UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/19/08
SERVED 03/19/08

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

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

In the Matter of	Docket No. 70-3098-MLA
SHAW AREVA MOX SERVICES	ASLBP No. 07-856-02-MLA-BD01
(Mixed Oxide Fuel Fabrication Facility)	March 19, 2008

MEMORANDUM AND ORDER
(Scheduling Prehearing Conference and Oral Argument)

On Friday, March 14, the Petitioners – whom we have already found to have standing to challenge the application by MOX Services for a Part 70 NRC license to operate the MOX facility now under construction – filed the final substantive document related to the several issues still pending before the Board concerning contention admissibility and other matters. Our decision on those matters will, we believe, be aided by oral discussion, both in the nature of a prehearing conference (to wrap up the matter of the content and admissibility of the reframed Contention # 4) and of an oral argument (on the other pending matters).

Accordingly, counsel are hereby advised that the Board proposes to hold a prehearing conference and an oral argument on Wednesday, March 26, 2008. That session will be held in the Board's Hearing Room at the NRC's Rockville, Maryland headquarters complex (on the 3rd floor of the Two White Flint North Building, 11545 Rockville Pike). The prehearing conference will begin at 1:00 PM and will be immediately followed by the oral argument, with the entire session expected to be concluded within three hours.

The prehearing conference portion will focus only upon the reframed Contention # 4, while the oral argument will focus on (1) the admissibility of the recently-filed Contention # 7;

(2) the jurisdictional and substantive issues relating to the Petitioners' request that facility construction be suspended pending completion of the facility's design; and (3) the need for, and possible outlines of, a case management order at this juncture. Counsel are to appear in person.

Schedule. The prehearing conference portion of the session will consist of the Board asking clarifying questions of counsel, in roundtable format, concerning their positions on the content of reframed Contention # 4. As part of discussion, the Board will be interested in hearing from each of the parties concerning the import of a previously-issued Safety Evaluation Report on the later segments of a licensing proceeding, whether that proceeding is subject to adjudication or not. See Staff "Response to Recast Contention Four," February 8, 2008, p. 6. The prehearing conference should not take more than 45 minutes.

At the oral argument, the Applicant and the Staff will proceed first on the question of the admissibility of recently-filed Contention # 7. They will have 15 minutes each, the bulk of which time should be devoted to addressing the matters of particular concern to the Board listed in the "Issues" paragraph, below. The Petitioners will then have 20 minutes on the same subject. The Applicant and Staff may then have 5 minutes each for rebuttal.

As to the request that construction be halted, the Petitioners will proceed first and will have 15 minutes. The Applicant and Staff will then have 10 minutes each, with the Petitioners having 5 minutes for rebuttal.

Thereafter, proceeding in the same order as on Contention # 7 above, each party will have 5 minutes to argue in support of its view of the wisdom of, need for, and content of a case management order at this juncture. Depending on the nature of those arguments, a final 10 minutes may be devoted to a roundtable discussion of those positions.

Issues. All parties should be prepared at the oral argument on Contention # 7 to address, among other things:

> (1) whether the language of 10 CFR § 70.23(a)(8) has a plain meaning which ought to be given force, and if so, what that plain meaning calls for, and if not, why not;
>
> (2) the similarities and differences between the regulation at issue here (70.23(a)(8)) and the one at issue in the Private Fuel Storage case (CLI-00-13, 52 NRC 23), relied upon by the Staff in its March 10, 2008, Response, p. 9;
>
> (3) on the assumption that the PFS precedent and others cited were found not to provide authority for the proposed approach to implementing 70.23(a)(8), whether the Vermont Yankee precedent (see our February 21, 2008 Memorandum and Order in this proceeding, fn. 2 and accompanying text) would preclude that approach (a matter which was not addressed by the Staff in its recently-filed Answer notwithstanding our earlier request that it do so); and
>
> (4) the implications of the admission of Contention # 7 in terms of how it would be adjudicated, with particular reference to whether it (i) is an "issue of law" (see 10 CFR § 2.309(f)(1)(i)) about which there are no facts in dispute; and (ii) has at least some characteristics of a "contention of omission" (see CLI-02-28, 56 NRC 373, 382-83).

Of course, by directing counsel's attention now to particular concerns, we do not intend to limit either the topics they may address or the scope of our own inquiry. The parties are free to address any other questions related to the issues set out above, as well as any other matters they believe deserve the Board's attention.

The Board recognizes that the action taken herein allows the parties relatively little time to prepare for the oral session on March 26, but has taken that action because the conflicting engagements of its individual members render the Board, as a whole, unavailable much of the following week. If the schedule announced herein creates irreconcilable conflict for any party, that party's counsel should notify the Board and the other counsel by electronic transmission before the close of business tomorrow (Thursday, March 20) and then contact those counsel in

an effort to agree upon another date. In terms of alternative dates, the Board is available on Thursday, March 27; Friday, April 4; and during the week beginning Monday, April 7.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Lawrence G. McDade
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 19, 2008

Copies of this Memorandum and Order were sent this date by e-mail to counsel for the Applicant, the NRC Staff, and the Petitioners.

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 (SCHEDULING PREHEARING CONFERENCE AND ORAL ARGUMENT) 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

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 (SCHEDULING PREHEARING CONFERENCE AND ORAL ARGUMENT)

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street, NW, Suite 600
Washington, DC 20036

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

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

[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of March 2008