April 16, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
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| SHAW AREVA MOX SERVICES | ) | Docket No. 70-3098-MLA |
| Mixed Oxide Fuel Fabrication Facility | ) | |
| | ) | |
| (License Application for Possession and Use of Byproduct, Source and Special Nuclear Materials) | ) | ASLBP No. 07-856-02-MLA-BD01 |

NRC STAFF RESPONSE TO PETITIONERS' MOTION FOR ADMISSION OF LATE-FILED CONTENTION 8

INTRODUCTION

On March 22, 2010, intervenors Nuclear Watch South, Blue Ridge Environmental Defense League ("BREDL"), and Nuclear Information and Resource Service (collectively "Intervenors") moved for the admission of a new contention regarding Shaw AREVA MOX Services' ("Applicant" or "MOX Services") December 17, 2009, application for an exemption from 10 C.F.R. § 74.55(b)(1), *Item monitoring*.[1] For the reasons set for the below, the NRC staff ("Staff") opposes the admission of this contention because it does not meet the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) or address the non-timely filing requirements of 10 C.F.R. § 2.309(c)(1).

BACKGROUND

On November 17, 2006, MOX Services filed a license application for possession and use of byproduct, source, and special nuclear materials at the Mixed Oxide Fuel Fabrication

[1] "Petitioners' Motion for Admission of Contention 8 Regarding Shaw AREVA MOX Services' Request for Exemption from Material Control and Accounting Requirements" (Mar. 22, 2010) ("Motion").

Facility ("MFFF") in Aiken, South Carolina.[2] The Staff published a notice of opportunity for hearing on March 15, 2007.[3] The license application is currently undergoing a safety review.

On May 14, 2007, Intervenors filed a petition for intervention and request for hearing ("Petition") on the license application.[4] The Staff and Applicant filed separate responses on June 11, 2007.[5] The Board heard oral arguments on August 22, 2007. On October 31, 2007, the Board issued a preliminary decision on the Petition, admitting Contentions 3 and 4.[6] The Board rejected the other contentions. In response to the Staff's request for reconsideration of Contentions 3 and 4,[7] the Board heard oral arguments on January 8, 2008.

On January 16, 2008, the Board issued a "Memorandum and Order" that offered a reshaped, proposed new Contention 4 and invited responses from all parties.[8] On January 25, 2008, Petitioners accepted recast Contention 4.[9] On February 7 and 8, 2008, the Applicant and the Staff responded to the Board's Order, objecting in part and in whole to recast Contention 4.[10]

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[2] The Applicant submitted its original application in September, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750195). The application was revised and resubmitted in November, 2006. Mixed Oxide Fuel Fabrication Facility License Application (Nov. 17, 2006) (ADAMS Accession No. ML070160311).

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

[4] "Petition for Intervention and Request for Hearing" (May 14, 2007).

[5] "NRC Staff Response to Petition for Intervention and Request for Hearing" (June 11, 2007); "Shaw AREVA MOX Services, LLC Answer Opposing BREDL, et al., Petition for Intervention and Request for Hearing" (June 13, 2007).

[6] *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), LBP-07-14, 66 NRC 169 (2007).

[7] "NRC Staff's Response to the Board's October 31, 2007 Order and Request for Reconsideration" (Nov. 9, 2007).

[8] "Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions)" (Jan. 16, 2008).

[9] "Intervenors' Acceptance of Recast Contention #4" (Jan. 25, 2008).

[10] "Shaw AREVA MOX Services LLC's Response to Petitioners' Contention 4 as Reformulated by the Board" (Feb. 7, 2008); "NRC Staff's Response to Recast Contention 4" (Feb. 8, 2008).

