UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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)	June 27, 2008

MEMORANDUM AND ORDER
(Ruling on Contentions and
All Other Pending Matters)

We previously ruled that three organizational Petitioners, then appearing before us pro se, had standing to challenge the application of Shaw AREVA MOX Services (MOX Services, or Applicant) for a license that would allow it to operate the Mixed Oxide Fuel Fabrication Facility (MFFF, or the MOX facility) it has commenced building on the federal government's Savannah River Site (SRS) south of Aiken, South Carolina.[1] In that same decision, we tentatively ruled that two of the Petitioners' five original contentions appeared to be admissible. In light of the unusual posture of the case and nature of those contentions, however, we invited reconsideration of that ruling; we also requested comments on certain novel procedural approaches that we suggested might be appropriate to invoke.

Since that time, the parties have filed, on their own initiative or at the Board's request, a variety of pleadings addressed to, inter alia, admitting initial contentions, submitting or opposing new contentions, debating questions about whether facility construction should be halted, and analyzing the wisdom and possible content of a case management order to guide the

[1] Shaw Areva MOX Services (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169 (2007). The three petitioners are identified in note 13, below.

proceeding's future course. As a consequence, we held two more oral arguments to aid our understanding of the parties' positions: the first was held on January 8, 2008; the second, which was combined with a prehearing conference, was held on April 9, 2008.

We now resolve all the matters pending before the Board. The actions we take today are summarized immediately below (pp. 2-3) and – following our recitation of the background of the proceeding in Part I (pp. 3-16) – the reasoning which led us to take those actions is set out in full in Parts II-IV of this opinion (pp. 16-41), leading to our formal Order (pp. 41-43). The concurring opinion of Judge Farrar follows (pp. 44-59).

1. Dismissal of Environmental Contentions. Because this phase of the proceeding is limited to safety issues, on reconsideration we dismiss environmentally-focused Contention 3, which we had initially admitted because of what then seemed to be its tie-in to safety-oriented Contention 4. Similarly, we dismiss, as outside this proceeding's scope, new Contention 6, which has an exclusively environmental focus.

2. Acceptance of Reshaped Contention. After the January 8, 2008, oral argument, we reshaped Contention 4 to promote clarity and to narrow its focus, and invited the parties' comments thereon.[2] As a result of those comments and the April 9, 2008, prehearing conference, we further revise that contention and finalize our ruling thereon.

We admit Contention 4 as thus revised. With their standing previously acknowledged, the admission of this contention completes the process for granting the Petitioners' intervention.

3. Action on Other Matters. In early February, 2008, the Petitioners retained counsel to represent them. In addition to submitting views on matters already pending, counsel filed a new contention, Contention 7, challenging the Applicant's future entitlement to an operating license under a regulatory interpretation the Staff had recently announced concerning the timing and

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[2] Licensing Board Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) (Jan. 16, 2008) (unpublished).

conditioning of action on the license.[3] Contemporaneously, a motion to stay facility construction pending design completion was filed; it led to the submittal, with our permission, of additional pleadings. The April 9, 2008, oral argument was held primarily to address the matters presented in the additional pleadings.

In light of a change in the Staff's litigating position on the issue of license timing and conditioning, adopted at the conclusion of the additional round of pleadings (and described on p. 34 below), we are not admitting new Contention 7. We are, however, conditioning its denial, requiring the other parties to notify the Petitioners when action on that subject is next contemplated. As to the request for a stay of construction, we find that it fails to meet the criteria that could support such relief and thus deny that request. We end by taking a case management step to guide the proceeding.

I. BACKGROUND

The current proceeding involves a challenge to the November 17, 2006, application of MOX Services for a license that would allow it to operate the MOX facility that it is building on the SRS.[4] That facility, for which a Construction Authorization was issued on March 30, 2005, is designed to fabricate mixed plutonium and uranium oxide (MOX) fuel for use in commercial nuclear power reactors as part of DOE's program for the disposition of surplus weapons-grade plutonium.

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[3] That interpretation is described at pp. 13-14, below.

[4] The Applicant submitted its original application in September, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750195). This application was revised at the request of the NRC Staff, and that version was submitted in November, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Nov. 17, 2006) (ADAMS Accession No. ML070160311) [hereinafter Application].

A. The Prior Proceeding

This is the second adjudicatory stage at which the licensing of the MOX facility has been considered. The first stage began on February 28, 2001, when the Applicant[5] filed a construction authorization request (CAR) seeking permission to build an MFFF on the SRS.[6] The MFFF was to be designed to operate for 20 years and to convert 36.4 tons of surplus weapons-grade plutonium into MOX fuel for civilian reactors.[7] Although DOE would own the MOX facility, its contractor, the Applicant consortium, would be the license holder and facility operator. Id.

1. Procedure for Considering Environmental Issues

Prior to receiving the Applicant's CAR, the Commission had published a notice setting out the general procedures to be followed in any proceeding concerning the MFFF.[8] This notice specified that the matter would be conducted in two phases. The first phase was to cover three aspects: (1) "design bases for the principal structures, systems, and components"; (2) "the quality assurance program"; and (3) "environmental issues." Id. The second phase was to involve "all other issues related to the issuance of a 10 C.F.R. part 70 license." Id. On April 18,

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[5] At that time, the Applicant was a consortium of several companies known as Duke Cogema Stone & Webster. The makeup and name of the consortium had changed by the time the current phase of the proceeding was launched, but those changes are not of consequence to our description of the proceeding or to our decision on the issues.

[6] See Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority To Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001).

[7] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 410-11 (2001). It was anticipated that, after fabrication, the MOX fuel would be used in four Duke Energy Corporation reactors: Units 1 and 2 of the Catawba Nuclear Station near York, South Carolina, and Units 1 and 2 of the McGuire Nuclear Station near Huntersville, North Carolina. Id. at 411.

[8] Notice of Opportunities for Hearings Related to Licensing the Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 6701, 6701 (Jan. 22, 2001).

2001, after reviewing the Application, the Commission published a notice of its acceptance for docketing and of an opportunity for a hearing on the first phase, the construction authorization. 66 Fed. Reg. at 19,994.

The Commission subsequently confirmed that this two-phase licensing procedure was intended to resolve in the CAR proceeding all the environmental issues related to both constructing and operating the MFFF.[9] The Commission emphasized that nothing in its regulations requires that NRC's environmental and safety reviews occur simultaneously, and that a review of the environmental effects of operating the facility could therefore be conducted prior to the safety review that would constitute the second phase of the licensing procedure. Id.

As this Board noted in a previous order, a practical effect of this licensing procedure is that no environmental report was submitted as part of the Application in the current stage of the proceeding, and no Environmental Impact Statement (EIS) will be prepared as part of the Staff review during this phase of the proceeding. LBP-07-14, 66 NRC at 184. This limitation on the scope of the current proceeding affects the admissibility of environmental contentions submitted by the Petitioners, as discussed in Part II below.

2. Procedure for Considering Safety and Other Issues

The two-stage licensing process applicable to the MOX facility, and the Notice of Opportunity for a Hearing issued for the CAR phase of the proceeding, "specified that the NRC would consider operation of the MOX facility later, when the agency would decide whether 'construction of the facility has been properly completed (see 10 CFR 70.23(a)(8)), and . . . all other applicable 10 CFR Part 70 requirements have been met.'"[10] The Commission emphasized

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[9] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214-16, 220-21 (2002). That approach was set up by the Commission specifically for the proceedings related to this facility.

[10] Duke Cogema, CLI-02-07, 55 NRC at 212 (citing 66 Fed. Reg. at 19,994) (emphasis and ellipsis in original).

that it intended for safety issues related to operation of the MOX facility to be resolved at the current stage of the licensing process. Id. at 220. Accordingly, the Notice of Opportunity to Request a Hearing that launched the current proceeding specifically refers to the Staff conducting a safety review and preparing a Safety Evaluation Report.[11]

In addition, the former Licensing Board presiding over the initial phase of the MOX licensing adjudication reserved consideration of the emergency plan to the second stage of the licensing process. Duke Cogema, LBP-01-35, 54 NRC at 462-63. According to that initial Board, "10 C.F.R. § 70.22(i)(1)(ii) does not require the submission of an emergency plan until [the Applicant] files an application for a possession and use license." Id. at 463. A contention related to this issue was submitted at the commencement of the current proceeding. LBP-07-14, 66 NRC at 179. That emergency plan contention was, however, rejected by this Board for failure to demonstrate the existence of a material dispute. Id. at 198.

For these reasons, this proceeding is currently limited to a consideration of safety issues related to operation of the MOX facility. We turn to a description of where the proceeding now stands.

B. The Current Proceeding

A notice of the pending MOX Services Application and of the opportunity to request a hearing was published in the Federal Register on March 15, 2007.[12] On May 14, 2007, three citizens' organizations (collectively, Petitioners), two of which had participated in the earlier construction permit proceeding, jointly filed a timely pro se Petition for Intervention and Request

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[11] 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, 12,204-05 (Mar. 15, 2007). The notice cites the EIS prepared as part of the CAR review, but does not open the question of further environmental review. Id.

[12] 72 Fed. Reg. at 12,204.

for Hearing.[13] The Petition included five contentions that formed the basis for the challenge to the requested license.

On June 11, 2007, the NRC Staff filed an answer opposing the Petition, the Petitioners' standing, and all five contentions.[14] The Applicant filed an answer two days later, taking similar positions,[15] and the Petitioners filed their reply on June 27, 2007.[16]

These pleadings all preceded the start of facility construction. The Applicant, which had received its construction permit on March 30, 2005, filed its request for an operating license on November 17, 2006, as noted above, and began actual construction of the facility on August 1, 2007.[17]

Having heard the first of what turned out to be a series of oral arguments on August 22, 2007 (after a site visit the previous day), the Board issued a ruling on October 31, 2007, in which we (1) determined that all three petitioning organizations had standing to intervene in this proceeding, and (2) tentatively admitted two and rejected three of the five contentions initially proffered by the Petitioners. LBP-07-14, 66 NRC at 190, 206. Each of the two admitted

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[13] Petition for Intervention and Request for Hearing (May 14, 2007) [hereinafter Petition]. The organizations were the Blue Ridge Environmental Defense League (BREDL), which participated in the earlier construction authorization proceeding; Nuclear Watch South (NWS), which participated in the prior proceeding under its former name of Georgians Against Nucear Energy (GANE); and the Nuclear Information and Resource Service (NIRS).

[14] NRC Staff Response to Petition for Intervention and Request for Hearing (June 11, 2007) [hereinafter Staff Answer].

[15] Shaw AREVA MOX Services, LLC Answer Opposing BREDL et al., Petition for Intervention and Request for Hearing (June 13, 2007) [hereinafter Applicant Answer].

[16] Reply of the Petitioning Organizations to the Answers Filed June 11 and 13 by NRC Staff and the License Applicant to Our Petition for Intervention and Request for Hearing Filed May 14, 2007 (June 27, 2007) [hereinafter Reply].

[17] Shaw AREVA MOX Services, LLC June 28, 2007 Status Report at 2.

contentions, labeled Contention 3 and Contention 4, challenged the Applicant's plans for the handling of radioactive waste that will be generated by the MOX facility.[18]

1. Board's Request for Additional Briefing on Contentions 3 and 4

At the time Contention 3 and Contention 4 were tentatively admitted, the Board noted that the Application had been received (and the Petitioner's contentions were therefore due) before construction of the MOX facility had begun, and that our ruling on contention admissibility therefore had to be made before substantial construction had taken place. Id. at 203. Indeed, construction is not scheduled to be completed until 2014, and we were thus aware that "any safety contention about construction outcomes . . . could scarcely avoid containing elements of speculation." Id. For that reason, although we tentatively concluded that both contentions met the admissibility requirements of 10 C.F.R. § 2.309(f)(1), we did not believe that they were ripe for litigation on the merits at that time. Id. at 206.

