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

August 19, 2003 (9:30AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

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| In the Matter of |) | August 11, 2003 |
| |) | |
| DUKE COGEMA STONE & WEBSTER |) | Docket No. 070-03098-ML |
| |) | |
| (Savannah River Mixed Oxide Fuel Fabrication Facility) |) | ASLBP No. 01-790-01-ML |
| |) | |

**DCS'S REPLY TO GANE'S OPPOSITION TO
MOTION FOR SUMMARY DISPOSITION OF
CONSOLIDATED CONTENTION 11**

Duke Cogema Stone & Webster ("DCS") hereby files its Reply to "Georgians Against Nuclear Energy Opposition to Duke Cogema Stone & Webster's Motion for Summary Disposition of Consolidated Contention 11" (July 29, 2003) ("GANE Opposition"). Georgians Against Nuclear Energy ("GANE") has failed to demonstrate that there is any genuine issue of material fact or law with respect to its assertion in Consolidated Contention 11 that the MOX Facility Environmental Report ("ER") "understates the impacts of the waste stream from

Template = SECY-041

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aqueous polishing to remove gallium.”¹ It has not met its burden to come forward with specific facts demonstrating that there is a genuine issue of material fact within the scope of the admitted Contention.² Nor has GANE shown that “the factual record, considered in its entirety, [is] enough in doubt . . . that there is reason to hold a hearing to resolve the issue.”³ As a result, GANE has provided no basis to deny DCS’s “Motion for Summary Disposition on Consolidated Contention 11” (July 9, 2003) (“DCS Motion”).

In its Opposition, GANE claims that: (1) summary disposition is not available in this modified Subpart L proceeding; (2) the NRC Staff’s draft Environmental Impact Statement (“EIS”) is “unclear” and “incomplete”; and (3) the Revision 3 changes to Table 3-3 of the MOX Facility ER “are not credible or adequately explained.”

As discussed below, none of GANE’s claims establish a genuine issue of material fact or law. First of all, NRC regulations at 10 CFR Part 2 provide for summary disposition in this proceeding. Second, issues regarding the NRC Staff’s draft EIS are outside the scope of Contention 11, which refers only to the description in the ER of the impacts of the high-alpha waste stream from the MOX Facility. Finally, Table 3-3 of the ER, as revised, accurately states the impacts of the high alpha waste stream. GANE’s inability to understand the statements and data in the ER does not constitute a genuine issue of material fact. Accordingly, DCS again

¹ *Georgians Against Nuclear Energy Contention Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Fabrication Factory at Savannah River Site*, at 41 (August 13, 2001).

² 10 CFR § 2.749(b).

³ *Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2)*, LBP-83-46, 18 NRC 218, 223 (1983).

respectfully requests that the Atomic Safety Licensing Board ("Board") summarily dispose of Consolidated Contention 11.

I. Use of Summary Disposition is Authorized in this Proceeding

In its Opposition, GANE claims for the first time that summary disposition is not available under the procedural rules governing this modified Subpart L proceeding. In support, GANE cites to the absence of a provision for summary disposition in the existing Subpart L, and the presence of such a provision in an as yet unpromulgated draft revision of the same subpart.

GANE is incorrect. The plain language of 10 CFR Part 2 allows for summary disposition. Specifically, 10 CFR § 2.2 states that "Subpart G sets forth general rules applicable to all types of proceedings...and should be read in conjunction with the subpart governing a particular proceeding" (emphasis added). 10 CFR § 2.749, found in Subpart G, provides for summary disposition "as to all or any part of the matters involved in the proceeding if the filings...show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law."⁴

Section 2.3 provides, "[i]n any conflict between a general rule in subpart G of this part and a special rule in another subpart...the special rule governs." There are no provisions in

⁴ 10 CFR §§ 2.749(a) and (d).

Subpart L, or in the Commission Order providing for a modified Subpart L proceeding that conflict with the summary disposition provisions set forth in 10 CFR § 2.749.²

Furthermore, the Board itself has recognized the availability of summary disposition in this proceeding in its Memorandum and Order admitting the contentions.⁶ There, in the context of Contention 6 (Inadequate Safety Analysis), the Board noted that “subsequently filed supplementary information filed by DCS in response to Staff RAIs may provide grist for the summary disposition mill as the proceeding progresses...”⁷ Accordingly, summary disposition is clearly available in this proceeding.

II. Issues Related to the Draft EIS Are Outside the Scope of This Contention

GANE makes a number of assertions regarding the completeness and clarity of the NRC Staff's draft EIS and its consistency with the ER. These assertions are outside the scope of the Contention. The NRC issued a draft EIS in February, 2003, over eighteen months after GANE proposed Consolidated Contention 11. As such, the Contention obviously does not address any concerns that GANE may have had about the draft EIS. Since February, 2003, despite attempts, GANE has not successfully amended or in any way supplemented its contentions to account for

² See generally, *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, NRC 478, 480 (2001).

⁶ *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001).

⁷ *Id.* at 438.

any such concerns it may have with respect to the draft EIS.⁸ The Board should reject GANE's attempt to allege inconsistencies between the ER and draft EIS as both untimely and improper.

In any event, GANE's effort to assert that there are inconsistencies between ER Table 3-3 and Table 4.11 of the draft EIS is a comparison of "apples and oranges." ER Table 3-3 explicitly addresses only liquid wastes generated by the MOX Facility aqueous polishing process. Table 4.11 of the draft EIS addresses total solid and liquid transuranic wastes generated by the entire MOX Facility (not just waste from the aqueous polishing process) in addition to wastes generated by the PDCF and the WSB.

⁸ See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum (Denying Admission of Late-Filed Contentions) (July 24, 2003).

III. Conclusion

GANE has failed to demonstrate that there is any genuine issue of material fact within the scope of Contention 11. For the reasons stated above, DCS' Motion for Summary Disposition on GANE Contention 11 should be granted.

Dated: August 11, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of DCS's: (1) "Reply to GANE's Opposition to Motion for Summary Disposition of Consolidated Contention 11"; and (2) "Motion to Strike and Response to GANE's Motion for Leave to Supplement its Opposition to DCS's Motion for Summary Disposition of Contention 1," dated August 11, 2003, were served this day upon the persons listed below, by e-mail and first class mail.

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8/11/03

Date