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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

In the Matter of	March 10, 2005
DUKE COGEMA STONE & WEBSTER	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 01-790-01-ML

DCS OPPOSITION TO GANE'S LATE-FILED CONTENTIONS ON THE MOX FACILITY FINAL ENVIRONMENTAL IMPACT STATEMENT

Duke Cogema Stone & Webster LLC ("DCS") opposes Georgians Against Nuclear Energy's ("GANE") two late-filed contentions challenging the adequacy of the Final Environmental Impact Statement ("FEIS") for the Mixed Oxide Fuel Fabrication Facility ("MOX Facility").[1] On February 28, 2005, GANE filed two "new" contentions—Contentions 21 and 22—challenging the FEIS for the MOX Facility (hereinafter "GANE late-filed contentions").[2] Both contentions are based on information contained in the U.S. Department of Energy's ("DOE") recent budget requests to Congress.

1 NUREG-1767, *Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina* (Jan. 2005).

2 *Georgians Against Nuclear Energy's Late-Filed Contentions Regarding Final Environmental Impact Statement For Proposed Plutonium MOX Fuel Fabrication Facility* (Feb. 28, 2005).

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Contention 22 is not new. GANE raised this contention before when it challenged the Revised Environmental Report and the Draft EIS for the MOX Facility.[3] For Contention 22, the "new" facts that GANE uses to recycle its argument were available to GANE months ago. The Board should reject Contention 22 on this basis alone.

But the Board should also reject both contentions because: (1) a balancing of the factors governing admission of late-filed contentions leans in DCS's favor; and (2) the contentions are speculative, concern a facility and activities not subject to NRC licensing, and are directly contrary to long-settled U.S. Supreme Court precedent and Council on Environmental Quality ("CEQ") regulations interpreting the National Environmental Policy Act ("NEPA"). For these reasons, Contentions 21 and 22 are inadmissible and GANE's request must be denied.

Section I of this Opposition summarizes the legal standards that GANE must meet for admission of its contentions including: (a) the five factors set forth in 10 C.F.R. § 2.714(a)(1) to justify admission of late-filed contentions; and (b) the standards for admission of any contention—late or not—set forth in 10 C.F.R. § 2.714(b)(2), 10 C.F.R. § 2.714(d)(2)(ii), and NRC decisions interpreting these standards. Section II demonstrates why GANE's late-filed contentions do not meet these standards and must be rejected.

I. LEGAL STANDARDS

Before reaching the question of whether GANE's late-filed contentions meet the pleading requirements of Section 2.714(b)(2), the Board must first ascertain whether GANE has addressed each of the five factors in Section 2.714(a)(1) and has met its burden of demonstrating that, on

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[3] *See GANE Contentions on Revised Environmental Report* at 8 (Sept. 11, 2002), and *GANE Contentions on Draft EIS* at 12 (Mar. 27, 2003).

balance, those factors favor undertaking a determination of the admissibility of the late-filed contentions.

A. Late-Filed Contentions

10 C.F.R. § 2.714(a) identifies the following five factors governing the admission of late-filed contentions:

(i.) Good cause, if any, for failure to file on time.

(ii.) The availability of other means whereby the [Intervenor's] interest will be protected.

(iii.) The extent to which the [Intervenor's] participation may reasonably be expected to assist in developing a sound record.

(iv.) The extent to which the [Intervenor's] interest will be represented by existing parties.

(v.) The extent to which the [Intervenor's] participation will broaden the issues or delay the proceeding.

GANE has the burden to affirmatively address each of these five factors and of persuading the Board that, upon balancing the factors, they support the admission of the late-filed contentions.[4]

Of the five factors, the first and most important is whether GANE has demonstrated "good cause" for filing late.[5] On April 30, 2002, the Board issued an order setting forth a new discovery schedule. In that order, the Board stated, *inter alia*:

> 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. For example, in circumstances where the issuance of a Staff or DCS document legitimately undergirds a late-filed contention, the Board will

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[4] *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order (Denying Admission of Late-Filed Contentions), slip op. at 5 (Nov. 19, 2002).

[5] *Id.*

> consider a contention filed within 30 days of the issuance of that document as presumptively meeting the good cause requirement of section 2.714(a)(1)(i). Absent extraordinary circumstances, a late-filed contention filed beyond the 30-day period will be found to lack good cause for the untimely filing.[6]

If GANE is unable to show "good cause," it must make a "compelling showing" that the other four factors nevertheless weigh in favor of granting the late-filed request.[7] When balancing the other four factors, the second and fourth factors receive less weight than the third and fifth.[8]

B. Admission of Contentions

10 C.F.R. § 2.714(b)(2) requires that each contention consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the Intervenor is to provide the following information with respect to each contention:

(i.) A brief explanation of the bases of the contention.

(ii.) 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, together with references to those specific sources and documents of which the Intervenor is aware and on which the Intervenor intends to rely to establish facts or expert opinion.

