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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:**
**Thomas S. Moore, Chairman**
**Charles N. Kelber**
**Peter S. Lam**

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| | ) | September 23, 2002 |
| In the Matter of | ) | |
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| DUKE COGEMA STONE & WEBSTER | ) | Docket No. 070-03098-ML |
| | ) | |
| (Savannah River Mixed Oxide Fuel Fabrication Facility) | ) | ASLBP No. 01-790-01-ML |
| | ) | |

**DUKE COGEMA STONE & WEBSTER'S ANSWER TO GEORGIANS AGAINST NUCLEAR ENERGY'S NEW AND AMENDED CONTENTIONS ON THE REVISED ENVIRONMENTAL REPORT**

Duke Cogema Stone & Webster ("DCS") hereby files its Answer to the Georgians Against Nuclear Energy ("GANE") "New and Amended Contentions Opposing Authorization for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Facility at Savannah River Site" ("GANE Late Filed Contentions"). Section I addresses the five factors set forth in 10 CFR § 2.714(a)(1) that must be considered in determining whether to admit late filed contentions in an NRC licensing proceeding. Section II discusses the extent to which GANE's late filed contentions meet the basic standards for admission set forth in 10 CFR § 2.714(b)(2).

As discussed below, GANE has failed to demonstrate "good cause" for its delay in submitting its late filed contentions, and a balancing of the factors set forth in 10 CFR § 2.714(a)(1) warrants rejection of those contentions. In addition, GANE's late filed contentions fail to satisfy the requisite standards for admission set forth in 10 CFR § 2.714(b)(2). For the

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reasons discussed below, DCS respectfully requests that the Atomic Safety and Licensing Board ("Board") deny GANE's request to admit its late filed contentions.

## I. GANE HAS FAILED TO MEET THE LEGAL STANDARDS GOVERNING THE ADMISSION OF LATE FILED CONTENTIONS

10 CFR § 2.714(a) identifies the following five factors governing the admission of late filed contentions:

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

The Intervenor has the burden to affirmatively address each of these five factors and of persuading a Licensing Board that upon balancing the factors, they support the admission of the late filed contentions.[1] Of the five factors, the first and most important is whether the Intervenor has demonstrated "good cause" for filing late.[2] If the Intervenor is unable to show "good cause," it must make a "compelling showing" that the other four factors nevertheless weigh in favor of

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1 *See Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-00-16, 51 NRC 320, 325 (2000) (*citing 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, National Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000)); *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n. 22 (1985).

2 *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 507 (2001); *PFS*, LBP-00-16, 51 NRC at 325; *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 24 (1996); *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979).

granting the late filed request.[3] When balancing the other four factors, the second and fourth factors receive less weight than the third and fifth.[4]

A. **GANE Has Failed To Demonstrate Good Cause**

On April 30, 2002, the Board issued an order setting forth a new discovery schedule ("April 30, 2002 Order"). In that order, the Board stated, *inter alia*:

> 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 later-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.*[5]

On July 11, 2002, DCS transmitted its revised Environmental Report ("ER") to the NRC. DCS provided a hard copy of this document directly to GANE via Federal Express and Federal Express confirmed delivery on Monday, July 15. Ms. Glenn Carroll confirmed with

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[3] *See PFS*, LBP-00-16, 51 NRC at 326; *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), 94-CLI-07, 39 NRC 322, 329 (1994) (citing *Texas Utilities Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988), *aff'd, Citizens for Fair Utility Regulations v. NRC*, 898 F.2d 51 (1990) (additional citations omitted); *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-19, 36 NRC 98, 105 (1992); *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982) (citing *Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Auth.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975); *Cincinnati Gas and Elec. Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983).

[4] *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730-31 (1982) (citing *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 889 (1981)); *see also Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524 (1985).

[5] *April 30, 2002 Order* at ¶ 8 (emphasis added).

counsel for DCS that she received the Federal Express package on that date.[6] Fifty-nine days later, on September 11, 2002, GANE filed four new, and two amended contentions in response to the revised ER. GANE incorrectly asserts that it learned of the availability of the revised ER through a letter received from the NRC Staff dated August 27, 2002.

