

February 11, 2008

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 BRIEF ON THE BOARD'S CASE MANAGEMENT AUTHORITY

INTRODUCTION

On January 16, 2008, after oral arguments on January 8, 2008, the Atomic Safety and Licensing Board ("Board") issued a Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) ("Order") requesting that each participant submit briefs on the Board's case management authority in this proceeding. Order at 7, 8. In that regard, the Board raised the question of whether it has the authority "to use case management tools to control the timing of contentions, and in particular impose specific timing requirements linked to major milestones in the case." Id. For the reasons set forth below, the NRC Staff (Staff) concludes that the Board's case management authority does not permit the Board to control the timing of the filing of contentions by interveners in the manner proposed by the Board.

DISCUSSION

At the January 8 oral argument, the Board raised its concerns that a proceeding could involve a potentially piecemealed process created by a voluminous number of contentions related to construction, for example, and the Board's ability to delay the filing of those (or other) types of contentions by interveners. For example, as a solution, the Board explained that filing of contentions could be delayed until after the issuance of the safety evaluation report (SER).

See Transcript of January 8, 2008 Proceedings at 212-20. In response to these concerns, the Staff performed a review of Commission regulations and policies governing adjudicatory proceedings and case management tools available to Boards. Potentially instructive information can be found in the regulations governing a Board's case management authority, 10 C.F.R. § 2.319; the regulations governing untimely filings and late-filed petitions/contentions, 10 C.F.R. §§ 2.309(c), (f)(2); and the policy statements of the Commission setting forth case management tools. See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18 (1998). See *also* Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. 452 (1981).

The Commission's regulations provide a number of case management tools available to the Board to conduct proceedings in an orderly, fair and impartial manner. The Commission has stated that it "...appreciates the many difficulties faced by boards in conducting these contentions in complex proceedings." Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 N.R.C. at 453. As a consequence, the Commission set forth a number of case management tools in its regulations. For example, 10 C.F.R. § 2.319(j) expressly provides the Board power to hold conferences before or during the hearing for settlement, simplification of contentions, or for any other proper purpose. A Board may also set reasonable schedules for the conduct of the proceeding and take action reasonably calculated to maintain overall schedules as well as consolidate proceedings for the efficiency of the process. 10 C.F.R. § 2.319.

Under section 2.307(a), except as otherwise provided by law, a presiding officer may shorten or lengthen the time required for filings for good cause or by stipulation approved by the Commission or the presiding officer, and, as a result, set deadlines for filings. See *also* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,186 (Jan. 14, 2004). This provision, however, only applies to times that have been fixed or a period of time prescribed for an act that

is required or allowed to be done at or within a specified time. 10 C.F.R. § 2.307. The Board may set a time limit for an action to be taken only in the absence of a prescribed time under Part 2. 10 C.F.R. § 2.307(b). Additionally, these provisions do not relieve the Board of the timing provisions under section 2.309(a) to decide the admissibility of contentions and standing in a licensing proceeding.

With that said, the Staff did not locate any authority that would permit a Board to delay the filing of contentions until, for example, after the issuance of a SER in this proceeding. Early on, the Commission laid out the process for the Staff's review, and any intervention or hearing proceeding challenging the construction authorization request. The Commission bifurcated the process, providing opportunities for a hearing addressing the construction authorization request/environmental report, and later, for a second hearing concerning the license application to use and possess special nuclear material. See Notice of Intent to Prepare an Environmental Impact Statement for the Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 13,794 (March 7, 2001). No authority to delay the filing of contentions as contemplated by the Board in the current context was included. See 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). In addition, the Staff could not locate any authority requiring or allowing interveners (or potential interveners) to delay the filing of their contentions. Without express permission from the Commission, any Board-created delay in filing contentions runs afoul of the Commission's regulations governing untimely filings under section 2.309(c) or late-filed contentions under section 2.309(f)(2).

With regard to imposing specific timing requirements linked to major milestones, the Staff's response is the same as above. The Staff believes that the Board is not precluded from setting a schedule linked to major milestones. However, any exception to the timing

requirements under the current regulatory framework for filing contentions would require permission from the Commission.

Respectfully submitted,

/RA Andrea' Z. Jones/

Andrea' Z. Jones
Marcia Simon
Counsel for the NRC Staff

Dated at Rockville, MD
This 11th day of February, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S BRIEF ON THE BOARD'S CASE MANAGEMENT AUTHORITY 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 11th day of February, 2008:

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

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 the Secretary * **
Rulemakings and Adjudications
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

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

Office of Commission Appellate
Adjudication * **
Mail Stop: O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C 20555
E-mail: OCAEmail@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

Lawrence G. McDade * **

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

Vincent C. Zabielski, Esq. **
Morgan Lewis and Bockius, LLP
1701 Market St.
Philadelphia, PA 19103
E-mail: 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

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

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

/RA Andrea' Z. Jones/

Andrea' Z. Jones
Counsel for the NRC Staff