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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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 INTERVENORS' LATE-FILED CONTENTION SEVEN  
AND BOARD'S MEMORANDUM AND ORDER OF FEBRUARY 21, 2008

INTRODUCTION

On February 11, 2008, Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information Research Services ("NIRS") (collectively, "Intervenors") filed "Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues" ("Intervenors' Response"). Intervenors request that the Atomic Safety and Licensing Board ("Board") admit late-filed contention seven and that the Board request that the Commission suspend construction pending completion of the design for the proposed facility. Intervenors' Response at 3-10. For the reasons explained in this response, the NRC Staff ("Staff") opposes the admission of contention seven because it fails to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1) and 10 C.F.R. § 2.309(c). Further, the Staff opposes Intervenors' request to suspend construction of the Mixed Oxide Fuel Fabrication Facility ("MOX Facility") because they fail to allege irreparable injury under the Commission's regulations.

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See 02

## BACKGROUND

### Construction Authorization

In February 2001, Shaw Areva MOX Services ("Applicant"), formerly known as Duke Cogema Stone and Webster ("DCS"), submitted a Construction Authorization Request (CAR) to build the MOX facility on the U.S. Department of Energy's Savannah River Site, near Aiken, South Carolina. The Staff performed environmental and safety reviews of the CAR and supporting documentation. In March 2005, the Staff issued a Construction Authorization (CA) to then DCS for the MOX facility. The Staff's technical basis for issuing the CA is set forth in NUREG-1821<sup>1</sup>. A Final Safety Evaluation Report issued in March 2005. Intervenors BREDL and NWS (then known as Georgians Against Nuclear Energy or "GANE") filed petitions for a hearing based on the CAR. Both were granted standing, and a number of contentions were admitted.<sup>2</sup> All contentions, however, were eventually withdrawn or disposed of through summary disposition, and the CAR proceeding was terminated on July 20, 2005. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 N.R.C. 53 (2005).

### License Application

On January 4, 2007, the Applicant filed a license application ("Application") for possession and use of byproduct, source, and special nuclear materials at the MOX facility in Aiken, South Carolina<sup>3</sup>. The Staff published a notice of opportunity for hearing on March 15, 2007. See Notice of License Application for Possession and Use of Byproduct, Source, and

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<sup>1</sup> "Final Safety Evaluation Report on the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina" (2005).

<sup>2</sup> NIRS did not seek to intervene in the CAR proceeding.

<sup>3</sup> The current application is the second stage of a two-stage licensing process for the MOX Facility. For a more complete procedural history, see Staff Response to Petition for Intervention and Request for Hearing (June 11, 2007) at 2-3.

Special Nuclear Materials for the MOX Facility, Aiken, SC, and Opportunity to Request a Hearing, 72 Fed. Reg. 12, 204 (Mar. 15, 2007). The license application is currently undergoing a safety review.

On May 14, 2007, Intervenors filed a petition for intervention and request for hearing ("Petition") on the license application. The Staff and Applicant filed separate responses on June 11, 2007. The Board heard oral arguments on August 22, 2007. On October 31, 2007, the Board issued a preliminary decision on the Petition to admit contentions three and four, however, the Board rejected the other contentions. In further consideration of their preliminary decision and in response to the Staff's request for reconsideration to admit contentions three and four by the Staff, the Board heard oral arguments on January 8, 2008. On January 16, 2008, the Board issued a Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) which required all participants to respond to specific questions set forth by the Board. On February 11, 2008, Intervenors submitted briefs in response to the January 16, 2008 Order which included late-filed contention seven and a request that the Commission suspend construction of the MOX facility. On February 21, 2008, the Board issued a Memorandum and Order (Regarding Content of Answers) ("Order") requiring that the Applicant and the Staff requiring that each address questions related to Intervenors' late-filed contention seven and request to suspend construction of the MOX facility<sup>4</sup>.

#### DISCUSSION

##### I. The Board's Order.

In its Order, the Board requested that the Staff provide responses to questions related to the Intervenors' late-filed contention seven and request to suspend construction of the MOX

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<sup>4</sup> Please note that because the Staff did not receive Intervenors' Response until after 5 p.m., the Staff's response is not due until March 10, 2008. See 10 C.F.R. § 2.306.

facility to avoid any later need for supplemental briefing. Order at 1. The Staff submits the following responses:

1. The Board requested information regarding accessibility to publicly-available information, the existence of a formal distribution list for such design information, and a process for obtaining non-publicly available information.

