

RAS R-78

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

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ADJUDICATIONS STAFF

Michael C. Farrar, Chair  
Dr. Nicholas G. Trikouros  
Lawrence G. McDade

In the Matter of	)	April 19, 2010
	)	
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
	)	

**ANSWER OF SHAW AREVA MOX SERVICES, LLC OPPOSING  
INTERVENORS' MOTION FOR ADMISSION OF CONTENTION 8**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.309(h)(1), Shaw Areva MOX Services, LLC ("MOX Services") submits this Answer to the Motion for Admission of Contention 8 Regarding Shaw Areva MOX Services' Request for Exemption from Material Control and Accounting Requirements ("Motion for Admission") filed by Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service (collectively referred to as "Intervenors") on March 22, 2010.

Intervenors filed the Motion for Admission seeking the admission of a new contention challenging an exemption request filed by MOX Services. The exemption request challenged by the new contention was filed by MOX Services with the NRC Staff on December 16, 2009, and seeks an exemption from two material control and accountability ("MC&A") requirements contained in Subpart E of 10 C.F.R. Part 74, §

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74.53(b)(1) ("Process monitoring") and § 74.55(b)(1) ("Item monitoring").<sup>1</sup> The NRC Staff has not granted the exemption request, and has indicated that it will not act until the safety evaluation report ("SER") is issued (currently scheduled for December 2010).<sup>2</sup>

As discussed below, the Motion for Admission must be denied as moot and not ripe because: (1) MOX Services intends to withdraw the exemption request; and (2) an exemption request cannot be challenged until the NRC Staff grants it (an event which has not yet occurred).<sup>3</sup>

## II. ANALYSIS

### *A. The Motion for Admission must be denied because the exemption request will be moot and is not ripe for challenge at this time.*

Within the next 30 days, MOX Services intends to submit a letter to the NRC Staff withdrawing its exemption request.<sup>4</sup> MOX Services will promptly serve a copy of any such correspondence to the Board and the Intervenors upon submission to the NRC Staff. In light of this development, it would serve no purpose for the Board to rule on the Motion for Admission based on the existing exemption request. Accordingly, on this basis alone, it would be premature and non-productive for the Board to rule on the admissibility of the pending contention.

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<sup>1</sup> According to the Intervenors, the portion of the exemption request related to "Item Monitoring" cannot be granted because the exemptions requested are not authorized by law, will endanger life or property or the common defense and security, and are not in the public interest as required by 10 C.F.R. § 74.7 ("Specific exemptions"). See Motion for Admission at 4-6. Intervenors have not challenged the portion of the exemption request related to "Process Monitoring."

<sup>2</sup> See Joint Status Update (Mar. 15, 2010).

<sup>3</sup> Furthermore, because the Motion for Admission will be moot and is procedurally premature, it is unnecessary for MOX Services to address the merits of whether the contention is admissible under 10 C.F.R. § 2.309(f)(1).

<sup>4</sup> MOX Services has determined, after additional review, that the requested exemptions are unnecessary. MOX Services' process and item monitoring processes will fully comply with applicable regulations.

Furthermore, an exemption request is not ripe for challenge until the NRC Staff grants it. In *Private Fuel Storage* (“PFS”)<sup>5</sup>, the applicant for a license to construct and operate an independent spent fuel storage installation filed a request with the NRC Staff, on April 2, 1999, for an exemption from certain seismic criteria in Part 72. PFS, 49 NRC at 433-34. In that request, PFS requested that it be allowed to use a probabilistic seismic hazard analysis rather than the deterministic methodology mandated by Section 72.102. *Id.* at 434. On April 30, 1999, the State of Utah filed a motion asking the Board to order PFS to characterize the exemption as a rule waiver application or to permit amendment of one of the contentions that was already admitted in the proceeding. *Id.*

The Board denied Utah’s motion and held that:

the uncertain nature of an exemption request (*i.e.*, that the request may not be granted) counsels that consideration of an exemption-related contention should await Staff action on the exemption. Accordingly, the timeliness of a contention based on an applicant’s exemption request is more properly judged from the time of Staff action on the exemption rather than when the exemption request is filed.

*Id.* at 438. The Commission later cited this holding with approval in CLI-01-12, stating that “[t]he Board determined that the issue would not be ripe until the Staff determined whether to grant the exemption. In its September 2000 SER, the Staff approved the exemption using [the requested] 2000-year return period.” *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 463 (2001) (citations omitted).

