RAS 6325

April 18, 2003
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket No. 070-03098
DUKE COGEMA STONE & WEBSTER	)	
	)	
Mixed Oxide (MOX) Fuel Fabrication Facility (Construction Authorization Request)	)	

NRC STAFF'S RESPONSE TO LATE-FILED CONTENTIONS SUBMITTED BY GEORGIANS AGAINST NUCLEAR ENERGY ON THE DEIS

INTRODUCTION

On March 27, 2003, Georgians Against Nuclear Energy (GANE) submitted a set of three late-filed contentions[1] pertaining to NUREG-1767, the NRC staff's draft "Environmental Impact Statement on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina" (MOX DEIS). In an unpublished order issued on March 28, 2003, the Atomic Safety and Licensing Board directed Duke Cogema Stone & Webster (DCS) and the staff of the Nuclear Regulatory Commission (NRC Staff) to submit responses to the March 27 Contentions by April 15, 2003. Pursuant to GANE's request for an extension of time, the Board changed the DCS and NRC Staff April 15 deadlines to April 18, 2003.[2]

As discussed below, GANE's proffered contentions lack an adequate factual and legal basis, and thus fail to meet the requirements of 10 C.F.R. § 2.714(b)(2). Additionally, GANE has

[1] *See* "[GANE's] Late-Filed Contentions Regarding Inadequacies in the Draft Environmental Impact Statement for the Proposed MOX Plutonium Fuel Factory at Savannah River Site," dated March 27, 2003 (March 27 Contentions).

[2] *See* Atomic Safety and Licensing Board's unpublished order dated April 8, 2003. DCS filed its response on April 17. *See* "Duke Cogema Stone & Webster's Answer to Late-Filed DEIS Contentions" (DCS April 17 Response).

failed to meet the late-filed contention requirements of 10 C.F.R. § 2.714(a)(1). The Board should accordingly refuse to admit any of the March 27 Contentions.

BACKGROUND

In May of 2001, GANE made its initial request for hearing on DCS' February 28, 2001, construction authorization request (CAR), regarding a proposed mixed oxide (MOX) fuel fabrication facility (MOX Facility), which DCS seeks to build at the United States Department of Energy's (DOE's) Savannah River Site (SRS) in South Carolina. DCS, a contractor of the DOE, had submitted an environmental report (ER) to the NRC in December 2000 regarding the proposed construction and operation of the MOX Facility -- a major federal action requiring the preparation of an environmental impact statement pursuant to the National Environmental Policy Act (NEPA).[3] The DOE had earlier issued a record of decision (ROD) in January 2000, pertaining to its surplus plutonium disposition program, and made decisions regarding (1) the construction and operation of a pit disassembly and conversion facility; (2) the construction and operation of a plutonium immobilization facility; (3) the construction and operation of the MOX Facility; (4) selection of a site for lead assembly fabrication; and (5) selection of a site for post-irradiation examination of lead assemblies.[4] The NRC's authority over the DOE's surplus plutonium disposition program is limited to matters pertaining to the proposed construction and operation of the MOX Facility.[5]

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[3] *See* "Notice of Intent to Prepare an Environmental Impact Statement for the Mixed Oxide Fuel Fabrication Facility," 66 Fed. Reg. 13794 (March 7, 2001).

[4] *See* "Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement," 65 Fed. Reg. 1608, 1619-20 (Jan. 11, 2000) (2000 ROD).

[5] *See* Section 202 of the Energy Reorganization Act (as amended in 1998), 42 U.S.C. § 5842(5).

In early 2002, the DOE published an amended ROD canceling the planned construction and operation of its immobilization facility,[6] and in July 2002 DCS submitted a revised ER to the NRC Staff. As stated in the revised ER, the DOE plans to build and operate a Waste Solidification Building (WSB) at the site of the DOE's proposed pit disassembly and conversion facility (PDCF). Both of these new DOE facilities would be located near the site of the proposed MOX Facility. *See* revised ER, at 5-22 to 5-24. Appendix G of the revised ER discusses the potential impacts related to the WSB. Section 1.2.3 of the revised ER references DOE's previous NEPA evaluations of the PDCF, and revised ER section 5.6 discusses the cumulative impacts related to the proposed operation of the PDCF, WSB, and MOX Facility. Additionally, Tables 5-14, 5-15a, 5-15b, 5-15c, and 5-15d in the revised ER present data related to potential PDCF and WSB impacts.