(iii.) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application that the Intervenor disputes and the supporting reasons for each dispute, or if the Intervenor believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the Intervenor's belief. On issues arising under the National Environmental Policy Act ("NEPA"), the Intervenor shall file contentions based on the applicant's environmental report. The Intervenor can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement,

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6 *Duke Cogema Stone &* Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order, slip op. at 3 (Apr. 30, 2002) (emphasis added).

7 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order (Denying Admission of Late-Filed Contentions), slip op. at 7 (Nov. 19, 2002).

8 *Id.* at 10.

environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

(Emphasis added.) In addition, pursuant to section 2.714(d)(2)(ii), the contention cannot be one that, even if proven, would be of no consequence to the proceeding and entitle the petitioner to no relief.

The purposes of the basis-for-contention requirements are to help assure that: (1) the hearing process is not improperly invoked, for example to attack statutory requirements or regulations; (2) the other parties are sufficiently put on notice so that they will know at least generally what they will have to defend against or oppose; (3) the proposed issues are proper for adjudication in the particular proceeding – *i.e.,* generalized views of what applicable policies ought to be are not proper for adjudication; (4) the contentions apply to the proposed facility; and (5) there has been sufficient foundation assigned for the contentions to warrant further explanation.[9]

As the Board explained earlier in this proceeding, the contention pleading criteria set forth in Section 2.714(b)(2) are mandatory and must be scrupulously followed.[10] As the Commission has stated, "[i]f any one of these requirements is not met, a contention must be rejected."[11] The provisions of Section 2.714 were specifically adopted by the Commission "to

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9 *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), LBP-86-10, 23 NRC 283, 285 (1986) (*citing Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). *See Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931-33 (1987); *Sierra Club v. NRC*, 862 F.2d 222, 227-28 (9th Cir. 1988).

10 *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 421 (2001).

11 *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); *accord Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999); *see Final Rule, Rules of Practice for Domestic Licensing Proceedings; Procedural Changes in the Hearing Process, Statement of Considerations*, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

raise the threshold bar for an admissible contention" and prohibit "vague, unparticularized contentions" resulting from "notice pleading with the details . . . filled in later."[12] Further, it is the burden of the intervenor to come forward with contentions meeting the pleading rules, and a licensing board is not free to supply missing information or draw factual inferences on the intervenor's behalf.[13] As emphasized in the *Statement of Policy on Conduct of Adjudicatory Proceedings,* "[a] contention's proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2)."[14] A contention is only admissible if there is a genuine, legitimate dispute of material fact or law with respect to the issue in question.[15]

In addition to the contention pleading requirements of Section 2.714(b)(2), a number of other long-established principles limit the subject matter of contentions. As the Board previously noted, licensing boards have jurisdiction only over those matters that the Commission commits to them in the various hearing notices and referral orders that identify the subject matter of the hearing. A contention is therefore admissible only if it is within the scope of the proceeding outlined in the Commission's hearing notice and referral order.[16] Related to the MOX Facility proceeding, the Commission set forth certain criteria in the Notice of Opportunity

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12 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 334, 338.

13 *Duke Cogema Stone & Webster*, LBP-01-35, 54 NRC at 422.

14 *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

15 *See, e.g., Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).

16 *Duke Cogema Stone & Webster*, LBP-01-35, 54 NRC at 423-24 (emphasis added.).

for a Hearing.[17] The Commission stated that contentions are expected to focus on DCS's Construction Authorization Request, Environmental Report, and Quality Assurance Plan.[18]

II. BOTH CONTENTIONS ARE INADMISSIBLE

GANE has failed to demonstrate "good cause" for its delay in submitting late-filed Contention 22, and a balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1) warrants rejection of both Contention 21 and Contention 22. In addition, both contentions fail to satisfy the requisite standards for admission set forth in 10 C.F.R. § 2.714(b)(2). For the reasons discussed below, the Board should deny GANE's request to admit these late-filed contentions.

A. Contention 21 is Inadmissible

Contention 21 challenges the adequacy of the FEIS based on "new" information allegedly indicating that DOE has "suspended" the plan to construct the Waste Solidification Building ("WSB"), to be used to solidify liquid wastes from the MOX Facility. Specifically, GANE alleges:

> 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 Waste Solidification Building ("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." [FEIS] at xviii.[19]

GANE also claims that to comply with NEPA:

> the NRC must await the DOE's decision regarding what measures it will use to dispose of liquid radioactive waste from the MOX

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17 *Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority To Construct a Mixed Oxide Fuel Fabrication Facility*, 66 Fed. Reg. 19,994 (Apr. 18, 2001).

18 *Id.* at 19,996.

19 *GANE Late-Filed Contentions* at 2.

> 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.[20]

In support of this contention, GANE provides a single exhibit – a five-page excerpt from the DOE's National Nuclear Security Administration ("NNSA") FY 2006 Budget Request to Congress, dated February 2005.

As demonstrated below, Contention 21 does not survive the balancing of factors for admission of late-filed contentions. Furthermore, the information upon which GANE relies does not raise a genuine issue of material fact or law.

