RAS 6926

October 16, 2003

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

DOCKETED
USNRC

October 22, 2003 (2:20PM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of	
DUKE COGEMA STONE & WEBSTER	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 01-790-01-ML

GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION TO STRIKE DCS' REPLY TO GANE'S OPPOSITION TO DCS' MOTION FOR SUMMARY DISPOSITION OF GANE CONTENTION 3 OR, IN THE ALTERNATIVE, REQUEST FOR LEAVE TO FILE SURREPLY

I. INTRODUCTION

Georgians Against Nuclear Energy ("GANE") hereby moves to strike DCS Reply to GANE Opposition to DCS Motion for Summary Disposition on Contention 3 (October 8, 2003) (hereinafter "DCS Reply"). The Reply should be stricken because, with only one minor exception, it fails to adhere to DCS's alleged purposes of clarifying "[t]echnical statements" that allegedly "mischaracterize the MOX Facility's seismic design and the work conducted to reach that design," and responding to "documents and opinions which were not previously identified either in GANE's discovery responses or

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SECY-02

by Dr. Long during his deposition."[1] DCS Request to File Reply to Georgians Against Nuclear Energy's Opposition to DCS's Motion for Summary Disposition of Contention 3 at 1 (September 18, 2003). In all other respects, the Reply constitutes a rehash of arguments made by DCS in its original summary disposition motion, or new arguments that could have been made in that motion.[2] This motion to strike should also be granted because, in making its arguments, DCS misrepresents and distorts the record of this proceeding. In the alternative, if the Atomic Safety and Licensing Board ("ASLB") denies this motion, GANE requests leave to file a surreply.

II. ARGUMENT

DCS's Reply does not respond to allegedly erroneous technical statements or new information or opinions in GANE's Opposition. Instead, DCS uses the Reply to reprise and consolidate its summary disposition motion, and to distort the record of this proceeding. In Section I, for instance, DCS repeats earlier arguments regarding the standard for summary disposition, without explaining why it is necessary to restate them. DCS also references an attached "table comparing DCS's Statement of Material Facts with GANE's Statement of Disputed Facts." DCS does not explain, nor is it evident, how this table corrects allegedly erroneous factual statements or addresses new information.

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[1] As discussed below at page 5, in GANE's Opposition to DCS's Summary Disposition Motion on Contention 3 (September 16, 2003) (hereinafter "GANE Opposition"), GANE erroneously identified the date of publication of the Lawrence Livermore National Laboratories ("LLNL") and Electric Power Research Institute ("EPRI") studies as the late 1970's and early 1980's, when in fact they were published in the late 1980's and early 1990's. GANE is correct, however, about the more important time frame of when LLNL and EPRI performed the work reported on in the studies.

[2] Duke Cogema Stone & Webster Motion for Summary Disposition on Contention 3 (August 22, 2003) (hereinafter "Summary Disposition Motion").

Instead, it provides DCS's one-sided characterization of the principal issues in the case, and DCS's version of the facts and opinions that relate to these issues. The table amounts to nothing more than DCS's attempt to have the "last word" in this summary disposition proceeding.

Section II of DCS's Reply is entitled "GANE FAILS TO RAISE A GENUINE ISSUE OF MATERIAL FACT." True to this broad title, Section II is devoted to rehashing DCS's summary disposition motion, not to identifying and responding to erroneous or misleading technical information or new facts and opinions. Therefore, as discussed in more detail below, all of the arguments in this section should be stricken. To the extent that these arguments are supported by the Supplemental Declaration of Dr. Carl Stepp (October 6, 2003) (hereinafter "Supplemental Stepp Declaration"), the declaration should also be stricken.[3]

In Subsection A, DCS claims that in Dr. Long's declaration supporting GANE's Opposition, he changed his previous position that it was "appropriate or conservative" to use a 120-km distance between the Savannah River Site and the Charleston Earthquake epicenter for the historical check on the DCS seismic analysis. A close examination of what Dr. Long actually said shows that Dr. Long has not changed his position at all, and that DCS simply seeks to distort the record and revisit the question of whether the

[3] In his Supplemental Declaration, Dr. Stepp also responds to Dr. Long's criticisms of his qualifications to testify about the adequacy of DCS's seismic hazards analysis or to make credible criticisms of Dr. Long's views. Reply at 22-23, Supplemental Stepp Declaration, paragraphs 3-7. Dr. Stepp's assertions regarding his qualifications are so general, however, that they fail to provide any meaningful information. At most, they show the existence of a genuine and material dispute of fact regarding Dr. Stepp's expertise.