On April 30, 2002, the Board issued a scheduling order governing this proceeding. In situations where new documents give rise to either late-filed contentions or late-filed amendments to admitted contentions, the Board established a 30-day period in which to submit such contentions, running from the issuance date of the new document. On this point, the Board stated as follows:

> 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 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. Finally, the Board reminds the Intervenors that they may need to file a late-filed contention or a late-filed amendment to an admitted contention if, for example, the scope, data, or conclusions set out in the draft EIS or the draft SER differ significantly from DCS's environmental report or construction authorization request.

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[6] The DOE published its amended ROD in April 2002 (*see* "Surplus Plutonium Disposition Program," 67 Fed. Reg. 19432 (April 19, 2002)), but had announced this and other program changes in January. *See* letter from DCS counsel to the Board, dated January 24, 2002.

April 30 order, at 3-4 (¶ 8) (unpublished).

On September 11, 2002, GANE submitted a set of late-filed contentions pertaining to the revised ER.[7] In an unpublished order dated November 19, 2002, the Board refused to admit any of GANE's September 2002 Contentions.

DISCUSSION

A. GANE Fails to Meet 10 C.F.R. § 2.714(b)(2) Contention Requirements

GANE's newly proffered contentions are not admissible under the 10 C.F.R. § 2.714(b)(2) standards applicable to both initial and late-filed contentions. In NRC proceedings, contentions must 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."[8] 10 C.F.R. § 2.714(b)(2)(i-iii). Additionally, the contention must be one which, if proven, would entitle the petitioner to relief. *See* 10 C.F.R. § 2.714(d)(2)(ii). These requirements are not intended to force

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[7] *See* "[GANE's] New and Amended Contentions Opposing Authorization For Duke Cogema Stone & Webster To Construct a Plutonium Fuel Factory at Savannah River Site" (GANE's September 2002 Contentions).

[8] In its 1989 statement of considerations (SOC) discussing changes made to the contention requirements of 10 C.F.R. § 2.714, the Commission stated that disputes under the rule should be considered "material" if their resolution would "make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. 33,168, at 33,172, col.2 (August 11, 1989) (rulemaking amending 10 C.F.R. § 2.714), *aff'd. sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990). Hearing petitioners must make at least "a minimal showing that material facts are in dispute" and that further inquiry is thus appropriate. 54 Fed. Reg. at 33,171, col. 3. *See also Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995).

a hearing petitioner to prove its case at the contention stage of a proceeding.[9] Although a proffered contention may be viewed by a licensing board in a light favorable to the hearing petitioner, if any one of the above requirements is not met the contention must be rejected.[10]

The contention requirements at issue were established in 1989, when 10 C.F.R. § 2.714 was amended. The revised contention rule raised "the threshold bar for an admissible contention" in order to "ensure that only intervenors with genuine and particularized concerns participate in NRC hearings," and to help prevent "serious hearing delays caused in the past by poorly defined or supported contentions." *Duke Energy Corp*. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). To this end, the Commission has stated that the mere referencing of documents "does not provide an adequate basis for a contention." *Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000).

Moreover, to be admissible, a contention must pertain to one or more issues falling within the scope of the matters set forth in the notice of opportunity for hearing. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994). The Commission reiterated that in this MOX proceeding, to be admissible, a proffered contention "must demonstrate that a genuine dispute exists" with DCS, and that "the dispute lies within the scope of the proceeding." *See* CLI-01-13, 53 NRC 478, 483 (2001). The Staff addresses the substance of GANE's newly proffered contentions below.

