March 10, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098-ML
	)	
Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

NRC STAFF'S RESPONSE TO LATE-FILED NEPA CONTENTIONS SUBMITTED BY GEORGIANS AGAINST NUCLEAR ENERGY

INTRODUCTION

On February 28, 2005, Georgians Against Nuclear Energy (GANE) submitted two late-filed contentions[1] following issuance of NUREG-1767, the NRC staff's final "Environmental Impact Statement on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina" (FEIS). Pursuant to an unpublished Atomic Safety and Licensing Board order dated February 10, 2005, the staff of the Nuclear Regulatory Commission (NRC Staff) is today submitting its response to the February 28 Contentions.

As discussed below in Section A, GANE's proffered contentions fail to meet the late-filed contention requirements of 10 C.F.R. § 2.714(a)(1). Additionally, GANE's contentions fail to meet the general contention standards of 10 C.F.R. § 2.714(b)(2), as shown below in Section B.[2] The Board should accordingly reject both of the February 28 contentions.

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[1] *See* "[GANE's] Late-Filed Contentions Regarding Final Environmental Impact Statement for Proposed Plutonium MOX Fuel Fabrication Facility," dated February 28, 2005 (February 28 Contentions).

[2] The Commission made the old Subpart G contention provisions of 10 C.F.R. § 2.714 applicable to this Subpart L proceeding, and in addition to meeting the substantive contention requirements of 10 C.F.R. § 2.714(b)(2), late-filed contentions must meet the 10 C.F.R. § 2.714(a)(1) criteria. *See* CLI-01-13, 53 NRC 478, 480-81 (2001).

BACKGROUND

In May of 2001, GANE made its initial request for hearing on the construction authorization request (CAR) submitted by Duke Cogema Stone & Webster (DCS). DCS seeks to build a mixed oxide (MOX) fuel fabrication facility (MOX Facility) at the United States Department of Energy's (DOE's) Savannah River Site (SRS) in South Carolina. DCS, a contractor of the DOE, had submitted an environmental report (ER) to the NRC in December 2000 regarding the proposed construction and operation of the MOX Facility -- a major federal action requiring the preparation of an environmental impact statement pursuant to the National Environmental Policy Act (NEPA).[3] The DOE had earlier issued a record of decision (ROD) in January 2000, pertaining to its surplus plutonium disposition program, and therein documented its decisions regarding (1) the construction and operation of a pit disassembly and conversion facility; (2) the construction and operation of a plutonium immobilization facility; (3) the construction and operation of the MOX Facility; (4) selection of a site for lead assembly fabrication; and (5) selection of a site for post-irradiation examination of lead assemblies.[4] The NRC's licensing authority over the DOE's surplus plutonium disposition program is limited to matters pertaining to the proposed construction and operation of the MOX Facility.[5]

In April 2002, the DOE published an amended ROD canceling the planned construction and operation of its immobilization facility,[6] and in July 2002 DCS submitted a revised ER to the NRC

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[3] *See* "Notice of Intent to Prepare an Environmental Impact Statement for the Mixed Oxide Fuel Fabrication Facility," 66 Fed. Reg. 13794 (March 7, 2001).

[4] *See* "Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement," 65 Fed. Reg. 1608, 1619-20 (Jan. 11, 2000) (2000 ROD).

[5] *See* Section 202 of the Energy Reorganization Act (as amended in 1998), 42 U.S.C. § 5842(5).

[6] The DOE published its amended ROD in April 2002 (*see* "Surplus Plutonium Disposition Program," 67 Fed. Reg. 19432 *et seq*. (April 19, 2002)), but had announced this and other program changes in January 2002. *See* letter from DCS counsel to the Board, dated January 24, 2002.

Staff. As stated in the revised ER, the DOE plans to build and operate a Waste Solidification Building (WSB) at the site of the DOE's proposed pit disassembly and conversion facility (PDCF). Both of these new DOE facilities would be located near the site of the proposed MOX Facility. *See* revised ER, at 5-22 to 5-24. Appendix G of the revised ER discusses the potential impacts related to the WSB. Section 1.2.3 of the revised ER references DOE's previous NEPA evaluations of the PDCF, and revised ER section 5.6 discusses the cumulative impacts related to the proposed operation of the PDCF, WSB, and MOX Facility. Additionally, Tables 5-14, 5-15a, 5-15b, 5-15c, and 5-15d in the revised ER present data related to potential PDCF and WSB impacts.