On February 11, 2008, Petitioners filed a second response to the Order urging the Board to accept recast Contention 4, proposing late-filed Contention 7, and requesting that the Commission suspend construction of the MOX Facility.[11] On February 21, 2008, the Board issued "Memorandum and Order (Regarding Content of Answers)" requiring that the Applicant and the Staff address questions related to Intervenors' late-filed Contention 7 and request to suspend construction of the MOX Facility. The Staff and Applicant separately filed briefs opposing admission of late-filed Contention 7 and suspension of construction.[12]

On June 27, 2008, the Board issued a "Memorandum and Order (Ruling on Contentions and All Other Pending Matters)," which dismissed Contentions 3 and 6, admitted recast Contention 4, declined to admit new Contention 7 with two notification conditions, and denied Intervenors' request for a stay of construction.[13] On July 11, 2008, the Staff filed a request for interlocutory review, specifically requesting that the Commission reverse the Board's two conditions, while the Intervenors, in their response to the Staff, requested that if Commission does not uphold the Board's ruling on Contention 7, that it admit Contention 7 but hold it in abeyance pending the Staff's issuance of its "completion" finding after construction. On February 4, 2009, the Commission granted the Staff's request for interlocutory review, reversed the Board's imposition of the two conditions, affirmed the Board's dismissal of Contention 7, but ruled "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.

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

[12] "Shaw AREVA MOX Services LLC's Answer to Petitioners' February 11, 2008 Response Regarding Case Management Issues" (Mar. 7, 2008); "NRC Staff's Response to Intervenors' Late-Filed Contention Seven and Board's Memorandum and Order of February 21, 2008" (Mar. 10, 2008).

[13] *MOX Services*, LBP-08-11, 67 NRC 460 (2008).

§ 2.309(c) or our regulatory requirements in 10 C.F.R. § 2.326 for reopening the record if otherwise applicable."[14]

On January 27, 2009, MOX Services filed its proposed procedures and hearing schedule in response to a November 20, 2008 Board order.[15] The Applicant urged the Board to apply Subpart N hearing procedures and to proceed forward with the hearing based upon the Applicant's safety analysis on the admitted contention and the Staff's technical review of that document, which would eventually be incorporated into the Staff's Safety Evaluation Report ("SER"). On March 23, 2009, the Board issued an Order summarizing a prehearing conference call in which the parties agreed to: continue under the Subpart L hearing procedures, but to revisit the Subpart N option at a later date, and establish a review schedule for the Staff and Intervenors once the Applicant submits its safety analysis on the admitted contention.[16]

On May 5, 2009, the Staff received the Applicant's safety analysis of the admitted contention and the Staff began its technical review with an anticipated completion date of September 1, 2009. On August 31, 2009, however, the Staff submitted a letter to the Board informing it that due to the interrelated nature of the issues in Contention 4 and the issues in the Staff's safety evaluation of the entire Application, it did not anticipate that a hearing could occur prior to the Staff's publication of its SER.

On October 9, 2009, the Board directed the Staff and Applicant to jointly file a status report at two-month intervals "contain[ing] (1) a brief statement regarding the then status of the technical review; and (2) the Staff's then best estimate as to the completion date of the review and the release of the SER."[17] Each of the three joint status reports have stated that: (1) the Staff is still engaged in its review of the Application and drafting its SER; (2) the Staff expects to

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[14] *MOX Services*, CLI-09-2, 69 NRC 55 (2009).

[15] "Memorandum and Order (Summarizing Prehearing Conference)" (Nov. 20, 2008).

[16] "Memorandum and Order (Summarizing Prehearing Conference)" (Mar. 23, 2009).

[17] "Memorandum and Order (Directing the Filing of Status Reports)" (Oct. 9, 2009).

present a draft copy of the SER to the Advisory Committee on Reactor Safeguards for review in July, 2010;[18] and (3) the Staff expects to release the final SER by December, 2010. On March 22, 2010, Intervenors filed the instant Motion, along with a supporting declaration from Dr. Edward S. Lyman.

## DISCUSSION

### I. Legal Standards for Admission of New Contentions

Three regulations govern the admissibility of new contentions filed after the original petition for intervention and request for hearing. First, a new contention may be admitted as a timely new contention if it meets the requirements of 10 C.F.R. § 2.309(f)(2). Under this provision, a contention filed after the initial filing period may be admitted with leave of the presiding officer only upon a showing that:

> (i) the information upon which the amended or new contention is based was not previously available;
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> (ii) the information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2).

