

August 23, 2010

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO PETITIONERS' MOTION FOR ADMISSION OF  
CONTENTIONS 9, 10, AND 11 REGARDING SHAW AREVA MOX SERVICES' REVISED  
FUNDAMENTAL NUCLEAR MATERIAL CONTROL PLAN

INTRODUCTION

On July 26, 2010, intervenors Nuclear Watch South, Blue Ridge Environmental Defense League ("BREDL"), and Nuclear Information and Resource Service (collectively "Intervenors") moved for the admission of three new contentions regarding Shaw AREVA MOX Services' ("Applicant" or "MOX Services") revision to its Fundamental Nuclear Material Control Plan ("Revised FNMCP"), submitted to the NRC in April 2010.<sup>1</sup> For the reasons set forth below, the NRC staff ("Staff") opposes the admission of the new contentions because they neither meet the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) nor do they meet the non-timely filing requirements of 10 C.F.R. § 2.309(c)(1). The Staff does not, however, challenge the Intervenors' satisfaction of the 10 C.F.R. § 2.309(f)(1) contention admissibility standards.

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<sup>1</sup> "Petitioners' Motion for Admission of Contentions 9, 10 and 11 Regarding Shaw AREVA MOX Services' Revised Fundamental Nuclear Material Control Plan" (July 26, 2010) ("Motion").

## 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 Facility (“MFFF”) in Aiken, South Carolina.<sup>2</sup> The Staff published a notice of opportunity for hearing on March 15, 2007.<sup>3</sup> The license application is currently undergoing a safety review by the Staff.

On May 14, 2007, Intervenors filed a petition for intervention and request for hearing (“Petition”) on the license application.<sup>4</sup> The Staff and Applicant filed separate responses on June 11, 2007.<sup>5</sup> 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 and rejecting the other contentions.<sup>6</sup> In response to the Staff’s request for reconsideration of Contentions 3 and 4,<sup>7</sup> 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.<sup>8</sup> On January 25,

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<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> “Petition for Intervention and Request for Hearing” (May 14, 2007).

<sup>5</sup> “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).

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

<sup>7</sup> “NRC Staff’s Response to the Board’s October 31, 2007 Order and Request for Reconsideration” (Nov. 9, 2007).

<sup>8</sup> “Memorandum and Order (Recasting Contention 4 and Suggesting Certain Discussions)” (Jan. 16, 2008).

2008, Petitioners accepted recast Contention 4.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> On July 11, 2008, the Staff filed a request for interlocutory review, specifically requesting that the Commission reverse the Board's two conditions related to its rejection of Contention 7. 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. On February 4, 2009, the Commission granted the Staff's request for interlocutory review, reversed the Board's imposition of the two conditions, affirmed

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<sup>9</sup> "Intervenors' Acceptance of Recast Contention #4" (Jan. 25, 2008).

<sup>10</sup> "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).

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

<sup>12</sup> "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).

<sup>13</sup> *Shaw AREVA MOX Services, LLC* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460 (2008).

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, Intervenor 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."<sup>14</sup>

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."<sup>15</sup> There have been five such joint status reports, and the last one stated that: (1) the Staff is still engaged in its review of the Application and drafting its SER; (2) the Staff expects to present a draft copy of the SER to the Advisory Committee on Reactor Safeguards for review in September 2010; and (3) the Staff expects to release the final SER by December 2010.<sup>16</sup>

On March 22, 2010, Intervenor filed a motion, along with a supporting declaration from Dr. Edwin S. Lyman, to admit a new contention regarding MOX Services' December 17, 2009, application for an exemption from 10 C.F.R. § 74.55(b)(1), *Item monitoring*.<sup>17</sup> The Staff opposed the admission of Contention 8 because it did not meet the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) nor did it address the non-timely filing requirements of 10 C.F.R. § 2.309(c)(1). Specifically, the Staff stated that both the information upon which the Intervenor base their new Contention 8 and the information related to the

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<sup>14</sup> *Shaw AREVA MOX Services, LLC (Mixed Oxide Fuel Fabrication Facility)*, CLI-09-2, 69 NRC 55 (2009).

<sup>15</sup> "Memorandum and Order (Directing the Filing of Status Reports)" (Oct. 9, 2009).

<sup>16</sup> NRC Staff Fifth Status Update (July 13, 2010).