On April 30, 2002, the Board issued a scheduling order governing this proceeding. In situations where new documents give rise to late-filed contentions, the Board established a 30-day period in which to submit such contentions, running from the issuance date of the new document. On this point, the Board stated in relevant part as follows:

> Any 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. ... 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," dated April 30, 2002 (unpublished) (April 30 Order), at 3-4 (¶ 8).

On September 11, 2002, GANE submitted a set of late-filed contentions pertaining to the revised ER.[7] In its "Memorandum and Order (Denying Admission of Late-Filed Contentions)," dated November 19, 2002 (unpublished) (November 19 Order), the Board refused to admit any of the September 2002 Contentions. On March 27, 2003, GANE submitted another set of late-filed contentions pertaining to the NRC staff's draft "Environmental Impact Statement on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility at the Savannah River Site,

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[7] *See* "[GANE's] New and Amended Contentions Opposing Authorization For Duke Cogema Stone & Webster To Construct a Plutonium Fuel Factory at Savannah River Site" (September 2002 Contentions).

South Carolina" (DEIS).[8] In its "Memorandum (Denying Admission of Late-Filed Contentions)," dated July 24, 2003 (unpublished) (July 24 Order), the Board refused to admit any of the March 2003 Contentions.

One of GANE's March 2003 Contentions (Contention 20) was titled "Failure to Discuss Immobilization Alternative." In rejecting this contention, the Board noted that it had previously rejected GANE's Contention 15, which had similarly claimed that the ER submitted by DCS had not adequately discussed the immobilization alternative. *See* July 24 Order, at 5. The Board further stated as follows:

> 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.

July 24 Order, at 6.

DISCUSSION

GANE now seeks the admission of Contention 21 (which is set forth in full below), stating as follows:

> Environmental Impacts of Liquid Radioactive
> Waste Disposal if WSB Is Cancelled.
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> The FEIS is inadequate to satisfy the requirements of NEPA because it fails to provide an up-to-date discussion of the environmental impacts of liquid radioactive waste disposal. The FEIS' assumption that liquid radioactive waste will be processed in the [WSB] is no longer valid, because the DOE has suspended its plan to build the WSB. In fact, the NRC stated in the FEIS that the WSB "would be required to support operation of the proposed MOX facility." *Id.* at xviii.
>
> Before it can approve construction of the MOX Facility, the NRC must await the DOE's decision regarding what measures it will use to dispose of liquid radioactive waste from the MOX Facility. If the method chosen is substantially different from the proposed WSB, the FEIS must be revised and re-issued in draft form for public comment. The revised draft should address all changes to the proposed MOX

[8] *See* "[GANE's] Late-Filed Contentions Regarding Inadequacies in the Draft Environmental Impact Statement for the Proposed MOX Plutonium Fuel Factory at Savannah River Site" (March 2003 Contentions).

> Facility that result from a change in DOE's waste treatment and disposal plan, including (a) the environmental impacts of any new alternative measures that are devised for processing and disposing of liquid radioactive waste, (b) the environmental impacts of any increase in the amount of time that liquid radioactive waste must be stored at the MOX Facility site before it is disposed of, [and] (c) any alterations in the process for purifying and processing MOX Facility feedstock that may result from revival of the immobilization alternative. The relative costs and benefits of any new alternative means proposed for disposing of liquid radioactive waste should also be compared to the costs and benefits of the WSB, unless and until the DOE demonstrates the unreasonableness of the WSB alternative for disposing of waste from the MOX Facility.[9]

GANE further seeks the admission of Contention 22 (which is set forth in full below), stating as follows:

> FEIS Fails to Consider Immobilization as a Alternative
> to Mitigate Environmental Impacts of Surplus Plutonium Disposal.
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> The FEIS is inadequate to satisfy the requirements of NEPA because it fails to consider immobilization as an alternative for mitigation of the environmental impacts from surplus plutonium disposal. While the DOE dropped consideration of immobilization as an alternative in 2002, it recently revived the alternative and has proposed to spend $10 million investigating it in FY 2006. The FEIS should analyze whether immobilization is a suitable alternative for disposing of any portion of the 34 MT of surplus plutonium now designated for MOX fuel production, including 8.5 MT of plutonium that previously was assigned to immobilization.[10]

These contentions, and their supporting bases, are addressed by the NRC Staff below in Sections A and B.[11]

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[9] In addition to the text set forth above, Contention 21 is supported by Bases A-E. *See* February 28 Contentions, at 3-7.

