

RAS 6654

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

DOCKETED 07/24/03

SERVED 07/24/03

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

July 24, 2003

MEMORANDUM

(Denying Admission of Late-Filed Contentions)

On March 27, 2003, Intervenor Georgians Against Nuclear Energy (GANE) filed three late-filed contentions addressing NUREG-1767, the Draft Environmental Impact Statement (Draft EIS) on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility (MOX Facility) at the Savannah River Site, South Carolina.¹ Duke Cogema Stone & Webster (DCS) and the NRC Staff oppose the admission of GANE's late-filed contentions.² During a May 13, 2003 telephone conference, GANE withdrew all of contention 19 and the Licensing Board denied the admission of GANE's two remaining contentions. This Memorandum sets forth the reasons for our denial.

¹See Georgians Against Nuclear Energy Late-Filed Contentions Regarding Inadequacies in the Draft Environmental Impact Statement for the Proposed MOX Plutonium Fuel Factory at Savannah River Site (Mar. 27, 2003) [hereinafter GANE Late-Filed Contentions].

²See Duke Cogema Stone and Webster's Answer to Late-Filed DEIS Contentions (Apr. 17, 2003) [hereinafter DCS Answer]; NRC Staff's Response to Late-Filed Contentions Submitted by Georgians Against Nuclear Energy on the DEIS (Apr. 18, 2003) [hereinafter NRC Staff Response].

Earlier in this 10 C.F.R. Part 2, Subpart L proceeding, the Commission directed that contentions are to be considered for admissibility under 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 66 Fed. Reg. 19,994, 19,996 (Apr. 18, 2001). Applying this standard,³ GANE's contentions are inadmissible for the reasons that follow.

GANE contention 18(a) challenges the Draft EIS preliminary recommendation that "unless safety issues mandate otherwise, the action called for is the issuance of the proposed license to DCS, with conditions to protect environmental values." Draft EIS at xx and 2-36. GANE claims that a conditional finding that a license should be issued fails to satisfy "NEPA's requirement for prior evaluation of environmental impacts." GANE Late-Filed Contentions at 4 (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). According to GANE, the "NRC is not permitted to wait until after it issues the EIS and allows construction of the proposed MOX Facility before resolving any remaining questions regarding the significance of the environmental impacts of the proposed project." GANE Late-Filed Contentions at 4. In essence, GANE's contention 18(a) seeks to challenge a Commission ruling made over a year ago in this very proceeding. GANE asserts that the Commission erred in Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-221 (2002), when it rejected GANE's argument that completion of the NRC's environmental review of the proposed MOX Facility must await completion of the related safety review. Specifically, the Commission found that NRC regulations "do not call for delaying the NRC's NEPA review until completion of the agency's operational safety review." Id. at 220.

³Because the Board finds that the contentions are inadmissible under 10 C.F.R. § 2.714(b)(2), it is unnecessary to consider whether the contentions would satisfy the standard for late-filed contentions as set forth in 10 C.F.R. § 2.714(a)(1)(i)-(v), which the Commission also made applicable to this proceeding. See Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478, 480-81 (2001).

GANE conceded that it “lodges this contention in part for the purpose of making a record for a possible appeal.” GANE Late-Filed Contentions at 5. GANE’s dissatisfaction with a prior Commission ruling in this proceeding, however, does not provide a basis for admitting a new contention directly challenging that ruling. The former Appeal Board has noted that “[a]ny contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue . . . is subsumed in that issue and precluded by the prior judgment’s collateral estoppel effect.” Carolina Power & Light Co. & N. Carolina E. Mun. Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 537 n.37 (1986) (quoting 1B, J. Moore, J. Lucas, & T. Currier, Moore’s Federal Practice ¶ 0.443[2] at 761 (2d ed. 1984) (footnotes omitted)). Therefore, we find contention 18(a) to be legally deficient and thus inadmissible.

The crux of contention 18(b) is that GANE objects to the use of the word “the” on page 2-36 of the Draft EIS in a sentence stating that “the action called for is the issuance of the proposed license to DCS.” According to GANE, “the Staff misleadingly describes the action to be taken as issuance of ‘the’ proposed license” when “there is no license, or even a license application” and consequently the Draft EIS violates “NEPA’s cardinal requirement for accuracy in representations made in an EIS.” GANE Late-Filed Contentions at 5-6.

In the unique circumstances of this proceeding and in isolation, the word “the” may be ambiguous when it precedes the word “license.” When, however, page 2-36 is read together with the rest of the Draft EIS (or even with just the Executive Summary), it is clear that GANE fails to establish that the Draft EIS is misleading or conveys any false impression. One does not need to look any further than page 1-3 of the Draft EIS to learn that if the construction authorization request is approved, DCS plans to apply for a license. Thus, the Board finds that contention 18(b) fails to create a genuine dispute on a material issue of fact or law as required under 10 C.F.R. § 2.714(b)(2)(iii) and therefore is inadmissible.