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[9] *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

[10] *See Arizona Public Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

1. GANE's Contention 18

GANE's contention 18 is titled "Inadequate Basis for Recommendation that the MOX Facility Should be Licensed." GANE's contention 18(a), titled "Conditional Finding Fails to Comply with NEPA," states as follows:

> As provided by 10 C.F.R. § 51.71(e), the Draft EIS makes a preliminary recommendation that "unless safety issues mandate otherwise, the action called for is the issuance of the proposed license to DCS, with conditions to protect environmental values." DEIS at 33. This conclusion is repeated in Chapter 2.5. DEIS at 2-36.
>
> The Staff's conditional finding that a license should be issued for the proposed MOX Facility "unless safety issues mandate otherwise" fails to satisfy the National Environmental Policy Act ("NEPA") or its implementing regulations at 10 C.F.R. § 51.71(e) and 10 C.F.R. § 70.22(a)(7), because it appears to be contingent upon the results of a future safety review.

March 27 Contentions, at 2. As shown below, contention 18(a) is defective in several respects, and GANE's basis for this contention is internally inconsistent.

The stated factual basis for contention 18(a) is incorrect. GANE erroneously claims that the MOX DEIS fails to state when the NRC expects to make its final conclusions pertaining to the environmental impacts of the proposed MOX Facility. *See* March 27 Contentions, at 3-4. Chapter 1 of the MOX DEIS describes how the NRC's decision-making process for the proposed MOX Facility includes separate environmental and safety reviews, and states that the final environmental impact statement for the proposed MOX Facility is expected to be published in August 2003. *See* MOX DEIS, at pp. 1-3 to 1-4. GANE's claim that the MOX DEIS is silent in this regard is simply not correct, and is contradicted by GANE's own recognition that the NRC Staff plans to issue the final environmental impact statement in August 2003. *See* March 27 Contentions, at 4 n.4.

Contention 18(a) is also legally deficient. GANE admits that contention 18(a) challenges a Commission ruling made over a year ago in this proceeding.[11] *See* March 27 Contentions, at 5. Not only is contention 18(a) contrary to the Commission's prior ruling in CLI-02-7, it impermissibly attacks the NRC's regulations,[12] to the extent such regulations are cited in CLI-02-7. Similarly, GANE's allegation (made as a supporting basis for contention 18(a)) that the NRC Staff in its MOX DEIS improperly "refused to make an unequivocal recommendation to issue the proposed construction authorization" (March 27 Contentions, at 5) is contrary to 10 C.F.R. § 51.71(e), which calls for a "preliminary" -- not a final or unequivocal -- recommendation by the NRC Staff in a DEIS regarding the proposed major federal action being evaluated. GANE recognizes this is what 10 C.F.R. § 51.71(e) requires (*see* March 27 Contentions, at 2 and n.1), yet concludes to the contrary that the MOX DEIS must include an unequivocal recommendation.

For the reasons set forth above, contention 18(a) is not an admissible contention.

GANE's contention 18(b) is titled "Draft EIS contains misleading implication that license for the proposed MOX Facility has been prepared," and states as follows:

> At pages xx [sic] and 2-6 of the Draft EIS, the Staff misleadingly describes the action to be taken as issuance of "the" proposed license to DCS. In fact, there is no license, or even a license application. The Staff's misleading statement violates NEPA's cardinal requirement for accuracy in representations made in an EIS.

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[11] The Commission rejected GANE's argument that completion of the NRC's environmental review of the proposed MOX Facility must await completion of the related safety review. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 220-21 and n.40 (2002), *citing* 10 C.F.R. § 51.70(a). Note that GANE's citation to "56 NRC 205" is not accurate.

[12] Long-settled NRC caselaw holds that adjudicatory hearings are not the proper forum in which to attack NRC regulations. *See Public Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416 (1989), *citing* 10 C.F.R. § 2.758. *See also* 10 C.F.R. § 2.1239 (similar rule prohibiting attacks on NRC regulations in Subpart L proceedings such as this one).

March 27 Contentions, at 5-6. As discussed below, this portion of contention 18 is without merit and should be rejected by the Board.

By only quoting the word "the" from page 2-6 of the MOX DEIS, contention 18(b) does not adequately identify the portion of the document which is allegedly misleading. Moreover, as stated above in response to contention 18(a), Chapter 1 of the MOX DEIS describes the NRC's decision-making process pertaining to whether DCS should be authorized to build and operate the proposed MOX Facility. As part of this description, the NRC Staff states that if the CAR is approved, DCS plans to apply for a 10 C.F.R. Part 70 license in October 2003. *See* MOX DEIS, at p. 1-3, lines 32-33. Thus, even if page 2-6 of the MOX DEIS stated that the action to be taken is issuance of the proposed license to DCS -- in fact, page 2-6 of the MOX DEIS contains no such statement -- GANE does not explain why such a description of a possible future action would be misleading, when read together with the MOX DEIS text at p. 1-3.

