, in its contention 12, the legality under NEPA of DCS's failure to address the environmental impacts of terrorist acts against the MOX facility.¹⁰

See *id.* at 3-4.

B. Suspension of Proceeding

As in the other cases we decide today (*see* note 1, *supra*), “we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.” *See Private Fuel Storage*, CLI-01-26, 54 NRC at ___, slip op. at 5. None of these considerations calls for postponement of the MOX proceeding.

GANE has advanced no reason that warrants immediate suspension of the MOX CAR proceeding to protect the health and safety or security of its members. As the NRC Staff notes, GANE fails to show an immediate and specific threat at the site of the proposed MOX facility. *See* Staff Brief at 5. Indeed, there will be no construction or operation there for years, even assuming DCS gains the NRC's approval of the license application. 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. The cost and inconvenience of litigating challenges to the DCS application are not the kind of injury that warrants postponing

¹⁰Lastly, GANE argues that the bifurcated structure of NRC licensing review of the MOX facility hampers the effectiveness of sabotage prevention and safeguards measures because the Commission has divorced design issues from operational issues. *See id.* at 11-12. We note that the Board recently denied GANE's earlier Motion, which challenged the legality of the two-part review of applications for the MOX facility that the Commission outlined in the Commission's notice of opportunity for hearing (66 Fed. Reg. 19,994 (Apr. 18, 2001)). *See* Dec. 20 Order.

the licensing proceeding.¹¹ Therefore, GANE is not injured or prejudiced in a cognizable sense simply because it may incur litigating costs and inconvenience from moving forward with the adjudication before the generic review is completed.

The Commission, of course, is well aware of the events of September 11, 2001, and has directed the NRC Staff to undertake a top-to-bottom review of every aspect of our security requirements in light of those events. The Commission's ongoing internal review is in its early stages, and may or may not result in policy or rule changes pertinent to the current adjudication. Our hearing rules, of course, contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding.¹² In the meantime, there is no reason to postpone the MOX fuel proceeding -- which, after all, will require resolution of many issues having nothing to do with terrorism. Moreover, we have authority to make any resulting modifications to our regulations applicable to both licensees and applicants and to require DCS to make any necessary modifications to its fuel fabrication facility. See 42 U.S.C. § 2201(b) and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).

During the time when the NRC is pursuing its top-to-bottom reassessment of its regulations and policies on terrorism, the agency must also continue to meet its statutory responsibilities for licensing and regulation of all nuclear facilities and materials in a timely and efficient manner. See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Permitting unnecessary delays would contravene the Commission's

¹¹See *McGuire & Catawba*, CLI-01-27, 54 NRC at ___, slip op. at 5-6 and references cited therein.

¹²See, e.g., 10 C.F.R. § 2.714(a) (late-filed contentions); 10 C.F.R. § 2.734 (motions to reopen the record). Our initial scheduling order in this case accounted for the possibility of late contentions. See CLI-01-13, 53 NRC at 481, 484-86.

fundamental duties to the general public, as well as to applicants and licensees. The Commission's objectives are

to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.

Id. at 19. Consistent with this policy, the Commission has a history of *not* delaying adjudications to await extrinsic actions, absent special needs of efficiency or fairness. See *Private Fuel Storage*, CLI-01-26, 54 NRC at ___, slip op. at 7-9 and references cited therein; *McGuire & Catawba*, CLI-01-27, 54 NRC at ___, slip op. at 5.

The public has an additional strong interest in moving forward with this proceeding; specifically, reducing the nation's inventory of plutonium. As we recently observed in a scheduling order in this proceeding:

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: reducing the inventory of plutonium in the nation's nuclear weapons' inventory in accordance with the U.S.-Russian Federal Plutonium Disposition Agreement.

CLI-01-13, 53 NRC at 484 (2001). In the absence of a compelling reason, we will not frustrate national security interests by suspending this proceeding.

During the pendency of this proceeding, our generic review of terrorism-related policies will, of course, continue forward. That review may or may not result in changes pertinent to the proposed MOX facility. Moving forward with the proceeding is not incompatible with our ongoing generic review and does not rule out considering the implementation of any newly-developed rules as part of the ongoing MOX proceeding if appropriate.

III. CONCLUSION

For the foregoing reasons, the Commission *denies* the petition of NCI and GANE to suspend this construction authorization request proceeding for the proposed MOX fuel fabrication facility.

IT IS SO ORDERED.

For the Commission¹³

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December, 2001.

¹³Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.