Contention 19 consists of two separate challenges to the adequacy of the support for the conclusions in the Draft EIS regarding the environmental impacts of the MOX Facility. See GANE Late-Filed Contentions at 7 to 12. In light of DOE's recent comments about the Environmental Report (ER) and the Draft EIS in DOE/EIS-0283-SA1, Changes Needed to the Surplus Plutonium Disposition Program (Supplement Analysis and Amended Record of Decision), GANE withdrew all of contention 19 during the telephone conference on May 13, 2003. See Tr. at 11-12, 23. This being so, contention 19 need not be considered.

In contention 20, GANE argues that "the Draft EIS unreasonably rules out immobilization as an alternative strategy for disposing of weapons-grade plutonium." GANE Late-Filed Contentions at 12. GANE acknowledges that the DOE has dropped its immobilization portion of the plutonium disposition strategy, but nonetheless asserts that the immobilization alternative must be evaluated in the Draft EIS because (a) DOE's economic circumstances may change, again making immobilization a viable alternative, and (b) consideration is necessary to prevent the creation of a self-fulfilling prophecy, where MOX production is considered the only available alternative. Id. Additionally, GANE notes that the NRC should consider immobilization as a partial strategy, as well as an alternative to MOX production. Id.

In contention 20, GANE fails to provide the required factual support or expert opinion for the assertion that the immobilization alternative remains a reasonable alternative to proposed action. In preparing environmental impact statements, federal agencies are not required to consider "an infinite range of alternatives, only reasonable or feasible ones." City of Carmel-By-The-Sea v. U.S. Dept. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997). It has also long been recognized that alternatives which "could only be implemented after significant changes in governmental policy or legislation" are not reasonable alternatives requiring

consideration. NRDC v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975). The Draft EIS specifically notes that an evaluation of “the immobilization alternative now would involve the NRC in foreign policy matters that the DOE has been conducting on behalf of the United States” and could “cause Russia to abandon its plutonium disposition efforts.” Draft EIS at 2-23. Requiring the NRC to analyze the immobilization alternative would require a shift in foreign policy and therefore, the Draft EIS correctly concludes that detailed analysis is not required by NEPA. GANE offers no facts or expert opinion to support its contention that immobilization remains a reasonable alternative that must be analyzed by the NRC, but merely makes the unsubstantiated assertion, that the “temporal economic circumstances may change” allowing DCS to once again pursue a hybrid strategy. GANE Late-Filed Contentions at 12. Accordingly, contention 20 fails to provide supporting facts or expert opinion showing that immobilization is still a reasonable alternative to the proposed action, as required by 10 C.F.R. § 2.714(b)(2)(ii). Therefore, this contention is inadmissible.⁴

Furthermore, the Board also rejects this contention because earlier in this proceeding, GANE submitted a similar contention that was barred because of its untimeliness. See Licensing Board Memorandum and Order (Denying Admission of Late-Filed Contentions) (Nov. 19, 2002) (unpublished). In September 2002, GANE submitted six late-filed new and amended contentions. See [GANE] New and Amended Contentions Opposing Authorization for [DCS] to Construct a Plutonium Fuel Factory at Savannah River Site (Sept. 11, 2002). One of them, contention 15, asserted that the “ER is inadequate because it does not discuss the alternative of immobilization for the 6.4 tons of impure weapons-grade plutonium.” Id. at 8. After balancing the five late-filing factors set forth in 10 C.F.R. §2.714(a)(1), the Board refused to entertain any of GANE’s contentions. Licensing Board Memorandum and Order (Denying

⁴Should circumstances change in the future, however, and immobilization becomes a more realistic option, it may then be necessary to supplement the NEPA analysis.

Admission of Late-Filed Contentions) (Nov. 19, 2002) at 11-12 (unpublished). In its March 2003 filing, GANE fails to point to any new information that was omitted in the ER, but added in the Draft EIS, that would change the analysis of the immobilization alternative. By simply rephrasing its contention and submitting it at a later date, GANE attempts to get a second bite at the apple. Thus, for this additional reason, contention 20 is inadmissible.

IT IS SO ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD⁵

/RA/

Thomas S. Moore
ADMINISTRATIVE JUDGE

/RA/

Charles N. Kelber
ADMINISTRATIVE JUDGE

/RA/

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland

July 24, 2003

⁵Copies of this 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

In the Matter of)
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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 (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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LB MEMORANDUM (DENYING ADMISSION
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 24th day of July 2003