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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

November 19, 2007

**INTERVENORS' RESPONSE TO ATOMIC SAFETY AND
LICENSING BOARD'S ORDER OF OCTOBER 31, 2007**

I. INTRODUCTION

Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information and Resource Service ("NIRS") (collectively "Intervenors") hereby respond to the questions raised by the Atomic Safety and Licensing Board ("ASLB") in LBP-07-14, Memorandum and Order (Ruling on Standing and Contentions) (October 31, 2007) ("LBP-07-14"). Intervenors also respond to arguments made by the Applicant, Shaw AREVA MOX Services, L.L.C., and the U.S. Nuclear Regulatory Commission ("NRC") Staff in their responses to LBP-07-14. See MOX Services' Brief in Response to Memorandum and Order (Ruling on Standing and Contentions) (November 9, 2007) ("Applicant's Response"); NRC Staff's Response to the Board's October 31, 2007 Order and Request for Reconsideration (November 9, 2007) ("NRC Staff Response").

As discussed below, Intervenors believe that having ruled that Contentions 3 and 4 meet the NRC's standards for admission of contentions, the ASLB must admit them for a hearing. But the ASLB has the authority to delay any dispositive proceedings on the

merits of Contentions 3 and 4 (such as summary disposition or a hearing) until the issues raised by the contentions are ripe. Intervenor believe that it is appropriate to hold the proceeding in abeyance pending completion of the NRC Staff's Draft Safety Evaluation Report ("SER").

II. DISCUSSION

A. The ASLB Should Grant a Hearing on Intervenor's Admitted Contentions.

NRC regulations require that the ASLB must grant a hearing if it determines that the petitioners have standing and they have proposed at least one admissible contention. 10 C.F.R. § 2:309(a). Thus, having made a determination that the Intervenor have standing and that Contentions 3 and 4 satisfy the admissibility standard, the ASLB has no choice but to grant the Intervenor a hearing. Therefore the Intervenor agree with the ASLB that "it is appropriate" to admit Contentions 3 and 4. LBP-07-14, slip op. at 43.

The Applicant argues that Contentions 3 and 4 are "clearly inadmissible," and therefore a hearing should not be held. Applicant's Response at 4. In making this argument, the Applicant ignores the ASLB's thorough discussion of the contentions and its reasonable determination with respect to Contention 4 that the "*current existence of the uncertainty about the safety analysis of the system for liquid waste handling . . . provides a sufficient basis to support the proffered contention, given the other support the Petitioners have mentioned.*" LBP-07-14, slip op. at 43 (emphasis in original). In addition, the ASLB reasonably found that Contention 3 was admissible because of the "potential environmental consequences of safety failures." *Id.*, n.87. The Applicant has suggested no valid reason for the ASLB to change its ruling. The fact that the

contentions may later be mooted by the establishment of waste acceptance criteria and the construction of the Waste Solidification Building does not alter the fact that the contentions are admissible now. The same is true for the Intervenor's late-filed Contention 6, whose admissibility is now pending before the ASLB.

B. The ASLB Has Authority to Manage the Hearing Fairly by Holding it In Abeyance.

The Intervenor agrees with the ASLB that the notice of hearing for the operating license proceeding was premature. LBP-07-14, slip op. at 38-39. Not only was the hearing notice issued before construction was substantially complete, but it appears to have been issued before the design of the facility was complete. As discussed in the Intervenor's late-filed Contention 6, it now appears that it may be necessary for the Applicant to amend its construction authorization request and/or its operating license application in order to ensure that the proposed plutonium MOX processing plant can accommodate a wider range of plutonium feedstocks. Of course, any such changes will necessitate additional NRC Staff reviews. And the NRC Staff will have to review the Applicant's compliance with 10 C.F.R. § 70.23(b)(8) in building the facility. It may be several years before the design of the proposed plutonium MOX processing facility is complete. In the meantime, the ASLB has the authority to ensure fairness in the hearing process, without dismissing the Intervenor's contentions.

