

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

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Kaye D. Lathrop
Dr. Craig M. White

In the Matter of

AREVA ENRICHMENT SERVICES, LLC

(Eagle Rock Enrichment Facility)

Docket No. 70-7015-ML

ASLBP No. 10-899-02-ML-BD01

June 4, 2010

ORDER

(Clarifying Initial Scheduling Order)

On May 19, 2010, the Board issued an initial scheduling order (ISO) establishing various milestones for the conduct of the uncontested Subpart G hearing mandated in this case by Section 193(b)(1) of the Atomic Energy Act, 42 U.S.C. § 2243(b)(1) and 10 C.F.R. § 70.23a.¹ The ISO stated that the Board intends to comply with the Commission's instruction that the "Board should issue its decision on . . . the . . . mandatory hearing . . . no later than 28 ½ months (855 days) from the date of this Order" (i.e., by November 15, 2011).² The Board has stated that "if we can beat that date, we will." Tr. at 23 (Judge Karlin). The Board set a schedule designed to achieve that result.

On June 1, 2010, Areva Enrichment Services, LLC (Areva), filed a request for clarification or certification³ "with respect to the schedule of completing the environmental

¹ Initial Scheduling Order (May 19, 2010) (unpublished).

² Notice of Receipt of Application for License; Notice of Consideration of Issuance of License; Notice of Hearing and Commission Order and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation; In the Matter of Areva Enrichment Services, LLC (Eagle Rock Enrichment Facility), CLI-09-15, 74 Fed. Reg. 38,052, 38,052 (July 30, 2009).

³ Request for Clarification or for Certification (June 1, 2010) (Request).

portion of the hearing on uncontested issues.”⁴ Areva complained that “other than the November 15, 2011 deadline, the Order is silent on the timing of the initial decision.” Id. at 1-2. Areva cited the Commission’s statement in the context of early site permit proceedings that “the Commission expects the boards in uncontested cases to issue their final initial decisions generally within 4, and at most 6, months of the Staff’s SER and FEIS issuances.” Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site), CLI-06-20, 64 NRC 15, 25 (2006). Areva asserts that, since the Staff currently estimates that it will issue the FEIS in February 2011,⁵ CLI-06-20 requires that the Board issue its initial decision between June and August of 2011 (e.g., between four and six months after the FEIS). Request at 2. Areva states that, if the Board “declines to adopt a schedule for issuing an initial decision,” then the Board should certify the following question to the Commission for early review: “Did the Commission intend for the 28.5 month milestone schedule or the schedule in CLI-06-20 to apply to this uncontested proceeding?” Id. at 5. For reasons set forth below, we believe that Areva’s question poses a false dichotomy.

The purpose of this order is to clarify our Initial Scheduling Order. As an initial matter, we note that our ISO contemplates a series of concrete and specific actions that are triggered when the Staff issues the FSER and FEIS. None of these specific steps are challenged by Areva. First, each judge reads and studies these substantial documents (600+ pages not including appendices) and the Board meets to assess and discuss the document.⁶ Second, the Board drafts and propounds written questions to the parties concerning these documents. ISO

⁴ Areva states that the NRC Staff takes no position with regard to the Request for Clarification or Certification. Id. at 1 n.2.

⁵ As stated in the ISO, the Staff currently estimates that it will issue the Final Safety Evaluation Report seven months earlier, in August 2010.

⁶ The Board will not stand idle waiting for the Staff to issue the FSER and FEIS. Instead, we intend to familiarize ourselves with key documents, such as the application, the environmental report, and the DEIS, that are available earlier. This will facilitate and expedite our review of the final documents.

at 6. Third, the parties file written answers to these questions. Id. Fourth, the Board studies the written answers. Fifth, the Board informs the parties as to the topics and issues that need to be addressed in the mandatory hearing. Id. Sixth, the parties submit evidence (i.e., written testimony and exhibits) concerning these topics to be covered at the evidentiary hearing. Id. at 6-7.

The foregoing ISO milestones consume approximately thirteen (13) weeks (40+14+21+14 days).⁷ At that point the Board will promptly read the written testimony and exhibits, and determine what remaining questions, if any, it needs to ask at the mandatory evidentiary hearing. The evidentiary hearing will then commence, perhaps as soon as one or two weeks after the parties have filed their testimony and exhibits.

The foregoing actions are necessary in order for the Board to discharge its responsibility “to take an independent ‘hard look’ at NRC Staff safety and environmental findings, but not to replicate NRC Staff work” and “to probe the logic and evidence supporting the NRC Staff findings and decide whether those findings are sufficient to support license issuance.” Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site), CLI-05-17, 62 NRC 5, 34 (2005). As the Commission has stated:

Boards are not to conduct a de novo evaluation of the application, but rather test the adequacy of the staff’s review. In doing so, boards have authority to ask clarifying questions of witnesses, to order the record to be supplemented, to reject the proposed action, or even to deny the construction permit outright, and to set conditions on the approval of the construction permit. As for the actual procedure to be followed at mandatory hearings, licensing board have considerable flexibility.

Id. at 42 (internal citations and quotations omitted).⁸

⁷ The 13 weeks is calculated from the date of issuance of the FSER (or FEIS) to the date the parties file their written testimony and exhibits.