[10] In addition to the text set forth above, Contention 22 is supported by Bases A-D. *See* February 28 Contentions, at 7-18.

[11] In its introductory section, GANE states that there is "no lawful basis" for the Board to approve the CAR. February 28 Contentions, at 1-2, *citing* 10 C.F.R. § 70.23(a)(7). GANE did not further pursue this point, and did not make it a part of either of its February 28 contentions. The NRC Staff thus does not address this statement, except to note that the authority to evaluate the environmental consequences of the proposed DCS action here rests with the NRC Staff. Unlike 10 C.F.R. Part 2 Subpart G hearings where the initial decision of the Board constitutes the environmental record of decision (subject to review by the Commission), in Subpart L hearings such as this one the NRC Staff director authorized to take the action prepares the environmental record of decision. *See* 10 C.F.R. § 51.102(b-c).

A. GANE Fails to Meet 10 C.F.R. § 2.714(a)(1) Standards for Admitting Late-Filed Contentions

As the party seeking admission of its two late-filed contentions, GANE bears the burden of showing that a balancing of the five 10 C.F.R. § 2.714(a)(1) factors (set forth below) weighs in favor of admission.[12] As discussed below, GANE has failed to meet this burden, and the Board should accordingly reject both of GANE's February 28 contentions.

All late-filed contentions are subject to a five-factor balancing test,[13] in which the following criteria are considered:

(i) Good cause, if any, for failure to file on 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 the development of 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 proceeding.

10 C.F.R. § 2.714(a)(1)(i)-(v). The Board should adhere to its November 19 Order and evaluate these five factors before addressing the substantive merits of the two February 28 contentions pursuant to the independent set of criteria found in 10 C.F.R. § 2.714(b). *See* November 19 Order, at 5 and 8. Such action would be consistent with the Commission's subsequent statement that,

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[12] *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000).

[13] NEPA-based contentions are not exempt from the application of the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1)(i)-(v). The Commission emphasized this point in its 1989 amendments to 10 C.F.R. § 2.714. *See* 54 Fed. Reg. 33,168, at 33,172, cols. 1-2 (August 11, 1989), *aff'd. sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990). *See also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 362-63 (1993).

pursuant to 10 C.F.R. § 2.714(a)(1)(i), the "first duty" of one submitting a late contention is to show "good cause to the Board" for doing so.[14]

The first of these factors – whether good cause exists to excuse a late filing – is entitled to the most weight.[15] As shown below, GANE has not established good cause for the late-filing of the two contentions at issue.

GANE briefly addresses the 10 C.F.R. § 2.714(a)(1)(i) factor. *See* February 28 Contentions, at 19. GANE asserts that good cause for its late-filed contentions exists because the contentions challenge the failure of the FEIS to address "changes in DOE's proposal for the MOX Facility." *Id*. These changes – such as the DOE's purported "reinstatement of the immobilization alternative" – are actions which GANE vaguely describes as occurring after the DEIS was issued [in February 2003]. *Id*. Significantly, GANE identifies no new information in the FEIS on which either Contention 21 or Contention 22 is based.

Moreover, in Basis C of Contention 22, GANE admits that nine months ago, in May of 2004, the DOE Secretary stated in a letter that the DOE was "conducting a preliminary investigation into a potential vitrification process" that could be used at the SRS whereby excess plutonium not suitable for fabrication into MOX fuel could be immobilized by surrounding it "with high-level waste glass." February 28 Contentions, at 14. GANE also cites a June 2004 report to Congress in whichthe DOE reiterated its intention to investigate such an immobilization option,[16] and a

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[14] *Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, at 44 and n.33 (2004).

[15] *See Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000).

[16] As to the amount of the DOE's surplus plutonium inventory which cannot be fabricated into MOX fuel, GANE claims that neither the May 2004 DOE letter nor the DOE's June 2004 report to Congress is clear on this point, and that DOE's statements on the subject in general are confusing. *See* February 28 Contentions, at 15-16. Even assuming *arguendo* the presence of such confusion, this would not authorize GANE to sit on its hands and wait nine months before submitting contentions.

November 2004 memorandum stating that the DOE had identified a location at the SRS for the proposed vitrification plant. February 28 Contentions, at 15-16. Clearly, this information became public months ago, and the DOE's February 2005 proposed budget documents merely request more funding to further explore its 2004 immobilization initiatives. If GANE wanted to litigate one or more contentions that information released by the DOE was inconsistent with the NRC's NEPA evaluation (as reflected in the DEIS), GANE had a Board-imposed duty in this proceeding to submit such contentions within 30 days of when the DOE issued the above-referenced 2004 documents. *See* April 30 Order, at 3-4 (¶ 8).