The ASLB's authority to manage the proceeding in a way that ensures fairness to all the parties is clear. Under 10 C.F.R. § 2.319, the Presiding Officer has "the power to regulate the course of the proceeding." Statement of Considerations, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,186 (January 14, 2004). The ASLB may

also determine the appropriate timing for summary disposition motions. *Id.* While 10 C.F.R. § 2.223(b) requires the presiding officers to notify the Commission “when there is a non-trivial delay in completion of the proceeding,” the Commission has emphasized that its “oversight of presiding officer with respect to case management is not intended to intrude on the independence of presiding officers in discharging their decisionmaking responsibilities.” 69 Fed. Reg. at 2,187.

Intervenors believe the appropriate remedy is to admit their contentions and hold the proceeding in abeyance until the issues raised by Contention 3 and 4 become ripe for a merits decision through summary disposition, a hearing, or a determination of mootness. Other ASLBs have held proceedings in abeyance in similar circumstances. In *U.S. Army* (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27, 30 (2004), for example, the Presiding Officer held a proceeding for a possession-only license in abeyance after granting a hearing request, pending completion of the Staff’s technical review and completion of a hearing file. In *Nuclear Fuel Services, Inc.*, (Erwin, Tennessee), LBP-03-01, 57 NRC 9, 14-15 (2003), the Presiding Officer held a licensing proceeding for a uranium processing plant in abeyance pending the submission of additional portions of the license application. In a licensing proceeding for a proposed uranium mine, the Presiding Officer held the case in abeyance for about two years pending completion of the NRC Staff’s review of the license application and preparation of a hearing file. *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque,

NM), LBP-98-9, 47 NRC 261, 266 and n.8 (1998), citing unpublished Memorandum and Order (Proceeding Status) (September 13, 1995).¹

Intervenors believe that the appropriate deadline for resuming the proceeding is when the Staff completes a draft SER that addresses the Applicant's compliance with the requirement of 10 C.F.R. § 70.23, including the safety of the proposed operation and the requirement of § 70.23(a)(8) that construction of the principal structures, systems, and components that were approved in the construction authorization proceeding "has been completed in accordance with the application." Setting completion of the draft SER as a milestone for resumption for the hearing will ensure that the parties' resources are not wasted by commencing the proceeding prematurely, *i.e.*, before the Applicant has completed the facility design, submitted any needed amendments to its construction authorization request and obtained Staff approval. Holding the proceeding in abeyance until the issuance of the draft SER will also ensure that the hearing does not go forward until one of the primary matters that may be contested in the proceeding is ripe, *i.e.*, the adequacy of construction to comply with the construction authorization.²

¹ In *Nuclear Fuel Services and Hydro Resources, Inc.*, which both predated the Commission's latest amendments to its procedural regulations (69 Fed. Reg. 2,182), the Presiding Officers did not rule on the petitioners' hearing requests before holding the proceedings in abeyance. The NRC's new regulation 10 C.F.R. § 2.309(i) now requires the ASLB to obtain an extension from the Commission in order to delay a ruling on hearing requests. The fact that the ASLB must now rule on a hearing request within forty-five days does not undermine the ASLB's authority, as invoked in *Nuclear Fuel Services and Hydro Resources, Inc.*, to exercise "sensible case management" by holding this proceeding in abeyance after making a ruling on standing and admissibility of contentions. *Nuclear Fuel Services*, 57 NRC at 12.

