

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

Before Administrative Judges:

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

In the Matter of

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

Docket No. 070-03098-ML

ASLBP No. 01-790-01-ML

November 19, 2002

MEMORANDUM AND ORDER
(Denying Admission of Late-Filed Contentions)

On September 11, 2002, Intervenor Georgians Against Nuclear Energy (GANE) filed six late-filed new and amended contentions addressing Duke Cogema Stone & Webster's (DCS) July 11, 2002 revised Environmental Report.¹ DCS and the NRC Staff oppose the admission of GANE's late-filed contentions.² For the reasons set forth below, the Licensing Board finds that a balancing of the five late-filing factors set forth in 10 C.F.R. § 2.714(a)(1) does not support entertaining any of GANE's contentions.

¹See Georgians Against Nuclear Energy New and Amended Contentions Opposing Authorization for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site (Sept. 11, 2002) [hereinafter GANE Late-Filed Contentions].

²See Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's New and Amended Contentions on the Revised Environmental Report (Sept. 23, 2002) [hereinafter DCS Answer]; NRC Staff's Response to Late-Filed Contentions Submitted by Georgians Against Nuclear Energy (Sept. 26, 2002) [hereinafter NRC Staff Response].

I. BACKGROUND

In its notice of opportunity for hearing in this 10 C.F.R. Part 2, Subpart L proceeding, the Commission stated that the provisions of the Rules of Practice for informal proceedings requiring petitioners to set forth areas of concern in their intervention petitions were inapplicable. See 66 Fed. Reg. 19,994, 19,996 (Apr. 18, 2001). Instead of identifying areas of concern, the Commission directed all petitioners to file contentions that would be judged for admissibility by the standards in 10 C.F.R. § 2.714(b)(2), the procedural rules governing formal 10 C.F.R. Part 2, Subpart G proceedings. See id. Further, in its order referring this informal proceeding to the Licensing Board (see Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 480-81 (2001)), the Commission stated that the Board should consider whether late-filed contentions should be entertained for a subsequent admissibility determination by balancing the five factors set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v):

- (i) Good cause, if any, for failure to file in 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 developing 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 proceedings.

In the first discovery scheduling order after admitting a number of GANE's initial, timely-filed contentions, the Licensing Board admonished the parties that

[a]ny party filing a late-filed contention must, in addition to meeting the requirements of 10 C.F.R. § 2.714(b)(2), address each of the five factors set forth in 10 C.F.R. § 2.714(a)(1). All late-filed contentions shall be filed within 30 days of the initiating action, event, or document underlying the late-filed contention. For example, in circumstances where the issuance of a Staff or DCS document legitimately undergirds a late-filed contention, the Board will consider a contention filed within 30 days of the issuance of that document as presumptively meeting the good cause requirement of section 2.714(a)(1)(i).

Absent extraordinary circumstances, a late-filed contention filed beyond the 30-day period will be found to lack good cause for the untimely filing.

Memorandum and Order (Feb. 12, 2002) at 3 (unpublished). Shortly after issuing that order, the Board, upon GANE's motion, canceled the discovery schedule portion of it because of the announcement of substantial changes to the Department of Energy's (DOE) plans for the Savannah River Mixed Oxide Fuel Facility. See Memorandum and Order (Mar. 7, 2002) (unpublished). Those changes required DCS to file a supplement to its environmental report (ER) and a supplemental construction authorization request (CAR) which, when filed, were projected to delay the issuance of the Staff's final environmental impact statement and safety evaluation report by about a year. See id. Thereafter, on April 30, 2002, the Board issued a new discovery schedule that, inter alia, listed July 15, 2002 as the projected date for DCS to file a supplement to its ER. See Memorandum and Order (Apr. 30, 2002) at 4 (unpublished).³ Along with the new discovery schedule and, in order to avoid any misunderstanding, the Board also reiterated the applicable provisions of its earlier order, including the entirety of its earlier admonition concerning late-filed contentions quoted above. See id. at 3.

