UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons
Kristine L. Svinicki

SHAW AREVA MOX SERVICES, LLC (Mixed Oxide Fuel Fabrication Facility)	Docket No. 70-3098-MLA

CLI-09-02

MEMORANDUM AND ORDER

In this decision, we address two requests. The first is the NRC Staff's request for interlocutory review[1] of a portion of the Atomic Safety and Licensing Board's June 27, 2008 Memorandum and Order (LBP-08-11).[2] Specifically, the Staff asks that we reverse the Board's imposition of two conditions on its dismissal of Contention 7 as filed collectively by Blue Ridge Environmental Defense League, Nuclear Watch South, and Nuclear Information and Resource Service (Intervenors). In Contention 7, Intervenors assert that Shaw Areva MOX Services, LLC (Applicant), in its application for a license to possess and use radioactive materials in its as-yet-unconstructed Mixed-Oxide Fuel Fabrication (MOX) Facility, has not satisfied the requirement in 10 C.F.R. § 70.23(a)(8)

[1] NRC Staff's Request for Interlocutory Review of the Licensing Board's Decision in LBP-08-11 Concerning Contention (July 11, 2008) at 7 (Staff's Request).

[2] LBP-08-11, 67 NRC 460, 489-90.

that construction of the "principal structures, systems, and components" approved in the construction authorization proceeding be "completed in accordance with the application."[3]

The two Board-imposed conditions at issue are:

(1) the Applicant will give the [Intervenors] 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 [Intervenors] at least 30 days written notice prior to making its decision on the "completion" finding.[4]

In addition, the Board imposed the following potential sanction: failure by the Staff and/or the Applicant "to honor these conditions will be deemed to provide 'good cause' – calculated on a day per day basis – for delayed filing of any substantive contention [Intervenors] may bring on this subject."[5] Intervenors oppose the Staff's interlocutory appeal, while the Applicant supports it.

The second request to us comes from Intervenors, who ask that, if we do not uphold the Board's ruling on Contention 7,[6] then we admit the contention but hold it in abeyance pending the Staff's issuance of its "completion" finding.[7] The Staff and the Applicant oppose Intervenors' request.

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[3] Before the Applicant's license to possess and use radioactive material can be issued, the Staff must find that the Applicant has satisfied this requirement. The parties and the Board have referred to this finding as a "completion" finding.

[4] *Id.*, 67 NRC at 490.

[5] *Id.*

[6] Intervenors oppose the Staff's request and ask us to affirm LBP-08-11. *Intervenors' Response to NRC Staff's Request for Interlocutory Review of LBP-08-11 Concern[ing] Contention* (July 17, 2008) at 11 (Intervenors' Response).

[7] *Id.* at 1. The implication of Intervenors' request is that Contention 7 (as revised) would challenge the Staff's "completion" finding. We emphasize that, to be admissible, a contention must challenge some aspect of the application at bar and cannot be directed (continued. . .)

In today's order, we take the following actions. We grant the Staff's request for interlocutory review, find that the Board overstepped the bounds of its authority, and reverse the Board's imposition of conditions and a potential sanction. We also affirm the Board's dismissal of Contention 7. But we rule that if, within 60 days after the pertinent information that would support the framing of the contention first becomes available, Intervenors submit a particularized and otherwise admissible contention regarding the construction of the MOX facility, then the contention will be deemed timely without the need to satisfy the balancing test for late-filing requirements of 10 C.F.R. § 2.309(c) or our regulatory requirements in 10 C.F.R. § 2.326 for reopening the record if otherwise applicable.[8]

I. GENERAL BACKGROUND

In 2001, the Applicant (then Duke Cogema Stone and Webster) submitted a Construction Authorization Request to build the MOX facility. An intervenor sought and was granted a hearing on the Construction Authorization (a different adjudication from the one now before us).[9] The Board in that proceeding admitted a number of contentions, but all were ultimately withdrawn or rejected. The Board terminated the Construction Authorization adjudication in July 2005.[10] Four months earlier, the Staff had issued a Construction Authorization for the MOX facility. But that did not end the

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at an action by the Staff. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

[8] The peculiar procedural circumstances and the unusual nature of the equities favoring Intervenors combine to render this decision *sui generis*. As such, it should not be considered precedential.

[9] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001).

[10] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-05-15, 62 NRC 53 (2005).