² Intervenors note that if the ASLB admits even one contention, it may hold the proceeding in abeyance. Thus, even assuming for purposes of argument that it were appropriate for the ASLB to deny admission of Contention 3 on the ground that there has

C. The Remedies Suggested by the Applicant and Staff are Inadequate.

Intervenors profoundly disagree with the Applicant's and NRC Staff's suggestion that if Contentions 3 and 4 are dismissed and this proceeding is terminated, their statutory right to a hearing will be adequately protected. Applicant's Response at 3, NRC Staff Response at 2. There is only one time when a hearing request and contentions are not subject to discretionary rejection by the Commission, and that is now. At this point, in order to get a hearing on their concerns, Intervenors have only to show that they meet NRC standing requirements and that their contentions are admissible under 10 C.F.R. §§ 2.309(d) and (f). If the ASLB dismisses the Intervenors' contentions and terminates this proceeding, the Intervenors will lose that hearing right. Instead they will be subject to discretionary standards for late-filed contentions and re-opening of the proceeding. *See* 10 C.F.R. §§ 2.309(c), 2.326. These standards allow the Commission to deny late hearing requests based on such equitable factors as whether the petitioner has "good cause" to file late (§ 2.309(c)(i)), the "extent to which the requestor's/petitioners' participation will broaden the issues or delay the proceeding" (§ 2.309(c)(vii)), the "extent to which the requestor's/petitioner's participation may reasonably be expected to assist in the development of a sound record" (§ 2.309(c)(viii)), whether the motion is "timely" or if untimely raises an "exceptionally grave safety issue" (§ 2.326(a)(1)), whether the issue raised is "significant" (§ 2.326(a)(2)), and whether the petitioner can

not yet been a "proposal" to abandon the WSB for purposes of the National Environmental Policy Act, Contention 4 is clearly admissible because the construction application does not address interim storage issues that were deferred to this stage in the construction authorization SER. *See* LBP-07-14, slip op. at 41.

demonstrate that "a materially different result would be or would have been likely had the newly proffered evidence been considered initially." § 2.326(a)(3).

The NRC Staff also asserts that "after completion of the pending licensing action," intervenors will have the opportunity to submit an enforcement petition under 10 C.F.R. § 2.206. The Staff's comparison of a § 2.206 proceeding with a licensing proceeding is ludicrous. Unlike the statutory hearing right conferred by 42 U.S.C. § 2239(a), § 2.206 confers no right to adjudication of an enforcement petition. The decision whether to grant or deny an enforcement petition is entirely within the discretion of the NRC Staff. 10 C.F.R. § 2.206(a). The Commission has no obligation to review an adverse decision by the Staff, and the public has no right to appeal the Staff's decision to the Commission. 10 C.F.R. § 2.206(c). Thus the opportunity to file a § 2.206 petition is in no way a substitute for the public's right to an opportunity for a hearing before an Atomic Safety & Licensing Board.

III. CONCLUSION

For the foregoing reasons, the ASLB should admit Contentions 3, 4 and 6 and hold the proceeding in abeyance until the Applicant has decided on the final design for the proposed MOX plutonium processing plant, made any necessary changes to its construction authorization request and/or license application, and substantially completed construction of the facility; and until the NRC Staff has had a chance to complete its safety review.³

³ Intervenors do not believe the ASLB's various suggested alternatives (LBP-07-14, slip op. at 44-47) are necessary, because the ASLB has the authority to hold this proceeding in abeyance if it admits at least one contention which it has already done. In addition,

Respectfully submitted,


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items i, iii, and iv are inappropriate because they would call for the internally contradictory action of dismissing contentions that have been determined to be admissible. Item ii does not appear to be permissible under 10 C.F.R. § 2.309(i), because the ASLB would not rule on the contentions within forty-five days of their submittal.

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

**Before Administrative Judges:
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Nicholas G. Trikouros
Lawrence G. McDade**

In the Matter of)

Shaw Areva MOX Services)

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

Docket No. 70-3098-MLA

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of Nuclear Watch South, Blue Ridge Environmental Defense League and Nuclear Information Resource Service's "Intervenors' Response to Atomic Safety & Licensing Board Order of October 31, 2007" was e-mailed to the following with hard copies served by First Class U.S. Mail.

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