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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	July 21, 2008
Shaw AREVA MOX Services, LLC)	Docket No. 70-3098-MLA
(Mixed Oxide Fuel Fabrication Facility Possession and Use License))	ASLBP No. 07-856-02-MLA-BD01
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**SHAW AREVA MOX SERVICES, LLC'S ANSWER TO
NRC STAFF'S "REQUEST FOR INTERLOCUTORY REVIEW OF THE LICENSING
BOARD'S DECISION IN LBP-08-11 CONCERNING CONTENTION 7"**

I. INTRODUCTION

On July 11, 2008, the NRC Staff (Staff) filed its Request for Interlocutory Review of the Licensing Board's Decision in LBP-08-11 Concerning Contention 7 ("Staff Request"), in which it requested, pursuant to 10 CFR § 2.341(f)(2), that the Commission undertake interlocutory review of the Atomic Safety and Licensing Board's ("Board") June 27, 2008 Memorandum and Order in the above-captioned proceeding.¹ The Board Order admitted one contention, denied all other contentions, denied a request to stay the proceeding, and conditioned its denial of Contention 7 on satisfaction of future notice requirements to be provided by the Applicant, Shaw AREVA MOX Services, LLC (MOX Services) and the Staff. The Staff Request seeks

¹ See Staff Request at 1 (Jul. 11, 2008) (citing the Board's "Memorandum and Order (Ruling on Contentions and All Other Pending Matters)," LBP-08-11, slip-op. (June 27, 2008) ("Board Order").

interlocutory review of the Board's notice requirements related to Contention 7.² Pursuant to 10 CFR § 2.341(b)(3), MOX Services submits this Answer providing its views on the Board's conditional dismissal of Contention 7 and on the notice requirements.³

II. ARGUMENT

A. BACKGROUND

Three citizens' organizations⁴ (collectively, "Intervenors") jointly filed a Petition for Intervention and Request for Hearing in the possession-and-use licensing proceeding for the Mixed-Oxide Fuel Fabrication Facility ("MFFF").⁵ The Board admitted Contention 4 and granted the Petition for Intervention and Request for Hearing.⁶ The Board also dismissed Contention 7, on the condition that MOX Services and the Staff comply with certain Board-created notice conditions.⁷ Those notice conditions relate to the requirement under 10 CFR § 70.23(a)(8) that the Commission approve a license for a plutonium processing and fuel fabrication plant if it has determined that construction of the principal structures, systems, and components has been completed in accordance with the application.

Contention 7 reads as follows:

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

² Staff Request at 1.

³ MOX Services had no appeal as of right under 10 CFR § 2.311 to the Board's conditional dismissal of Contention 7. MOX Services notes that the Staff's Request does not jeopardize MOX Services' subsequent right to appeal should the Board fail to terminate the proceeding upon resolution of all admitted contentions. *Cf.* Board Order at 39 (stating that a "wait-and-see attitude, and a minimalist approach" are appropriate regarding contentions that are not ripe for consideration given the "nascent phase of facility construction").

⁴ Blue Ridge Environmental Defense League ("BREDL"), Nuclear Watch South ("NWS"), and Nuclear Information and Resource Service ("NIRS").

⁵ Petition for Intervention and Request for Hearing (May 14, 2007).

⁶ Board Order at 41-42.

⁷ *Id.* at 35, 41.

approved under 10 CFR § 70.23(b) has been completed in accordance with the application,⁸

In dismissing this contention, the Board imposed the following conditions:

(1) [T]he 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.⁹

Although neither the Staff nor MOX Services is appealing the admission of Contention 4,¹⁰ the Staff has requested that the Commission undertake interlocutory review of the Board’s conditional dismissal of Contention 7 and notice requirements.¹¹

The Board takes issue with the timing of MOX Services’ application for a possession-and-use license, and with the Commission’s decision to notice the opportunity for a hearing on that application shortly after receipt and docketing of the application and at an early stage of facility construction.¹² The Board seeks to modify the requirements of 10 CFR Part 2 in this case “in order to preserve, untrammelled, the [Intervenors’] litigation options.”¹³ Thus, rather than dismiss the contention outright, the Board has fashioned the notice requirements and a “Case Management Approach,”¹⁴ to give the Intervenors special notice and opportunity beyond those provided in Part 2 to submit contentions at a later date.¹⁵ The Board Order also predetermines a finding of “good cause” for a subsequent late filing by Intervenors, but leaves ambiguous

⁸ Intervenors’ Response to Atomic Safety and Licensing Board’s Memorandum and Order of January 16, 2008 Regarding Case Management Issues at 3 (Feb. 11, 2008).

