

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	Docket No. 070-03098
DUKE COGEMA STONE & WEBSTER)	
)	
Mixed Oxide Fuel Fabrication Facility)	
(Construction Authorization Request))	

NRC STAFF'S RESPONSE TO LATE-FILED CONTENTIONS SUBMITTED BY
GEORGIANS AGAINST NUCLEAR ENERGY

INTRODUCTION

On September 11, 2002, Georgians Against Nuclear Energy (GANE) submitted a set of late-filed contentions, consisting of four new contentions, and amended versions of two GANE contentions previously admitted by the Atomic Safety and Licensing Board in this proceeding.¹ Duke Cogema Stone & Webster (DCS) filed its response to GANE's Late-filed Contentions on September 23, 2002.² Pursuant to 10 C.F.R. § 2.714(c),³ the staff of the Nuclear Regulatory Commission (NRC Staff) now files its response.

As discussed below, GANE's Late-filed Contentions were due no later than August 15, 2002, and thus were not timely filed. GANE has not established good cause for failing to adhere to the applicable terms of a scheduling order issued by the Board on April 30, 2002, and has

¹ See "[GANE's] New and Amended Contentions Opposing Authorization For Duke Cogema Stone & Webster To Construct a Plutonium Fuel Factory at Savannah River Site" (GANE's Late-filed Contentions).

² See "Duke Cogema Stone & Webster's Answer to [GANE's] New and Amended Contentions on the Revised Environmental Report" (DCS Response).

³ In this modified 10 C.F.R. Part 2, Subpart L proceeding, the Subpart G contention provisions of 10 C.F.R. § 2.714 are applicable. See CLI-01-13, 53 NRC 478, 480-81 (2001).

otherwise failed to meet the requirements of 10 C.F.R. § 2.714(a)(1) pertaining to the admission of late-filed contentions. Additionally, GANE's Late-filed Contentions do not meet the contention requirements of 10 C.F.R. § 2.714(b). The NRC Staff therefore requests the Board to deny GANE'S request to amend two of its previously-admitted contentions, and deny GANE'S request to admit its four late-filed contentions.

BACKGROUND

In May of 2001, GANE made its initial request for hearing on DCS' February 28, 2001, construction authorization request (CAR), regarding a proposed mixed oxide (MOX) fuel fabrication facility (MOX Facility), which DCS seeks to build at the United States Department of Energy's (DOE's) Savannah River Site (SRS) in South Carolina. DCS, a contractor of the DOE, had submitted an environmental report (ER) to the NRC in December 2000, regarding the proposed construction and operation of the MOX Facility, which is a major federal action over which the NRC has jurisdiction, and which requires an environmental impact statement (EIS).⁴ The DOE had earlier issued a Record of Decision in January 2000, pertaining to its surplus plutonium disposition program, and made decisions regarding (1) the construction and operation of a pit disassembly and conversion facility; (2) the construction and operation of a plutonium immobilization facility; (3) the construction and operation of the MOX Facility; (4) selection of a site for lead assembly fabrication; and (5) selection of a site for post-irradiation examination of lead assemblies.⁵ The NRC's authority over the DOE's surplus plutonium disposition program is limited to matters pertaining to the proposed construction and operation of the MOX Facility.⁶

⁴ See "Notice of Intent to Prepare an Environmental Impact Statement for the Mixed Oxide Fuel Fabrication Facility," 66 Fed. Reg. 13794 (March 7, 2001).

⁵ See "Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement," 65 Fed. Reg. 1608, 1619-20 (Jan. 11, 2000).

⁶ See Section 202 of the Energy Reorganization Act (as amended in 1998), 42 U.S.C.

Early this year the DOE changed its surplus plutonium disposition program by deciding to convert additional surplus plutonium into MOX fuel, and to cancel the planned construction and operation of its immobilization facility.⁷ As a result of this DOE action, the NRC Staff held a public meeting with DCS in February -- with GANE representatives in attendance -- at which time DCS announced it would need to submit a revised ER evaluating changes to the proposed MOX Facility made necessary by DOE's decision to convert additional surplus plutonium into MOX fuel.⁸ By letter to DCS dated March 12, 2002 (with contemporaneous copies sent to GANE and others), the NRC Staff directed DCS to submit its revised ER by July 15, 2002.⁹

On April 30, 2002, the Board issued an order setting forth a revised schedule for conducting discovery in this proceeding.¹⁰ In situations where new documents give rise to either late-filed contentions or late-filed amendments to admitted contentions, the Board established a 30-day period in which to submit such contentions, running from the issuance date of the new document. On this point, the Board stated in full as follows:

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

⁶(...continued)
§ 5842(5).

