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OFFICE OF SECRETARY
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ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	April 3, 2008
Shaw AREVA MOX Services, LLC	)	Docket No. 70-3098
(Mixed Oxide Fuel Fabrication Facility Possession and Use License)	)	ASLBP No. 07-856-02-MLA-BD01

SHAW AREVA MOX SERVICES LLC'S RESPONSE
ON MFFF CONSTRUCTION SUSPENSION ISSUES

I. INTRODUCTION

On March 14, 2008, Petitioners in the above-captioned proceeding submitted a "Reply to Shaw AREVA MOX Services' and NRC Staff's Opposition to Intervenors' Request to ASLB to Request NRC Commissioners to Suspend Construction of Proposed MOX Plutonium Processing Facility" (Petitioners' Reply). In its March 20, 2008 "Order (Authorizing Filing of Additional Briefs)," the Atomic Safety and Licensing Board (Board) authorized Shaw AREVA MOX Services (MOX Services) to respond to Petitioners' Reply, and to focus on those "matters covered in the Petitioners' [R]eply which the Applicant could not have anticipated in its opposition to the suspension motion." Order (Mar. 20, 2008) at 1. The Board subsequently authorized MOX Services to file its Response by April 4, 2008. *See* "Order (Rescheduling Oral Session and Briefing Deadline, and Providing Additional Guidance Regarding Oral Argument)" (March 25, 2008) at 1. MOX Services' Response is provided below. For the reasons discussed

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below, the Board should not request that the Commission suspend construction of the Mixed Oxide Fuel Fabrication Facility (MFFF).[1]

II. ARGUMENT

Petitioners have requested that this Board ask the Commission to "suspend construction of the proposed MOX . . . facility pending completion of the design for the proposed facility." Petitioners' Reply at 1. There is absolutely no legal or factual basis for the Board to take such extraordinary action, and doing so would directly contradict both the decision of the Atomic Safety and Licensing Board that has already ruled on MOX Services' Construction Authorization Request (CAR) and the applicable Commission regulations. Petitioners are continuing to try to relitigate issues previously resolved in the prior CAR proceeding.

Petitioners make five basic points in support of their request in their March 14 Reply. Petitioners' Reply at 2-5.

(1) First, Petitioners state that "Shaw AREVA and the NRC Staff argue that Petitioners' request is governed by the standard for issuance of a stay." Petitioners' Reply at 2. However, Petitioners never argue either: (1) that the standards for issuance of a stay are inapplicable; or (2) that they have met those standards.[2] *See* Petitioners' Reply at 2-3. Instead, Petitioners state that "whether or not the harm" of moving forward with the current licensing proceeding is "irreparable," "it constitutes exactly the type of harm the Commission Staff sought to avoid by recommending the promulgation of 10 C.F.R. § 70.23(b) to require pre-construction approval of major design elements." Petitioners' Reply at 2. Thus, Petitioners have not rebutted

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[1] MOX Services' primary arguments in response to Petitioners' request are set forth in our March 7, 2008 "Answer to Petitioners' February 11, 2008 Response Regarding Case Management Issues" at 15-24.

[2] The standards for issuance of a stay are contained in 10 CFR § 2.1213, Application for a stay. The four specific factors that must be addressed in making an application for a stay are: (1) whether the requestor will be irreparably injured unless a stay is granted; (2) whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) whether the granting of a stay would harm other participants; and (4) where the public interest lies. 10 CFR § 2.1213(d).

MOX Services' and the NRC Staff's position that the criteria for issuance of a stay apply and have not been satisfied.[3]

Petitioners also now cite for the first time, a SECY paper (SECY-R-188) issued by the Atomic Energy Commission Staff in 1971, which recommended that 10 CFR Part 70 be revised to require NRC Staff review and approval prior to authorizing construction of plutonium processing or fuel fabrication facilities. *See* Petitioners' Reply at 2. Petitioners state that "[t]o go forward with construction . . . would invite the very problems the NRC sought to avoid in adopting the recommendations [contained in SECY-R-188]." Petitioners' Reply at 3.