When the Board had a second opportunity to rule on whether the PFS exemption request was ripe for challenge, it reiterated that an exemption request cannot be

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<sup>5</sup> *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-99-21, 49 NRC 431 (1999).

challenged until the NRC Staff actually grants it. In December 1999, the NRC Staff issued an SER in which it made clear that, although it was inclined to do so, the NRC Staff was not yet granting the PFS exemption because it needed to consider the revised seismic return period requested by PFS. *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-00-15, 51 NRC 313, 318 (2000). After the SER was issued and despite the clear language stating that the exemption had not been granted, Utah filed a motion to amend one of its contentions to challenge new information in the exemption request. *Id.* at 316. The NRC Staff opposed Utah's motion as being premature in light of the NRC Staff's explicit language in the SER that it had not yet granted the exemption. *Id.* at 317. The Board found that "although the Staff seems inclined to grant the exemption, it has not done so. As a consequence, the ripeness concern upon which we based our earlier ruling continues unabated." *Id.* at 318. Utah was only able to challenge the exemption request after the NRC Staff expressed its intent to grant it in a September 2000 SER. *See Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-01-03, 53 NRC 84; *aff'd & remanded*, CLI-01-12, 53 NRC 459 (2001).

As the case law makes clear, an exemption request cannot be challenged until the NRC Staff expresses its intent to grant it in the SER. In this case, the NRC Staff has yet to act on MOX Services' exemption request. Accordingly, it is not ripe for challenge and the Motion for Admission must be denied.<sup>6</sup>

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<sup>6</sup> By taking this position under the current set of facts, MOX Services is not waiving any argument to be made in response to any other contention that an Intervenor has an "ironclad obligation to examine publicly available documentary material" to formulate a timely contention. *Crow Butte, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 550 (2009),

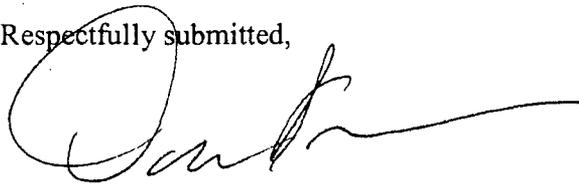
### III. CONCLUSION

Intervenors filed a new contention challenging a portion of an exemption request that will be withdrawn, and that has not been granted by the NRC Staff. The Board in the *PFS* line of cases found that an exemption-related contention is premature until NRC Staff action because of the "uncertain nature of the exemption request." *PFS*, LBP-99-21, 49 NRC at 438. The uncertain nature of an exemption request is demonstrated here by MOX Services' decision to withdraw the exemption request before any NRC Staff action (*i.e.*, while a challenge to the exemption request is premature). Because the exemption request is being withdrawn and the contention was filed before any NRC Staff action, the logic of the *PFS* Board applies here. That is, that until an exemption request is granted by the NRC Staff, it is not ripe for challenge because of the uncertainty involved (*i.e.*, the exemption request may be withdrawn by the applicant or denied by the NRC Staff). Thus, the new contention should not be admitted.<sup>7</sup>

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<sup>7</sup> MOX Services recognizes that Intervenors are required to submit a Reply to the Answer within seven days. 10 C.F.R. § 2.309(h)(2). Should Intervenors desire an extension of time to submit their Reply after MOX Services actually serves its correspondence withdrawing the exemption request, MOX Services would have no objection to extending the date for Intervenors' Answer until seven days after service of that correspondence on the Board and parties.

Respectfully submitted,



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Possession and Use License) )	ASLB No. 07-856-02-MLA
_____ )	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "Answer of Shaw Areva Mox Services, LLC Opposing Intervenor's Motion for Admission of Contention 8" have been served on the following persons on this 19th day of April 2010, by electronic mail and first class mail.

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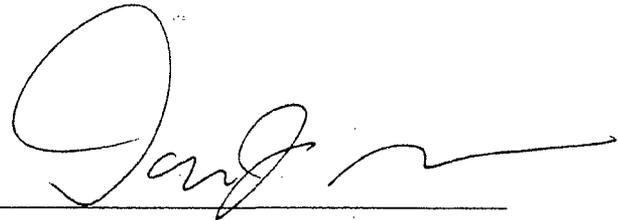
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**Subject:** Answer of Shaw AREVA MOX Services, LLC Opposing Intervenors' Motion for Admission of Contention 8  
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Please see the attached **Answer of Shaw AREVA MOX Services, LLC Opposing Intervenors' Motion for Admission of Contention 8**.

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