The April 30 Order on this point is consistent with the long-standing holding that under 10 C.F.R. § 2.714, an intervention petitioner has an "ironclad obligation" to carefully examine publicly available documents in order to "uncover any information that could serve as the foundation for a specific contention." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982); *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). *See also Ohio v. NRC*, 814 F. 2d 258 (6th Cir. 1987). The Commission specifically endorsed this holding in its 1989 rulemaking amending 10 C.F.R. § 2.714 (*see* 54 Fed. Reg. *supra*, at 33,170, col.3), and in referring this proceeding to the Board the Commission further stated that it would not be permissible to "simply wait for the Staff to issue its SER or EIS before formulating contentions." CLI-01-13, 53 NRC 478, 483 n.2 (2001), *citing* CLI-83-19, *supra*, 17 NRC at 1045-49. Accordingly, GANE did not have the option of waiting to see whether the FEIS would discuss possible changes in the DOE's surplus plutonium disposition program before submitting contentions.

GANE concludes its 10 C.F.R. § 2.714(a)(1) discussion by asking the Board to take into account "the fact that the issues raised by GANE could not have been raised before," because they "stem from fundamental changes that the government has made to its own proposal at the last minute." February 28 Contentions, at 20-21. As indicated above, GANE has established no such

fact with respect to any NRC actions, and there has been no change in the "proposal" regarding the MOX Facility.[17] The recent DOE budget proposals raise only the possibility of future change in the DOE's larger surplus plutonium disposition program, and apart from these items, the DOE documents GANE relies on were made public months ago. Thus, GANE's claim regarding last-minute changes has no basis. For all of the reasons stated above, the Board should find that Contentions 21 and 22 are untimely.

Absent a showing of good cause for its late filing, GANE must make a compelling case that the other four factors set forth in 10 C.F.R. § 2.714(a)(1)(ii)-(v) warrant admission of its February 28 contentions.[18] In evaluating these other factors, the second and fourth factors -- *i.e.*, the availability of other means to protect GANE's interest, and the ability of other parties to represent GANE's interest -- are the least important, and are thus not given as much weight as the third factor (the potential contribution to the development of a sound record) and fifth factor (the potential for broadening the issues and causing delay).[19]

Regarding the third factor, GANE was obligated to identify the precise issues it was addressing, and to summarize the proposed supporting testimony of its prospective witnesses.[20] Far from summarizing any supporting testimony, GANE states in addressing this factor that it has "not determined whether it will be necessary to call an expert witness to assist in presenting its

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[17] As discussed below in Section B, GANE has confused the NRC's proposed action with the DOE's connected actions, and has failed to show that the DOE budget proposals carry any weight in comparison to a DOE ROD or amended ROD.

[18] *See Private Fuel Storage, supra*, CLI-00-2, 51 NRC at 79.

[19] *See Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992).

[20] *See Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993).

case." February 28 Contentions, at 20. GANE thus places itself squarely within the Board's previous holding on this same 10 C.F.R. § 2.714(a)(1)(iii) issue, in which the Board ruled as follows:

> 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. ... GANE's meager assertion fails to make such a showing with regard to any of its late-filed contentions. ... GANE's late-filed contentions contain no supporting affidavits of experts that can be deemed the functional equivalent of the experts' proposed testimony.

November 19 Order, at 8 (citations omitted). Because GANE has again presented no summary of the expert testimony it intends to offer in support of its late-filed contentions, GANE has failed to show how it could potentially contribute to the development of a sound record, and has thus not met its burden regarding the 10 C.F.R. § 2.714(a)(1)(iii) criterion.

GANE has similarly failed to meet its burden regarding the 10 C.F.R. § 2.714(a)(1)(v) criterion – the potential for broadening the issues or delaying the proceeding. As GANE acknowledges, admitting either of GANE's February 28 contentions will clearly "broaden the issues and delay the proceeding, because there are no other issues currently pending" before the Board. February 28 Contentions, at 20.

As stated above, the second and fourth late-filed contention factors (the availability of other means to protect GANE's interest; and the ability of other parties to represent GANE's interest) are the least important 10 C.F.R. § 2.714(a)(1) criteria, and are not given much weight. Thus, while these two factors do not weigh against admitting GANE's February 28 contentions, they do not outweigh the other three admission criteria. Because GANE did not meet its burden of showing that the 10 C.F.R. § 2.714(a)(1)(i), (iii) and (v) criteria weigh in favor of admitting the contentions, neither of its February 28 late-filed contentions should be admitted.

