

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:

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

In the Matter of
SHAW AREVA MOX SERVICES
(Mixed Oxide Fuel Fabrication Facility)

Docket No. 70-3098-MLA
ASLBP No. 07-856-02-MLA-BD01
November 20, 2008

MEMORANDUM AND ORDER
(Summarizing Prehearing Conference)

The Board held a prehearing teleconference with the parties on Wednesday, October 29, 2008, to follow up on the prehearing conference of August 12, 2008. During that earlier conference, the Board had adopted the Applicant's suggestion (Tr. at 542-45) that scheduling the next phases of this proceeding might be more readily addressed were the parties to be given approximately 60 days to assess their positions and strategy.

We thus expected to continue at the October 29 conference the discussion of scheduling and other matters left open during the previous conference. See Order (Scheduling Prehearing Conference Call) (Aug. 5, 2008) (unpublished); and Notice and Order (Convening Prehearing Conference Call) (Oct. 24, 2008) (unpublished). But as we learned, the Applicant had not yet determined how it wishes to proceed to litigate the merits of the one contention admitted in this proceeding.¹ Nonetheless, a very useful discussion of various options took place.

¹ See LBP-08-10, 67 NRC __, __ (June 27, 2008) (slip op. at 23-32) (admitting Contention 4, involving certain aspects of the handling of the facility's liquid high-alpha waste).

1. The end result was that, with each of the parties' concurrence, the Board adopted a variation of the Applicant's original suggestion (Tr. at 607) that the proceeding be further deferred. Specifically, the Applicant was given up to 90 days from the date of the teleconference (i.e., until no later than Tuesday, January 27, 2009) to file either: (1) a proposal concerning the manner in which it wishes to litigate the pending contention (Tr. at 634, 636); or (2) a status report indicating its reasons for believing that the matter should once again be deferred.² The NRC Staff and the Intervenors will have two weeks from the date of that filing to submit their answers thereto (Tr. at 637-38). Once those papers are in hand, the Board will convene a prehearing conference to take place shortly thereafter (id.).

a. To guide the Applicant and the other parties as they contemplate the possible options, we repeat here certain points made during the teleconference. First, the Board generally disfavors motions for summary disposition in Subpart L proceedings (see Tr. at 605-07; see also 10 C.F.R. §§ 2.329(c)(4) and 2.1205(a)); cf. § 2.710(d)(1). This is because greater time and effort might be required to analyze and to determine the presence or absence of a "genuine issue as to any material fact,"³ than would be involved in simply convening a Subpart L hearing for the concrete purpose of asking questions about, and thus directly testing the validity of, the Applicant's supporting evidentiary materials (which quite likely would not be greatly different from those that would have been filed with a summary disposition motion). The latter circumstance permits us to decide, directly and efficiently, the merits of any factual issue(s) involved and thus to avoid any inefficient efforts to resolve what sometimes prove to be more ephemeral matters.

² Although this latter option was not discussed at the prehearing conference, it might yet come into play and thus deserves advance mention here.

³ 10 C.F.R. § 2.710(d)(2). In this regard, the parties should bear in mind that summary disposition motions are not ordinarily the vehicle for resolving any so-called "battle of the experts." Private Fuel Storage (Independent Spent Fuel Storage Installation), LBP-01-39, 54 NRC 497, 510 (2001). See generally id. at 509-12 (even more applicable to Subpart L matters).

b. Second, in light of the Staff's election to participate in this proceeding⁴ and the protection afforded the Staff by 10 C.F.R. § 2.332(d),⁵ the Board would strongly prefer, before reaching any decision on the merits, to have before it – in whatever form is found appropriate – the functional equivalent of the type of Staff analysis that would ordinarily be found in a Safety Evaluation Report (SER)⁶ (ordinarily, an evidentiary hearing takes place after the SER is issued, but that step is not expected here (Tr. at 611) before December 2010). Thus, we envision that, under whatever procedural approach is eventually taken, once the Applicant's substantive material is submitted, the Staff would be given the time it needs to perform thorough analysis of, and to take a position on, that material. Then, in fairness, the Intervenor would be allotted a correlative time period thereafter to frame their own position on the Applicant's proposal.

We stress that the views expressed above are only preliminary in nature, and any of the parties is free to argue that the circumstances of this case call for different approaches. Nonetheless, the parties might find our preliminary views helpful in plotting their course.