⁹ Board Order at 35.

¹⁰ See Staff Request at 1 & n.1.

¹¹ *Id.* at 1.

¹² Board Order at 34; *but see id.* at 39 & n.81 (noting that the timing of the Application and Notice were consistent with applicable NRC requirements).

¹³ *Id.* at 34.

¹⁴ *Id.* at 39-41.

¹⁵ *Id.* at 35.

whether such a request should be directed to the Commission to reopen the record pursuant to 10 CFR § 2.326, or whether the Board intends to hold open this proceeding beyond resolution of any admitted contentions.¹⁶ It is the uncertainty created by the Board's conditional dismissal and Case Management Approach that brings the parties before the Commission.

MOX Services agrees with the Staff that "the Board's dismissal of Contention 7 conditioned on Board-imposed noticing requirements exceeds its authority."¹⁷ Moreover, the Board's conditions, established for the purpose of giving the Intervenors "reasonable notice of an opportunity to formulate . . . 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,"¹⁸ are impermissible modifications to the Commission regulations in Part 2, which provide well-established mechanisms for Intervenors to file additional contentions in this proceeding or to reopen a record following termination of a proceeding.¹⁹

B. THE BOARD HAS EXCEEDED ITS AUTHORITY

1. The Board May Not Conditionally Dismiss a Contention

The Board exceeded its authority in conditionally dismissing Contention 7. The Commission has held that "a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements."²⁰ That prohibited

¹⁶ *Id.* at 35.

¹⁷ Staff Request at 1.

¹⁸ Board Order at 35.

¹⁹ See 10 CFR §§ 2.309, 2.326 (providing opportunities for public participation upon the production of newly available information); see also 10 CFR § 2.335 (prohibiting an attack on a Commission rule in an adjudicatory proceeding).

²⁰ *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 461, 466-467 (1982) (stating further that "[t]he Commission might, of course, have chosen to confer such authority to accommodate an existing lack of sufficient available information to enable the petitioner to fulfill those requirements. Instead, the Commission opted for a different procedure. Whether or not in agreement with that election, the adjudicatory boards must respect and abide by it.").

act is essentially what the Board here has done. The Board Order attempts to preserve for a later date a contention that does not now meet the Commission's admissibility requirements.²¹ Whether under the rubric of "conditionally dismissed" or "conditionally admitted," the result is the same: the Board may not hold in abeyance a contention that is otherwise inadmissible pending the occurrence of some future action.²² The Commission already decided this issue, and whether or not in agreement with that decision, "the adjudicatory boards must respect and abide by it."²³

2. The Board May Not Alter the Review Process Provided by 10 CFR § 70.23 by Imposing Notice Requirements Not Contained in Regulations

Although a licensing board may have authority to issue certain notice requirements pursuant to its case management authority under 10 CFR § 2.319, that authority is limited to management of the proceeding before it, not the substantive safety requirements committed to the Staff.²⁴ Licensing boards have no authority to impose or modify regulatory requirements

²¹ See Board Order at 34-35 ("[T]he matter [giving rise to Contention 7] was essentially mooted just before the most recent oral argument. ...[S]ome of the rationale underlying the filing of Contention 7 was removed. Given...the impracticality of litigating this contention before its time, we have decided against admitting the contention.... Instead, we are dismissing the contention, but only on the condition that the Applicant and the NRC Staff [provide notice related to a "completion" finding].").

Contention 7 must be dismissed because it fails to identify any specific issue associated with the construction of the MFFF principal structures, systems, and components. See *Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues* at 3 (Feb. 11, 2008).

²² See *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), ALAB-687, 16 NRC 460, 466-467 (1982) (explaining further that the Commission does not except from the requirements for late-filed contentions, those instances in which petitioners cannot meet specificity requirements because the requisite information is not available at the time the contentions are due).

²³ *Id.*

²⁴ See *Potomac Elec. Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-277, 1 NRC 539, 540 (1975) (noting that, under [the regulation that is now 10 CFR § 2.319], licensing boards have the "general authority to regulate the course of a hearing"); *New Eng. Power Co.* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 279-80 (1978) ("[10 CFR § 2.319] is not an all-purpose delegation of power to licensing boards to control or direct the work of the Staff in carrying out its primary responsibilities."); see also *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1290 (1984) (concluding that a licensing board's general authority to shape the course of a proceeding under 10 CFR § 2.319 does not extend to allow the Board to admit late-filed contentions that are otherwise inadmissible).

under 10 CFR § 2.335(a).²⁵ Here, the Board's Order exceeds its case management authority by imposing additional substantive notice requirements beyond those established by the Commission in 10 CFR § 70.23, and through these notice provisions, has effectively altered the regulatory process.