Accordingly, GANE fails to establish that the MOX DEIS is misleading or conveys any false impression, and the Board should therefore rule that contention 18(b) is not an admissible contention. The Board should reject contention 18 in its entirety.

2. GANE's Contention 19

GANE's contention 19 is titled "Inadequate Support for Conclusions Regarding Environmental Impacts of MOX Facility." Contention 19(a), titled "Impacts of Waste Solidification Building and Pit Disassembly and Conversion Facility," states as follows:

> According to the Draft EIS, two new U.S. Department of Energy ("DOE") facilities are "needed" to support the proposed MOX Facility: the Waste Solidification Building ("WSB") and the Pit Disassembly and Conversion Facility ("PDCF"). Draft EIS at 1-7. The PDCF is needed to convert some 25.6 metric tons of surplus plutonium metal to plutonium dioxide, which would be processed at the MOX Facility. *Id.* The WSB is proposed in order to process the waste product from the proposed MOX Facility into Transuranic ("TRU") waste that can be disposed of at the Waste Isolation Pilot Project. *Id.*
>
> Although the DOE is responsible for building and operating the WSB and the PDCF, the NRC Staff does not appear to have consulted the DOE or any current DOE

> environmental document regarding the environmental impacts of the WSB and the PDCF, in order to verify the factual information or the conclusions it presents in the Draft EIS regarding the environmental impacts of these facilities. Thus, the Draft EIS fails to satisfy NEPA's requirements for cooperation and consultation with other agencies. *See* 42 U.S.C. § 4332(2)(C), 10 C.F.R. § 51.70(c), and 40 C.F.R. § 1501.6.
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> The Staff's failure to consult DOE for the purpose of verifying DCS's representations about the WSB and the PDCF also violates NEPA's well-established requirements that agencies must take a "hard look" at environmental impacts of proposed decisions, and exercise independence in its judgments. *See Foundation on Economic Trends v. Heckler,* 756 F.2d 143, 151 (D.C. Cir. 1985); *Sierra Club v. Peterson,* 717 F.2d 1409, 1413 (D.C. Cir. 1983); 10 C.F.R. § 51.70(b).
>
> Before reaching any definitive conclusions regarding the environmental impacts of the WSB or the PDCF, the NRC Staff should be required to await DOE's determination as to whether these facilities require preparation of an EIS. If the DOE decides that an EIS is warranted for the WSB and/or the PDCF, the EIS should be prepared *before* the MOX Facility is licensed or built, in order to ensure that all impacts of the integral project are considered.

March 27 Contentions, at 7-9. Significantly, contention 19(a) identifies no technical inaccuracies which undermine any of the MOX DEIS conclusions. As discussed below, this contention lacks an adequate legal basis, and fails to identify any information wrongly excluded from the MOX DEIS.

As set forth above, GANE's contention 19(a) cites 42 U.S.C. § 4332(2)(C), 10 C.F.R. § 51.70(c)[13] and 40 C.F.R. § 1501.6[14] in claiming that the MOX DEIS fails to satisfy NEPA and its implementing regulations regarding consultations with other agencies. The cited NEPA provision requires the responsible Federal official to "consult with and obtain the comments of any Federal

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[13] This NRC NEPA regulation pertains to cooperation with State and local agencies, and GANE fails to explain what applicability it has here regarding the NRC's interactions with the DOE.

