RAS 4068

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
	February 26, 2002

DCS' ANSWER IN OPPOSITION TO
INTERVENORS' MOTION TO POSTPONE DISCOVERY

On February 22, 2002, Georgians Against Nuclear Energy and Blue Ridge Environmental Defense League ("Intervenors") filed a Motion to Postpone Discovery ("Motion") in this proceeding for construction authorization of the Mixed Oxide Fuel Fabrication Facility ("MOX Facility"). Duke, Cogema Stone & Webster ("DCS") hereby files its answer in opposition to the Motion.

I. Background

The Department of Energy ("DOE") initially selected a hybrid approach for disposition of surplus plutonium involving construction of both an immobilization facility and a MOX Facility. By letter dated January 24, 2002, counsel for DCS filed a letter notifying the Licensing Board and the parties that the DOE had determined that some of the material previously intended for immobilization will instead be processed by the MOX Facility and fabricated into MOX fuel

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(this material is called "alternate feedstock"). This letter also notified the Board and parties that, as a separate matter, DOE was also evaluating possible alternatives for processing the MOX Facility's high-alpha liquid waste stream by the Savannah River Site ("SRS"), and might decide to construct a new facility to solidify that waste.[1] The letter went on to state:

> It is anticipated that DOE will direct DCS to alter the MOX Facility design to accommodate this material. Some revisions to the CAR [Construction Authorization Request] and Environmental Report ("ER") ultimately will be required to reflect the receipt and processing of these additional feed materials.
>
> DCS is currently reviewing the implications of the proposed changes. However, it does not believe that they should have any impact on the schedule for discovery on the existing, admitted contentions. Most of those contentions are independent of, and will not be affected by, the anticipated MOX Facility design changes. Therefore, DCS believes that the hearing on those contentions can and should proceed in accordance with the current schedule. Depending on the extent of the changes, some modification in the overall hearing schedule on the remaining contentions that are related to the anticipated MOX Facility design changes may be warranted.

Subsequently, the Licensing Board issued a Memorandum and Order (February 12, 2002) establishing a schedule for discovery in this proceeding and directing the staff to identify any changes in the schedule for issuance of its reports.

By letter dated February 14, 2002, counsel for the NRC staff notified the Board and parties that there would be a delay in issuance of the draft environmental impact statement ("DEIS") but not the draft safety evaluation report ("DSER") for the MOX Facility. This letter referred to the letter dated January 24 from counsel for DCS, and stated that the delay in issuance of the DEIS was due to the changes in the design of the MOX Facility to accommodate the alternate feedstock and the construction of a new facility to solidify the high-alpha waste stream.

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[1] DOE has now decided to pipe the high-alpha liquid waste to a stand-alone solidification facility to be located off of the MOX Facility site but on the SRS. The stand-alone facility will be used for MOX Facility and Pit Disassembly and Conversion Facility wastes.

In particular, the staff's letter mentioned that additional chemical processing equipment and other design changes would be needed to handle the alternate feedstock material. The staff's letter also stated that the staff will soon be providing the Board with a more definite schedule for issuance of the DEIS.

Subsequently, Intervenors filed their Motion to Postpone Discovery. As the basis for the Motion, Intervenors stated that at a meeting on February 13, DCS announced several major changes to the MOX production process, that the schedule for completion of the safety and environmental reviews would be delayed by at least 11 months, and that it would constitute a gross waste of the parties' time and resources to proceed with discovery under the schedule imposed by the Board's February 12, 2002 Memorandum and Order.[2]

For various reasons, DCS believes that the discovery schedule set by the Board should not be postponed as a result of the changes in the schedule for issuance of the DEIS. DCS believes that the current dates for identification of experts, service of interrogatories, and conduct of depositions on the existing, admitted contentions should be retained. Although DCS recognizes that there should be an opportunity for discovery on the supplements to the ER and CAR and the DEIS and that the final date for discovery will need to be extended to account for the delays in the staff's final environmental impact statement ("EIS") and final safety evaluation report ("SER"), an extension is not a valid reason for postponing *commencement* of discovery. Furthermore, until the NRC staff provides the Board with the revised schedule for issuance of the DEIS, there is no basis for any schedule extension.