The NRC's Agencywide Documents Access and Management System (ADAMS) contains the publicly available and readily obtainable version of the license application and any Applicant submittals that are non-classified, nonsensitive. There is no formal distribution list specifically for design information, and the regulations do not require that the NRC maintain such a list.

The Applicant maintains information related to design and design changes, which is required under the Applicant's equivalent 10 C.F.R. § 70.72 Change Process<sup>5</sup>. There is no requirement, however, that the information be submitted to the Staff. In accordance with the Mixed Oxide Fuel Fabrication Facility Construction Inspection Program (issued May 18, 2005)(ADAMS Accession No. ML051450201), which was implemented, in part, to satisfy requirements of 10 C.F.R. § 70.23(a)(8), the Staff conducts in-office reviews of the information at the site and issues a report/summary, which is available in ADAMS.

Interested parties who wish to obtain specific, non-publicly available information may consult with NRC's website at [www.nrc.gov](http://www.nrc.gov) to determine whether the document is public or non-public. The Commission issued guidance for designating sensitive and unclassified non-safeguards information relating to NRC regulated source, byproduct, and special nuclear

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<sup>5</sup> Currently, the Applicant is not subject to section 70.72 requirements but agreed as part of the Mixed Oxide Fuel Fabrication Facility Construction Inspection Program to implement a program equivalent to that set forth in section 70.72.

materials. The guidance is found in Regulatory Issue Summary 2005-31 and can be accessed at the NRC website.<sup>6</sup> See <http://www.nrc.gov/reading-rm/sensitive-info/materials.html>. Also, interested parties should consult Executive Order 12968 "Access to Classified Information" to determine the requirements for accessing classified information.

In addition, the NRC recently published "Delegated Authority To Order Use of Procedures for Access to Certain Sensitive Unclassified Information," 73 FR 10, 978 (Feb. 29, 2008). The final procedure, however, is not effective until March 31, 2008, and does not apply retroactively to proceedings that have been previously initiated---such as the current MOX proceeding. According to the Notice, the Commission will include the procedures to be applied by order in the associated Federal Register notice of hearing or a notice of opportunity for hearing. *Id.* at 10, 978. Interested parties may also consult Subpart I of 10 C.F.R. Part 2 which provides special adjudicatory procedures for the treatment of classified information (Restricted Data and/or National Security Information) in NRC proceedings.

2. The Board requested that the Staff provide an explanation of section 70.23(a)(8) that relates to: 1) the stage at which "completion" of facility design/construction occurs and the document the Applicant uses to obtain such a determination; 2) the authority for issuance of a license before a section 70.23(a)(8) determination and/or subject to later fulfillment of a similar "completion" condition and if no authority exists, a response as to whether the Staff's failure to follow 10 C.F.R. § 70.23(a)(8) is an impermissible challenge to the regulation.

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<sup>6</sup> Additional questions regarding access to non-public information, the requirements for protection of and access to Safeguards Information (SGI), for example, are in 10 C.F.R. Part 73. In particular, 10 C.F.R. § 73.21(c) describes certain threshold requirements for access to SGI, including "need to know" which is defined in 10 C.F.R. § 73.2, the definitions section of Part 73. As of this date, the MOX facility only has classified and sensitive information. Also, within the NRC website are procedures to obtain non-publicly available information related to Freedom of Information Act ("FOIA") under 5 U.S.C. §§ 552 and 552a. See <http://www.nrc.gov/reading-rm/foia/foia-privacy.html>. NRC's regulations on public records and how to obtain these are under 10 C.F.R. Part 9. A guide to requesting FOIA information can also be found on the NRC website.

In order to address issues raised by question two—as well as intervenors' late-filed contention and request to suspend, the Staff provides a brief explanation of 10 C.F.R. §70.23(a)(8) and its applicability in the Staff's review of the license application and these proceedings.