B. GANE's NEPA Contentions Fail to Meet 10 C.F.R. § 2.714(b)(2) Requirements

GANE's proffered NEPA contentions are not admissible under the 10 C.F.R. § 2.714(b)(2) standards applicable to all contentions. In NRC proceedings, contentions must specify the particular issue of law or fact which the hearing petitioner seeks to litigate, and must contain: (1) "a brief explanation of the bases of the contention"; (2) "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing"; (3) references to specific documents or other sources of information within the petitioner's knowledge "on which the petitioner intends to rely" in establishing the contention's validity; and (4) sufficient information to show that a genuine dispute exists between the petitioner and the NRC applicant "on a material issue of law or fact."[21] 10 C.F.R. § 2.714(b)(2)(i-iii). To be admissible, a contention must also be one which, if proven, would entitle the petitioner to relief.[22]

Additionally, the following provisions apply specifically to the NEPA contentions which GANE now proffers:

> On issues arising under [NEPA], the petitioner shall file contentions based on the applicant's environmental report. The petitioner can ... file new contentions if there are data or conclusions in the ... [FEIS] ... that differ significantly from the data or conclusions in the applicant's document.

10 C.F.R. § 2.714(b)(2)(iii). Regarding this last "differ significantly" requirement, the Commission has stated that an amended NEPA contention "is not an occasion to raise additional arguments that

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[21] In its 1989 rulemaking amending 10 C.F.R. § 2.714, the Commission stated that disputes under the rule should be considered "material" if their resolution would "make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. *supra*, at 33,172, col.2. Hearing petitioners must make at least "a minimal showing that material facts are in dispute" and that further inquiry is thus appropriate. *Id*., at 33,171, col. 3. *See also Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

[22] *See* 10 C.F.R. § 2.714(d)(2)(ii); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 142 (1993), *reconsideration denied*, CLI-93-12, 37 NRC 355 (1993).

could have been raised previously," and reiterated the long-standing holding that NRC hearing participants have "an ironclad obligation" to examine publicly available documents with sufficient care to enable the participant "to uncover any information that could serve as the foundation for a specific contention."[23] Moreover, a licensing board's function is not to act as an editor, parsing and fine-tuning the NRC Staff's NEPA evaluations; rather, boards are to focus on whether the NEPA evaluation at issue has been shown to have "unduly ignored or minimized pertinent environmental effects" of the proposed action.[24]

As indicated above, the 10 C.F.R. § 2.714(b)(2) contention requirements were established in 1989. The revised contention rule raised the threshold for an admissible contention in order to "ensure that only intervenors with genuine and particularized concerns participate in NRC hearings," and to help prevent "serious hearing delays caused in the past by poorly defined or supported contentions."[25] To this end, the Commission has stated that the mere referencing of documents "does not provide an adequate basis for a contention."[26]

While these 10 C.F.R. § 2.714(b)(2) pleading requirements are not intended to force GANE to prove its case,[27] and while the proffered contentions may be viewed by the Board in a light

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[23] *In the Matter of Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002) (footnotes omitted). Although as indicated the Commission was discussing amended NEPA contentions, the Staff submits the same considerations apply equally to new late-filed NEPA contentions.

[24] *In the Matter of Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 431 (2003).

[25] *In the Matter of Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[26] *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000).

[27] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996); *Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004).

favorable to GANE, if any one of these requirements is not met for a given contention, that contention must be rejected. *See Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Moreover, to be admissible, a contention must pertain to one or more issues falling within the scope of the matters set forth in the notice of opportunity for hearing. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). The Commission reiterated that in this MOX proceeding, to be admissible, a proffered contention "must demonstrate that a genuine dispute exists" with DCS, and that "the dispute lies within the scope of the proceeding." *See* CLI-01-13, 53 NRC 478, 483 (2001).

With these considerations in mind, the NRC Staff addresses below the merits of GANE's newly proffered NEPA contentions and their supporting bases.

1. Contention 21. Environmental Impacts of Liquid Radioactive Waste Disposal if WSB Is Cancelled.

As stated above, pursuant to 10 C.F.R. § 2.714(b)(2)(iii), GANE is required to base its NEPA contentions on the DCS ER (or any revisions thereto), and GANE can now file new NEPA contentions only if there are data or conclusions in the FEIS that differ significantly from those in the amended ER.[28] GANE's Contention 21 does not allege that the DCS and NRC Staff NEPA evaluations differ in their respective analyses of the WSB impacts.