Petitioners' purpose in citing this document is by no means clear, as SECY-R-188 adds nothing to Petitioners' prior arguments. The recommendations embodied in SECY-R-188 were implemented by changes made to Part 70 over 36 years ago. *See* 36 Fed. Reg. 17573-75 (Sept. 2, 1971). The key recommendation that was incorporated in the final rule was the requirement for Commission review of the design bases of principal structures, systems and components (PSSCs) prior to authorizing construction. *Id.* Those very regulations that incorporated the recommendations of SECY-R-188 governed the NRC Staff, Licensing Board, and Commission's review in the CAR proceeding. The regulations were fully met, as was demonstrated by the affirmative findings that were made in the CAR proceeding. Again, Petitioners are trying to relitigate the CAR proceeding and have provided no basis for doing so.

(2) Petitioners next state that they had consulted with counsel for the other parties and expressed their position that the proceeding and construction should be suspended. Petitioners'

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[3] We recognize that the Petitioners are not asking the Board itself for a stay, but instead are asking the Board to refer the matter to the Commission for a stay decision. The Board should not do so, if it does not have a reasonable basis to believe that the criteria for issuance of a stay have been met. Petitioners have not even attempted to make such a showing. Furthermore, Petitioners have not addressed the criteria either for a certification to the Commission under 10 CFR § 2.319(1), or for the referral of a Motion to the Commission under 10 CFR § 2.323(f) and those criteria clearly have not been met.

Reply at 3-4. MOX Services previously stated that we were not consulted by Petitioners' representative in an effort to resolve the issues associated with the motion regarding suspension of construction prior to the filing of Petitioners' suspension motion, contrary to the requirements for motions set forth 10 CFR § 2.323. MOX Services' counsel recollects a conversation with Ms. Carroll, in which she did mention Petitioners' desire to have construction of the MFFF suspended, but it was not at all apparent from that conversation that Ms. Carroll was engaging in a "sincere effort to . . . resolve the issues raised in the motion" pursuant to 10 CFR § 2.323. In fact, in filing their request regarding suspension of construction, Petitioners never alluded to or certified that they had made any such effort to resolve the suspension issue with counsel for the other parties. Nevertheless, assuming that a miscommunication did occur, Petitioners' point that they consulted with counsel is a procedural matter that does not support their suspension request.

(3) Petitioners next argue that MOX Services' position that this Board lacks jurisdiction to consider its request identifies "another reason why the ASLB should refer Intervenors' request to the Commission." Petitioners' Reply at 4. This Board's jurisdiction is established and bounded by the Notice of Opportunity for Hearing -- which relates exclusively to the license application for possession and use of licensed material. *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. 12204 (Mar. 15, 2007). If Petitioners believe that construction should be suspended, they should submit a 10 CFR § 2.206 Petition to the Executive Director for Operations. They have provided no reason for the Board to consider a matter that is beyond the Board's jurisdiction.

(4) Next, Petitioners again cite SECY-R-188 for the proposition that, at the construction approval phase, the NRC will review, among other things, "waste handling and treatment systems" and "design provisions relating to industrial security and nuclear material safeguards." Petitioners' Reply at 5. Referring back to their original request regarding suspension of construction, Petitioners state that "significant issues with respect to waste disposal and security remain unresolved." Petitioners' Reply at 5.

10 CFR Part 70, as revised after the issuance of SECY-R-188, prescribed the requirements for issuance of the Construction Authorization. MOX Services has met those requirements and has been issued a Construction Authorization. As part of its submittal, MOX Services was required to provide the design bases for PSSCs (*see, e.g.,* CAR Chapter 11, Plant Systems), and necessary security and safeguards-related information (*see* CAR Chapter 13, Safeguards). Specific contentions were raised and ultimately dismissed in the CAR proceeding relating to physical protection,[4] material control and accounting,[5] and handling of waste streams.[6] Once again, Petitioners continue to try to litigate design-related matters within the scope of the prior proceeding.[7]

(5) Finally, Petitioners continue to repeatedly adhere to the erroneous position that "the design [must be] completed before construction beg[ins]." Petitioners' Reply at 6. This

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4 *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), Georgians Against Nuclear Energy Contentions Opposing A License For Duke Cogema Stone & Webster To Construct A Plutonium Fuel Factory At Savannah River Site, ASLBP No. 01-790-01-ML (Aug. 13, 2001), at 10 (Contention 2: Lack Of Consideration Of Physical Protection In Facility Design).