<sup>17</sup> "Petitioners' Motion for Admission of Contention 8 Regarding Shaw AREVA MOX Services' Request for Exemption from Material Control and Accounting Requirements" (Mar. 22, 2010).

Applicant's inability to satisfy 10 C.F.R. § 74.55(b)(1) have been available since March 15, 2007; therefore, the Staff argued that the information was not timely filed and, as such, that the Intervenor could not satisfy the 10 C.F.R. § 2.309(f)(2) requirements for a late-filed new contention. MOX Services, on the other hand, opposed the admission of Contention 8 as moot, because it intended to withdraw the exemption request, and not ripe, because it stated that an exemption request cannot be challenged until the NRC Staff grants it, which had yet to occur.<sup>18</sup> On May 17, 2010, the Applicant withdrew its request for an exemption from aspects of process and item monitoring requirements and served copies of its Revised FNMCP on the parties.<sup>19</sup> On May 24, 2010, Intervenor withdrew Contention 8.<sup>20</sup> On July 26, 2010, Intervenor submitted the instant Motion, along with a supporting declaration from Dr. 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 are to be filed. 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*;
- (ii) the information upon which the amended or new contention is based is *materially different* than information previously available; and
- (iii) the amended or new contention has been submitted in a *timely fashion* based on the availability of the subsequent information.

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<sup>18</sup> "Answer of Shaw AREVA MOX Services, LLC Opposing Intervenor's Motion for Admission of Contention 8" (Apr. 19, 2010).

<sup>19</sup> "Certificate of Service" (May 17, 2010).

<sup>20</sup> "Intervenor's Response to Shaw AREVA MOX Services' Withdrawal of Exemption Application and Withdrawal of Contention 8" (May 24, 2010).

10 C.F.R. § 2.309(f)(2) (emphasis added).

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 non-timely contentions, 10 C.F.R. § 2.309(c). Non-timely 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;
- (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.<sup>21</sup> Where no showing of good cause for the lateness is tendered, "petitioner's demonstration on the other factors must be particularly strong."<sup>22</sup> In fact, the

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<sup>21</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

<sup>22</sup> *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)).

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.”<sup>23</sup>

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 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 Contentions Were Not Submitted in a Timely Fashion Based on the Availability of Subsequent Information

Intervenors state that the new contentions are timely filed because they are based on information that is materially different from information that was previously available to Intervenors.<sup>24</sup> Specifically, Intervenors point to three documents<sup>25</sup> as providing information that “not only is the design of the proposed MOX Facility inadequate to support item verification and

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<sup>23</sup> *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-12, 70 NRC \_\_\_\_ (Mar. 26, 2010) (slip op. at 4).

<sup>24</sup> Motion at 16.

<sup>25</sup> The Intervenors identify these documents: (1) the Applicant’s December 17, 2009, Exemption Request, (2) the Applicant’s May 17, 2010, Notice of Withdrawal of Exemption Request, and (3) the Applicant’s October 7, 2009, and December 17, 2009, response to the Staff’s February 26, 2009 RAI’s.

alarm resolution, but that [the Applicant] has no plans to correct its design problems.”<sup>26</sup>

Intervenors state that they submitted their contentions within 60 days of May 27, 2010, the date they received a number of requested documents from the Staff.<sup>27</sup>

Intervenors’ new Contentions 9, 10, and 11, however, were not submitted in a timely fashion based on the availability of subsequent information. Instead of filing 60 days after May 27, 2010, which Intervenors did, they should have filed within 60 days of May 17, 2010, the date they received the revised FNMCP.

Intervenors attempt to make a cumulative argument in support of their satisfaction of the NRC’s timeliness standards: the Intervenors essentially argue that it is not simply the information in a single document, but rather the sum total of information in all the requested documents that informed their new Contentions 9, 10, and 11. But, this argument is unavailing. While Intervenors did not *receive* many of the “documents that could provide insights into the reasons for SAMS’ action”<sup>28</sup> until May 27, 2010, the Motion is still non-timely because Intervenors had the *ability to attain* the documents they requested well before May 27, 2010.<sup>29</sup> “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

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<sup>26</sup> Motion at 16.