1. GANE has failed to meet the legal standards governing the admission of late-filed contentions for Contention 21

a. Good cause

DCS does not contest this factor in the context of Contention 21.

b. Other means available to protect GANE's interest

GANE cannot protect its interest with respect to this late-filed contention in the current proceeding or in any other proceeding because GANE's contention is so speculative. This factor, therefore, should weigh against admission of Contention 21.

c. GANE has not demonstrated that it will assist in developing a sound record on the contention

GANE has not demonstrated that its participation may reasonably be expected to assist in developing a sound record. To address this factor, an Intervenor "should set out with as much particularity as possible the precise issue it plans to cover, identify its prospective witnesses, and

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[20] *Id.*

summarize their proposed testimony."[21] GANE states that it has not determined whether it will be necessary to call an expert witness to assist in presenting its case. In particular, it states:

> GANE's participation in this proceeding may reasonably be expected to assist in the development of a sound record. At this juncture, GANE has not determined whether it will be necessary to call an expert witness to assist in presenting its case. GANE believes that the existing record that has been established by the DOE and the NRC shows that MOX Facility liquid radioactive waste disposal impacts are significant and must be addressed before construction of the MOX Facility may be authorized. In addition, the reasonableness and viability of the immobilization alternative can be determined from the history of the surplus plutonium disposition program, without resort to an expert witness. GANE respectfully submits that as a representative of the public whom NEPA is intended to serve, GANE should be permitted to show the manner in which internal inconsistencies, lack of clarity and unsound reasoning fatally undermine the NRC's and DOE's environmental decision-making process with respect to disposition of surplus plutonium.[22]

GANE does not identify any prospective witnesses, or summarize the proposed testimony of any witness. Nor does GANE identify any NRC precedent supporting its position. GANE simply submits information regarding DOE's delay in completing the WSB detailed design. GANE offers no support for its assertion that placing the WSB detailed design on hold is equivalent to canceling the WSB baseline associated with the MOX Facility. In this proceeding, the Board has previously rejected admission of late-filed contentions, finding that for this third factor, GANE had failed to make a compelling showing favoring admission, in part, because it had "totally failed to summarize the proposed testimony of its prospective witnesses" and provided "no

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21 *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986) (*quoting Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982)).

22 *GANE Late-Filed Contentions* at 20 (emphasis added).

supporting affidavits of experts that can be deemed the functional equivalent of the experts' proposed testimony."[23]

GANE should not be permitted to rely on its mere assertion that DOE's Budget Request creates a lack of clarity that undermines the NRC environmental decision-making process with respect to the MOX Facility. GANE has failed to show that this third factor favors consideration of Contention 21. Therefore, the Board must conclude that this factor weighs against admitting the late-filed contention.

d. Representation of GANE's interest by another party

GANE states that, to its knowledge, "there is no other party to this proceeding that has raised the concerns of Contentions 21 and 22."[24] DCS does not assert that other parties are representing GANE's interest; however, this and the second factor receive less weight.[25]

e. Admission of this contention will broaden the issues in this proceeding

GANE acknowledges that the admission of Contention 21 will broaden the issues and delay the proceeding because there are no other contentions currently pending before the Board. GANE alleges, however, that the issues stem from "fundamental changes that the government has made to its own proposal at the last minute," and that "any delay in the conclusion of this

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23 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order (Denying Admission of Late-Filed Contentions), slip op. at 8 (Nov. 19, 2002).

24 *GANE Late-Filed Contentions* at 20.

25 *Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730-31 (1982) (*citing South Carolina Electric and Gas Co.*(Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 894, 895 (1981)). In a number of other proceedings, applicants for NRC licenses and the NRC Staff have conceded this factor but successfully argued that, on balance, an Intervenor's late-filed contentions should not be admitted. *See, e.g., Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 610 (1988); *see also Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-89-04, 29 NRC 62, 70 (1989); *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), LBP-85-9, 21 NRC 524, 527-28 (1985).

adjudicatory proceeding is the fault of the federal government."[26] This is a misstatement of fact and a mischaracterization of DOE's statements in its NNSA Budget Request regarding the WSB. DOE has not changed the WSB baseline described in the FEIS, and, furthermore, the WSB is not subject to NRC licensing. The Board should weigh this factor against admitting the contention.

f. Conclusion

In summary, GANE has not demonstrated that, on balance, the factors in 10 C.F.R. § 2.714(a) favor admission. Therefore, the Board should not admit Contention 21 because the legal standards for late filing have not been met.

2. GANE has failed to meet the legal standards for admission of Contention 21

In addition to not meeting the legal standards for late-filed contentions, GANE has failed to raise a genuine issue of material fact or law justifying admission of Contention 21. Instead, GANE mischaracterizes the facts in order to fabricate an issue where there is none. Specifically, GANE alleges that "the DOE has suspended its plan to build the WSB,"[27] suggesting that DOE has canceled the WSB. This is not the case. Rather, NNSA simply has requested no additional funds for the WSB in FY 2006 because:

> The detailed design [for the WSB] is on hold pending evaluation of cost-effective alternatives, involving the use of existing facilities to provide radioactive waste treatment capabilities at the Savannah River Site. A decision is expected later in FY 2005.[28]

This clearly indicates that DOE has made no decision to cancel the WSB, and therefore, the WSB remains the baseline approach for the treatment of MOX Facility liquid wastes.

