

August 31, 2007 (3:59pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Before Administrative Judges:
Michael C. Farrar, Chairman
Lawrence G. McDade
Dr. Nicholas G. Trikouros**

In the Matter of:)	August 31, 2007
)	
Shaw AREVA MOX Services, LLC)	Docket No. 70-3098
)	
(Mixed Oxide Fuel Fabrication Facility)	ASLBP No. 07-856-02-MLA-BD01
Possession and Use License))	
)	
)	

**SHAW AREVA MOX SERVICES LLC MOTION TO DENY PETITIONER
NUCLEAR INFORMATION AND RESOURCE SERVICE'S REQUEST FOR HEARING**

On May 14, 2007 the Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information and Resource Service (NIRS) jointly filed their "Petition for Intervention and Request for Hearing" in the above-captioned proceeding. In accordance with 10 CFR §§ 2.1204 and 2.323, Shaw AREVA MOX Services, LLC (MOX Services), for the reasons set forth below, hereby requests that the Atomic Safety and Licensing Board (Board) promptly reject NIRS' request for hearing. MOX Services has contacted NIRS, NWS, BREDL, and the NRC Staff in an effort to resolve the issue raised in this Motion. NIRS and NWS' representatives oppose this Motion. BREDL's representative (Mr. L. Zeller) does not oppose this Motion. Mr. Zeller advised Counsel for MOX Services that he concurs that NIRS

has not participated in this proceeding. Staff Counsel has indicated that the Staff will respond, if appropriate, upon review of this Motion.

I. BACKGROUND

Without any prior notice to the Board, the NRC Staff, or MOX Services, NIRS failed to attend the combined oral argument and prehearing conference as ordered by the Board in its July 16, 2007 Scheduling Order.¹ NIRS' failure to appear was a violation of NRC requirements, and is the latest example of a pattern of non-participation in this proceeding by NIRS. In accordance with the Commission's rules, policy, and precedent, NIRS' behavior warrants the sanction being requested by MOX Services – denial of its request for hearing.

II. APPLICABLE LEGAL STANDARDS

The Commission has clearly stated its expectations regarding participants' conduct in NRC licensing proceedings:

Fairness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations. While a board should endeavor to conduct the proceeding in a manner that takes account of the special circumstances faced by any participant, the fact that a party may have personal or other obligations or possess fewer resources than others to devote to the proceeding does not relieve that party of its hearing obligations. When a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party.

Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981).

Failure to appear at a pre-hearing conference is "a serious matter." See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), ALAB-488, 8 NRC 187, 191 (1978). Even when an intervenor has sound reasons for not attending a Board-ordered hearing, it must

¹ Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), Scheduling Order, ASLBP No. 07-856-02-MLA-BD01 (July 16, 2007) at 1.

formally request that a Board excuse it from participation. *Id.* at 191. Intervention “does not carry with it a license to step into and out of the consideration of a particular issue at will.”

Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975). Moreover, an intervenor “does not have the option of waiting on the sidelines until such time as he might choose to enter the contest.” *Id.*

If a party fails to appear at a prehearing conference or to comply with any prehearing order entered by the presiding officer, the presiding officer may make any orders in regard to the failure that are just. *See* 10 CFR § 2.320. A licensing board is expected to take action when parties, for whatever reason, fail to comply with scheduling and other orders. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-05, 51 NRC 64, 67 (2000) (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923, 1928 (1982)); *see also Policy on Conduct of Adjudicatory Proceedings*, 63 Fed. Reg. 41,872 (Aug. 5, 1998) (“...licensing boards are expected to take appropriate actions to enforce compliance with [scheduling orders]”).

When a party fails to meet its obligations, a number of sanctions are available to the Board to assist in the management of proceedings. *Statement of Policy on Conduct of Licensing Proceedings*, 13 NRC at 454. The available sanctions include:

- ◆ warning the offending party that such conduct will not be tolerated in the future
- ◆ refusing to consider a filing by the offending party
- ◆ denying the right to cross-examine or present evidence
- ◆ dismissal of one or more of the party's contentions
- ◆ imposing appropriate sanctions on counsel for a party; or,
- ◆ in severe cases, dismissal of the party from the proceeding.

See id.

In selecting a sanction, boards should consider the following factors in light of all the circumstances:

- ◆ The relative importance of the unmet obligation,
- ◆ its potential for harm to other parties or the orderly conduct of the proceeding,
- ◆ whether its occurrence is an isolated incident or a part of a pattern of behavior,
- ◆ the importance of the safety or environmental concerns raised by the party.