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[2] Motion, pp. 1-2. Footnote 4 of the Motion also states that delay may occur because DOE needs to supplement its environmental impact statements. It is our understanding the DOE has not yet determined whether it needs to supplement its reports.

II. Intervenors' Motion Provides No New Material Information that Would Warrant the Board to Change the Discovery Schedule

Prior to issuance of the discovery schedule on February 12, 2002, counsel for DCS had informed the Board and parties of the change in DOE's plans for plutonium disposition, changes in the design to accommodate the alternate feedstock, the possibility of construction of a solidification facility for the high-alpha wastes, the need for supplements to the ER and CAR and the likely need to modify the overall hearing schedule on those contentions that are affected by the changes. Thus, at the time the Board issued the discovery schedule, the Board was aware of most of the "new information" cited by the Intervenors in their Motion.

The only new information cited by the Intervenors' Motion is the fact that the NRC staff has decided to delay issuance of the DEIS, and that the delay in the staff's final EIS and SER might be 11 months (and possibly longer).[3] However, based upon the letter by DCS' counsel, it was obvious that the schedule for the staff's review would be affected by the need for DCS to issue supplements to the CAR and ER to account for the design and process changes. The only unknown was the extent of the overall impact on the staff's schedule.

DCS does not believe that delay in issuance of the DEIS is material to the commencement of discovery.[4] The Commission's Referral Order (CLI-01-13) established an

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[3] The Motion, p. 3, also alleges that "one of the members of the DCS consortium, Duke Engineering & Services ('Duke E&S'), is being sold to Framatome ANP, a French corporation," and it questions whether Framatome's involvement in the MOX Facility violates the prohibition in the Atomic Energy Act, 42 U.S.C. § 2133(d) against foreign ownership of nuclear facilities. This allegation is both factually and legally incorrect. First, Framatome ANP will not contain any ownership interest in DCS. Second, 42 U.S.C. § 2133(d) does not prohibit foreign ownership of materials facilities, but only production and utilization facilities. Finally, there are no admitted contentions regarding foreign ownership, and therefore discovery on the admitted contentions should not be affected by the actions of Framatome ANP.

[4] The Motion, p. 5, states that issuance of the final EIS and SER is a prerequisite for a hearing to go forward. Whatever may be the merits of this statement, it does not pertain to commencement of discovery.

overall schedule for this proceeding,[5] which was adhered to by the Board in issuing its Memorandum and Order of February 12, 2002. The Commission's Referral Order does not link the commencement of discovery to the date of issuance of the DEIS. Instead, the Referral Order calls for the commencement of discovery at the same time the Licensing Board issues its decision on standing and admissibility of contentions (which was issued on December 6, 2001). Similarly, the Board's Memorandum and Order does not explicitly link discovery to the issuance of the DEIS and DSER by the NRC staff. In fact, the Memorandum and Order provides for substantial discovery prior to issuance of the DSER.

Furthermore, it is not typical in a NRC licensing proceeding to await the issuance of a DEIS or DSER before commencing discovery. Instead, discovery typically begins upon issuance of the licensing board's memorandum and order admitting contentions, and discovery typically proceeds (at least initially) based upon the applicant's safety and environmental reports, not the NRC staff's DEIS and DSER.

In summary, most of the information cited in the Motion is not new, and the remainder is not material to the date for commencement of discovery. Accordingly, the Intervenors' Motion to postpone discovery should be denied.

III. Commencement of Discovery Will Not Burden the Parties

The Motion states that there is no reason to burden the parties with discovery when the entire schedule is certain to be delayed, and that a postponement of discovery would preserve the

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5 *Duke, Cogema, Stone & Webster*, CLI-01-13, 53 NRC 478, 485 (2001).

status quo, conserve the resources of the parties, and provide relief from these time-consuming and expensive obligations.[6] DCS submits that the Intervenors' reasoning is a *non sequitor.*

Commencement of discovery on the current schedule will not impose any additional burdens on the parties or require them to expend any additional resources than they otherwise will be required to spend. In fact, the same amount of resources will have to be spent, regardless of whether discovery commences now or after the DEIS is issued. Thus, the only issue is the timing of the expenditures. DCS suggests that the *timing* of the expenditures, as distinct from the amount of the expenditure, does not support the Intervenors' claim of undue burden.

