LBP-11-09

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
Nicholas G. Trikouros
Lawrence G. McDade

In the Matter of	Docket No. 70-3098-MLA
SHAW AREVA MOX SERVICES	ASLBP No. 07-856-02-MLA-BD01
(Mixed Oxide Fuel Fabrication Facility)	April 1, 2011

MEMORANDUM AND ORDER
(Admitting New Contentions 9, 10, and 11)

This proceeding arises out of the application of Shaw AREVA MOX Services (Applicant) for a license to possess and to use byproduct material, source material, and special nuclear material (SNM) at its proposed mixed oxide fuel fabrication facility at the Savannah River Site, which is overseen by the Department of Energy and is located near Aiken, South Carolina.[1] Before the Board is the motion of Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service (collectively, Intervenors) to admit three

[1] Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750195); see also Letter from David Stinson, President and COO, Duke Cogema Stone & Webster, to U.S. Nuclear Regulatory Commission, Duke Cogema Stone & Webster Mixed Oxide Fuel Fabrication Facility Submittal of License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750194) [hereinafter Sept. 27, 2006 Application Letter]; 10 C.F.R. § 70.22(b) (requiring an application to contain a full description of the applicant's program for control and accounting of special nuclear material to show how it will comply with the 10 C.F.R. Part 74 requirements). The Applicant subsequently submitted a revision to its application. See Mixed Oxide Fuel Fabrication Facility License Application (Nov. 17, 2006) (ADAMS Accession No. ML070160311).

new contentions, Contentions 9, 10, and 11, challenging the adequacy of Applicant's April 2010 revision to its Fundamental Nuclear Material Control Plan (2010 FNMCP).[2]

In these contentions, the full text of which appears in a non-public Appendix which we are issuing separately from this decision,[3] Intervenors allege that the 2010 FNMCP fails to comply with the NRC's material control and accounting (MC&A) regulations contained in 10 C.F.R. Part 74. These regulations set monitoring frequency and alarm resolution requirements that are designed to detect abrupt losses (e.g., theft), and to enable verification of the presence and integrity of plutonium and other SNM.[4]

Both the Applicant and the NRC Staff concede that these new contentions meet the Agency's substantive pleading requirements,[5] but they oppose admission of the contentions as untimely submitted.[6] Applicant asserts that Intervenors filed these contentions over three years late,[7] while the NRC Staff's view is that Intervenors filed them only ten days late.[8]

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[2] Petitioners' Motion for Admission of Contentions 9, 10, and 11 Regarding Shaw MOX Areva Services' Revised Fundamental Nuclear Material Control Plan (July 26, 2010) [hereinafter Motion].

[3] Because the new contentions necessarily involve sensitive unclassified non-safeguards information (SUNSI), and consistent with our commitment to limit, to the extent practicable, direct reference to protected information in our rulings, the full text of the contentions must be withheld from the public. See Licensing Board Order (Granting Joint Motion Regarding SUNSI Disclosure Procedures and Requesting Appointment of SUNSI Expert) (Dec. 21, 2010) at 2 (unpublished).

[4] See Motion at 1-2; 10 C.F.R. Parts 70 & 74.

[5] Tr. at 722.

[6] Shaw Areva MOX Services LLC's Answer to Intervenors' Motion for Admission of Contentions 9, 10, and 11 (Aug. 23, 2010) at 2 [hereinafter Applicant Answer]; 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 (Aug. 23, 2010) at 1, 8 [hereinafter Staff Answer].

[7] Applicant Answer at 15.

[8] Staff Answer at 8, 10.

For the reasons explained below, a Majority of the Board (Judges Farrar and Trikouros) grants Intervenors' motion, finding that nontimeliness concerns do not bar admission of the proffered contentions. Specifically, contrary to the view of the Applicant (and of our dissenting colleague Judge McDade[9]), we conclude that the 2010 FNMCP is materially different from the plan that accompanied Applicant's original submission in 2006, and that Intervenors' new contentions could not have been based on that earlier plan. As to the Staff's argument, we conclude that, while Intervenors may have made a ten-day miscalculation of the date that triggered the filing deadline, they have demonstrated good cause for taking that approach, and a balance of the other relevant factors also favors admission of their contentions.

