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September 11, 2002

Administrative Judge Thomas S. Moore, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Proposed Reformulation and Recommendations Regarding GANE Contentions 1 and 2; *Duke Cogema Stone and Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Docket No. 70-3098- ML

Dear Judge Moore:

The purpose of this letter is to provide Duke Cogema Stone & Webster's (DCS) proposed reformulation, and recommendations regarding the litigation, of Georgians Against Nuclear Energy (GANE) Contentions 1 and 2 relating to the "design bases" for material control and accounting (MC&A) and physical security for the MOX Facility. In its April 3, 2002 Memorandum and Order (CLI-02-09), the Commission provided guidance to the Licensing Board regarding, among other things, the resolution of GANE Contentions 1 and 2. The Commission stated as follows:

> Although we deny [DCS' request for interlocutory review of the Licensing Board's admission of Contentions 1 and 2], we add a cautionary note. We purposefully set boundaries for the . . . MOX hearings. Under our two-step approach, the present Board's jurisdiction extends only to construction authorization issues. [Footnote omitted.] Therefore the Board must limit litigation of all contentions to design bases, quality assurance program, and environmental review issues.

CLI-02-09, slip op. at 5. With respect to Contentions 1 and 2 in particular, the Commission stated:

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> We note in passing that there is a substantial disagreement among the parties as to, *inter alia*, whether physical protection and material control and accounting systems are within the intended scope of the "principal structures, systems, and components" referenced in 10 C.F.R. § 70.23(b). We also note that there are alleged to be several ways in which such design bases may be associated with the safety finding under § 70.23(b), and that the Board's bottom line is that the "design bases of the MC&A and physical protection systems of the [MOX Facility] are not precluded from consideration under section 70.23(b)." LBP-01-35, 54 NRC at 429 (2001). As we find an insufficient case for interlocutory review at this point, we are not deciding the extent to which the design bases of these two systems will be relevant or should be judged at this stage. However, we expect the Board to go forward in a manner that refines and specifies the standards by which these design bases issues will be deemed appropriately litigated and resolved.

Id. at 5, n.15 (emphasis added).

During the April 18, 2002 teleconference the Licensing Board stated that Contentions 1 and 2:

> deal with the lack of material in the construction authorization request dealing with material control and accounting and physical security. They don't deal with the adequacy of something that's not yet there. And anything dealing with the latter, of course, would require a late filed contention. . . .
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> * * *
>
> What the Board was also wondering was frankly, if contentions, for example, 1 and 2 deal with, as it is the Board's understanding when we admitted this, the lack of information [in the CAR], if the Applicant is intending in its supplemental filings with the Commission to be providing much of this information, will that not essentially resolve any of these contentions . . . . [I]t may well, at least 1 and 2, take care of itself after that information is provided.

April 18, 2002 Teleconference Transcript at 14, 29 (emphasis added).

During the April 18 teleconference, counsel for DCS explained its interpretation of the Commission's directive as follows:

> What we think the Commission is saying is essentially that there ought to be some effort to reformulate and clarify the contention[s] and to develop a little more clearly the standard by which [the] contention[s] would be evaluated in the litigation should it go forward.

Id. at 24. The Board expressed its agreement with DCS' interpretation. *Id.* at 27. DCS' proposed reformulation, and recommendations regarding the litigation, of Contentions 1 and 2 are provided below.

Contention 1: Lack of Consideration of Safeguards in Facility Design

Contention 1 currently states:

> The DCS Construction Authorization Request (CAR) does not contain detailed information on MFFF design features relevant to the ability of DCS to implement material control and accounting (MC&A) measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 74, and there is no indication that MC&A considerations were taken into account in the MFFF design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP (Fundamental Nuclear Material Control Plan) that will meet or exceed the regulatory acceptance criteria in Section 13.2.4 [of the MFFF Standard Review Plan (SRP)]," SRP at 13.2.5.2A. Failure to adequately consider MP&A [sic] issues during the MFFF design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the MFFF in compliance with 10 CFR Part 74 without significant retrofitting (and may not be able to even with retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use SNM at the MFFF. Consequently, Chapter 13.2 of the CAR in its current form is grossly inadequate and should be rejected.

Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site (August 13, 2001) (GANE Contentions) at 2-3. The essence of this contention is that the Construction

Authorization Request (CAR) does not "contain detailed information on MFFF design features" for MC&A. Because of the absence of this information in the CAR, GANE states that "there is no indication that MC&A considerations were taken into account in the MFFF design" and that therefore the CAR does not provide a basis for NRC to conclude that DCS will be able to meet applicable MC&A requirements and guidelines.

The adequacy of DCS' "detailed . . . design features" for MC&A, as opposed to its MC&A "design bases" is clearly beyond the scope of the CAR proceeding. Accordingly, the contention should be reformulated to refer only to DCS' MC&A-related design bases, in accordance with 10 CFR § 70.23(b) and the Commission's directive in CLI-02-09.[1]

In addition, as the Board properly recognized during the April 18 teleconference, the existing contention is limited to the absence, rather than the adequacy, of DCS' MC&A-related design basis information. Accordingly, the standards governing the litigation of this contention should make clear that the actual content and adequacy of DCS' design bases are outside the scope of the existing contention.