A close examination of 10 C.F.R. Part 70, the Atomic Energy Act of 1954, as amended (AEA), and Commission case law reveal that the Staff is not precluded from issuing a license conditioned upon meeting the requirements of 10 C.F.R. § 70.23(a)(8)<sup>7</sup>. Under part 70, the Commission has broad authority to impose license conditions. See 10 C.F.R. § 70.31(a). The Commission may

incorporate in any license such additional conditions and requirements with respect to the licensee's ownership, receipt, possession, use, and transfer of special nuclear material as it deems appropriate or necessary in order to... (2) protect health or to minimize danger to life or property, ... (5) ...provide for such inspections of activities under the license as may be necessary or appropriate to effectuate the purposes of the [AEA] and regulations thereunder.

10 C.F.R. § 70.32(b).

In this instance, the finding under section 70.23(a)(8)—if the Staff determines to integrate it as a license condition—would verify that construction of the PSSCs was complete in accordance with the Construction Authorization approved under section 70.23(b). With regard to license conditions specifically designed to verify compliance, the Commission has stated that a license condition "...[must] be precisely drawn so that the verification of compliance becomes a largely ministerial rather than adjudicatory act." *Private Fuel Storage, L.L.C.* (ISFSI), CLI-00-13, 52 NRC 23, 34 (2000). The Staff "should be able to verify compliance without having to

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<sup>7</sup> The Board should note that the regulations applicable to the MOX facility under Part 70 were not mandated by Congress in the AEA. Rather, the Commission promulgated the regulations under the authority granted under the AEA, particularly sections 53 and 161. See 42 U.S.C. §§ 2073, 2201.

make overly complex judgments” on whether, as a legal or factual matter, there has been compliance. *Id.* Under the Commission’s decision, the Staff may design a license condition so that verification that the PSSCs are constructed in accordance with the license application is largely ministerial. Thus, the Staff can make a finding under 70.23(a)(8) that would be evaluated through implementation of the Construction Inspection Program (“CIP”) which was developed to address section 70.23(a)(8) requirements for the MOX facility.

The CIP includes an Inspection Manual Chapter (“IMC”) and a number of Inspection Procedures (“IP”) for on-site inspection during construction of the MOX facility. See IMC 2630, Mixed Oxide Fuel Fabrication Facility Construction Inspection Program (issued May 18, 2005) (ADAMS Accession No. ML051450201). Documentation that construction of PSSCs is completed in accordance with the construction authorization occurs through inspection reports issued after the Staff conducts on-site inspection of construction. According to IMC 2630, the purpose of the IMCs are to “...verify that the design bases of the principal systems, structures, and components (“PSSCs”) and the Quality Assurance (“QA”) Program are being adequately implemented during construction to provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents” and “verify that the construction of the PSSCs...have been completed in accordance with the construction authorization and license application....” IMC 2630 at 1.<sup>8</sup> The Staff’s CIP provides for “direct inspection throughout all stages of construction” and an audit-type inspection program that reviews, among other things, applicable regulations, requirements and commitments. IMC 2630 at 5-6.

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<sup>8</sup> Several of the inspection procedures also indicate that their purpose is to determine by direct observation and independent evaluation that various construction related tasks are being performed in accordance with the license application. See, e.g., IP 88130, Resident Inspection Program for On-site Construction Activities at the Mixed Oxide Fuel Fabrication Facility, at 1 (ADAMS Accession No. ML051450187).

The Board should note that the framework of section 70.23 indicates that the requirement of section 70.23(a)(8) is one of several requirements for approval of a Part 70 license for a plutonium processing and fuel fabrication facility ("PPFF")<sup>9</sup>. Section 70.23 (a)(8) requires the Commission to determine for the approval of a license application that "[w]here the proposed activity is the operation of a plutonium processing and fuel fabrication plant [(PPFF plant)], construction of the principal structures, systems, and components [(PSSC)] *approved pursuant to [70.23(b)]* has been completed *in accordance with the application.*" See 10 C.F.R. § 70.23(a)(8) (emphasis added). By its plain language, this provision must apply after construction has been substantially completed (*i.e.*, when construction of the PSSCs has been completed). *Id.* However, the provision is limited in two key respects. First, section 70.23(b) requires a pre-construction determination by the Commission that "the design bases and quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." *Id.* at § 70.23(b). The review in section 70.23(a)(8) is limited to those PSSCs "approved pursuant to 70.23(b)," *i.e.*, in the CAR. *Id.* at § 70.23(a)(8). Second, section 70.23(a)(8) requires the Commission's review of construction "in accordance with the application"<sup>10</sup>. Thus, section 70.23(a)(8) requires a determination that the PSSCs approved pursuant to 70.23(b) were constructed as provided in the application.