NRC's review of the proposed MOX facility or end the MOX hearing process. Early in the Construction Authorization proceeding, we had held that our "regulations contemplate *two* approvals – approval of construction (10 C.F.R. §§ 70.23(a)(7), (b)) and approval for operation (10 C.F.R. § 70.23(a)(8))."[11]

In 2006, the Applicant sought the second NRC approval it needed, this one a license to operate the MOX facility, or as it is called in the proceeding now before us, a "possession-and-use" license. The Staff published a notice of opportunity for hearing in 2007.[12] At that time, the Applicant had not yet begun construction under the 2005 Construction Authorization. Intervenors sought a hearing on the possession-and-use license application. Thereafter, the Board admitted Intervenors' Contention 4.[13]

Subsequently, in early 2008, the Staff announced its intention to issue a "possession and use" license to the Applicant *before* construction was complete, subject to a condition that the construction be completed in accordance with the requirements of section 70.23(a)(8).[14] Prior to this announcement, Intervenors had understood that they "would have the opportunity to challenge the adequacy of the MOX facility's construction

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[11] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 217 (2002) (emphasis added).

[12] Notice of License Application for Possession and Use of Byproduct, Source, and Special Nuclear Materials for the MOX Facility, Aiken, SC, and Opportunity to Request a Hearing, 72 Fed. Reg. 12,204 (Mar. 15, 2007).

[13] Last year, the Board ruled that Contentions 3 and 4 were admissible, but delayed their actual admission pending further discussions with the parties on how the Board should manage the two contentions (given that the actual construction was so far in the future). LBP-07-14, 66 NRC 169, 206-12, 214 (2007). Later amending these rulings, the Board reaffirmed its admission of Contention 4 but dismissed Contention 3. LBP-08-11, 67 NRC at 475-76.

[14] LBP-08-11, 67 NRC at 473, referring to Transcript of Jan. 8, 2008, Oral Argument (Tr.) at 202, 230 (NRC Staff Counsel Martin).

at around the time the NRC Staff completed its safety review,"[15] that is, about the time the Staff issued its "completion" finding. Thereafter, Intervenors submitted their late-filed Contention 7 – stating that the Applicant had not satisfactorily completed construction as required by section 70.23(a)(8) – after concluding that the Staff's new approach would deprive them of a sufficient opportunity to defend their interests regarding safe construction of the MOX facility.

Eight weeks later, the Staff filed with the Board a "change of position," stating that it would, after all, make the "completion" finding required in section 70.23(a)(8) *before* issuing a possession-and-use license.[16] This change of position removed some, but not all, of the rationale underlying Contention 7.[17] The Board and the parties spent much time at oral argument on Contention 7 discussing Intervenors' remaining concerns and also how the Board should manage Contention 7,[18] given that construction would not be completed for another four to eight years.[19]

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[15] LBP-08-11, 67 NRC at 473. See also Intervenors' Response to Atomic Safety and Licensing Board's Memorandum and Order of January 16, 2008 Regarding Case Management Issues (Feb. 11, 2008) at 3-5 & n.1; Transcript of Apr. 9, 2008, Oral Argument at 467 (Farrar, J.).

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

[17] LBP-08-11, 67 NRC at 489.

[18] Tr. at 445-521.

[19] The actual period is uncertain. The Board refers to "a six-year construction" period (LBP-08-11, 67 NRC at 489, 494; LBP-07-14, 66 NRC 169, 203 (2007) (referring to 2014)), the Applicant refers to eight years (*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"* (July 21, 2008) at 10 n.38 (Applicant's Answer)), and NRC Staff counsel implies a period of at least four years (Tr. at 450 (NRC Staff Counsel Jones)).

II. BACKGROUND TO THE STAFF'S APPEAL

After hearing oral argument and reviewing the parties' briefs, the Board in LBP-08-11 dismissed Contention 7, but on the condition that the Staff and the Applicant notify Intervenors of their intent to take certain actions that related to compliance with section 70.23(a)(8).[20] The Board further provided that, if those conditions were not satisfied, Intervenors would be given extra time within which to submit any revised contentions along the same lines as Contention 7.