DCS also recommends that the Board clarify whether DCS is required to establish certain specific design bases discussed by GANE in its basis statement. GANE's basis statement for Contention 1 identifies certain, specific types of information which it believes should be included in DCS' design bases. In particular, GANE states that:

> the MC&A design basis must include a detailed description of how holdup accumulation (1) can be effectively managed through choices for design elements such as process equipment materials and geometries, glovebox ventilation systems and dust collection systems; and (2) can be measured with NDA systems to the degree of accuracy necessary to meet 10 CFR Part 74 requirements.

GANE Contentions at 7. GANE later discusses the "MFFF Scrap Processing Unit," expressing concern that DCS "may not be able to meet NRC requirements for scrap control . . ." and that "this provides another example of the importance of design basis information for systems relevant to MC&A . . . ." *Id.* at 8-9. The standards governing litigation of this contention should include consideration of whether DCS is required to establish design bases addressing these specific areas of concern, and if so, whether DCS has done so.

Furthermore, DCS' compliance with MC&A requirements that apply at the possession and use license stage is not an appropriate topic for consideration under the existing contention. Thus, the contention should be reformulated to make clear that DCS need not, at the CAR

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1 Nothing in this letter should be construed as a waiver of DCS' previously-stated position that it is not required to submit MC&A or physical protection-related information pursuant to 10 CFR § 70.23(b) or any other NRC requirement at the CAR stage.

stage, demonstrate compliance with 10 CFR Part 74 or the applicable NRC implementing guidance. The only regulation at issue is DCS' compliance with the requirement in 10 CFR § 70.23(b) to submit the design bases of its principal SSCs.

Based on the above, DCS recommends that Contention 1 be reformulated to read as follows:

> "DCS' Construction Authorization Request (CAR) does not identify the MC&A-related design bases of principal structures, systems and components for the MOX Facility as required by 10 CFR § 70.23(b)."

The standards for litigating and resolving this contention should be as follows:

1. Does 10 CFR § 70.23(b) require DCS to establish MC&A-related design bases in the CAR?

(a) If so, has DCS identified its MC&A-related design bases in the CAR?

(b) If so, must the MC&A design bases include provisions to: (1) manage holdup accumulation through facility design elements; (2) measure holdup accumulation; or (3) control scrap at the MOX Facility?

(c) If so, has DCS provided design bases in the CAR addressing those activities?

This, of course, would not preclude GANE from submitting a late-filed contention regarding the adequacy of DCS' MC&A design bases.

Contention 2: <u>Lack of Physical Protection in Facility Design</u>

Contention 2 currently states:

> The DCS Construction Authorization request (CAR) does not contain detailed information on MFFF design features relevant to the ability of DCS to implement physical protection measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 73, and there is no indication that physical protection considerations were taken into account in the MFFF design. As a result, the CAR does not provide a basis for NRC to "establish that the applicant's proposed design, location, construction technique and material for elements of the physical protection system and related commitments will lead to a physical protection plan that will meet or exceed the regulatory

> acceptance criteria in Section 13.1.4 [of the MFFF Standard Review Plan (SRP)]." SRP, § 13.1.5.2A.
>
> Failure to adequately consider physical protection issues during the MFFF design phase not only exhibits poor engineering practice but also greatly increases the probability that DCS will not be able to operate the MFFF in compliance with 10 CFR Part 73 without significant retrofitting (and may not be able to even with retrofitting), and thus that NRC ultimately will deny DCS a license to possess and use SNM at the MFFF. Consequently, Chapter 13.1 of the CAR in its current form is grossly inadequate and should be rejected.

GANE Contentions at 9-10. The language of Contention 2 closely parallels that of Contention 1, except that Contention 2 relates to DCS' physical protection program. As a result, the same general reasoning discussed above applies equally to this contention. DCS therefore recommends the following reformulation of Contention 2:

> "DCS' Construction Authorization Request (CAR) does not identify the physical protection-related design bases of principal structures, systems and components for the MOX Facility as required by 10 CFR § 70.23(b)."

The standards for litigating and resolving this contention should be as follows:

1. Does 10 CFR § 70.23(b) require DCS to establish physical protection-related design bases in the CAR?

   (a) If so, has DCS identified its physical protection-related design bases in the CAR?

As stated in our September 3, 2002 letter regarding the status of settlement negotiations, DCS tried to resolve these contentions without the need for further litigation. In light of our inability to reach a settlement, DCS hopes that this letter will assist the Board and the parties in efficiently resolving these contentions. Because the Board's decision may impact the content of the revised CAR, which is scheduled for submission to the NRC by October 31, it would be most helpful to DCS if the Board could rule on these matters as expeditiously as possible.

Respectfully submitted,

Donald J. Silverman

cc: Office of Commission Appellate Adjudication
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