We therefore invited the parties to submit additional briefs discussing alternatives for how the Board might proceed, and indicated that the Board would be open to reconsidering its admission decision if another mechanism were available to preserve the Petitioners' hearing rights until such time as litigation on the merits of a contention was feasible. Id. In particular, we asked the parties to discuss the desirability of the following four options:

> 1) Rejecting Contentions 3 and 4 on condition that one or more additional notices of opportunity for hearing would be issued at appropriate times;
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> 2) Deferring a ruling on the admissibility of the contentions until a more appropriate time;
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> 3) Rejecting the contentions but keeping the proceeding open; and

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[18] Id. at 198. The first of these contentions challenged the Applicant's waste plan from an environmental perspective, while the second was safety oriented. At the time of admission, however, the Board noted that "the proffered basis for the latter also incorporates the bases underlying the former, and thus to that extent they are interrelated; in any event, the two contentions present a common, overriding issue." Id.

4) Rejecting the contentions in return for acceptance of a license condition.

Id. at 206-09.

The Applicant and the NRC Staff filed their responses to this order on November 9, 2007.[19] The Applicant rejected all four of the Board's proposed alternatives and continued to argue that Contentions 3 and 4 were inadmissible. Applicant Response to Board Order at 4-7. With respect to the preservation of the Petitioners' hearing rights as construction progresses between now and 2014, the Applicant argued that:

> [T]he Commission's regulations provide procedural mechanisms for Petitioners to raise contentions, when ripe, in the future in relation to the MOX Services License Application. Those mechanisms, which are set forth in 10 CFR §§ 2.309 and 2.326 of the Commission's regulations, provide well-accepted, time-honored, and Commission-approved avenues for effective public participation in NRC licensing proceedings. They are available to Petitioners in this proceeding, and in MOX Services' strongly held view, should suffice. MOX Services respectfully suggests that there is no need for this Board to create new and novel processes to replace the existing regulatory regime.

Id. at 3. Like the Applicant, the Staff opposed all four of the alternatives presented in the Board's October 31 Order, reiterated its opposition to the decision to admit Contentions 3 and 4, and requested that the Board reconsider its decision and dismiss the contentions. Staff Response to Board Order at 1-2.

The Petitioners filed their response to the Board order ten days later, on November 19, 2007,[20] in which they argued that the appropriate course of action was to admit Contentions 3 and 4 and to hold them in abeyance until they are ripe for a hearing on the merits. Id. at 4. In terms of when that might be, the Petitioners made this suggestion:

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[19] MOX Services' Brief in Response to Memorandum and Order (Ruling on Standing and Contentions) (Nov. 9, 2007) [hereinafter Applicant Response to Board Order]. NRC Staff's Response to the Board's October 31, 2007 Order and Request for Reconsideration (Nov. 9, 2007) [hereinafter Staff Response to Board Order].

[20] Intervenors' Response to Atomic Safety and Licensing Board's Order of October 31, 2007 (Nov. 19, 2007).

> the appropriate deadline for resuming the proceeding is when the Staff completes a draft SER that addresses the Applicant's compliance with the requirement of 10 C.F.R. § 70.23, including the safety of the proposed operation and the requirement of § 70.23(a)(8) that construction of the principal structures, systems, and components that were approved in the construction authorization proceeding "has been completed in accordance with the application."

Id. at 5. Although the Petitioners did not specifically address the four alternatives proposed by the Board, they rejected the proposed remedies presented by the Applicant and the NRC Staff on the grounds that "[t]here is only one time when a hearing request and contentions are not subject to discretionary rejection by the Commission, and that is now." Id. at 6.

2. New Contention 6

On October 5, 2007, the Petitioners filed a new contention, labeled Contention 6, alleging that the license application for the MOX facility fails to address proposed changes in the DOE strategy for disposing of surplus plutonium.[21] The Applicant filed its answer opposing Contention 6 on October 29,[22] and the NRC Staff followed suit on October 31.[23] The Petitioners filed their reply on November 7.[24] Because briefing of Contention 6 was not complete at the time of our October 31 Order, we did not rule on it therein. LBP-07-14, 66 NRC at 213.

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[21] Petitioners' Late-Filed Contention Regarding the Need to Supplement EIS for Proposed MOX Plutonium Processing Facility (Oct. 5, 2007) [hereinafter Contention 6 Pleading].

[22] Shaw AREVA MOX Services LLC's Answer Opposing Petitioners' Late-Filed Contention (Oct. 29, 2007) [hereinafter Applicant Answer to Contention 6].

[23] NRC Staff Response to Petitioners' Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Fuel Processing Facility (Oct. 31, 2007) [hereinafter Staff Answer to Contention 6].

[24] Intervenors' Reply to Applicant and NRC Staff Responses to Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility (Nov. 7, 2007) [hereinafter Contention 6 Reply].

3. Issues Pending After January Oral Argument

Oral argument was held on the pending issues in the case on January 8, 2008.[25] That session 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 were to remain pending).

During the oral argument, the Board indicated that it was considering whether to limit and to recast the previously admitted contentions. The Board also indicated that, were it to do so, it would promptly send a draft of the 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. Tr. at 360-61. The filing of a positive answer to that inquiry would trigger a response from the Applicant and from the NRC Staff as to their respective positions on whether the recast contention was admissible, and if not, why not. Id.

4. Reformulated Contention 4

The Board submitted the revised contention (labeled Contention 4 from the earlier contention upon which it is principally based) to the parties on January 16, 2008, along with a brief explanation of the reasoning behind the Board's proposed clarifications.[26] In the same order, the Board requested that the parties confer on, and then brief the issue of, how the

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[25] The oral argument was originally scheduled for December 6, 2007. Licensing Board Order (Scheduling Oral Argument) (Nov. 21, 2007) (unpublished). It was moved to January 8, 2008, however, at the request of the Applicant's counsel. Licensing Board Memorandum and Order (Rescheduling Oral Argument and Providing Notice of Expected Date for Decision) (Dec. 4, 2007) (unpublished).

[26] Licensing Board Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions) (Jan. 16, 2008) (unpublished) [hereinafter Order Recasting Contention 4]. The substance of and reason for the revisions will be discussed in Part III below.

proceeding might best be managed in the future, given the possibility of new contentions during the long construction timeline. Id. at 2, 7-8.

The Petitioners subsequently indicated that they agreed with the contention as recast and were willing to proceed with its litigation.[27] The Applicant responded with several objections to the Board's draft restatement of the contention, and supplied proposed remedial changes, indicating that it did not object to the Board's revision provided that the Applicant's proposed changes were incorporated in the final language.[28] The NRC Staff responded by reiterating its opposition to the original contention and further objecting to the Board's version.[29]

5. Case Management Issues, New Contention 7, and Request to Suspend Construction

On January 31, 2008, the Applicant and the Petitioners informed the Board that the parties had conferred as directed in the Order Recasting Contention 4, but were unable to reach agreement on a case management approach.[30] On February 11, 2008, the Applicant and the NRC Staff both filed briefs which argued that Licensing Boards do not have the authority to regulate the timing of contentions, such as by entertaining new contentions at specific milestones in the case.[31]

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[27] Intervenors' Acceptance of Recast Contention #4 (Jan. 25, 2008) [hereinafter Petitioners' Response to Order Recasting Contention 4].

[28] Shaw AREVA MOX Services LLC's Response to Petitioners' Contention 4 as Reformulated by the Board (Feb. 7, 2008) [hereinafter Applicant Response to Order Recasting Contention 4], at 1.

[29] NRC Staff's Response to Recast Contention Four (Feb. 8, 2008) [hereinafter Staff Response to Order Recasting Contention 4].

[30] Applicant's Report in Response to the Board's January 16, 2008 Memorandum and Order (Jan. 31, 2008); Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 (Jan. 31, 2008).

[31] Shaw AREVA MOX Services LLC's Views on the Appropriate Content of a Case Management Order (Feb. 11, 2008); NRC Staff's Brief on the Board's Case Management Authority (Feb. 11, 2008).

On the same date, the Petitioners informed the Board that they were no longer appearing pro se but instead had retained counsel.[32] Contemporaneously, the Petitioners submitted their views regarding the Board's authority to manage the case to protect the interests of citizen-intervenors and suggested several ways to proceed with the case in the future.[33] The Petitioners agreed with the Applicant and Staff that the Board's ability to manage the timing of this proceeding is limited, and noted that they did not want to have their ability to file new contentions constrained by any particular milestones in the case. Id. at 2-3. Rather, they suggested that "[a]dditional action by the Commission is . . . needed to ensure that the premature docketing of the license application does not prejudice the Intervenors' hearing rights." Id. at 3.

In addition, the Petitioners submitted a new contention, labeled Contention 7, which stated that the Application "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." Id. As the basis for this contention, the Petitioners alleged that the Applicant "has hardly begun construction of the proposed facility, and therefore has not built the principal structures, systems and components that were approved by the NRC in its construction authorization decision" and argued that the NRC therefore "has no basis for concluding that Shaw AREVA has complied with 10 C.F.R. § 70.23(a)(8)." Id.

In further support of this contention, the Petitioners noted that, until the oral argument of January 8, 2008, they had reasonably believed that they would have the opportunity to

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[32] Notice of Appearance by Diane Curran and Notice of Withdrawal of Appearances by Glenn Carroll, Louis A. Zeller, and Mary Olson (Feb. 11, 2008).

[33] Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues (Feb. 11, 2008) [hereinafter Petitioners' Case Management/Contention 7 Response].

challenge the adequacy of the MOX facility's construction at around the time the NRC Staff completed its safety review (id. at 4), but at that oral argument the NRC Staff had announced that it planned to issue a license before construction was complete. The Petitioners filed their new contention based on, and in response to, this new information. Id. at 4-5.

The Petitioners' Case Management/Contention 7 pleading of February 11 (see note 33, above) contained an additional element. Specifically, they requested that the Board submit to the Commission their request to suspend construction of the MOX facility until the facility design is complete. Id. at 5-10.

On February 21, 2008, the Board ordered the Applicant and the NRC Staff to address certain questions in their answers to the Petitioners' February 11, 2008, filing.[34] On March 7, 2008, the Applicant responded, indicating that the Petitioners' position on case management (opposing the establishment of contention-filing milestones) was compatible with that of the Applicant.[35] The Applicant also indicated, however, its opposition both to Contention 7 and to the Petitioners' request regarding the suspension of construction. Id. On March 10, 2008, the NRC Staff submitted an answer which took the same position as the Applicant.[36]

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[34] Licensing Board Memorandum and Order (Regarding Content of Answers) (Feb. 21, 2008) (unpublished) [hereinafter Order Regarding Content of Answers]. (The Board sought answers to questions regarding: (1) the public's access to information on the ongoing status of the facility design; (2) the 10 C.F.R. § 70.23(a)(8) determination process; and (3) the opportunities for intervenors to review and challenge the designs and the 10 C.F.R. § 70.23(a)(8) determination.) See also Licensing Board Memorandum and Order (Scheduling Prehearing Conference and Oral Argument) (Mar. 19, 2008) (unpublished) (setting out questions related to Contention 7 for the parties to answer at oral argument) [hereinafter March 26 Oral Argument Order].

[35] Shaw AREVA MOX Services LLC's Answer to Petitioners' February 11, 2008 Response Regarding Case Management Issues (Mar. 7, 2008) at 2 [hereinafter MOX Services Answer to Feb. 11 Response].

[36] NRC Staff's Response to Intervenors' Late-Filed Contention Seven and Board's Memorandum and Order of February 21, 2008 (Mar. 10, 2008) [hereinafter NRC Staff Response to Feb. 21 Order].

The Petitioners filed their reply regarding Contention 7 on March 14, 2008.[37] On the same date, they filed a Motion for Leave to Reply, along with the Reply itself, to those portions of the Applicant and Staff answers that addressed the construction suspension request.[38] The Applicant filed its opposition to this motion on March 19, 2008,[39] requesting in the alternative the opportunity to respond to the Petitioner's reply. The next day, the Board issued an order granting the Petitioner's Motion for Leave to Reply and also granting the alternative relief requested by the Applicant.[40] The Applicant filed its response on April 3, 2008,[41] and the NRC Staff filed its response on April 4, 2008.[42]

6. April Oral Session

The Board held a prehearing conference and additional oral argument on April 9, 2008,[43] in order to conduct a focused examination of the outstanding issues in the case that would help precipitate their resolution. The prehearing conference portion centered on the reframed

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[37] Intervenors' Response to Shaw AREVA MOX Services' and NRC Staff's Opposition to Admission of Contention 7 (Mar. 14, 2007).