The Staff, while recognizing our reluctance to consider interlocutory appeals,[21] asserts that LBP-08-11 satisfies one of our two procedural criteria for such review under 10 C.F.R. § 2.341(f)(2),[22] that is, that the challenged order "affects the basic structure of the proceeding in a pervasive or unusual manner."[23] Combining its procedural and substantive arguments, the Staff asks us to review and reverse the Board's ruling because it could result in (i) an indefinite extension of this proceeding's life, (ii) the

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[20] As the Applicant correctly states, Section 70.23 does not impose a requirement on an applicant to "request" a completion finding, or call for a single action, such as an inspection, on the part of the Staff that would, as the Board and Intervenors apparently contemplate, serve as a discrete starting point for revising Contention 7. Applicant's Answer at 6. Rather, as construction activities are undertaken, the Applicant is likely to take a variety of actions over a period of years that will be, similarly, considered and closed out by the Staff in multiple inspections and review activities. This type of review is not unusual in the licensing context, but it presents the need for a novel resolution of the appeal at hand. By contrast, with respect to combined licenses issued under 10 C.F.R. Part 52, the Atomic Energy Act itself prescribes a mechanism for interested persons to request a hearing as to the adequacy of construction after issuance of a combined license. Atomic Energy Act of 1954, as amended (AEA), § 189a.(1)(B), 42 U.S.C. § 2239(a)(1)(B). *Cf.* AEA § 185.b, 42 U.S.C. § 2235(b). *See generally* 10 C.F.R. § 52.103.

[21] *See*, *e.g.*, *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 465-66 (2004).

[22] Staff's Request at 3-4.

[23] 10 C.F.R. § 2.341(f)(2)(ii).

Board's unauthorized supervision of the Staff's non-adjudicatory activities, and (iii) the circumvention of regulations restricting late-filed contentions. The Applicant supports the Staff's Request.[24]

Intervenors oppose the Staff's Request.[25] They do not address whether the Staff satisfies the standards for interlocutory review. Instead, they challenge the merits of the Staff's argument. Intervenors argue that the Board's action was a reasonable exercise of its authority to ensure that they have sufficient advance notice of any Staff action which would trigger revising the now broadly-framed Contention 7.[26]

Intervenors also make their own request, asking us to protect their right to file a revised Contention 7 if a contention-triggering event occurs after the record in this proceeding has closed.[27] More specifically, they ask that if we are unwilling to uphold the Board's approach to Contention 7,[28] then we alternatively admit Contention 7 but hold it in abeyance pending the Staff's "completion" finding under section 70.23(a)(8).[29]

III. DISCUSSION

A. The Staff's Request for Interlocutory Review

We agree with the Staff that the Board's ruling on Contention 7 satisfies the interlocutory review standard in section 2.341(f)(2)(ii) in that the ruling "affects the basic structure of the proceeding in a pervasive or unusual manner." The Board's ruling derives from the unusual (perhaps unique) nature of this proceeding. During the earlier

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[24] Applicant's Answer at 4-11.

[25] Intervenors' Response at 7.

[26] *Id.* at 11.

[27] *Id.* at 1, 10-13.

[28] *Id.* at 11.

[29] *Id.* at 1.

(construction) phase of this proceeding, we considered the requirements of the AEA, and determined that a "two-step" licensing (and hearing) process for a MOX facility was permissible.[30] We went on to approve a procedural scheme crafted specifically for this adjudication.[31] As a result, this proceeding is likely to generate Board rulings that "affect[] the basic structure of the proceeding in a pervasive or unusual manner" – which is just what happened here. Indeed, in our earlier *MOX* adjudication, we embraced the "affects the basic structure of the proceeding" rationale to justify interlocutory review of the "two-step licensing" issue.[32] We similarly undertake interlocutory review here and turn now to the merits.

The Board overstepped its authority when it imposed the two conditions and the potential sanction for any failure by the Staff or Applicant to satisfy them. Although dismissing a contention with conditions differs in form from admitting a contention with conditions, the two are the same in substance. Both essentially hold a contention in suspended animation – the first by declaring it "dead, but then, maybe not," and the latter by declaring it "alive, but then, maybe not." Consequently, the Board contravened longstanding NRC precedent that "a licensing board is not authorized to admit conditionally, for *any* reason, a contention that falls short of meeting the specificity requirements" set forth in our procedural rules.[33] The Board must instead dismiss insufficient contentions outright.

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[30] Savannah River Mixed Oxide Fuel Fabrication Facility, CLI-02-7, 55 NRC at 214-17.

[31] *Id. 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 (Apr. 18, 2001).

[32] Savannah River Mixed Oxide Fuel Fabrication Facility, CLI-02-7, 55 NRC at 213-14.

[33] Staff's Request at 4, quoting *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 467 (1982) (emphasis in original). Although the Atomic Safety and Licensing Appeal Board (ALAB) was disbanded in 1991, its decisions still (continued. . .)

