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September 24, 2002

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

Re: DCS Proposal regarding GANE's Material Control & Accounting (Contentions 1 and 2)

Dear Judge Moore,

The purpose of this letter is to respond to Duke Cogema Stone and Webster's ("DCS's") letter dated September 11, 2002, which proposes to reformulate GANE's Contentions 1 and 2. These contentions challenge the lack of design information regarding plutonium Materials Control & Accounting ("MC&A") and physical security measures in the MOX Facility Construction Authorization Request. For the reasons discussed below, GANE does not believe the proposed rewording is appropriate. GANE intends to stand by its contentions as they were originally written and admitted by the ASLB.

As summarized by the Atomic Safety and Licensing Board ("ASLB") in LBP-01-35, 42 NRC 403, 425 (2001), Contention 1:

> asserts that because the CAR lacks sufficient information on design features relevant to implementing MC&A measures capable of meeting or exceeding the Commission's MC&A requirements, the CAR fails to provide any basis for the NRC, as called for in the Staff's MFFF Standard Review Plan (SRP), to be able 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 SRP.

As the ASLB correctly observes, Contention 2 is similar to Contention 1, in asserting that:

> because the CAR lacks sufficient information on design features relevant to implementing physical protection measures capable of meeting or exceeding the Commission's physical protection requirements, the CAR fails to provide any basis for the 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.'

Id.

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Based on certain statements made by the Commission in CLI-02-09, 55 NRC 245 (2002), DCS argues that "the adequacy of DCS's 'detailed . . . design features' for MC&A, as opposed to its MC&A 'design bases' is clearly beyond the scope of the CAR proceeding." DCS letter at 4. DCS also makes the same argument with respect to Contention 2. *Id.* at 6. Thus, DCS proposes to reword the contention in a manner that removes all references to the terms "design features" or "design information," and focuses instead on "design bases."

DCS proposes to narrow GANE's contentions in a way that would be inconsistent with the intent of the contentions and the regulations on which they are based. The term "design features," as used in Contentions 1 and 2, is broader than the term "design bases." Design bases, as defined in the Commission's regulations and guidance, essentially constitute performance specifications.[1] The design information sought in Contentions 1 and 2 includes the design bases for the proposed facility, as well as sufficient information about MC&A and physical security systems to demonstrate that those design bases are sufficient and can be met. This additional information includes a reasonable description of the structures, systems, and components to be used; a discussion of how these structures, systems, and components are integrated into the design of the facility as a whole; and a demonstration that the vulnerabilities of the structures, systems and components have been addressed.

GANE's position is consistent with 10 C.F.R. § 70.22(f), which sets forth the type of information necessary to satisfy 10 C.F.R. § 70.23(b). The necessary information includes "a description *and safety assessment* of the design bases of the principal structure, systems, and components of the plant." (Emphasis added). In arguing that the proposed rewording of the contentions is necessary to comply with 10 C.F.R. § 70.23(b), DCS completely ignores this regulatory language.

GANE also disagrees with DCS's argument that the proposed rewording is necessary to comply with the Commission's directive in CLI-02-09. DCS Letter at 4. DCS relies for its proposed rewording on the Commission's statement in CLI-02-09 that "the Board must limit litigation of all contentions to design bases, quality assurance program, and environmental review issues." 55 NRC at 249. In addition, DCS refers to a statement by the Commission in CLI-02-09 that the "bottom line" of the ASLB's decision in LB-01-35 is that "the design bases of the MC&A and physical protection systems of the [MOX fuel fabrication facility] are not precluded from consideration under section 70.23(b)." *Id.*, note 15.

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[1] As quoted in the body of Contention 1, the Standard Review Plan for the MOX Facility defines "design bases" as: "the information that identifies the specific functions to be performed by an SSC of a facility, and the specific values or ranges of values chosen for controlling parameters as a reference bounds for the design." This is similar to the definition of "design bases" found in 10 C.F.R. § 50.2.

In GANE's view, neither CLI-02-09 nor LBP-01-35 dictates the narrowing of the contention as proposed by DCS. CLI-02-09 broadly directs the ASLB to refine and specify the manner in which it will litigate "design bases issues." 55 NRC at 249. It does not narrow the scope or category of design bases issues that can be litigated. Moreover, the ASLB's observation that design bases are included within the scope of 10 C.F.R. § 70.23(b) does not preclude consideration of a safety assessment of the design bases, *i.e.*, information that is relevant or necessary for determination that the design bases are sufficient and can be met. *See* 10 C.F.R. § 70.22(f). This is not only required by the regulations, but by common sense. In GANE's view, it would be the height of absurdity for the NRC to approve design bases for a facility that will process 3.5 tons of plutonium per year, without also reviewing some reasonable amount of information as to how those design bases would be satisfied through the actual design of the facility.

Thus, GANE does not agree to any change in the contentions as submitted.

Finally, GANE wishes to clarify its understanding that DCS's letter constitutes an expression of DCS's opinion regarding steps that GANE or the ASLB should take to reformulate GANE's contentions, rather than a formal request for action by the ASLB. If DCS intends to seek action from the ASLB on the narrowing of Contentions 1 and 2, it should present its request in a summary disposition motion or its evidentiary presentation to the ASLB.

Respectfully submitted,

Glenn Carroll/DC

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Coordinator

Cc: Service list

[2] This letter was prepared with substantial assistance from GANE's legal adviser, Diane Curran.