March 22, 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 GANE'S MOTION AND REPLY

INTRODUCTION

On March 17, 2005, Georgians Against Nuclear Energy (GANE) moved for leave to reply[1] to the March 10 responses filed by the staff of the Nuclear Regulatory Commission (NRC Staff),[2] and by Duke Cogema Stone & Webster (DCS). These March 10 responses opposed the admission of two late-filed contentions submitted by GANE on February 28, 2005,[3] 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).

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[1] *See* "[GANE's] Motion For Leave to Reply to DCS and NRC Staff Responses to Late-Filed Contentions Regarding Final Environmental Impact Statement For Proposed Plutonium MOX Fuel Fabrication Facility" (GANE's Motion). Attached to GANE's Motion was "[GANE's] Reply to DCS and NRC Staff Responses to Late-Filed Contentions Regarding Final Environmental Impact Statement For Proposed Plutonium MOX Fuel Fabrication Facility" (GANE's Reply).

[2] *See* "NRC Staff's Response to Late-Filed NEPA Contentions Submitted by Georgians Against Nuclear Energy," at 1 (March 10, 2005) (Staff Response to Late-Filed Contentions).

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

Pursuant to an unpublished Atomic Safety and Licensing Board (Board) order dated March 18, 2005, the NRC Staff today submits this combined response to GANE's Motion and to GANE's Reply. As set forth below in Section A, because GANE's Motion is both untimely, and not otherwise adequately supported, it should be denied. As discussed below in Section B, based on a consideration of the merits of GANE's Reply, the Board should still reject both of the late-filed contentions.

DISCUSSION

A. GANE's Motion Is Untimely and Not Adequately Supported

The rule governing motions practice states in relevant part that the party filing a motion "shall have no right to reply, except as permitted by the presiding officer." 10 C.F.R. § 2.730(c).[4] This requirement is incorporated by reference into Subpart L proceedings. *See* 10 C.F.R. § 2.1237(a). The Board previously addressed the subject of reply pleadings in this proceeding, stating that a motion for leave to file such a pleading must be in the Board's hands within "at least three business days" from when the response triggering the reply motion was filed. "Memorandum and Order" (unpublished), dated July 17, 2001, at 6 (emphasis in original). As stated above, the NRC Staff and DCS responses at issue were filed on March 10, 2005. Accordingly, to be timely, GANE's Motion had to be filed no later than March 15, 2005. Prior to the day GANE's Motion was filed, GANE's counsel gave no notice she would be seeking leave to reply, and GANE's Motion identifies no reason or excuse for the late filing.

Instead, contrary to 10 C.F.R. § 2.730(c), GANE claims that with respect to filing "replies to responses to contentions, it is well-established that petitioners are entitled to an opportunity to reply." GANE's Motion, at 1-2, *citing Houston Lighting and Power Co.* (Allens Creek Nuclear

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[4] While the NRC in 2004 amended its 10 C.F.R. Part 2 adjudicatory rules (*see* Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004)), the new rules apply only to proceedings noticed on or after February 13, 2004. The new rules therefore do not apply here, and the former Part 2 rules are accordingly referenced throughout this filing.

Generating Station, Unit 1), ALAB-565, 10 NRC 521, 525 (1979); and *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981). As discussed below, neither of these cases provides persuasive authority for granting GANE's Motion.[5]

Significantly, neither case pertains to the admissibility of late-filed contentions, and they pre-date the 1989 amendments to the 10 C.F.R. § 2.714 rule governing contentions. As discussed in the Staff Response to Late-Filed Contentions, the substantive contention requirements GANE must meet – 10 C.F.R. § 2.714(b)(2) and (d)(2) – were the ones added to the rule in the 1989 rulemaking, which acted to raise the threshold for an admissible contention.[6] Unlike before, a contention filer must now put all his or her cards on the table. *Cf. Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991) (one seeking leave to reply must anticipate potential arguments and frame their initial pleading accordingly). Moreover, GANE was given ample time following issuance of the FEIS to frame its late-filed contentions, and submit them to the Board for consideration. Thus, the Appeal Board's 1981 statement on which GANE seemingly relies establishes no right of reply here. *See Allens Creek, supra,* 10 NRC at 525 (before ruling on a contention's admissibility, the contention's proponent "must be given some chance to be heard"). GANE has certainly been given such a chance here.

Furthermore, the Appeal Board's statement quoted above was only *dicta*, because no legal

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[5] LBP-81-18 simply quotes excerpts from ALAB-565, and is not further discussed. *See* 14 NRC 71, at 73.