The Board also acted without authority in instructing the Staff to give Intervenors notice of its intent to take certain administrative action (that is, issue a "completion" finding). Absent delegated authority, which is not present here, our licensing boards lack authority to direct the Staff's non-adjudicatory actions.[34] Boards also lack authority to establish prospective sanctions for any failure by the Staff and/or the applicant to comply with the Board's notice conditions. Any other conclusion would inappropriately permit the Board to do indirectly what it may not do directly,[35] that is, to avoid applying our regulations concerning late-filed contentions (10 C.F.R. § 2.309(c)).

B. Intervenors' Request for Relief

Even though the Board's remedy overstepped its authority, its concern that Intervenors' hearing rights not be compromised in the unusual circumstances of this case is understandable. Perhaps recognizing the problematic nature of the Board's remedy, Intervenors suggest a different one: that we admit Contention 7 and hold it in abeyance pending the Staff's issuance of its "completion" finding under 10 C.F.R. § 70.23(a)(8).[36] Intervenors are concerned that, if the record of this proceeding has closed by the time the Staff issues that finding, then they would be prejudiced in the following two respects.

First, Intervenors would not receive specific notice of the Staff's "completion" finding – an action which, in Intervenors' opinion, would notify them of their need to

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carry precedential value. *See*, *e.g., Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-99-24, 50 NRC 219, 222 n.3 (1999).

[34] *See*, *e.g.*, *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 385 n.69 (2007); *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516-17 (1980).

[35] See generally International Paper Co. v. Ouellette, 479 U.S. 481, 495 (1987).

[36] Intervenors' Response at 1, 11.

timely file a revised Contention 7.[37] Intervenors assert that, without such notice, they would be left in the difficult position of spending up to the next eight years searching haystacks for needles that, at any particular time, may or may not be there.[38]

Second, even were they able to overcome the first disadvantage, they would still be entitled only to the opportunity "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."[39] Regarding this second disadvantage, Intervenors observe that the right to seek party status under a heightened admissibility standard would place them at a distinct disadvantage compared with their existing status as intervenors.[40]

As explained above, Contention 7 asserts that construction has not been completed satisfactorily in accordance with 10 C.F.R. § 70.23(a)(8). Based on a strict reading of our procedural regulations governing admissibility of contentions,[41] we conclude that Contention 7 is inadmissible. Intervenors have not carried their regulatory burden to show that there currently exists a "genuine dispute"[42] as to whether the Applicant can satisfy our regulatory requirement that construction of the "principal structures, systems, and components" approved in the construction authorization

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[37] *Id.* at 8, 11-12.

[38] *See id.* at 12 (observing that they are at risk of being "unprotected by any requirement for the Staff to give them notice of its findings [and with] no reliable way to know when to even attempt to exercise their hearing rights on the issue" of compliance with section 70.23(a)(8)).

[39] *Id.* at 12.

[40] *Id.* at 11-12; Tr. at 458-60, 483, 488 (Intervenors Counsel Curran).

[41] 10 C.F.R. § 2.309(f).

[42] 10 C.F.R. § 2.309(f)(1)(vi).

proceeding be "completed in accordance with the application."[43] The Applicant is still in only the very early stages of construction, and is not slated to complete construction for a number of years.[44] Consequently, information is not currently available (nor could it be) that would permit Intervenors to frame an admissible contention challenging specific aspects of construction.[45] And for the same reason, Intervenors have not (nor could they have) carried their additional regulatory burden of presenting "facts or expert opinion" to support Contention 7.[46]

But because Intervenors' inability to satisfy our contention admissibility rules in this instance is due to factors beyond their control, we decline to adopt the Staff's and the Applicant's position that we require Intervenors to meet both our strict late-filed requirements and our even stricter reopening standards if Intervenors identify safety issues during the upcoming years of ongoing construction Rather, if Intervenors file a new or amended Contention 7, with supporting materials, within 60 days after pertinent information (be it a supplement to the application or some other document, such as a Staff inspection report) first becomes available, then the contention will be deemed timely filed and Intervenors will be absolved of their obligation to satisfy the late-filing

[43] 10 C.F.R. § 70.23(a)(8).

[44] *See* note 19, *supra*.

[45] Indeed, the Board and the parties recognize that such information might not become available until long after the only remaining contention in this adjudication, Contention 4, is resolved and the adjudicatory record closed. *See*, *e.g.*, Intervenors' Response at 11-12 (observing that "in advance of the Staff's safety findings under 10 C.F.R. § 70.23(a)(8), litigation . . . [might] conclude[] and the [Board] lose[] its jurisdiction").