Instead, Contention 21 is based on speculation as to what DOE may later decide to do regarding the WSB. As stated in Basis D for Contention 21, the DOE "is considering other unnamed waste disposal alternatives" to building the WSB (perhaps involving the use of existing SRS facilities having the capability "to provide radioactive waste treatment"); further, the DOE "expects to make a decision" on the WSB sometime before October 1 of this year. February 28

[28] *See generally In the Matter of Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002); *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993).

Contentions, at 6. If the DOE decides to cancel its plans to build the WSB, it must publish an amended ROD announcing such a decision. *See* 10 C.F.R. § 1021.315 (requiring DOE to prepare a ROD and publish it in the Federal Register whenever DOE decides to take action on a proposal covered by an EIS). The DOE followed this procedure when it published its amended ROD in 2002 cancelling the planned construction and operation of a DOE immobilization facility at the SRS. *See* "Surplus Plutonium Disposition Program," 67 Fed. Reg. 19432 *et seq*. (April 19, 2002). Here, if the WSB is in fact cancelled and an amended ROD is published, the NRC would then determine whether the FEIS should be supplemented, or whether prior environmental analyses adequately address whatever WSB alternative may be selected.[29] Until the DOE clarifies its plans pertaining to the WSB, the NRC will not be in a position to make an informed decision on whether additional NEPA analysis would be warranted.

Bases B and C of Contention 21 merely serve to confirm that the liquid radioactive waste impacts associated with operating the MOX Facility have already been properly identified and evaluated in the FEIS and the underlying ER prepared by DCS. *See* February 28 Contentions, at 4-6. GANE claims in Basis E that the FEIS "must be considered incomplete unless and until DOE makes a decision about whether to build and operate the WSB" (*id*., at 7), but if the WSB is not cancelled GANE has provided no basis for finding the FEIS inadequate.

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[29] Under 10 C.F.R. § 51.92(a), supplementation is required when there are substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. Even if DOE opts not to construct the WSB and implements an alternate waste disposal pathway, a supplemental EIS will only be required if there is a "*seriously* different picture of the environmental impact of the proposed project from what was previously envisioned." *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996) (citations omitted). Thus, if the environmental impacts of providing waste treatment capabilities through existing facilities are similar to those evaluated for the WSB, no supplementation would be necessary.

GANE's legal premise for Contention 21 (set forth in Basis A) is faulty, because it confuses the NRC's proposed action with the DOE's connected actions.[30] GANE's error is most evident in its claim that "the DOE has made a substantial change to the proposed action, by suspending its plan to build and utilize the WSB." February 28 Contentions, at 4. The NRC has no licensing authority over the WSB, and the NRC's proposed action here for NEPA purposes is whether to authorize the construction and operation of the MOX Facility. *See* DEIS at p. 1-4, lines 8-13 and boxed text; FEIS at p. 1-6. Absent this proposed action, the NRC Staff would have had no reason to publish its DEIS and FEIS. The WSB's construction and operation is discussed separately in the DEIS and FEIS as a connected action (*see* DEIS at p. 1-7, lines 33-40, and p. 2-14, lines 10-12; FEIS at pp.1-9 and 2-14), and is not part of the proposal for which a construction authorization has been requested.

Furthermore, as stated above, a contention is admissible only if it pertains to an issue falling within the scope of the matters set forth in the notice of opportunity for hearing.[31] Here, the notice of opportunity for hearing acts to limit the scope of admissible contentions to those directly relating to whether the CAR for the MOX Facility should be granted. *See* 66 Fed. Reg. 19994, at 19995 col.2 (April 18, 2001). Therefore, even if the DOE budget documents had the force of an amended ROD with respect to the WSB, GANE's Contention 21 identifies no legal basis for admitting the contention into this proceeding.

Moreover, the February 2005 budget proposals on which GANE relies are insufficient to demonstrate a genuine dispute as to whether the WSB will later be constructed. The Commission

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[30] The Council on Environmental Quality (CEQ) regulations define connected actions either as ones which "cannot or will not proceed unless other actions are taken previously or simultaneously" or actions which "are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1).

[31] *See River Bend, supra,* CLI-94-10, 40 NRC at 51. *See also* CLI-01-13, *supra*, 53 NRC at 483.

has stated that whereas another federal agency's ROD constitutes a "tangible plan" requiring consideration, a news report regarding a possible future land-use change is too speculative to support a contention.[32] Here, because the DOE's 2002 amended ROD includes plans to construct the WSB, any contention based on the possibility that a future ROD will change this plan is too speculative to raise a genuine dispute over a material issue.