Second, a contention that does not qualify as a timely new contention under 10 C.F.R. § 2.309(f)(2) may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). Nontimely filings may only be entertained following a determination by the presiding officer that a balancing of the following eight factors, all of which must be addressed in the petitioner's filing, weigh in favor of admission:

> (i) Good cause, if any, for the failure to file on time;

[18] The next status update will likely reflect a schedule change wherein the Staff expects to present a draft copy of the SER to the Advisory Committee on Reactor Safeguards Subcommittee for review in August, 2010, with full Committee review occurring in September, 2010.

(ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;

(iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;

(iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;

(v) The availability of other means whereby the requestor's/petitioner's interest will be protected;

(vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;

(vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and

(viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c). The first factor, whether good cause exists for the failure to file on time, is the most important.[19] Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong."[20] In fact, the Commission just recently stated that "[a] petitioner's showing must be highly persuasive; it would be a rare case where we would excuse a non-timely petition absent good cause."[21]

Finally, in addition to fulfilling the requirements of either 10 C.F.R. § 2.309(f)(2) or § 2.309(c)(1), a petitioner must show that the contention meets the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration that the issue raised in the contention is material to the

[19] *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

[20] *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-92-12, 36 NRC 62, 73 (1992) (quoting *Duke Power Co.* (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-431, 6 NRC 460, 462 (1977)).

[21] *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 70 NRC ___, (Mar. 26, 2010) (slip op. at 4).

findings the NRC must make to support the action that is involved in the proceeding; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

## II. Intervenors' New Contention is Inadmissible

### A. Intervenors' New Contention Is Nontimely

Intervenors state that the new contention is timely filed because: (1) the information upon which it bases its contention was not available prior to December, 2009; (2) the information related to the Applicant's inability to satisfy 10 C.F.R. § 74.55(b)(1) is materially different from information previously available; and (3) the contention was timely filed within 60 days of receiving the exemption application.[22] As the Staff demonstrates below, however, both the information upon which the Intervenors base their contention and the information related to the Applicant's inability to satisfy 10 C.F.R. § 74.55(b)(1) have been available since March 15, 2007; therefore, the information was not timely filed, and Intervenors cannot satisfy the 10 C.F.R. § 2.309(f)(2) requirements for a late-filed new contention.

#### 1. The Information Upon Which Intervenors Base Their New Contention Was Previously Available

On March 15, 2007, the Staff published the Notice of License Application for Possession and Use of Byproduct, Source, and Special Nuclear Materials for the Mixed Oxide Fuel Fabrication Facility, Aiken, SC, and Opportunity to Request a Hearing in the Federal Register.[23]

[22] Motion at 7.

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

This notice listed a cover letter transmitting the Application and a publicly available version of the Application, among other documents. Page 1 of the cover letter states that the Fundamental Nuclear Material Control ("FNMC") Plan referred to in Chapter 13 of the License Application is being withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d). Chapter 13.3 of the publicly available Application, "Material Control and Accounting," reiterates that point, stating that the Applicant has submitted its FNMC Plan under separate cover.[24] Thus, potential intervenors were aware that the Application contained the FNMC Plan related to the topic of Material Control and Accounting ("MC&A"). Because the FNMC Plan is withheld as "Official Use Only" information, potential intervenors are required to specifically request it and either enter into a protective order for the entire proceeding, and/or sign a non-disclosure agreement or affidavit, a requirement which Intervenors were fully knowledgeable of.[25]

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[24] This information is repeated in the public redacted version of the Applicant's Application, from January 4, 2007, available at ADAMS Accession No. ML070160311, also listed in the Staff's notice of opportunity for hearing.