2. We take this opportunity also to elaborate upon the reasons behind a step taken during the August conference concerning the practice to be followed in connection with submitting any new or amended contentions that may arise in the course of the proceeding (Tr. at 584-85). Our intention at that time was to achieve efficiency, and to eliminate any uncertainty about scheduling, by consolidating two related procedural steps.

⁴ See 10 C.F.R. § 2.1202(b)(2).

⁵ "In establishing a schedule, the presiding officer shall take into consideration the NRC staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner. Hearings on safety issues may be commenced before publication of the NRC staff's safety evaluation upon a finding by the presiding officer that commencing the hearings at that time would expedite the proceeding. . . ."

⁶ Compare 10 C.F.R. § 2.1202(b)(1)(ii).

Specifically, our Rules contain one section dealing with motion practice generally,⁷ and another dealing with the filing of contentions specifically.⁸ When contentions are filed after the initial stage of a proceeding, both those sections come into play. Under one interpretation, they would require a party seeking to file a new or amended contention to take two separate steps which, while unremarkable on their own, do not mesh entirely well. The first step involves filing a motion (with supporting argument) for leave to file the contention. The second – taken either simultaneously or after receiving a ruling on the motion – involves submitting the contention itself, with appropriate documentation and argumentation.

Under the regulations, if the two steps are taken simultaneously, those opposing the motion and/or contention have 10 days to answer the motion (with no reply permitted by the proponent)⁹ but 25 days to answer the contention itself (with 7 days permitted for a reply).¹⁰ If the two steps are not taken simultaneously, the cumulative briefing periods, and the interim time consumed by the Board's ruling on the initial motion, can be unnecessarily time-consuming.

The approach we outlined at the prehearing conference, in keeping with that of Boards in other proceedings, calls for consolidated presentation and briefing of these two interrelated matters. Under that approach, which we direct be followed here, if a party seeks to file a motion for leave to file a new or amended contention, then it shall file such motion and the substance of the proposed contention simultaneously. In other words, the pleading shall include (1) either a motion for leave to file a timely new or amended contention under 10 C.F.R.

⁷ 10 C.F.R. § 2.323.

⁸ 10 C.F.R. § 2.309.

⁹ 10 C.F.R. § 2.323(c).

¹⁰ 10 C.F.R. § 2.309(h)(1)-(2).

§ 2.309(f)(2),¹¹ or a motion for leave to file an untimely new or amended contention under 10 C.F.R. § 2.309(c); (2) the proposed new or amended contention itself; and (3) the support for that proposed contention, showing that it satisfies all the elements of 10 C.F.R. §2.309(f)(1). Responses will then be handled as follows: within twenty-five (25) days after service of the motion and proposed contention, any other party may file a consolidated answer, responding to all elements of both the motion and the contention; then, within seven (7) days of service of the answer(s), the movant may file a reply to all aspects of the answer(s).

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

By Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 20, 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) Intervenors Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information and Resource Service (NIRS).

¹¹ In our decision admitting Contention 4, we set 60 days (instead of the customary 30) as the time period after the discovery of new information – *i.e.*, after the date when “the Petitioners learn. . . , or [are] in position to learn, of the availability of information about the [triggering] event or document” – within which a new or amended contention would be deemed presumptively timely. LBP-08-10, 67 NRC at ___ (slip op. at 40-41).

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 (SUMMARIZING PREHEARING CONFERENCE) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Lawrence G. McDade
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Catherine Marco, Esq.
Brett Michael Patrick Klukan, Esq.
Kimberly Ann Sexton, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Shaw AREVA MOX Services
P.O. Box 7097
Aiken, SC 29804
Attention: Dealis Gwyn

Docket No. 70-3098-MLA
LB MEMORANDUM AND ORDER (SUMMARIZING PREHEARING CONFERENCE)

Glenn Carroll
Coordinator
Nuclear Watch South
P.O. Box 8574
Atlanta, GA 31106

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629

Mary Olson
Nuclear Information and Resource Service
P.O. Box 7586
Asheville, NC 28802

Donald J. Silverman, Esq.
Timothy P. Matthews, Esq.
Anna L. Vinson, Esq.
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004

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

[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of November 2008