

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

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)	October 21, 2003
DUKE COGEMA STONE & WEBSTER)	Docket No. 070-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility))	ASLBP No. 01-790-01-ML

**DCS REPLY TO
GANE'S OCTOBER 16, 2003 MOTION TO STRIKE**

Duke Cogema Stone & Webster LLC ("DCS") hereby replies to Georgians Against Nuclear Energy's ("GANE") October 16, 2003 Motion to Strike DCS's Reply of October 8 ("GANE Motion").¹

As demonstrated below, GANE's Motion to Strike is unwarranted. GANE's request in the alternative—that it be given leave to file a surreply—is untimely. GANE could have filed a timely request in accordance with the established procedures in this proceeding, but it did not do so. Accordingly, all aspects of GANE's Motion should be denied.

¹ See *Georgians Against Nuclear Energy's Motion to Strike DCS's 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* (Oct. 16, 2003).

I. DCS'S OCTOBER 8 REPLY WAS PROPER

GANE alleges that DCS's Oct. 8 Reply² "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"³ and that at least one argument is "a naked bid for another bite at the summary disposition apple."⁴ GANE is incorrect.

DCS provided four reasons to support its September 18, 2003 request for leave to file a reply to GANE's Opposition⁵ to Summary Disposition on Contention 3. DCS wished to:

1. clarify technical statements in GANE's Opposition which mischaracterize the Mixed Oxide Fuel Fabrication Facility's ("MOX Facility") seismic design;
2. clarify technical statements in GANE's Opposition which mischaracterize the work conducted to reach the MOX Facility's seismic design;
3. respond to documents which were not previously identified either in GANE's discovery responses or by Dr. Long during his deposition; and
4. respond to opinions which were not previously identified either in GANE's discovery responses or by Dr. Long during his deposition.⁶

DCS did just that.

GANE raises nine arguments. DCS demonstrates below why each of these is incorrect.

² DCS's Reply to GANE's Opposition to DCS's Motion for Summary Disposition on Contention 3 (Oct. 8, 2003).

³ GANE Motion at 2.

⁴ *Id.* at 5.

⁵ See *Georgians Against Nuclear Energy's Opposition to Duke Cogema Stone & Webster's Motion for Summary Disposition of GANE Contention 3* (Sept. 16, 2003).

⁶ DCS Request to File Reply to GANE's Opposition to DCS's Motion For Summary Disposition on Contention 3 at 1 (September 18, 2003)

A. A Section Briefly Stating the Standards for Summary Disposition is Proper

GANE complains that “DCS repeats earlier arguments regarding the standard for summary disposition without explaining why it is necessary to restate them.”⁷ DCS typically includes an introduction and legal standards section in its filings for the convenience of the Board and the parties. It is entirely proper to include such a section in a filing, and its presence does not justify a Motion to Strike.

B. A Table Comparing Material Facts is Proper

GANE also objects that DCS attached a “table comparing DCS’s Statement of Material Facts with GANE’s Statement of Disputed Facts.”⁸ DCS, of course, could not have made such a comparison before GANE filed its Opposition, and all DCS intended was to give the Board and the parties a summary table reflecting not only the new information in GANE’s Opposition, but also the responsive information reflected in DCS’s Reply. This argument does not justify striking any aspect of DCS’s Reply.

C. Appropriateness of 120 kms for the Historical Check

GANE let the cat out of the bag on this argument and is now seeking to put it back. Regarding the appropriateness of using 120 kms as the closest distance for the historical check, GANE states 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 historic check should be re-calculated.”² This argument fails to justify a Motion to Strike.

It was proper for DCS to respond to opinions that were contrary to what Dr. Long had already stated under oath. During his deposition, Dr. Long stated—twice—that it was

⁷ GANE Motion at 2.

⁸ *Id.* (quoting DCS Motion).

“realistic” to use 120 kms for the historical check of the 1886 Charleston earthquake.¹⁰ Naturally, DCS was surprised when GANE disputed whether it was “appropriate or conservative” to use 120 kms. “Realistic” is defined as a “tendency to or expressing an awareness of things as they really are” or “accurately representing what is depicted or described.”¹¹ It is reasonable for DCS to equate “realistic” with “appropriate.” Accordingly, the part of the contention challenging the use of 120 kms can be dismissed without a hearing because it is undisputed that 120 kms was appropriate. Moreover, it is altogether fitting and proper that DCS point out the inconsistencies in the record and in GANE’s position.

D. Seismic Design of the MOX Facility vs. the Historical Check

This is the argument that GANE claims is a “a naked bid for another bite at the summary disposition apple.”¹² Specifically, GANE states that DCS reiterates that “Dr. Long has not done any calculations of his own” and “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.”¹³

GANE takes these statements out of context. The pages of DCS’s reply cited by GANE relate to a comparison of DCS’s and GANE’s statements of material facts, particularly ¶¶ 4-9.¹⁴ It was necessary to revisit the issue of how the historical check of the PC-3 spectrum relates to the MOX Spectrum (which gets its spectral shape from Reg. Guide 1.60) because GANE appears to confuse this distinction. Therefore, DCS was clarifying technical statements

² *Id.* at 3-4.

