October 31, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
SHAW AREVA MOX SERVICES	)	Docket No. 70-3098-MLA
Mixed Oxide Fuel Fabrication Facility	)	
	)	
(License Application for Possession and	)	ASLBP No. 07-856-02-MLA-BD01
Use of Byproduct, Source and Special	)	
Nuclear Materials)	)	

NRC STAFF RESPONSE TO PETITIONERS' LATE-FILED CONTENTION REGARDING NEED TO SUPPLEMENT EIS FOR PROPOSED MOX PLUTONIUM FUEL PROCESSING FACILITY

INTRODUCTION

On October 5, 2007, the Blue Ridge Environmental Defense League (BREDL) and Nuclear Watch South (NWS) (collectively, "Petitioners") filed a "Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Fuel Processing Facility" ("Late-Filed Contention"). For the reasons set forth below, the Staff opposes the admission of this contention because it fails to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1) and because it does not meet the requirements for a new or amended contention. 10 C.F.R. §§ 2.309(f)(2), 2.309(c)(1).

BACKGROUND

On January 4, 2007, Shaw Areva MOX Services ("Applicant") filed a license application ("Application") for possession and use of byproduct, source, and special nuclear materials at the Mixed Oxide Fuel Fabrication Facility ("MOX Facility" or "MFFF") in Aiken, South Carolina.[1] The

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[1] The current Application is the second stage of a two-stage licensing process for the MOX Facility. For a more complete procedural history, see Staff Response at 2-3.

NRC Staff ("Staff") published a notice of opportunity for hearing on March 15, 2007. Notice of License Application for Possession and Use of Byproduct, Source, and Special Nuclear Materials for the Mixed Oxide Fuel Fabrication Facility, Aiken, SC, and Opportunity to Request a Hearing, 72 Fed. Reg. 12,204 (March 15, 2007).

On May 14, 2007, BREDL, NWS, and the Nuclear Information and Resource Service (NIRS), filed a petition for intervention and request for hearing ("Petition") on the license application. The Staff filed a response[2] to the Petition on June 11, 2007 ("Staff Response"), and the Applicant filed a response on June 13, 2007. The Atomic Safety and Licensing Board ("Board") heard oral arguments on August 22, 2007, and the Petition is still pending before the Board[3]. On October 5, 2007, the Petitioners filed this Late-Filed Contention.[4]

DISCUSSION

I. Standing

A petition for a hearing must demonstrate that the petitioner has standing to intervene. 10 C.F.R. § 2.309(d)(1). In the Staff's Response, the Staff presented its arguments against Petitioners' claims of standing. Staff Response at 3-8. For the reasons set forth in the Staff Response, the Staff reaffirms its position that none of the petitioners (BREDL, NIRS or NWS) have established standing in this proceeding; consequently, Petitioners' Late-Filed Contention should be dismissed. However, should the Board find that Petitioners have demonstrated

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[2] NRC Staff Response to Petition for Intervention and Request for Hearing (June 11, 2007).

[3] On October 17, 2007 the Board issued a Memorandum notifying the parties that it anticipates issuing a decision on the Petition no later than October 31, 2007. Also currently pending before the Board is the Applicant's August 31, 2007 Motion to Deny Petitioner Nuclear Information and Resource Service's Petition to Intervene.

[4] Please note that because the Staff did not receive Petitioners' Late-Filed Contention until after 5 p.m., the Staff's response is not due until October 31, 2007. 10 C.F.R. § 2.306.

standing, Petitioners' Late-Filed Contention should be denied for the reasons set forth below.

II. Late-Filed Contention

A. Legal Standards for Admission of Late-Filed Contentions

Three regulations govern the admissibility of late-filed contentions in an adjudicatory proceeding. *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572-76 (2006). First, a late-filed contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave of the presiding officer only upon a showing that:

(i) the information upon which the amended or new contention is based was not previously available;

(ii) the information upon which the amended or new contention is based is materially different than information previously available; and

(iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

Second, a contention that does not qualify as a new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 234-35 (2006). Nontimely filings may only be entertained following a determination by the presiding officer that a balance of the following eight factors, all of which must be addressed in the petitioner's filing, weigh in favor of admission:

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

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner

disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

B. Petitioners' Late-Filed Contention is Inadmissible

As explained below, Petitioners' Late-Filed contention should not be admitted because: (1) it does not meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1); (2) it does not meet the admissibility requirements for new or amended contentions in 10 C.F.R. § 2.309(f)(2); and (3) it is nontimely. 10 C.F.R. § 2.309(c).