Failure to appear at a prehearing conference is an example of a party not meeting its obligations, and may result in the application of sanctions by the Board. *See Wisconsin Electric Power Company* (Point Beach Nuclear Plant, Unit 1), LBP-82-108, 16 NRC 1811, 1817 *aff'd*, ALAB-719, 17 NRC 387, 389 (1983). In *Wisconsin Electric*, a petitioner notified the Board that it had a scheduling conflict with a prehearing conference. *Wisconsin Electric* at 1813. The Board cautioned the petitioner that it risked default if it did not attend. *Id.* The Board then advised the petitioner that the prehearing conference would go forward the next day, and further stated that if the petitioner were not present, the Board would proceed without it. *Id.* The prehearing conference then took place as scheduled, and the petitioner did not attend. *Id.* The Board then applied the factors from the *Statement of Policy on Conduct of Licensing Proceedings*, discussed above, in order to determine what sanction was appropriate. *Id.* at 1813-1815. The Board found the petitioner had defaulted on its hearing obligations, and after applying the factors, dismissed its petition for hearing. *Id.* at 1817.

III. ANALYSIS

Applying the legal standards discussed above, NIRS' behavior warrants sanction from the Board. Prompt dismissal from the proceeding is the appropriate sanction because all four of the factors to be considered when applying sanctions have been met. Specifically: (1) NIRS' obligation to attend the pre-hearing conference was an important obligation; (2) NIRS' failure to

appear resulted in harm to the orderly conduct of the proceeding; (3) non-participation in the pre-conference hearing was part of an on-going pattern of non-participatory behavior by NIRS; and (4) the safety and environmental concerns raised by NIRS were jointly proffered by NWS and BREDL, and will be not be dismissed based upon the Board granting this Motion.

A. NIRS' obligation to attend the pre-hearing conference was an important obligation.

In its July, 16, 2007 Scheduling Order (“Order”), the Board observed that the “45 day rule” in 10 CFR § 2.309(i) would have ordinarily required the Board to issue a decision by August 13, 2007, but given, *inter alia*, “the importance of argument to the Board’s full understanding of the issues” and the parties’ and Board scheduling constraints, a decision by mid-September would be unobjectionable. *See* Order at FN4. It is clear that the Board considered attendance at the scheduled oral argument to be an important obligation – an obligation that NIRS has failed to meet.

Moreover, unlike the petitioner that was dismissed in *Wisconsin Electric Power Company, supra*, at 1813, NIRS did not even notify the Board beforehand that it would not attend. NIRS’ action is particularly troubling, considering that NIRS employs a full-time staff and, together with its affiliates, comprises a “network [that] spans more than a dozen offices and programs across the globe.” *See* NIRS website at <http://www.nirs.org/about/nirs.htm>. Since NIRS is a sophisticated, seasoned intervenor, it should have been able to provide someone to represent it at the prehearing conference, or as a minimum courtesy, provide some explanation after the fact of why it had failed to appear.

B. NIRS' failure to appear resulted in harm to the orderly conduct of the proceeding.

The prehearing conference was an important step in the hearing process since it focused on the critical issues of standing and admissibility of contentions. If NIRS had been at the conference, the parties might have become better informed of NIRS' bases for its positions and MOX Services would have been able to present more specific rebuttal on those bases. MOX Services and the Board were therefore deprived of the opportunity to more fully develop the record, which would have enabled the Board to make a more fully informed decision regarding standing and admissibility of contentions.

C. Non-participation in the preconference hearing was part of an on-going pattern of non-participatory behavior by NIRS.

NIRS has not meaningfully participated in the proceeding. Over MOX Services' objection, and in contravention of 10 CFR § 2.314(b), NIRS continues to use NWS to represent its interests.² In its June 13, 2007 "Answer Opposing BREDL et al. Petition for Intervention and Request for Hearing" (Answer), MOX Services demonstrated that NIRS could not be represented by NWS in this proceeding. Answer at 12. In their June 27, 2007 "Reply Of The Petitioning Organizations To The Answers Filed June 11 And 13 By NRC Staff And The License Applicant To Our Petition For Intervention And Request For Hearing Filed May 14, 2007" (Petitioners' Reply), Petitioners stated that NIRS had filed a Notice of Appearance designating Ms. Mary Olson as NIRS' representative in this proceeding. Petitioners' Reply at 2.

While the Notice of Appearance filed by Mary Olson gives the impression that NIRS has met the requirements of 10 CFR § 2.314(b), the impression is illusory. Over the past four

² A partnership, corporation, or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law, but not by another organization. See 10 CFR § 2.314(b).

months, communications between MOX Services and Petitioners BREDL and NWS have been frequent and direct, enabling the amicable resolution of various scheduling issues. However, NIRS has been completely silent,³ choosing instead to communicate through NWS' representative Glenn Carroll.⁴ Most recently, when NIRS failed to appear, NWS and BREDL were left to represent NIRS' interests at the prehearing conference. NIRS continues for all practical purposes to be a non-participant whose interests are represented by NWS -- even after it was made aware that such a representation is improper and having taken the curative action of filing a Notice of Appearance for Ms. Olson.