¹⁰ Long Deposition Transcript at 190:1-6; 190:13-14.

¹¹ American Heritage Dictionary 1030 (2nd ed. 1992).

¹² GANE Motion at 5.

¹³ *Id.*

in GANE's filing which mischaracterize the MOX Facility's seismic design, and summarizing the issue before discussing others.

This argument fails to justify a Motion to Strike.

E. Date of the EPRI & LLNL Studies

This argument is a red herring. The publication and performance dates of the Electric Power Research Institute ("EPRI") and Lawrence Livermore National Laboratory ("LLNL") probabilistic seismic hazard assessments ("PSHAs") should not be material to the summary disposition motion. The fact is that the PSHAs were robustly designed to stand the test of time and that NRC accepts—as a matter of law—the outputs of the EPRI and LLNL PSHAs for a MOX Facility without recomputation.

That being said, GANE should not be complaining about anything regarding the dating of the publication or performance of the EPRI and LLNL PSHAs relied upon by DCS. GANE originally stated that these PSHAs were "conducted in the late 1970s and early 1980s"¹⁴ and "published over twenty years ago."¹⁶ GANE now acknowledges that it was flat-out wrong about the publication dates,¹⁷ thereby proving that it was necessary for DCS to clarify GANE's technical misstatement in this regard.

GANE is also wrong about the dates the EPRI and LLNL PSHAs were actually conducted. Again, GANE is off by about a decade. The LLNL PSHA was conducted in 1986

¹⁴ See DCS Oct. 8 Reply at 7-8.

¹⁵ GANE Opposition at 4

¹⁶ *Id.* at 8.

¹⁷ GANE Motion at 5 ("The assertion that these studies were published over twenty years ago does, indeed, constitute an error").

and 1987.¹⁸ The EPRI PSHA was done essentially in parallel with the LLNL PSHA.¹⁹ Moreover, work on the LLNL PSHA continued through the early 1990s.²⁰ These facts are obvious from a review of documents available from the NRC.²¹ Again, Dr. Long's memory on this issue—unsupported by citations—does not create a material issue of fact.

While DCS appreciates GANE's counsel's correction as to the publication dates, to argue that "DCS is simply taking an opportunity to distort the existing record" regarding other dates is baseless.²² It is GANE that continues to distort the record by making erroneous statements.

This argument also fails to justify a Motion to Strike.

F. Dr. Stepp Was the Technical Leader of the EPRI PSHA

In response to Dr. Long's statement that he was told years ago that the EPRI PSHA would not be used for specific sites,²³ DCS offered in a supplemental affidavit 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 sites."²⁴ GANE asks that this

¹⁸ See e.g. J.B. Savy et al, *Eastern Seismic Hazard Characterization Update*, UCRL-ID-115111 at 2 (June 1993) ("Since the 1989 [Eastern United States] study was in fact performed in 1986-1987. . .").

¹⁹ See e.g. P. Sobel, *Revised Livermore Seismic Hazard Estimates for Sixty-Nine Nuclear Power Plant Sites East of the Rocky Mountains*, NUREG-1488 at 1 (April 1994) ("In conjunction with funding LLNL to perform a PSHA study, NRC recommended that the nuclear power industry perform an independent study to provide a coordinated utility position on PSHA estimates and to provide NRC with comparative information. A consortium of nuclear power utilities . . . funded the Electric Power Research Institute (EPRI) to perform a seismic hazard study.").

²⁰ See *Id.* at 2 ("In 1992 and 1993 LLNL re-elicited input data from the seismicity and ground motion experts using a revised elicitation process.").

²¹ See *Id.*; see also DCS Motion for Summary Disposition, n. 24 and 25.

²² GANE Motion at 6.

²³ Long Declaration ¶ 9(a)(iv) (GANE Opposition, Attachment B).

²⁴ Supplemental Affidavit of Dr. Stepp, ¶ 16.

language be stricken, alleging that it should have been included in the Motion for Summary Disposition.²⁵

This information was included in the Motion for Summary Disposition. Dr. Stepp—in paragraph 16 of his *original* affidavit which accompanied the Summary Disposition Motion—stated that:

I am intimately familiar with the EPRI and LLNL PSHA studies. For the EPRI studies, I developed the project plan and directed the development of the methodology for its PSHA and provided technical leadership to obtain a generic topical review of the methodology by the NRC. For the LLNL studies, I was one of the experts who provided seismic source evaluations.²⁶

In paragraph 41 of that same *original* affidavit, Dr. Stepp stated:

Also, as the developer of the methodology for the EPRI PSHA, I have first hand knowledge that the EPRI PSHA outputs were expected to be used for specific sites.²⁷

GANE's misreading does not justify a Motion to Strike.