⁷ The DOE published formal notice of these changes in April 2002 (see "Surplus Plutonium Disposition Program," 67 Fed. Reg. 19432 (April 19, 2002), but had announced the changes in January. See letter from DCS counsel to the Board, dated January 24, 2002.

⁸ See letter from NRC Staff counsel to the Board, dated February 14, 2002.

⁹ See MOX Hearing File item # 95 (March 12 letter, and Attachment 1 thereto). GANE was sent another copy of these items when the MOX Hearing File was updated. See letter from NRC Staff counsel to the Board, dated March 28, 2002.

¹⁰ The Board's initial discovery schedule was set forth in an order dated February 12, 2002. After DCS announced that it would need to submit a revised ER, the Board issued an order on March 7, 2002, stating that it would later need to revise the discovery schedule. The Board stated in its April 30 order that all of its February 12 order was superceded, but noted that it was repeating many of the February 12 order's provisions. See April 30 order, at 1.

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 Intervenor 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.

April 30 order, at 3-4 (¶ 8) (emphases added).

By cover letter dated July 11, 2002, DCS submitted its revised ER to the NRC.¹¹ GANE then waited until September 11, 2002, before submitting additional contentions, all of which are based on DCS' revised ER. See GANE's Late-filed Contentions, at 1.

DISCUSSION

A. GANE Fails to Meet Board's 30-Day Requirement for Submitting Additional Contentions

GANE has not established good cause for failing to comply with the Board's April 30 scheduling order,¹² and the Board should therefore refuse to admit any of GANE's Late-filed Contentions. GANE's 30-day response time for filing the subject contentions began running on July 11, 2002, when DCS submitted its revised ER, since that is the date of the "document underlying the late-filed contention[s]" (April 30 order, at 3), and GANE admits that all of the subject contentions are based on the revised ER. See GANE's Late-filed Contentions, at 1, and 15.

¹¹ See MOX Hearing File item # 109, as listed in Supplement # 3 to the MOX Hearing File Index (attached to letter from NRC Staff counsel to the Board and parties, dated August 7, 2002). DCS' revised ER became generally accessible to the public through the NRC's ADAMS system as of July 26, 2002 (ADAMS accession number ML021990442).

¹² GANE references the Board's 30-day requirement set forth in the superseded scheduling order of February 12, 2002. See GANE's Late-filed Contentions, at 15. That order contained the same provisions regarding the admission of late-filed contentions as does the Board's April 30 order. Cf., ¶ 8 of the Board's February 12 order, at 3, to ¶ 8 of the Board's April 30 order, at 3-4.

Moreover, DCS states that on July 15, 2002, a paper copy of its revised ER was delivered to Glenn Carroll, GANE's representative, and that counsel for DCS confirmed with Ms. Carroll that she had received this delivery. See DCS Response, at 3-4. GANE did not reference this July 15 delivery in its September 11 filing, and this omission alone would warrant a Board decision refusing to admit any of GANE's Late-filed Contentions.¹³ Under the terms of the Board's April 30 order, any GANE contentions based on the revised ER were due no later than August 15, 2002.

Even if in its reply GANE establishes that, contrary to the representations of DCS' counsel, GANE did not receive a copy of DCS' revised ER on July 15, 2002, the Board should reject GANE's attempt to tie its contention deadline to when it received the NRC Staff's August 7, 2002 letter. See GANE's Late-filed Contentions, at 15. GANE had nearly four months advance notice that DCS, in mid-July 2002, would be submitting a revised ER,¹⁴ and GANE thus had plenty of time for planning to review the report with an eye towards filing further contentions. If, by mid-July, GANE had not received the revised ER, it had the reasonable obligation of making inquiry about the report's status, since GANE knew (or should have known) the potential consequences of submitting tardy contentions.¹⁵ Furthermore, after receiving the revised ER -- regardless of the initial delivery date -- if GANE then anticipated difficulties in meeting the Board's 30-day requirement for submitting additional contentions, GANE should have requested an exception from this requirement. Instead, GANE waited several weeks before submitting the subject contentions, and

¹³ In this regard, the Board has requested GANE to reply to the DCS Response by October 7, 2002. See Board order, dated September 25, 2002.