The availability of new information may provide good cause for late filed contentions.[7] The NRC's test for "good cause" under such circumstances requires that the Intervenor specifically establish that: (1) the information is new and was not available earlier; and (2) the Intervenor acted promptly after learning of the new information.[8] GANE has not satisfied this two prong test. First, because GANE received a copy of the revised ER directly from DCS, it cannot argue that the copy provided in the Hearing File was new and "not available earlier." Second, GANE did not act promptly after receiving the revised ER. There was nothing precluding GANE from filing its contentions within 30 days of July 15, as contemplated by the Board's April 30, 2002 Order. Instead, it waited over eight weeks before filing. Therefore, GANE's contentions are late without good cause. GANE has also failed to even suggest that any "extraordinary circumstances" justify its delay.

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6 DCS can provide proof of delivery on July 15, 2002 if necessary. Furthermore, the revised ER was posted on ADAMS on July 26, 2002.

7 *See Consumers Power Co* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC at 577 (citing *Nuclear Fuel Services, Inc. and New York State Atomic and Space Development Auth.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC at 275).

8 *See PFS*, LBP-01-39, 54 NRC at 507 (standard applied after Intervenor was already a party to the proceeding). Most of the cases involve initial petitions for intervention, but the same principles apply to late filed contentions from an existing Intervenor. *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 164-65 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 69-73 (1992); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-83-42, 18 NRC 112, 117 (1983); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1047 (1983).

In a similar case, *Private Fuel Storage*, the State of Utah (the "State") submitted late filed contentions in response to an amended license application.[9] Earlier, the applicant had provided the NRC with a commitment letter on the same subject.[10] The State argued that the commitment letter was "too speculative" and that it needed to wait until the formal license application amendment was filed—although the two documents did not substantively differ.[11] The Licensing Board, however, determined that there was nothing to preclude the State from filing contentions relative to the commitment letter, other than the State's "erroneous view that it did not need to act until [the applicant] formally amended its license application."[12] In *Private Fuel Storage*, the Licensing Board found that there was no good cause for the *fifty-one days* that had passed from the time that the commitment letter was available to the Intervenors. In the instant case GANE filed fifty-nine days after it actually received the revised ER.

One final point should be made on the question of good cause. Since very early in this proceeding, GANE has maintained the fiction that it is acting *pro se*, despite the fact that it regularly acknowledges in its pleadings that it receives "substantial assistance" from experienced legal counsel.[13] To date, GANE's "legal advisor" has not filed a formal notice of appearance in this proceeding. DCS has not objected to this arrangement. Under the circumstances, however, GANE should be held strictly to applicable standards and procedures. Deadlines for submittals before the Board are perhaps the simplest and most obvious procedures that should be met. The

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9 *PFS*, LBP-00-16, 51 NRC at 325-326.

10 *See id*

11 *Id.*

12 *Id.*

13 *See, e.g., GANE Late Filed Contentions* at 15 ("This pleading was prepared with substantial assistance from GANE's legal advisor, Dianne Curran").

Board should not exhibit the flexibility that Licensing Boards, on occasion, provide to *pro se* intervenors in determining whether GANE has demonstrated good cause for its late filing.

For the aforementioned reasons, this factor weighs against admission of GANE's contentions.

**B. Other Means to Protect GANE's Interest**

DCS does not assert that there are other means for GANE to protect its interest with respect to the majority of these late filed contentions.[14] However, this factor and the fourth factor, discussed below, receive "lesser weight than the other factors."[15]

**C. GANE Has Not Demonstrated That It Will Assist In Developing a Sound Record on These Contentions**

GANE has not demonstrated that its participation may reasonably be expected to assist in developing a sound record. To address this factor, an Intervenor should "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."[16] GANE states:

> GANE's participation may reasonably be expected to assist in the development of a sound record. GANE is being advised in this proceeding by Dr. Edwin Lyman of the Nuclear Control Institute, and hopes to present testimony by Dr. Lyman. Dr. Lyman is a highly qualified expert on the issue of plutonium disposition. In

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[14] Some of GANE's contentions refer to DOE's actions under NEPA. Those contentions can be, or should have been, pursued by GANE in another forum.