As demonstrated in the aforementioned discussion, the Commission's review and

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<sup>9</sup> For the MOX facility, the Commission's previous decision justifying the two-stage proceeding recognized this, explaining that "[i]n order to authorize operation of a MOX fuel fabrication facility (*i.e.*, by granting a 10 CFR part 70 license), the NRC must find that construction of the facility has been properly completed (see 10 CFR 70.23(a)(8)), *and that all other applicable 10 CFR part 70 requirements have been met.*" See Notice of Acceptance of Docketing of the Application, and Notice of Opportunity for Hearing on an Application for Authority to Construct a Mixed Oxide Fuel Facility," 66 FR 19,994, 19,994 (Apr. 18, 2001).

<sup>10</sup> Contrast the Part 70 requirement to the language in Part 50 for issuance of an operating license for reactors which requires a finding that construction has been substantially completed in conformity with the construction permit, the application, the provisions of the AEA, and the Commission's rules and regulations. 10 C.F.R. § 50.57(a)(1).

approval requires compliance with multiple requirements under Part 70; approval of a license application is not contingent primarily upon the finding in section 70.23(a)(8).<sup>11</sup> The broad authority of the Commission to impose license conditions under section 70.31(a) allows the use of a license condition to make the finding under 70.23(a)(8) as long as the verification of compliance is largely ministerial rather than an adjudicatory act. *Private Fuel Storage, L.L.C.* (ISFSI), CLI-00-13, 52 NRC 23, 34 (2000).

3. The Board requested a response as to what opportunities exist for actual or potential Intervenor to review and to challenge the proceedings: 1) design and design changes made before issuance of the license; 2) design changes made after a license is issued and 3) compliance with license conditions at the time construction is complete and the facility becomes operational and whether there are ITAACs for Part 70 or are analogous process in Part 70.

If the facility has not been constructed according to approved plans, 10 C.F.R. § 2.309(f)(2) and 10 C.F.R. § 2.309(c) provide ample opportunity for Intervenor to challenge facility design not in compliance with NRC-approved plans and design changes before the license is issued. Once the license issues, if the Intervenor determine it appropriate, they may pursue a petition for enforcement under 10 C.F.R. § 2.206 to challenge design changes to the MOX facility. As to whether license conditions have been met after the construction is complete, Intervenor may pursue a petition for enforcement under 10 C.F.R. § 2.206. As for opportunities to review design changes, much of the facility design is sensitive and classified information. As stated in response to question one, the Applicant maintains information related to design, which is required under the Applicant's equivalent 10 C.F.R. 70.72 Change Process.

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<sup>11</sup> An important aspect of the regulatory scheme in Part 70 that is applicable to the MOX facility is that the license granted is for *use and possession* of special nuclear material in the MOX facility. The license is neither a license to operate nor a license of the MOX facility itself. See 10 C.F.R. § 70.3.

There is no requirement, however, that the information be submitted to the Staff. General information related to design changes submitted under the Applicant's equivalent 10 C.F.R. § 70.72 Change Process would be included in information presented at the annual public meetings where the applicant presents an update on the license application and the ISA Summary (excluding sensitive and classified information).

With regard to the Board's last inquiry under question three, ITAAC does not apply to Part 70 licenses and there is no process under Part 70 that is analogous to ITAAC. The ITAAC under 10 C.F.R. Part 52 for reactors, as explicitly set forth in section 185b of the AEA, must "provide reasonable assurance that the facility has been constructed and will be operated in conformity with the license, the provisions of the [AEA], and the Commission's rules and regulations." 10 C.F.R. § 52.97 (b)(1) requires the Commission to identify ITAAC. In contrast to Part 52, 10 C.F.R. §70.23(a)(8), which was not promulgated in response to a direct decree from Congress in the AEA, requires only a determination that "construction...has been completed in accordance with the application...."

II. Legal Standards of Admissibility of Late-filed Contentions under 10 C.F.R. § 2.309(c) and Contentions under section 2.309(f)(1).