¹⁴ As set forth in the Background section, *supra*, a copy of the NRC Staff's letter to DCS dated March 12, 2002 -- directing DCS to submit a revised ER by July 15, 2002 -- was at the same time sent to GANE. See MOX Hearing File item # 95 (March 12 letter, and Attachment 1 thereto). GANE was sent another copy of these items when the MOX Hearing File was updated. See letter from NRC Staff counsel to the Board, dated March 28, 2002.

¹⁵ Both before and after becoming aware that DCS in mid-July 2002 would be submitting a revised ER, GANE knew about the Board's 30-day provision. See Board orders dated February 12, 2002, and April 30, 2002 (both at ¶ 8).

has provided no adequate justification for its delay. Under these circumstances, adherence to the Board's 30-day provision works no unfair hardship on GANE.

Accordingly, the Board should find that any GANE contentions based on DCS' revised ER were due no later than August 15, 2002, and that GANE has not established good cause for delaying its submission of such contentions until September 11, 2002. The NRC Staff therefore requests the Board to deny GANE's request to admit its September 11 contentions.

B. 10 C.F.R. § 2.714(a)(1) Standards for Admitting Late-Filed Contentions Not Met

In addition to failing to comply with the Board's specific 30-day requirement for submitting late-filed contentions in this proceeding, GANE does not show that the factors specified in 10 C.F.R. § 2.714(a)(1)(i)-(v) favor admitting the contentions at issue. These NRC regulations provide that late-filed contentions may only be admitted after a balancing of five factors:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in the development of a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1)(i)-(v). As the party seeking admission of its late-filed contentions, GANE bears the burden of showing that a balancing of these five factors weighs in favor of admitting them.¹⁶ The first factor, whether good cause exists to excuse a tardy filing, is entitled to the most

¹⁶ See *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000).

weight.¹⁷ For the reasons set forth in Section A, *supra*, the Board should find that GANE has not shown good cause for its failure to file the subject contentions by August 15, 2002.

Absent such a showing of good cause, GANE must make a compelling case that the other four factors set forth in 10 C.F.R. § 2.714(a)(1)(ii)-(v) warrant admission of its late-filed contentions.¹⁸ In evaluating these other factors, the second and fourth factors -- *i.e.*, the availability of other means to protect GANE's interest, and the ability of other parties to represent GANE's interest -- are the least important, and are thus not given as much weight as the third and fifth factors.¹⁹ Regarding the third factor (the potential contribution to the development of a sound record), GANE was obligated to identify the precise issues it was addressing, and to summarize the proposed supporting testimony of its prospective witnesses.²⁰ In addressing this third factor, GANE states only that it is "being advised in this proceeding by Dr. Edwin Lyman of the Nuclear Control Institute," that GANE hopes to present his testimony, and that he is a "highly qualified expert on the issue of plutonium disposition." GANE's Late-filed Contentions, at 15. GANE fails to summarize any of Dr. Lyman's proposed testimony with respect to the contentions at issue, except for some indirect indications of what his positions may be on GANE's Contention 17. See *id.*, at 12-13. GANE thus fails to meet its burden regarding the third lateness factor, and does not even address the fifth lateness factor (the extent to which GANE's participation will broaden the issues or delay the proceeding).

¹⁷ See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000).

¹⁸ See *Private Fuel Storage, supra*, CLI-00-2, 51 NRC at 79.

¹⁹ See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992).

²⁰ See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993).

Since there is no good cause for its tardy filing, GANE had to make a compelling case that the other four factors set forth in 10 C.F.R. § 2.714(a)(1)(ii)-(v) favor admitting the contentions at issue. GANE makes no such case. Nor has GANE shown the presence of extraordinary circumstances excusing compliance with the terms of the Board's April 30 order. Accordingly, the Board should refuse to admit any of GANE's Late-filed Contentions.