[15] *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC at 1730-31 (citing *South Carolina Electric and Gas Co.* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 895 (1981)). In a number of other proceedings, applicants for NRC licenses and the NRC Staff have conceded this factor but successfully argued that, on balance, an Intervenor's late filed contentions should not be admitted. *See, e.g., Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC at 610; *see also Public Service Co of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-04, 29 NRC 62, 70 (1989); *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC at 527-28.

[16] *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (quoting *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC at 1730).

> addition, GANE's contentions present legal issues of significant import, on which it has the assistance of its legal advisor, Diane Curran.[17]

GANE does not identify the *precise* issues it plans to cover, nor does it provide a summary of proposed testimony. The vague statements that Dr. Lyman is an expert on "the issue of plutonium disposition," that GANE "hopes to present testimony by Dr. Lyman", and that GANE has legal assistance, are insufficient. GANE has not demonstrated any particular expertise with respect to these environmental contentions.[18]

Nor does GANE identify any NRC precedent which states that representation or assistance from counsel should be considered in determining whether an Intervenor is likely to contribute to the development of a sound record. The presence of counsel has been considered by Licensing Boards in balancing the five late-filing factors when counsel will "make [the Intervenor's] testimonial case only by cross-examination . . . ."[19] This modified subpart L proceeding, of course, does not permit cross-examination of witnesses by counsel.

Accordingly, this factor weighs against admission of GANE's contentions.

**D. Representation of GANE's Interest By Other Parties**

GANE does not even attempt to address the extent to which its interest will be represented by existing parties. By failing to do so, it has not met its burden.

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17 *GANE Late Filed Contentions* at 15.

18 It is also somewhat disingenuous for GANE to identify Dr. Lyman as an expert on the revised ER. When GANE identified experts for this proceeding on May 17, 2002, Dr. Lyman was not among the experts identified for the environmental contentions (Contentions 9, 11, and 12). *See Georgians Against Nuclear Energy and Blue Ridge Environmental Defense League Identification of Experts for MOX Construction Authorization Proceeding*, at 1-2 (May 17, 2002).

19 *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 926 (1987); *see also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 28 (1996).

The Commission stated in *Calvert Cliffs* that if a petitioner fails to address all of the five factors that govern late-filed contentions, the Board need not allow the petitioner to cure its pleading.[20] Although *Calvert Cliffs* involved a failure to plead any of the factors, DCS believes that the same principle should apply in this case, especially since GANE also fails to address the fifth factor (see below). As GANE itself has explicitly recognized, it has had substantial legal assistance throughout this proceeding. Therefore, GANE has no excuse for not addressing all of the relevant criteria.

**E. Admission of These Contentions Will Broaden the Issues In this Proceeding**

GANE also fails to address whether admission of its contentions will broaden the issues or delay the proceeding. The new contentions will broaden the issues to be litigated in the proceeding. New issues raised by the proposed contentions include, among others, a number of issues related to DOE's planned Waste Solidification Building, provisions for waste disposal, and the impacts of surplus plutonium immobilization. Accordingly, this factor weighs against admission of GANE's contentions.

**F. Summary on Late Filing Criteria**

GANE lacks good cause, fails to provide the "compelling showing" required on the other four factors set forth in 10 CFR § 2.714(a), and has not demonstrated the "extraordinary circumstances" required by the Board's April 30, 2002 Order. Accordingly, GANE has not met its burden and its late filed contentions must be rejected.

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[20] *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC at 347-348 & n.11.

## II. GANE'S CONTENTIONS DO NOT MEET THE STANDARDS FOR ADMISSION SET FORTH IN 10 CFR § 2.714(b)(2)

GANE has the burden of showing that its contentions are admissible.[21] As stated by the Commission, "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[22] The general standards for admission of contentions are set forth in 10 CFR § 2.714(b)(2). DCS discusses below why GANE has not met its burden for each of its late filed contentions.

### A. 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.[23]

GANE's supporting bases for this amended contention consist of two arguments. First, GANE argues that the ER does not evaluate "the potential costs of accidents", but instead "simply assumes that they will not occur."[24]

Amended Contention 9 does not satisfy the requirements of 10 CFR § 2.714(b)(2). GANE does not provide alleged facts or expert opinion that support its contention as required by Section 2.714(b)(2)(ii). The amended contention refers to costs at "the proposed MOX Facility." GANE's first basis, however, relies *exclusively* upon the costs of accidents at the Waste

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21 *Notice of Opportunity for a Hearing*, 66 Fed. Reg. at 19,994 (April 18, 2001). A similar statement appears in the Commission's referral order. *Duke, Cogema, Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 483 (2001) ("It is the responsibility of all petitioners to provide the necessary information to show that their contentions satisfy the requirements for admission").