Basis E of Contention 21 identifies no valid reasons for admitting the contention. The present uncertainty about the WSB's status has not changed the DCS proposal now before the NRC. Uncertainties have surrounded the DOE's surplus plutonium disposition program for years,[33] but this provides no legitimate basis for delaying the CAR proceeding. Under the terms of the year 2000 agreement between the United States and the Russian Federation (referenced in n.3 of the February 28 Contentions), the two nations are obligated to implement their respective plutonium disposition programs "in parallel to the extent practicable" (Article II, ¶ 3), and the obligations of the two nations are "reciprocal." Article II, ¶ 4. Potential uncertainties over the pace of Russia's disposition program could thus affect the DOE's program. But the various uncertainties are rooted in the fact that the DOE's surplus plutonium disposition program is tied to the actions of a foreign nation, and involve the types of political questions that form no basis for a NEPA contention.[34]

For all of the above reasons, the Board should find that GANE's proffered NEPA Contention 21 is not admissible under the 10 C.F.R. § 2.714(b)(2) standards.

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[32] *Florida Power & Light Co.* (Turkey Point Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24 and n.18 (2001) (rejecting contention that an airport which might someday be located near the facility raised an admissible safety issue under 10 C.F.R. Part 54).

[33] For example, in discussing the MOX fuel program – a component of its larger surplus plutonium disposition program – the DOE in its 2002 amended ROD referenced the fact that the DOE could ultimately decide "not to proceed with either" the MOX Facility or the plutonium immobilization facility. *See* 67 Fed. Reg., *supra*, at 19435 col.1.

[34] *See Private Fuel Storage, supra,* CLI-04-4, 59 NRC at 40.

2. Contention 22. FEIS Fails to Consider Immobilization as a Alternative to Mitigate Environmental Impacts of Surplus Plutonium Disposal.

In filing this contention, GANE seeks a third bite at the same apple. *See* July 24 Order, at 6. As stated above, GANE can now file new NEPA contentions only if there are data or conclusions in the FEIS that differ significantly from those in the amended ER. GANE's Contention 22 does not allege that the amended ER and the FEIS differ in their respective analyses of the immobilization alternative, and as discussed below DCS and the NRC Staff have properly relied on previous DOE analyses of the immobilization alternative.

GANE has not identified a basis for requiring the NRC Staff to analyze the plutonium immobilization alternative anew in its FEIS. GANE acknowledges in Basis B of Contention 22 that in 1999, the DOE analyzed this alternative.[35] In its DEIS and FEIS, the NRC Staff referenced the SPDEIS analysis of the plutonium immobilization alternative, stating that because this alternative had already been evaluated by the DOE "a new NRC analysis of this alternative was not required." DEIS at 2-23; FEIS at 2-23. GANE fails to show that this tiering from the 1999 DOE analysis, and its incorporation by reference, was improper.[36] In fact, the CEQ regulations state that "agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues." 40 C.F.R. § 1502.20.[37] Moreover, the NRC's NEPA regulations specifically

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[35] *See* February 28 Contentions, at 9, *citing* the DOE's Surplus Plutonium Disposition Final Environmental Impact Statement (SPDEIS). *See also* SPDEIS, at Ch. 2 (analyzing alternatives), and Ch. 4 (analyzing environmental consequences).

[36] Tiering, as defined in the CEQ regulations, refers to "the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28. The CEQ regulations also authorize the use of incorporation by reference. *See* 40 C.F.R. § 1502.21.

[37] The Sixth Circuit has specifically approved the NRC's use of tiering. *See Kelley v. Selin*, 42 F.3d 1501, 1519-20 (6th Cir. 1995).

endorse the use of the tiering and incorporation by reference techniques. *See* 10 C.F.R. Part 51, Appendix A, Section 1(b). Accordingly, the DOE's evaluation of the environmental impacts of plutonium immobilization is properly relied upon in the Staff's DEIS and FEIS. In short, even if immobilization is viewed as a reasonable alternative to the DCS proposal, no further NEPA analysis of this alternative is now required.[38]

Moreover, Contention 22 identifies no topics related to the immobilization alternative that a supplement to the FEIS could evaluate, apart from those already studied by the DOE in previous NEPA analyses. Additionally, the only FEIS text cited in support of Contention 22 which relates to the immobilization alternative is the description of alternate feedstock material, with which GANE takes no issue. *See* February 28 Contentions, at 17-18. Furthermore, Contention 22 has the same flaws as Contention 21 to the extent that it similarly relies on speculation as to what action the DOE may later take. Contention 22's supporting bases are more specifically addressed below.