[14] This regulation, established by the Council of Environmental Quality (CEQ), gives the lead federal agency for the NEPA action discretion to consult with other federal agencies, but does not establish any legal duty mandating that such consultations occur. *See* 40 C.F.R. § 1501.6. Moreover, GANE does not show that with respect to whether the proposed MOX Facility should be licensed, any federal agency other than the NRC should act as the lead agency in performing the NEPA review. Thus, the fact that the DOE was not named as a cooperating agency for the MOX DEIS forms no legal basis supporting contention 19(a).

agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C)(v).[15] In accordance with this NEPA provision, copies of the MOX DEIS have been sent to the DOE and other federal agencies for comment, pursuant to 10 C.F.R. §§ 51.73 and 51.74(a)(2). This latter NEPA regulation tracks the language of 42 U.S.C. § 4332(2)(C)(v). Contention 19(a) and its stated bases (*see* March 27 Contentions, at 9-11) constitute an impermissible attack on these relevant 10 C.F.R. Part 51 requirements. *See* n. 12, above. Moreover, the final EIS for the proposed MOX facility will reflect any comments received from the DOE and other federal agencies, and the NRC's responses thereto. In short, in the absence of any indication that the NRC Staff violated any of NEPA's procedural requirements in issuing the MOX DEIS, GANE does not make the required minimal showing that further inquiry on the points it raises would be appropriate.

Furthermore, in vaguely claiming that the NRC Staff did not reference "any current DOE document"[16] or "any recent reports or correspondence from the DOE,"[17] contention 19(a) fails to adequately identify any specific DOE report or other type of information that the MOX DEIS should have -- but did not -- discuss. *See* 10 C.F.R. § 2.714(b)(2)(ii-iii) (contention must reference specific documents or other sources of information which establish the contention's validity).

Accordingly, the Board should rule that contention 19(a) is not an admissible contention.

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[15] *See Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 554 (9th Cir. 1977) (discussing the 42 U.S.C. § 4332(2)(C)(v) requirement for consultation and noting that there is no specified "form which the consultation must take"). GANE cites no NEPA case law on this point. GANE's suggestion that the NRC, prior to issuing the MOX DEIS, was required to formally consult with the DOE on matters pertaining to the proposed WSB ignores the fact that DCS is a contractor of the DOE. As DCS noted, DOE representatives had provided to DCS "virtually all" of the WSB information contained in DCS' amended ER. DCS April 17 Response, at 12. Because the DOE was the source of the WSB information in the amended ER, NRC consultation with the DOE after receiving the information from DCS would not have contributed to an independent analysis.

[16] March 27 Contentions, at 9.

[17] *Id*. at 9-10.

GANE's contention 19(b) is titled "Assumption Regarding Quantity of Plutonium to be Processed at Proposed MOX Facility," and states as follows:

> The Draft EIS's assumption that that [sic] 34 metric tons ("MT") of plutonium will be sent to the proposed MOX Facility for processing is not supported by a valid NEPA decision by the DOE.

March 27 Contentions, at 11. While the MOX DEIS makes this assumption, GANE identifies no problems this assumption creates in any of the MOX DEIS conclusions. An admissible contention must contain sufficient information to show that a genuine dispute exists between GANE and DCS "on a material issue of law or fact" (10 C.F.R. § 2.714(b)(2)(iii)), and GANE fails to establish that the 34 MT assumption constitutes such an issue of law or fact. Additionally, the contention must be one which would entitle GANE to relief (*see* 10 C.F.R. § 2.714(d)(2)(ii)), and GANE fails to establish that use of the 34 MT assumption entitles it to relief.

Accordingly, for the reasons stated above, the Board should rule that contention 19(b) is not an admissible contention, and the Board should reject contention 19 in its entirety.

3. Contention 20

GANE's contention 20 is titled "Failure to Discuss immobilization Alternative," and states as follows:

> In Section 2.3.3, the Draft EIS unreasonably rules out immobilization as an alternative strategy for disposing of weapons-grade plutonium, in violation of 10 C.F.R. § 51.71(d). Although the DOE has dropped the immobilization portion of its plutonium disposition strategy for economic reasons, these temporal economic circumstances may change, and thus do not justify the NRC's decision to completely eliminate consideration of the immobilization alternative. To the contrary, consideration of immobilization must be preserved in order to ensure that (a) if and when the DOE's economic circumstances change, the NRC has prepared a decisionmaking [sic] document that fully and fairly evaluates a set of reasonable alternative approaches, and (b) the lack of consideration of the immobilization in the Draft EIS does not create a self-fulfilling prophecy, i.e., lead to a failure to fund immobilization because it is not perceived as a viable alternative.
>
> Moreover, consideration of immobilization should not be "all-or-nothing." Just as the DOE has done in the past, the NRC should consider immobilization as both a complete alternative and a partial strategy.