Neither in 10 CFR § 70.23 nor elsewhere in the NRC's regulations, does the Commission impose a requirement on an applicant to ask the Staff for the "completion" finding under 10 CFR 70.23(a)(8).²⁶ Similarly, the regulations do not contemplate a single inspection that will result in the Staff's required determination under 10 CFR § 70.23(a)(8). Yet these are exactly the actions the Board's Order imposes as "notice" triggers.²⁷ As MOX Services understands the Staff's review process, the § 70.23(a)(8) determination will be made some years from now and will rely on multiple inspections and review activities, conducted over a period of years, that will provide the basis for a determination as to whether the construction of the MFFF principal structures, systems, and components has been completed in accordance with the application.²⁸

Furthermore, any ultimate determination that the Staff makes will be based upon the culmination of those multiple inspection and review activities conducted over a number of years. The results of those activities will be memorialized throughout this period in inspection reports and other NRC documents. If the Intervenor believe that there is new information warranting a late-filed contention arising out of the inspections and activities, they may *not* wait to file those

²⁵ See 10 CFR § 2.335(a) ("[N]o rule or regulation of the Commission . . . concerning the licensing of . . . special nuclear material . . . is subject to attack by way of discovery, proof, argument, or any other means in an adjudicatory proceeding subject to [Part 2].").

²⁶ See 10 CFR § 70.23; 10 CFR Part 70.

²⁷ Board Order at 35.

²⁸ See 10 CFR § 70.23(a)(8) (requiring in connection with for approval of a license application of a plutonium processing and fuel fabrication plant, a determination that the principal structures, systems, and components of the facility have been constructed in accordance with the application).

contentions until the Staff is ready to draw its ultimate conclusion under § 70.23(a)(8), and the Board may not authorize them to do so via the notice provisions it has issued.

In the Intervenor's July 17, 2008 Response to NRC Staff's Request for Interlocutory Review of the Licensing Board's Decision in LBP-08-11 Concerning Contention 7 ("Intervenor's Response"), they state that they had "assumed that they would be able to submit contentions challenging the adequacy of construction of the proposed plant under 10 CFR § 70.23(a)(8) when the NRC Staff issued its SER."²⁹ Intervenor is represented by experienced counsel and should be aware of 10 CFR § 2.309(f)(2)(iii), which requires that contentions filed subsequent to the initial filing must have "been submitted in a timely fashion based on the availability of the subsequent information." Intervenor may not wait until an SER is issued to file a contention if the information upon which the contention was based was available at an earlier time. Thus, the Intervenor's interpretation is contrary to the rules, as is the Board's direction, to the extent that it purports to use the notice provisions to allow Intervenor to wait to submit new contentions based on previously available information, until the SER is issued.

Accordingly, the notice requirements attached to the Board's conditional dismissal of Contention 7 should be stricken and that dismissal made unconditional.

3. THE BOARD MAY NOT SUPERVISE THE STAFF'S REVIEW FUNCTION

The Board's notice conditions also exceed its authority because it may not supervise the Staff's performance of its regulatory duties.³⁰ Licensing boards have no authority to direct the conduct of the Staff's review of technical information.³¹ The Board's notice requirements

²⁹ Intervenor's Response at 6.

³⁰ See *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980) ("[I]t is . . . clear that the Boards do not direct the staff in performance of their administrative functions").

³¹ See, e.g., *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("[L]icensing boards do not sit to . . . supervise or direct NRC Staff regulatory reviews"), citing *Balt. Gas &*

constitute additional requirements imposed on the Staff—separate and distinct from the existing Commission requirement that the Staff ensure satisfactory completion of construction before issuing the possession-and-use license—that, in effect, serve to supervise the Staff’s performance of its regulatory activities and are therefore outside the Board’s authority.

C. COMMISSION REGULATIONS PROVIDE SUFFICIENT OPPORTUNITY FOR THE INTERVENORS TO RAISE CONTENTIONS BASED ON NEW INFORMATION

1. Commission Regulations for Late-Filed Contentions or Reopening the Record Strike an Appropriate Balance

The Board’s Order is apparently based upon the premise that the Intervenor’s interests are not adequately protected without the Board imposing special, case-specific, notice requirements. On the contrary, the Intervenor may raise additional contentions, when ripe, under 10 CFR §§ 2.309 or 2.326 as appropriate.³² These rules provide the Commission’s established mechanisms for the Intervenor to challenge issuance of a license based on any newly-available information. In promulgating those regulations, the Commission struck its balance between the interests in fair procedures that permit participants in licensing proceedings to react to new information developed or submitted after a proceeding has begun, with the public’s interest in “efficient and expeditious licensing proceedings.”³³ In fact, the Commission

Elec. Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998); *Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121 (1995) (“As a general matter, the Commission’s licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews”); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514 (1980).