<sup>27</sup> These documents include the December 2009 FNCMP, the December 17, 2009 formal responses to the Staff’s RAIs, the October 7, 2009 draft RAI Responses and draft Exemption Request, the Staff’s February 26, 2009 formal RAIs, and the Applicant’s original 2006 FNMCP. The full list of documents can be found in the Staff’s May 27, 2010 Letter to Counsel for the Intervenors transmitting the documents.

<sup>28</sup> Motion at 16.

<sup>29</sup> The Board adopted the parties’ previously agreed to protective order on December 31, 2008, wherein 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. (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.) Thus, Intervenors have had notice about the availability of the requested documents since those documents were disclosed in the Staff’s 30-day hearing file.

uncover any information that could serve as the foundation for a specific contention.”<sup>30</sup> Further, 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.”<sup>31</sup> The chart below details the documents referenced by Intervenors as supporting their new contentions<sup>32</sup> and the dates in which they were disclosed by the Staff and thus made available to the Intervenors:

SE No.	Accession Number	Title/Description	Document Date	Disclosure Date
SE-18-02	ML093561015	Request for Exemption from Aspects of Process and Item Monitoring. <sup>33</sup>	12/17/2009	1/19/2010
SE-18-03	ML093570532	Shaw AREVA MOX Services, LLC - Responses to Requests for Additional Information re Review of Fundamental Nuclear Material Control Plan & Instrumentation & Control Security Aspects for License Application Request.	12/17/2009	1/19/2010
SE-18-04	ML093570533	MOX Fuel Fabrication Facility Material Control & Accounting & Fundamental Nuclear Material Control Plan, Enclosure 2.	12/17/2009	1/19/2010
SE-15-07	ML092870426	2009/10/07 MFFF - FW: Draft MC&A Responses, MC&A Plan, Exemption Request (ouo)	10/07/2009	10/19/2009
SE-08-03	ML090160570	Enclosure 1 re: RAI-OUO, Fundamental Nuclear Material Control Plan MOX Fuel Fabrication Facility Application Dated September 27, 2006.	02/26/2009	3/19/2009
N/A	ML062860340	MOX Fuel Fabrication Facility (MFFF) Material Control and Accounting (MC&A) Fundamental Nuclear Material Control (FNMC) Plan General Discussion, Revision.	05/31/2006	

<sup>30</sup> *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)). See also *MOX Services*, CLI-09-2, 69 NRC 55, fn. 47 (2009).

<sup>31</sup> *Crow Butte Resources, Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC 535, 550 (2009).

<sup>32</sup> Motion at 16.

<sup>33</sup> The December 17, 2009 Exemption Application is referenced by Intervenors, however, that document was mailed to Intervenors on January 20, 2010 and received “on or about January 21, 2010.” Motion at 16, fn. 3.

Because Intervenor's new contentions are grounded in the Revised FNMCP,<sup>34</sup> which was hand-delivered on May 17, 2010,<sup>35</sup> Intervenor should have filed their new contentions within 60 days of that date: July 16, 2010. By filing on July 26, 2010, Intervenor's Motion is 10 days late.

III. Intervenor's New Contentions Do Not Meet the Requirements for Admission of a Non-timely 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)."<sup>36</sup> While Intervenor addressed seven out of the eight factors, they failed to address the fourth factor: the possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest. By failing to address one of the eight factors, Intervenor has failed to comply with the Commission's "stringent" pleading requirements for non-timely contentions,<sup>37</sup> and as such, this failure constitutes sufficient grounds for rejecting their Motion.<sup>38</sup>

Even if the Board were to overlook this deficiency, Intervenor's argument that there is good cause for their failure to file on time is misplaced. Intervenor base their good cause

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<sup>34</sup> See e.g., Motion at 2 ("In its Notice of Withdrawal, SAMS claims that it no longer believes that an exemption from the MC&A regulations is needed because 'the existing Mixed Oxide Fabrication Facility design, programs and controls satisfy the requirements of 10 CFR Part 74, Subpart E.' As demonstrated in Contentions 9, 10, and 11, however, SAMS is incorrect.") and Motion at 3 ("The issues raised by Contentions 9, 10, and 11 all relate to the adequacy of the FNCMP's [sic] measures for accounting for plutonium at the MOX Facility, whether it is located in containers or in the equipment that processes it.")