[38] Intervenors' Motion for Leave to Reply to Shaw AREVA MOX Services' and NRC Staff's Oppositions to Intervenors' Request to ASLB to Request NRC Commissioners to Suspend Construction of Proposed MOX Plutonium Processing Facility (Mar 14, 2007); Intervenors' Reply to Shaw AREVA MOX Services' and NRC Staff's Oppositions to Intervenors' Request to ASLB to Request NRC Commissioners to Suspend Construction of Proposed MOX Plutonium Processing Facility (Mar 14, 2007) .

[39] Shaw AREVA MOX Services, LLC's Answer to Motion for Leave to Reply to Opposition to Petitioners' Request Regarding Suspension of Construction (Mar. 19, 2008).

[40] Licensing Board Order (Authorizing Filing of Additional Briefs) (Mar. 20, 2008) (unpublished). This order also permitted the NRC Staff to file a response.

[41] Shaw AREVA MOX Services LLC's Response on MFFF Construction Suspension Issues (Apr. 3, 2008) [hereinafter Applicant Construction Suspension Response].

[42] NRC Staff's Response to Petitioners' Reply of March 14, 2008, Regarding Petitioners' Request to Suspend Construction (Apr. 4, 2008).

[43] The argument was originally scheduled for March 26, 2008. March 26 Oral Argument Order at 1. At the request of the parties, however, it was postponed to the later date. Licensing Board Order (Rescheduling Oral Session and Briefing Deadline, and Providing Additional Guidance Regarding Oral Argument) (Mar. 25, 2008) (unpublished).

Contention 4. March 26 Oral Argument Order at 1. The oral argument covered three main topics: (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. Id. at 1-2.

The aforesaid written pleadings and oral presentations have positioned us to rule on all the pending matters. The explanation for those rulings, summarized on pp. 2-3 above, follows in Part II: Inadmissible Contentions (pp. 16-22); Part III: Reformulated Contention 4 (pp. 23-32); and Part IV: New Contention, Current Activity, and Future Direction (pp. 33-41).

II. INADMISSIBLE CONTENTIONS

A. Reconsideration of Contention 3

Upon further reflection, and in light of the reformulation of Contention 4 discussed in Part III below, the Board has reconsidered the admissibility of Contention 3, and now dismisses it. At the time those contentions challenging waste-handling were submitted, there was, as we noted in our initial ruling, considerable overlap between the two. LBP-07-14, 66 NRC at 198-206. This overlap stemmed in part from the Petitioners having incorporated the extensive material supporting Contention 3 by reference into Contention 4. Petition at 23. Our main goal in reformulating Contention 4 was to remove this overlap and to distinguish more clearly between the thrust of the two contentions. Once this was accomplished, a clear difference emerged: Contention 3 concerns the environmental impact of any disruption in the transfer of waste away from the MOX facility, while Contention 4 focuses on the safety impact if waste cannot be transferred and must remain on site.[44]

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[44] See MOX Services, LBP-07-14, 66 NRC at 205 n.87, in which we noted that "our primary concern is with the safety contention," but that we "carry the environmentally related contention along (for now) because of the potential environmental consequences of safety failures." At that time we noted that the safety contention would remain even if the environmental contention were dismissed. Id.

Given the two-stage process established for this facility's licensing proceedings, there are barriers to admitting an environmental contention that go beyond the normal pleading rules that apply to safety contentions here (and as well to environmental contentions in other proceedings). See Section I.A.1 above. In our previous published order of October 31, 2007, this Board indicated that an environmental contention may be admitted at this stage of this proceeding only under a very limited set of circumstances, and observed that these could include situations where: (1) a petitioner relies upon newly available, significant information within the framework of 10 C.F.R. § 2.309(f)(2); (2) a petitioner meets the nontimely filing requirements of § 2.309(c); or (3) a petitioner successfully argues for supplementing the EIS pursuant to 10 C.F.R. § 51.92. LBP-07-14, 66 NRC at 192.

The Petitioners' original argument regarding Contention 3 does use the words "[n]ew and significant information" (the term used in § 2.309(f)(2)); it does not, however, identify any such information. Rather, the Petitioners' argument focuses on a lack of progress in designing and constructing a Waste Solidification Building (WSB), a facility located elsewhere on the larger DOE site and not covered by the MOX facility license, but anticipated by DOE to receive waste from that facility. Petition at 17-18. Because the WSB has not yet been designed, Contention 3 is based not on new information as that term is ordinarily understood, but rather on a lack of available information that is an inexorable consequence of an application to operate the facility being submitted so early in the construction process. See Section I.B.1 above.

The Board is concerned about the need to make – and the legitimacy of making – significant decisions intrinsic to this operating license proceeding[45] when construction of the facility has scarcely begun. This concern alone, however, is not sufficient to permit admission

[45] Although formally denominated as a proceeding involving a "possession and use permit," the matter before us has been referred to as involving facility "operation" both by the Commission in an adjudicatory decision and by the Staff in a formal notice (see text accompanying n.10, above), and has been conceded by the Applicant to be essentially of that nature. Tr. at 110-11.

of Contention 3 in the face of the specific direction regarding this particular licensing process, namely, that environmental issues would be resolved at the earlier CAR phase. Absent more specific new information that would support admission of a new environmental contention under 10 C.F.R. § 2.309(f)(2), or a focused pleading related to one of the other legal theories that could support admission of an environmental contention at this stage, we must, on reconsideration, reverse our previous decision and dismiss Contention 3.

B. New Contention 6

The full text of Contention 6, as submitted by the Petitioners, reads as follows:

> The license application for the mixed oxide ("MOX") plutonium fuel factory ("MFFF") fails to comply with the National Environmental Policy Act ("NEPA") or NRC implementing regulation 10 C.F.R. § 51.92, because the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") environmental impact statement ("EIS") for the facility does not address significant proposed changes in the U.S. Department of Energy's ("DOE's") strategy for disposing of surplus weapons-grade plutonium, which in turn would require modifications to the design of the MOX plutonium fuel processing facility. The environmental impacts of these design changes, their implications with respect to connected actions, and alternatives that would avoid or mitigate their impacts, must be considered before the facility can be licensed to operate.

Contention 6 Pleading at 1-2. As a basis for this contention, the Petitioners cite the requirement, as outlined by the Supreme Court, that agencies reconsider their environmental review of proposed actions when "new and significant information" arises.[46] The Petitioners also cite 10 C.F.R. § 51.92(a)(1)-(2), which requires supplementation of the EIS if "(1) There are substantial changes in the proposed action that are relevant to environmental concerns; or (2) There are new and significant circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

This contention stems, Petitioners explain, from the September 5, 2007, publication by DOE of an Amended Record of Decision (ROD) regarding its intent to ship up to 11 additional

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[46] Id. at 2 (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371-72 (1989)).

metric tons of surplus, non-pit, weapons-usable plutonium metals and oxides to the SRS. Id. at 3-4. According to the Petitioners, although DOE asserts that this decision relates only to the storage of the plutonium, it may become necessary, in the absence of other ways to dispose of the material, to modify the MFFF to accommodate a greater quantity of plutonium than currently planned. Id. at 4-5. This is especially true, the Petitioners say, because a significant portion of the additional plutonium is likely to contain impurities that exceed the specifications of the current MOX facility design. Id. at 5-6.

According to the Petitioners, Contention 6 meets the filing requirements contained in 10 C.F.R. § 2.309(c) that are applicable to nontimely contentions. Id. at 7-8. The first of these requirements, good cause for nontimely filing, they say is met because the contention was filed within 30 days of the release of the September 5 Amended ROD. Id. at 7. The Petitioners then argue that the other requirements are met because the Petitioners have already established standing and demonstrated their interest in the outcome of the proceeding. Id. at 8.

The Applicant opposes admission of Contention 6 on the grounds that it is "speculative and premature" and "fails to demonstrate that the NRC's standards for admissibility of contentions have been met." Applicant Answer to Contention 6 at 1. The Applicant agrees with the Petitioners that the Amended ROD relates to storage of surplus plutonium. Id. at 4. The Applicant parts company with the Petitioners, however, regarding the consequences of the storage decision for any future plans for the MOX facility. The Amended ROD does not provide any information on ultimate disposition, the Applicant says, and any further decisions regarding disposition would be the subject of future determinations and NEPA analyses. Id. at 4-6. In advance of any decision in that regard, it is "premature to speculate whether such decision would constitute a substantial change relevant to environmental concerns, or significant new circumstances or information relevant to environmental concerns." Id. at 7. According to the Applicant, Contention 6 is therefore premature. Id.

Furthermore, the Applicant argues that because there is currently no plan to change the MOX facility to accommodate additional materials, there is no genuine dispute of material fact or law pending. Id. at 8. Accordingly, the Applicant urges that Contention 6 fails to satisfy the contention pleading requirements of 10 C.F.R. § 2.309(f)(1) and must be dismissed. Id.

The NRC Staff also argues that the information upon which the Petitioners rely fails to demonstrate any change in, or differential environmental impact from, the MOX facility plans. From this premise, it argues that Contention 6 falls outside the scope of this proceeding because the two-stage process that governs licensing of the MOX facility required that all environmental issues be resolved at the previously-completed first stage. Staff Answer to Contention 6 at 6. To be admissible, the NRC Staff continues, any new environmental contention would have to satisfy the 10 C.F.R. § 51.92 requirements for supplementing the EIS, in particular the requirements of subsections 51.92(a)(1) and (2) that there are "substantial changes in the proposed action" or "significant new circumstances or information." Id. According to the NRC Staff, the Petitioners have not shown that any such changes or new circumstances or information exist. Id. at 7.

To the contrary, according to the NRC Staff, the Amended ROD merely indicates that the MFFF is one of the options the DOE is considering for disposition of the additional plutonium, not that any modification of the facility to accommodate additional plutonium is currently planned. Id. The Staff also notes that the agency has not received any requests to modify the current Application, and observes that the Commission has stated that NRC proceedings are to be based on the application as it exists at a given time and not on any potential future amendments.[47] Finally, the Staff argues that Contention 6 fails to satisfy the requirements for new contentions in 10 C.F.R. § 2.309(f)(2) and (c) because all information

[47] Id. at 7-8 (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002)).

available in the September amended ROD was also available in a Notice of Intent (NOI) that the DOE published on March 28, 2007. Id. at 9.

In their Reply, the Petitioners urge that Contention 6 should be treated the same way Contentions 3 and 4 were in our prior order on contention admissibility. Contention 6 Reply at 2-3 (citing LBP-07-14, 66 NRC at 204-05). The Petitioners say that any defects in Contention 6 are due to the Applicant's decision to file its license application early, and the contention should therefore be admitted at this stage even though it depends upon future events. Id. at 3. According to the Petitioners, Contention 6 should be admitted as a "way to handle these concerns with a mind to the greatest protection of the affected public." Id.

In ruling on the admissibility of Contention 6, we again note that the threshold for admitting environmental contentions in this proceeding is considerably higher than it is in most licensing adjudications. The two-stage process being used in this proceeding put environmental and safety issues on separate tracks, with environmental issues expected to be addressed in the first stage, and safety issues to be divided across the two stages. Therefore, at this stage, environmental contentions must meet not only the usual contention pleading requirements applicable to all proceedings, but also the additional requirements for new contentions under 10 C.F.R. §§ 2.309(f)(2) or 2.309(c), or for supplementing the EIS pursuant to 10 C.F.R. § 51.92. As all parties agree, the last of these regulations requires the Staff to supplement the EIS if there are "substantial changes in the proposed action" or "significant new circumstances or information" that bear on environmental concerns. 10 C.F.R. § 51.92(a)(1)-(2).