1. Petitioners' Late-Filed Contention does not meet the Contention Admissibility Requirements in 10 C.F.R. 2.309(f)(1)

Petitioners claim that the license application for the MOX facility "fails to comply with the National Environmental Policy Act ("NEPA") or … 10 C.F.R. § 51.92," because the Staff's environmental impact statement ("NRC EIS")[5] fails to address "significant proposed changes" in DOE's "strategy for disposing of surplus weapons-grade plutonium, which in turn would require modifications to the design" of the MOX facility. Late-Filed Contention at 1, 2. As further support, Petitioners rely, in part, on DOE announcements that describe the process for preparing a DOE Supplemental Environmental Impact Statement (SEIS): an amended Record of Decision (ROD) announced on September 5, 2007;[6] and a disposition plan[7]. Late-Filed

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[5] NUREG-1767, "Final Environmental Impact Statement on the Construction and Operation of a Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina" (2005).

[6] Department of Energy, Amended Record of Decision: Storage of Surplus Plutonium Materials at the Savannah River Site, 72 Fed. Reg. 51,807 (Sept. 11, 2007).

[7] Department of Energy, "Plan for Alternative Disposition of Defense Plutonium and Defense Plutonium Materials That Were Destined for the Cancelled Plutonium Immobilization Plant"("Disposition Plan"), September, 2007, available at http://www.em.doe.gov/pages/arodpu.aspx. This plan incorporates another report entitled "Business Case: DOE's Proposed Baseline Approach for Disposing of Surplus Plutonium," which was submitted to Congress in April, 2007. Disposition Plan at 4.

Contention at 5, 6. Because the information referenced by Petitioners is insufficient to demonstrate that the Applicant will change the MFFF design, the contention falls outside the scope of this proceeding and should be rejected.

The scope of a proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Board. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As stated in the Notice of Opportunity to Request a Hearing, this proceeding concerns the Application submitted on January 4, 2007. 72 Fed. Reg. 12,204 (March 15, 2007). Prior to this submittal, there was an earlier NRC proceeding on the construction authorization request and environmental issues. *See* Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19,994 (April 18, 2001)[8]. Thus, any attack on the Staff's EIS at this juncture is outside the scope of this proceeding unless the Petitioners can show that the Staff must prepare a SEIS pursuant to 10 C.F.R. § 51.92. According to Subsection 51.92, the Staff will prepare a SEIS if: "(1) there are substantial changes in the proposed action that are relevant to environmental concerns; or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." The Commission has further interpreted Subsection 51.92 declaring that:

> A supplement to the EIS is not required "every time new information comes to light after the EIS is finalized." As a general matter, the agency must consider whether the new information is significant enough to consider preparation of a supplement. The new information must present "a seriously different picture of the environmental impact of the proposed project from what was previously envisioned."

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[8] On July 20, 2005, this proceeding was terminated following motions for summary disposition. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53 (2005) (Order Terminating Proceeding).

Hydro Resources, Inc. (P.O. Box 777, Crownpoint, New Mexico 87313), CLI-99-22, 50 N.R.C. 3, 14 (1999) (internal citations omitted).

Petitioners have not identified any significant new information nor shown that there have been substantial changes to the proposal currently under review. An examination of the DOE ROD and the Disposition Plan demonstrates that there is no concrete plan to use the MFFF for the disposition of additional surplus plutonium. For example, in the ROD, the DOE announced it was preparing a SEIS to evaluate the potential environmental impacts of alternative methods to disposition surplus, non-pit plutonium; and that the MFFF would be considered as one alternative in a list of others. ROD, 72 Fed. Reg. at 51,809. In the Disposition Plan, the DOE describes the potential disposition strategies and states that "[e]liminating the mission for the Plutonium Vitrification process would result in the MFFF and H-Canyon processing additional plutonium, therefore requiring some modifications to both facilities." Disposition Plan at 7. In the very same paragraph, however, the DOE affirmed that that it "will *continue to evaluate this option* to determine whether it presents a more cost effective, technically feasible method of disposal." Disposition Plan at 7 (emphasis added). These announcements are hardly evidence that the DOE intends to modify the MFFF, as petitioners would like the Board to believe. The DOE is simply informing the public that the MFFF is being considered as one alternative, which may require modification, in a broader strategy to disposition surplus plutonium. Thus, because there is no significant new information or circumstances bearing on the proposed action, a supplement to the EIS is not required.