³² See 10 CFR §§ 2.309, 2.326 (providing opportunities for public participation upon the production of newly available information); see also MOX Services’ Brief In Response to Memorandum and Order (Ruling on Standing and Contentions) at 3 (Nov. 9, 2007).

³³ *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2) CLI-83-19, 17 NRC 1041, 1045, 1048 (1983) (“We start with the basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation. . . . A second fundamental principle applicable here is that there is a substantial public interest in efficient and expeditious administrative proceedings. . . . The Commission believes that [all of the regulatory factors for a late-filed contention, taken together,] are reasonable procedural requirements for determining whether to admit contentions that are filed late. . . .”).

stated unequivocally that its procedures for late-filed contentions under 10 CFR § 2.309(c) “[strike] a reasonable balance between the public’s hearing rights and its rights to an efficient and expeditious administrative process.”³⁴ The Commission even has addressed squarely the issue presented here, where information upon which a contention may be based has not yet been developed. The Commission concluded that its standards governing late-filed contentions are fair and appropriate even where the factual predicate for a contention—here, certain construction-related information—is not yet available to provide a basis for a contention early in the proceeding.³⁵

To the extent that the Board’s Order attempts to shift the burden from the Intervenor to MOX Services and the Staff to keep the Intervenor apprised of new information, its decision is contrary to Commission-established procedures and precedent. As the Commission noted, intervenors adopt certain responsibilities when they become a party to an adjudicatory

³⁴ *Id.* at 1050.

³⁵ *Id.* at 1044-1045 (“The Commission recognizes that fairness requires procedures which permit participants to licensing proceedings to react to licensing documents that are developed or submitted after a proceeding has begun. Fairness also requires the Commission to conduct efficient and expeditious licensing proceedings. . . . The Commission believes that [all of the regulatory factors for a late-filed contention, taken together,] are reasonable procedural requirements for determining whether to admit contentions that are filed late because they rely solely on information contained in licensing-related documents *that were not required to be prepared or submitted early enough to provide a basis for the timely formulation of contentions.*”) (emphasis added).

Note that the Commission’s decision rejected the Appeal Board’s finding that the nonexistence of relevant documents, which made it impossible for a sufficiently specific contention to have been asserted at an earlier date, is the controlling factor when considering admission of a late-filed contention. *Id.* at 1044. The Appeal Board had held that any other result would create a “‘catch-22’ situation” that would encourage applicants to delay the completion of those documents. *Catawba*, ALAB-687, 16 NRC at 470 & n.16. The Commission disagreed, stating that, “[i]f undue delay should occur, it can be as easily dealt with in a balancing test as in a *per se* rule.” *Catawba*, CLI-83-19, 17 NRC at 1047.

See also Commission Order, *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4) at 1-2 (Apr. 7, 2008) (unpublished) (rejecting intervenor’s request to suspend or withdraw the Notice of Hearing on the grounds that, because future Requests for Additional Information (RAIs) and “open items” may solicit new information from the applicant, the license application as it stands is incomplete: “If the applicant’s response to the Staff’s RAI [...] provide[s] new and materially different information, [the intervenor] will not be harmed because it will have an opportunity to proffer contentions based upon that new information under 10 CFR § 2.309(f).”)

proceeding, including the information gathering and reviewing “obligations attendant upon such participation.”³⁶ Specifically, the Commission stated that:

[A]n intervenor in an NRC proceeding must be taken as having accepted the obligation of uncovering information in publicly available documentary material. Statements that such material is too voluminous or written in too abstruse or technical language are inconsistent with the responsibilities connected with participation in Commission proceedings and, thus, do not present cognizable arguments.³⁷

In the instant case, Commission findings under 10 CFR § 70.23(a)(8) will be based upon multiple, publicly-available reports of inspection activities conducted over a period of years.³⁸ The Intervenor will have access to those reports³⁹ and, as parties to this proceeding, Intervenor have accepted the obligation to keep themselves informed. In sum, the need for the Board’s conditions is obviated by existing Commission procedures for public participation. Accordingly, the notice provisions should be stricken.