Furthermore, substantial progress can be made to complete discovery on the existing admitted contentions while the supplements to the ER and CAR and the DEIS are being prepared. For example, parties can identify their expert witnesses, can propound interrogatories seeking the bases for the positions of the parties, and can conduct discovery based upon the CAR, ER, and DSER. All of this discovery is independent of the schedule for issuance of the DEIS. Finally, as discussed in the next section, most of the contentions pertain to issues that are not relevant to the changes involving the use of alternate feedstock and solidification of high-alpha waste. Therefore, discovery on these contentions should not be affected by the supplements to the CAR and ER or the delay in issuance of the DEIS.

In summary, the Intervenors have not provided any justification for their claim that commencement of discovery will impose an undue burden on the parties.

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[6] Motion, pp. 5-6, 7.

IV. Most of the Admitted Contentions Do Not Pertain to the Changes Involving Alternate Feedstock and Solidification of High-Alpha Wastes.

The Intervenors argue that a delay in discovery is warranted because the issues raised by the admitted contentions may be affected by the supplements to the CAR and ER.[7] As discussed below, such a claim has no basis.

Most of the admitted contentions are based upon safety and security considerations rather than upon National Environmental Policy Act ("NEPA") and environmental considerations. These include: Contentions 1 and 2 on material control and accounting and physical security; Contention 3 on seismic design; Contentions 5, 8 and 9A on definition of the controlled area boundary;[8] and Contention 6 on safety analysis. Thus, the need for a supplement to the ER and the delay in the DEIS schedule should have no impact on these contentions.

Second, these contentions are also unrelated to the changes to the MOX Facility. The incorporation of some additional steps into the design of the facility to accommodate the processing of the alternate feedstock and the decision to transport the high-alpha liquid waste stream to a stand alone DOE facility for solidification by DOE (in lieu of transport to the high-level waste tank system) do not have any relationship to the above-referenced contentions and should not affect the Board's schedule for proceeding on discovery on those contentions.

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[7] Motion, p. 6.

[8] While Contention 8 alleges that DCS' designation of the controlled area creates deficiencies in its Environmental Report, the underlying issue (whether the proposed controlled area is appropriate) is the same as for Contentions 5 and 9A.

Specifically:

- Contentions 1 and 2 allege that the CAR does not describe the design of the material control and accounting (MC&A) and physical security systems. These contentions will not be affected either by the changes in the facility to permit processing of the alternate feedstock or by offsite solidification of high-alpha wastes. The Intervenors argue that the concerns raised in Contentions 1 and 2 may also apply to the modified systems for handling the alternate feedstock.[9] However, contrary to the Intervenors' apparent belief, the designs of the MC&A and security systems are separate and distinct from the design of the feedstock processing systems; *e.g.*, the design for physical security barriers, access control, and intruder detection will not be affected by changes in systems to permit processing of alternate feedstock.
- Contention 3 alleges that the seismic design is inadequate because DCS has not properly determined the seismic hazard for the MOX Facility site. The seismic hazard is based upon the characteristics of the MOX Facility site and will not be affected by the use of alternate feedstock or offsite solidification of high-alpha wastes. The Intervenors argue that it would be wasteful to conduct discovery on Contention 3 when DCS plans to submit additional elements of the plant design that must meet seismic qualifications.[10] However, Contention 3 does not pertain to the seismic qualification of any particular system but instead to the identification of the seismic hazard for the MOX Facility site.
- Consolidated Contention 5 alleges that DCS has improperly selected the location of the controlled area boundary because DCS does not have control over the entire controlled area.

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[9] Motion, pp. 6-7. Section 11.3 of the CAR does describe the design bases for the aqueous polishing system and therefore is not affected by the concerns raised in Contentions 1 and 2 regarding the lack of design basis for the MC&A and security systems.

[10] Motion, pp. 6-7.

The location of the controlled area is independent of whether or not the MOX Facility processes alternate feedstock or whether DOE solidifies the high-alpha wastes. The Intervenors argue that the appropriate size of the controlled area might be affected by the nature of the processes that are undertaken at the facility.[11] However, the location of the controlled area boundary is determined by the area over which the applicant can control access, not by the design of any particular system.