March 27 Contentions, at 12. As discussed below, GANE's contention 20 fails to satisfy the three admissibility requirements in 10 C.F.R. § 2.714(b)(2).

First, under 10 C.F.R. § 2.714(b)(2)(i), GANE has not provided a sufficient explanation of the factual or legal bases for asserting that the NRC was required to analyze the immobilization alternative. GANE relies on 10 C.F.R. § 51.71(d) for the proposition that the NRC was required to analyze the immobilization alternative. Section 51.71(d) states that a "draft environmental impact statement will include a preliminary analysis that considers and weighs ... the environmental impacts of alternatives to the proposed action." 10 C.F.R. § 51.71(d). However, as GANE acknowledged in its stated basis for contention 20, the DOE analyzed the immobilization alternative in its Surplus Plutonium Disposition Final Environmental Impact Statement (SPD FEIS). *See* March 27 Contentions, at 12-13; *see also* SPD FEIS, at Ch. 2 (analyzing alternatives), Ch. 4 (analyzing environmental consequences). In discussing the immobilization alternative (*see* MOX DEIS section 2.3.3), the NRC Staff referenced this previous DOE analysis of the immobilization alternative. NEPA case law establishes that "[a]gencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts." *Sierra Club v. U.S. Army Corps of Eng'rs,* 295 F.3d 1209, 1215 (11th Cir. 2002); *see also Churchill County v. Norton*, 276 F.3d 1060, 1074 (9th Cir. 2001). GANE fails to show that the Staff improperly tiered from the DOE analysis.[18]

With respect to tiering, the CEQ regulations direct federal agencies to use this technique "to relate broad and narrow actions and to avoid duplication and delay" (40 C.F.R. §§ 1502.4(d)) and further state that "agencies are encouraged to tier their environmental impact statements to

[18] Tiering, as defined in the CEQ regulations, refers to "the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." 40 C.F.R. § 1508.28.

eliminate repetitive discussions of the same issues." 40 C.F.R. § 1502.20. Moreover, the Sixth Circuit has specifically approved the NRC's use of tiering. *See Kelley v. Selin*, 42 F.3d 1501, 1519-20 (6th Cir. 1995). GANE's contention 20 thus fails to make the required minimal showing that the MOX DEIS' use of tiering is prohibited, and GANE has thus failed to adequately establish a factual or legal basis for this contention. GANE's contention 20 should therefore be rejected.

Second, under 10 C.F.R. § 2.714(b)(2)(ii), GANE fails to provide the required factual support or expert opinion for the assertion that the immobilization alternative remains a reasonable alternative to the proposed action. In its 2000 ROD, the DOE announced its decision to use both the immobilization approach and the MOX fuel approach for disposing of surplus plutonium. *See* 65 Fed. Reg. 1608, 1619-20 (Jan. 11, 2002). As GANE noted (*see* March 27 Contentions, at 13), the DOE later amended its 2000 ROD to exclude the immobilization alternative, stating as follows:

> DOE/NNSA has evaluated its ability to continue implementing two disposition approaches and has determined that in order to make progress with available funds, only one approach can be supported. Russia does not consider immobilization alone to be an acceptable approach because immobilization, unlike the irradiation of MOX fuel, fails to degrade the isotopic composition of the plutonium ... Because selection of an immobilization-only approach would lead to loss of Russian interest in and commitment to surplus plutonium disposition, DOE is of the view that if only one disposition approach is to be pursed, the MOX approach rather than the immobilization approach is the preferable one.

Department of Energy, Amended Record of Decision, 67 FR 19432, 19434 (April 19, 2002) (Amended ROD).

In preparing environmental impact statements, federal agencies are not required to consider "an infinite range of alternatives, only reasonable or feasible ones." *City of Carmel-By-The-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Moreover, alternatives that would fail to "'accomplish the purpose of an action'" are not considered to be reasonable alternatives that need to be evaluated in detail.[19] Here, because the immobilization alternative did not meet the

[19] *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (continued...)

purpose and need of the proposed action, *i.e.*, the cooperative advancement by Russia and the United States toward the reduction of surplus plutonium stockpiles, the NRC staff found that the immobilization alternative was no longer a reasonable alternative to the proposed action. *See* MOX DEIS, at section 2.3.3.

