

July 18, 2008 (10:04am)

OFFICE OF SECRETARY
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July 17, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

SHAW AREVA MOX SERVICES

Mixed Oxide Fuel Fabrication Facility
Possession and Use License

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

**INTERVENORS' RESPONSE TO NRC STAFF'S REQUEST FOR
INTERLOCUTORY REVIEW OF LBP-08-11 CONCERNED CONTENTION 7**

I. INTRODUCTION

Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information and Resource Service ("NIRS"), (collectively "Intervenors") hereby respond to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff's Request for Interlocutory Review of the Licensing Board's Decision in LBP-08-11 Concerning Contention 7 (July 11, 2008) ("NRC Staff Brief"). Intervenors agree that interlocutory review of LBP-08-11 is appropriate, but only for the purpose of ensuring that the measures for protection of Intervenors' hearing rights, imposed by the Atomic Safety and Licensing Board ("ASLB") in LBP-08-11, are carried on beyond the time when the ASLB's jurisdiction over this proceeding expires. In the alternative, the Commission should order that Contention 7 be admitted and held in abeyance pending completion of the NRC Staff's findings under 10 C.F.R. § 70.28(a)(8).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. NRC Hearing Notice and Review of License Application

In 2005, the NRC granted to Shaw AREVA MOX Services, L.L.C. (“Shaw AREVA”) a “construction authorization” to build a facility that would convert 36.4 tons of surplus weapons-grade plutonium into fuel for civilian nuclear power plants. LBP-08-11, slip op. at 4. Although authorized to begin construction, Shaw AREVA delayed commencement of construction until August 1, 2007. LBP-08-11, slip op. at 7. Shaw AREVA predicts that it will not complete construction of the facility until 2014. LBP-07-14, 66 NRC 169, 203 (2007). *Shaw AREVA MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169, 203 (2007) (“LBP-07-14”).

In November of 2006, before it had begun construction, Shaw AREVA applied to the NRC for an operating license for the facility. The filing of the license application triggered a safety review process by the NRC Staff, in which the Staff must determine, *inter alia*, that construction of the “principal structures, systems, and components” approved in the construction authorization proceeding “has been completed in accordance with the application.” 10 C.F.R. § 70.23(a)(8). In other words, as described by the ASLB in LBP-08-11, the NRC must determine that “every major aspect of the facility ‘has been completed’ in accordance with its design.” *Id.*, slip op. at 33.

Despite the fact that it would be approximately eight more years before construction of the facility was complete and the NRC Staff could make the necessary finding under 10 C.F.R. § 70.23(a)(8), the NRC immediately issued a notice of opportunity to request a hearing on Shaw AREVA’s license application. 72 Fed. Reg. 12,204 (March 15, 2007).

The notice of hearing stated that the NRC would “review the license application for compliance with applicable sections of regulations in Title 10 of the code of Federal Regulations.” 72 Fed. Reg. at 12,205. Thus, the NRC effectively put the public on notice that the question of whether Shaw AREVA had satisfied 10 C.F.R. § 70.23(a)(8) would be a permissible subject of a hearing. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1451 (D.C. Cir 1984), cert. denied, 469 U.S. 1132 (1985) (holding that the NRC must offer a public hearing on all issues it considers material to a licensing decision).

B. Intervenors’ Hearing Request

On May 14, 2007, Intervenors submitted a timely hearing request and five contentions. Among Intervenors’ contentions, Contention 3 challenged the Environmental Report’s failure to comply with the National Environmental Policy Act (“NEPA”) by demonstrating that Shaw AREVA or the U.S. Department of Energy (“DOE”) has any concrete plans for the construction or operation of the Waste Solidification Building (“WSB”) that was proposed in the Environmental Impact Statement (“EIS”) for the facility, raising the likelihood that high-alpha liquid waste from the aqueous polishing process would have to be stored onsite. Contention 3 also criticized, under NEPA, Shaw AREVA’s failure to address the environmental and safety risks posed by extended onsite storage of high-alpha liquid waste. Under NRC regulations for implementation of the Atomic Energy Act, Contention 4 similarly challenged the adequacy of Shaw AREVA’s license application to address the safety and

public health risks posed by indefinite storage of liquid high-alpha waste at the site or to contain measures for the safe storage of that waste.¹