In addition, the Staff has not received any new proposals from the Applicant to change or modify the application that is the subject of this proceeding. The Commission has stated that NRC proceedings are to consider ". . . the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing

proceeding." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002). In *Catawba and McGuire*, the Commission reversed a Board decision to admit a NEPA-related contention by Petitioners, BREDL and NIRS. Petitioners in the Catawba and McGuire proceedings asserted that because Duke Energy anticipated the use of MOX fuel in its reactors, the Staff should have considered it as part of the review of the license renewal application, even though Duke Energy had not submitted a modification. Although as a supporting bases for the contention the Petitioners showed that Duke Energy signed a contract with the DOE for future use of MOX fuel, the Commission rejected the contention, holding that under the ripeness test, the contention failed because "…a possible future action must at least constitute a 'proposal' pending before the agency" to be ripe for adjudication. *Id*. at 295. The Commission further reasoned that projects that are merely contemplated, as opposed to reasonably certain or concrete, do not constitute a proposal and thus are not "ripe" for adjudication[9]. *Id.* at 295. In this case, the Commission's holding in the *Catawba and McGuire* decision is applicable; Petitioners' contention is not ripe for adjudication at this time. DOE's announcements and plan are evidence that the DOE is considering various options for the disposition of additional surplus plutonium, but does not constitute a concrete proposal to modify the MFFF. Consequently, consistent with the Commission's holding in *Catawba and McGuire*, the environmental challenge presented is not a proposal that is "pending before the agency;" therefore, it is not ripe for adjudication. Thus, the contention is outside the scope of this proceeding.

Finally, Petitioners have not shown enough information to demonstrate a genuine

[9] In addition to applying the ripeness test, the Commission, following *Webb v. Gorsuch*, 699 F. 2d 157 (4th Cir. 1983), applied the nexus test. The Commission found that there was no interdependence between Duke Energy's renewal application and any potential fuel-related amendment application. Id. at 97.

dispute of a material issue of law or fact in this licensing proceeding. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners have not identified any information demonstrating that the DOE proposes to modify the current license application, nor have Petitioners shown that there is any concrete plan to modify the MFFF. Thus, because there is no genuine dispute of a material issue of law or fact, the contention should be rejected.

2. <u>Petitioners' Late-Filed Contention does not meet the admissibility requirements for a new contention.</u>

Even if the Late-Filed Contention meets the 10 C.F.R. § 2.309(f)(1) admissibility requirements, it should be denied because it is not based on new information that is materially different from information previously available, and because it has not been submitted in a timely fashion. 10 C.F.R. § 2.309(f)(2). The DOE published a Notice of Intent to Prepare a SEIS for surplus plutonium disposition at the SRS on March 28, 2007.[10] Petitioners argue that the March 28, 2007 NOI "did not describe any plans to change the design or operation" of the MOX Facility, and therefore the Disposition Plan was "the first time DOE has announced that the [MOX Facility] will require modification in order to accommodate plutonium feedstock." Late-Filed Contention at 4, 7. For support, Petitioners cite a section of the Disposition Plan that states that "eliminating the mission for the Plutonium Vitrification Process may result in the MFFF and H-Canyon processing additional plutonium, therefore requiring some modifications to both facilities." Late-Filed Contention at 4-5. This information is neither new nor materially different than information already available.

First, Petitioners have not shown that the information upon which this contention is based was not previously available. 10 C.F.R. § 2.309(f)(2)(i). On March 28, 2007, DOE

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[10] Department of Energy, Notice of Intent to Prepare a Supplemental Environmental Impact Statement for Surplus Plutonium Disposition at the Savannah River Site, 72 Fed. Reg. 14,543 (March 28, 2007) ("March 28, 2007 NOI").

spelled out its plans to evaluate alternatives for disposing of the 13 metric tons of surplus plutonium "without a defined disposition path," one of which is using surplus plutonium as feedstock for the MOX Facility. March 28, 2007 NOI, 72 Fed. Reg. at 14,545. Therefore, Petitioners had notice that DOE was considering processing additional plutonium in the MOX Facility no later than March 28, 2007, well before they filed their original contentions on May 14, 2007. Although the March 28, 2007 NOI does not explicitly state that design changes would be required to process additional plutonium in the MOX Facility, Petitioners themselves cite documents published in 2005 to support their assertion that the "technical necessity of modifying the [MFFF] to implement the strategy described in the September 5, 2007 Plan is clear." Late-Filed Contention at 5-6 (citing the NRC Final Safety Evaluation Report (FSER)[11] and a Pacific Northwest National Laboratory (PNNL) research report[12]). Thus, based on their own arguments, Petitioners had sufficient information available to them by March 28, 2007, to raise this issue. The Commission has stated that Petitioners are obligated to "examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention." Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983)). Consequently, in order to

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[11] NUREG 1821, "Final Safety Evaluation Report on the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina" (2005).