Furthermore, it has long been recognized that alternatives which "could only be implemented after significant changes in governmental policy or legislation" are not reasonable alternatives requiring consideration. *Natural Res. Defense Council*, 524 F.2d 79, 92 (2nd Cir. 1975). GANE offers no facts or expert opinion to support its contention that immobilization remains a reasonale alternative required to be analyzed by the NRC. GANE merely asserts, without any supporting facts or expert opinion, that the "temporal economic circumstances may change," allowing DCS to once again pursue a hybrid strategy. March 27 Contentions, at 12. Likewise, in spite of DOE's explanation that immobilization is now an untenable option, and without offering any supporting facts or expert opinion, GANE asserts that immobilization should continue to be considered by the NRC "as both a complete alternative and a partial strategy." *Id.* Because contention 20 fails to provide the required supporting facts or expert opinion showing that immobilization is still a reasonable alternative to the proposed action, the Board should reject the contention.

Third, under 10 C.F.R. § 2.714(b)(2)(iii), GANE is required to base its NEPA contentions on the DCS ER, and GANE can amend those contentions or file new NEPA contentions only if there are data or conclusions in the MOX DEIS that differ significantly from those in the ER or

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[19](...continued)
(10th Cir. 2002)(quoting Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1051 (10th Cir. 2001). Additionally, NEPA does not require analysis of alternatives an agency has "'in good faith rejected as too remote, speculative, or ... impractical or ineffective.'" *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1174 (10th Cir. 1999)(quoting All Indian Pueblo Council v. U.S., 975 F.2d 1437, 1444 (10th Cir. 1992).

amended ER.[20] GANE's contention 20 does not allege that the amended ER and the MOX DEIS differ in the analyses of the immobilization alternative. In fact, both the amended ER and the MOX DEIS indicate that the immobilization alternative is no longer being considered as an alternative, due to the DOE's Amended ROD.[21] Because the MOX DEIS does not include new data that differs from the data in the amended ER with regard to the immobilization alternative, GANE's contention 20 does not meet the requirements of 10 C.F.R. § 2.714(b)(2)(iii), and should therefore be rejected.

Accordingly, for the reasons stated above, the Board should rule that contention 20 is not an admissible contention.

B. GANE Fails to Meet 10 C.F.R. § 2.714(a)(1) Standards for Admitting Late-Filed Contentions

GANE does not show that the factors specified in 10 C.F.R. § 2.714(a)(1)(i)-(v) favor admitting the March 27 Contentions. These NRC regulations provide that late-filed contentions may only be admitted after a balancing of five factors:

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

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

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in the development of a sound record.

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

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

10 C.F.R. § 2.714(a)(1)(i)-(v). As the party seeking admission of its late-filed contentions, GANE bears the burden of showing that a balancing of these five factors weighs in favor of admitting

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[20] *See generally In the Matter of Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002); *Sacramento Municipal Utility Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993).

[21] *Compare* MOX DEIS, Section 2.3.3, at 2-23 *with* DCS' amended ER, Sections 1.2.4 and 1.3.2, at 1-4 and 1-9.

them.[22] As discussed below, GANE has not established good cause for the late-filing of contention 20.

The first factor, whether good cause exists to excuse a late filing, is entitled to the most weight.[23] Here, the issue is not whether the March 27 Contentions were submitted within 30 days of when the MOX DEIS became available, but whether these contentions involve NEPA issues which GANE could have raised earlier in this proceeding. As the Commission recently held in another ongoing proceeding, an amended NEPA contention "must rest on data or conclusions that 'differ significantly' from was submitted in the Environmental Report. An amended NEPA contention is not an occasion to raise additional arguments that could have been raised previously."[24]

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[22] *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000). On the question of timeliness, GANE relies in part on the provisions of 10 C.F.R. § 2.714(b)(2)(iii). *See* March 27 Contentions, at 18. But these provisions do not exempt NEPA-based contentions from the application of the late-filed contention criteria of 10 C.F.R. § 2.714(a)(1)(i)-(v). The Commission emphasized this point in its 1989 amendments to 10 C.F.R. § 2.714. *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). *See also Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324 (2001).