[6] *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). For example, contentions must now 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." 10 C.F.R. § 2.714(b)(2)(I-iii).

authority supporting it was cited, and the finding was characterized as being "somewhat tentative." *Id.,* at 525 n. 17. The Appeal Board's actual holding was that in dealing with objections to contentions, each licensing board must "fashion a fair procedure," following the cardinal rule that "each side must be heard." *Id*., at 524 (citations omitted). Here, each side has now been heard with respect to GANE's February 28 contentions. Additionally, as indicated above, this Board met the Appeal Board's fairness requirement when it established a process for dealing with reply pleadings. *See* "Memorandum and Order" (unpublished), dated July 17, 2001, at 6. GANE's three-business-day window in which to seek leave to reply closed on March 15, and in filing GANE's Motion on March 17, GANE identified no reason for the Board to waive its three-day requirement.

The NRC Staff therefore concludes that GANE's Motion should be denied, because it is both untimely, and not adequately supported.

B. GANE Fails to Satisfy the Requirements For an Admissible Late-Filed Contention

In the Staff Response to Late-Filed Contentions, the NRC Staff concluded that neither Contention 21 nor Contention 22 satisfied the late-filed contention requirements of 10 C.F.R. § 2.714(a)(1) or the general contention standards of 10 C.F.R. § 2.714(b)(2).[7] As requested by the Board in its March 18, 2005 Order, the Staff addresses the merits of GANE's Reply below. The Staff concludes that the Board should still reject both of the late-filed contentions.

1. Contention 21 is inadmissible.

In its reply, GANE fails to rebut the Staff's conclusion that Contention 21 is inadmissible. First, GANE overstates the import of the Department of Energy's (DOE's) budget request by asserting that the "DOE has suspended its plan to build the Waste Solidification Building" (WSB). GANE's Reply, at 2. To the contrary, DOE simply stated that the WSB "detailed design is on hold." February 28 Contentions, at 6. Completing detailed designs of the WSB at a later date is a far cry

[7] *See* Staff Response to Late-Filed Contentions, at 1.

from abandoning the WSB entirely. The remainder of GANE's arguments that the FEIS is inadequate flow from the false assumption that "on hold" equals canceled. Accordingly, Contention 21 is inadmissible because it lacks sufficient information to demonstrate that a genuine dispute exists between GANE and DCS.

Second, GANE fails to support its conclusion that the FEIS is inadequate. Although GANE formulates the question before the Board as whether "GANE has submitted sufficient evidence to show the existence of a genuine dispute . . . regarding the adequacy of the FEIS to address the environmental impacts of the high-alpha liquid radioactive waste stream," GANE fails to support its affirmative answer. GANE's Reply, at 3. GANE has submitted no information pertaining to any new or significant environmental impacts. Rather, GANE presumes, without any support or expert opinion, that the environmental impacts assessed in the FEIS will be different (and greater) if the WSB's detailed design is put on hold. *Id*.; *see also*, Staff Response to Late-Filed Contentions, at 14. Because GANE did not provide any new information on different environmental impacts beyond those evaluated in the FEIS, GANE has failed to raise a genuine dispute regarding the adequacy of the FEIS.

Third, GANE also takes issue with the timing of the Staff's decision regarding supplementation, arguing that the Staff has a "legal obligation to ensure that all of the environmental impacts" are addressed "<u>before</u> construction is authorized." GANE's Reply, at 5 (emphasis in original). To the contrary, the National Environmental Policy Act (NEPA) has long been construed as requiring only that an agency make a good faith effort to predict reasonably foreseeable environmental impacts, and that in doing so it should apply a "rule of reason" after taking a "hard look" at potential environmental impacts; further, an agency need not have complete information on all issues before proceeding. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989). Here, the Staff fulfills its NEPA obligations through its FEIS discussion of the environmental impacts of liquid radioactive waste management activities that will be necessary in

implementing the proposed action. *See e.g.*, FEIS at 2-14 and 4-26. Because GANE has not submitted any new information or expert opinion that suggests the discussion of liquid radioactive waste impacts in the FEIS is inadequate, Contention 21 must be rejected.

Fourth, GANE argues that the Staff "misses GANE's point that part of the proposed action is the generation of a large quantity of high-alpha radioactive waste, whose impacts must be addressed." GANE's Reply, at 5. But, as stated above, the Staff addresses the impacts of the high-alpha radioactive waste in the FEIS. *See e.g.*, FEIS at 2-14 and 4-26. Conceptually, the WSB can be understood as a grouping of waste treatment processes and capabilities to handle high-alpha radioactive waste. *See* FEIS, at 2-14 to 2-19. If the DOE can achieve the same level of waste reduction and solidification by adapting or sharing existing capabilities at other facilities while keeping the environmental impacts within the range of impacts evaluated in the FEIS, the FEIS remains adequate.[8] *See* Staff Response to Late-Filed Contentions, at 14. As GANE would have it, every design change in a project—even if that change results in similar or reduced environmental impacts—would render the existing NEPA analysis inadequate. Such a conclusion would strip NEPA of its "rule of reason." GANE has simply failed to allege, with adequate support or expert opinion, that the Staff has ignored or minimized pertinent environmental effects of the proposed action.