22 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

23 *GANE Late Filed Contentions* at 2.

24 *Id*

Solidification Building ("WSB"), which is a separate facility to be built by DOE in another part of the F Area at the Savannah River Site.[25] Accordingly, this basis does not support the contention.

Furthermore, GANE does not provide sufficient information to show that a genuine dispute exists on a material issue of law or fact, as required by Section 2.714(b)(2)(iii). The WSB and its impacts are discussed in the ER as a "connected action" and not as part of either the Proposed Action or alternatives thereto.[26] While GANE asserts that the ER is required to contain an analysis of the "costs" of accidents at the WSB, its only reference to applicable law is the general statement that "NEPA requires consideration of all foreseeable impacts ...."[27]

GANE must explain why the information that it believes is missing from the ER is required to be included by NEPA or by the NRC's implementing regulations.[28] It is not enough to simply state that the information in question has not been included. Nor does the general statement that "NEPA requires consideration of all foreseeable impacts" provide a sufficient basis for GANE's contention. GANE points to no provision of NEPA or NRC regulation requiring an assessment of the costs of actions *connected* to the proposed action.[29] More

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25 GANE states that "*Appendix G* of the ER lists a number of potential accidents involving MOX *waste*. The ER should discuss the potential costs of *such* accidents." GANE also refers to potential hydrogen and red oil explosions as well as "other accidents ... identified" in Appendix G to the ER. *GANE Late Filed Contentions* at 2 (emphasis added). Appendix G discusses the "Environmental Impacts of Construction and Operation of the Waste Solidification Building."

26 ER, at Appendix G, at G-1.

27 *GANE Late Filed Contentions* at 2.

28 *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

29 The construction and operational costs of the WSB are included in the PDCF costs presented in the DOE's Feb. 15, 2002 Report to Congress and included in ER Section 6.1.2 and ER Table 6-1.

specifically, GANE points to no legal requirement to consider the *costs of accidents* at facilities which are the subject of a connected action.

In any event, GANE's basis statement misrepresents the content of the ER. GANE states that the ER "simply assumes that [accidents at the WSB] will not occur."[30] On the contrary, Appendix G to the ER includes 12 pages discussing potential accidents at the WSB and the potential environmental costs of such accidents.[31] DCS identifies those instances where its accident analyses demonstrate that no significant radiological or chemical release is postulated, as well as those where a hypothetical release could occur. Appendix G provides information on bounding credible accidents and their consequences to workers and the public.[32] Section 5.6.1 of the ER addresses the impacts of the WSB in the context of the cumulative impacts of the Proposed Action and other "past, present and reasonably foreseeable future actions . . . ."[33]

Thus, the ER contains a full and sufficient discussion of the foreseeable impacts of the WSB. DCS is not required to address connected actions (such as the construction and operation of the WSB) at the same level of detail that is required for the Proposed Action. Accordingly, this part of the contention does not identify any genuine issue of material fact, and consequently does not provide an adequate basis for admission of the contention.

GANE's second argument in support of this contention is that:

> DCS has not discussed the costs that would be incurred if DCS' predictions regarding the methods to be used for waste processing

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30 *GANE Late Filed Contentions* at 2. Although the preceding sentence identifies the MOX Facility, all the examples that follow refer to the WSB.

31 DCS' inclusion of this information in no way concedes that such information is required to be included in an ER under NEPA or the NRC's implementing regulations. DCS is not bound to limit the information it places in an ER to that which is strictly required by law.

32 ER, Appendix G, at G-19 to G-31, and Table G-13.

33 ER at 5-48.

> and disposal do not come to fruition. For instance, the ER does not address the costs to store the MOX waste, or the costs associated with any environmental risks it may pose, if it will not be accepted at WIPP.[34]

This aspect of amended Contention 9 also fails to meet the requirements of Section 2.714(b)(2)(iii). GANE points to no legal authority for its position that an ER must assume the speculative failure of the proposed waste disposal path and, therefore, must include a discussion of resulting "costs." Accordingly, GANE has not provided sufficient information to show that a genuine dispute exists on a material issue of law or fact.