Both NRC Staff and Shaw AREVA opposed the admission of Contentions 3 and 4, in part on the ground that at this point in the licensing proceeding, the question of whether Shaw AREVA will change its plan to build the WSB is “speculative” and a matter of “conjecture.” Shaw AREVA MOX Services LLC Opposition to BREDL et al Petition for Intervention and Request for Hearing at 37 (June 11, 2007), NRC Staff’s Response to Petition for Intervention and Request for Hearing at 22 (June 11, 2007), respectively.

C. LBP-07-14

In LBP-07-14, the ASLB issued a decision admitting Contentions 3 and 4, but reserving judgment on how they should be managed given the length of the period of time before the contentions would actually be ripe for litigation. 66 NRC at 206. The ASLB responded specifically to Shaw AREVA’s and the Staff’s arguments regarding the allegedly speculative or conjectural nature of Contentions 3 and 4, noting that:

[V]irtually any contention that Petitioners might have in mind at this juncture relating to safety aspects of the construction process as conducted, or of facility operation, would have to contain some element of speculation, given that construction had not yet begun and the design had not yet been completed. In this

¹ On October 5, 2007, Intervenors also submitted late-filed Contention 6, asserting that a document recently issued by the DOE showed that DOE contemplated significant changes in the design of the proposed MOX plutonium processing facility, in order to accommodate a greater range of feedstocks and thereby eliminate the plutonium vitrification process that was planned as part of the surplus plutonium disposition program. Petitioners’ Late-Filed Contention Regarding Need to Supplement EIS for Proposed MOX Plutonium Processing Facility. The ASLB rejected the contention in LBP-08-11 on the ground that the DOE’s discussion of possible future changes to the design of the proposed facility did not amount to “substantial changes in the proposed action” or “significant new circumstances or information” warranting reconsideration of the original EIS under NEPA. *Id.*, slip op. at 21, citing 10 C.F.R. § 51.92(a)(1)-(2).

situation, and in any others where the Notice of Hearing might be viewed as premature . . . the natural result is that facility proponents will argue that *any* safety contentions will likewise be premature and/or speculative.

Id., 66 NRC at 202 (emphasis in original). The ASLB also noted that:

If those arguments were to carry the day . . . 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.” 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, as premature, thus ending the process and eliminating ready later opportunities to raise construction-practice matters freely.

Id. The ASLB ruled that both Contentions 3 and 4 met the NRC’s test for admissibility of contentions, but held off a dispositive ruling admitting the contentions pending further discussion with the parties as to what would be the best means for managing the contentions under the circumstances that actual construction of the facility was so far off. 66 NRC at 206-211.

The measures suggested by the ASLB included rejecting the contentions on the condition that one or more additional notices of hearing would be issued at appropriate times, deferring a ruling on the contentions until a more appropriate time, rejecting the contentions but determining not to dismiss the proceeding at this juncture, and rejecting the contentions in return for acceptance of a license condition. *Id.* Intervenors responded by arguing that the ASLB had no choice but to admit the contentions if they met the admissibility standard, and therefore recommended that the ASLB admit the contentions and hold them in abeyance until the NRC Staff issued its SER. Intervenors’ Response to Atomic Safety and Licensing Board’s Order of October 31, 2007 (November 19, 2007).

Both the NRC Staff and Shaw AREVA argued that the contentions were inadmissible and therefore should be dismissed. NRC Staff's Response to the Board's October 31, 2007 Order and Request for Reconsideration at 3 (November 9, 2007) (arguing that the contentions are based on "speculation and conjecture" and that the "appropriate way to deal with any possible new information" is to submit a late-filed contention or an enforcement petition under 10 C.F.R. § 2.206); MOX Services' Brief in Response to Memorandum and Order (Ruling on Standing and Contentions) at 3 (November 9, 2007) (suggesting that Intervenors should submit a late-filed contention and/or seek to re-open the record if their concerns became "ripe" in the "future").