Contention 6 is based solely on DOE's Amended ROD, which itself does not reflect any changes to the design or capacity of the MOX facility or to the type of materials to be processed there. As the Staff correctly observes, a contention dealing with changes that have not yet been presented to the agency (e.g., as an amendment to the Application) must fail because "'a possible future action must at least constitute a 'proposal' pending before the agency' to be ripe

for adjudication."[48] No such proposal based on the Amended ROD is currently before the NRC.[49]

We also note an area in which our October 31, 2007, Order does not support the meaning that the Petitioners would attribute to it, and where the proper reading highlights what we consider to be an important difference between Contention 6 and Contentions 3 and 4. Specifically, the Petitioners' Reply characterizes our decision on Contentions 3 and 4 as indicating that "mere uncertainty about whether a proposal to change the MOX facility design should be carried out should not defeat the admissibility of [a] contention." Contention 6 Reply at 3 (emphasis added). That proposition does not reflect our meaning. As we saw the matter, Contentions 3 and 4 deal not with proposed changes to the MOX facility design, but rather with the facility as designed being able to accommodate an interruption in the transfer of stored liquid high alpha waste out of the MOX facility that could significantly influence the facility's environmental impact and safe operation. LBP-07-14, 66 NRC at 204.

Contention 6, in contrast, revolves around the possibility of future design changes to the facility. As such, it is entirely speculative and would for that reason be inadmissible at this stage even absent the restrictions on environmental contentions in general.[50]

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[48] Staff Answer to Contention 6 at 9 (citing McGuire/Catawba, CLI-02-14, 55 NRC at 295).

[49] Furthermore, the Applicant notes that the Amended ROD itself indicates that DOE is preparing a separate EIS (a document presumably not yet complete as it was not furnished by any of the parties) on the issue of how to dispose of the surplus plutonium that may be transferred to the SRS for storage. Applicant Answer to Contention 6 at 4 n.7. In the event that DOE eventually decides to dispose of some or all of the additional plutonium at the MOX facility, it may well be that a contention focusing on this subject matter would then be both ripe and timely to present.

[50] In light of the disposition we make of this contention, we need not address its alleged belatedness.

III. REFORMULATED CONTENTION 4

Contention 4 was originally synopsized by the Petitioners in this fashion:

> Whether the License Application for the proposed plutonium processing facility is inadequate because it does not address safety and public health risks posed by indefinite storage of liquid high-alpha waste at the site or contain measures for the safe storage of that waste.

Petition at 6. A complete, full-page statement of the original contention can be found later in the Petition (at 23). Because that full statement also incorporates by reference the several pages (Petition at 17-23) of material supporting Contention 3, its precise dimensions are the subject of some ambiguity. We attempted to cure this ambiguity and to eliminate overlap with Contention 3 in the manner described below.

A. Board Proposal to Recast Contention 4

As mentioned in Section I.B.4 above, on January 16, 2008, a week after the second oral argument, the Board recast Contention 4 and submitted that draft to the parties for their consideration, along with a brief explanation of the reasoning behind the Board's proposed revisions. Order Recasting Contention 4. The Petitioners thereupon indicated that they agreed with the contention as recast and were indeed willing to proceed with its litigation.[51]

The Applicant, expressing some concern with the proposed revised contention, took the constructive steps of (1) submitting several proposed changes to the Board's version and (2) indicating that it would not object to our admitting the recast contention if those changes were incorporated in the final version.[52] For its part, as noted above, the NRC Staff responded by reiterating its opposition to the original contention and by further objecting to the Board's proposal, including the addition of a reference to, and the role of, the Staff's earlier SER.[53]

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[51] Petitioners' Response to Order Recasting Contention 4.

[52] Applicant Response to Order Recasting Contention 4.

[53] Staff Response to Order Recasting Contention 4.

1. The Board's Initial Proposal

As reshaped by the Board (including the relevant portions of Contention 3 incorporated by reference), the new Contention 4 proposed to the parties read 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).

Order Recasting Contention 4 at 5.

2. Legal Authority for Board Reformulation of Contentions

As we noted in the unpublished order that transmitted the recast Contention 4,[54] Licensing Boards, though not obligated to reformulate contentions,[55] are permitted to do so in certain circumstances.[56] In a seminal decision, the Susquehanna 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. There would appear to be more cause for a Board to take such action when (as was the case here when Contention 4 was first proposed) petitioners are appearing pro se. In such instances, material embracing legitimately admissible contentions may not be presented as clearly as would be expected when counsel familiar with our proceedings has been retained for contention-drafting purposes.[57]

As we also noted, a Board's authority in this area is circumscribed in the sense that it may not, on its own initiative, provide basic, threshold information required for contention

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[54] Order Recasting Contention 4 at 3.

[55] Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

[56] Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-79-06, 9 NRC 291, 295-96 (1979).

[57] 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, ALAB-226, 8 AEC at 406, where the Appeal Board noted that "[p]lainly there is no duty placed upon a licensing board by the Administrative Procedure Act, or by our Act and the regulations promulgated thereunder, to recast contentions offered by one of the litigants for the purpose of making those contentions acceptable." This was especially true when "the party is represented by competent legal counsel." Id.

admissibility.[58] 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 make an otherwise inadmissible contention admissible.[59]

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.[60] Authority for both types of reformulation is found in 10 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. Rationale for the Board's Proposal Regarding Contention 4

In reformulating the Petitioners' contentions in the fashion it did, the Board took into account the two-stage process for licensing the MOX facility, which we described in our October 31, 2007, Order and in Section I.A.1 above. See LBP-07-14, 66 NRC at 176, 184. In order to ensure that there remained no ambiguity regarding the issues to be raised by Contention 4, the Board restated Contention 4 with the specific intent of eliminating environmental issues and materials that are beyond the scope of this proceeding, rather than allowing such extraneous material to be blended with the safety issues that may more properly be considered.

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[58] Order Recasting Contention 4 at 3-4 (citing Arizona Public Services Co. (Palo Verde Nuclear Generating Station), CLI-91-12, 34 NRC 149, 155 (1991)). See also PPL Susquehanna LLC (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 23 (2007); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[59] In the Matter of Andrew Siemaszko, CLI-06-16, 63 NRC 708, 720-21 (2006) (citing Palo Verde, CLI-91-12 at 155).

[60] See Order Recasting Contention 4 at 4 n.3 for a list of recent published orders in which Licensing Boards have reformulated contentions.

Having said that, we did draw upon certain 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 removed any reference to Contention 3, but preserved what the Board perceived to be the 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 noted that the Petitioners cited 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 Contention 3. Petition at 18. Such elements legitimately belong to both contentions and can be incorporated into Contention 4 without inappropriately mixing environmental and safety considerations.

B. Ruling on Parties' Proposed Contention 4 Revisions

As indicated above, both the Applicant and Staff objected to certain aspects of the recast version of Contention 4 put forward by the Board. In the prehearing conference portion of the April 9, 2008, session, we discussed the specifics of each objection and how the related changes they had suggested would eliminate those objections. Tr. at 404-45. We address each of those objections below, and for the reasons there set out, we (1) accept the Applicant's suggestions in their entirety, but (2) reject the Staff's main objection as non-meritorious (while adopting its other ones). We then present the revised contention in its final form, and admit it for adjudication.

1. The Applicant's Objections and Suggestions

The Applicant characterized its objections as falling into two categories: two were said to raise "legal issues," and four dealt with "corrections and clarifications." We address them in that manner, and do so in a much abbreviated fashion where no controversy remains.

a) Applicant's "Legal Issues":

i. "liquid high-alpha waste" v. waste generally:

The Applicant objected to the general nature of the recast contention's concern with all radioactive waste, as opposed to the original contention's having specified "liquid high-alpha waste" as the concern. The Petitioners agreed to accept this limitation,[61] and the Staff assured us that its eventual regulatory review of the Application and of facility construction would address all waste streams, not just the one now to be the focus of the contention. Tr. at 405-07. In that circumstance, the Applicant's suggested revision is accepted.

ii. problems "outside fence" only v. problems "inside fence" as well:

At oral argument, counsel for the Applicant argued that "the contention, as written, . . . is intended [only] to address the problem of the unavailability of the WSB to receive waste" and of any measures that might be necessary in order for the MOX facility to store liquid high-alpha waste over a period of time as a result of that unavailability. Tr. at 429. According to the Applicant, extending the contention to cover any problems with waste management within the MOX facility itself is inappropriate. Tr. at 430. The Petitioners disagreed, arguing that the problem is not just whether the WSB is built and in a condition to receive waste, but also whether the waste produced within the MOX facility meets the waste acceptance criteria for sending it to the WSB. Tr. at 435. For this reason, the Petitioners said, a broader inquiry into the waste issue is appropriate. Tr. at 435-36.

The Board noted, however, that Contention 4 incorporated the material supporting Contention 3, which appeared to focus on problems of a nature that might occur only outside the MOX facility. Tr. at 432. On this score, the Applicant and the Petitioners disagreed fundamentally about the proper way to interpret the ACRS letter cited in Contention 4. The

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[61] Intervenors' Response to Shaw Areva MOX Services' and NRC Staff's Proposed Changes to Recast Contention 4 (Feb. 19, 2008) [hereinafter Petitioners' Response to Recast Contention], at 1-2 ; Tr. at 405.

Applicant believes that that letter, too, refers almost exclusively to the potential unavailability of the WSB, Tr. at 433-34, while the Petitioners maintain that it also refers to events within the MOX facility that might render the waste unacceptable for processing at the WSB. Tr. at 437.

Although an argument exists that the contention should be framed more broadly, we sustain the Applicant's objection and limit the contention as requested. We do so with, and on, the understanding that the crucial points sought to be raised by the contention (and of especial concern to both the ACRS and to this Board) will be addressed even under the limited version.[62]

b) Applicant's Other Objections:

i. other measures generally v. specific named measures only:

The Applicant objected to the specificity with which one aspect of the contention was restated, i.e., where the Board's version reflected an assumption that particular named actions would have to be taken in the event of a failure; the Applicant suggested that the contention should also leave open the possibility of taking other remedial measures as well. The Petitioners concurred in the Applicant's quite reasonable suggestion.[63] We agree as well.

ii. SER setpoint "expectation" v. SER setpoint "requirement":

The Applicant argued that, in redrafting the contention, we should not have converted the Staff's stated "expectation" that setpoints would be needed into a future "requirement" that they be in place, and instead that such a step should await further developments and analyses. In the absence of any objection from the Petitioners, we grant the Applicant's request.

iii. "possible" problems v. "given" problems:

The Applicant correctly pointed out that we referred to certain problems as "given" when we intended to be speaking hypothetically. We agree that referring to them as "possible"

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[62] See Tr. at 429, lines 17-25 (Mr. Silverman); Tr. at 434, lines 15-22 (Judge Trikouros); Tr. at 434-35 (Mr. Silverman).

[63] Petitioners' Response to Recast Contention at 3; Tr. at 409.

problems would better reflect the situation presented, and we thus accept the Applicant's suggestion.

iv. "analyses" v. "procedures":

The Applicant urged that our reference in the revised contention to the need for certain "procedures" would have been better stated had we referred to the need to conduct future "analyses." The suggestion is accepted.

2. The Staff's Objection to Including an SER Reference

The Staff's major objection[64] to the form of the reframed contention is its inclusion – for purposes of providing support for the need for a particular requirement the contention seeks to have imposed – of a reference to the Safety Evaluation Report (SER) prepared by the Staff at the earlier construction authorization stage of the proceeding.[65] The Staff first argues that the SER was not specifically mentioned in Contention 4 (or in the incorporated-by-reference Contention 3) as originally drafted by Petitioners. The Staff, supported by the Applicant, goes on to assert that in any event the earlier SER does not and cannot of itself establish any binding requirements (Staff Response to Order Recasting Contention 4 at 6), for those are found only in the governing statutes, regulations and other materials. Id.; Tr. at 411-14.

The Staff is wrong on both counts. Although the SER was not explicitly mentioned in the original version of the contention, the SER was the precise subject of, and was thus reflected in, the letter from the ACRS that the Petitioners did cite explicitly. In reviewing the SER, that

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[64] The Staff lodged two other objections. One mirrors the Applicant's concern (see pp. 28-29, above) about extending the contention to include problems created "within" the site boundary (Staff Response to Order Recasting Contention 4 at 6). The other suggests the inclusion of a clarifying reference (id. at 7), a suggestion which we adopt (see final version of contention, p. 32, below).

