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

DOCKETED  
USNRC

November 9, 2007 (11:58am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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In the Matter of:

Shaw AREVA MOX Services, LLC

(Mixed Oxide Fuel Fabrication Facility  
Possession and Use License)  
\_\_\_\_\_

)  
) November 9, 2007  
)

) Docket No. 70-3098  
)

) ASLBP No. 07-856-02-MLA-BD01  
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**MOX SERVICES' BRIEF IN RESPONSE TO MEMORANDUM AND ORDER  
(RULING ON STANDING AND CONTENTIONS)**

**I. INTRODUCTION**

In an October 31, 2007 Memorandum and Order (Ruling on Standing and Contentions)<sup>1</sup> ("Memorandum and Order") issued by the Atomic Safety and Licensing Board ("Board") in the above-captioned proceeding, the Board, among other things, dismissed as inadmissible proposed Contentions 1, 2, and 5 proffered by Nuclear Watch South, the Blue Ridge Environmental Defense League, and the Nuclear Information and Resource Service ("Petitioners"), but admitted Petitioners' proposed Contentions 3 and 4 "subject to . . . reconsideration."<sup>2</sup> The Board made it clear that its decision was not final and that the time for any petition for review to the Commission has not yet begun to run.<sup>3</sup>

<sup>1</sup> LBP-07-14 (slip op.).

<sup>2</sup> *Id.* at 53. The Board also ruled that Petitioners have standing to be admitted as Parties to this proceeding. *Id.*

<sup>3</sup> *Id.*

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In addressing Contentions 3 and 4, the Board stated that the two Contentions pose a “common issue” -- that is, whether “the contentions are speculative and/or premature and, if so, in what fashion a rejection of those contentions, and the possible concomitant dismissal of the pending petition, should be framed or conditioned.”<sup>4</sup> The Board went on to discuss its concerns with respect to the “prematurity” of the Commission’s Notice of Opportunity for Hearing and the impact of that on the Petitioners’ ability to frame and have admitted valid contentions.<sup>5</sup> While the Board provisionally admitted these two Contentions,<sup>6</sup> it “express[ed] [its] willingness to reconsider [its] decision” based upon four alternative procedural paths it proposed, in lieu of admitting and litigating the Contentions at this time.<sup>7</sup> Thus, the Board directed the NRC Staff and MOX Services to file briefs by November 9, 2007, addressing the four “reconsideration alternatives” and any related matters or other alternatives.<sup>8</sup> MOX Services’ position, in response to the Board’s directive and the four reconsideration alternatives, is presented below.

## **II. DISCUSSION**

### **A. Preliminary Matters**

Before responding specifically to the four alternatives proposed by the Board, MOX Services would like to make two fundamental observations.

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<sup>4</sup> *Id.* at 34. Contention 3 alleged that the Environmental Impact Statement (EIS) for the MFFF did not satisfy the requirements of the National Environmental Policy Act and NRC implementing regulations because it failed to address new and significant information showing that neither the Applicant nor the U.S. Department of Energy has any concrete plans for construction or operation of the Waste Solidification Building that was proposed in the EIS, and as a result, high-alpha liquid waste from the aqueous polishing process at the proposed facility may have to be stored onsite for an extended period of time; and such extended onsite storage of the high-alpha liquid waste poses environmental and safety hazards that have not been addressed by the NRC in the EIS. *See* Petition for Intervention and Request for Hearing at 16-17 (May 14, 2007). Similarly, Contention 4 alleged that the license application was inadequate because it did not address safety and public health risks posed by indefinite storage of liquid high-alpha waste at the site or contain measures for the safe storage of that waste. *See id.* at 23.

<sup>5</sup> Memorandum and Order at 34-40.

<sup>6</sup> *Id.* at 43.

<sup>7</sup> *Id.* at 44.

<sup>8</sup> *Id.* at 52.