In conclusion, amended Contention 9 does not satisfy the requirements of 10 CFR § 2.714(b)(2) and must be rejected.

### B. 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.[35]

GANE's amended Contention 11 is also based on two arguments. First, GANE argues that the use of the WSB to process waste from the MOX Facility, and DOE's ability to accept waste from the WSB at the Waste Isolation Pilot Plant ("WIPP"), are speculative. As a result, it argues that "there is no basis for the ER's conclusion that waste disposal will have a negligible impact," and that therefore the ER "should evaluate the costs and environmental impacts of

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[34] *GANE Late Filed Contentions* at 3.

generating waste that is neither processed nor disposed of off-site."[36] In support, GANE states that:

- DOE has made no "commitment to build" the WSB or to "use the technology described in the ER";
- The ER does not indicate whether DOE has "budgeted any funds" for the WSB;
- DOE has not prepared an Environmental Impact Statement "for the WSB and its process"; and
- The ER "provides no analysis [of] whether the form of radioactive waste that will be generated at the WSB will meet federal and state acceptance criteria for disposal at WIPP."[37]

Amended Contention 11 does not satisfy the requirements of 10 CFR § 2.714(b)(2). First, GANE does not provide sufficient information to show that a genuine dispute exists on a material issue of law or fact. GANE must explain why the information that it believes is missing from the ER is required to be included by NEPA or by the NRC's implementing regulations.[38] It is not enough to simply state that the information in question has not been included. Nor does the general statement that "it is insufficient to comply with the National Environmental Policy Act" provide a sufficient basis for GANE's contention.[39]

Again, GANE is not taking issue with any aspect of the Proposed Action or alternatives thereto, but instead with DCS' discussion of a connected action. In any event, GANE points to no legal requirement for DCS to demonstrate that DOE has "committed" to build the WSB or to use the referenced technology. Nor does GANE point to a legal requirement that DCS prove that DOE has the funds budgeted for the WSB at this time, or that the WIPP acceptance criteria will

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35 *GANE Late Filed Contentions* at 3.

36 *Id.* at 4, 5.

37 *Id.* at 4.

38 *See Arizona Public Service Co.*, CLI-91-12, 34 NRC at 155-56.

39 *GANE Late Filed Contentions* at 3.

be met. The fact that there may be additional regulatory steps needed before waste can be disposed of at WIPP does not mean that the ER is inadequate.[40]

Furthermore, GANE's suggestion that the waste disposition plan is speculative, is incorrect. As discussed in the ER, the high-alpha and stripped uranium waste streams generated at the MOX Facility (as well as certain designated waste streams from DOE's Pit Disassembly and Conversion Facility (PDCF)) will be transferred to the WSB to be processed by DOE, and ultimately disposed of by DOE at WIPP.[41] The discussion in the ER is consistent with the technical direction DCS has received from DOE regarding the disposition of MOX Facility wastes.

In particular, by letter dated February 11, 2002, DOE informed DCS that it had "changed its planning basis for disposition" of these waste streams and had made the decision to "pipe the waste to a stand alone treatment facility to be located off the MOX site ...."[42] DOE also stated that "[c]onceptual design information for this facility will be prepared by DOE and provided to [DCS] for use in the Environmental Report."[43] The ER reflects the programmatic direction received from DOE, as well as the WSB conceptual design information provided by DOE's contractor, Westinghouse Savannah River Company.

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40 GANE also alleges that the "WIPP only accepts defense waste by Act of Congress. (Public Law 102-579, as amended by Public Law 104-201, 106 STAT 4777)." *GANE Late Filed Contentions* at 4. The general citation to a statute, without reference to a particular provision, is insufficient for GANE to meet its burden under 10 CFR § 2.714(b)(2). This is especially the case when GANE's second citation lacks a page reference and is to a statute that is 450 pages long.

41 ER at 5-22 to 5-24.

42 See letter, James V. Johnson (DOE) to Ed Brabazon (DCS), *Contract No. DE-AC02-99CH10888, Plutonium Disposition Solidification Facility* (February 11, 2002).