D. Contention 7

At the time that Intervenors submitted their initial hearing request in May of 2007, they assumed that they would be able to submit contentions challenging the adequacy of construction of the proposed plant under 10 C.F.R. § 70.23(a)(8) when the NRC Staff issued its SER, which was predicted for 2009. *See* LBP-07-14, 66 NRC at 203. At a January 8, 2008, oral argument before the ASLB, however, the NRC Staff announced that it intended to issue a license several years *before* construction was completed. Tr. at 230. The Staff also stated that it would make compliance with 10 C.F.R. § 70.23(a)(8) a condition of the operating license rather than offering it as an issue to be litigated in the operating license hearing. *Id.*

Concerned that they would completely forfeit their ability to challenge the applicant's compliance with 10 C.F.R. § 70.23(a)(8) if they waited for the SER, the Intervenors submitted Contention 7:

Contention: Shaw AREVA's application for an operating license should be denied because Shaw AREVA has not demonstrated that construction of the

principal structures, systems and components approved under 10 C.F.R. § 70.23(b) has been completed in accordance with the application.

Basis: Shaw AREVA 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. Therefore the NRC has no basis for concluding that Shaw AREVA has complied with 10 C.F.R. § 70.23(a)(8).²

² This contention satisfies a balancing of the NRC's late-filing criteria in 10 C.F.R. § 2.309(c). First, as discussed above, Intervenor's have good cause for submitting the contention now because they were previously unaware that the NRC Staff would seek to exclude the issue of compliance with 10 C.F.R. § 70.23(a)(8) from the licensing proceeding. Intervenor's counsel did not become aware of the NRC Staff's position until she was able to review the transcript of the January 8 oral argument, which became available on January 22, 2008. The contention is also being filed within 30 days after the Staff made the representations at the January 8 oral argument.

Intervenor's Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues (February 11, 2008).

Both Shaw AREVA and the Staff argued that Contention 7 is inadmissible and that it fails to satisfy a balancing of the NRC's late-filing criteria. In arguments that diametrically contradicted each other, Shaw AREVA argued that the contention is inexcusably late because it could have been filed at the beginning of the proceeding (Shaw AREVA MOX Services LLC's Answer to Petitioner's February 11, 2008 Response Regarding Case Management Issues (March 7, 2008)); while the Staff argued that the contention was premature because the findings required by 10 C.F.R. § 70.23(a)(8) have not yet been "triggered." NRC Staff's Response to Intervenor's Late-Filed Contention Seven and Board's Memorandum and Order of February 21, 2008 at 15 (March 10, 2008). Both parties urged the ASLB to dismiss the contention, but did not

suggest any mechanism by which Intervenor's right to a hearing on the issue of compliance with Section 70.23(a)(8) would be preserved.

D. NRC Staff's Change of Position

On April 7, 2008, two days before an oral argument the ASLB had scheduled to consider the admissibility of Contention 7, the NRC Staff submitted a "Notice of Change of Approach" in which it notified the ASLB and parties that it had changed its position with respect to the question of whether compliance with 10 C.F.R. § 70.23(a)(8) would be treated as a license condition. The Staff stated that:

After further consideration of 10 C.F.R. § 70.23(a)(8), the Staff has determined that the license to possess and use special nuclear material will not be issued before a determination that construction of the principal structures, systems and components approved pursuant to section 70.23(b) is in accordance with the application.

Id.

In an oral argument held on April 9, 2008, the parties discussed the implications of the Staff's change of position. The Staff's counsel argued that Intervenor's still had an opportunity to submit contentions regarding the applicant's satisfaction of 10 C.F.R. § 70.23(a)(8) because the Staff would be issuing its Section 70.23(a)(8) safety findings inspection reports that could be used as the basis for contentions. Tr. at 497-98. Intervenor's counsel pointed out, however, that if the record of this proceeding has already closed, they will not be entitled to notice of the Staff's safety findings, nor would there be a mechanism for seeking access to safeguards or SUNSI information. Tr. at 456-58.