2. The Commission Allowed Early Notice to Assist Intervenor

Although much is made of the “early notice” provided in this proceeding,⁴⁰ such early notice was established, at least in part, for the benefit of the Intervenor. In reference to the notice provisions applicable to two-step reactor licensing proceedings (which are generally analogous to the structure of the instant proceeding), the Commission explained the following:

³⁶ *Catawba*, CLI-83-19, 17 NRC at 1048.

³⁷ *Id.*

³⁸ Construction of the MFFF is expected to be completed and the facility is expected to begin operations in approximately 2016, pursuant to the most recent DOE-approved baseline schedule.

³⁹ The fact that some documents related to construction of the MFFF will be withheld from public disclosure as containing sensitive security related information is not relevant to the issue presented in this request for interlocutory review. The Commission’s decision to protect security related information from public disclosure presents separate issues not raised by Intervenor or the Board Order. Further, MOX Services anticipates that the Board will issue an appropriate protective order in this proceeding, permitting Intervenor representatives appropriate access to security related information during the course of the proceeding.

⁴⁰ *See, e.g.*, Board Order at 50 (Concurring Opinion).

In construction permit and operating license proceedings, the appropriate notices [...] would be issued as soon as practicable after the application is docketed, to provide potential intervenors a better opportunity for more meaningful participation in the hearing process.⁴¹

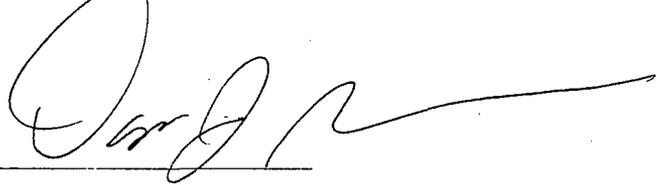
In effect, early notice enables more meaningful public participation at the first opportunity, and at a time before construction is substantially complete and the license is perceived to be a *fait accompli*. It is ironic that the Intervenors now complain of the early notice afforded by the Commission to enhance meaningful public participation.

⁴¹ Restructuring of Facility License Application Review and Hearing Processes, 37 Fed. Reg. 15,127, 15,128 (July 28, 1972).

III. CONCLUSION

As established above, the Board lacks the authority to condition the dismissal of a contention, to modify the Commission's regulatory requirements, or to supervise the Staff's performance of its regulatory duties.⁴² The Commission has already found that its regulations that allow participants in adjudicatory proceedings to react to new information strike the appropriate balance between fairness and efficiency, and that the early notice provided by the Commission enhances public participation.⁴³ Given that a conditional dismissal is outside the Board's authority, Contention 7 should be unconditionally dismissed. Moreover, the Board-imposed notice requirements fall well outside its authority and are contrary to Commission precedent, and therefore should also be stricken.

Respectfully submitted,



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⁴² See *supra* pp. 4-8.

⁴³ See *supra* pp. 8-11.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	July 21, 2008
Shaw AREVA MOX Services, LLC.)	Docket No. 70-3098-MLA
(Mixed Oxide Fuel Fabrication Facility)	
Possession and Use License))	ASLB No. 07-856-02-MLA-BD01

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Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.314(b), the following information is provided:

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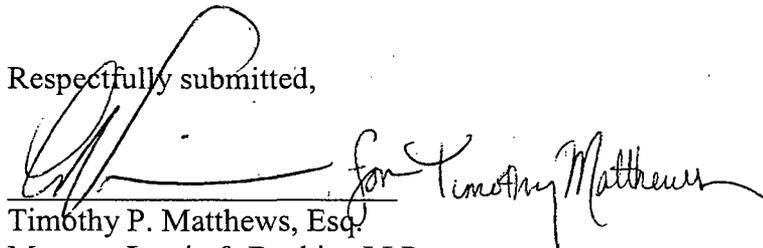
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 CFR § 2.314(b), the following information is provided:

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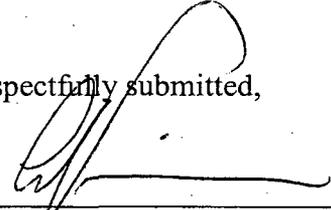
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Dated: 21 July 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

) July 21, 2008

Shaw AREVA MOX Services, LLC)
(Mixed Oxide Fuel Fabrication Facility)
Possession and Use License))

) Docket No. 70-3098-MLA

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Shaw AREVA MOX Services LLC's Answer to NRC Staff's 'Request for Interlocutory Review of the Licensing Board's Decision in LBP-08-11 Concerning Contention 7'" and the "Notice of Appearance" of Timothy P. Matthews and Anna L. Vinson were served upon the persons listed below, by e-mail and first class mail, this twenty-first day of July, 2008.

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Dated: 21 July 2008