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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

In the Matter of)	October 18, 2002
)	
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 RESPONSE TO GANE'S
REPLY TO DCS' AND NRC STAFF'S RESPONSES TO
NEW AND AMENDED CONTENTIONS**

Duke Cogema Stone & Webster ("DCS") hereby files its Response to "Georgians Against Nuclear Energy's Reply to DCS' and NRC Staff's Responses to New and Amended Contentions" ("DCS Response").¹ The Atomic Safety and Licensing Board's ("Board") October 10, 2002 Order authorized the filing of this DCS Response. For the reasons discussed below, GANE's request to admit its late-filed contentions on DCS' revised Environmental Report ("ER") should be denied.

I. GANE Has Acknowledged It Lacks Good Cause for Having Filed its Contentions Late and That No "Extraordinary Circumstances" Exist

GANE states that its failure to open the Federal Express package containing the revised ER "does not amount to the 'extraordinary circumstances' demanded by the ASLB" and it

¹ *Georgians Against Nuclear Energy's Reply to DCS' and NRC Staff's Responses to New and Amended Contentions* (October 7, 2002) ("GANE Reply").

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therefore “withdraws its claim to presumptive good cause for the late-filing.”² GANE also acknowledges that its “late filing may be justified” only if it is able to make a “compelling showing on the four other factors” set forth in 10 CFR § 2.714(a)(1).³ Thus GANE has a heavy burden to overcome if its late contentions are to be admitted.⁴

II. GANE Has Failed to Make A “Compelling Showing” on the Other Four Factors in 10 CFR §2.714(a)(1)

DCS’ review of the relevant published NRC cases indicates that there have been few if any instances in which, in the absence of good cause, an Intervenor has successfully made the required “compelling showing” on the other four factors in 10 CFR § 2.714(a)(1). While such cases may exist, they are clearly the exception and not the rule. As such, GANE must make an unusually persuasive showing in order to warrant the extraordinary admission of its late-filed contentions. It clearly has not done so.

Of the four remaining factors for consideration, GANE correctly states that greater weight should be given to: (1) whether the Intervenor’s participation may reasonably be

² *GANE Reply* at 19. Ms. Carroll appears reluctant to view the majority of proprietary materials that are part of this proceeding. Thus, she did not open the package containing the revised ER that was delivered to her on July 15, 2002 (which contained no proprietary materials). However, the Board’s Protective Order requires that all proprietary materials be sent with inner and outer packaging marked to indicate the presence of proprietary materials. *Protective Order* (June 29, 2001) at 6. Ms. Carroll could have easily checked the contents of the package to determine if it contained such materials. Thus, there is no reason for Ms. Carroll to avoid opening packages delivered to her by overnight mail.

³ *GANE Reply* at 19. The “compelling showing” standard was recently reaffirmed as the applicable standard by the Commission. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-00-02, 51 NRC 77, 79 (2000).

⁴ GANE’s criticism of DCS’ position that it is not legally obligated to serve documents on GANE’s legal advisor is misleading. See *GANE Reply* at 19. GANE fails to point out that, at the request of Ms. Curran, DCS counsel sends courtesy copies of all electronic submittals to the Board to Ms. Curran at the same time they are filed with the Board. DCS has not adopted a similar practice with respect to correspondence and submittals to the NRC Staff which do not constitute legal pleadings.

expected to assist in developing a sound record (the third factor); and (2) the extent to which the Intervenor's participation will broaden the issues or delay the proceeding (the fifth factor).⁵

A. Development of a Sound Record

It is well recognized that GANE must "set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony."⁶ However, the only effort GANE has made to demonstrate that its participation will assist in developing a sound record is to: allege that Dr. Lyman is a "highly qualified expert on plutonium disposition issues"; indicate that it has retained the services of "experienced counsel"; and assert that it has provided "specific and well-supported" contentions.⁷

GANE's argument that it has provided contentions and bases with the specificity required by 10 CFR § 2.714 is not a "compelling" factor in its favor. Indeed, it is no more than an assertion that GANE has met the minimum standard for admission of a contention.