<sup>35</sup> "Certificate of Service" (May 17, 2010) from MOX Services stating that a Withdrawal of Request for Exemption from Aspects of Process and Item Monitoring and the Revised FNMCP have been served by hand-delivery to counsel for the Intervenor on May 17, 2010.

<sup>36</sup> *Oyster Creek*, CLI-09-7, 69 NRC at 260 (emphasis added) (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).

<sup>37</sup> *Id.* at 260 (citations omitted) (quoting *Calvert Cliffs et al.*, CLI-06-21, 64 NRC at 33).

<sup>38</sup> 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.

argument on their failure to file much earlier in the proceeding, as opposed to the 10-day delay between the July 16, 2010 date, in which they should have filed, and the July 26, 2010 date they did file. Even if Intervenor were to attempt a good faith argument for the 10-day delay, the Staff doubts it would be much different than the situation in *North Atlantic Energy Service, Corp., et al.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201 (1999), where the Commission found a petitioner lacked good cause for a hearing request filed seven days after the filing deadline when the argument relied on a “misimpression” of due dates.<sup>39</sup>

Further, Intervenor’s argument that “it was reasonable and consistent with Commission policy of limiting public access to SUNSI for them to avoid requesting the FNMCP or any other information classified as SUNSI until it became clear that it was necessary in order to resolve their concerns”<sup>40</sup> is without merit. There is neither any such policy underlying the protective order nor any such expectation for parties who have signed a nondisclosure agreement. Therefore, Intervenor has failed to satisfy the 10 C.F.R. § 2.309(c) requirements for the filing of a non-timely new contention.

#### VI. Contention Admissibility

Should the Board find that Contentions 9, 10, and 11 meet either the 10 C.F.R. § 2.309(f)(2) timeliness requirements or the 10 C.F.R. § 2.309(c) late-filed contention criteria, the Staff would not oppose the admission of the contentions to the extent that they are understood as limited to the bases articulated below.<sup>41</sup>

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<sup>39</sup> *Seabrook*, CLI-99-6, 49 NRC at 223 (“We cannot agree that United’s failure to read carefully the governing procedural regulations constitutes good cause for accepting its late-filed petition.”).

<sup>40</sup> Motion at 17.

<sup>41</sup> See e.g., *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), CLI-10-05, 70 NRC \_\_\_ (Jan. 7, 2010) (slip op. at 14) (“The scope of a contention is limited to issues of law and fact pled with particularity in the intervention petition, including its stated bases, unless the contention is satisfactorily amended in accordance with our rules. Otherwise, NRC adjudications quickly would lose order. Parties and licensing boards must be on notice of the issues being litigated, so that parties and boards may prepare for summary disposition or for hearing. Our procedural rules on contentions are designed to ensure focused and fair proceedings.”)

A. Intervenors' New Contention 9

Intervenors' new Contention 9 states that the Applicant's Revised FNMCP does not satisfy 10 C.F.R. § 74.55(b)(1) because it does not demonstrate that the item monitoring program has the capability to verify, on a statistical sampling basis, the presence and integrity of strategic special nuclear material ("SSNM"). Specifically, the Intervenors state that the Applicant has failed to make a showing that it complies with § 74.55(b)(1) in two respects: (1) the Applicant fails to explain how its Manufacturing Management and Information System ("MMIS") Item Procedure meets § 74.55(b)(1)'s requirement to verify the "integrity" of SSNM and (2) the Applicant fails to provide any quantitative details related to the verification procedure such that a determination can be made as to whether the verification frequency is sufficient to meet the requirements of § 74.55(b)(1). Further, Intervenors state that the Applicant's December 17, 2009, Exemption Request, the Staff's February 26, 2009, Request for Additional Information ("RAI"), and the Applicant's continued reliance on the apparently unchanged 2006 Perpetual Inventory Report all show that the Applicant is not in compliance with § 74.55(b)(1).

B. Intervenors' New Contention 10

Intervenors' new Contention 10 states that the Applicant's Revised FNMCP is inadequate to satisfy the alarm resolution requirements of 10 C.F.R. § 74.57(b), specifically stating that the Applicant has not demonstrated that it can meet its commitment to normally resolve a Material Control and Account ("MC&A") alarm within three working days. Intervenors base this contention on the same information underlying its Contention 9: that Applicant's December 17, 2009, Exemption Request was an admission it could not verify the presence and integrity of SSNM within the 30-day and 60-day time periods required by 10 C.F.R. § 74.55(b)(1) and, as such, cannot credibly meet its FNMCP commitment.