[12] J.M. Tingey and S.A. Jones, "Chemical and Radiochemical Composition of Thermally Stabilized Plutonium Oxide from the Plutonium Finishing Plant Considered as Alternate Feedstock for the Mixed Oxide Fuel Fabrication Facility," PNNL-15241, Pacific Northwest National Laboratory, July 2005, pp. iv and 1.5-1.7.

be timely, this Late-Filed Contention should have been filed with the Petitioners' original Petition.

Second, this information is not materially different than information previously available. 10 C.F.R. § 2.309(f)(2)(ii). As discussed above, at this point, the DOE is merely analyzing an alternative that would require making changes to the MFFF; however, there has been no final decision on how to disposition the surplus plutonium. *See* DOE Disposition Plan at 1-2. Currently, there are no concrete plans to actually make any changes to the MFFF, so there is no materially different information to consider.

Finally, Petitioners' new contention is not "timely… based on the availability of the subsequent information." 10 C.F.R. § 2.309(f)(2)(iii). As discussed above, the information underlying Petitioners' contention was available no later than March 28, 2007, well before Petitioners filed their Petition on May 14, 2007. Therefore, their Late-Filed Contention is not timely. Because Petitioners' contention does not meet the criteria of 10 C.F.R. § 2.309(f)(2), it cannot be admitted as a new contention unless Petitioners satisfy the requirements for the admission of a nontimely contention. 10 C.F.R. § 2.309(c).

3. Petitioners' Late-Filed Contention does not meet the requirements for admission of a nontimely contention

Because the contention is nontimely, it may only be admitted after a demonstration by the petitioners that a balancing of the eight factors in 10 C.F.R. §2.309(c)(1) weigh in favor of admission. In this instance, the Petitioners have not satisfied that criteria. Petitioners seeking admission of a late-filed contention bear the burden of showing that a balancing of these factors weighs in favor of admission. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2), CLI-98-25, 48 NRC 325, 347 (1998). First, under Subsection 2.309(c)(1)(i), the Petitioners cannot show good cause for failing to file their contention on time because the information was available to them as early as March 28, 2007, well before they filed their May

14, 2007, Petition. Second, Petitioners have not demonstrated that there is no alternate means of protecting their interest. 10 C.F.R. § 2.309(c)(1)(v). If the Petitioners believe that the MFFF should not be considered as an alternative in the DOE's broader disposition strategy, Petitioners can submit comments through the DOE's NEPA process inviting public comment. Additionally, Petitioners are free to raise NEPA-related issues if the Applicant submits an amendment to the license application or to the license, seeking permission to modify the MFFF. Third, Petitioners have not shown that admitting this contention would not broaden the issues and unnecessarily lengthen the proceeding. 10 C.F.R. § 2.309(c)(1)(vii). As discussed previously, this proceeding is limited to a decision based on the application that is pending before the NRC. Thus, the late-filed contention would broaden the issues and expand the proceeding unnecessarily. Finally, Petitioners have not shown that this contention will assist in the development of a sound record because the contention rests entirely upon speculative, future events.[13] Because Petitioners have not satisfied the criteria for late-filed contentions, the contention should be rejected.

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[13] A discussion of the other factors in10 C.F.R. § 2.309(c)(1)(iii), (iv), and (vi) would be repetitive considering that petitioners' qualifications to satisfy those criteria have been challenged in various arguments in the Staff's responses.

CONCLUSION

As explained above, the Petitioners have not demonstrated that they have standing to intervene in the proceeding nor have they submitted a contention that meets either the requirements for late filed contentions or the contention admissibility standards. Therefore, the Late-Filed Contention should be denied.

Respectfully submitted,

/RA by Andrea' Z. Jones/

Andrea' Z. Jones
Jody C. Martin
Counsel for the NRC Staff

Dated at Rockville, MD
this 31st day of October, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO THE PETITIONERS' LATE-FILED CONTENTION REGARDING NEED TO SUPPLEMENT EIS FOR PROPOSED MOX PLUTONIUM PROCESSING FACILITY" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk(*); and by electronic mail as indicated by a double asterisk (**) on this 31st day of October, 2007:

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