

November 9, 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'S RESPONSE TO THE BOARD'S  
OCTOBER 31, 2007 ORDER AND REQUEST FOR RECONSIDERATION

INTRODUCTION

On October 31, 2007, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order Ruling on Standing and Contentions ("Order"). In the Order, the Board dismissed Contentions 1, 2, and 5; and admitted Contentions 3 and 4, subject to reconsideration upon the submission of briefs by NRC Staff ("Staff") and Shaw Areva MOX Services ("Applicant")<sup>1</sup>. In an effort to further address the contentions admitted, the Board set out four options, or "reconsideration' alternatives" and requested that the Staff and the Applicant provide comments and address "any related matters – or other alternatives – they wish to bring to the Board's attention." Order at 52. For the reasons explained in this response, the Staff respectfully submits that it cannot endorse the Board's view on Contentions 3 and 4 or any of the four "reconsideration alternatives" presented because there is neither a sufficient basis nor sufficient authority. The Staff reaffirms its position that the contentions be dismissed

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<sup>1</sup> In summary, Contention 3 states that the extended storage of waste was not considered in the EIS. Contention 4 states that the license application fails to address the safety and public health risks of indefinite radioactive waste storage.

for failure to meet the admissibility requirements. In this regard, the Staff requests that the Board reconsider its interlocutory decision and issue a final Order dismissing Contentions 3 and 4.

### DISCUSSION

The Staff recognizes that the Board feels that "[a]n outright dismissal would raise profound questions about the fairness (in terms of procedural due process) of an interpretation of the regulations that would result in a Notice of Hearing being largely fanciful in terms of creating a genuine opportunity for a hearing". Order at 49. However unique, from the Board's point of view, the Commission's approach to bifurcating the hearing proceedings for the license review of the MFFF, the Staff is bound to follow the Commission's direction in the matter. Indeed, the Commission's decision to bifurcate this proceeding is evidence that the Commission believed that the regulations in place are sufficient to provide any intervenor a genuine opportunity for hearing if new information arises. In fact, the Commission has promulgated regulations specifically designed to provide avenues to protect the public's ability to participate in situations where new information arises, including allowing for untimely intervention petitions, 10 C.F.R. § 2.309(c). In addition, after completion of the pending licensing action, 10 C.F.R. § 2.206 provides that any member of the public may file a request to institute a proceeding to "modify, suspend or revoke a license, or for any other action as may be proper." In the Staff's view, these regulations are the appropriate way to deal with any possible new information. Thus, rather than creating a less than genuine opportunity for a hearing, the Commission has carefully designed the regulatory framework to assure the public's ability to have input before and after the licensing process through adjudicatory and non-adjudicatory means.

In this case, Contentions 3 and 4 are based on speculation and conjecture by the Petitioners that the DOE will not build the Waste Solidification Building; but, the Petitioners have not presented sufficient information to support adjudicating that allegation. If DOE determines

that the WSB will not be utilized for waste from the MFFF, then the Petitioners will be made aware of this.<sup>2</sup> This new information will allow the Petitioners to proceed using the methods spelled out in the Commission regulations listed above. For that reason, any agreement by the Staff to the Board's proposals in this case is inappropriate and inconsistent with the adjudicatory process contemplated by the Commission.

At this juncture, the admissibility of contentions 3 and 4, as presented by the Petitioners, is the threshold issue for the Board. Through its Order, the Board invited the Staff to provide comments and/or views on the proposals set out in its Order, indicating its willingness to reconsider its interlocutory ruling. A brief explanation of the reasons the Staff cannot endorse the alternatives is provided for the Board's consideration.

I. Analysis of the Board's "Reconsideration Alternatives"

A. Alternative One

In alternative one, the Board would reject the contentions at this point on the condition that the Staff issue one or more Notices of Hearing as construction progresses. Order at 44-45. The Staff cannot agree to issue another Notice of Hearing in this case. The regulations clearly allow for dual hearings concerning the issuance of both a license for construction and operation. See 10 C.F.R. § 70.23(a). The Commission's decision to allow for hearing on the operation of a facility well before construction is completed demonstrates their comfort with conducting proceedings in this fashion. Further, as stated above, the Commission's regulations provide for: the admission of untimely intervention petitions, 10 C.F.R. § 2.309(c); and, allowing members of the public to file a request that the NRC take action to "modify, suspend or revoke a license, or

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<sup>2</sup> See August 29, 2007 Letter from Margaret J. Bupp to Administrative Judges regarding policies and procedures for informing stakeholders; see *also*, Applicant's August 31, 2007 Motion for Leave to Supplement NRC Staff Letter Dated August 29, 2007, with Supplement.

for any other action as may be proper,” which entitles the requestor to a written evaluation of a properly filed request that indicates either that the NRC is taking the requested action or explains why the NRC is denying the request. 10 C.F.R § 2.206. These regulations, in the Staff’s view, are the appropriate way to deal with any possible new information.