I. BACKGROUND

On November 17, 2006, Applicant submitted its application for possession and use of byproduct, source, and special nuclear material at the proposed facility,[10] thereby commencing the second step in the facility licensing process.[11] The first step, taken in 2001, involved submission by the Applicant (formerly Duke Cogema Stone and Webster[12]) of a construction authorization request (CAR) for the proposed facility.[13] In March of 2005, the NRC authorized construction of the facility.[14]

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[9] See Dissenting Opinion of Judge Lawrence G. McDade (April 1, 2011) [hereinafter Dissent].

[10] 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, 12,204 (Mar. 15, 2007).

[11] See LBP-07-14, 66 NRC 169, 175 (2007).

[12] Id. at 176 n.5; 72 Fed. Reg. at 12,204.

[13] See Notice of Acceptance for Docketing of the Application, and Notice of Opportunity for a Hearing, on an Application for Authority to Construct a Mixed Oxide Fuel Fabrication Facility, 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001).

[14] 72 Fed. Reg. at 12,204; see Duke Cogema Stone & Webster, Docket No. 70-3098, Mixed Oxide Fuel Fabrication Facility Construction Authorization, Construction Authorization No.

Some of the Intervenors and their representatives in the instant proceeding also participated in the prior CAR proceeding.[15] One of the contentions submitted therein claimed that the CAR omitted necessary design information regarding the proposed facility's MC&A monitoring system, and that instead it "merely stated the Applicant's commitment to submit the MC&A and physical protection system plans" later, i.e., "with the anticipated filing of its possession and use license application."[16] The Licensing Board presiding over that proceeding then dismissed the contention for mootness upon Applicant's submission of CAR revisions, which contained supplemental MC&A design information supporting later development of an FNMCP that presumably would meet the MC&A regulations.[17]

When Applicant submitted its current application – in effect a very early request for an operating license – on November 17, 2006, construction of the proposed facility had not yet begun.[18] As it turned out, that construction, albeit authorized in March 2005, did not commence until August of 2007. It is scheduled for completion in 2014.[19]

Applicant included with its 2006 license application a plan (the 2006 FNMCP), which addressed MC&A design information, a subject that is a central focus of the proposed new

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CAMOX-001 (Mar. 30, 2005) (ADAMS Accession No. ML050660392) [hereinafter Construction Authorization].

[15] LBP-07-14, 66 NRC at 175.

[16] Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-04-9, 59 NRC 286, 291-92 (2004); see also Duke Cogema Stone & Webster (Savannah River Mixed Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 410 (2001); LBP-07-14, 66 NRC at 177.

[17] LBP-04-9, 59 NRC at 293; see also Intervenors' Reply to Shaw MOX Areva Services' and NRC Staff's Responses to Contentions 9, 10 and 11 Regarding Revised Fundamental Nuclear Material Control Plan (Aug. 30, 2010) at 6 n.3 [hereinafter Reply].

[18] See LBP-08-11, 67 NRC 460, 468 (2008).

[19] See id.

contentions.[20] The 2006 FNMCP was withheld from public disclosure as "sensitive unclassified non-safeguards information" (SUNSI).[21]

On March 15, 2007, the NRC published a notice of opportunity to request a hearing regarding the application.[22] Shortly thereafter, Intervenors obtained a copy of the application itself.[23] The Intervenors maintain that they took guidance from, and relied upon, a ruling in the CAR proceeding that the FNMCP would be developed in accordance with agency regulations. As a result, Intervenors did not make a special SUNSI request for a copy of the underlying nonpublic 2006 FNMCP.[24] At the time, the Intervenors had not retained counsel; rather, they functioned pro se in preparing their intervention petition,[25] not retaining counsel to represent them until mid-February, 2008.[26]

On May 14, 2007, Intervenors timely filed their petition for intervention and request for hearing on the application, in which they submitted several contentions, none of which dealt with the subject of the now-proffered contentions.[27] In a decision issued on October 31, 2007, we found that Intervenors had standing to participate in this proceeding as parties and admitted two

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[20] See Sept. 27, 2006 Application Letter at 1.