A contention may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). *Amergen Energy Co. (Oyster Creek Nuclear Generating Station)*, LBP-06-22, 64 N.R.C. 229, 234-35 (2006). Nontimely filings may only be entertained following a determination by the presiding officer that a balance of the following eight factors, all of which must be addressed in the petitioner's filing, weigh in favor of admission:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c). The first factor, whether good cause exists for the failure to file on time, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 N.R.C. 289, 296 (1993). Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong." *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 N.R.C. 62, 73 (1992), quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 N.R.C. 460, 462 (1977).

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner

disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

III. Intervenor's Late-filed Contention Does Not Meet The Criteria For Admission Of A Nontimely Contention.

A late-filed contention may only be admitted after a demonstration by the Intervenor that a balancing of the eight factors in section 2.309(c)(1) weigh in favor of admission. In this instance, the burden is squarely on Intervenor to satisfy the criteria. *Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 & 2)*, CLI-98-25, 48 N.R.C. 325, 347 (1998). While the Staff does not challenge Intervenor's claim of good cause in this circumstance, the Staff submits that there are other factors that weigh against admitting late-filed contention seven.

First, Intervenor has not demonstrated that there is no alternate means of protecting their interest. Their claim that a hearing is the only avenue to enforce compliance with section 70.23(a)(8) is unsupported because the current regulatory framework provides Intervenor with an opportunity to challenge adequacy of construction of the PSSCs through the filing of late-filed and/or new contentions. Once the SER issues, however, Intervenor can raise late-filed contentions, if there is new information in the SER that was not previously available. They may also file a petition under section 2.206 requesting enforcement action by the Staff. Further, the Commission has not made a finding regarding section 70.23 (a)(8) nor is the Commission required to make that finding at this time. If the PSSCs are not constructed in conformity with the construction authorization as approved under 70.23(b), Intervenor may file a contention asserting those arguments at the appropriate time. Thus, Intervenor is not in danger of losing their right to challenge the adequacy of construction of the PSSCs.

Second, Intervenors have not demonstrated that contention seven would not broaden the issues or unnecessarily lengthen the proceeding. They assert that the very lengthy time frame of this proceeding satisfies the criterion. The Staff disagrees. Intervenors fail to allege any inconsistencies between construction of the PSSCs under section 70.23(a)(8) and the construction authorization. Intervenors themselves point out in their contention, "...that Shaw AREVA has hardly begun construction of the proposed facility. Intervenors" Response at 3. They also fail to show that the Staff has acted contrary to the requirements of section 70.23(a)(8) or that the Staff intends to act contrary to the Commission's requirements under section 70.23(a)(8). Further, Intervenors' attempt to convince the Board to admit this contention is contrary to the rules on late-filed contentions because their proposal is also packaged with a request to delay these proceedings "... in order to preserve Intervenors' hearing rights in the future..." and to "...request the ASLB to hold Contention seven in abeyance pending the Staff's completion of the SER" without any justification. The Commission has stressed that it has an "important policy supporting prompt decision-making." *Dominion Nuclear Connecticut*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 N.R.C. 551, 568 (2001). Thus, this factor does not weigh in Intervenors' favor.

Finally, Intervenors have not shown that their participation will contribute to creating a sound record because the contention rests purely upon events that Intervenors themselves admit in their contention have not happened, i.e. a demonstration of compliance with section 70.23(a)(8). As previously explained, the Staff never made any representation whatsoever that compliance with section 70.23(a)(8) is not required nor did the Staff make a finding on section 70.23(a)(8). According to Intervenors' own observations, construction of the MOX facility has only recently gotten underway. Thus, there is no claim yet for an expert witness such as Dr. Edwin S. Lyman to challenge or contradict because they have not proffered an admissible contention. An intervenor should provide specific information from which a Board can infer that

the Intervener will contribute to the development of a sound record on a particular issue in question. *Duke Power Co.*, 22 N.R.C. 59, 85 (1985). The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. *Long Island Lighting Co.*, 20 N.R.C. 426, 440 (1984).

As demonstrated above, on balance, Intervenors cannot meet their burden; the contention should be rejected. Even if the Board determines that Intervenors have met their burden under section 2.309(c), Intervenors fail to satisfy the requirements for contention admissibility.

IV. Intervenors Contention Fails To Present a Genuine Dispute of Law or Fact that is Material to These Proceedings.

CONTENTION: Shaw AREVA'S application for an operating license should be denied because Shaw AREVA has not demonstrated that construction of the principal structures, systems and components approved under 10 C.F.R. § 70.23(b) has been completed in accordance with the application<sup>12</sup>.

