

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 01/16/08

ATOMIC SAFETY AND LICENSING BOARD  
Before Administrative Judges:

SERVED 01/16/08

Michael C. Farrar, Chairman  
Nicholas G. Trikouros  
Lawrence G. McDade

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  
January 16, 2008

MEMORANDUM AND ORDER  
(Recasting Contention 4  
and  
Suggesting Certain Discussions)

Oral argument was held in this matter on Tuesday, January 8, 2008. That lengthy argument covered a number of subjects, including (1) the admissibility of the Petitioners' recently-filed Contention 6; (2) the reconsideration of our earlier decision to admit Contentions 3 and 4; and (3) the need for, and the appropriate contents of, a case management order to govern the future course of the proceeding (assuming that at least one admitted contention remains pending).

During the January 8 argument, the Board indicated that it was considering whether to limit and to recast the previously-admitted contentions. The Board also indicated that it would promptly send a draft Board-revised contention to the Petitioners so that they could determine whether, as limited and recast, it remained a contention that they wished to litigate. The filing of a positive answer to that inquiry would trigger a response from the Applicant MOX Services and from the NRC Staff as to their position on whether the recast contention was admissible, and if not, why not.

1. Overall Approach. The Board's original intention had been to recast the contention and to send it to the parties unaccompanied last Friday, January 11. Upon reflection, the Board came to the view (and so advised the parties informally by email of that date) that it would be better to accompany the recast draft contention with a brief review of the authorities that allow the Board to take such action. That review appears in Section 2, below.

The recast contention (carrying the number 4 from the earlier contention upon which it is principally based) follows in Section 3, along with a brief explanation of our thinking in drafting it. Our eventual ruling on the admissibility of that recast contention (as well as on pending new Contention 6, which has been fully briefed and argued) will await receipt of the responses being sought from the parties, as specified in Section 3, and will, if necessary, expand upon the reasons that led us to recast it as we did. (As to the timing of this process, see p. 7, below.)

In order to use the time between now and those admissibility rulings to best advantage, the Board is hereby presenting to the parties its suggestion at oral argument that they -- having heard all the discussion during the argument, and proceeding on the assumption that at least one contention will be or will remain admitted -- engage in discussions to determine whether, and to what extent, there might be common ground among them as to the conditions that should be contained in any case management order. See Tr. at 302-03, 320-21, 325-26, 361. Any party may initiate the suggested discussions. If within 10 days of this Order no party has done so, the Applicant is directed to initiate contact with the other parties about our suggestion.

The parties should report to us as to the progress of the discussions by the end of the month. If, on the other hand, the parties choose, after initial contact, not to enter into such discussions, or to the extent that such discussions prove fruitless, we should promptly be so advised. In that event, each party should, within 10 days of such advice being furnished to us, file its own views as to the appropriate content of a case management order. See Tr. at, e.g., 212-14, 217-19, 220, 345. See also Section 4, below.

A number of other matters arose during the oral argument. The process for addressing one such matter is set out in Section 4, below.

2. Recasting Principles. Under long-standing precedent, Licensing Boards are not obligated to reformulate contentions that are deficient in some way. Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974). Although Licensing Boards are not required to recast contentions submitted by petitioners, they are permitted to do so. Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-06, 9 NRC 291, 295-96 (1979). In that early case, the Board rewrote many of the petitioner's contentions, noting that

such a course commended itself to us because of the similarity of different contentions, the commingling in some contentions of certain extraneous, irrelevant, or legally unacceptable statements, and the desirability of defining issues simply and directly, while including therein all matters raised by the petitioners which are suitable for litigation in this proceeding.

Id. It would seem that there would be more cause for the Board to take such action when petitioners are appearing pro se, as is the case here, for in that circumstance material embracing legitimately admissible contentions may be expected to be presented less cogently than would be the case when counsel familiar with and skilled in our proceedings has been retained for contention-drafting purposes.<sup>1</sup>

A Board's authority in this area is, however, circumscribed in the sense that it may not, on its own initiative, provide the basic threshold information required for contention admissibility. See Arizona Public Services Co. (Palo Verde Nuclear Generating Station), CLI-91-12, 34 NRC

---

<sup>1</sup> It is long-established precedent that pro se petitioners are not "held to those standards of clarity and precision to which a lawyer might reasonably be expected to adhere." Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973). In this vein, see Zion, above, where the Appeal Board noted that the lack of any Board duty to take on "the role of an advocate for any party by attempting" to "recast contentions offered by one of the litigants for the purpose of making those contentions acceptable" was especially true when "the party is represented by competent legal counsel."

149, 155 (1991).<sup>2</sup> In the final analysis, a Board may reframe admissible contentions “for purposes of clarity, succinctness, and a more efficient proceeding,” but must not add material not raised by the petitioners to an otherwise inadmissible contention in order to render it admissible. In the Matter of Andrew Siemaszko, CLI-06-16, 63 NRC 708, 720-21 (2006) (citing Palo Verde, CLI-91-12 at 155).