[21] See id.

[22] 72 Fed. Reg. at 12,204, 12,206. The notice of opportunity for hearing referenced a cover letter associated with the application that listed the 2006 FNMCP as a supporting, but not publicly available, document associated with the application. See 72 Fed. Reg. at 12,206; Sept. 27, 2006 Application Letter at 1.

[23] Motion at 5; see LBP-07-14, 66 NRC at 174-75.

[24] See Motion at 5; Reply at 6.

[25] See Petition for Intervention and Request for Hearing, Attachment, Certificate of Service (May 14, 2007).

[26] See Letter from Diane Curran, to Licensing Board, Filing in MOX Plutonium Fuel Fabrication Facility Licensing Proceeding, Docket No. 70-3098 (Feb. 12, 2008), Enclosure 1, Notice of Appearance by Diane Curran and Notice of Withdrawal of Appearances by Glenn Carrol, Louis A. Zeller, and Mary Olson (Feb. 11, 2008).

[27] See LBP-07-14, 66 NRC at 174-75.

of their contentions, Contentions 3 and 4, for hearing.[28] Later, the Board dismissed Contention 3 as well as a new Contention 6; recast Contention 4; and imposed conditions regarding submission of new or amended contentions addressing issues raised in original Contention 7.[29]

At that early stage, the Board set forth a filing ground-rule for future contentions, establishing that the Board would consider new or amended contentions to be timely under 10 C.F.R. § 2.309(f)(2) if filed within 60 days of any "triggering event."[30] We established 60 days, as opposed to the typical 30 days, for the express purpose of providing a reasonable and practical time frame for the Intervenors to research and to analyze new developments in this complex and evolving proceeding.[31] On February 4, 2009, the Commission affirmed the Board's rule that new contentions would be deemed timely under Section 2.309(f)(2) if filed within 60 days after pertinent information first becomes available.[32]

The question before us involves compliance with that time period insofar as new Contentions 9, 10, and 11 are concerned. For that purpose, and within the framework of the broader legal standards that apply to such a situation (see Part II, Legal Standards), the relevant facts are as follows:

On February 26, 2009, the NRC Staff sent the Applicant a Request for Additional Information (RAI).[33] In the RAI, the NRC Staff requested a revision of the 2006 FNMCP that

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[28] See id. at 190, 214.

[29] See LBP-08-11, 67 NRC at 464.

[30] Id. at 493.

[31] Id. at 493-94.

[32] CLI-09-2, 69 NRC 55, 58 (2009).

[33] See Enclosure 1 re: RAI-OUO, Fundamental Nuclear Material Control Plan MOX Fuel Fabrication Facility Application Dated September 27, 2006 (Feb. 26, 2009) (ADAMS Accession No. ML090160570).

would sufficiently meet the regulatory requirements of 10 C.F.R. Part 74.[34] Applicant responded to the RAI by stating that it planned to request an exemption from certain Part 74 requirements.[35]

On December 17, 2009 Applicant submitted its request to exempt the facility from certain of the agency's 10 C.F.R. Part 74 MC&A regulations.[36] Applicant stated that the exemptions were necessary, because it could not meet certain specific requirements set forth in 10 C.F.R. Part 74.[37]

On March 22, 2010, Intervenors filed a motion to admit a new contention, Contention 8, challenging Applicant's exemption request.[38] The proffered contention was supported by a declaration from Dr. Edwin S. Lyman.[39]

The NRC Staff opposed admission of Contention 8, claiming that it failed to satisfy the requirements for a new or amended contention under 10 C.F.R. § 2.309(f)(2) and the nontimely

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[34] Id. at 13-18.