As a basis, Intervenors' claim that because MOX Services has barely begun construction there is no basis for concluding that MOX Services has complied with section 70.23(a)(8). Intervenors' Response at 3. In this instance, their contention fails to present a genuine dispute of law or fact that is material to these proceedings for several reasons. First, Intervenors fail to point to any information demonstrating that the Commission made a finding under section 70.23(a)(8). Further, they have not presented any information that the construction that has

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<sup>12</sup> The Staff never made any representations to the Board that compliance with 10 C.F.R. § 70.23(a)(8) would not be required as Intervenors claim. Intervenors' Response at 3-4. On the contrary, the Staff explained to the Board that "...[d]uring the operational readiness review, the staff has to make the final findings that all the provisions of section 70.23(a)(8) have been met, or all the requirements of section 70.23(a)(8) have been met. When they make those findings, then the license [conditions] will fall out. Transcript of January 8, 2008 at p.231 lines 6-11.

commenced at the MOX site does not comply with the construction authorization or approval by the Staff under section 70.23(b). Moreover, Intervenor's by their own statements point out that construction has only just begun which means that the finding required under section 70.23(a)(8) is not yet triggered. Under the requirements of section 2.309, the Board cannot admit contentions that are not adequately supported with information or cite references or documents that contradict the information in a license application. Thus, their contention should be rejected.

Second, Intervenor's' fears that the "...NRC Staff may unlawfully seek to preclude Intervenor's from litigating the adequacy of construction of the proposed facility" is a statement that neither challenges the adequacy of the application or construction nor is a valid justification for admitting late-filed contention seven. Under the Rules of Practice for § 2.309(a)-(f)(formerly 2.714(a)), the Board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting specificity requirements. *Duke Power Co.*, (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 467 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041. As explained earlier, there is no basis in fact to support such an allegation.

Likewise, Intervenor's' belief that they would not have "...an opportunity to challenge the adequacy of construction of the proposed facility around the time of publication of the SER," Intervenor's' Response at 4, is also without merit because the regulations governing late-filed or new contentions under sections 2.309(c) and 2.309(f)(2) provide opportunities to challenge the adequacy of construction. Once the SER issues, however, Intervenor's can raise late-filed contentions if there is new information in the SER that was not previously available. Further, the Intervenor's can position themselves to initiate these challenges because as the Staff has explained the policy and procedures regarding keeping stakeholders informed of information

related to the MOX facility. See August 29, 2007 Letter from Margaret J. Bupp to Administrative Judges (regarding policies and procedures for informing stakeholders).

Finally, Intervenor's claim that the "[s]taff's proposal [to issue a license several years before construction is completed and to make compliance with 10 C.F.R. § 70.23(a)(8) a condition of the permit] violates section 189a of the Atomic Energy Act, 42 U.S.C § 2239(a) because it would remove a material issue from the scope of the hearing" (emphasis added), is also without merit and fails to meet the requirements for contention admissibility. Intervenor's Response at 5. As explained in the Staff's response to the Board's question two, the Commission has broad authority under Part 70 to impose license conditions, See 10 C.F.R. § 70.31, and the AEA does not preclude the finding required under section 70.23(a)(8) to be satisfied through the use of license conditions. Use of such a condition would simply involve verifying that construction of the PSSCs was completed in accordance with the construction authorization approved under section 70.23(b). Thus, the Intervenor's contention is without merit and should be rejected.

V. Intervenor's Lack A Sufficient Basis In Law Or Fact To Support A Request To Suspend Construction.

Although the Intervenor's fail to cite the applicable regulatory authority to support a request to suspend construction, the request is the equivalent of a motion for a stay under 10 C.F.R. § 2.342 and can be treated as such. *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), 20 N.R.C. 1443 (1984)<sup>13</sup>. In ruling on a stay request, the Commission's Rules of Practice require the Board consider the same four factors traditionally

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<sup>13</sup> The Appeal Board treated motions to stay two Licensing Board decisions as requests to suspend issuance of a low-power license for the facility because issuance of the license was authorized by the time the Appeal Board received the motions. As a result, the Appeal Board converted the motions for stay into requests/motions to suspend and applied the criteria for motions to stay under 10 C.F.R. § 2.788, now section 2.342, to the requests to suspend.