[46] 10 C.F.R. § 2.309(f)(1)(v).

requirements of 10 C.F.R. § 2.309(c).[47] Likewise, under those same circumstances, Intervenors need not satisfy our regulatory requirements for reopening the record.[48]

This may lead to one or more new or amended "Contention 7"-related contentions as construction proceeds and as fresh issues emerge.[49] Litigating contentions when they first arise is preferable, from the standpoint of efficient decision-making, to allowing them to fester until the Staff has finished its "completion" review. We

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[47] This ruling is limited to the issue raised by Contention 7, and does not apply to any other late-filed contention, or late-filed petition to intervene. Any other such filing must conform to our late-filing requirements to be accepted by the Board for consideration.

Nor do we relieve Intervenors of their "ironclad obligation" to regularly and diligently search publicly-available NRC or Applicant documents for information relevant to their Contention 7. *McGuire*, CLI-02-28, 56 NRC at 386 ("Hearing petitioners have an 'ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention'"), quoting Final Rule, Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

In our view, Intervenors overstate the burden that this "ironclad obligation" places upon them. For example, the NRC staff maintains a Web page devoted exclusively to documents relevant to the MOX license application. This Web page (http://www.nrc.gov/materials/fuel-cycle-fac/mox/meetings.html#upcoming) contains hyperlinks to a variety of documents, including inspection reports, correspondence, the Staff's requests for additional information, summaries of recent public meetings, slide presentations used at those meetings, transcripts of earlier meetings, and announcements of upcoming meetings.

[48] Reopening the record is an "extraordinary" action. 51 Fed. Reg. 19,535, 19,538 (May 30, 1986). Because proponents of motions seeking to reopen the record bear a "heavy burden" (*Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-756, 18 NRC 1340, 1344 (1983) (quoting *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit No. 1), ALAB-462, 7 NRC 320, 338 (1978)), a waiver of the "reopening" requirements seems the most equitable course of action to take in this particular case.

[49] The Staff and Applicant may file Answers 25 days after service of the new contention(s), and Intervenors may then submit a Reply seven days after service of the Answer(s). *See generally* 10 C.F.R. § 2.309(h)(1), (2).

remind Intervenors, moreover, that any new or amended contentions must satisfy the usual contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1).[50]

Finally, to ensure that this adjudication has a defined endpoint, we direct the NRC Staff to file a notice advising the Board (if the record is still open) or the Commission (if the record is closed) once all information relevant to the "completion" finding is before the agency.[51] If the record is still open and if Intervenors have not offered one or more new or amended "Contention 7"-related contentions within the 60 days after such a notification, then we direct the Board to terminate the adjudication (unless at least one other contention remains pending).

IV. CONCLUSION

We *grant* the NRC Staff's request for interlocutory appeal, *affirm* the Board's dismissal of Contention 7 (although without prejudice to resubmission consistent with the terms of this decision), and *reverse* the Board's imposition of conditions and a potential sanction.

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[50] Should Intervenors seek to file a new or amended contention, based on Contention 7, after the 60-day window has closed, such a request would be also subject to our late-filing rules in 10 C.F.R. § 2.309(c).

[51] This may take the form of a "Board Notification." *See*, *e.g.*, Board Notification 2006-02, Supplemental Information Potentially Relevant and Material to Proceeding in the Matter of the U.S. Army and the Jefferson Proving Ground Site (Mar. 14, 2006)(ADAMS Accession No. ML060650231).

IT IS SO ORDERED.

For the Commission

(NRC SEAL) **/RA/**

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of February 2009.

Commissioner Jaczko, concurring:

I would have preferred that contention 7 be held in abeyance rather than being dismissed. That said, from a practical standpoint, I believe this order diminishes significant differences between the two approaches. The one remaining concern I have is that, given the unique circumstances of this case, the appropriate timing for filing contentions will continue to be a challenge. Thus, if they have not already done so, I would encourage the intervenors to request to be placed on any service lists the technical staff at the NRC maintains in addition to the service list in this adjudication. Although this will only provide intervenors with documents prepared by the NRC staff, it could provide additional assurance that, as this case moves forward, arguments about the timing of contentions do not overshadow the more important arguments about the substance of the contentions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Shaw AREVA MOX Services	)	Docket No. 70-3098-MLA
	)	
(Mixed Oxide Fuel Fabrication Facility, Aiken, SC)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSON MEMORANDUM AND ORDER (CLI-09-02) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal mail.

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of February 2009