On September 11, 2002, GANE filed two late-filed amended contentions and four new contentions regarding DCS' revised ER. According to the opening paragraph of GANE's contention filing, "[n]otice that the ER had been added to the MOX hearing file was provided by

³In this regard, the Staff, by letter dated March 12, 2002, earlier had informed DCS that it should file its revised ER by July 15, 2002 -- a date also reflected in the Staff's updated review schedule accompanying the letter as Attachment 1. According to the Staff's response to GANE's late-filed contentions, a copy of its March 12 letter and Attachment 1 was also sent to GANE at the same time it was mailed to DCS. See NRC Staff Response at 5 n.14. Additionally, a copy of the Staff's March 12 letter and Attachment 1 appears as document #95 in the hearing file of this proceeding. Staff counsel's March 28, 2002 cover letter forwarding copies of the documents to the Licensing Board as a supplement to the hearing file indicates that copies were also sent to GANE's representative.

a letter from the NRC Staff on August 7, 2002.” GANE Late-Filed Contentions at 1. In a two-paragraph section addressing the late-filing criteria in section 2.714(a)(1)(i)-(v) at the end of its contention filing, GANE also states that it

learned of the availability of the ER through a letter from the NRC Staff, dated August 27 [sic], 2002. The letter was served by first-class mail, and was not sent electronically. GANE has filed these contentions within 35 days of the issuance of the notice by NRC Staff (30 days plus five for first-class mailing).

Id. at 14.

In its answer to GANE’s late-filed contentions, DCS states that it transmitted the revised Environmental Report to the NRC on July 11, 2002, and “provided a hard copy of this document directly to GANE via Federal Express and Federal Express confirmed delivery on Monday, July 15.” DCS Answer at 3. The Board then ordered GANE to file a reply to the DCS Answer addressing, inter alia, whether GANE received the revised Environmental Report on July 15, 2002, by Federal Express delivery. See Order (Sept. 25, 2002) (unpublished).

In its reply, GANE explains that, at the time it filed the late-filed contentions, it believed the Staff’s August 7, 2002 letter indicating the revised ER had been placed in the hearing file was its first notice of the availability of the ER.⁴ GANE states that it has now confirmed that a Federal Express package containing the ER was received at GANE’s office on July 15, 2002.

Id. at 18. According to GANE,

the package was inadvertently misfiled before it was opened. GANE’s representative now recalls having received a Federal Express package around July 15, but also recalls that she placed the package, unopened, in a locked cabinet. She did this because she mistakenly thought the package contained proprietary documents, which DCS generally sends to GANE in overnight mail packages. As a general rule, GANE’s representative tries not to open packages containing proprietary information unless her legal or technical advisor (to whom DCS sends copies of all proprietary documents it serves on GANE) advises her that there is some reason to do so. At that particular time, GANE’s

⁴See Georgians Against Nuclear Energy’s Reply to DCS’s and NRC Staff’s Responses to New and Amended Contentions (Oct. 7, 2002) at 17 [hereinafter GANE Reply].

representative was also distracted by the birth of her first grandchild on July 12, and was spending much of her time visiting the hospital. GANE's representative did not become aware that she had already received a copy of the Revised ER until DCS pointed out, in its September 23 filing, that Federal Express had delivered such a package.

Id. In light of this acknowledged mistake, GANE withdrew its original assertion of good cause for the late-filing of its six new and amended contentions. Id. at 19. Thereafter, by order issued October 10, 2002, the Board granted DCS' motion for leave to respond to GANE's reply and DCS filed a response.⁵

II. ANALYSIS

As directed by the Commission in its referral order, the Licensing Board must evaluate the late-filed contentions using the five factors in section 2.714(a)(1). Thus, before reaching the question whether GANE's six new and amended contentions meet the pleading requirements of section 2.714(b)(2), the Board must first ascertain whether GANE addressed each of the five section 2.714(a)(1) factors and met its burden of demonstrating that, on balance, those factors favor undertaking a determination of the admissibility of the late-filed contentions. See Baltimore Gas & 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 Center v. NRC, 208 F.3d 256 (D.C. Cir. 2000).

The first and most important of the section 2.714(a)(1) factors is whether GANE has demonstrated good cause for the late filing of its contentions. See id. at 347 n.10; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). GANE now has withdrawn its original claim of good cause for the timing of its contention filing and thus effectively concedes that it cannot demonstrate good

⁵See Duke Cogema Stone & Webster's Response to GANE's Reply to DCS' and NRC Staff's Responses to New and Amended Contentions (Oct. 18, 2002).

cause for waiting until September 11 to file six new and amended contentions dealing with DCS's July 11 revised ER. Indeed, its conduct with respect to the Federal Express package from DCS containing the revised ER that GANE's representative received on July 15, 2002 is inexcusable. GANE's actions are frankly incomprehensible in circumstances where, as here, (1) the Licensing Board twice admonished the parties that late-filed contentions based upon a document should be filed within 30 days of its issuance; (2) the Staff twice mailed GANE copies of its correspondence with DCS indicating the revised ER should be filed by July 15, 2002; and (3) the Board issued a scheduling order identifying July 15, 2002 as the projected date for the filing by DCS of its revised ER. Yet, upon receiving a Federal Express package on July 15 from DCS, GANE's representative merely filed it away unopened.