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26 *Id.* at 20-21.

27 *Id.* at 2-3.

28 *Id.*, Exhibit 1, at 531 (emphasis added.)

a. The referenced information in the NNSA Budget Request is speculative

The NNSA Budget Request does not trigger any legal obligation for the NRC under NEPA. The U.S. Supreme Court has embraced the doctrine that EISs need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities."[29] GANE mischaracterizes the information by suggesting that DOE has made a decision to cancel the WSB. The Budget Request—when given an honest reading—plainly shows that DOE has put "on hold" the WSB detailed design so that it may consider cost-effective design alternatives for treatment of liquid waste generated by the MOX Facility.

This statement does not imply that DOE has changed its baseline approach. The Environmental Report and FEIS present bounding waste characteristics. Delaying the final design of the WSB until the MOX Facility design and waste characteristics are finalized allows time to consider a more cost-beneficial approach for detailed design of the WSB. Accordingly, GANE's assertions regarding DOE's statements in its NNSA Budget Request provide a basis far too speculative to warrant admission of this contention.

In addition, the U.S. Supreme Court has held that an appropriations request does not trigger an agency's NEPA obligation to prepare an EIS.[30] In *Andrus v. Sierra Club,* three organizations brought suit alleging that a proposed curtailment in the budget of the National Wildlife Refuge System would "cut back significantly the operations, maintenance, and staffing of units within the system."[31] The organizations alleged that "the proposed budget curtailments

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29 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978); *see also, Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976) (noting that the "contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action").

30 *Andrus v. Sierra Club*, 442 U.S. 347, 349 (1979).

31 *Id.* at 352.

would significantly affect the quality of the human environment."[32] Section 102(2)(C) of NEPA requires a detailed statement on the environmental impacts of "proposals for legislation."[33] The organizations in *Andrus* essentially challenged a then recently-promulgated regulation by the CEQ excluding from the definition of "legislation," an agency's requests for appropriations.[34] The Supreme Court upheld the CEQ's regulatory interpretation and held that an appropriations request does not require an agency to prepare an EIS.[35] Under this holding, the NRC would not be required to prepare an EIS or to supplement an existing FEIS merely because another agency chose to defer funding for an ongoing project for a single year in order to consider potential changes to that project.

Moreover, the CEQ regulations continue to exclude budget requests from the definition of "legislation."[36] Thus, GANE's contention runs counter to established Supreme Court precedent and relevant CEQ regulations.

If DOE later takes action that results in new and significant information regarding environmental impacts, NRC could then consider whether it is required under NEPA to evaluate those impacts. Accordingly, the NRC has no current obligation under NEPA to supplement or revise the MOX Facility FEIS based on the information provided by GANE in Contention 21.

b. Discussion of GANE's bases for contention

GANE presents five bases for Contention 21. None of these provides an adequate basis for the contention. A contention simply alleging that some general, nonspecific matter ought to

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32 *Id.* at 353.

33 42 U.S.C. § 4332(2)(c).

34 *Andrus*, at 357 (*referencing* 40 C.F.R. § 1508.17).

35 *Id.* at 349.

36 40 C.F.R. § 1508.17. The Commission has adopted the definition in this section. *See* 10 C.F.R. § 51.14(b).

be considered does not provide the basis for an admissible contention.[37] GANE's assertion that the NRC must address information in the NNSA Budget Request indicating that DOE may evaluate using existing facilities for radioactive waste treatment is not sufficient to admit the contention. GANE's bases do not support admission of Contention 21 as a matter of fact or law because they raise no genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii). Each basis is discussed below:

- Introduction and Legal Requirements – In this section, GANE summarizes what it believes are the NRC's responsibilities under NEPA. GANE alleges that DOE has made a "substantial change" to the proposed action by "suspending" its plan to build and utilize the WSB and that the FEIS is no longer valid. This section fails to establish a basis for the contention because it mischaracterizes the documents it references and refers to information that is speculative and which does not trigger a legal obligation under NEPA. It also fails to raise a material issue because it mischaracterizes the information in DOE's Budget Request.

- Generation of Liquid Radioactive Waste from the Proposed MOX Facility – This section simply restates facts that are discussed in the FEIS acknowledging that the MOX Facility would generate liquid radioactive waste (*see, e.g.*, Section 4.3.4 of the FEIS). No new information is provided.

- WSB and Previous Proposal for Liquid Radioactive Waste Disposal – This section presents facts discussed in the FEIS. Based on the belief that DOE has cancelled the WSB, GANE alleges that the FEIS is inadequate because it does not address the liquid transuranic ("TRU") waste that will no longer be treated at the WSB, apparently because the FEIS relies on the expectation that solid TRU waste from the WSB is to be disposed of at the Waste Isolation Pilot Plant. No information provided by GANE indicates that DOE has changed its plans to solidify the TRU waste generated by the MOX Facility. Therefore, the issues regarding additional liquid TRU waste are unfounded.