- Contention 6 alleges that the safety analyses are inadequate, citing the safety analyses of fires in the PuO_2 Buffer Storage Area and hydrogen explosions in the sintering furnace. These areas do not pertain to the systems that process the feedstock. The Intervenors argue that litigation of Contention 6 should await the supplemental safety analyses for processing the alternate feedstock.[12] However, the bases for Contention 6 do not refer to the safety analysis for the systems for processing feedstock. If the Intervenors wish to contest the safety analysis for the systems for processing feedstock, they will need to submit a late-filed contention with an adequate basis pertaining to that system.

In summary, because these contentions are not affected by the changes or by the delay in issuance of the DEIS, discovery on these contentions should proceed on schedule.

Two contentions (as consolidated) are based upon NEPA considerations and could be affected by the proposed MOX Facility changes. It is conceivable that the cost comparison issues raised in Contention 9 could be affected by the planned MOX Facility changes, and it appears that the planned solidification of the high-alpha liquid waste stream is directly related to

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[11] Motion, pp. 6-7.

[12] Motion, pp. 6-7.

Contentions 11 and 1E. Even for these NEPA-based contentions, however, DCS believes that, for the reasons discussed below, discovery should commence.[13]

The planned alternate feedstock and solidification changes will be addressed in supplements to the ER and CAR and in the DEIS when it is eventually issued. Under the Commission's Referral Order (CLI-01-13), the parties will be able to conduct discovery against the NRC Staff following issuance of the final EIS and SER.[14] Additionally, the Intervenors will have the opportunity to submit late-filed contentions or amended contentions based upon those updated analyses. If any new contentions are admitted, the Intervenors will presumably have the opportunity for additional discovery on those new contentions. Thus, commencement of discovery on the current schedule will not deprive the parties of the opportunity to conduct full and sufficient discovery on the admitted contentions and the final EIS. Additionally, after the supplements to the CAR and ER and the DEIS are issued, DCS recommends that the parties be provided with an opportunity to submit a round of interrogatories and to conduct depositions, with such discovery limited to the impact of the planned MOX Facility changes on these NEPA-based contentions.

In summary, most of the admitted contentions do not pertain to the changes in the MOX Facility and will not be affected by supplementation of the CAR and ER or by the delay in issuance of the DEIS. Therefore, discovery should proceed on those contentions. Furthermore,

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13 Discovery on Contention 12 on terrorist-caused beyond design basis accidents is of course being held in abeyance pursuant to the Commission's February 6, 2002 Memorandum and Order (CLI-02-04).

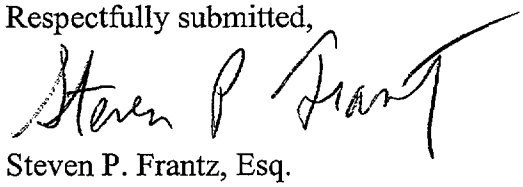
14 *Duke, Cogema, Stone & Webster*, CLI-01-13, 53 NRC 478, 485 (2001). The Commission's Referral Order provides for discovery for 45 days after issuance of the FEIS and SER, whereas the Board's Memorandum and Order specifies a last date for discovery, which is 45 days after issuance of the FEIS and SER. To account for the delay in issuance of the FEIS and SER, the Board should modify its Memorandum and Order to reflect the revised dates for issuance of the FEIS and SER once the staff informs the Board of those dates.

even though some contentions may be affected by the changes in the MOX Facility, much useful discovery can take place on those contentions prior to issuance of the DEIS.

V. Conclusions

Commencement of discovery on the current schedule will not create any substantial new burdens on the Intervenors. Given the limited scope of the proposed alternate feedstock and solidification changes, and the lack of relevance of those changes to most of the existing contentions, it would be inappropriate to delay discovery on the existing contentions. Accordingly, DCS respectfully suggests that the Board deny the Intervenors' Motion to Postpone Discovery.

Respectfully submitted,



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February 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of DCS' ANSWER IN OPPOSITION TO INTERVENORS' MOTION TO POSTPONE DISCOVERY, were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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February 26, 2002