[25] During the earlier MOX proceeding on the Construction Authorization Request ("CAR"), Glenn Carroll and Diane Curran availed themselves of the ability to access withheld documents. Although the Board in the CAR proceeding took it upon itself to order the Applicant to file a proposed protective order and affidavit of nondisclosure within five days of its establishment, and then subsequently issued the protective order 11 days after that, counsel for Intervenors in the current proceeding was aware that as participants in proceedings they "have a right to say we need a protective order to look at" information withheld as official use only or safeguards information. "Transcript of Shaw AREVA MOX Services Hearing on April 9, 2008" at 504-505 (ADAMS Accession No. ML081050303).

Counsel for the Applicant followed up on Ms. Curran's point, explaining that "we had a protective order in the construction authorization case signed out by the board if my recollection serves me before any contention was even admitted. The Intervenors/Petitioners could have asked for [a protective order]. When they do ask for one, I'm sure the board will take it under consideration. They have the right to do that. They haven't done it yet." *Id.* at 506. Only on an August 12, 2008 transcript, more than a year after their initial Petition and almost a year and a half after the notice of opportunity for hearing, does counsel for Intervenors first discuss the possibility of a protective order. "Transcript of Proceedings of Shaw AREVA MOX Services on August 12, 2008" at 566 ("And I just want to clarify from the intervenors' perspective that we are waiting to get those privilege logs at the end of the month. And then we anticipate entering into a nondisclosure agreement and seeking a protective order so that we can look at all of the information that is being withheld from us, whether it is because it is sensitive or proprietary. That is the approach we plan to take.") (ADAMS Accession No. ML082280515).

Finally, during the final stages of the CAR proceeding, following a request to terminate by the Applicant, Ms. Curran, on behalf of GANE, requested that the Staff not revoke Ms. Curran's and Mr. Edwin Lyman's security clearances as "GANE intends to participate in the operating license proceeding, and it is possible that GANE will raise security issues whose litigation would require Dr. Lyman and me to

In the Official Use Only May 2006 revision of the FNMC Plan,[26] Section 2.8.3 details the Applicant's "Item Monitoring Conditions for Specific Storage Areas" plan. While the May 2006 FNMC Plan does not use the word "exemption," the FNMC plan does discuss that the testing time frames are different than those required by 10 C.F.R. § 74.55(b)(1), that the proposed testing time frames are "relaxed monitoring frequencies," and attempts to provide justifications for them. The proposed testing time frames in the May 2006 FNMC Plan are the same various proposed testing time frames for item monitoring tests as listed in the Applicant's December 2009 exemption request.

As described in the table in Attachment 1, adequate reference was made to the FNMC Plan in letters sent to Intervenors and the documents listed in the notice of opportunity for hearing. This material demonstrates that prior to the Applicant's submittal of the Application, the Staff sent a meeting notice to Glenn Carroll, Diane Curran, and Louis Zeller informing them of a public meeting with the Applicant on September 27, 2006, where the Applicant would brief the Staff on the content and layout of its Application and Integrated Safety Analyses Summary for the MOX Facility.[27] At this meeting, the Applicant gave an overview of its Application and its contents, specifically stating that the FNMC Plan was submitted separately.[28] As such, the

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have access to classified information." Letter to the Board re: DCS Motion to Terminate MOX CAR Proceeding (May 27, 2005) (ADAMS Accession No. ML051540181). Ms. Curran and her client's, Ms. Carroll's, knowledge about the stricter requirements for classified information access and their stated desire to participate in the current proceeding by raising security issues further supports their understanding of the document access requirements.

[26] ADAMS Accession No. ML062860340.

[27] NRC Meeting Notice (Sept. 8, 2006) (ADAMS Accession No. ML062490117). The meeting occurred on the same day that the Applicant submitted its Application to the NRC.

[28] *See* "License Application Package Overview – MOX Fuel Fabrication Facility," Enclosure 4, Sept. 27, 2006 (ADAMS Accession No. ML062760258). Although none of the Intervenors attended the meeting, they were provided notice of the meeting, the referenced overview document is publicly available, and their expert, Dr. Edwin Lyman, was in attendance. September 27, 2006 MOX LA and ISA Summary Meeting Attendees, Enclosure 2 (ADAMS Accession No. ML062760243).