applied by the courts in deciding similar motions. *Id.* The presiding officer must determine whether the moving party has made as strong showing that it is likely to prevail on the merits; 2) whether the party will be irreparably injured unless the stay is granted; 3) whether the granting of a stay would harm other parties; and 4) where the public interest lies. According to Commission decisions, factors 1 and 2 are the most important, see *Sequoia Fuels Corp.*, CLI-94-9, 40 NRC 1, 6-8 (1994), with irreparable injury being the most important of the four factors set forth in section 2.788(e) (now 2.342(e)). *Id.* at 7, citing *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-3, 31 NRC 219, 258 (1990), *aff'd on other grounds sub nom. Massachusetts v. NRC*, 924 F. 2d 311, 288 (D.C. Cir. 1991).

Consequently, where a movant fails to show irreparable harm, then it must make an overwhelming showing that it is likely to succeed on the merits. See, e.g., *Kerr-McGee Chemical Corp.* (West Chicago Rare Earths Facility), ALAB-928, 31 N.R.C. 263, 269 (1990). In this regard, Intervenor's request fails to meet all of the criteria applicable to requests to suspend.

As an initial matter, their allegation that major features of the design of the facility is not yet settled is insufficient to support a request to suspend. Intervenor's Response at 5. Their claim that the "Commission should order Shaw AREVA to suspend construction until all principal structures, systems, and components related to safety and security have been completed", Intervenor's Response at 9, runs afoul of the construction authorization approved under section 70.23(b), and the section 70.23(a)(8) finding that the Staff will make to determine if the PSSCs have been constructed according to their license application and/or their construction authorization. The Commission noted in the initial Federal Register Notice for Opportunity for Hearing that the Applicant would submit an initial application focusing on the preconstruction approvals of siting and design bases, "leaving the balance of the information, including detailed design and safety evaluation issues, to be addressed in a second submittal."

Notice, 66 Fed. Reg. 6,701, 6,701 (Jan. 22, 2001). Thus, Intervenors' request is unfounded.

At any rate, even when applied to the criteria for stay motions, their request to suspend fails. According to the regulation, Intervenors have ten days after service of a decision or action of a presiding officer to file an application for a stay. 10 C.F.R. § 2.342(a). Under this requirement, Intervenors should have initiated stay proceedings as early as the issuance of the order terminating the first phase of proceedings related to the construction authorization, upon issuance of the construction authorization and/or as late as the first day of the commencement of construction at the site, which occurred on August 1, 2007. Because they fail to file a timely request, it should be rejected.

The request also fails to meet the irreparable injury criterion because the examples provided in support of the request are not sufficient to demonstrate that irreparable injury will occur without a suspension of construction or that the information presented impacts the proposal in a way that requires an immediate suspension of construction.

Intervenors argue that recast contention four raises design issues. They fail, however, to assert how irreparable injury will result if those issues are not immediately addressed. They only state that "[t]his is a design issue that should be resolved before construction proceeds." Intervenors' Response at 6. Their arguments ignore the construction authorization, and fail to examine the impact of a suspension on that decision and the harm it will bring to the project and other participants in these proceedings. Based on the foregoing, the request should be denied.

Similarly, they fail to show how irreparable injury will result if construction is not suspended due to the Department of Energy's ("DOE") announcement that it is "...considering changes to the federal program for disposition of surplus plutonium". Intervenors' Response at 6. Intervenors only argue that "the use of the proposed MOX plutonium fuel fabrication facility to process plutonium that was formerly destined for vitrification may require processing..., thus requiring a change to the plant's design basis". *Id.* at 6. But, they fail to show how this

uncertain determination could result in irreparable injury to them unless immediate action is taken. As the Staff argued in response to late-filed contention six, the DOE has not made any definitive decisions with regard to any changes at the MOX facility as implicated in the announcement. Thus, the request should be denied.