GANE cites *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 520 (2001) for the proposition that "if contentions are stated with 'specific thoroughness,' it follows that they can be reasonably expected to assist in the development of a sound record."⁸ There is an enormous disparity between the showing made by the State of Utah

⁵ *GANE Reply* at 20.

⁶ *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). GANE argues that *Braidwood* and *Grand Gulf* were issued before the NRC raised the standard for the admission of contentions in 1989 – in an apparent attempt to suggest that it is not required to set out its issues, witnesses and proposed testimony with particularity. *GANE Reply* at 22, n.7. This standard of particularity, however, remains the rule today. See *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74, (1992).

⁷ *GANE Reply* at 20-21.

⁸ *GANE Reply* at 21.

in *Private Fuel Storage* and the showing made by GANE in this case. DCS encourages the Board to read the *Private Fuel Storage* Board's description of the 'impressive package' provided by the State of Utah in support of its late-filed contentions which the Board concluded "could serve as a model" for other intervenors and was "exemplary."² GANE's supporting bases do not compare to those provided by the State of Utah.

Furthermore, GANE has made no effort in its Response to "summarize [the] proposed testimony" of its witness – even though it was given a second opportunity to do so after DCS raised this issue as a deficiency in GANE's original September 11, 2002 pleading.¹⁰ In *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-15, 44 NRC 8, 27-29 (1996), the Intervenor indicated that their expert had reviewed all publicly available information relevant to the contention (relating to doses from decommissioning activities), had analyzed that information, and would be able to "go through all the decommissioning steps, provide a person-rem total for each step, and make an estimate of the occupational exposure risk." The Board, in response stated that it:

would have liked the Petitioners to describe in greater detail what the substance of their experts' testimony would be. Thus, for the Petitioners this factor is, at best, inconclusive and, at worst, weighs against them to a minor degree.¹¹

In this case, GANE has fallen short of even the level of information provided in *Yankee Atomic* – again despite having been given a second opportunity to do so. Similarly, in an earlier *Private Fuel Storage* decision, the Board stated:

² *Private Fuel Storage*, 54 NRC at 518-519.

¹⁰ *Duke Cogema Stone & Webster's Answer to Georgians' Against Nuclear Energy's New and Amended Contentions on the Revised Environmental Report* (September 23, 2002) ("DCS Answer") at 6-7.

¹¹ *Yankee Atomic Electric Co.*, 44 NRC at 28-29.

the State fails to make a compelling showing that admission of the contention will assist in developing a sound record. Petitioners are required to provide the Board with a 'real clue about what they would say to support the contention beyond the minimal information they provide for admitting the contention.' [citation omitted] *Here the State simply indicates the name and profession of its expert witness and asserts that his testimony will develop a sound record without providing a real explanation as to what will compose such a record, the type of proffer we previously have found lacks the specificity demanded by the Commission if this factor is to be accorded any significant weight in favor of admitting the contention.*¹²

GANE clearly has not met this standard.

Finally, as DCS has previously stated, the presence of counsel has been considered by the Licensing Board in balancing the five late-filing factors when counsel will "make [the Intervenor's] testimonial case only by cross examination."¹³ No such cross-examination is available in this modified Subpart L proceeding. Nor is it clear what level of involvement GANE's legal advisor will even have in the hearing, since she has not been designated as GANE's counsel of record.

Thus, GANE has failed to make a compelling showing that it will contribute to the development of a sound record.

B. Broadening of the Issues or Delay in the Proceeding

GANE did not even address this factor in its initial pleading. GANE now states that it:

did not go into any detail regarding this factor because it was operating under the mistaken belief it was relatively unimportant, given that GANE believed it was meeting the presumptive good cause criteria for the late filing.¹⁴

¹² *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), 50 NRC 306, 315 LBP-99-43 (1999) (emphasis added).