- Proposal Changed in 2005 DOE Budget Request – This basis statement merely cites to and quotes the NNSA FY 2006 Budget Request. As discussed above, this information does not change the WSB as the baseline for treatment of liquid wastes from the MOX Facility.

- Inadequacy of FEIS to Support MOX Facility Construction Authorization – GANE alleges that the FEIS cannot be relied on to satisfy NEPA's requirement regarding "reasonably foreseeable environmental impacts" of the MOX Facility because of DOE's "declared uncertainty" about liquid waste treatment. If DOE proposes to and decides to modify its

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[37] *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).

plans for treating radioactive waste, it might then prepare appropriate NEPA documentation. However, GANE's use of the word "if" regarding a DOE decision in the future to "pursue some waste disposal alternative that is significantly different from the WSB," demonstrates that even GANE recognizes that its contention is speculative and that the NNSA Budget Request does not create an obligation under NEPA.[38] GANE's claim is not supported in fact and, therefore, fails to state a legal basis for the contention.

c. Conclusion

In summary, Contention 21 is speculative, without adequate basis, and inconsistent with case law and CEQ regulations. The Board should conclude, therefore, that it does not raise a genuine dispute on a material issue of law or fact in the MOX Facility proceeding.

B. Contention 22 is Inexcusably Late and is Otherwise Inadmissible

Contention 22 challenges the adequacy of the FEIS based on "new" information that the DOE Office of Environmental Management ("EM") has allegedly "revived" immobilization of surplus plutonium as a viable alternative to fabrication of MOX fuel.[39] The NRC specifically decided not to address immobilization as an alternative in the MOX Facility FEIS.[40] GANE claims that the DOE revival of this alternative requires the NRC to revise the FEIS. Specifically, GANE alleges:

> 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 [metric tons ("MT")] of surplus plutonium now designated for MOX fuel production, including 8.5 MT of plutonium that previously was assigned to immobilization.[41]

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38 *GANE Late-Filed Contentions* at 7.

39 *Id.*

40 NUREG-1767, Vol. 1, at 1-15.

41 *GANE Late-Filed Contentions* at 7.

In support of its contention, GANE includes five exhibits consisting of public DOE documents dating from May 2004 through February 2005.

As demonstrated below, GANE has not shown "good cause" and Contention 22 does not survive the balancing of factors for admission of late-filed contentions. Furthermore, the information upon which GANE relies does not raise a genuine issue of material fact or law. Accordingly, Contention 22 must be rejected.

1. GANE has failed to meet the legal standards governing the admission of late-filed contentions for Contention 22

GANE has not met its burden to demonstrate "good cause," nor has GANE made a "compelling showing" that, on balance, the factors favor admitting this late-filed contention.

a. GANE has failed to demonstrate good cause

As discussed above in Section I.A, the Board's April 30, 2002 Order required that all late-filed contentions be filed within 30 days of the initiating action, event, or document underlying the late-filed contention. GANE has not met this requirement because it had access to documents in mid-2004 that provided essentially the same information that GANE now asserts is "new information" for purposes of challenging the FEIS.

In its late-filed contentions, GANE includes references, Exhibit 3 (dated May 28, 2004) and Exhibit 4 (dated June 2004), which indisputably state that DOE was considering the use of vitrification—an immobilization technology—for surplus plutonium.[42] Exhibit 3, Attachment p. 1, states that "DOE is conducting a preliminary investigation into a potential vitrification

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[42] These documents would have been widely distributed to the public. As evidence that at least one of these documents was available to GANE months ago, the Alliance for Nuclear Accountability, a nuclear watchdog group, issued a *Top Ten DOE Radioactive Pork Report* on September 29, 2004. The Alliance discussed DOE's June 2004 Budget Request (GANE's Exhibit 4) in Section 8 of its report (*see*, www.ananuclear.org).

process that could be used at [Savannah River Site] ...." Exhibit 4, p. 4, contains the same language. On the basis of these documents, GANE could have filed a contention in the summer of 2004, asserting that DOE was considering "reviving" immobilization for the excess surplus plutonium.

Because GANE had access to earlier, more detailed information on substantially the same issue, and failed to raise a contention at that time, GANE has not met the 30-day time limit for late-filed contentions set forth in the Board's April 30, 2002 Order. Therefore, GANE has not demonstrated "good cause" for its untimely filing.

b. Other means available to protect GANE's interest

GANE cannot protect its interest with respect to this late-filed contention in the current proceeding or in any other proceeding because GANE's contention is so speculative. This factor, therefore, should weigh against admission of Contention 22.

c. GANE has not demonstrated that it will assist in developing a sound record on the contention

As discussed in Section II.A.1.c. above, GANE has not demonstrated that its participation may reasonably be expected to assist in developing a sound record. For the same reasons set forth in that Section, GANE fails to make a compelling showing that this third factor favors consideration of Contention 22.

d. Representation of GANE's interest by another party

DCS does not assert that other parties would represent GANE's interest. GANE states, to its knowledge, "there is no other party to this proceeding that has raised the concerns of Contentions 21 and 22."[43] DCS notes, however, that GANE has provided no "compelling