43 *Id.*

GANE's statement that DOE has not prepared an EIS for the WSB also clearly provides an inadequate basis for admission of this contention. As this Board has previously held, alleged deficiencies in *DOE's* NEPA processes or practices are outside the scope of this proceeding.[44]

Finally, GANE apparently believes that because of the alleged speculative nature of the WSB/WIPP waste disposition path, DCS must analyze MOX Facility onsite storage of such wastes. (See GANE's Amended Contention 9.) GANE points to no legal authority for its position that an ER must assume the speculative failure of the proposed waste disposal path and, therefore, must include a discussion of resulting "costs." Accordingly, GANE has not provided sufficient information to show that a genuine dispute exists on a material issue of law or fact.

GANE's second argument in support of this contention is that the ER contains "an unexplained reduction in the volume of MOX waste ... from 81,000 gallons to ... 68,898 gallons annually" which GANE believes is "inconsistent with the waste stream to be expected from enhanced aqueous polishing of impure plutonium which would generate greater, not lesser [waste] volumes."[45]

The 81,000 gallons presented in the initial version of the ER was an error. DCS informed the NRC of this error more than a year ago, and committed to correct the information in the revised ER:

> The volume of stripped uranium in the ER (68,000 gal.) is incorrect. The correct volume of stripped uranium is 35,140 gal/yr average with a maximum of 42,300 gal/yr during transition periods. The ER will be updated to reflect this correction.[46]

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44 *Memorandum and Order* at 60 (December 6, 2001).

45 *GANE Late Filed Contentions* at 5.

46 Letter from P. Hastings (DCS) to NRC Document Control Desk, *Responses to Request for Additional Information on the Environmental Report*, DCS-NRC-000053, at 5 (July 12, 2001) (Hearing File Doc. #45).

As a result of the planned processing of alternate feed material, the anticipated volume of the stripped uranium stream has in fact modestly increased (from the *corrected* value previously reported in DCS' July 12 RAI response) to the values now reported in Table 3-3. Accordingly, a comparison of Table 3-3 from the initial and revised ERs shows that although the maximum expected annual volumes of the "high-alpha" waste streams did increase as a result of the processing of alternate feedstock, the error in waste volume of the stripped uranium stream more than compensates for that increase. The result is a smaller total high alpha waste stream. Thus, there is no unexplained inconsistency as GANE alleges.

In conclusion, amended Contention 11 does not satisfy the requirements of 10 CFR § 2.714(b)(2) and must be rejected.

### C. 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.[47]

GANE argues that, while the ER does identify a red oil explosion, it "does not address the environmental impacts" of such an explosion.[48] Once again, there is no genuine dispute on any material issue of law or fact.

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47 *GANE Late Filed Contentions* at 6.

48 *Id.*

GANE focuses on the WSB and misrepresents the content of the ER. In ER Appendix G, DCS discusses a red oil explosion in the WSB High Activity Waste Evaporator and acknowledges the potential for environmental impacts—such an event could "result in the dispersion of radioactive materials and hazardous chemicals."[49] However, because such an explosion is not the bounding credible explosion event at the WSB, the ER does not specifically quantify its potential consequences. Instead, DCS quantifies the specific consequences of the bounding explosion event (a hydrogen explosion in the High Activity Waste Evaporator).[50]

GANE points to no legal requirement that DCS describe the specific impacts or consequences of a red oil explosion in the WSB when such an explosion is not the bounding scenario. GANE argues that "[e]ven low probability events must be considered" but ignores the fact that the ER describes DCS' accident analysis methodology, including its performance of a Preliminary Hazards Analysis to estimate accident consequences as a result of all credible events—including low probability ones—and its screening for those events with the highest risk to workers or the public.[51] Since this contention does not raise a genuine issue of material fact or law, it must be rejected.

### D. 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

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49 ER, Appendix G, at G-28

50 *Id* at G-28 to G-29, and Table G-13.

51 *Id* at Appendix G. Furthermore, GANE's extended discussion of NRC Staff comments in the Draft Safety Evaluation Report regarding a potential red oil explosion in the aqueous polishing portion of the MOX Facility is irrelevant to its contention regarding the WSB, which is a separate facility to be built by DOE on another portion of the F Area at the SRS. *GANE Late Filed Contentions* at 7-8.