C. GANE Fails to Meet 10 C.F.R. § 2.714(b)(2) Contention Requirements

In addition to having met neither the terms of the Board's April 30 order, nor the late-filed requirements of 10 C.F.R. § 2.714(a)(1), GANE's proffered contentions are not admissible under the 10 C.F.R. § 2.714(b)(2) standards. In NRC proceedings, contentions must specify the particular issue of law or fact which the hearing petitioner seeks to litigate, and must contain: (1) "a brief explanation of the bases of the contention"; (2) "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing"; (3) references to specific documents or other sources of information within the petitioner's knowledge "on which the petitioner intends to rely" in establishing the contention's validity; and (4) sufficient information to show that a genuine dispute exists between the petitioner and the NRC applicant "on a material issue of law or fact."²¹ 10 C.F.R. § 2.714(b)(2)(i-iii). Additionally, the contention must be one which, if proven, would entitle the petitioner to relief. See 10 C.F.R. § 2.714(d)(2)(ii). These requirements are not intended to force

²¹ In its 1989 statement of considerations (SOC) discussing changes made to the contention requirements of 10 C.F.R. § 2.714, the Commission stated that disputes under the rule should be considered "material" if their resolution would "make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. 33,168, at 33,172, col.2 (August 11, 1989) (rulemaking amending 10 C.F.R. § 2.714), *aff'd. sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990). Hearing petitioners must make at least "a minimal showing that material facts are in dispute," and that further inquiry is thus appropriate. 54 Fed. Reg., *supra*, at 33,171, col. 3. See also *Georgia Institute of Technology (Georgia Tech Research Reactor)*, CLI-95-12, 42 NRC 111, 118 (1995).

a hearing petitioner to prove its case at the contention stage of a proceeding.²² But while a proffered contention may be viewed by a licensing board in a light favorable to the hearing petitioner, if any one of the above requirements is not met the contention must be rejected.²³

As noted above, the contention requirements at issue were established in 1989, when 10 C.F.R. § 2.714 was amended. The revised contention rule raised “the threshold bar for an admissible contention” in order to “ensure that only intervenors with genuine and particularized concerns participate in NRC hearings,” and to help prevent “serious hearing delays caused in the past by poorly defined or supported contentions.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). To this end, the Commission has stated that the mere referencing of documents “does not provide an adequate basis for a contention.” *Calvert Cliffs, supra*, CLI-98-25, 48 NRC at 348 (citation omitted).

Moreover, to be admissible, a contention must pertain to one or more issues falling within the scope of the matters set forth in the notice of opportunity for hearing. See *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). The Commission reiterated that in this MOX proceeding, to be admissible, a proffered contention “must demonstrate that a genuine dispute exists” with DCS, and that “the dispute lies within the scope of the proceeding.” See CLI-01-13, *supra*, 53 NRC at 483. The Staff addresses the substance of GANE’s September 11 contentions below.

²² See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

²³ See *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

1. **Amended Contention 9. Inadequate Cost-Benefit Analysis**

GANE's amended Contention 9 states:

The comparison of costs provided in the ER is inadequate, because it fails to account for significant potential costs of the proposed Mox Facility.

GANE's Late Filed Contentions, at 2. GANE's bases for this amended contention consist largely of a number of unsupported statements as to what the revised ER does not contain. See GANE's Late Filed Contentions, at 2-3.²⁴ A contention alleging that a document does not contain adequate information must identify supporting reasons for the belief that information is lacking, including references to other specific sources of information which establish the validity of the contention. See *Palo Verde, supra*, CLI-91-12, 34 NRC at 155-56. GANE's amended contention 9 fails in this regard, since it does not reference other specific sources of information (apart from the revised ER) to support the contention's validity. Moreover, a series of unsupported statements expressing GANE's opinion of what "NEPA requires" does not meet the revised contention rule's requirement that allegations be adequately particularized and specific. See *Oconee, supra*, CLI-99-11, 49 NRC at 334. Accordingly, the Board should reject GANE's amended contention 9.

2. **Amended Contention 11. Inadequate Discussion of Measures for Disposal of Waste**

GANE's amended Contention 11 states:

The ER provides an inadequate discussion of the environmental impacts of the waste material generated by the proposed MOX Facility, because it fails to address the viability of proposed measures for the processing and disposal of waste that would be generated by the Facility. Therefore, it is insufficient to comply with the National Environmental Policy Act.

²⁴ GANE cites generally to Appendix G of the revised ER, but does not explain how the 12 pages of text there -- discussing the costs of potential accidents, bounding credible accidents, and their consequences to workers and the public -- is inadequate. See revised ER, Appendix G, at G-19 to G-31, and Table G-13.

GANE's Late Filed Contentions, at 3. As discussed below, GANE's amended Contention 11 fails to show that a genuine dispute now exists between it and DCS on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii).