With that limitation in mind, Licensing Boards in recent cases have reformulated a wide range of contentions in order either to eliminate extraneous issues or to consolidate related issues for a more efficient proceeding.<sup>3</sup> Authority for both types of reformulation is found in 10

---

<sup>2</sup> See also PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 9 (2007); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

<sup>3</sup> Recent published orders in which Licensing Boards have reformulated contentions at the point of initial admission include the following:

Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), LBP-07-03, 65 NRC 237, 259 (2007) (admitting a contention and noting that its litigation could involve inquiry into baseline issues identified in a related, but inadmissible, contention).

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 315 (2006) (admitting a contention while limiting it to (a) specific plant components within the scope of license renewal proceedings and (b) potential radiation doses in excess of regulatory limits); id. at 341 (admitting a contention while limiting its scope to specific input data described in the petitioner’s pleadings).

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253, 271 (2004) (admitting a contention as to some of its bases, but denying other bases as lacking support, failing to challenge the Environmental Report, or falling outside the scope of the proceeding); id. at 272 (admitting a contention subject to limitations agreed on by parties during a prehearing conference).

Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 62 (2004) (admitting a contention as to two of its bases and reformulating it to eliminate bases that do not raise a material dispute); id. at 63 (admitting a contention and reformulating it to eliminate elements outside the scope of the proceeding); id. at 68 (admitting a contention and reformulating it to eliminate issues unrelated to the application); id. at 69 (admitting a contention and reformulating it to eliminate items that the applicant is under no legal obligation to do).

Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC 49, 107 (2002) (admitting and consolidating two contentions

C.F.R. § 2.319(j), which authorizes the presiding officer to hold conferences “before or during the hearing for settlement, simplification of contentions, or any other proper purpose,” and in Section 2.329(c)(1), which specifies that a prehearing conference may be held for “simplification, clarification, and specification of the issues.”

3. Proposed Contention. Operating under the principles set out above, we have reshaped the content of Petitioners’ originally submitted, and previously admitted, Contentions 3 and 4. As thus reshaped, proposed new Contention 4 reads as follows:

CONTENTION 4:  
LICENSE APPLICATION FAILS TO ADDRESS  
HAZARDS POSED BY UNPLANNED INTERRUPTIONS  
IN THE TRANSFER OF RADIOACTIVE WASTE

The License Application and Integrated Safety Analysis Summary (ISA Summary) for the proposed mixed oxide fuel fabrication facility (MOX FFF) are inadequate because they do not address safety and public health risks posed by an inability to transfer waste from the facility, resulting in the need to forego receipt of radioactive materials and/or to safely shut down the facility and to store liquid high-alpha waste at the site for an extended period of time.

The MOX FFF License Application does not assure that there is always sufficient waste storage capacity to bring the facility to a safe configuration in the event that waste transfer is interrupted, in that it fails to describe how active waste generating operations would be terminated or curtailed before the waste storage capacity exceeds design limits, allowing for any backlog of waste in the facility. See NUREG-1821 (MOX FFF Construction Authorization Request FSER), § 11.2.1.3.11, p. 11-48 in which the NRC Staff required that actual setpoints would be provided in the License Application. This requires that a detailed evaluation be performed and coordinated with the ISA Summary.

Additionally, the License Application does not address the safety issues associated with waste aging within the facility given protracted onsite storage that might be occasioned by a delay in waste transfer operations caused by circumstances either within or outside the facility boundary. This would entail including in the ISA Summary procedures for the identification and mitigation of any hazards posed by aging wastes over short, intermediate, and long duration timeframes. See Letter from Graham B. Wallis [ACRS], to Nils J. Diaz, Review of the Final Safety Evaluation Report for the Mixed Oxide Fuel Fabrication Facility Construction Authorization Request (Feb. 24, 2005).

In reformulating the Petitioners’ contentions in this way, the Board took into account the unique two-stage process for licensing the MOX FFF, which we described in our earlier contention

---

submitted by the same petitioner); id. at 128 (admitting and consolidating two contentions submitted by different petitioners).

admissibility order. Shaw AREVA MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC \_\_ , \_\_ (slip op. at 4, 13-14) (Oct. 31, 2007).

Under that process, safety issues related to constructing the MOX FFF were litigated in an earlier proceeding, as were environmental issues related to both constructing and operating the facility. Id. For that reason, “no environmental report was submitted as part of the application in this stage of the proceeding, and . . . no Environmental Impact Statement (EIS) will be prepared as part of the Staff review” of the application currently under consideration. Id. at 14. We note that the Petitioners’ Contention 3 did include environmental issues, and that Contention 4 incorporated the bases of Contention 3 by reference. Id. at 34. Accordingly, the Board has restated Contention 4 with the specific intent of eliminating even a cross-reference to environmental issues and materials that may be beyond the scope of this proceeding, rather than allowing them to be blended with the safety issues that may more properly be considered under the process that has been set forth.

At oral argument, the Petitioners stressed that the two-stage process in this proceeding contemplated the possibility of supplementing the EIS prepared in the earlier proceeding if new environmental information emerges. Tr. at 351. See also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-07, 55 NRC 205, 221 (2002). The Board is aware of this possibility and will discuss it at greater length in its ruling on Contentions 3 and 6. At this time, however, only the safety and public health issues presented by Contention 4 are under consideration.

