

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 13791

DOCKETED 06/20/07

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

SERVED 06/21/07

Michael C. Farrar, Chairman
Nicholas G. Trikouros
Dr. William M. Murphy

In the Matter of
SHAW AREVA MOX SERVICES
(Mixed Oxide Fuel Fabrication Facility)

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

June 20, 2007

ORDER
(Granting Extension and
Calling for Status Reports)

Pursuant to our Order of June 14, 2007, the Reply of the petitioning organizations to both the NRC Staff's and the Applicant's Answers (filed June 11 and June 13, respectively) is due before the end of the day today. Yesterday afternoon at 4:15 PM, the Petitioners served electronically a request for a one-week extension of filing time, until next Wednesday, June 27. The Petitioners reported in their extension request that, based on discussions with the opposing parties (see 10 CFR § 2.323(b), the NRC Staff "does not object" to the extension but that the Applicant had "refused to support" it. In that regard, the Applicant filed electronically two hours later (at 6:20 PM) an opposition to the extension.

A. The Content of the Opposition. That opposition made three fundamental arguments. Although containing some valid points, those arguments are neither individually nor collectively substantial enough to deny the requested extension.

1. The Ten-Day Rule. The Applicant points first to the regulation requiring that motions be filed no later than ten days after the occurrence or circumstance from which the motion arises. 10 CFR § 2.323(a). Along that line, the Applicant argues that at least some of the factors relied upon by the Petitioners for the extension arose "well over ten days" ago.

The Applicant's premises may be true but its conclusion does not follow. The opportunity for the Petitioners to file a reply was not actualized until the events of the week of June 11, when the Staff and Applicant filed their Answers to the petition. Their motion was filed well within ten days of those events. To be sure, the Petitioners could have notified us of their scheduling problems at an earlier date, as counsel for the Applicant recently did regarding his upcoming international vacation, but they were under no obligation to do so.¹ In any event, insofar as the ten-day rule was concerned, their motion was not out of compliance.

2. The "Good Cause" Requirement. The Applicant characterizes as essentially matters of convenience, rather than of "good cause" within the meaning of 10 CFR § 2.307(a), the reasons cited by the Petitioners as justifying the requested one-week extension. The Applicant's arguments overlook that, lacking the assistance of counsel, these are pro se petitioners, and that matters that affect or disrupt their personal lives also compromise their ability to attend to their pro se obligations.² To be sure, those who undertake to participate pro se in a complex and difficult proceeding must be prepared to alter their other activities, perhaps significantly, to fulfill those responsibilities. We are not prepared to say, however, that the reasons assigned for seeking a one-week time extension at this stage – thereby allowing a total of two weeks to file a response to a pair of lengthy and thorough answers that seek total dismissal of the Petition – do not constitute good cause in the circumstances.

¹ The Board was informed by its law clerk on Monday, June 18, of an oral communication from Applicant's lead counsel concerning his previous scheduling of an international vacation from June 29 to July 16. At least implicit in that communication was the hope, if not the request, that we not schedule any MOX prehearing events during that period. Advising us of that scheduling information was not done within ten days of the scheduling of the vacation (or the appointment of this Board, whichever was later). In timely fashion, however, it was done within ten days of our June 14 Order raising the Applicant's scheduling conflict.

² The Board notes that personal matters (e.g., family obligations, illness onset, and vacation schedules) have the potential to disrupt even a professional's ability to meet responsibilities in a timely fashion. Of course, a professional often has colleagues to fall back upon.

3. The Belated Filing. The Applicant's third point concerns what it views, with some justification, as the "eleventh hour" filing of the extension request, in late afternoon on the day before the due date. To be sure, no regulation explicitly precludes this approach (cf. 10 CFR § 2.323(c)), but it does put a party who wishes to oppose the request in the very difficult position of filing an immediate response if it wishes to be heard on the matter.

It is not a sufficient answer to the Applicant's complaint in this regard to compliment it for the very thorough and forceful response it prepared and filed within two hours. No party should have to do this. For this reason, other Boards in the past have established a ground rule at the outset of a proceeding – which we do now – that hereafter any requests for an extension must be filed no less than three days before the due date of the filing for which the extension is being sought (absent, of course, some extraordinary cause developing within that three-day period).