historic check should be re-calculated. Contrary to DCS's representation in the Reply, Dr. Long's deposition transcript shows that while he agreed that the 120-km distance was "realistic" or "probably realistic," he never agreed that it was conservative. Deposition of Dr. Leland T. Long, transcript at 190:1-14 (June 25 and 26, 2003) (hereinafter "Long Deposition Transcript"). Instead, he stated that that the calculation "should be done correctly," and that DCS should not "throw in errors to make it look like a more severe case." *Id.* at 190:11-13. Moreover, contrary to DCS's representation, Dr. Long did not state in his declaration that "he does not agree that 120 kms is 'appropriate.'" DCS Reply at 6. Rather, he stated that he believes that a 120-km distance is "not necessarily conservative."[4] As DCS should be well aware, there is a significant difference between whether a calculation appears to be reasonable or realistic, and whether it is conservative. While the parties are obviously in agreement that somewhere in the range of 80-120 km is the appropriate distance for maximizing the Moho Bounce, the calculation must be done correctly before any determination can be made as to the conservatism of 120 km.

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[4] Declaration of Dr. Leland Timothy Long Regarding Contention 3, paragraph 56 (September 16, 2003). The entire text of paragraph 56 reads as follows:

> In Statement 3, DCS incorrectly claims that I agree with the assertion that a 7.3 moment magnitude earthquake with an epicenter located 120 km southeast of the MOX Facility site is "appropriate or conservative for modeling the historic 1886 Charleston earthquake ground motions." I do not agree with that statement, and I have not said so. As can be seen in the documents cited by DCS, I agree that the Charleston earthquake is the most severe documented historical event that is relevant to the seismic design for the MOX Facility. *See* GANE's June 28, 2002, response to DCS Interrogatory 3.32; Long deposition transcript at 129:10-15. It is not necessarily conservative to put the MOX Facility 120 km from the Charleston earthquake, because effects like the Moho bounce increase shaking with increased distance.

Thus, because Dr. Long's position regarding the lack of conservatism of DCS's analysis was clearly established in his deposition, DCS has no grounds for revisiting it now.

Next, DCS reprises an argument that was made in its original summary disposition motion: that DCS must prevail on the question of the adequacy of the historical check, because Dr. Long has not done any calculations of his own. *See* DCS Reply at 7-8, DCS Summary Disposition Motion at 24. DCS also repeats its previous argument that even if Dr. Long is correct, the historical ground motions are still enveloped by the seismic design basis spectrum for all frequencies of structural interest. DCS Reply at 8, Summary Disposition Motion at 23. With the exception of two quibbling footnotes, DCS does not cite any new information or opinions that it is responding to with this argument. Instead, the argument amounts to a naked bid for another bite at the summary disposition apple.

In Section B, DCS argues that GANE "relies heavily on a mistaken belief that the EPRI and LLNL PSHAs were 'conducted in the late 1970s and early 1980s' and 'published over twenty years ago.'" DCS Reply at 8. The assertion that these studies were published over twenty years ago does, indeed, constitute an error – but the error relates to the date of publication of the studies, not the time period when the studies were conducted.[5] For purposes of judging whether the LLNL and EPRI studies are outdated, which is the important question in this proceeding, the relevant time frame is when the work of the LLNL and EPRI studies was done. GANE has made no erroneous statements, nor has it provided new information, about that subject. Dr. Long's

[5] Moreover, the error was made by GANE's counsel, not Dr. Long.

declaration is consistent with his deposition testimony, in which he stated that preparation of the LLNL and EPRI studies was done in the 1970's and 1980's. Long Deposition transcript at 79:7, 84:5, 303:7. Thus, rather than replying to new information, DCS is simply taking an opportunity to distort the existing record for the purpose of giving the appearance that Dr. Long is incorrect when he asserts that the EPRI and LLNL studies are out of date. The argument therefore should be stricken.

DCS also takes issue with Dr. Long's statement that it was his understanding, during the LLNL and EPRI studies, that the computations were generalized for comparison purposes, and not intended for specific sites without a more detailed evaluation. DCS Reply at 9-10. In support of its position, DCS presents the Supplemental Stepp Declaration, which asserts for the first time that Dr. Stepp was "the technical leader of the EPRI PSHA work," and that he knows "first hand that the EPRI PSHA outputs were expected to be used for specific site." Supplemental Stepp Declaration, par. 16.

This assertion should be stricken, because it could have been made in Dr. Stepp's original declaration of August 6, 2003. At the time DCS filed its Summary Disposition Motion and Dr. Stepp's supporting declaration, it was well aware of Dr. Long's deposition testimony that he had consulted others involved in the studies and been told that they were not intended for site-specific use without more analysis. Long Deposition transcript at 175-176. In the "Experience" section of his August 6 declaration, Dr. Stepp had the opportunity to discuss the basis for his claimed knowledge of the purpose of the EPRI study, but didn't. Instead, he simply stated that he was responsible for

development of the methodology. *See id.*, par. 6. Thus, Dr. Long's assertion is not new information, and DCS's argument should be stricken.[6]

In Section C, DCS disputes Dr. Long's argument that DCS should have updated the LLNL and EPRI studies with quantitative analyses, without bothering to address the question of whether this constitutes a new argument by Dr. Long, or a technical mischaracterization of DCS's work. *Id.* at 10-13 and 16-19. Instead, it launches into an argument that revisions to the PSHA are not legally required, and that in any event the LLNL and EPRI studies are "robust" enough to withstand the test of time. *Id.* at 12-13.