Moreover, GANE's proffered explanation for not opening the July 15 Federal Express package from DCS is, at best, problematic. GANE asserts that its representative believed the package contained proprietary documents and that the representative avoids opening such packages except upon the advice of its legal advisor. The Board's protective order controlling the treatment of proprietary information, however, requires that all such material be sent with an outer mailing envelope carrying a statement that it should only be opened by the addressee and an inner sealed envelope bearing a statement that it contains proprietary information. See Protective Order (June 29, 2001) at 5-6 (unpublished). In order that she could obtain access to the DCS's proprietary information, GANE's representative executed, on July 27, 2001, a prescribed affidavit of nondisclosure stating, inter alia, that she had read the Board's June 29, 2001 protective order. Here, of course, DCS's revised ER contained no proprietary information, so the Board's prescribed proprietary mailing directive did not apply. Nor is there any indication from GANE that DCS has not adhered in the past to the Board's directive for mailing proprietary

material. Accordingly, the preeminent good cause criterion of section 2.714(a)(1) weighs heavily against entertaining GANE's late-filed contentions.

Absent a demonstration of good cause for the timing of late-filed contentions, there must be a compelling showing that the four remaining section 2.714(a)(1) factors favor entertaining the contentions for an admissibility determination. See Braidwood, CLI-86-8, 23 NRC at 244; cf. Westinghouse Electric Corp. (Nuclear Fuel Export License for Czech Republic -- Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 329 (1994). Further, in weighing the remaining four criteria, the second and fourth factors are to be given less weight than factors three and five. See Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992); Braidwood, CLI-86-8, 23 NRC at 245.

Turning initially to the more important of the remaining four factors, the third criterion deals with GANE's assistance in developing a sound record. In this regard, GANE argues, without more, that its participation may reasonably be expected to assist in the development of a sound record because it is being advised, and hopes to present testimony, by Dr. Edwin Lyman, a highly-qualified expert on plutonium disposition and that a number of its "contentions present legal issues of significant import, on which it has the assistance of its legal advisor." GANE Late-Filed Contentions at 15. Both DCS and the Staff assert that the third factor requires GANE to identify the precise issues its contentions address and summarize the proposed testimony of its prospective witnesses on those issues. They argue that GANE's assertions fall far short of the required showing. See DCS Answer at 6-7; NRC Staff Response at 7. Further DCS argues, in effect, that the assistance of counsel does not aid GANE's required showing where, as here, the proceeding is an informal one in which a party is precluded from making its testimonial case through cross-examination. See DCS Answer at 7.

GANE fails to make a compelling showing that the third of the section 2.714(a)(1) factors favors entertaining its late-filed contentions. With respect to this factor, the Commission has emphasized “the necessity of the moving party to demonstrate that it has special expertise on the subjects which it seeks to raise” by providing specific and detailed information on the precise issues involved, the identity of prospective witnesses, and a summary of their proposed testimony. Braidwood, CLI-86-8, 23 NRC at 246; accord Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993); Comanche Peak, CLI 92-12, 36 NRC at 74; Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 327-28 (2001); id., LBP-00-27, 52 NRC 216, 224 (2000). GANE’s meager assertion fails to make such a showing with regard to any of its late-filed contentions. It argues, however, that because its contentions meet the contention pleading requirements of section 2.714(b)(2), including the requirement of specificity, nothing more is required. See GANE Reply at 21-22. To the contrary, the requirement to demonstrate that the five factors of section 2.714(a)(1) favor considering GANE’s late-filed contentions is independent of the pleading requirements for admissible contentions of section 2.714(b)(2). Here, for example, GANE has totally failed to summarize the proposed testimony of its prospective witnesses for even a single contention, much less all of them. Moreover, even if the balancing of the five factors of section 2.714(a)(1) were not deemed independent of the pleading requirements of section 2.714(b)(2), GANE’s late-filed contentions contain no supporting affidavits of experts that can be deemed the functional equivalent of the experts’ proposed testimony. Compare Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 518, 520 (2001) (where single late-filed contention had 12-page basis supported by 3 multipage declarations of experts). Further, GANE merely states that it “hopes to present testimony by Dr. Lyman.” GANE Late-Filed Contentions at 15.

Additionally, the third factor does not weigh in GANE's favor because GANE's legal advisor is available to address those contentions presenting legal issues. Id. Although counsel may assist in clarifying purely legal issues by filing legal memoranda, the third factor addresses the development of the evidentiary record. It is for this reason the Commission has emphasized the need for the proponent of late-filed contentions to summarize the proposed testimony of prospective witnesses -- a matter involving facts and expert opinion, not legal arguments. Accordingly, GANE has failed to make a compelling showing that the third section 2.714(a)(1) factor favors considering its late-filed contentions.