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[43] *GANE Late-Filed Contentions* at 21.

showing" why the NRC should afford this factor particular significance when balancing it against the other four factors, considering that GANE has failed to show "good cause" for the late filing.

e. Admission of this contention will broaden the issues in this proceeding

GANE acknowledges that the admission of its contentions will broaden the issues and delay the proceeding because there are no other contentions currently pending before the Board. GANE alleges, however, that the issues it raises stem from "fundamental changes that the government has made to its own proposal at the last minute," and that "any delay in the conclusion of this adjudicatory proceeding is the fault of the federal government."[44] In fact, this is a misstatement of fact and a mischaracterization of DOE's statements in its FY 2006 Budget Request regarding the Plutonium Disposition Facility conceptual design. DOE has not changed the project baseline for the surplus plutonium dedicated to the MOX Facility described in the FEIS. In any event, the late filing of this contention is due to GANE's delay because it could have raised this issue in the summer of 2004. Therefore, this factor weighs against the Board entertaining GANE's late-filed Contention 22.

f. Conclusion

In summary, GANE has not shown "good cause" and has not demonstrated that, on balance, the factors in 10 C.F.R. § 2.714(a) favor admission. Therefore, the Board should not admit Contention 22 because the legal standards for late filing have not been met.

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[44] *Id.* at 20-21 (emphasis added).

2. GANE has failed to meet the legal standards for admission of Contention 22

Even if the Board finds that Contention 22 meets the late-filed contention standards, the contention is not admissible. Not only does GANE mischaracterize information in DOE's EM Budget Request, and take it out of context, but the information has no relevance to the matter before the NRC—whether to issue a Construction Authorization for the MOX Facility. It is also speculative and inconsistent with Supreme Court precedent and CEQ regulations.

a. GANE mischaracterizes information in DOE's Budget Request

GANE has mischaracterized the information in DOE's Budget Request as it pertains to the EM Office and confuses the role of the NNSA and EM. GANE apparently believes that DOE is considering immobilizing some of the surplus plutonium slated for fabrication into fuel at the MOX Facility. DOE has not, however, "revived" the option for immobilization of the 34 MT of surplus weapons-grade plutonium that is suitable for MOX fuel. DOE's prior grounds for eliminating immobilization as an alternative for the 34 MT are still accurate and valid.

It is DOE's EM Office that is evaluating the use of immobilization to provide a disposition pathway for plutonium not subject to the agreement with the Russian Federation. The plutonium materials being evaluated for immobilization are either not suitable for fabrication into MOX fuel, or are not allowed under the agreement with Russia.

The very documents GANE includes as bases for Contention 22 demonstrate that DOE is not considering using an immobilization process for the surplus plutonium dedicated to the MOX Facility. Specifically, Exhibits 3, 4, and 5 make clear that DOE's consideration is related to

approximately 13 MT of surplus plutonium not suitable for the production of MOX fuel.[45]

Exhibit 3 states:

> [DOE is] conducting a preliminary investigation into a potential vitrification process that could be used at [Savannah River Site ("SRS")] to prepare excess plutonium that cannot be fabricated into MOX fuel for potential disposal in a deep geologic repository.[46]

Exhibit 4 states that:

> [W]ith 34 metric tons of surplus plutonium to be dispositioned through the MOX fuel program, approximately 16 metrics [sic] tons would be without a disposition path. However, about three metric tons of this surplus plutonium has subsequently been reclassified as programmatic need material, resulting in a total of up to approximately 13 metric tons of surplus plutonium that currently is without a disposition path. ... DOE is conducting a preliminary investigation into a potential vitrification process that could be used at SRS to prepare excess plutonium that cannot be fabricated into MOX fuel for potential disposal in a deep geologic repository.[47]

Exhibit 5 states that "EM is reviewing options to transfer or disposition the remaining fissile materials that cannot go into the mixed-oxide fuel process" and that its FY 2006 activities include:

> $10,000,000 for the initiation of the Plutonium Disposition Facility conceptual design. This facility will enable disposition of plutonium stored at Savannah River Site that cannot be converted into mixed oxide fuel.[48]

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45 *See* Exhibit 3, pg. 2, Exhibit 4, pg. 4, and Exhibit 5, pg. 2. DOE has long ago recognized that some inventory of surplus plutonium was not suitable for conversion into MOX fuel. *See DOE Record of Decision*, 68 Fed. Reg. 20,134, 20,136 n. 4 (Apr. 24, 2003).

46 *GANE Late-Filed Contentions*, Exhibit 3, letter from DOE Secretary Abraham, to Hon. John T. Conway, Chairman, Defense Nuclear Facilities Safety Board, dated May 28, 2004 (emphasis added).

47 *GANE Late-Filed Contentions*, Exhibit 4, *DOE First Report to Congress on Actions Taken by the Department of Energy in Response to the Proposals in the Defense Nuclear Facilities Safety Board's December 2003 Report to Congress on Plutonium Storage at the Savannah River Site*, at 4-5 (June 2004) (emphasis added).

