

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

DUKE COGEMA STONE & WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

February 12, 2002

MEMORANDUM AND ORDER

Pursuant to 10 C.F.R. § 2.1209, the Licensing Board sets forth the following directives and schedule for the conduct of discovery in Phase II of the proceeding:

1. On February 6, 2002, the Commission issued CLI-02-04 in which it granted, in part, the petition for review of Duke Cogema Stone & Webster (DCS) seeking, inter alia, review of the Board's ruling admitting GANE contention 12. In granting review, the Commission also directed the Board to proceed no further on that contention. Accordingly, there shall be no discovery on GANE contention 12 pending further order of the Board.

2. In CLI-01-13, 53 NRC 478, 481 (2001), the Commission directed that there should be no discovery against the NRC Staff until the Staff issues the final Environmental Impact Statement (EIS) and the final Safety Evaluation Report (SER). Accordingly, there will be no discovery against the Staff pending further order of the Board.

3. Pursuant to the designation of both parties, GANE shall act as lead party on (a) consolidated GANE contention 5 and 8 consolidated with BREDL contention 9A; and (b) GANE contention 11 consolidated with BREDL contention 1E. As lead party, GANE shall be responsible for prosecuting these contentions.

4. Each party shall serve no more than two rounds of interrogatories for each admitted contention. All interrogatories shall be served by e-mail and grouped by contention with the contention number clearly marked. Any party seeking leave of the Board to serve a third round of interrogatories for any contention must demonstrate good cause for the additional interrogatories.

5. The parties must file and serve on all other parties any notices of deposition. Once deposition transcripts become available, they should be submitted immediately to deponents for review and any corrections made within ten (10) days.

6. As reflected in the schedule below, all parties should make a good faith effort to identify by March 7, 2002, the experts who are expected to provide testimony for each admitted contention along with each expert's address, current employment, and relevant biographical information. The Board recognizes that circumstances may arise in which a party may need to retain other or additional experts to provide testimony for one or more contentions after that date. In such circumstances, the party shall immediately provide the information noted above for any new expert and update any relevant outstanding interrogatory answers. In no event, however, may a party name an expert so late in the discovery process that it delays the proceeding or unduly prejudices another party.

7. The Board strongly advises the parties to treat the draft EIS and draft SER as nearly "final" documents for purposes of conducting disposition discovery on the admitted contentions. Any party waiting until the issuance of the final EIS and the final SER to conduct all or a majority of the depositions it plans to take must accept all risks attendant on such an approach.

Moreover, regardless of the circumstances, the Board is unlikely to look favorably upon any request to extend the discovery period on already admitted contentions by a party who postpones taking depositions until the 45-day period after the issuance of the final EIS and SER. See CLI-01-13, 83 NRC at 485.

8. Any party filing a late-filed contention must, in addition to meeting the requirements of 10 C.F.R. § 2.714(b)(2), address each of the five factors set forth in 10 C.F.R. § 2.714(a)(1). All late-filed contentions shall be filed within 30 days of the initiating action, event, or document underlying the late-filed contention. For example, in circumstances where the issuance of a Staff or DCS document legitimately undergirds a late-filed contention, the Board will consider a contention filed within 30 days of the issuance of that document as presumptively meeting the good cause requirement of section 2.714(a)(1)(i). Absent extraordinary circumstances, a late-filed contention filed beyond the 30-day period will be found to lack good cause for the untimely filing. Finally, the Board reminds the Intervenors that they may need to file a late-filed contention or a late-filed amendment to an admitted contention if, for example, the scope, data, or conclusions set out in the draft EIS or the draft SER differ significantly from DCS's Environmental Report or construction authorization request. Failure to file a new late-filed contention or a late-filed amendment to an admitted contention may, upon a proper motion, result in the dismissal of an admitted contention.

9. The schedule set out below provides specific dates for various discovery steps through September 30, 2002 -- the date the Staff has stated it hopes to issue the final EIS and the final SER. If, at any time, the Staff determines that it will be unable to meet the currently projected dates for issuing the draft EIS and/or the draft SER, it shall immediately notify the Board and the other parties of the new projected dates for issuing those draft documents. In the event the Staff's newly projected dates are less than eight (8) days from the currently projected dates, there will be no schedule adjustment. If it appears, however, that the currently

projected dates will slip by more than seven (7) days, the Staff shall immediately notify the Board and the other parties of the new dates, and the Board will develop a new schedule.

All discovery actions and other filings in the proceeding to be taken after September 30, 2002 (or the date of the actual issuance of the final EIS and SER) shall follow the schedule set out in the Commission's referral order. See CLI-01-13, 53 NRC at 484-86. As all parties are aware, the Commission-directed schedule keys all actions to the date the Staff issues the final EIS and the SER. To ensure there is no misunderstanding, the Board will issue an order setting specific dates for all remaining actions once there is a firm date for the Staff issuance of the final EIS and SER.

Because the schedule the Board has been directed to follow is keyed to the issuance of the EIS and the SER by one party to the proceeding, i.e. the NRC Staff, there is at least the appearance of unfairness in that a litigant, and not the Licensing Board, is effectively controlling the schedule for concluding the proceeding. Nevertheless, all parties should recognize that if the Staff issues the EIS and SER on the projected date of September 30, 2002, then, under the schedule directed by the Commission, the parties' simultaneously-filed written presentations on the admitted contentions will be due 90 days thereafter -- a date that falls between the Christmas and New Year holidays. That filing date, combined with the Commission's directive that the Board should not grant any extensions of time except for "unavoidable and extreme circumstances," CLI-01-13, 53 NRC at 486, effectively ties the Board's hands with respect to extending any filing deadline due to the holiday season. Accordingly, the parties should begin their planning now for meeting those deadlines. To help the parties plan, the Staff shall file a notice as to its then current projected date for issuance of the final EIS and the final SER on the last business day of each month beginning in June 2002 and continuing until those documents are issued.

10. Schedule:

February 25, 2002	Projected date for Staff issuance of draft EIS.
March 7, 2002	Parties identify experts for each admitted contention.
March 15, 2002	Parties serve by e-mail first round of interrogatories.
April 12, 2002	Parties respond by e-mail to first round of interrogatories and identify and make available for copying any documents not in hearing file that their experts plan to rely on.
April 30, 2002	Projected date for Staff issuance of draft SER.
May 17, 2002	Parties serve by e-mail second round of interrogatories.
June 14, 2002	Parties respond by email to second round of interrogatories.
June 21, 2002	Parties wishing to take oral depositions may begin filing notices of deposition.
September 30, 2002	Projected date for Staff issuance of final EIS and SER.
November 15, 2002	Discovery on currently admitted contentions must be completed.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland

February 12, 2002

¹Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) DCS; (2) the NRC Staff; (3) GANE; and (4) BREDL.

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NUCLEAR REGULATORY COMMISSION

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Fabrication Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER DATED FEBRUARY 12, 2002 have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-ML
LB MEMORANDUM AND ORDER DATED
FEBRUARY 12, 2002

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of February 2002