

RAS 4371

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: 202.739.3000
Fax: 202.739.3001
www.morganlewis.com

DOCKETED
USNRC

2002 APR 25 PM 3: 16

OFFICE OF THE SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

DOCKET NUMBER
PROD. & UTIL. FAC. ~~70-3098-ML~~

Morgan Lewis
C O U N S E L O R S A T L A W

Alex S. Polonsky
(202) 739-5830
apolonsky@morganlewis.com

April 17, 2002

VIA E-MAIL AND FIRST CLASS MAIL

Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

RE: Proposed Discovery Schedule for MOX Facility CAR Proceeding
for April 18, 2002 Teleconference

Dear Chairman Moore:

In accordance with the Board's Order of April 11, 2002, and on behalf of Duke Cogema Stone & Webster (DCS), attached is a proposed schedule for discovery in the MOX Facility Construction Authorization Request (CAR) proceeding. DCS, GANE, and the NRC Staff conferred yesterday in an attempt to reach an agreement on a new discovery schedule. Unfortunately, DCS and GANE could not agree on the timing of discovery.

DCS would like to commence discovery promptly, and proposes that the parties identify experts and serve a first round of interrogatories within the next three weeks. An early round of interrogatories will allow litigation to proceed more efficiently for two reasons. First, the scope of the first interrogatories will probably determine if Restricted Data (RD) or National Security Information (NSI) will be part of the CAR proceeding. Based on conversations with Glenn Carroll, no member or consultant of GANE has the necessary clearance to view RD or NSI at this time. Prior to September 11, DCS understands that it took the Department of Energy about six months to process an application requesting such clearance. That process may now be substantially longer.¹ Second, the answers to interrogatories may provide sufficient information

¹ DCS has conveyed this potential for delay to GANE, and has offered to assist GANE to initiate the application process on numerous occasions since early January 2002. To date, we have not been advised as to whether GANE desires to obtain such a clearance, and if so, which of its representatives intends to apply.

to allow the Board to narrow or dispose of some of the admitted contentions as a matter of law, avoiding the time and expense of both a second round of interrogatories and the need for depositions on those contentions.

There should be little added burden on the parties to identify experts and serve a first round of interrogatories in the near term. During the conference call on December 20, 2001, the Licensing Board ordered the parties to immediately begin preparing interrogatories (Tr. p. 443). In addition, the Board cancelled its prior discovery order on the same date (March 7) that the parties were to have identified their experts, and only one week before the parties were to have served their first round of interrogatories. We therefore presume that GANE has already undertaken substantial efforts to identify its experts and to prepare an initial set of interrogatories, if it intends to file interrogatories in the first round.

The discovery schedule proposed by DCS, however, also takes into account the extended licensing schedule, by delaying the second round of interrogatories and the commencement of depositions until after DCS has submitted its supplements to the Environmental Report (ER) and CAR based on the recent MOX program changes. This addresses GANE's concern—expressed in its motion to postpone discovery—that GANE have an opportunity to serve interrogatories after DCS submits its supplements to the ER and CAR. It also obviates the need for a third round of interrogatories to address the ER and CAR supplements, thereby reducing the overall burden on the parties. Finally, regarding depositions, the proposed schedule retains the Board's previous position and GANE's preference, that parties be permitted to take depositions through the 45-day period after issuance of the Final EIS and SER (currently November 17, 2003).²

GANE proposes to postpone the start of discovery for ten months—until after the Staff's issuance of the Draft EIS, scheduled for February 2003. GANE states that this is consistent with CLI-01-13, and that the Commission has keyed the discovery schedule to the issuance of the final SER and EIS. On the contrary, the Commission anticipated that discovery would commence once the contentions were accepted for admission and that only discovery against the NRC Staff was to be delayed until after issuance of the final EIS and SER.

GANE also states that its schedule “establishes the . . . Draft EIS as the triggering event” for the identification of witness. It is not clear why, in GANE's view, the draft EIS should trigger the identification of witnesses, but the draft SER (which is to be released at the end of this month and which is absent from GANE's schedule) should not.