The fifth of the section 2.714(a)(1) factors deals with the extent the Board's consideration of GANE's late-filed contentions will broaden the issues or delay the proceeding. In its initial filing, GANE asserts that it satisfies the standard for late-filed contentions in section 2.714(a)(1)(i)-(v) but neither mentions the fifth factor nor explains how that factor favors entertaining its contentions. GANE Late-Filed Contentions at 14-15. Only in its Board-ordered reply does GANE seek to show that consideration of its late-filed contentions will neither significantly delay the proceeding nor broaden the issues. GANE Reply at 22-24. Both DCS and the Staff argue that GANE failed to meet its burden regarding the fifth factor by neglecting even to address it. DCS Answer at 8; NRC Staff Response at 7. Additionally, DCS asserts that GANE's late-filed contentions raise new issues that necessarily will broaden the issues to be litigated in the proceeding. DCS Answer at 8.

Like the third factor, the fifth factor also weighs against considering GANE's late-filed contentions. As the party filing the contentions, GANE had the burden of demonstrating that a balancing of each of the five factors in section 2.714(a)(1) favors considering its contentions. Moreover, the Board's February 12, 2002 and April 30, 2002 orders directed any party filing late-filed contentions also to address each of the five factors in section 2.714(a)(1). As should

be obvious in such circumstances, GANE was required to meet its burden in its initial filing -- a burden GANE failed to carry by not addressing the fifth factor in its contention filing. In its reply, GANE argues 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 late filing." GANE Reply at 24 n.9. GANE's mistaken belief about good cause and the relative importance of the fifth factor does not relieve it of the obligation to meet its burden. Here, GANE gambled that it had demonstrated good cause for the timing of its contention filing and that it would not address the fifth factor, even though nothing precluded it from fully addressing the fifth factor as well as all the others. Having lost its gamble, GANE should not now be heard to complain that it made a bad bet. Although in the circumstances the fifth factor weighs against entertaining GANE's late-filed contentions, it nevertheless should be made clear that any broadening of issues or delay in the proceeding flows directly from DOE's change in plans for the facility and the need for DCS to file a revised ER and supplement to the CAR.

The remaining section 2.714(a)(1) factors -- the second, concerning the availability of other means to protect GANE's interest, and the fourth, concerning the extent of representation of GANE's interests by other parties -- are the least important and given less weight than the others. With respect to the second factor, GANE asserts that this proceeding is the only avenue available for protecting its interest in a complete and balanced environmental analysis of DCS's CAR. See GANE Late-Filed Contentions at 15. Neither DCS nor the Staff challenge GANE's claim and, because there is no other readily available and effective means to protect GANE's interest, this factor weighs in its favor.

The fourth factor, however, weighs against entertaining the late-filed contentions because GANE, once again, failed to address it in its initial filing. Although the fourth factor

generally weighs in favor of the party filing the late-filed contentions, and would appear to do so here, GANE's failure even to address it precludes such a finding. Thus, the fourth criterion of section 2.714(a)(1) does not support considering GANE's late-filed contentions.

III. CONCLUSION

GANE concedes, as it must, that it lacks good cause for waiting until September 11, 2002 to file its late-filed contentions dealing with DCS's July 11, 2002 revised ER. Further, the

third, fourth, and fifth section 2.714(a)(1) factors also weigh against the Board entertaining GANE's late-filed contentions. Therefore, a balancing of the late-filing criteria clearly requires that all the late-filed new and amended contentions be rejected.⁶

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD⁷

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

November 19, 2002

⁶In its reply, GANE requests that the Board require DCS and the NRC Staff "to provide GANE's legal advisor with electronic notice of DCS's and the NRC Staff's correspondence or filings with the ASLB or the Commission, and their correspondence with GANE." GANE Reply at 19. GANE also represents that its legal advisor has informally requested DCS to include her on its service list but that "DCS has taken the position that it is not required to do so unless GANE's legal advisor files a notice of appearance." *Id.* The Board would hope that the parties would see fit to extend basic professional courtesies to one another and resolve this matter without any involvement by the Board. In the event that the parties do not reach a mutually-satisfactory resolution, GANE should file a motion seeking relief so that DCS will have an opportunity to respond.

⁷Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to (1) GANE; (2) BREDL; (3) DCS; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (DENYING ADMISSION OF LATE-FILED CONTENTIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 19th day of November 2002