[65] Staff Response to Order Recasting Contention 4 at 3-6 (discussing NUREG-1821, Final Safety Evaluation Report on the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina (Mar. 2005) (ADAMS Accession No. ML050960447)).

letter focused in part on the very issues raised by the Petitioners. In these circumstances, it is thus but a small and appropriate step to highlight explicitly in the revised contention the material already implicitly embodied in the original contention.

Of course, in a larger sense the matter is not a consequential one. Whether or not the referenced SER citation appears in the revised contention, the relevant SER material will deserve attention in any adjudication that may eventually take place on the contention.

What is far more consequential are the implications of the Staff's second argument, i.e., that an SER prepared at one stage lacks force at the next stage. The Staff appears to be arguing here that a definitive statement in an earlier SER about the need to resolve a serious matter in a future license application, a determination that paves the way for awarding the first license (here a construction authorization), has no essential force at the second stage, when the time arrives to take the steps previously said to be needed.

It is possible that we have misapprehended the thrust of the Staff argument. If the Staff meant to say only that an earlier SER is not self-executing, and that its solutions must first be translated into license conditions, or the like, to have legal force, its position might well be valid. But, looked at in context, the Staff seemed to be arguing that the determinations embodied in and relied upon in an earlier SER may or may not be followed in the next licensing phase. If that is the position being asserted, then much of the underpinning of, and reliance placed upon, the Staff's regulatory review would be vitiated.

Such a position must be rejected. For now, however, we content ourselves, for purposes of the specific matter before us, with leaving intact the SER reference we placed in the reframed Contention 4.

3. Final Version of Contention 4 for Adjudication

To complete the evolution of Contention 4, we have amended the recast version that we earlier presented to the parties to reflect the proposed changes and suggestions that we have just accepted. That process yields a final revision of the contention – asserting that the approach taken by the Applicant thus far falls short of what is required of an ISA Summary (see 10 C.F.R. §§ 70.60, 70.61, 70.62(c) – that 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) (Chapter 5 of the license application) for the proposed mixed oxide fuel fabrication facility (MFFF) are inadequate because they do not address safety and public health risks posed by an inability to transfer liquid high-alpha waste from the facility, resulting in the need to forego receipt of radioactive materials, safely shut down the facility, or take other appropriate measures, and to store liquid high-alpha waste at the site for an extended period of time.

The MFFF License Application does not assure that there is always sufficient liquid high-alpha waste storage capacity to bring the facility to a safe configuration in the event that liquid high-alpha waste receipt by DOE is interrupted, in that it fails to describe how active waste generating operations would be terminated or curtailed before the liquid high-alpha waste storage capacity exceeds design limits, allowing for any backlog of such waste in the facility. See NUREG-1821 (MFFF Construction Authorization Request FSER), § 11.2.1.3.11, p. 11-48, in which the NRC Staff stated its expectation that actual setpoints would be provided in the License Application.

Additionally, the License Application does not address the safety issues associated with liquid high-alpha waste aging within the facility due to possible protracted onsite storage that might be occasioned by a delay in liquid high-alpha waste transfer operations caused by an unplanned interruption in the receipt of liquid high-alpha waste by DOE. This would entail including in the ISA Summary analyses of hazards posed by aging liquid high-alpha 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).

As thus restated, the contention reflects all of the suggestions that the Applicant presented. Once again, the Applicant indicated that incorporation of those suggestions would eliminate its objections to the admission of the contention.[66]

[66] Applicant Response to Order Recasting Contention 4 at 1; Tr. at 405.

IV. NEW CONTENTION, CURRENT ACTIVITY, AND FUTURE DIRECTION

A. Situational Overview

Some time ago, the Commission established, initially in the environmental arena, the concept of a "contention of omission."[67] Under this concept, those opposing a planned license may launch a challenge by simply pointing out that the license proponents had failed (i.e., omitted) to address a particular matter at all. Once the license proponents address the omission, the original contention of generalized omission becomes moot by its terms, but may be replaced by a particularized contention arguing that the action curing the omission is deficient in some substantive respect.[68]

In advancing Contention 7, the Petitioners in effect filed a "grand contention of omission" addressing the current absence of an overriding regulatory pre-condition to the award of an operating license – namely, the 10 C.F.R. § 70.23(a)(8) requirement that every major aspect of the facility "has been completed" in accordance with its design.[69] Although the Applicant and Staff have been heard to state the matter differently, the Petitioners were essentially relying upon the undisputed and incontestable fact that the facility's major aspects could not have been "completed" within the meaning of the regulation because construction of them had just begun.

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[67] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002) (cited and discussed in our earlier opinion herein, LBP-07-14, 66 NRC at 206, n.88 and accompanying text).

[68] As the Commission put it: "There is, in short, a difference between contentions that merely allege an 'omission' of information and those that challenge substantively and specifically how particular information has been discussed in a license application." McGuire/Catawba CLI-02-28, 56 NRC at 382-83. Although the Commission was speaking in terms of a failure to supply information (the omission issue then before it), we have been pointed to no reason, and are aware of none, why the principle there enunciated is not equally applicable to the difference between a challenge to a license proponent's failure to take action (the analogous "omission") and a challenge to the substance of the action once taken.

[69] We attach the adjective "grand" to this contention because it focuses on the feature of this proceeding which the Commission previously singled out as its major focus. See p. 5, above, text accompanying n.10.

The filing of Contention 7 appeared intended not to create the need for an early adjudication of its merits but simply to preserve the "completion" issue for subsequent litigation. The need for such a placeholder was triggered, explain the Petitioners, by the enunciation of a Staff position at the January 8, 2008, oral argument that the Section 70.23(a)(8) finding would likely be made without notice and well in advance of actual "completion" of construction.[70] See pp. 13-14, above.

Whatever may be said of that Staff position – and as the matter progressed we indicated that its ramifications needed to be addressed[71] – and of the resulting need for and appropriateness of Contention 7, the matter was essentially mooted just before the most recent oral argument. At that time, the Staff notified us of a change in litigating position whereby it abandoned the questionable regulatory interpretation previously advanced and indicated it would await the completion of construction before (if warranted) issuing the license.[72]

With the controversy over the prior Staff position thus mooted, some of the rationale underlying the filing of Contention 7 was removed. Its admissibility remains, however, to be decided, and we turn now to that question.

B. Admissibility of Contention 7

The admission of Contention 7 – presented in elegantly simple form – could be justified in order to preserve, untrammeled, the Petitioners' litigation options on this, one of the unusual issues presented by the publication of a notice of hearing on an operating license for a facility at the nascent stages of a six-year construction process. Nonetheless, a better approach commends itself to us. Given the Staff's change of position as to the timing of the "completion" finding, the long construction process ahead, and the impracticality of litigating this contention

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[70] Petitioners' Case Management/Contention 7 Response at 3-5; Tr. at 458-59.

[71] See Order Regarding Content of Answers at 1-2; March 26 Oral Argument Order at 3.

[72] NRC Staff's Notification of Change of Approach (Apr. 7, 2008) at 1.

before its time, we have decided against admitting the contention and having it sit open on the docket as a placeholder for the future.

Instead, we are dismissing the contention, but only on the condition that the Applicant and the NRC Staff take the following action at the appropriate time: (1) the Applicant will give the Petitioners at least 60 days written notice prior to asking the Staff to make the "completion" finding; and (2) the Staff, once asked by the Applicant, will provide Petitioners at least 30 days written notice[73] prior to making its decision on the "completion" finding.

In this fashion, the Petitioners will have reasonable notice of an opportunity to formulate – in an effective and efficient manner – any challenges they may then have to the substance of that finding, and to present such a substantive contention without the need for extraordinary allotments of additional time (beyond the norm) to do so. Failure of the license proponents, or either of them, to honor this condition will be deemed to provide "good cause" – calculated on a day per day basis – for delayed filing of any substantive contention the Petitioners may bring on this subject.

C. Stay of Construction

The Petitioners have also asked us to pass on to the Commission their request that construction of the MOX facility, and this hearing process, be suspended "until the design of primary safety and security systems is complete."[74] According to the Petitioners, "[i]f – as contemplated by the regulations – the primary features of the facility design are completed before the operating license proceeding begins – the procedural problems that now plague this proceeding are likely to be resolved." Id. The Petitioners cite several ways in which they allege that the current design is incomplete, among them the lack of sufficient waste storage capacity,

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[73] If the Staff process for making the "completion" finding is to take fewer than 30 days, the Staff shall instead provide notice of the start of that process and of its expected duration.

[74] Petitioners' Case Management/Contention 7 Response at 10.

the possibility of design changes to accommodate additional feedstocks, and possible discrepancies regarding the standards to be applied in protecting the facility from terrorist threats. Id. at 6-8.

The Applicant argues that this request "is effectively a motion to stay the effectiveness of the Construction Authorization issued by NRC Staff," and that it should be denied because it is extremely late and does not address the factors for granting such a stay that are laid out in 10 C.F.R. § 2.1213. MOX Services Answer to Feb. 11 Response at 15. According to the Applicant, the Petitioners should have made this request of the licensing board presiding over the earlier CAR proceeding, and the request should have been submitted within five days of the Construction Authorization issuance on April 6, 2005. Id. (citing 10 C.F.R. § 2.1213(a)). Further, the Applicant says, the Petitioners' request does not even attempt to address the four factors that influence the grant of stay under 10 C.F.R. § 2.1213(d):

> (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 the other participants; and
>
> (4) Where the public interest lies.

Id. at 15-16.

The Applicant goes on to argue that, were these factors addressed, they would weigh against issuing the stay, because the stay would harm the Applicant's interests and because the public interest lies in completing the facility without unneeded delays or costs. Id. at 16. The Applicant further asserts that some of the alleged flaws in the design that the Petitioners cite are themselves contentions that have been submitted for resolution in this proceeding (in particular Contentions 4 and 6), while others are simply speculative. Id. at 17-20.

The NRC Staff agrees that the Petitioners' request should be treated as a request for a stay, and agrees with the Applicant that the Petitioners have failed to meet the standards for granting such a stay.[75] In any event, the Staff says, the request "runs afoul of the construction authorization approved under section 70.23(b)," and of the overall procedure for licensing the MOX facility. Id. at 17. Furthermore, the request was untimely because it should have been submitted to the CAR board within 10 days of the decision of the presiding officer to approve the construction authorization request. Id. at 18 (citing 10 C.F.R. § 2.342(e)). Finally, the Staff claims that the Petitioners have failed to demonstrate that permitting construction to proceed would cause an irreparable injury. Id. at 18-20. For all these reasons, the Staff argues that the request should be denied.

The Board agrees that this pleading should be treated the same as a motion to stay; we should therefore not pass it along to the Commission without first determining that it has some merit based on the classic four factors listed in the regulations, which reflect the similar judicial precedents.[76] We find that these four factors mandate our denying the Petitioner's request. Accordingly, we need not address the issue of which timeliness test applies to this situation.[77]

Under the first of these factors, the Petitioners have not shown that they will be irreparably harmed if the stay is not granted. To be sure, the Petitioners raise various design issues; they do not, however, indicate how a failure to address these issues now will cause irreparable injury. The Petitioners have also failed to make a strong showing that ultimately they

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[75] NRC Staff Response to Feb. 21 Order at 17. Staff and Applicant each point to different regulations governing motions to stay with the Staff using 10 C.F.R. § 2.342(e) and the Applicant pointing to 10 C.F.R. § 2.1213(d); however, each of these regulations include the same factors to be analyzed.

[76] 10 C.F.R. § 2.1213(d); 10 C.F.R. § 2.342(e).