> immobilization and is now proposed to be remanufactured into MOX.[52]

In support of this contention, GANE continues to extol the perceived virtues of immobilization. It argues generally that NEPA requires an assessment of alternatives in order to inform federal agency decision-making, and that DCS must evaluate the alternative of immobilizing the plutonium that was previously destined for processing at the now cancelled Plutonium Immobilization Plant ("PIP") .

Contention 15 is outside the scope of this proceeding. As the Board is aware, until the recent U.S. Government decision to modify the surplus plutonium disposition program (to rely exclusively on MOX fuel production and irradiation), the government planned to immobilize a portion of the surplus plutonium as part of a "hybrid" disposition strategy. GANE's contention acknowledges that immobilization has been previously analyzed under NEPA ("immobilization . . . was previously analyzed to be preferred . . ."), yet it argues that DCS must again evaluate its impacts.

Of course, immobilization has been thoroughly evaluated as an alternative by DOE in its prior environmental impact statements. DOE's "Storage and Disposition of Weapons Usable Fissile Materials Final Programmatic EIS" ("S&D PEIS") evaluated numerous options for the immobilization of surplus plutonium and selected the hybrid approach to plutonium disposition.[53] DOE subsequently evaluated immobilization further in the "Surplus Plutonium Disposition Final EIS" ("SPD EIS") and concluded that up to 17 metric tons of plutonium would be dispositioned via immobilization.[54] In the SPD EIS, DOE evaluated 11 alternatives involving

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[52] *GANE Late Filed Contentions* at 8 (emphasis added).

[53] See ER at 1-6 through 1-8, and Table 1-1.

[54] *See id.* at 1-8 through 1-9, and Table 1-2.

immobilization of 17 metric tons of surplus plutonium and four alternatives involving immobilization of 50 metric tons.[55] This analysis bounds the scenario GANE presents in its contention.

DOE has now chosen to abandon immobilization as a disposition option. Having been thoroughly evaluated in DOE's prior environmental reviews and abandoned as a policy decision by the federal government, it makes no sense for DCS to be required to reevaluate the impacts of immobilization in its ER.

Nevertheless, DCS has appropriately tiered from and relied upon DOE's prior environmental determinations. The ER discusses the prior DOE environmental reviews and considers the results of those reviews in selecting an appropriate range of alternatives to be addressed.[56] The ER properly recognizes that certain policy determinations have already been made by DOE[57], and this Board has concluded that those determinations are outside the scope of the proposed action presently before the NRC.[58]

In addition, GANE's citation to 10 CFR § 51.45(b)(3), which requires an ER to generally address alternatives, is unpersuasive. Section 51.45(c) more specifically requires an analysis of only those alternatives that are "available."[59] As DOE has determined, immobilization is not an available alternative. Therefore, DCS' ER should no more reevaluate the impacts of (the now abandoned) immobilization option, than it should reevaluate any of the other fundamental policy determinations previously made by DOE.

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55 *See* SPD EIS ROD at 6.

56 ER at 1-6 through 1-9.

57 *Id.* at ES-2.

58 *Memorandum and Order* at 20-22 (Dec. 6, 2001).

## E. 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.[60]

GANE argues that the ER for the MOX Facility must consider the impacts associated with surplus plutonium that will *not* be fabricated into MOX fuel and which has therefore been "stranded' by cancellation of the immobilization program."[61] GANE's bases identify two types of "stranded" plutonium: "at least two" metric tons of the 34 metric tons covered by the U.S.-Russian Agreement; and "at least" eight metric tons not covered by the Agreement.

This contention does not create a genuine dispute on a material issue of law or fact. First, GANE is in the wrong forum to resolve its concern which deals exclusively with alleged failures by the DOE. GANE itself seems to recognize that it is up to DOE to determine whether any further consideration of the impacts associated with this excess plutonium is required:

> It would seem to be the responsibility of DOE to address this issue by performing a supplemental EIS for its plutonium disposition program. However, there is no indication that DOE intends to address this large gap in NEPA analysis which falls within the scope of the MOX program.[62]

Environmental review of the disposition of this excess material is outside the scope of the proceeding.

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59 *See also* 10 CFR § 70.23(a).

60 *GANE Late Filed Contentions* at 10.