Basis A cites the NRC Staff's duty, pursuant to 10 C.F.R. § 51.92(a), to supplement a NEPA analysis if there have been "substantial changes" in the proposed action. February 28 Contentions, at 8. But as discussed in Section B.1 above, potential changes in the DOE's surplus plutonium disposition program do not equate to substantial changes in the DCS proposal now before the NRC, which the FEIS has evaluated. Moreover, potential DOE actions do not create bases for admissible contentions in this proceeding.

Basis B, focusing as it does on the history of the DOE's surplus plutonium disposition program, provides no information relevant to the admissibility of Contention 22 except in the following negative sense. Quoting text from FEIS p. 2-23 (reflecting the DOE's determination that the MOX-only approach "is the key to successfully completing the September 2000 agreement

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[38] NEPA case law establishes that "[a]gencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts." *Sierra Club v. U.S. Army Corps of Eng'rs,* 295 F.3d 1209, 1215 (11th Cir. 2002); *see also Churchill County v. Norton*, 276 F.3d 1060, 1074 (9th Cir. 2001).

between Russia and the United States")[39], GANE erroneously claims that "the DOE had failed to document" this finding in its April 2002 amended ROD. February 28 Contentions, at 13. On the contrary, as a basis for cancelling the immobilization portion of its disposition strategy, the DOE there made the following statement:

> ... [The] current disposition strategy involves a MOX-only approach, under which DOE/NNSA would dispose of up to 34 t [sic] of surplus plutonium by converting it to MOX fuel and irradiating it in commercial power reactors. Implementation of this strategy is key to the successful completion of the agreement between the U.S. and the Russian Federation discussed in Section I.A., above.

67 Fed. Reg., at 19435 col.1 (emphasis added). In claiming otherwise, GANE's Contention 22 is factually incorrect. Moreover, as discussed in Section B.1 above, unless the above-quoted ROD (April 2002) is superseded by a subsequent ROD, the MOX-only approach remains in effect. GANE admits that the FEIS analysis is consistent with the relevant RODs published to date by the DOE. *See* February 28 Contentions, at 13.

In Basis D, GANE claims that the DOE is now "actively pursuing immobilization as an alternative for disposing of surplus plutonium," and that the NRC must therefore "follow DOE's lead in resuming consideration of immobilization." February 28 Contentions, at 16-17. If immobilization is in fact pursued by the DOE, and its earlier RODs to the contrary are superseded by a new ROD, the NRC would then determine whether the FEIS should be supplemented. Until such time, the NRC will not be in a position to make an informed decision on whether additional NEPA analysis would be warranted. However, as noted by GANE (*see* February 28 Contentions, at 17), the environmental benefits of immobilization compared to MOX fuel production are set forth in SPDEIS Section 4.30. GANE fails to address the tiering provisions discussed above, and provides no explanation or justification as to why a further NEPA evaluation of the immobilization alternative would be warranted.

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[39] *See also* DEIS p. 1-2, lines 29-30, and FEIS p. 1-2 (both specifically citing DOE's 2002 amended ROD).

For all of the above reasons, the Board should find that GANE's proffered NEPA Contention 22 is not admissible under the 10 C.F.R. § 2.714(b)(2) standards.

CONCLUSION

As discussed above in Section A, GANE has failed to meet the late-filed contention requirements of 10 C.F.R. § 2.714(a)(1). Additionally, as shown above in Sections B.1 and B.2, GANE's February 28 contentions lack an adequate factual and legal basis, and thus fail to meet the requirements of 10 C.F.R. § 2.714(b)(2). The NRC Staff therefore requests that the Board reject both of the February 28 contentions.

Respectfully submitted,

/RA/

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Dated at Rockville, Maryland
this 10th day of March, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 0-70-3098-ML
	)	
Mixed Oxide Fuel Fabrication Facility	)	
(Construction Authorization Request)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO LATE-FILED NEPA CONTENTIONS SUBMITTED BY GEORGIANS AGAINST NUCLEAR ENERGY" in the above captioned proceeding have been served upon the following persons, by electronic mail, and by U.S. mail, first class, or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution, this 10th day of March, 2005.

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