[77] Under 10 C.F.R. § 2.342(a), a party must file the stay application within ten days after service of the decision, while under 10 C.F.R. § 2.1213(a), a party has five days to file its stay application after the issuance of the notice of the Staff's action.

will prevail on the merits, as for example by demonstrating that the initial decision of the Licensing Board in the CAR proceeding was in error. In essence, the Petitioners' request asks us to look at issues that were clearly in the purview of the board that handled the CAR, and were resolved in the course of the initial proceeding by that Board's approval of the design bases of the principal structures, systems, and components.[78] We do not believe the Petitioners have provided the support for a determination that the CAR board was in error, and the structure of this licensing process does not permit us to reopen issues resolved by the earlier proceeding absent circumstances that do not appear to exist here.

Of course, as we have already discussed, the Staff has yet to make the Section 70.23(a)(8) determination – relevant and requisite to this proceeding – that the facility's principal structures, systems, and components have been constructed in accordance with the Application. It may be that at that juncture the merits of some of the matters underlying the stay motion will be ripe for consideration. See pp. 35-36, above.

Finally, it is clear that a stay would harm the Applicant by adding to the costs and uncertainties involved in constructing the MOX facility. And it is far from clear that there is any overriding public interest that would be served by staying the proceeding.[79]

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[78] See 66 Fed. Reg. at 6,701.

[79] The Board also notes that, to the extent that the grounds for the stay overlap any contentions already submitted herein, our determinations related to those contentions apply to the stay as well. The Applicant alleges that the part of the stay request focusing on waste issues is a variation on Contention 4 (MOX Services Answer to Feb. 11 Response at 17), a contention that remains a part of this proceeding and will be resolved as litigation progresses. Additionally, the part of the stay request that discusses additional feedstocks is similar to Contention 6, id., which has already been rejected for reasons discussed. See pp. 21-22, above. Other parts of the Petitioners' request fall short in that, although they do not duplicate existing contentions, they fail to satisfy the applicable regulatory standards for granting a stay.

Insofar as we have treated the petitioners request as the equivalent of a stay motion, we therefore deny it. We also find that it lacks sufficient merit to warrant passing it up to the Commission.[80]

D. Case Management Approach

In our earlier opinion, we expressed some concern over the logistical and related problems threatened to be created by launching an operating license proceeding before construction had begun.[81] In an effort to anticipate those problems, we suggested for the parties' consideration a number of approaches that might provide a sensible alternative to the admission of one or more contentions which, by their nature and in light of the nascent stage of facility construction, would not be suitable for litigation for some time. LBP-07-14, 66 NRC at 206-09. In addition, we asked the parties to confer to see if they might agree on any form of case management approach that would allow for a more effective and efficient proceeding. As a result, these subjects were discussed at some length during the January and April oral sessions.

Without reciting the various positions taken and arguments advanced, it became clear that no wholesale innovations were both desired by the participants and workable. Nonetheless, we are faced with having to apply, to an unusual adjudicatory situation, a regulatory regime which was written with different types of adjudications primarily in mind. Upon reflection, it appears that a "wait-and-see" attitude, and a minimalist approach, is most appropriate at this time.

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[80] In light of our determination that each of the four factors is lacking, our conclusion is not affected by the Supreme Court's recent decision concerning the importance of one of the factors. Munaf v. Geren, # 06-1666, 553 U.S. __ (slip op. at 12-13) (June 12, 2008).

[81] To be sure, no law or regulation precluded the Applicant from filing its application when it did, but neither was the Applicant required to submit it that early. Tr. at 227-28. It appears that once the Applicant made that election, the Staff was required to notice the application, once it was docketed, for possible hearing.

On a related subject, it has been customary in other proceedings for licensing boards, after intervention has been allowed, to establish a specific time period after the occurrence of a triggering event during which new contentions will, if filed within that time, be deemed to have been filed "in a timely fashion based on the availability of the subsequent information" within the meaning of 10 C.F.R. § 2.309(f)(2)(iii). Many times, boards have selected thirty days as that specific presumptive time period.[82]

We think that a longer period is justified here. At several junctures during this proceeding, we have noted the enormity of the task – either in terms of the volume of paperwork or the system for its dissemination -- facing citizen-intervenors who are monitoring the publication of documents on the progress of facility planning and construction in an effort to file timely new contentions. Given the disparity in resources, the Applicant's choice to file well in advance of the start of construction should not be allowed to place upon the Petitioners the burden of having to face, continuously for the entirety of a six-year construction period, a rolling 30-day deadline for monitoring, reviewing, analyzing, and critiquing documents. That period is too short in these circumstances.

Given the length of time that this proceeding will consume, there is no room for the Applicant to argue that its interests, or the public interest, would be harmed by extending the Petitioners' time. After all, an extension of a rolling 30-day deadline to, for example, a rolling 60-day one, confers the benefit of doubling the Petitioners' time to prepare any one contention

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[82] See, e.g., Entergy Nuclear Vermont Yankee L.L.C., and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LR, ASLBP No. 06-849-03-LR, Licensing Board Order (Initial Scheduling Order) (Nov. 17, 2006) at 7 (unpublished); Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), Docket No. 50-293-LR, ASLBP No. 06-848-02-LR, Licensing Board Order (Establishing Schedule for Proceeding and Addressing Related Matters) (Dec. 20, 2006) at 7 (unpublished); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), Docket No. 52-011-ESP, ASLBP No. 07-850-01-ESP-BD01, Licensing Board Order (Prehearing Conference and Initial Scheduling Order) (May 7, 2007) at 3 (unpublished).

while adding a total of only 30 days – during a six year construction period – to the overall time Petitioners will have to file contentions. This would seem a worthwhile investment in making the opportunity for a hearing a meaningful one.

Until amended by us on a showing of changed circumstances, then, new or amended contentions filed in this proceeding will be deemed timely if filed within 60 days of the Petitioners learning, or being in position to learn, of the availability of information about the event or document triggering the filing of such a contention. If additional time to file is needed, Petitioners may, before the expiration of the 60 days, seek an extension based on a showing of need; if such an extension is granted, the new or amended contention(s) will likewise be considered timely.

V. ORDER

For the foregoing reasons (and with Judge Farrar filing a concurring opinion), the Board takes the following actions:

1. On reconsideration, Contention 3 is DISMISSED and Contention 4 is ADMITTED;

2. The Petitioners having previously been found to have standing, and one of their contentions now having been found admissible, their Petition to Intervene and Request for a Hearing is GRANTED;

3. Recently-filed Contention 6 is DISMISSED;

4. Recently-filed Contention 7 is DISMISSED, on the condition that future notice concerning the subject matter of the contention be provided as detailed on p. 35 above;[83]

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[83] Specifically, those notice conditions require (with an explanatory footnote omitted) that "the Applicant and the NRC Staff take the following action at the appropriate time: (1) the Applicant will give the Petitioners at least 60 days written notice prior to asking the Staff to make the 'completion' finding; and (2) the Staff, once asked by the Applicant, will provide Petitioners at least 30 days written notice prior to making its decision on the 'completion' finding."

5. The request that we refer the motion for a stay of construction to the Commission is DENIED; and

6. The 60-day period detailed in the Case Management Approach section of this opinion is ADOPTED to govern the filing of such contentions as may hereafter be submitted.

Appeal Rights. The agency's Rules of Practice provide, in 10 C.F.R. § 2.311, that within 10 days after service of this Memorandum and Order (which shall be considered to have been served by regular mail for purposes of calculating that date) an appeal can be taken, in the format prescribed, to the Commission on the question whether the Petition to Intervene "should have been denied in its entirety."[84] Responses to any such appeal are due within 10 days after service of the appeal. 10 C.F.R. § 2.311(a). The appeal and any answers shall conform to the requirements of 10 C.F.R. § 2.341(c)(2).

Under the regulation (cited above) governing appeal rights at this juncture, so long as one contention is admitted, dismissal of other contentions is deemed interlocutory in nature. Those dismissals are therefore not subject to appeal by the Petitioners until the proceeding is later terminated or unless the Commission directs otherwise. See Private Fuel Storage (Independent Spent Fuel Storage Installation), CLI-03-16, 58 NRC 360, 361 (2003). Accordingly, Petitioners need not take any action at this time to preserve any challenge they may later wish to bring to our dismissal rulings.

Because our declining to refer the Petitioners' request for a stay of construction to the Commission was the equivalent of the direct denial of a stay motion, a petition for review may be filed, pursuant to 10 C.F.R. § 2.341(b)(1) and (f)(2), within 15 days after service of this Memorandum and Order (which shall be considered to have been served by regular mail for

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[84] If the Applicant were to take such an appeal, it would be for the Commission to determine the estoppel impact, if any, of the Applicant's earlier representation that Contention 4 would be acceptable were the Board to adopt the Applicant's suggestions as to that contention's content. See p. 32, above.

purposes of calculating that date).[85] Answers to any such petition are due within 10 days after service of the petition, and the petitioner may file a reply within 5 days of service of any answer. 10 C.F.R. § 2.341(b)(3). The petition and any subsequent filings shall conform to the requirements of 10 C.F.R. § 2.341(b) and (f)(2).

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

With respect to the concurring opinion of Judge Farrar that follows (pages 44-59), his colleagues believe that the expression of those views is not necessary to a decision on the matters now before us.

Rockville, Maryland
June 27, 2008

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

[85] Under an earlier version of the agency's rules, stay motions were appealable under former 10 C.F.R. § 2.786(g), as applied by the Commission in Hydro Resources, Inc. (Albuquerque, NM), CLI-98-08, 47 NRC 314, 320 (1998) and in Duke Cogema, 55 NRC at 205, 214 n.15. Because the provisions of the new rules cited in the text roughly correspond to former § 2.786(g), the Petitioners should, absent contrary Commission directive, follow the same appeal procedure that was previously in force.

Concurring Opinion of Judge Farrar:

I agree with the Board's disposition of the pending matters and with the reasoning that led to that result. I offer these additional thoughts because this proceeding has, in my view, highlighted a number of troubling aspects about practices that have developed and are being employed in the operation of the NRC's regulatory and adjudicatory systems.

Concededly, as my colleagues note in declining to join in these thoughts (see page 43), it is not ordinarily within our judicial role to provide comments that are not necessary to decide the issues pending before us. But because the matters involved could affect the future of this proceeding, as well as upcoming proceedings, I believe that it would serve the public interest to bring them to the attention of the Commission.

The first matter involves the NRC's internal safety culture. There is general agreement that plant safety is, in the first instance, crucially dependent on the existence of a robust industrial safety culture. Looking beyond that principle, the Commission has stressed the need for that same type of safety culture to drive the performance of the NRC Staff in its regulation and oversight of the industry. In my judgment, this proceeding has exposed matters that might indicate that that culture is being undermined – and thus ought to cause those responsible for instilling that Staff culture, and nurturing its existence, to take notice.

The other matters center on potential intervenors' right to a hearing, which is an empty promise unless there is an opportunity to be heard "at a meaningful time and in a meaningful manner." [1] It is in that spirit that this concurrence respectfully suggests a need for Commission directives or policies that would enable agency adjudications to proceed differently when circumstances call for it. Specifically, those adjudications should be conducted in a way that more nearly assures that the agency's hearing process – one of the means by which nuclear safety is promoted and the natural environment protected – makes the hearings mandated by the Atomic Energy Act "meaningful."

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[1] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

In that regard, this proceeding has illustrated how the adjudicatory system established by the Commission can become contorted so as to place artificial – even unfair – barriers in the way of those citizens, organizations or governments genuinely seeking to participate in a constructive manner. The Commission made its intervention rules "strict by design" – but that does not justify what we have seen here.

The proceeding has also focused attention on the unnecessarily short and burdensome time periods that routinely govern potential intervenors' pre-hearing participation in the adjudicatory process. In contrast, industry parties are routinely – and quite properly – granted great blocks of time, both within and outside the adjudicatory process, to prepare or to reformulate their presentations. All agree that the better an Applicant's presentation, the more that safety will be promoted. But does not the Atomic Energy Act require us at least to allow for the possibility that the same might be said of a particular Intervenor's presentation?