[23] *See Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). On this point, GANE claims that its March 27 Contentions are based on "significant new information in the DEIS" (March 27 Contentions, at 16), but GANE does not specify what this new information is, and later states in inconsistent fashion that to a significant degree its contentions "are legal in nature," and only "raise questions regarding the NRC Staff's procedural compliance with NEPA." March 27 Contentions, at 17. As discussed below, while the latter of these GANE statements may be true for some of the newly proffered contentions, GANE's contention 20 was not timely filed.

[24] *In the Matter of Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 385-86 (2002) (citations omitted). Although the cited case addresses amended NEPA contentions, rather than new late-filed NEPA contentions, the same legal criteria apply to both types of contentions. *See* Board's April 30 order, at 4 (¶ 8) (unpublished) (GANE needs to file late-filed contentions or late-filed amendments to admitted contentions if, for example, the scope, data, or conclusions set out in the MOX DEIS differ significantly from DCS's ER). To raise a new contention under NEPA after the DEIS is published,

(continued...)

GANE's contention 20 should have been filed within 30 days of DCS submitting its amended ER in July 2002. *See* Board's April 30 order, at 3-4 (¶ 8) (unpublished) (30-day period in which to submit late-filed contentions, running from the issuance date of the document on which the contention is based). In its amended ER, DCS stated that the immobilization alternative would no longer be analyzed as an alternative to the proposed action. *See* DCS amended ER, Sections 1.2.4 and 1.3.2, at 1-4 and 1-9. GANE thus had constructive notice last summer that the MOX DEIS might not contain a new in-depth evaluation of the immobilization alternative, particularly in light of the Board's 2001 statement emphasizing the status of the DCS ER as the "foundation document" for the MOX DEIS. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 424 (2001). Any concerns GANE had about how the immobilization alternative would be evaluated should have been raised in contentions challenging the amended ER. GANE has proffered an untimely contention by waiting until the publication of the MOX DEIS to raise this immobilization issue.

For all of the reasons stated above, the Board should find that contention 20 is untimely.

Absent a showing of good cause for its late filing, GANE must make a compelling case that the other four factors set forth in 10 C.F.R. § 2.714(a)(1)(ii)-(v) warrant admission of its March 27 Contentions.[25] In evaluating these other factors, the second and fourth factors -- *i.e.*, the availability of other means to protect GANE's interest, and the ability of other parties to represent GANE's interest -- are the least important, and are thus not given as much weight as the third factor (the potential contribution to the development of a sound record) and fifth factor (the potential

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[24](...continued)
the contention must be based on new and significant information that was not previously available in the ER. *See* 10 C.F.R. § 2.714(b)(2)(iii); *see also In the Matter of Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264, n.6 (2000).

[25] *See Private Fuel Storage,* CLI-00-2, 51 NRC at 79.

for broadening the issues and causing delay).[26] Regarding the third factor, GANE was obligated to identify the precise issues it was addressing, and to summarize the proposed supporting testimony of its prospective witnesses.[27] GANE presents no such testimony in support of its March 27 Contentions. GANE thus fails to meet its burden regarding the 10 C.F.R. § 2.714(a)(1)(iii) criterion.

Since GANE did not meet the criteria set forth in 10 C.F.R. § 2.714(a)(1)(i) and (iii), the March 27 Contentions should not be admitted.

CONCLUSION

As discussed above in Section A, GANE's March 27 Contentions lack an adequate factual and legal basis, and thus fail to meet the requirements of 10 C.F.R. § 2.714(b)(2). Additionally, as shown above in Section B, GANE has failed to meet the late-filed contention requirements of 10 C.F.R. § 2.714(a)(1). The NRC Staff therefore requests that the Board reject all of the March 27 Contentions.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland
this 18th day of April, 2003

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[26] *See Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992).

[27] *See Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 165-66 (1993).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-3098
	)	
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO LATE-FILED CONTENTIONS SUBMITTED BY GEORGIANS AGAINST NUCLEAR ENERGY ON THE DEIS" have been served upon the following persons this 18th day of April, 2003, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution system).

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