First, it is clear that the Commission's regulations provide procedural mechanisms for Petitioners to raise contentions, when ripe, in the future in relation to the MOX Services License Application. Those mechanisms, which are set forth in 10 CFR §§ 2.309 and 2.326 of the Commission's regulations, provide well-accepted, time-honored, and Commission-approved avenues for effective public participation in NRC licensing proceedings. They are available to Petitioners in this proceeding, and in MOX Services' strongly held view, should suffice. MOX Services respectfully suggests that there is no need for this Board to create new and novel processes to replace the existing regulatory regime. Indeed, MOX Services believes that creating such *ad hoc* procedures could very well result in the unintended consequence of increasing the potential for future litigation.<sup>9</sup>

Second, a critical distinction must be drawn between matters that are within the scope of the NRC's jurisdiction and matters that are committed to the jurisdiction of the U.S. Department of Energy (DOE) by virtue of the Atomic Energy Act of 1954 as amended and Section 202 of the Energy Reorganization Act of 1974. While licensing of the planned MOX Fuel Fabrication Facility (MFFF) is within the scope of the NRC's jurisdiction,<sup>10</sup> construction and operation of DOE's planned Waste Solidification Building (WSB) most assuredly is not. MOX Services has committed to turn over the liquid high-alpha waste that is the subject of Contentions 3 and 4 to DOE.<sup>11</sup> DOE's management of this waste, DOE's construction timing, and DOE's operation of

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<sup>9</sup> In addition, where the parties desire, the Commission's rules contain alternative dispute resolution and settlement processes. *See* 10 CFR § 2.338.

<sup>10</sup> *See* 42 U.S.C. § 5842.

<sup>11</sup> *See* Mixed Oxide Fuel Fabrication Facility License Application § 10.1.2.2 ("Liquid radioactive waste is transferred to [DOE] facilities...for appropriate storage and disposition.")

the WSB are matters that are determined by DOE pursuant to its independent statutory authority and responsibilities, and are not within the NRC's jurisdiction.<sup>12</sup>

With these basic observations in mind, we turn to the Board's four proposed reconsideration alternatives.

**B. Reconsideration Alternatives**

MOX Services has carefully considered each of the Board's proffered alternatives. However, we continue to strongly believe that, as stated in our June 13, 2007 Answer,<sup>13</sup> Contentions 3 and 4 are clearly inadmissible and should be dismissed without condition or caveat. For that reason, MOX Services cannot support any alternative that would result in either a conditional rejection (necessitating future hearing notices, license conditions, or license amendments), or a deferral of a Board ruling on admissibility.

In particular, MOX Services believes that the various proposed alternatives raise a number of very significant and fundamental legal, regulatory and policy questions with respect to the jurisdiction and authority of the Board, the NRC Staff, and MOX Services as the license applicant. Among these are the following:

- The authority of the Board or any entity other than the Commission to establish requirements or policy with respect to future Notices of Opportunity for Hearing;
- The authority of the Board to defer a decision on contention admissibility after full briefing and all procedural requirements applicable to the decision on admissibility of contentions have been met;

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<sup>12</sup> As evidenced by the DOE FY2008 Congressional Budget Request attached as Exhibit 1 to MOX Services' June 13, 2007 Answer, DOE does in fact intend to construct the WSB. *See Shaw AREVA MOX Services, LLC Answer Opposing BREDL Et Al. Petition for Intervention and Request for Hearing (June 13, 2007)*, Exh. 1, at 3 of 10. The WSB is scheduled to start operation in 2013. *Id.* at 4 of 10. MOX Services notes that, since the WSB is not expected to receive waste from the MFFF until 2016, there was no need to begin construction of the WSB until the fourth quarter of 2008. *See id.*

<sup>13</sup> *See* MOX Services' June 13, 2007 Answer at 35-38.

- The authority of the Board to keep the proceeding open in the face of contentions which are, in MOX Services' view, clearly inadmissible;
- The authority of the Board to establish license conditions at this pre-evidentiary phase of the proceeding, and concerning a facility (DOE's Waste Solidification Building) which is not subject to NRC's jurisdiction;
- The authority of the Board to establish case-specific and unique processes for handling future, possible contentions that have not yet been proffered; and
- The extent to which the alternatives are inconsistent with existing Commission-approved regulations governing contentions filed after the initial submittal of a request for hearing.