Intervenors could have requested access to the FNMC Plan in order to provide timely contentions at the outset of this proceeding in their initial Petition.

Significantly, with respect to the knowledge of Intervenors in this proceeding, the terms and issues associated with "Material Control and Accounting" and "Fundamental Nuclear Material Control Plan" are well-known to Glenn Carroll, Diane Curran, and BREDL. During the earlier MOX proceeding on the Construction Authorization Request ("CAR"), Georgians Against Nuclear Energy ("GANE"), the intervenor organization Ms. Carroll then represented, submitted two contentions[29] that were admitted and consolidated by that board regarding the insufficiency of information in the CAR on the design features of the Applicant's MC&A Plan and physical protection systems.[30] In fact, as stated by Dr. Edwin Lyman in his Declaration supporting the Motion, this new contention directly relates to the issues raised during the CAR proceeding.[31] GANE's Contention 1 stated that the CAR "does not contain detailed information on MFFF design features relevant to the ability of [the Applicant] to implement material control and accounting (MC&A) measures capable of meeting or exceeding the regulatory requirements of 10 CFR Part 74, and there is no indication that MC&A considerations were taken into account in the MFFF design."[32] GANE then cited to Sections 13.2.4 and 13.2.5.2(A) of NUREG-1718, "Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility," which requires the Applicant to have an "FNMCP that will meet or exceed the regulatory acceptance criteria in Section 13.2.4," which in turn requires, *inter alia*, item

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[29] "Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site," (Aug. 13, 2001) (ADAMS Accession No. ML012280145) ("GANE Hearing Request").

[30] *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 429 (2001).

[31] Motion at Exhibit 1, "Declaration of Dr. Edwin S. Lyman Regarding Shaw AREVA MOX Services' Application for an Exemption from NRC Material Control and Accounting Regulations," at 7 (# 31-33).

[32] GANE Hearing Request at 2-3.

monitoring sufficient to meet the requirements of 10 C.F.R. § 74.55.[33] GANE went on to state that because the Applicant "has not provided any details about how MC&A considerations were integrated into the design, NRC cannot have confidence that the design of the facility will be conducive to implementation of an FNMCP that can meet its requirements."[34] During that proceeding, GANE was aware that the Applicant would be submitting its FNMC Plan, describing how its MC&A plan would be established, implemented, and maintained with its application for a possession and use license.[35] Further, BREDL was a party in the CAR proceeding as well as this one, and thus should be held to be similarly knowledgeable about MC&A and FNMC Plan issues. Therefore, the references to the separately submitted and withheld FNMC Plan in the cover letter and Application should be viewed as providing appropriate notice to the Intervenors of their need to immediately enter into a protective order and request those documents.

Even if the Board were to find that Intervenors were not aware of the availability of the FNMC plan and associated proposed item monitoring frequency plan proposed by the Applicant after the March 15, 2007 Notice of Opportunity for Hearing, multiple other documents that were disclosed in the Staff's Hearing File or sent directly to the Intervenors provided notice that the Applicant was requesting exemptions from 10 C.F.R. § 74.55(b). These documents, listed in the table in Attachment 1, show there were a number of documents dealing with the Staff's MC&A Requests for Additional Information ("RAIs") and associated responses that detail the exemption request, the Applicant's draft exemption request, and updated FNMC plans. All of

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[33] *Id.* at 3.

[34] *Id.* at 5.