1. Safety Culture.

The NRC Staff quite rightly focuses, in the course of conducting its regulatory mission, on the safety culture of an Applicant organization. It does so on the universally-held theory that the absence of a fully-committed dedication to the promotion of safety throughout an organization will eventually result in safety shortcomings, regardless of whether a snapshot reveals safety deficiencies at the moment. We need not belabor the point – the extent of, or lack of, a licensee's safety culture is a key point in the nuclear regulatory scheme administered by the Staff.[2]

The significance of having a well-developed safety culture is not limited to the regulated industry. Examination of the agency's policy directives and other official records indicates that,

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[2] For example, significant remedial and punitive steps were taken when such a culture was found wanting, following the Davis-Besse reactor vessel head incident of several years ago.

from the Commission on down, the strength of the Staff's own performance is, not surprisingly, also viewed as highly dependent upon its own internal safety culture.[3]

The approaches the Staff took to two matters during this proceeding appear to raise concerns about the robustness of the agency's internal safety culture. Perhaps those two matters were aberrational, and can be explained away as of little broader consequence. But, on the other hand, they may be symptomatic of safety culture deficiencies, and thus raise a serious question about a foundation of nuclear safety – the culture of the government organization responsible for promoting it. To protect against that possibility, I discuss the two matters below.

a. The Regulatory Shortcut. It seems to me a matter of great concern that the Staff would, at one juncture, have been willing to take an obviously unauthorized shortcut in considering issuance of a license.[4] The initial willingness of the Staff to ignore the unmistakable meaning of the regulations,[5] if left unaltered, would have sped the grant of a license (albeit an unlawful one) to the Applicant. To be sure, the specific shortcut has now been abandoned, after the Board challenged it with a series of questions (see note 5), and the Staff personnel who produced that outcome are to be commended.

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[3] See, e.g., Dr. Richard A. Meserve, Chairman, U.S. Nuclear Regulatory Comm'n, "Safety Culture: An NRC Perspective" at the INPO CEO Conference (Nov. 8, 2002); Gregory B. Jaczko, Commissioner, U.S. Nuclear Regulatory Comm'n, "Public Confidence and the Nuclear Regulatory Commission" at the Nuclear Power and Global Warming Symposium (Nov. 8, 2005) at 3; Staff Requirements Memorandum – Briefing on State of NRC Technical Programs (Apr. 3, 2008) at 2.

[4] See Board opinion at 34, describing the Staff's earlier plan to award the license prior to construction completion, and then to monitor activities leading to completion, notwithstanding that a regulatory pre-condition to a license award – embodied in the applicable regulation's unmistakable language – flatly requires that construction "has been completed." See also the discussion below, pp. 51-52, of Contention 7 in another context.

[5] See Board opinion, pp. 13-14, 34.

But does the culture which led to the promotion of that shortcut still exist?[6] The Commission's regulations that govern us reflect a valid purpose in seeking to avoid unnecessary delays in reaching final decisions in the adjudicatory process. But is it possible that the constant pressure outside the adjudicatory process to "do it faster" could have not only a procedural but a substantive impact on the quality of the Staff's work (technical and legal) that eventually finds its way to us inside the adjudicatory process?

b. The Disappearing SER. Perhaps this case simply presents a "perfect storm" of circumstances which will not soon again come together, and thus the abandoned shortcut just referred to can be safely regarded as portending nothing about the system as a whole. But what about the seemingly cavalier treatment of the earlier Safety Evaluation Report, whose instructions the Staff seems to be so ready to cast aside? See Board opinion, at p. 31.

There are consequential, if not breathtaking, implications in the Staff's argument that an SER prepared at one stage need not be given formal force at the next stage. Over the years, many important safety issues in many different proceedings, whether the subject of adjudication or not, have been put to rest – and an applicant awarded a permit or license – on the strength of a Staff SER indicating what needed to be done to resolve that matter.[7]

Under that practice, at least implicit in the notion of what the SER said was "needed to be done" was that, as activity under the thus-awarded permit or license proceeded, it would "indeed be done." The Staff appears to be arguing here, however, that a definitive statement in

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[6] Lest I be misunderstood, I am not suggesting that the early grant of an unlawful license would of itself create a safety problem. Rather, my concern is that if such a grant were the product of a Staff attitude that elevated "do it faster" above regulatory principles (or other valid standards), that attitude could create safety problems somewhere down the line.

[7] I refer primarily to non-adjudicatory situations, where the Staff's SER was viewed as providing essentially the defining word in the regulatory process. But even in adversarial adjudications, where no party's evidence has primacy based only on its source, the expertise underlying SER determinations has in the past often carried the day.

an earlier SER about how to resolve a serious matter – serious enough for it to draw the specific attention of the ACRS and for us to focus on it in our earlier opinion (LBP-07-14, 66 NRC at 204) – so that a license could be awarded, has no essential force when the time to take the stated steps later arrives.[8]

The Board's resolution of this matter takes care of the issue for purposes of reframing Contention 4. But does it remove the threat of an SER being issued in the future at one stage of a proceeding and its conclusions being ignored at a later stage? In other words, are Staff SERs now to be – like the railroad tickets discussed in the cases that beginning law students read about in their contracts course[9] – "good this day only," i.e., long enough to keep a licensing proceeding moving at the mandated speed but not long enough to guide that proceeding to its eventual destination?

The Staff work that comes before us in adjudications represents, in most instances, a very small part of the Staff's overall endeavors. Thus, it is no answer to dismiss, without analysis, the two events of concern here as not adding up to much. The question is, rather, whether those events are symptomatic of larger trends. I think it appropriate to call these concerns to the attention of those in authority.

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[8] The Board's opinion (p. 31, above) recognizes the possibility that the Staff may be arguing only that an SER is not self-executing, in that it must later be incorporated in other, binding, licensing documents. I share that recognition, but nonetheless have a concern here over the apparent absence of any manifest Staff intent to mandate such incorporation.

[9] See, e.g., Elmore v. Sands, 54 N.Y. 512 (1874).

2. Meaningful Hearing.

The Petitioners were instrumental in focusing the Board's attention on the troubling matters discussed above. That they did so is a testament to the contribution that they, and others like them, can make to a proceeding. Moreover, in doing so they often labor under a number of disadvantages. That is the subject to which I now turn, wondering how much more they might contribute to our proceedings – and thus to nuclear safety – if the adjudicatory process allowed them to.

a. Entry Barriers. In the course of periodically tightening the agency's contention pleading rules, previous Commissions have explained their purpose in terms of making adjudicatory proceedings more effective and efficient, while maintaining fundamental fairness.[10] Whatever may be said of those doctrines in the normal case, their operation, when applied to a proceeding such as this one, raises serious questions not previously addressed by the Commission, nor seemingly contemplated by its predecessors when the governing regulations were promulgated.

The anomalous situation before us was triggered by the Applicant's voluntary decision to file what can be fairly described as a "very early" operating license application (i.e., it was filed well before construction commenced, and well before the Staff needed to have the application in hand to assure timely processing in terms of generating a licensing decision in advance of construction completion). This situation, in turn, created an opportunity for the erection of additional pleading hurdles – beyond those fairly contemplated by the already-strict rules – for the Petitioners to overcome.

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[10] See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-08, 13 NRC 452 (May 20, 1981); Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168 (Aug. 11, 1989); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (July 28, 1998); Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

The Board explained this concern about pleading requirements in its earlier decision. (LBP-07-14, 66 NRC at 201-02 and n.94), where it addressed the Applicant's and Staff's arguments that the contentions filed were speculative and/or premature. In that regard, we concluded that

> if those arguments were to carry the day, however, NRC hearing opportunities could soon come to be viewed as chimerical – a result that would seem to be the opposite of what Commissioners past and present have said is their goal [footnote omitted]. For in an "early notice" situation like this one, it would never be possible for a petitioner to have a contention admitted if potentially legitimate safety concerns about actual construction practices, or upcoming operational procedures, were automatically rejected, without recourse, because they were filed before construction had either commenced at all or proceeded any distance. It would be paradoxical to let that situation label the challenge, rather than the notice [of opportunity for hearing], as premature, thus ending the process and eliminating ready later opportunities to raise construction-practice matters freely.

Id. (emphasis added).

We returned to this theme later, where in a footnote we indicated that "given the timing of the Notice of [Opportunity for] Hearing here, contentions challenging construction outcomes will necessarily contain an element of the theoretical. As we have seen, that is not the Petitioners' fault – the Applicant's plans themselves have elements of incompleteness and are thus open to challenge via contentions of omission." Id. at 209 n.94.

It may be that the action the Board has taken herein, both in (1) admitting Contention 4 while conditioning the rejection of Contention 7, and (2) establishing certain guidelines for managing the proceeding going forward, reconciles the terms of the regulations with the circumstances of the case, and does substantial justice for all parties. But a larger, more general concern about the problematic nature of "early notice" proceedings nonetheless remains, exemplified in the two specific matters described below.

i. The Trigger for Contention 7. As indicated in today's Board decision (see n.69) and earlier in this concurrence (n.4), Contention 7 goes to the heart of one of the fundamental purposes for which this portion of the MOX proceeding was convened, i.e., to deal with the issue of whether the facility, or at least its principal components, "has been completed" (emphasis added) in accordance with its design as required by 10 C.F.R. § 70.23(a)(8). The Applicant and Staff nonetheless claim that the contention before us is "speculative" and that it "does not raise a genuine issue of fact."

To the contrary, the contention is not at all speculative – it relies quite precisely on the existing situation, namely, the incontestible fact that construction has barely begun and thus it clearly has not been, and cannot be described as, "completed" as expressly demanded by the governing regulation. On that score, the license proponents are also misguided in arguing that there is no genuine issue of fact before us – that is so, but the undisputed facts cut in the Petitioners' favor, not theirs.

To be sure, the Applicant may one day be entitled to have the Staff make, and the Board to sustain, the "completion" finding. But the Petitioners would, if they sought it, be entitled to a grant of summary disposition that as of this day the undisputed facts are that the facility has not been completed in any sense of that word.

In this sense, this contention – focusing on today's facts – is the polar opposite of those that attempt to speculate that the Applicant will later take some action out of keeping with licenses previously issued,[11] or that – as we have seen here in contentions (like # 6) that the Board has rejected – the Applicant will change the design or purpose of its facility. Changes

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[11] This Board is well aware of the doctrine that it is not to be assumed, in determining whether to issue a license, that the licensee may later fail to do what the license or agency regulations require of it. See cases cited in LBP-07-14, 66 NRC at 209, n.94. Whatever may be the reach of that doctrine to preclude such speculative post-licensing-focused contentions, it surely was not intended to provide a presumptive substitute for the pre-licensing performance that is required before a sought-after license may be issued.

such as those can readily be challenged if and when (but only when) they are formalized in an amendment to the license application.

On the other hand, admitting (and even summarily adjudicating) Contention 7 would be devoid of practical impact. It would not preclude the Applicant from continuing the construction process, an effort it plainly intends to carry on. In this respect, this contention of omission is unlike those that challenge a failure to present or to discuss information, for those failures might indeed go unremedied in the absence of the contention.

In joining the Board in not allowing pursuit of Contention 7 at this juncture, I am also influenced by that contention's peculiar genesis and resulting timing. This provides a lesson learned for avoiding that result in other early notice cases: petitioners might well need to file at the very outset of a proceeding any broadscale contentions of omission they may wish to bring. Although this approach might present certain burden-shifting pleading conundrums as construction and litigation proceed, Boards are already equipped to handle such problems. Of course, it would be a welcome development were the Commission to elect to provide guidance as to better approaches in "early-notice" cases.[12]

ii. The Prematurity/Belatedness Dilemma. The second example flows from the threatened impact of the inconsistency between alternative arguments that the Applicant and Staff presented to those of the Petitioners' contentions that were not included in the original Petition.[13] On the one hand, those contentions were said to be premature, for complaining of

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[12] In this regard, however, see n.17, below.

[13] Contentions filed after, and less formally than in, the initial petition (which is a formal response to a notice of opportunity for hearing) must carry with them a demonstration that they are "timely" or that there is (among other things) good cause for their untimeliness. See 10 C.F.R. §§ 2.309(f)(2)(i)-(iii) and 2.309(c)(1). Thus, for the remainder of the construction period, the Applicant would have the opportunity to raise the alternative and inconsistent "premature/untimely" defenses.

projected developments that had not yet occurred.[14] On the other hand, if they were not found to be premature, we were urged to reject them as untimely because some even older document made mention of them in a fashion that should have, so the theory goes, triggered the Petitioners' attention at that time. Tr. at 194.