C. Intervenors' New Contention 11

Intervenors' new Contention 11 states that the Applicant has not demonstrated that it satisfies 10 C.F.R. § 74.57(e) because it fails to provide support for the timeframes it advanced

in its Revised FNMCP, at § 3.3.1.6, for rapidly assessing the validity of alleged thefts of SSNM. Intervenor's base this contention on the same information underlying its Contention 9 that Applicant's December 17, 2009, Exemption Request was an admission it could not verify the presence and integrity of SSNM within the 30-day and 60-day time periods required by 10 C.F.R. § 74.55(b)(1) and, as such, cannot credibly meet its Revised FNMCP commitment.

CONCLUSION

For the reasons set forth above, the Staff opposes the admission of new Contentions 9, 10, and 11 because they do not meet the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) nor do they meet the non-timely filing requirements of 10 C.F.R. § 2.309(c)(1). The Staff does not, however, challenge the Intervenor's satisfaction of the 10 C.F.R. § 2.309(f)(1) contention admissibility standards.

Respectfully submitted,

**/RA/**

Kimberly A. Sexton  
Counsel for the NRC Staff

Dated at Rockville, MD,  
this 23rd day of August, 2010.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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SHAW AREVA MOX SERVICES	)	Docket No. 70-3098-MLA
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(Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 07-856-02-MLA-BD01

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO PETITIONERS' MOTION FOR ADMISSION OF CONTENTIONS 9, 10, AND 11 REGARDING SHAW AREVA MOX SERVICES' REVISED FUNDAMENTAL NUCLEAR MATERIAL CONTROL PLAN" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (\*); and by electronic mail as indicated by a double asterisk (\*\*) on this 23rd day of August, 2010:

Michael C. Farrar, Chair \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Mike.Farrar@nrc.gov

Lawrence G. McDade \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Lawrence.McDade@nrc.gov

Dr. Nicholas G. Trikouros \* \*\*  
Administrative Judge  
Atomic Safety and Licensing Board Panel  
Mail Stop – T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Nicholas.Trikouros@nrc.gov

Office of Commission Appellate  
Adjudication \* \*\*  
Mail Stop O-7 H4M  
U.S. Nuclear Regulatory Commission  
Washington, D.C 20555  
E-mail: OCAAMAIL.Resource@nrc.gov

Katherine Tucker \* \*\*  
Board Law Clerk  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: Katherine.Tucker@nrc.gov

Office of the Secretary \* \*\*  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
E-mail: Hearing.Docket@nrc.gov

Glenn Carroll \*\*  
Coordinator  
Nuclear Watch South  
P.O. Box 8574  
Atlanta, GA 31106  
E-mail: Atom.girl@mindspring.com

Louis A. Zeller \*\*  
Blue Ridge Environmental Defense League  
P.O. Box 88  
Glendale Springs, N.C. 28629  
E-mail: BREDL@skybest.com

Donald J. Silverman, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
E-mail: dsilverman@morganlewis.com

Timothy P. Matthews, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
E-mail: tmatthews@morganlewis.com

Shaw AREVA MOX Services \*\*  
Attn: Dealis Gwyn  
P.O. Box 7097  
Aiken, S.C. 29804

Mary Olson \*\*  
Nuclear Information and Resource Service  
P.O. Box 7586  
Asheville, N.C. 28802  
E-mail: maryolson@main.nc.us

Diane Curran, Esq. \*\*  
Harmon, Curran, Spielberg, & Eisenberg, LLP  
1726 M Street, N.W., Suite 600  
Washington, DC 20036  
E-mail: dcurran@harmoncurran.com

Alvin H. Gutterman, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
E-mail: agutterman@morganlewis.com

Anna V. Jones, Esq. \*\*  
Morgan Lewis and Bockius, LLP  
1111 Pennsylvania Ave., N.W.  
Washington, DC 20004  
E-mail: anna.jones@morganlewis.com

Patrisha Harich \* \*\*  
ASLBP Program Analyst  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555

*/RA/*

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Kimberly A. Sexton  
Counsel for the NRC Staff