Finally, GANE continues to argue that all of the contentions are potentially affected by the recently announced MOX program changes and that its proposed schedule will avoid litigating issues “twice.” As previously discussed in our February 26, 2002 “Answer in Opposition to

² As we have previously stated, DCS does not believe it is prudent to require the parties to condense their time for taking depositions to the 45-day period previously proposed by GANE.

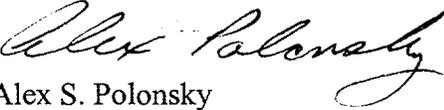
Thomas S. Moore, Chairman
April 17, 2002
Page 3

Morgan Lewis
COUNSELORS AT LAW

Intervenors' Motion to Postpone Discovery" (see pp. 7-11), DCS does not agree that the contentions will be so impacted by the MOX Program changes. Furthermore, DCS' proposed discovery schedule does not necessitate any duplicative litigation.

Mr. Peter Hastings (Licensing Manager for DCS), Mr. Don Silverman, and I plan to participate on behalf of DCS in the conference call tomorrow (April 18, 2002) at 1:00 p.m. to discuss the schedule.

Sincerely,


Alex S. Polonsky

Attachment: DCS' Proposed Discovery Schedule

cc: Office of Commission Appellate Adjudication
Secretary of the Commission
Judge Kelber, ASLB
Judge Lam, ASLB
J. Hull, Nuclear Regulatory Commission, OGC
M. Young, Nuclear Regulatory Commission, OGC
D. Dambly, Nuclear Regulatory Commission, OGC
G. Carroll, GANE
D. Curran, Legal Advisor to GANE (via e-mail only)
D. Moniak, BREDL
L. Zeller, BREDL (via e-mail only)

DCS' Proposed Discovery Schedule
MFFF CAR Proceeding
(April 18, 2002 Teleconference)

Tues. April 30, 2002	1) Projected date for NRC Staff issuance of draft SER. 2) For each admitted contention (except #12), parties provide names, current employment positions, and addresses of experts who are expected to provide testimony along with the expert's biographical information.
Mon. May 6, 2002	Parties serve first round of interrogatories (grouped by contention) via e-mail no later than 6 p.m.
Thurs. June 6, 2002*	Parties respond by e-mail to first round of interrogatories and identify and make available for copying any documents not in the hearing file upon which their experts plan to rely.
Mon. July 15, 2002	DCS submits supplement to the ER
Wed. Oct. 30, 2002	DCS submits supplement to the CAR
Mon. Dec. 1, 2002	Parties serve second round of interrogatories (grouped by contention) via e-mail no later than 6 p.m.
Mon. Jan. 13, 2003*	Parties respond by e-mail to second round of interrogatories and identify and make available for copying any additional documents not in the hearing file upon which their experts plan to rely.
Mon. Jan 20, 2003	Parties wishing to take oral depositions may begin filing notices of deposition. Parties have until 45 days after the NRC Staff issues the Final EIS and SER to complete depositions. Deposition transcripts should be submitted to deponents for review and correction as soon as the transcripts become available.
Mon. Feb. 24, 2003	Projected date for Staff issuance of draft EIS.
Wed. April 30, 2003	Projected date for Staff issuance of draft SER, Rev. 1.
Fri. Aug. 29, 2003	Projected date for Staff issuance of Final EIS.
Tue. Sept. 30, 2003	1) Projected date for Staff issuance of Final SER. 2) Discovery against NRC Staff begins.
Mon. Nov. 17, 2003	Discovery on currently admitted contentions must be completed.

Notes:

- * Parties may complete this activity prior to, but no later than this date. Pursuant to 10 CFR § 2.740(e), parties have a continuing obligation to update each other as additional experts, documents, and information are identified.
- The Commission has stated that, other than documents not part of the hearing file upon which experts plan to rely, document discovery is not anticipated.
- In addition to filing by e-mail, all documents will be filed by First Class Mail.
- Interrogatories may include requests for admission under 10 CFR § 2.742.