E. LBP-08-11

In LBP-08-11, the ASLB announced that it had reconsidered the admissibility of Contentions 3 and 4, and decided to admit Contention 4 but reject Contention 3 on the ground that at this point, “when construction of the facility has scarcely begun,” Intervenors could not satisfy the standard in 10 C.F.R. § 51.92(a) for presentation of significant new information or changed circumstances regarding construction of the WSB. *Id.*, slip op. at 17.

The ASLB also addressed Contention 7. The ASLB concluded that Contention 7 was admissible under the NRC’s standards in 10 C.F.R. § 2.309, but decided to conditionally dismiss the contention for purposes of sound case management.² As the ASLB explained:

The admission of Contention 7 – presented in elegantly simple form – could be justified in order to preserve, untrammled, the Petitioners’ litigations 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 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 prior to making its decision on the ‘completion’ finding.

Id. The ASLB noted that this management tool would protect Petitioners by giving them:

“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

² The Staff’s assertion that the ASLB ruled Contention 7 inadmissible is simply not supported by the language of the decision. *See* NRC Staff Brief at 8.

to present such a substantive contention without the need for extraordinary allotments of additional time (beyond the norm) to do so.

Id. at 35. To ensure the effectiveness of its management measures, the ASLB also provided an automatic enforcement mechanism:

Failure of the license proponents, or either of them, to honor this condition will be deemed to provide 'good cause' – calculated on a per day basis – for delaying filing of any substantive contentions the Petitioners may bring on this subject.

Id.

On July 11, 2008, the NRC Staff submitted to the Commission a petition for interlocutory review of LBP-08-11 to the extent that it conditionally dismissed the contention, imposed notice requirements on the Staff and Shaw AREVA, including sanctions for noncompliance.

III. ARGUMENT: INTERLOCUTORY REVIEW IS JUSTIFIED ONLY FOR THE PURPOSE OF EXTENDING PROCEDURAL PROTECTIONS OF INTERVENORS' HEARING RIGHTS BEYOND THE TERM OF THE ASLB'S JURISDICTION.

As the ASLB made clear in LBP-08-11, its decision to (a) conditionally dismiss an otherwise admissible contention, (b) impose notice requirements on the applicant and Staff, and (c) back up the notice requirements with penalties for noncompliance, constituted case management tools for addressing the problematic situation created by the NRC Staff's premature issuance of a hearing notice for the proposed MOX plutonium processing facility. As demonstrated above in Section II, and as discussed extensively in LBP-07-14 and LBP-08-11 (including Judge Farrar's concurrence), this fundamental error by the NRC Staff has undermined the ASLB at every turn in attempting to make fair and reasonable decisions in this proceeding. With respect to Contention 7, the ASLB took the reasonable step, rather than letting the contention "sit open on the docket" for a

period of years, of dismissing the contention with the expectation that some future opportunity would be provided to challenge the basis for the Staff's determinations under 10 C.F.R. § 70.23(a)(8).

As the Intervenors previously argued to the ASLB, they believe the ASLB had no discretion to deny admission of Contention 7 once the contention was deemed admissible, but could hold the contention in abeyance if needed. *See* discussion above at 5. Nevertheless, Intervenors believe that the alternative remedy fashioned by the ASLB – conditional dismissal – is also effective in protecting the Intervenors' right to a hearing on the issue of compliance with 10 C.F.R. § 70.23(a)(8), and therefore reasonable. Moreover, for the period while the ASLB retains jurisdiction of this case, *i.e.*, the pendency of litigation of Contention 4, it is clear that the notice requirements established by the ASLB are a reasonable exercise of the ASLB's well-established authority to ensure that the parties have adequate notice of significant events in the licensing process, in order to give them sufficient time to prepare their pleadings.³ In *U.S. Army* (Jefferson Proving Ground Site), LBP-04-01, 59 NRC 27, 30 (2004), for example, the Presiding Officer held a case in abeyance pending completion of the Staff's technical review, and ordered the Staff to “promptly file and serve upon the parties a notification to that effect.”