As stated in the basis supporting GANE's amended Contention 11, and in the revised ER, the DOE plans to build and operate a Waste Solidification Building (WSB) at the site of the DOE's proposed pit disassembly and conversion facility (to be located near the site of the proposed MOX Facility). All high-alpha waste generated by operation of the proposed MOX Facility would be piped to the WSB for processing by the DOE, and the DOE plans to ultimately ship the resulting transuranic waste to the Waste Isolation Pilot Project (WIPP) in New Mexico. See GANE's Late Filed Contentions, at 3-4, and revised ER, at 5-22 to 5-24. The DOE previously performed a NEPA analysis evaluating the impacts of disposing transuranic waste at the WIPP (see revised ER, at 5-24), and is now performing a further NEPA evaluation regarding the aspects of its Surplus Plutonium Disposition Program relating to the production of MOX fuel. See 67 Fed. Reg. 19432, 19435 col. 1 (April 19, 2002). Until the DOE issues its further NEPA evaluation, the detailed information -- which GANE contends is improperly absent from DCS' revised ER -- is presently unavailable. GANE's quarrel at present is thus with the DOE, not DCS.²⁵

A further basis for GANE's amended Contention 11 is the allegation that the revised ER, when compared to the original ER, contains an unexplained reduction in the volume of MOX waste from 81,000 gallons to 68,898 gallons annually. See GANE's Late Filed Contentions, at 4-5. This reduction is not "unexplained." As stated by DCS, the 81,000 gallon figure in the initial ER was

²⁵ This situation differs from that which the Board addressed in admitting GANE's original contention 11. See LBP-01-35, 54 NRC 403, 442-444 (2001). There, the Board found that neither previous DOE studies, nor DCS' original ER, discussed the high-alpha liquid waste stream which would be produced by the aqueous polishing of plutonium at the proposed MOX Facility, and that DCS therefore had an obligation to address the impacts of the high-alpha liquid waste stream in its ER. See 54 NRC at 443. Here, DOE is in the process of performing a NEPA evaluation (see 67 Fed. Reg., at 19435 col. 1), and it remains to be seen what that evaluation will show.

erroneous, and DCS had previously informed the NRC Staff of this error, and its commitment to correct it in the revised ER.²⁶

Accordingly, the Board should find that there is no basis for accepting GANE's amended Contention 11 at this time.

3. **Contention 14. ER Fails to Address Risks of Red Oil Explosion**

GANE's Contention 14 states:

The ER is deficient because it fails to address the potential for a red oil explosion in the Waste Solidification Building, the environmental impacts of such an accident, or measures for avoiding or mitigating a red oil explosion. Because a red oil explosion is a credible event that may have significant impacts on the human environment, it should be addressed. 10 C.F.R. § 51.45, 42 U.S.C. § 4332.

GANE's Late Filed Contentions, at 6.

GANE's Contention 14 is based largely on safety concerns the NRC Staff has raised as part of its ongoing review of the CAR, as reflected in the draft safety evaluation report (DSER) issued on April 30, 2002. See GANE's Late Filed Contentions, at 7-8. The Commission has previously emphasized the need, pursuant to 10 C.F.R. § 2.714(b)(2), to focus on the technical details in the applications being reviewed by the NRC Staff, rather than on issues identified by the NRC Staff.²⁷ The basic issue in licensing proceedings is the adequacy of the information submitted by an applicant -- not the Staff's review of such information -- and the NRC Staff resolves all safety questions regardless of whether a hearing takes place. See *Calvert Cliffs, supra*, CLI-98-25, 48 NRC at 350. Thus, the NRC Staff submits that an admissible contention here cannot be based

²⁶ See DCS Response, at 15-16 and n.46, *citing* letter from DCS to the NRC dated July 12, 2001 (Hearing File Item #45).

²⁷ See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, at 147 (regarding environmental contentions), and 150 (regarding safety contentions), *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993). Thus, the fact that the Staff has issued requests for additional information to the applicant does not establish the presence of a material issue of law or fact. *Id.*

solely on issues which have already been identified in the DSER. Accordingly, the Board should not admit GANE's Contention 14

4. **Contention 15. Inadequate Discussion of Alternatives**

GANE's Contention 15 states:

The ER is inadequate because it does not discuss the alternative of immobilization for the 6.4 tons of impure weapons-grade plutonium which was previously analyzed to be preferred for immobilization and is now proposed to be manufactured into MOX.

GANE's Late Filed Contentions, at 8.