¹³ *DCS Answer* at 7.

¹⁴ *GANE Reply* at 24, n.9.

Of course, GANE's assumption that it had met the good cause standard did not relieve it of its obligation to address the remaining factors in 10 CFR § 2.714(a)(1).

DCS has previously described why it believes admission of these contentions will broaden the issues in the proceeding.¹⁵ This factor has been found by Licensing boards to weigh against admission of late-filed contentions even if the "contention[s] may not significantly delay the proceeding."¹⁶ In the *Private Fuel Storage* proceeding, the Licensing Board found that even though formal discovery had not commenced and "prompt admission" of a late-filed contention would "not result in a protracted delay in the proceeding," it would broaden the issues. Consequently, this resulted in factor five weighing against admission of the late-filed contention.¹⁷ Here, discovery has begun and admission of these contentions could add days to any hearing held in this proceeding.

GANE, for its part, states that the Board in *Private Fuel Storage* "previously has held [that] if there will already be a hearing on similar issues, or further opportunities for admitting timely contentions due to later filings, the fifth factor should swing the balance in favor of *admitting the contention*."¹⁸ GANE has significantly mischaracterized the *Private Fuel Storage* decision. Rather than hold that this fifth factor should "swing the balance in favor of *admitting the contention*," the Board stated that it did not view the broadening of the issues "as having a

¹⁵ DCS Answer at 8.

¹⁶ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-14, 51 NRC 301, 310 (2000).

¹⁷ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 294 (1998).

¹⁸ GANE Reply at 23 (emphasis added).

significant impact relative to delay of this proceeding” and that the “weighing of [all of] the requisite late-filing factors swings the balance in favor of admitting” the contention.¹⁹

C. The Remaining Two Factors

With respect to the final two factors – the availability of other means whereby the Intervenor’s interest will be protected, and the extent to which the Intervenor’s interest will be represented by existing parties – while these typically weigh in favor of the admission of a late-filed contention, they are not sufficient to offset the other relevant factors.

III. GANE Has Improperly Raised New Issues and Expanded the Scope of Its Proposed Contentions in Its Latest Reply

As discussed below, GANE’s Reply impermissibly attempts to raise new issues and to broaden the scope of several of its proposed late-filed contentions.

A. Amended Contention 9, Inadequate Cost Benefit Analysis

This late-filed contention was limited exclusively to the costs of accidents at the proposed Waste Solidification Building (“WSB”) and did not address any accidents at the MOX Facility itself. All of GANE’s examples of potential accidents were taken from Appendix G to the ER (which addresses the environmental impacts of the WSB). Indeed, GANE specifically stated that the two accidents it describes (hydrogen and red oil explosions) “are not the only type of severe accident for which costs must be considered, *other accidents are identified at pp. G-28, 29 of the ER.*”²⁰

¹⁹ *Private Fuel Storage*, 54 NRC at 520-521 (emphasis added). In *Private Fuel Storage*, the Board also found good cause for the delay in filing, and as stated earlier, found the State of Utah’s bases for its contention to be “exemplary.” *Id.* at 519-520.

²⁰ *GANE Late-Filed Contentions* at 2 (emphasis added).

However, in its Reply GANE now states that the “accidents in Appendix G were intended to serve as examples ... not the complete list” and that the “revised ER does not consider the costs of *any* accidents.”²¹ Not only does this go beyond the bounds of the original late-filed contention, but GANE never identifies any other specific examples of accidents which might occur at the MOX Facility itself. The absence of such additional information is particularly telling. GANE has had access to the ER and revised ER for more than enough time to identify any additional examples it intends to rely upon. Furthermore, GANE has acknowledged that “it would not be in [its] interest to hold back any currently available information that might support its contentions.”²² Under the circumstances, it is fair to presume that GANE has no examples of accidents which could occur at the MOX Facility, and to limit the scope of this contention to the costs of accidents at the WSB.