[35] Draft MC&A Responses, MC&A Plan, Exemption Request (Oct. 7, 2009) Enclosure at 1-5 RAI Response Summary Chart at 21, 26 (ADAMS Accession No. ML092870426); Shaw AREVA MOX Services, LLC – Responses to Requests for Additional Information re the Review of Fundamental Nuclear Control Plan & Instrumentation & Control Security Aspects for License Application Request (Oct. 17, 2009) Enclosure 1 at unnumbered 12,17 (ADAMS Accession No. ML093570532).

[36] See Request for Exemption from Aspects of Process and Item Monitoring (Dec. 17, 2009) (ADAMS Accession No. ML093561015).

[37] Id. at 6, Enclosed Exemption Request at 3 ("MOX Services cannot satisfy these [requirements].") [the nature of these requirements is SUNSI protected: we direct the parties' and the Commission's attention to the specific nature of those requirements as reflected in the cited documents].

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

[39] See id., Exh. 1, Declaration of Dr. Edwin S. Lyman Regarding Shaw AREVA MOX Services' Application for an Exemption from NRC Material Control and Accounting Regulations (Mar. 22, 2010).

filing requirements of 10 C.F.R. § 2.309(c).[40] Specifically, the NRC Staff stated that both the information upon which the Intervenors based Contention 8 and the information related to the Applicant's inability to satisfy 10 C.F.R. Part 74 requirements was contained in the 2006 FNMCP and had been available since March 15, 2007 – the date of publication in the Federal Register of the notice of availability of the 2006 application and opportunity to request a hearing.[41] While the NRC Staff asserted that the contention was late,[42] Applicant opposed admission of Contention 8 as both: (1) not ripe, on the theory that an exemption request cannot be challenged until the NRC Staff grants it;[43] and (2) moot, because the Applicant intended to withdraw the exemption request.[44]

On May 17, 2010, Applicant indeed withdrew its request for an exemption.[45] On that same date, Applicant presented a revised Fundamental Nuclear Material Control Plan (2010 FNMCP); this was served on the Intervenors in accordance with the December 31, 2008, Protective Order, governing the exchange of non-public information, that we issued after

[40] NRC Staff Response to Petitioners' Motion for Admission of Late-Filed Contention 8 (Apr. 16, 2010) at 1.

[41] See id. at 7-14; 72 Fed. Reg. at 12,204.

[42] See NRC Staff Response to Petitioners' Motion for Admission of Late-Filed Contention 8 (Apr. 16, 2010) at 7.

[43] These diverging positions of the Staff and the Applicant recall the Board Chairman's concurrence in LBP-08-11, 67 NRC at 497, 503-04, where he discussed a "prematurity/belatedness dilemma" concerning the impact of the inconsistency between alternative arguments of the Applicant and the NRC Staff that a proffered contention is filed on the one hand too early and on the other hand too late. Id. at 504-05.

[44] Answer of Shaw AREVA MOX Services, LLC Opposing Intervenors' Motion for Admission of Contention 8 (Apr. 19, 2010) at 2.

[45] Certificate of Service (May 17, 2010) (ADAMS Accession No. ML1014503590) (providing notice withdrawal of request for exemption from aspects of process and item monitoring, and service of the 2010 FNMCP).

granting Intervenors' intervention petition.[46] On May 24, 2010, in recognition of the Applicant's action, Intervenors withdrew Contention 8 and notified the Board of their plans to gather pertinent information to determine whether to submit new contentions.[47] On July 26, 2010, Intervenors submitted the instant motion, proffering new Contentions 9, 10, and 11, along with a supporting declaration from Dr. Lyman, which supersedes Contention 8 and its associated declaration of Dr. Lyman.[48]

On August 23, 2010, both the NRC Staff and Applicant submitted their answers opposing the contentions, but only on timeliness grounds, not on substantive ones.[49] Specifically, as noted at the outset (page 2, above), Applicant claims that Intervenors filed these contentions over three years late, while the NRC Staff argues that Intervenors filed them ten days late.[50] Intervenors submitted their reply on August 30, 2010.[51]

We held oral argument on October 26, 2010.[52] During the oral argument, we provided an opportunity for the parties to submit supplemental briefing addressing the timeliness of Contentions 9, 10, and 11, and the differences between the original 2006 FNMCP and the revised 2010 FNMCP.[53] Intervenors submitted their supplemental brief on November 15, and

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[46] Id.; see also LBP-07-14, 66 NRC at 175, 214; Licensing Board Order (Adopting Protective Order (Dec. 31, 2008) (unpublished).