This contention pertains to the following topic on which the NRC has requested public comment: in light of the DOE's decision canceling its plans to construct and operate a plutonium immobilization facility, the extent to which the immobilization of surplus plutonium should be discussed in the NRC's draft EIS for the proposed MOX Facility.²⁸ The comment period was recently extended to September 30, 2002.²⁹ The following discussion thus only reflects a preliminary NRC Staff position, subject to change pending the close of the comment period and evaluation of all comments received.

The NRC Staff is persuaded that the August 2001 "Scoping Summary Report"³⁰ correctly states the NRC's position on how topics which were the subject of previous DOE decisions will be evaluated in the NRC's draft EIS for the proposed MOX Facility. As stated there, "issues pertaining to decisions already made by DOE will be addressed by referencing the appropriate DOE analysis." Scoping Summary Report, at 22. As noted by DCS, the DOE has evaluated the immobilization

²⁸ See 67 Fed. Reg. 20183, at 20184 col. 3 (April 24, 2002).

²⁹ See 67 Fed. Reg. 59320 (September 20, 2002).

³⁰ The full title is "Environmental Impact Statement Scoping Process, Scoping Summary Report, Mixed Oxide Fuel Fabrication Facility, Savannah River Site."

alternative in prior NEPA analyses.³¹ To the extent necessary in its draft EIS for the proposed MOX Facility, the NRC Staff presently plans to reference the appropriate DOE analyses regarding the immobilization alternative. Moreover, given DOE's decision to cancel its plans to build an immobilization facility, little would be gained in re-evaluating such an alternative. The NRC must deal with the existing circumstances in deciding which alternatives are reasonable ones,³² and an alternative that does not accomplish the project's purpose (*i.e.*, a mutual reduction of weapons-grade plutonium in the United States and the Russian Federation) is not a reasonable alternative requiring NEPA evaluation.³³

The NRC Staff thus agrees with DCS (*see* DCS Response, at 19) that there is no NEPA requirement for DCS in its revised ER to re-evaluate immobilization impacts which the DOE has already addressed. GANE's Contention 15 fails to show that a genuine dispute now exists between it and DCS on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii). Furthermore, in its ruling on the original contentions submitted in this proceeding, the Board held that contentions pertaining to topics evaluated by the DOE as part of its larger surplus plutonium disposition program raise issues which are outside the scope of this MOX proceeding. *See* LBP-01-35, 54 NRC 403, 441-42, and 460-61 (2001). Since Congress granted the NRC authority only over the proposed construction and operation of the MOX Facility (*see* Section 202 of the Energy Reorganization Act, 42 U.S.C. § 5842(5)), the NRC has no jurisdiction over other actions

³¹ *See* DCS Response, at 18-19, *citing* DOE's "Storage and Disposition of Weapons Usable Fissile Materials Final Programmatic EIS," and DOE's "Surplus Plutonium Disposition Final EIS" (in which the DOE evaluated 11 alternatives involving immobilization of 17 metric tons of surplus plutonium, and four alternatives involving immobilization of 50 metric tons).

³² *See National Resources Defense Council, Inc. v. Hodel*, 865 F. 2d 288, 295 (D.C. Cir. 1988).

³³ *See National Wildlife Federation v. FERC*, 912 F. 2d 1471, 1484-85 (D.C. Cir. 1990) (purpose of dam project was to satisfy water-supply needs, and alternatives not satisfying such needs are not reasonable alternatives requiring NEPA evaluation).

taken by the DOE under its surplus plutonium disposition program, whether such actions are conducted at the SRS or elsewhere.

For the above reasons, the Board should refuse to admit GANE's Contention 15.

5. **Contention 16. Inadequate Analysis of Plutonium Stranded by Disposition Program Changes**

GANE's Contention 16 states:

Cancellation of the immobilization program has stranded several tons of plutonium covered by the U.S.-Russian Agreement without a disposition path. MOX is under analysis to be the sole disposition path for the nation's surplus plutonium. Therefore environmental impacts of this significant gap in the MOX program should have been analyzed in the ER as required under NEPA.

GANE's Late Filed Contentions, at 10-11.