Having said that, we did draw upon other material presented in Contention 3, and incorporated by reference in Contention 4, to the extent that it did bear upon the safety issue embodied in Contention 4. The recast Contention 4 removes any reference to Contention 3, but preserves what the Board perceives to be the original intent of the contention, which was to identify a deficiency in the License Application associated with the potential safety effects of the

inability to transfer waste in terms of facility startup, safe shutdown and protracted waste storage. In particular, the Board notes that the Petitioners cite the sections of the License Application that they challenge in their discussion of Contention 3, and that the significance of the ACRS letter cited in Contention 4 is explained at some length in the material incorporated from Contention 3.<sup>4</sup> Such elements legitimately belong to both contentions and can be utilized in Contention 4 without inappropriately mixing environmental and safety considerations.

-----  
Based on the approach (but not the precise dates) contemplated at oral argument (see p. 2, above), Petitioners are hereby given until Friday, January 25, 2008, to inform the Board as to whether they wish to pursue the new Contention 4. If they choose not to, the Board will dismiss it, and turn its attention to the reconsideration of Contention 3 (and Contention 4 as originally drafted by Petitioners) and the admissibility of Contention 6.

If, on the other hand, the Petitioners' answer is positive, the Applicant and Staff are directed to file their responses to the Petitioners' thus-adopted new Contention 4 by Friday, February 8, 2008. The Board would thereupon address all the matters then pending before it.<sup>5</sup>

4. Board Authority. The oral argument also covered the matter of the scope of our authority to issue case management orders, which calls for further briefing. In that regard, the Board directs the Applicant and the Staff, and the Petitioners to the extent that they wish to contribute, to brief the question of what authority a Board has to use case management tools to

---

<sup>4</sup> Petition for Intervention and Request for Hearing (May 14, 2007) at 18-19.

<sup>5</sup> The Board recognizes that, under this schedule, its ultimate resolution of the admissibility of the contentions will end up taking considerably longer than initially contemplated. Although a number of scheduling delays will have contributed to that result (see, e.g., our December 4, 2007 unpublished Order rescheduling oral argument), the extended schedule has resulted in large measure from the unusual nature of the proceeding -- the difficult issues (such as alleged prematurity of contentions) raised by the very early notice of hearing (issued before construction began), and the long time-horizon before construction of the facility is completed have combined (1) to call for thorough consideration of the matter and (2) to eliminate any possibility of prejudice to any party from the delay. Cf. 10 C.F.R. § 2.309(i).

control the timing of contentions, and in particular to impose specific timing requirements linked to major milestones in the case. See Tr. at, e.g., 212-20, 320-21, 345. This may be done as part of the content-related filings required by the final sentence on page 2, above, or earlier if the party wishes to do so.

-----

Each party is responsible for reviewing the Transcript to determine whether any other matters discussed warrant action at this juncture, and if so to bring them to the Board's attention. If any matters in the Transcript or in this Memorandum and Order require clarification, any party may seek further Board direction. Any such steps should be taken by Friday, January 25, 2008.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

*/RA/*

\_\_\_\_\_  
Michael C. Farrar, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

\_\_\_\_\_  
Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

*/RA/*

\_\_\_\_\_  
Lawrence G. McDade  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
January 16, 2008

Copies of this Memorandum and Order were sent this date by e-mail to (1) counsel for Applicant Shaw AREVA MOX Services, (2) counsel for the NRC Staff, and (3) the representatives of Petitioners Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information Resource Service (NIRS).

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
Shaw AREVA MOX Services, LLC ) Docket No. 70-3098-MLA  
 )  
(Mixed Oxide Fuel Fabrication Facility )  
Possession and Use License)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RECASTING CONTENTION 4 AND SUGGESTING CERTAIN DISCUSSIONS) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

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

Administrative Judge  
Nicholas G. Trikouros  
Atomic Safety and Licensing Board Panel  
Mail Stop - T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

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

Jody C. Martin, Esq.  
Andrea Z. Jones, Esq.  
Marcia J. Simon, Esq.  
Office of the General Counsel  
Mail Stop - O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

Shaw AREVA MOX Services  
P.O. Box 7097  
Aiken, SC 29804  
Attention: Dealis Gwyn

Docket No. 70-3098-MLA  
LB MEMORANDUM AND ORDER (RECASTING CONTENTION 4  
AND SUGGESTING CERTAIN DISCUSSIONS)

Glenn Carroll  
Coordinator  
Nuclear Watch South  
P.O. Box 8574  
Atlanta, GA 31106

Louis A. Zeller  
Blue Ridge Environmental Defense League  
P.O. Box 88  
Glendale Springs, NC 28629

Mary Olson  
Nuclear Information and Resource Service  
P.O. Box 7586  
Asheville, NC 28802

Donald J. Silverman, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, NW  
Washington, DC 20004

Vincent C. Zabielski, Esq.  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103

[Original signed by Evangeline S. Ngbea]

---

Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 16<sup>th</sup> day of January 2008