5 *See id.* at 2-3 (Contention 1: Lack Of Consideration Of Safeguards In Facility Design, alleging that the CAR did not contain detailed information on MFFF design features relevant to the ability of Duke COGEMA Stone & Webster (MOX Services' predecessor) to implement material control and accounting measures).

6 *See id.* at 41 (Contention 11: ER Fails to Address the Waste Stream from Aqueous Polishing).

7 Petitioners' claim that the Design Basis Threat (DBT) that will govern the design is "uncertain" is disingenuous. Petitioners' Reply at 5, n.3. As Petitioners have pointed out in footnote 3 of their March 14 Reply, the NRC Staff has made it clear that MOX Services must satisfy the NRC DBT and that DOE will also confirm that its DBT requirements are met.

assertion is a direct and improper challenge to the regulations (10 CFR § 70.23(b)), and is wrong as a matter of law.

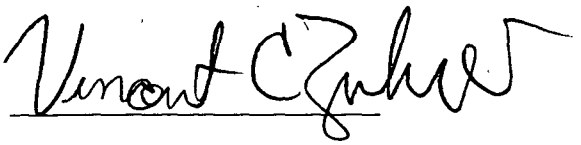
Section 70.23(b) provides that the "Commission will approve construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant on the basis of information [provided in the application] when the Commission has determined that the design bases of the principal structures, systems, and components, and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents." Petitioners' concern that the "Commission expressed no opinion on what would be the result if the two-step process failed to ensure that the design was completed before construction began" appears to be related to a perceived deficiency with 70.23(b) itself. *See* Petitioners' Reply at 6. Such an attack on Commission regulations is clearly outside of the scope of the present adjudicatory hearing, and provides no basis for the relief requested. *See* 10 CFR § 2.335 (prohibiting attack on NRC regulations in the context of adjudicatory proceedings).

Applicable case law is consistently clear that facility construction may commence well before design completion. For example, the U.S. Supreme Court and the Commission have held that, in the context of a two-part nuclear reactor licensing process, applicants need not have a complete facility design prior to the NRC authorizing construction. The Supreme Court upheld issuance of a construction permit for a breeder reactor when the Commission concluded that the applicant could safely build a reactor, but deferred any decision on later operation subject to receipt of additional design information. *See Power Reactor Dev. Co. v. Int'l Union of Elec. Radio and Machine Workers, AFL-CIO, et al.*, 367 U.S. 396, 406-410 (1961). The Court examined whether the Commission must make the same definitive finding of reasonable

assurance of safe operation at the construction authorization phase as it would have to before it licenses actual operation. *Id.* at 398, 407. Answering this question in the negative, the Court noted that in a step-by-step licensing procedure, the finding of reasonable assurance for construction "is to be made, by definition, *on the basis of incomplete information* ...." *Id.* at 407 (emphasis added). Similarly, the Commission issued a provisional construction permit for the Oyster Creek reactor, even though "[d]etailed design of numerous of the plant features [was] not complete and also numerous final design decisions [were] yet to be made." *Jersey Central Power & Light Co.*, 2 AEC 446, 454 (1964). Petitioners clearly have no basis for their argument that the design of the MFFF must be complete in order for construction to be authorized.

For the reasons previously stated by MOX Services and those set forth in this Response, Petitioners' request should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of "Shaw AREVA MOX Services LLC's Response on MFFF Construction Suspension Issues" were served upon the persons listed below, by e-mail and first class mail, this third day of April, 2008.

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