Intervenors are concerned, however, that if, in advance of the Staff's safety findings under 10 C.F.R. § 70.23(a)(8), litigation on Contention 4 concludes and the

³ *See* 10 C.F.R. § 2.319, which assigns a Presiding Officer the “duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order.” Section 2.319 also authorizes the presiding officer to “[r]egulate the course of the hearing and the conduct of participants,” “[s]et reasonable schedules for the conduct of the proceeding,” and “[i]ssue orders if necessary to carry out the presiding officer's duties and responsibilities under this part.” 10 C.F.R. § 2.319 and subsections (g), (k), and (q), respectively.

ASLB loses its jurisdiction, Intervenors will be deprived of their right under the Atomic Energy Act to be notified of the Staff's safety findings or to request a hearing on the issue of compliance with 10 C.F.R. § 70.23(a)(8). Thus, Intervenors agree with the Staff that it is appropriate for the Commission to conduct a limited interlocutory review of LBP-08-11 -- for the sole purpose of ensuring that the measures for protection of Intervenors' hearing rights, imposed by the ASLB in LBP-08-11, are carried on beyond the time when the ASLB's jurisdiction over this proceeding expires.

While Intervenors agree with the Staff that limited interlocutory review of LBP-08-11 is appropriate, Intervenors fundamentally disagree with the Staff's purpose in seeking interlocutory review. The Staff has made it clear its intention, in seeking interlocutory review, that after the record has closed and the ASLB's jurisdiction has expired, the Intervenors should no longer have any right to be heard on the question of whether Shaw AREVA has built the MOX plutonium plant to design, as required by 10 C.F.R. § 70.23(a)(8). Instead, the Staff seeks to place Intervenors in the position of having to request a discretionary determination that they meet an equitable standard for obtaining a hearing, under the Commission's standards for late-filed contentions and motions to reopen the record. NRC Staff Brief at 4. If the Staff's request is granted, the Intervenors will also be unprotected by any requirement for the Staff to give them notice of its findings, and therefore will have no reliable way to know when to even attempt to exercise their hearing rights on the issue.

The Staff's position is diametrically opposed to the requirements of the Atomic Energy Act and interpreting case law. Under the Act, any interested person has the right to a hearing on a proposed license. 42 U.S.C. § 2239(a)(1). As the U.S. Court of

Appeals for the D.C. Circuit ruled in *Union of Concerned Scientists*, the NRC may not abridge that hearing right by requiring a petitioner to move to reopen a closed record in seeking to litigate material licensing issues. 735 F.2d at 1441. The Commission should not use its powers of interlocutory review to effect such a result, but instead should ensure that Intervenor's hearing rights are protected in spite of the Staff's premature issuance of a hearing notice in this case. In the alternative, the Commission should order the ASLB to admit Contention 7 and hold it in abeyance pending completion of the Staff's determination under 10 C.F.R. § 70.23(a)(8).

IV. CONCLUSION

In noticing a hearing eight years before there was any possibility that safety findings under 10 C.F.F. § 70.23(a)(8) could be made, the NRC Staff made a serious procedural error that now threatens to compromise the Intervenor's hearing rights. The Commission should not -- and under the Atomic Energy Act may not -- allow the Staff's mistake to turn this case into "a shell game with the usual street-corner outcome: whatever guess the Petitioners make" about when to seek a hearing on licensing issues "will prove wrong." LBP-08-11, slip op. at 54.

Therefore, for the foregoing reasons, the Commission should take review of LBP-08-11 for the limited purpose of ensuring that the procedural protections of Intervenor's hearing rights, partially afforded by the ASLB in LBP-08-11, extend beyond the term of the ASLB's jurisdiction over this case.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)

Shaw AREVA MOX Services)

(Mixed Oxide Fuel Fabrication Facility)
Possession and Use License))

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CERTIFICATE OF SERVICE

I certify that on July 17, 2008, copies of the foregoing Intervenors' Response to NRC Staff's Request for Interlocutory Review of LBP-08-11 Concerning Contention 7 were served on the following by e-mail, and that they were served on the following day by first-class mail:

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