For all the above reasons as well as those contained in the Staff's Response to GANE's Late-Filed Contentions, the Board should find that GANE's proffered NEPA Contention 21 is not admissible.

2. Contention 22 is inadmissible.

In its reply, GANE fails to rebut the Staff's conclusion that Contention 22 is inadmissible. Conspicuously, GANE does not even address the arguments made by the Staff opposing

[8] Later in its reply, GANE explicitly acknowledges the concept that an agency may rely on bounding impacts. *See* GANE's Reply, at 11.

Contention 22. *Compare* GANE's Reply, at 8-12 *with* Staff Response to Late-Filed Contention, at 17-20. Specifically, the Staff argued that even if the immobilization alternative is revived, DOE's prior analyses of this alternative—which are discussed and incorporated in the FEIS—remain valid. Staff Response to Late-Filed Contentions, at 17-18. The arguments that GANE does make are addressed below.

First, GANE attempts to draw a distinction between its proposed Contention 22 and a previous immobilization contention rejected by the Board. GANE's Reply, at 10. This distinction makes no difference because GANE fails to address the underlying rationale for excluding the immobilization alternative in both instances. Specifically, the Staff rejected immobilization as a reasonable alternative because the MOX-only approach "is the key to successfully completing the September 2000 agreement between Russia and the United States." *See* Staff Response to Late-Filed Contentions, at 18-19; February 28 Contentions, at 13. Moreover, the Staff concludes that the immobilization alternative is not reasonable because it does not render the plutonium proliferation-proof. FEIS, at 1-2. Thus, even if DOE ultimately determines that immobilization is technologically feasible, GANE has provided no information or expert opinion to contradict the Staff's conclusion in the FEIS that immobilization is not a reasonable alternative.

GANE also argues that its proposed Contention 22 meets the "good cause" criterion of the late-filed contention standard since it "reasonably waited until DOE announced its intention to go ahead with a conceptual design for an immobilization facility" before filing a contention. GANE's Reply, at 12. GANE attempts to explain its failure to raise the issue in a timely manner by drawing a distinction between the "preliminary investigations" of the 2004 letters and the "conceptual

design" in DOE's 2006 Budget.[9] *Id*. But, significantly, GANE neglects to mention the November 2004 Memorandum upon which it also relied. *Compare* GANE Reply, at 12 *with* February 28 Contentions, at 15. As the Staff previously noted, GANE has an "ironclad obligation" to carefully examine publicly available documents to uncover information underlying a late-filed contention. *See* Staff Response to Late-Filed Contentions, at 8; Board "Memorandum and Order", at 3-4 (¶ 8) (April 30, 2002) (unpublished). Thus, GANE failed to raise the issue in a timely fashion and the contention must be rejected.

Lastly, GANE argues that the Staff holds inconsistent positions regarding the appropriate timing of Contention 22 and the speculative nature of DOE's budget proposal. GANE's Reply, at 13. To the contrary, the Staff's position is clear: research and development of immobilization technology does not render immobilization a reasonable alternative to MOX fuel nor render the FEIS inadequate. However, assuming *arguendo* that DOE efforts to study immobilization constitute new information that invalidate the FEIS, such information was available months ago. Thus, GANE's Contention 22 is untimely.

For all the above reasons as well as those contained in the Staff's Response to GANE's Late-Filed Contentions, the Board should find that GANE's proffered NEPA Contention 22 is not admissible.

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[9] Although GANE attempts to distinguish between investigation and design, GANE states in its reply that DOE "has proposed to spend $10 million investigating [plutonium immobilization] in its FY 2006 budget request." GANE Reply, at 8 (emphasis added). In the Staff's view, DOE's Office of Environmental Management is simply seeking funds to explore plutonium immobilization technology separate and distinct from the National Nuclear Security Administration's efforts to dispose of surplus plutonium by converting it to MOX fuel. Indeed, the funding request to explore immobilization technology is in Volume 5 of DOE's 2006 budget, while the surplus plutonium disposition program is discussed in Volume 1.

CONCLUSION

As discussed above in Section A, GANE's Motion should be denied because it is untimely and not adequately supported. As shown above in Section B, GANE's Reply contains no new information supporting the admission of GANE's February 28 contentions. Therefore, both Contention 21 and Contention 22 should be rejected.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 22nd day of March, 2005

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO GANE'S MOTION AND REPLY" 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 22nd day of March, 2005.

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