48 *GANE Late-Filed Contentions*, Exhibit 5, *DOE FY 2006 Congressional Budget Request, Environmental Management*, p. 171 (Feb. 2005) (emphasis added).

GANE's mischaracterization of its own Exhibits does not create a genuine issue of material fact or law.

b. Contention 22 is essentially the same as Contentions 15 and 20

Contention 22 is essentially the same as Contentions 15 and 20, in which GANE argued that the Revised Environmental Report and Draft EIS unreasonably ruled out immobilization as an alternative strategy for disposing of weapons-grade plutonium.[49] The Board did not address the substance of Contention 15 because it was rejected on the basis of GANE's late filing.[50] In rejecting Contention 20, however, the Board found that GANE had failed to provide the required factual support or expert opinion for the assertion that the immobilization alternative remained a reasonable alternative to the proposed action.[51]

Further, the Board recognized that alternatives that can be implemented only after significant changes in government policy or legislation are not reasonable alternatives requiring consideration.[52] The Board noted that requiring the NRC to analyze the immobilization alternative would require a shift in foreign policy and that the NRC correctly concluded in the Draft EIS that a detailed analysis of immobilization was not required by NEPA.[53] The government's policy regarding dispositioning 34 MT through the MOX Facility is unchanged and GANE has provided no facts or expert opinions that indicate otherwise. For the same reasons discussed in the Board's earlier decision, the immobilization alternative still is not a

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49 *See GANE Contentions on Revised Environmental Report* at 8 (Sept. 11, 2002), and *GANE Contentions on Draft EIS* at 12 (Mar. 27, 2003).

50 *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum and Order (Denying Admission of Late-Filed Contentions), slip op. at 12 (Nov. 19, 2002).

51 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Memorandum (Denying Admission of Late-Filed Contentions), slip op. at 4 (July 24, 2003).

52 *Id at 4-5, citing NRDC v. Callaway*, 524 F.2d 79, 93 (2d Cir. 1975).

reasonable alternative for the surplus plutonium dedicated to the MOX Facility, and the Board should therefore reject GANE's third attempt to promote immobilization because it has already been addressed in this proceeding.[54]

c. Referenced information in DOE's Budget Request is legally insufficient, speculative and outside the scope of the MOX Facility proceeding

As discussed above in Section II.A.2.a, the Supreme Court in *Andrus* held that EISs are not required for budget requests. Existing CEQ regulations support this precedent. Under this precedent, the EM Budget Request would neither require DOE to prepare an EIS nor the NRC to supplement the MOX Facility FEIS.

The Supreme Court also has embraced the doctrine that EISs need not discuss the environmental effects of alternatives which are "deemed only remote and speculative possibilities."[55] DOE's funding request for the conceptual design of an immobilization facility—referred to in the DOE documents as the Plutonium Disposition Facility—is not a decision to

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53 *Id.* at 5.

54 Moreover, even for the 34 MT of plutonium slated for fabrication into MOX fuel, immobilization is not a reasonable alternative to be analyzed in detail by the NRC in its FEIS. As NRC explained in its FEIS, the two reasonable alternatives before the NRC for the 34 MT of plutonium are no action (*i.e.*, no NRC license or construction authorization) and the proposed action (*i.e.*, issuance of an NRC license and construction authorization). *See* FEIS, § 2, at 2-1. As the NRC explained in the FEIS, immobilization of the 34 MT is not a reasonable alternative to be analyzed in detail, because immobilization would not meet the purpose and need of the proposed action, and because immobilization would impact foreign policy matters by blocking implementation of the U.S. Agreement with Russia. *See* FEIS, § 2.33, at 2-23.

In essence, GANE is attempting to cause a review of the DOE NEPA process and DOE decisions, even though DOE's NEPA process and DOE's prior decisions are not subject to the NRC licensing proceedings for the MOX Facility. To further explain, if NRC took no action (*i.e.*, denied the construction authorization for the MOX Facility), the status quo would be maintained (*i.e.*, continued storage of the 34 MT of plutonium designated for MOX fuel fabrication). DOE then would develop proposals in lieu of an NRC-licensed MOX Facility for the 34 MT of plutonium, with appropriate DOE NEPA documentation. In this regard, DOE has already considered immobilization of the 34 MT in prior DOE NEPA documentation and previously decided, instead, to pursue MOX fuel fabrication for 34 MT of the surplus plutonium. GANE had a prior opportunity to participate in DOE's NEPA process. GANE cannot now use its contention before the NRC to attempt to achieve what it did not achieve during the prior DOE NEPA process.

55 *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978).

immobilize plutonium. Rather, EM's review of its options for plutonium disposition is speculative and does not create an obligation under NEPA.