Based on the forgoing, NIRS' failure to appear at the oral argument and prehearing conference continues a pattern of behavior of non-participatory behavior by NIRS.

D. The safety and environmental concerns raised by NIRS were jointly proffered by NWS and BREDL, and will not be dismissed based upon the Board granting this Motion.

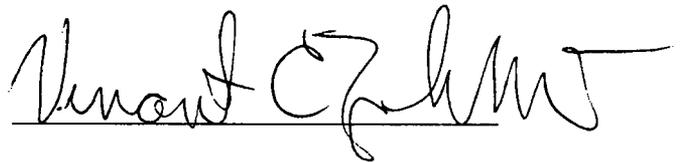
Dismissing NIRS from the present proceeding will not prevent appropriate adjudication of any of the safety or environmental concerns it has raised, because NIRS contentions were proffered jointly with BREDL and NWS. Therefore, each of the contentions will be thoroughly reviewed by the Board regardless of whether or not NIRS is admitted as a Party to the proceeding.

³ Every written communication by MOX Services in the current proceeding has been served upon NIRS. MOX Services, however, has not received from NIRS a single direct communication via first-class mail, voice mail, electronic mail, or any other media.

⁴ See, e.g., electronic mail from G. Carroll to parties dated June 19, 2007 (transmitting Joint Request for 5-Day Extension for Filing Consolidated Reply on MOX License Application submitted by Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information & Resource Service and certificates of service); electronic mail from G. Carroll to parties dated July 7, 2007 (providing dates BREDL, NWS and NIRS representatives would be available for oral argument and site tour); electronic mail from G. Carroll to parties dated July 30, 2007 (Transmitting draft joint response from NWS, BREDL, and NIRS). Also, at the August 22, 2007 Pre-hearing conference and Oral Argument, Counsel for MOX Services was informed verbally by Ms. Carroll that Ms. Olson of NIRS was not going to attend.

Based on the foregoing, and in accordance with Commission policy, rules, and precedent, MOX Services respectfully requests that the Board apply the Commission's *Statement of Policy on Conduct of Licensing Proceedings* and promptly deny NIRS' request for hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald J. Silverman", written over a horizontal line.

Donald J. Silverman, Esq.
Vincent C. Zabielski, Esq.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Ave, N.W.
Washington, DC 20004
Phone (202) 739-5502
E-mail: dsilverman@morganlewis.com

COUNSEL FOR
SHAW AREVA MOX SERVICES, LLC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

THE ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:
Michael C. Farrar, Chairman
Lawrence G. McDade
Dr. Nicholas G. Trikouros**

In the Matter of)	August 31, 2007
Shaw AREVA MOX Services, LLC)	Docket No. 70-3098
(Mixed Oxide Fuel Fabrication Facility)	
Possession and Use License))	ASLBP No. 07-856-02-MLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Shaw AREVA MOX Services LLC Motion to Deny Petitioner Nuclear Information and Resource Service's Request for Hearing" were served upon the persons listed below, by e-mail and first class mail, this 31st of August, 2007.

Administrative Judge
Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-Mail: mcf@nrc.gov)

Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: ngt@nrc.gov)

Andrea Z. Jones
Jody C. Martin
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15D21
Washington, DC 20555-0001
(E-mail: axj4@nrc.gov, jcm5@nrc.gov.)

Administrative Judge
Lawrence G. McDade
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-Mail: lgm1@nrc.gov)

Secretary of the Commission *
Attn: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Mail Stop: 0-16C1
Washington, DC 20555-0001
(E-mail: hearingdocket@nrc.gov)

Louis A. Zeller
Blue Ridge Environmental Defense League
PO Box 88
Glendale Springs, NC 28629
(E-mail: BREDL@skybest.com)

Patricia Harich
ASLBP Program Analyst
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
pah@nrc.gov

Marcia Carpentier
Law Clerk
Atomic Safety & Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: mx7@nrc.gov)

Glenn Carroll
Coordinator
Nuclear Watch South
139 Kings Highway
Decatur, GA 30030
(E-mail: Atom.girl@mindspring.com)

Mary Olson
Nuclear Information and Resource Service
PO Box 7586
Asheville, NC 28802
(E-mail: maryolson@main.nc.us)



Vincent C. Zabielski, Esq.
Counsel for Shaw AREVA MOX Services, LLC

* E-mail, original and two copies