Each of the Board's proposed alternatives is addressed briefly below.

1. Reject Those Contentions On Condition That One Or More Additional Notices Of Hearing Would Be Issued At Appropriate Times

It is not at all clear that the Board or any entity other than Commission has the authority to determine when or under what circumstances to issue such Notices. We also note that a Notice of Hearing, as opposed to a Notice of Opportunity for Hearing (*see* 10 CFR § 2.104 versus § 2.105) is entirely inappropriate under circumstances, such as here, where there is no mandatory hearing requirement. Finally, this alternative would establish an open-ended, indeterminate hearing process which we do not believe is consistent with Commission policy or practice.

2. Defer Ruling On The Contentions Until A More Appropriate Time

With the completion of all submittals on contention admissibility, and related oral arguments before the Board, it is not appropriate to defer a ruling on admissibility, particularly with respect to contentions that are not "ripe" and may never be. Again, this alternative would

create an open-ended, indeterminate hearing process that is inconsistent with Commission policy and practice.

3. Reject The Contentions But Determine Not To Dismiss The Proceeding At This Juncture

This alternative is subject to the same concerns and issues expressed above with respect to finality and timeliness of the proceeding. As MOX Services noted in its Answer, Petitioners' Contentions are speculative at best, as evidenced by the Board's acknowledgment that their "merits [may] become more ripe, as they have the potential to do."<sup>14</sup>

4. Reject The Contentions In Return For Acceptance Of A License Condition

It is not clear that the imposition of any license condition is appropriate at this pre-evidentiary stage of the proceeding. Moreover, a license condition "requiring the availability of the WSB"<sup>15</sup> or in any way restraining DOE's actions with respect to the WSB would run afoul of DOE's exclusive jurisdiction. Furthermore, the Board's alternative reads 10 CFR §70.72 (the change process that determines whether or not a license amendment is required) out of the regulations, and the proposal for an "automatic" Notice of Hearing is inconsistent with the applicable regulations.

The Board itself has acknowledged that its approach "may be viewed as unorthodox."<sup>16</sup> The Board has also raised the question of "[w]hether [its] case management authority . . . would allow" it to take the actions it has proposed, absent agreement of the parties.<sup>17</sup>

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<sup>14</sup> Memorandum and Order at 47.

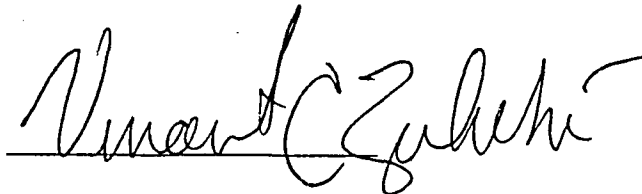
<sup>15</sup> *Id.* at 47.

<sup>16</sup> Memorandum and Order at 49.

<sup>17</sup> *Id.* at 51. It is also unclear that the Board has the authority to take such actions even if all parties agree to do so.

In light of these fundamental questions and MOX Services' view that Contentions 3 and 4 are clearly inadmissible, MOX Services respectfully declines to accept or endorse any of the proffered alternatives. We therefore continue to urge the Board to dismiss Contentions 3 and 4 as inadmissible.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Vincent C. Zabielski", written over a horizontal line.

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NUCLEAR REGULATORY COMMISSION**

**THE ATOMIC SAFETY AND LICENSING BOARD**

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

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| In the Matter of                       | ) | November 9, 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 |
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**CERTIFICATE OF SERVICE**

I hereby certify that copies of "MOX Services' Brief In Response To Memorandum And Order (Ruling On Standing And Contentions)" were served upon the persons listed below, by e-mail and first class mail, this 9th day of November, 2007.

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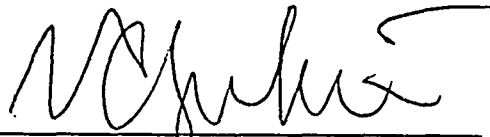
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