This issue is, in any event, outside the scope of the MOX Facility proceeding because even if the EM budget request ripens into a decision, it would not affect the 34 MT of surplus plutonium dedicated to the MOX Facility. When and if DOE makes a decision regarding immobilization, DOE would determine whether it is obligated under NEPA to supplement its EISs related to surplus plutonium disposition. But even these changes by DOE would not affect the FEIS for the MOX Facility. Thus, DOE's affairs regarding surplus plutonium not intended for the MOX Facility are outside the scope of this proceeding.

d. Discussion of GANE's bases for Contention 22

GANE discusses four points as the basis for Contention 22. None raise a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii). Each basis is discussed below:

- Introduction and Legal Basis – GANE presents some basic NEPA principles and argues that the FEIS fails to address a significant change in DOE's proposal for surplus plutonium disposition, which affects the consideration of alternatives for the MOX Facility. For the reasons discussed above, GANE provides no new information that would change the NRC's conclusions in the FEIS.

- History of Consideration of Immobilization as an Alternative – GANE recycles facts about the historical policy changes regarding immobilization as an alternative to MOX fuel fabrication. The discussion regarding the U.S.-Russian Agreement is not new. Even if DOE elects to pursue immobilization as a method of surplus plutonium disposition for the 13 MT not suitable for the MOX process, that decision would not (without further foreign policy changes) reassign any of the 34 MT currently dedicated to the MOX Facility. The NRC would neither be involved in nor have NEPA responsibilities associated with a DOE decision related to materials outside the scope of the MOX Facility. Further, the NRC's conclusions in the FEIS on this issue do not differ from the Draft EIS. GANE previously filed similar contentions: (1) Contention 15, which alleged that the Revised ER failed to discuss immobilization as an alternative to processing the majority of the surplus plutonium at the MOX Facility, was rejected on the basis that it was filed late without good cause, and (2) Contention 20, discussed above, was rejected as unsupported. The Board should not admit yet another substantially similar contention this late in the proceeding.

- Revival of Immobilization Alternative – GANE refers to DOE reports that indicated it was investigating a potential vitrification process for dispositioning 13 MT of surplus plutonium that is not suitable for MOX fuel. The DOE's FY 2006 Budget Request only indicates that DOE is proposing funding to further investigate design concepts for a Plutonium Disposition Facility. Accordingly, GANE's contention is speculative and does not make the Budget Request ripe for NEPA consideration. GANE also states that "DOE has contradicted itself and created confusion" by not clarifying whether any of the surplus plutonium slated for MOX fuel may now be immobilized.[56] In spite of GANE's apparent confusion, the documents referenced as the basis for GANE's contention are clear on the point that immobilization is being considered only for the surplus plutonium that is not suitable for the MOX Facility. Simply because some of the DOE documents may contain information that GANE finds confusing does not provide a basis for admitting a contention. The Commission has noted that its boards do not sit to "flyspeck" environmental documents or to add details or nuances.[57] The NRC is clear that the "FEIS is based on a total of 34 MT (37.5 tons) of surplus plutonium" (FEIS at 1-6). The NRC is not obligated to clarify the other amounts of surplus plutonium in DOE's Plutonium Disposition Program discussed in various DOE documents.

- Immobilization Must Be Considered as an Alternative to MOX Production – DOE consideration of immobilization referenced by GANE is outside the scope of the MOX Facility proceeding. Furthermore, the only reason that DOE appears to be considering immobilization in the future is to disposition surplus plutonium that is not suitable for and not dedicated to the MOX Facility.[58] That some of the 34 MT now dedicated to the MOX Facility was originally slated for immobilization is also outside the scope of this proceeding. Therefore, the NRC conclusions in the FEIS regarding immobilization, and whether it is a reasonable alternative, remain unchanged by current DOE actions.

e. Conclusion

Contention 22 presents no genuine dispute on a material issue of law or fact. Thus, even if the Board found "good cause" for GANE's late filing, Contention 22 must be rejected as legally insufficient, without an adequate basis, and outside the scope of the proceeding.

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56 *GANE Late-Filed Contentions* at 16.

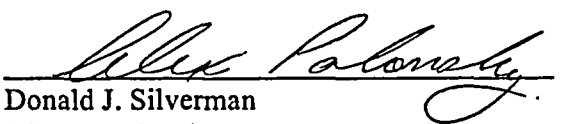
57 *See Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-04, 53 NRC 31, 71 (2001).

58 Even when DOE abandoned the "hybrid approach" for plutonium disposition, it was aware that there would be some surplus plutonium that could not be processed through the MOX Facility. *See DOE Record of Decision*, 68 Fed. Reg. 20,134, 20,136 n.4 (Apr. 24, 2003).

III. CONCLUSION

GANE has failed to demonstrate "good cause" for its delay in submitting late-filed Contention 22, and a balancing of the factors set forth in 10 C.F.R. § 2.714(a)(1) warrants rejection of both Contentions 21 and 22. In addition, GANE's late-filed contentions fail to satisfy the standards for admission set forth in 10 C.F.R. § 2.714(b)(2). Accordingly, DCS respectfully requests that the Board deny GANE's request to admit its late-filed contentions.

Respectfully submitted,



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Dated March 10, 2005

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

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "DCS Opposition To GANE's Late-Filed Contentions On The MOX Facility Final Environmental Impact Statement" were served this day upon the persons listed below by electronic and First Class Mail.

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