61 *Id*

In addition, GANE's contention appears to ignore the discussion in the ER of the No Action Alternative. The No Action Alternative included continued storage—or stranding—of all surplus plutonium. Therefore, the environmental impact of the No Action Alternative bounds the impact from any "stranded" material.

In conclusion, Contention 16 does not satisfy the requirements of 10 CFR § 2.714(b)(2) and must be rejected.

### F. 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.[63]

GANE states that additional reactors will be needed to irradiate the 3.5 MT per year of MOX fuel to be produced at the MOX Facility and that "there is a distinct possibility that DOE will not be able to locate any additional reactors willing to accept the costs and risks of MOX use."[64] As a result, it argues that either the "MOX core fraction" at the Catawba and McGuire reactors will have to be increased to above 40%, or that a "backlog of unused MOX fuel" will accumulate at the MOX Facility.[65]

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62 *Id.* at 11.

63 *Id.* at 11-12.

64 *Id.* at 12.

65 *Id.*

GANE's arguments about the safety and environmental impacts of a hypothetical increase in the amount of MOX fuel to be irradiated in the Catawba and McGuire reactor cores (see GANE Late Filed Contentions at pp. 13-14), even if true, are highly speculative and clearly outside the scope of this proceeding. In refusing to admit a proposed contention regarding the impacts of irradiating MOX fuel in the Catawba and McGuire reactors, the Board has previously held that "the impacts of burning MOX fuel in the mission reactors is outside [the] scope [of the proceeding.]"[66]

GANE's argument that DCS must consider the impacts of a "backlog" of fresh MOX fuel are also highly speculative and are based on erroneous assumptions. GANE seems to assume that DCS is required to manufacture 3.5 MT of MOX fuel annually. Neither the U.S.-Russian Agreement nor the DCS-DOE contract require the processing of 3.5 MT of MOX fuel per year. Under the U.S.-Russian Agreement, the U.S. has committed to "take all reasonable steps ... to begin operation of disposition facilities necessary to dispose of no less than two (2) metric tons per year of its disposition plutonium ...."[67] Although DCS' contract with DOE requires DCS to design a facility which is *capable of receiving* plutonium at a rate of 3.5 MT/year from the PDCF, it does not require DCS to actually process 3.5 MT of plutonium annually. In addition, the MOX Facility is being designed for 20 years of operation, which is several years longer than the time required to process 34 MT, even at a rate of 2 MT per year.[68] DCS is designing the

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66 *Memorandum and Order,* at 44 (Dec. 6, 2001). In addition, the Commission has ruled that contentions involving the possible use of MOX at specific reactors are not ripe until 10 CFR Part 50 license amendment applications are submitted. *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).

67 *Agreement Between the Government of the United States of America and the Government of the Russian Federation Concerning the Management and Disposition of Plutonium Designated As No Longer Required for Defense Purposes and Related Cooperation,* Article V.

68 ER at 1-2.

MOX Facility for a maximum throughput of 3.5 MT of plutonium per year and the environmental analyses documented in the ER are based conservatively on that maximum throughout.[69] Finally, GANE provides no basis for assuming that DCS would continue to manufacture MOX fuel if sufficient reactor capacity was not available to irradiate that quantity of fuel. Thus, GANE's assertion that the ER must consider the potential for a backlog of fresh fuel is without basis and does not raise a genuine dispute on a material issue of law or fact Accordingly, Contention 17 must also be rejected.

## III. CONCLUSION

GANE has failed to demonstrate "good cause" for its delay in submitting late filed contentions, and a balancing of the factors set forth in 10 CFR § 2.714(a)(1) warrants rejection of those contentions. In addition, GANE's late filed contentions fail to satisfy the standards for admission set forth in 10 CFR § 2.714(b)(2). Accordingly, DCS respectfully requests that the Board deny GANE's request to admit its late filed contentions.

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Dated September 23, 2002

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[69] *Id.*

## CERTIFICATE OF SERVICE

I hereby certify that copies of DUKE COGEMA STONE & WEBSTER'S ANSWER TO GEORGIANS AGAINST NUCLEAR ENERGY'S NEW AND AMENDED CONTENTIONS ON THE REVISED ENVIRONMENTAL REPORT were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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