[35] *See e.g.,* MOX Fuel Fabrication Facility Construction Authorization Request, Rev. 2/28/01 at §§ 13.1, 13.2 (ADAMS Accession No. ML010650150); GANE Hearing Request at 5, "The applicant merely asserts that the FNMCP it will provide when it applies for a license application for possession and use of SNM will meet the performance objectives and capabilities for the MFFF MC&A system required by 10 CFR §74.51"; *Duke Cogema*, LBP-04-9, 59 NRC 286, 291-92 (2004) ("At the time of its original filing in February 2001, the CAR did not include any design basis information for either the MC&A or physical protection systems and merely stated the Applicant's commitment to submit the MC&A and physical protection system plans with the anticipated filing of its possession and use license application").

these documents would have given Intervenors the same information needed to form an admissible contention prior to seeing the actual exemption request in the Staff's January 19, 2010 Hearing File. There were also two notices sent to Intervenors related to a November 3, 2009 closed meeting to discuss the Applicant's responses to the Staff's MC&A RAIs, which if Intervenors had requested to attend, would have given them the same information. Thus, as the documents detailed in the table in Attachment 1 go to show, Intervenors have had notice of the exemption going back to at least December 19, 2008.[36] As the Commission has explicitly stated, "a petitioner may not simply wait for the Staff to identify missing information and then ground a new contention on that request."[37]

As the Commission explained in *Oyster Creek*, the Commission's "'requirements for untimely filings and late-filed contentions' are 'stringent.'"[38] "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.'"[39] Here, a review of the publicly available documents would have enabled Intervenors to uncover the existence of relevant documents classified as "Official Use Only" and withheld as security-related information in this

[36] Although "in some cases, a petitioner may base a new contention on an RAI if the RAI or its response raises new information," *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 550 (2009), the information in the RAIs and associated responses do not provide any new information that was not previously available to the Intervenors when the notice of opportunity for hearing was published in the Federal Register.

[37] *Crow Butte*, CLI-09-12, 69 NRC at 550.

[38] *Oyster Creek*, CLI-09-7, 69 NRC at 261 (citations omitted) (quoting *Florida Power & Light Co., FPL Energy Seabrook, LLC, FPL Energy Duane Arnold, LLC, Constellation Energy Group, Inc.* (Calvert Cliffs Nuclear Power Plant, Units 1 & 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30, 33 (2006).

[39] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 386 (2002) (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)).

case. Intervenors in this case understood the requirements for access to documents and the nature of a protective order.[40] Thus, they could have entered into a protective order at the outset or simply requested that the necessary documents be provided to them through another avenue,[41] but failed to do so. Their failure to file a request for a protective order at the outset should not toll the time that the documents are considered to be available to them. Further, even if the Board does not find that the Intervenors had appropriate access to documents such that they were available to them at the outset, the documents were certainly available to them following issuance of the December 31, 2008 protective order. On that date, four of the Intervenors' individual members were afforded access to "Controlled Information"— proprietary, Official Use Only, Sensitive Unclassified Non-Safeguards Information, and other Controlled Information—giving them essentially the same access as they have to publicly available information.[42] Thus, Intervenors should be held to have had appropriate notice about the availability of the FNMC plan and the requested exemption, like the Application itself, when the notice of opportunity for hearing was published in the Federal Register, or at the latest on December 31, 2008, making their new contention untimely.

2. The Information Upon Which Intervenors Base Their New Contention Is Not Materially Different Than That Which Was Previously Available

Intervenors' essential argument in their contention is that the Applicant's exemption request is inadequate, stating that it "provides crude calculations" and "poorly articulated"

[40] Even in a case where a potential intervenor claimed to be "not 'confident'" in its ability to request withheld information, the Commission looked to whether the potential intervenor "even attempted to do so, by making relevant inquiries or otherwise." *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006).

[41] "Under longstanding agency precedent, petitioners or intervenors may request and, where appropriate, obtain – under protective order or other measures – information withheld from the general public for proprietary or security reasons." *USEC*, CLI-06-10, 63 NRC at 460.

[42] Intervenors have made use of this availability to access document four times. *See* NRC Staff Document Disclosure Letters from May 15, 2009 (ADAMS Accession No. ML091340673), June 4, 2009, October 22, 2009, and January 20, 2010.

arguments that "do not adequately justify" the Applicant's exemption request.[43] Further, Intervenors argue that the Applicant fails to "offer any new measures to compensate for the requested time extensions."[44] Therefore, Intervenors challenge lies with the alternate proposed time frames and a lack of adequate justification, rather than with the language of the justifications.