For the reasons just indicated, and notwithstanding the legitimacy of some of the points submitted by the Applicant, the Board finds that the Petitioners have demonstrated good cause for the one-week extension they requested. We now turn to other matters which affect the scheduling of the proceeding in the near term.

B. The Scheduling of the Proceeding. The Board wishes to make due allowance for the more than two-week scheduled vacation of Applicant's lead counsel (see note 1, above). Absent that allowance, the Board had been targeting Wednesday, July 11, for a prehearing conference / oral argument, and was considering holding that session near the site of the MOX facility.³ That plan would still have been feasible even with today's grant of the one-week briefing extension. But making allowance for Applicant's counsel's vacation (June 29 to July

³ Although the Board had earlier indicated it might hold that session within 7-10 days of the Petitioners' (June 20) reply, we had since concluded that we could not do so during the next work week without unjustifiably curtailing our and the parties' ability to prepare for that session. For its part, the following week, which includes the July 4 holiday, presents logistical difficulties.

16) not only undermines that plan but also brings into play the two-week out-of-town vacation (July 18 through July 31) long planned by the Board Chairman.

One obvious solution would be to hold the contemplated session on Wednesday, August 8. But to do so would compromise the Board's ability to issue a decision on the intervention petition within the 45-day time frame time set by Commission regulation. 10 CFR § 2.309(i). Under that regulation, and assuming the filing of Petitioners' reply by the new due date, the Board's decision would be due by Monday, August 13 (August 11 is a Saturday).

The applicant's opposition to today's extension did not cite any particular prejudice to its client's interests resulting from the one-week delay. In that regard, in light of the scheduling issues outlined above, it would help the Board decide on a course of action if we knew certain background information about the proceeding, including the degree of particular prejudice that might occur were we to miss the 45-day deadline by approximately two weeks, issuing a decision by the end of August rather than by August 13.⁴

To that end, we are directing each of the parties to file with us by Friday, June 29, a status report, each covering a different subject:

- The Applicant is to report on the degree to which construction of the facility is complete, the now-anticipated construction completion date and, if different, the date upon which it would expect to begin operations (assuming all needed licenses were then in hand).
The Applicant's report is also to discuss any potential for delay that might flow from the recently-reported views of Congressional appropriators about funding the project.
- The NRC Staff is to report on the schedule that it is now following for the creation and issuance of the Safety Evaluation Report for the facility.

⁴ We recognize that the 45-day deadline incorporates values and goals independent of prejudice in a particular proceeding. But it would seem that the implementation of those deadline values, and the legitimacy of extensions in particular cases, would frequently involve consideration of other values as well.

- The Petitioners are to report on the status of their efforts to establish that the representatives of each of the three organizations appearing before us have indeed been duly authorized by those organizations to appear in that capacity. Those matters need not have been fully resolved by June 29, but we should be informed of the steps that have been taken, or will be taken, to resolve them (see June 14 Order, last paragraph).

Each of the parties may also include in its report (1) an indication of any difficulties that might be caused were the Board to conduct the site-vicinity session referred to above on Wednesday August 8 , and/or (2) suggestions as to alternative dates or approaches that would allow the Board to obtain clarification on particular matters that would aid it in reaching a decision on the intervention petition.

For the foregoing reasons, the requested extension is, for good cause shown, GRANTED to Wednesday, June 27; the parties are DIRECTED to file the respective status reports outlined above by Friday, June 29, and the “three-day” rule for filing future extension motions herein is ADOPTED.

We close by noting our confidence that this proceeding will move along, under the Board's direction – and with the parties demonstrating mutual respect and engaging in cooperative efforts – in both an efficient and a just manner, leading to sound and timely conclusions on both short-term procedural matters and long-term substantive issues. In that regard, the Board fully expects that the parties will extend to each other in this proceeding the same courtesies they would expect would be extended to themselves in other federal judicial tribunals.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman

Rockville, Maryland
June 20, 2007

Copies of this Order were sent this date by e-mail transmission to (1) counsel for the Applicant and for the NRC Staff and (2) each of the individuals who signed the petition on behalf of the three organizations seeking to intervene.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Shaw AREVA MOX Services, LLC) Docket No. 70-3098-MLA
)
(Mixed Oxide Fuel Fabrication Facility)
Possession and Use License)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (GRANTING EXTENSION AND CALLING FOR STATUS REPORTS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of June 2007