B. Amended Contention 11. Inadequate Discussion of Measures for Disposal of Waste

This late-filed contention was previously limited to an allegation that the discussion of environmental impacts of waste from the MOX Facility waste was inadequate.²³ For example, GANE alleged that uncertainties in the disposal path for waste generated at the WSB called into question the “ER’s conclusion that waste disposal will have a negligible impact.”²⁴ GANE now seeks to expand this contention to require a discussion of new alternatives. Specifically, GANE states that since there are:

numerous uncertainties that attend the question of whether the MOX Facility waste can be disposed of safely offsite, it is necessary to evaluate alternatives such as long-term onsite storage

²¹ *GANE Reply* at 3 (emphasis added).

²² *GANE Reply* at 22.

²³ *GANE Late-Filed Contentions* at 3.

²⁴ *GANE Late-Filed Contentions* at 5.

. . . this requires consideration of reasonable alternatives to offsite disposal.²⁵

This broadening of the scope of Amended Contention 11 – to address additional alternatives such as long-term onsite storage which are never mentioned in GANE’s *Late-Filed Contentions* – is impermissible.

In addition, GANE originally identified “an unexplained reduction in the volume of MOX waste . . . [which is] inconsistent with the waste stream to be expected from enhanced aqueous polishing of impure plutonium.”²⁶ GANE now wants DCS to provide “a clear explanation of the reason for the alleged error.”²⁷ While the ER is not required to contain such an explanation, DCS has corrected the error in the revised ER and clearly explained the basis for the error in its September 23 Answer. In addition, this particular request from GANE comes over a year after GANE knew (or should have known) that the original number was in error.²⁸ GANE has provided no justification why this issue is litigable in the first place, let alone why it is litigable a year after the issue was known to all the parties.

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

This proposed contention was previously limited to the environmental impacts of a red oil explosion in the WSB.²⁹ However, GANE now raises questions regarding: “DCS’ definition of what is a credible accident”; DCS’ treatment of beyond design basis accidents; and entire sections of the ER dealing with loss of confinement accidents (ER at G.4.2.2) and explosion

²⁵ GANE Reply at 9 (emphasis added).

²⁶ GANE *Late-Filed Contentions* at 4-5.

²⁷ GANE Reply at 10.

²⁸ See Letter from P. Hastings (DCS) to NRC Document Control Desk, Responses to Request for Additional Information on the Environmental Report, DCS-NRC-000053, at (July 12, 2001) (Hearing File Doc. #45).

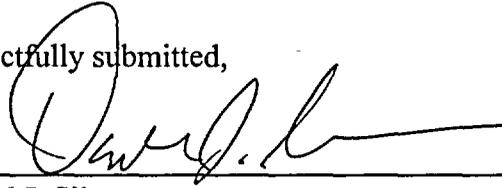
²⁹ GANE *Late-Filed Contentions* at 6-8.

events (ER at G.4.2.4) at the WSB.³⁰ Thus, GANE has again attempted to broaden impermissibly the scope of its original contention.

IV. Conclusion

GANE has failed to show either good cause or the extraordinary circumstances needed to justify its delay in submitting its late-filed contentions. Furthermore, it has failed to make the compelling showing required on the remaining four factors set forth in 10 CFR § 2.714(a)(1). Finally, GANE's efforts to expand the scope of its proposed contentions should be rejected. Accordingly, GANE's new and amended contentions should not be admitted.

Respectfully submitted,



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October 18, 2002

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³⁰ *GANE Reply* at 10-11.

CERTIFICATE OF SERVICE

I hereby certify that copies of DUKE COGEMA STONE & WEBSTER'S RESPONSE TO GANE'S REPLY TO DCS' AND NRC STAFF'S RESPONSES TO NEW AND AMENDED CONTENTIONS 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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