Ordinarily, parties to litigation are entitled to make alternative arguments, even inconsistent ones. See, e.g., FED. R. CIV. P. 8(d)(3). But the potential repetition of the "premature/untimely" defenses – by those who control the creation of, and to some extent the access to, the vast numbers of documents that have already emerged, and will continue to emerge for the next six years of construction – threatens to create entry demands on the Petitioners that are both procedurally unworkable and fundamentally unfair.

These demands occur because, after the initial pleading is filed, the Petitioners must constantly review documents during the entire remaining period of construction (here, some six years) to see if there is anything in them that might generate a contention. They must be prepared to act quickly (see n.13, above), within a certain time period after discovering the new material.

But if they thereupon file the contention, they will be told it is premature, on the ground that the problem it portends has not yet been realized. If, on the other hand, they do not file it, they will later be told they are too late, on the ground that the earlier document should have served to trigger their action.

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[14] Tr. at 194-95. I omit from this category contentions like # 7, which (as does # 4) complain that actions that were supposed to have been taken had not yet been accomplished. As to contentions like those, the "prematurity" defense may be readily rejected so long as Boards recognize it for what it is, or more accurately for what it lacks (see p. 51, above, n.11 and accompanying text; p. 54, below, n.16 and accompanying text). Rather, I refer here to contentions like # 6, which complained of potential changes to the facility that had not yet been formally proposed.

Under this scenario, no amount of learned advice (see, e.g., Tr. at 204) can solve Petitioners' dilemma for them. There is no preventing either (1) an enormous waste of resources[15] or (2) a critical loss of opportunity. Justice should not be dispensed so randomly.

There may, however, be a path to a solution. As noted above, the Applicant and Staff have argued strenuously that contentions about future events (as distinguished from current shortcomings) are premature until the event of which they complain has come to fruition. Where appropriate, I intend to take guidance from that argument to this extent – in justifying any alleged failure to have acted more quickly in presenting new contentions, the Petitioners are free (at least in my judgment) to rely upon the principle (ardently espoused herein by the Applicant and Staff) to the effect that contentions are premature when they complain of an event *outside* the scope of the application (or of other obligations of the applicant) that has not yet transpired.[16] Absent some special circumstances, I would expect (based on the arguments the license proponents have thus far relied upon) to look askance at any claims, after the event has transpired and a contention been duly filed, that such a just-ripened event – even if it could have earlier been predicted by careful scrutiny of an earlier document – should have been the subject of an earlier contention.

Otherwise, this proceeding would turn into a shell game, with the usual street-corner outcome: whatever guess the Petitioners make will prove wrong. The Petitioners ought not be expected to proceed for the next six years on that basis.

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[15] Ordinarily, of course, a vast disparity exists between the resources of facility proponents and those of facility opponents. Although this does not relieve such opponents of their obligations (Statement of Policy [n.10, above], CLI-81-08, 13 NRC at 454), in fairness, they ought not be forced to churn and to dissipate their resources needlessly in response to "Catch-22" situations.

[16] Contentions 4 and 7, in contrast, each complain that an event necessary to the grant of the license had not yet transpired.

Perhaps the simple rejection of the Applicant's prematurity arguments on the estoppel-type grounds outlined above will promote sensible case management going forward. This issue threatens to appear, however, in other early notice cases, and the Commission might do both litigants and Boards a service by providing generally-applicable guidance on this score.[17]

b. Inappropriate Deadlines. The question of timing arises in another context. The Board has herein defined what will be considered a presumptively "timely" new contention as one filed within 60 days, rather than the usual 30 days, after the discovery of new information.[18] That is good, so far as it goes, in that it begins to deal with one aspect of the larger problem plaguing our proceedings, namely, the lack of symmetry between the times allotted, and the second chances afforded, to applicants on the one hand, and petitioners/intervenors on the other.

To be sure, at some phases of a proceeding (e.g., the submission of pre-filed testimony before an evidentiary hearing, and the preparation of post-trial briefs thereafter), both sides are treated alike (as they should be) in terms of time allotments. But that equity of treatment occurs largely at and around the evidentiary hearing stage. The inequity which concerns me comes earlier, where it can readily operate unfairly to deprive facility opponents of a meaningful opportunity to advance their issues to the critical hearing stage, where Boards can assure them fairness.

The unfairness starts at the beginning. Notices of opportunity for hearing, prepared by the NRC Staff in the name of the Commission, are too often either terse and uninformative, or

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[17] In the Board's prior opinion (LPB-07-14, 66 NRC at 207-08), we noted that the regulations governing Combined Operating License proceedings – where, as here, authorization to operate will be part of what is sought before construction begins – provide for a later "last-chance" opportunity for plant opponents to challenge construction practices, perhaps thereby alleviating some of the problems raised here.

[18] While we have set 60 days as the presumptive minimum, we have made provision for the Petitioners to seek more time on the grounds circumstances make it appropriate.

long and convoluted.[19] They may contain within them all the elements legally prescribed, but too often are not crafted in a manner that would allow them to be a source of easily comprehensible guidance as to the precise nature and timing of the intense procedural[20] and substantive activity that must be undertaken in a very short time for an intervention to succeed.

There might be more of an effort made by the agency as a whole to see to it that its notices serve as such a source, e.g., by highlighting key points or by involving the Office of Public Affairs in their drafting. But licensing boards have absolutely no role to play in supervising the Staff, so this too is a matter for the Commission to consider.

Such notices frequently allow, as prescribed by the regulations, 60 days for the initial filing of contentions.[21] But an applicant has usually had many years to prepare the application that is being contested, and applications are lengthy and complex. If more time to prepare a responsive petition is needed, especially in "early notice" cases (like this one where construction had not even started),[22] the Commission may wish to consider awarding it more routinely, so that when the proceeding gets to us the contentions are more thoroughly framed and supported, and we can move more efficiently and effectively to deal with their substance.

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[19] Rather than cite specific examples that might later suggest my disqualification from sitting in a particular case, I simply note my general impression from reading various notices. Facility-specific descriptions (if included) and deadlines, needed to draft intervention pleadings, seem too often to be obscured by boilerplate, rather than highlighted in some fashion.

[20] The procedural difficulties petitioners might encounter, for example, in preparing to act in accordance with the agency's Electronic Information Exchange, can scarcely be overstated. The Notice is long; the instructions are longer; and becoming skilled is not easy.

[21] To be sure, prospective petitioners will usually have had an opportunity for access to at least a redacted version of an application for some additional period before the Staff issues the notice that formally triggers the opportunity to participate.

[22] As previously noted, construction did not start until after the intervention petition was filed, and will not be completed for six more years. The Staff Safety Evaluation Report is not scheduled for issuance for nearly 2½ years (December 20, 2010), and litigation of any admitted contentions usually awaits that development. In this "early notice" case, then, time was not of the essence – but the deadlines imposed on petitioners made it seem otherwise.

In sum, the Commission may wish to consider (1) insisting that notices of hearing opportunities, upon which the public relies to know how to proceed, be more artfully crafted so as to articulate more clearly what is required; (2) allowing more time to file intervention petitions in circumstances where, like here, the adjudication is not yet on the critical path[23] and time is not yet of the essence (see n.22); and (3) making it clear that well-founded extensions of time for filing petitions or taking other actions at the contention stage are not disfavored in any proceeding, particularly where the Applicant has taken extraordinary amounts of time to put its materials together.

The latter two steps would advance symmetry, for if the Staff detects deficiencies in an application before or after a notice of hearing opportunity is issued, the applicant will freely be given (outside the adjudicatory process) ample opportunity to amend it. This is as it should be, for it serves the public interest in safety for a facility application to be as good as it can be.[24] But it can also serve the public interest in safety, one would think, for a facility opposition to be as good as it can be.

This is most readily achieved by granting more time at the outset. For once the initial petition is filed, facility proponents routinely press within the adjudicatory process to ensure that any attempt thereafter to cure any deficiencies – as in a response to the proponents' answers – is rejected as untimely.[25]

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[23] In most instances, pursuant to Commission direction, evidentiary hearings on admitted contentions await the Staff's later issuance of key analytical documents. 10 C.F.R. § 2.332(d).

[24] See Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 710, n.12 and accompanying text (2005).

[25] See, e.g., Nuclear Mgmt. Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006); Louisiana Energy Servs. (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004); Louisiana Energy Servs. (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

It is no answer to say that disparate, unfair treatment does not exist, in that the limitless opportunities for the applicant to "get it right" take place outside the hearing process, while the denial of opportunities for the petitioners to raise their challenges occurs inside the hearing process, where "the rules are the same for everyone." That is a meaningless bromide when the crucial adjudicatory pleading deadlines have practical exclusionary impact on only one of the parties – the petitioners.

As an example, at an earlier stage of this case, the Applicant and Staff took actions that resulted in delays of well over a year in the issuance of the Construction Authorization.[26] But the Applicant later opposed a five-day extension of time for the petitioners to file a pleading before us.[27]

In my view, a set of conditions that fosters these approaches and disparities should not have been allowed to continue to develop within the bounds of the Commission's adjudicatory system. The Board's action today, providing a more expansive period for filing timely new or amended contentions, begins – but only begins – to right that situation. The Commission should speak to it.

In the final analysis, all this seems reminiscent of, and analogous to, the procedural due process doctrine that governs the notification of absent parties. That doctrine essentially

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[26] See Duke Cogema, LBP-03-21, 58 NRC at 347 n.44 (2003). Similarly, at one stage of the PFS proceeding (see n.24, above), questions about the Applicant's approach to accidental aircraft crash issues led it to seek deferral of the entire proceeding for what turned out to be several months. That Board later commented that the regulatory system, and the public interest, benefitted from that delay. LBP-05-29, 62 NRC at 712. Thus, my point is not that applicants should not be allowed to "get it right"; rather, their opponents should not have to beg for even a minimum extension for them also to "get it right." There should be at least some modicum of even-handedness extended to them, if not in absolute time to prepare their filings, at least in relative receptivity to a plea for some additional time.

[27] Applicant's "Answer Opposing Joint Request for 5-Day Extension . . ."(June 19, 2007). Compare n.25 of the Board's opinion.

prescribes that where personal service cannot be made, one must use a form of "legal notice" that one would employ if one were really trying to reach the person. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).[28] The analogy here is simple – the adjudicatory system ought to operate in the way it would if it were "really trying" (1) to encourage the participation of those who are protected by the Atomic Energy Act's grant of hearing rights and (2) to provide them the opportunity for a meaningful hearing.

Of course, as perhaps suggested by some of the practices that have evolved, some might have believed that facility opponents have nothing to contribute to the hearing process. Those who subscribe(d) to that view have always had the option to seek to have the Act amended to abolish the hearing process and to leave final regulatory decisions to informal interaction between applicants and the NRC Staff, with no public participation.

Barring such a change in the law, the hearing opportunity it provides ought to be a meaningful one. In that respect, Contention 4, which we have admitted and which involves a serious matter, stands as a testament to the contribution intervenors might make to assuring that this facility, if built, measures up to the safety standards applicable to it.

Conclusion

The adjudicatory system – and its impact on public safety and environmental protection – benefits both from robust Staff performance and from meaningful intervenor participation. To that end, the foregoing views have been presented with one aim in mind: to point to ways in which the nuclear regulatory regime might avoid disruptions or errors attributable to safety-culture or due-process shortcomings.

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[28] "The means employed must be such as one desirous of actually reaching the absentee might reasonably adopt to accomplish it." Id. at 315. Those means may differ considerably depending on the situation and the circumstances, but the point is that the notifier cannot hide behind legalistic niceties when a ready, practical way to reach the recipient was known to exist.

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 (RULING ON CONTENTIONS AND OTHER PENDING MATTERS) (LBP-08-11) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 27th day of June 2008