B. Alternative Two

In alternative two, the Board states that “if on reconsideration we were to determine that the Petitioners’ contentions were not ripe now but might later be actualized, we could simply defer taking action on their admissibility.” Order at 46. The Staff cannot agree to this alternative because neither the Staff nor the Board has the authority to agree to delay a decision on admissibility. 10 C.F.R. § 2.309(i) states that the “presiding officer shall, within forty-five (45) days after the filing of answers and replies under paragraph (h) of this section, issue a decision on each request for hearing/petition to intervene, absent an extension from the Commission.”<sup>3</sup> Further, the Commission has stressed that it has an “important policy supporting prompt decisionmaking.” *Dominion Nuclear Connecticut*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 568 (2001). In Millstone, the Commission noted that Subsection 2.309(i) “*requires* a board to rule on any petition to intervene and/or request for hearing within 45 days of receiving the answers and replies associated with that petition and/or request.” *Id.* (emphasis in original). Because the Staff is bound to follow Commission regulations, it cannot support an alternative that would delay issuing a decision on the admissibility of the contentions; doing so would constitute a recommendation that the Board violate Commission regulations.

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<sup>3</sup> The Board cited the *Pa’ina* case as support for this option. The Staff notes that the *Pa’ina* decision involved a stay application under 10 C.F.R. § 2.1213(a). This section of the regulations is not covered by the timing requirement in 10 C.F.R. § 2.309(i).

C. Alternative Three

For alternative three, the Board proposed that it “would reject the contentions but not dismiss the proceeding, instead simply holding the adjudication open.” Order at 47. The Staff cannot agree to a Board action to hold this proceeding in abeyance if there is no admissible contention. According to Section 2.309, the Board can only grant a petition for hearing if the petitioner can demonstrate standing and propose at least one admissible contention. Thus, if the contentions are held inadmissible, then the petitioners cannot be parties and the Board must close the proceedings. Further, this alternative, in the Staff’s view, circumvents the Commission’s rules by unnecessarily establishing an alternative process.

D. Alternative Four

In alternative four, the Board proposed that the Applicant agree to a license condition that would require the “availability of the WSB and the needed implementation of alarms, setpoints and procedures before it could begin to receive material for processing.” If these plans changed, then the Applicant would have to seek an amendment “of that license condition.” The Staff cannot agree to this alternative because it requires that the Staff expand its jurisdictional authority to require that the Applicant construct the Waste Solidification Building (“WSB”). As the Staff noted in its original response to the petition for hearing, the WSB is a DOE facility subject to DOE’s authority. Staff Response at p. 22. Thus, adding such a condition to the license, for the purpose of triggering a notice of hearing pursuant to the NRC regulations, would be contrary to the NRC’s licensing authority in these proceedings.

II. Contentions 3 and 4 are inadmissible.

The Staff reaffirms its position that Petitioners’ contentions are outside the scope of this proceeding and speculative. As stated in the Staff’s initial Response, Staff Response at 20-23, both contentions rest on the speculative assumption that DOE will not build the WSB. In Contention 3, the Petitioners did not present any new information or changed circumstances

that would require the staff to prepare a supplemental environmental impact statement; consequently, Contention 3 is outside the scope of this proceeding. Similarly, Contention 4 is based on conjecture that the WSB will not be built, which would force the Applicant to deviate from its application, and instead, store an impermissible amount of waste at the MFFF. This contention remains inadmissible because it is outside the scope of this proceeding and is not supported by relevant facts or expert opinion. Therefore, the Staff respectfully requests that the Board dismiss the contentions.

CONCLUSION

For the reasons explained in this response, the Staff respectfully requests that the Board consider the information offered in response to each alternative; reconsider its interlocutory decision, and dismiss the contentions.

Respectfully submitted,

***/RA by Andrea' Z. Jones/***

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

Dated at Rockville, MD  
this 9<sup>th</sup> day of November, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S RESPONSE TO BOARD'S OCTOBER 31, 2007 ORDER AND REQUEST FOR RECONSIDERATION" 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 9<sup>th</sup> day of November, 2007:

Michael C. Farrar, Chair \* \*\*  
Administrative Judge  
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

Lawrence G. McDade \* \*\*  
Administrative Judge  
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

Dr. Nicholas G. Trikouros \* \*\*  
Administrative Judge  
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

Office of Commission Appellate  
Adjudication \* \*\*  
Mail Stop: O-16 G4  
U.S. Nuclear Regulatory Commission  
Washington, D.C 20555  
E-mail: OCAAmal@nrc.gov

Office of the Secretary \* \*\*  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
E-mail: HEARINGDOCKET@nrc.gov

Glenn Carroll \*\*  
Coordinator  
Nuclear Watch South  
P.O. Box 8574  
Atlanta, GA 31106  
E-mail: Atom.girl@mindspring.com

Louis A. Zeller \*\*  
Blue Ridge Environmental Defense League  
P.O. Box 88  
Glendale Springs, N.C. 28629  
E-mail: BREDL@skybest.com

Donald J. Silverman, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)

Vincent C. Zabielski, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1701 Market St.  
Philadelphia, PA 19103  
E-mail: [vzabielski@morganlewis.com](mailto:vzabielski@morganlewis.com)

Shaw AREVA MOX Services  
Attn: Dealis Gwyn  
P.O. Box 7097  
Aiken, S.C. 29804

Marcia Carpentier \* \*\*  
Board Law Clerk  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [mx7@nrc.gov](mailto:mx7@nrc.gov)

Patrishia Harich \* \*\*  
ASLBP Program Analyst  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [pah@nrc.gov](mailto:pah@nrc.gov)

Mary Olson \*\*  
Nuclear Information and Resource Service  
P.O. Box 7586  
Asheville, N.C. 28802  
E-mail: [maryolson@main.nc.us](mailto:maryolson@main.nc.us)

***/RA by Jody C. Martin/***

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Jody C. Martin  
Counsel for the NRC Staff