It is too late to make these arguments, because they could have and should have been made in DCS's initial motion. DCS was well aware that, in his deposition testimony, Dr. Long made numerous statements to the effect that the site-specific updates to the LLNL and EPRI studies that he seeks are computational. *See, e.g.*, Long Deposition transcript at 28:5-17 (calling for consideration of Moho bounce in hazard computation), 156:16-21 (calling for re-definition of probabilistic numbers used in the LLNL and EPRI studies), 160-161 (explaining the mathematical process of predicting earthquake risk), 301:13-18 (stating that computation of the PSHA should include information regarding potential for major earthquakes at epicenters other than Charleston), 275:1-12 (suggesting that computations in PSHA could affect the length of the return period). Indeed, given that the EPRI and LLNL results are expressed in

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[6] In any event, a close reading of Dr. Stepp's Supplemental Declaration raises the question of whether he does actually disagree with Dr. Long. In paragraph 16, Dr. Stepp states that he knows "first hand that the EPRI PSHA outputs were expected to be used for specific sites." The question is not whether the EPRI and PSHA outputs could be used for specific sites, but whether additional analysis was required for a site-specific application. Long Deposition Transcript at 175:19-20, 176:11-13.

quantitative terms, it would be strange if Dr. Long were seeking a different type of re-evaluation. The arguments should be stricken.

At pages 13-16, DCS disputes the applicability of Reg. Guide 1.165, and also its terms. This argument should be stricken, because DCS previously addressed the applicability and relevance of Reg. Guide 1.165 in its initial Summary Disposition Motion. *Id.* at 26-27. According to DCS, Reg. Guide 1.165 "explicitly permits" the site-specific use of the EPRI and LLNL studies. GANE's and Dr. Long's citation of provisions of Reg. Guide 1.165 that do not support DCS's view does not amount to new information or mischaracterizations of DCS's work to which DCS should be allowed to respond. DCS should not be permitted to have a second round of argument on Reg. Guide 1.165.

Finally, DCS disputes GANE's assertion that the MOX Facility seismic hazard would increase if new ground motion attenuation models were considered. *Id.* at 20-21. DCS claims that in making its argument, GANE did not consider an argument by Dr. Stepp to the effect that consideration of these models is effectively embraced by the large range of uncertainty in the LLNL and EPRI ground motion attenuation models. *Id.* at 21. Dr. Long explicitly addressed this point in his deposition, however:

> Q. If their model or the output of their model was already – if the level of ground motion for the anomalous zone that you see in Atkinson and Boore at 100 kilometers falls within the range of uncertainties already taken into account in the Livermore or EPRI, would you find it acceptable to you as Livermore or EPRI, assuming that was the only issue you had with Livermore or EPRI?
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> A. Probably not, and the reason is when you have a systematic variation in the attenuation relationship, that is an error. Even though it falls within a plus or minus, if it is systematic in one direction, it will systematically bias the result you get, and the systematic bias is that, in this case, because Charleston, Bluffton and

> Bowman are the most active seismic areas and they are all within that distance range, they will have some impact on the computation and that is my concern. These are all at that distance. At that distance there is a bias in the data even though it may fall within the range. That bias suggests when you run the final computations, you will be biased by about that same amount.

Long Deposition Transcript at 204-05. In addition, Dr. Long testified that the range of uncertainty should be reduced if the PSHA is updated to include more current information. Long Deposition Transcript at 154-55, 158:6-12, 168-69. Thus, once again, DCS's Reply does not identify any new information or arguments by Dr. Long of which DCS was previously unaware.

III. CONCLUSION

For the foregoing reasons, the ASLB should strike all but a very small portion of DCS's Reply, which addresses the publication date of the LLNL and EPRI studies. In the alternative, if the ASLB decides to deny this motion, it should grant GANE an opportunity for a surreply. In particular, GANE seeks to reply to the various distortions of the record cited above, to submit its own table comparing disputed material facts, and to submit a declaration in surrebuttal to Dr. Stepp.

Respectfully submitted,

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October 16, 2003

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2003, copies of the foregoing GEORGIANS AGAINST NUCLEAR ENERGY'S MOTION TO STRIKE PORTION OF DCS'S REPLY TO GANE'S OPPOSITIN TO DCS'S MOTION FOR SUMMARY DISPOSITION OF GANE CONTENTION 3, ETC., were served on the following by e-mail and first-class mail:

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