G. Legal Question Regarding Recomputation of the EPRI and LLNL PSHAs

GANE states that it was improper for DCS to “dispute[s] Dr. Long’s argument that DCS should have updated the LLNL and EPRI studies with quantitative analyses” since “Dr. Long made numerous statements [in his deposition] to the effect that the site-specific updates to the LLNL and EPRI studies that he seeks are computational.”²⁸

It is clear from DCS’s Motion for Summary Disposition that DCS did not understand GANE’s position that DCS needed to recompute the EPRI and LLNL PSHAs. Section IV.F.

²⁵ GANE Motion at 6.

²⁶ Affidavit of Dr. Stepp, ¶ 16 (August 6, 2003) (Attachment C to DCS’s August 22, 2003 Motion for Summary Disposition).

²⁷ *Id.* at ¶ 41.

of DCS's Motion for Summary Disposition set forth DCS's understanding of GANE's concerns with the seismic design.²⁹ As GANE acknowledges in its Opposition, DCS understood that GANE was arguing that certain data and hypotheses were not *considered* in the EPRI and LLNL PSHAs, not that the PSHAs needed to be recomputed regardless of whether these data and hypotheses were considered. When GANE responded in its Opposition for the first time that DCS's understanding was wrong, DCS appropriately responded in its October 8 Reply and explained why the issue raised by GANE was not appropriate as a matter of law.

This does not justify a Motion to Strike.

H. Discussion of Reg. Guide 1.165 was Proper

Similarly, GANE argues that it was improper for DCS to "dispute[s] the applicability of Reg. Guide 1.165, and also its terms. . . . 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."³⁰

GANE is wrong. DCS mentioned Reg. Guide 1.165 in its Motion for Summary Disposition only as an example of the NRC accepting site-specific use of the EPRI and LLNL PSHAs.³¹ Nothing more. GANE, however, used Reg. Guide 1.165 for the different argument that DCS needed to recompute the EPRI and LLNL PSHAs. As stated above, DCS appropriately responded in its October 8 Reply and explained why Reg. Guide 1.165 could not be used for that purpose, and why this issue could be resolved as a matter of law.

This does not justify a Motion to Strike.

²⁸ GANE Motion at 7.

²⁹ See DCS Motion for Summary Disposition at 17-20.

³⁰ GANE Motion at 8.

³¹ See DCS Motion for Summary Disposition at 26.

I. Challenge to the Ground Motion Attenuation Calculation

GANE next states that it was improper for DCS to argue that “GANE did not consider an argument by Dr. Stepp to the effect that consideration of [new ground motion attenuation] models is effectively embraced by the large range of uncertainty in the LLNL and EPRI ground motion attenuation models.”²² GANE fails to tell the whole story. GANE identified an article from 1977 which purports to include a ground motion attenuation model that DCS should have considered. This article was not identified in GANE’s discovery responses as a document upon which GANE’s experts plan to rely. It was appropriate for DCS to respond and to provide the background for doing so.

Finally, if anything should be stricken regarding this issue, it should be GANE’s argument. Instead of limiting its discussion to what information in DCS’s Reply should be stricken, GANE substantively responded to specific calculations with quotes from Dr. Long’s deposition. As GANE itself would have to admit, such an argument should have been included in GANE’s Opposition.

This does not justify a Motion to Strike.

II. GANE’S SURREPLY REQUEST IS UNTIMELY

GANE asks that if its Motion to Strike is denied, it be given the opportunity to file a surreply. Such a request is untimely.

This Board requires that a motion for leave to file a surreply “be filed so that it is in the hands of the Licensing Board at least three business days of the filing of the response for which

²² GANE Motion at 8.

leave to reply is sought.”³³ DCS filed its Reply on October 8. To be timely, GANE should have filed on Tuesday, October 14. GANE did not do so. The Board should not reward GANE for its failure to follow the established procedures for requesting a right to reply.³⁴

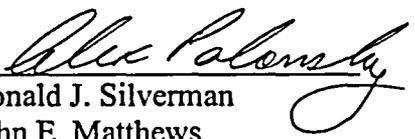
VI. CONCLUSION

GANE’s Motion to Strike is not justified and should be denied. GANE’s request in the alternative—for leave to file a surreply—is untimely, and should also be denied.

Dated: October 21, 2003

Respectfully submitted,

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³³ *Memorandum and Order*, Duke Cogema Stone & Webster, NRC Docket No. 70-070-03098-ML, at 6 (July 17, 2001).

³⁴ GANE’s Motion contains so much rebuttal argument that GANE has, in effect, already filed a Reply.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the DCS REPLY TO GANE'S OCTOBER 16, 2003 MOTION TO STRIKE were served this day upon the persons listed below by electronic and First Class Mail.

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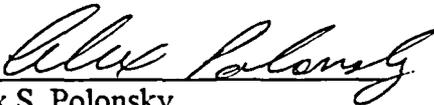
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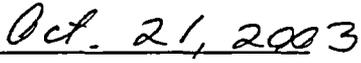
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