Further, they argue that "Shaw AREVA continues to build the MOX plant even though security framework at the facility, including the design basis threat ("DBT") that will apply, remains unclear..." and, "the NRC has not explained how it will verify this claim [that MOX facility will meet DOE and NRC DBT criteria] in the absence of an MOU." Intervenors' Response at 6-7. This basis is without merit and fails to demonstrate how irreparable harm will result unless immediate action is taken to suspend construction. In this instance, the NRC has not yet determined whether to enter into an MOU. But, more importantly, the Applicant's intent to comply with the NRC and DOE DBT has been fulfilled. The Applicant submitted the physical security plan to the Staff, which was intended to comport with the NRC and DOE DBT<sup>14</sup>. That plan is currently undergoing a review. The Board should note that the Intervenors' additional reference to a Government Accounting Office report of September 11, 2007, does not contain specific information related to the design specifications of the MOX facility nor do Intervenors show how this information requires that immediate action is taken to suspend construction so that this issue is addressed. Thus, the document does not provide support for the Intervenors' request. Considering all of the foregoing, the request should be rejected.

With regard to the news release by the National Nuclear Security Administration, the

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<sup>14</sup> The physical security plan was submitted under separate cover with the license application on September 27, 2006 as Confidential National Security Information. A redacted public version of the license application was submitted to the NRC on January 4, 2007 (ML070160304 and ML070160311). Note that the Staff will only make a determination regarding whether the MOX facility meets the NRC DBT based on the NRC's regulations. The DOE will make a finding that the plan meets its DBT under the DOE's regulatory authority.

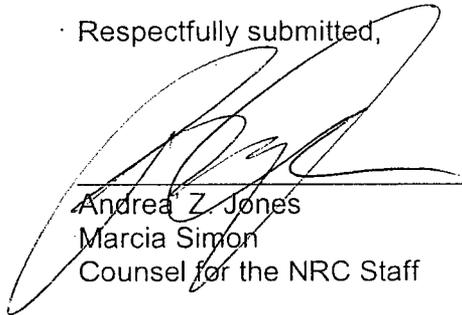
Intervenors fail to demonstrate how the events announced irreparably injure them. They only state that “[s]uch a major expansion of the mission of the proposed MOX plutonium fuel production facility is likely to have significant design implications...”, but they fail to point to any information that demonstrates that the lack of significant design information will result in irreparable injury, unless a suspension of construction is granted.

In closing, Intervenors have not met the criteria for stay motions and would not likely be successful on the merits of the late-filed contention seven. “Suspension of construction pending to protect Intervenors’ right to a hearing on safety and security-related design issues” is not sufficient to demonstrate irreparable injury, Intervenors’ Response at 9, because the Commission’s current regulatory framework allows Intervenors to challenge the adequacy of construction under the late-filed contention rules of section 2.309(f)(2) or request enforcement action under 10 C.F.R. § 2.206. “Unlike a decision on the merits, a stay motion necessarily contemplates immediate injury requiring judicial intervention to keep it from occurring.” *Matter of Hydro Resources, Inc.* 2929 Coors Blvd. Suite 101 Albuquerque, New Mexico 87120, 47 N.R.C. 119, 139 (1998). As demonstrated above, Intervenors cannot satisfactorily meet that or any other factor. Without an appropriate showing of irreparable injury, the request should be rejected.

#### CONCLUSION

Intervenors have not satisfied the rules on late-filed contentions and contention admissibility, and the Board does not have the authority to delay a decision, i.e. hold in abeyance, on contention admissibility. Any delay would be in direct contravention of the Commission’s policy and rules under Section 2.309(i). Based on the foregoing, the Staff respectfully requests that late-filed contention seven and the request to suspend construction be denied.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'MS', is written over a horizontal line. The signature is fluid and cursive.

Andrea Z. Jones  
Marcia Simon  
Counsel for the NRC Staff

Dated at Rockville, MD  
This 10<sup>th</sup> day of March, 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)	)	ASLBP No. 07-856-02-MLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the NRC STAFF'S RESPONSE TO INTERVENORS' LATE-FILED CONTENTION SEVEN AND BOARD'S MEMORANDUM AND ORDER OF FEBRUARY 21, 2008 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 10<sup>th</sup> day of March 2008:

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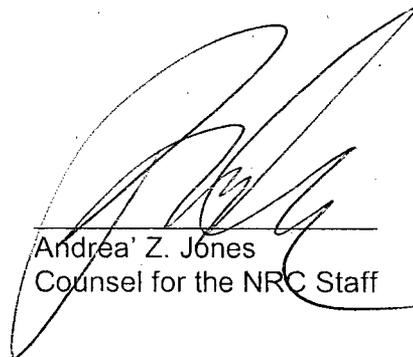
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