Similar to GANE's amended contention 9, the bases for GANE's Contention 16 consist largely of a number of unsupported GANE opinions. See GANE's Late Filed Contentions, at 11-12. A contention alleging that a document does not contain adequate information must identify supporting reasons for the belief that information is lacking, and include references to other specific sources of information which establish the validity of the contention. See *Palo Verde, supra*, CLI-91-12, 34 NRC at 155-56. GANE's contention 16 fails in this regard, since it lacks supporting information establishing the contention's validity, and does not reference other specific sources of information against which the contention may be measured. A series of unsupported statements expressing GANE's opinion of what NEPA requires does not meet the revised contention rule's requirement that allegations be adequately particularized and specific. See *Oconee, supra*, CLI-99-11, 49 NRC at 334. Accordingly, the Board should reject GANE's contention 16.

6. **Contention 17. Inadequate Analysis of MOX Production Rate and Reactor Availability**

GANE's Contention 17 states:

Additional reactors required to process 3.5 MT of plutonium per year have not been identified and committed to the MOX plan. The environmental impacts of the eventuality of MOX output exceeding reactor usage and fresh MOX fuel containing weapons-grade plutonium accumulating at SRS including alternatives for coping with this problem must be analyzed to fulfill NEPA requirements that all foreseeable environmental impacts must be analyzed.

GANE's Late Filed Contentions, at 12.

To the extent this contention is based on concerns over whether reactors which may eventually use MOX fuel will have to increase the MOX core fraction above 40 % (see GANE's Late Filed Contentions, at 13-14), it clearly raises issues which are outside the scope of this proceeding. In previously ruling that GANE's original contention 7 ("ER Inadequate to Address the Environmental Impacts of Using MOX Fuel in the Catawba and McGuire Reactors") was not admissible, the Board stated that the impacts of burning MOX fuel in those reactors are not within the scope of this proceeding. See LBP-01-35, *supra*, 54 NRC at 439. Additionally, the Commission has since ruled that contentions involving the possible use of MOX fuel at specific reactors are not ripe until such licensees submit 10 C.F.R. Part 50 license amendment applications. See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002).

Moreover, as discussed by DCS, GANE's Contention 17 is based on the erroneous premise that DCS will be required to manufacture 3.5 MT of MOX fuel annually. DCS states that neither the U.S.-Russian Agreement nor the DCS-DOE contract require the processing of 3.5 MT of MOX fuel per year. See DCS Response, at 22. DCS also points out that GANE provides no basis for assuming that DCS would continue to manufacture MOX fuel if sufficient reactor capacity was not available to irradiate the quantity of MOX fuel being manufactured. See DCS Response, at 23.

Accordingly, for the above reasons, the Board should refuse to admit GANE's Contention 17.

CONCLUSION

As discussed above, GANE's Late-filed Contentions were due no later than August 15, 2002. GANE has not established good cause for failing to comply with the applicable terms of the Board's April 30, 2002, scheduling order, and has otherwise failed to meet the 10 C.F.R. § 2.714(a)(1) late-filed contention requirements. Additionally, GANE's Late-filed Contentions do not meet the contention admissibility requirements of 10 C.F.R. § 2.714(b). The NRC Staff therefore requests the Board to deny GANE's request to amend two of its previously-admitted contentions, and deny GANE's request to admit its four late-filed contentions.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of September, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
DUKE COGEMA STONE & WEBSTER) Docket No. 70-3098
)
(Savannah River Mixed Oxide Fuel)
Fabrication Facility))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO LATE-FILED CONTENTIONS SUBMITTED BY GEORGIANS AGAINST NUCLEAR ENERGY" have been served upon the following persons this 26th day of September, 2002, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*)) through the Nuclear Regulatory Commission's internal distribution system).

Administrative Judge *
Thomas S. Moore, Chairman
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: tsm@nrc.gov

Administrative Judge *
Peter S. Lam
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: psl@nrc.gov

Administrative Judge *
Charles N. Kelber
U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, D.C. 20555
E-mail: cnk@nrc.gov

Glenn Carroll
Georgians Against Nuclear Energy
P.O. Box 8574
Atlanta, GA 30306
(E-mail: atom.girl@mindspring.com)

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
(E-mail: BREDL@skybest.com)

Donald J. Silverman, Esq.
Marjan Mashhadi, Esq.
Alex S. Polonsky, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W
Washington, DC 20004
(E-mail: dsilverman@morganlewis.com
mmashhadi@morganlewis.com
apolonsky@morganlewis.com)

Office of Commission Appellate Adjudication*
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
(E-mail: hrb@nrc.gov)

Office of the Secretary *
ATTN: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

/RA/

John T. Hull
Counsel for NRC Staff