⁸ The “flexibility” may be more limited here, where the application concerns a uranium enrichment facility. This is because the statute dictates that an “adjudicatory [not legislative] hearing on the record” be held for applications for uranium enrichment facilities. Section 193(b)(1) of the Atomic Energy Act, 42 U.S.C. § 2243(b)(1). Likewise, in accordance with the statutory “on the record” requirement, the regulations dictate that hearings regarding uranium

Based on the ISO's milestones, and the Staff's current best estimate that it would issue the FEIS in February 2011, the ISO assumes that the evidentiary hearing regarding environmental issues could occur as early as June 2011.⁹ However, the timing of the evidentiary hearing is dependent on the actual availability of the parties' counsel and witnesses. Thus, the Board instructed the parties to submit calendars specifying the availability of their counsel and witnesses during June, July, and August of 2011. Id. The parties are to provide this information by June 15, 2010. Once we receive this information, the Board intends to schedule the evidentiary hearings at the earliest feasible date.¹⁰

Uncontested evidentiary hearings typically take one to three days. Once the evidentiary hearing is completed and the evidentiary record is closed, the regulations give the parties thirty (30) days within which to file proposed findings of fact and conclusions of law. 10 C.F.R. § 2.712. See also 10 C.F.R. § 2.1209. In addition, the model milestones call for the Board to issue its decision within ninety (90) days of the end of the evidentiary hearing and closing of the record. 10 C.F.R. Part 2 Appendix B (Model Milestones for Subpart G and Subpart L Proceedings). Thus, if the evidentiary hearing on environmental matters was completed as late as August 15, 2011, the model milestones would call for the initial decision to be issued by November 15, 2011. This is entirely consistent with the deadline set by the Commission in CLI-09-15.

The Board will attempt to issue its initial decision before the November 15, 2011 date. The Board hereby rules that the parties shall submit their proposed findings of fact and

enrichment facilities be conducted pursuant to 10 C.F.R. Part 2 Subpart G. 10 C.F.R. § 70.23a. No such provisions apply to ESP applications.

⁹ ISO at 8. In addition, the mandatory evidentiary hearing regarding safety issues, while not currently on the critical path, could occur as early as December 2010. Id.

¹⁰ In light of the Commission's commitment to openness and transparency, as well as its policy of holding hearings in the vicinity of the proposed facility, the Board contemplates holding the evidentiary hearings in the vicinity of Bonneville, Idaho. Thus, the timing of the evidentiary hearings is also somewhat dependent upon securing a suitable and available local venue.

conclusions of law within twenty (20) days of the closing of the record. Further, the Board hopes to issue its initial decision on environmental matters within sixty (60) days of the closing of the record. Thus, assuming that the FEIS is issued in early February 2011, and the evidentiary hearing can be held in early June 2011, we hope to issue the initial decision both within six months of the issuance of the FEIS (e.g., August 2011), and well before November 15, 2011.

Finally, we note that in order to meet (or beat) the November 15, 2011 goal, several conditions must be met. First, as Chairman Jaczko stated herein, the time frames in the schedule are “dependent upon reduced timeframes for the applicant to respond to the staff’s requests for additional information.” CLI-09-15, 70 NRC at 28. He noted that the agency “has no control over either the timeliness or quality of the applicant’s responses to requests for additional information.” Id. Second, the ISO schedule is dependent on when the Staff issues the FSER and FEIS. Third, the schedule is dependent on the quality of the FSER and FEIS. Our job is to take a hard look at these documents and to probe Areva’s and the Staff’s logic and evidence. This schedule assumes that the FSER and FEIS will be of high quality and that Areva and the Staff will have diligently covered all required matters. Fourth, the ISO schedule is dependent upon Areva and the Staff providing high quality filings herein, including fair and complete answers to the Board’s written questions (as outlined above).¹¹ Fifth, the schedule is dependent on the availability of the parties’ counsel and witnesses so that the evidentiary hearings can occur as soon as possible. The parties have yet to inform us of their availability. Sixth, issuing the initial decision within the time frame set by the Commission is dependent upon the diligence and expedited work of this Board.

The sixth element is the only condition within our control.

¹¹ As the Board stated during the prehearing conference, we are somewhat concerned that review of this application, FSER and FEIS may entail review of classified information and/or safeguards information, which require the imposition of additional procedures, and thus delay. Tr. at 47-48. We are committed to managing this process as efficiently as possible.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
AREVA ENRICHMENT SERVICES, LLC) DOCKET NO. 70-7015-ML
(Eagle Rock Enrichment Facility))
)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Board **ORDER (Clarifying Initial Scheduling Order)**, dated June 4, 2010, have been served upon the following persons by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission.
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Alex S. Karlin, Chair
Administrative Judge
alex.karlin@nrc.gov

Catherine Scott, Esq.
clm@nrc.gov
Mauri T. Lemoncelli, Esq.
mauri.lemoncelli@nrc.gov

Kaye D. Lathrop
Administrative Judge
kaye.lathrop@nrc.gov

Carrie M. Safford, Esq.
carrie.safford@nrc.gov
Marcia J. Simon, Esq.
mjs5@nrc.gov

Craig M. White
Administrative Judge
craig.white@nrc.gov

OGC Mail Center
OGCMailCenter@nrc.gov

Anthony C. Eitrem, Esq.
Chief Counsel
ace1@nrc.gov

Megan Wright, Law Clerk
megan.wright@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001

Hearing Docket
hearingdocket@nrc.gov

ocaamail@nrc.gov

AREVA ENRICHMENT SERVICES, LLC (Eagle Rock Enrichment Facility) – 70-7015-ML
ORDER (Clarifying Initial Scheduling Order)

Counsel for AREVA

Winston & Strawn, LLP
1700 K Street, N.W.
Washington, DC 20006
Rachael Miras-Wilson, Esq.
rwilson@winston.com
Carlos Sisco, Sr. Paralegal
csisco@winston.com

Winston & Strawn, LLP
101 California Street
San Francisco, CA 94111
Tyson Smith, Esq.
trsmith@winston.com

Counsel for AREVA

Curtiss Law
P.O. Box 153
Brookeville, MD 20833
James Curtiss, Esq.
curtisslaw@gmail.com

[Original signed by Linda D. Lewis] _____
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 4th day of June 2010