The Applicant's exemption request did not ask for anything new or different because the alternate proposed time frames are the same as in the Applicant's May 2006 FNMC Plan. Instead, the exemption simply provided more explanation and justification for the same requested relaxation of the requirements in 10 C.F.R. § 74.55(b) that existed in Section 2.8.3 of the Applicant's May 2006 FNMC Plan. The fact that less explanation and less justification was provided in the May 2006 FNMC Plan than in the current exemption request, however, does not support a finding that the information is materially different. Logically speaking, if Intervenors believe that the exemption request with more justification and explanation is inadequate, then the initial notification of the relaxation request that contained no justification or explanation was *a fortiori* inadequate. Therefore, the information Intervenors relied on in formulating this contention was not materially different and Intervenors therefore had a regulatory obligation to challenge it in their original Petition.[45]

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[43] Motion at 5.

[44] *Id.*

[45] *See Oyster Creek*, CLI-09-7, 69 NRC 235, where an analogous issue occurred when the intervenors in that case filed a motion to admit a number of new contentions, one of which involved a challenge to a commitment for an enhanced inspection program. The licensing board rejected the new contention because the information in the challenged inspection program was not "new"; the inspection program existed in the license renewal application and the intervenors did not challenge the inspection program in their original petition to intervene. The licensing board found that "[i]mprovements to an existing program cannot be challenged where the existing program was not challenged." *Id.* at 245 (paraphrasing *Oyster Creek*, LBP-06-22, 64 NRC 229, 244-48 (2009)). In upholding the licensing board's decision, the Commission explained that the board's:

> policy concern that conferring an automatic right to file a new contention whenever an applicant improves an existing program might have "the perverse effect of discouraging applicants from enhancing safety, health,

B. Intervenors' New Contention Does Not Meet the Requirements for Admission of a Nontimely Contention

As the Commission has stated, "Section 2.309(c)(2) clearly provides that a petitioner 'shall address' *all* eight factors set forth in section 2.309(c)(1)."[46] Instead of addressing the eight factors, Intervenors merely provided the statement that "Contention 8 satisfies a balancing of the NRC's late-filed contention criteria in 10 C.F.R. § 2.309(c)(i)-(viii)."[47] By failing to address any of the eight factors, especially good cause, Intervenors have failed to comply with the Commission's pleading requirements, and as such, this failure constitutes sufficient grounds for rejecting their Motion.[48]

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> and environmental programs on a voluntary basis." In our view, the Board's statement is sensible. All things being equal, we ought not establish disincentives to improvements. In any event, we find the Board's additional basis for rejecting the new contention to be reasonable:
>
> > [A]s a matter of law and logic, if — as Citizens allege — AmerGen's *enhanced* monitoring program is inadequate, then AmerGen's *unenhanced* monitoring program embodied in its [license renewal application] was *a fortiori* inadequate, and Citizens had a regulatory obligation to challenge it in their original Petition [t]o Intervene.

*Oyster Creek*, CLI-09-7, 69 NRC at 274.

[46] *Id.* at 260 (emphasis added) (quoting *Calvert Cliffs et al.*, CLI-06-21, 64 NRC at 34).

[47] Motion at 7.

[48] *See e.g., Watts Bar*, CLI-10-12, 70 NRC at (slip op. at 4); *Oyster Creek*, CLI-09-7, 69 NRC at 260-61; *Calvert Cliffs et al.*, CLI-06-21, 64 NRC at 34.

## CONCLUSION

For the reasons set forth above, the Staff opposes the admission of this new contention because it does not meet the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) or address the non-timely filing requirements of 10 C.F.R. § 2.309(c)(1).

Respectfully submitted,

**/RA/**

Kimberly A. Sexton
Counsel for the NRC Staff

Dated at Rockville, MD,
this 16th day of April, 2010.