[47] Intervenors' Response to Shaw AREVA MOX Services' Withdrawal of Exemption Application and Withdrawal of Contention 8 (May 24, 2010) at 1-2.

[48] See Motion; Declaration of Dr. Edwin S. Lyman in Support of Intervenors' Contentions 9, 10, and 11 (July 26, 2010) [hereinafter Lyman Declaration].

[49] See Tr. at 722; Applicant Answer at 2; Staff Answer at 8.

[50] See Applicant Answer at 15; Staff Answer at 8, 10.

[51] See Reply.

[52] Tr. at 704-838.

[53] Id. at 828-34.

Applicant submitted its response brief on December 3.[54]

II. LEGAL STANDARDS

Three regulations address the admissibility of additional contentions once an adjudicatory proceeding has been initiated. These are: 10 C.F.R. § 2.309(f)(1), which establishes the basic admissibility criteria that all contentions must satisfy[55] (but which is not at issue here among the parties, see pages 2 and 9); 10 C.F.R. § 2.309(f)(2), which deals with the factors that govern the admission of timely new or amended contentions; and 10 C.F.R. § 2.309(c), which deals with the admission of nontimely contentions.

Under 10 C.F.R. § 2.309(f)(2), a petitioner or intervenor may file timely new or amended contentions, with leave of the Board, if the following requirements are met:

> (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)(i)-(iii) (emphasis added). The Commission summarized the application of Section 2.309(f)(2) in this proceeding to be:

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[54] Intervenors' Supplemental Brief Regarding Timeliness and Justification for Late Filing of Contentions 9, 10, and 11 (Nov. 15, 2010) [hereinafter Supplemental Brief]; Shaw Areva MOX Services' Brief in Response to Intervenors' November 15, 2010 Supplemental Brief (Dec. 3, 2010).

[55] To be admissible, a contention must: (1) provide a specific statement of law or facts in dispute; (2) explain the basis for the contention; (3) show that the contention is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings that the NRC must make to support the action involved in the proceeding; (5) state the facts or expert opinion which support the contention; and (6) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes or, if the application is alleged to be deficient, by identifying such deficiencies and the supporting reasons for this allegation. 10 C.F.R. § 2.309(f)(1); see Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 124 (2009).

> that if, within 60 days after the pertinent information that would support the framing of [a new contention] first becomes available, Intervenors submit a particularized and otherwise admissible contention regarding the construction of the MOX facility, then the contention will be deemed timely without the need to satisfy the balancing test for late-filing requirements of 10 C.F.R. § 2.309(c) or our regulatory requirements in 10 C.F.R. § 2.326 for reopening the record if otherwise applicable.[56]

If a proposed new contention which is filed after the initial filing period set forth in the hearing notice[57] is not timely under 10 C.F.R. § 2.309(f)(2)(iii), then the proponent of the contention must address the eight criteria, set out in 10 C.F.R. § 2.309(c)(1), that govern "nontimely filings," and show that a balance of these factors weighs in favor of admitting that contention.[58] The first of the eight criteria – "good cause" for failure to file on time – is the most important factor in the 10 C.F.R. § 2.309(c) analysis.[59] If good cause is not shown, the Board may still permit the late filing, but the petitioner or intervenor must make a strong showing on the other factors.[60]

III. POSITIONS OF THE PARTIES

Overview. In response to Intervenors' motion to admit Contentions 9, 10, and 11, the Applicant and the NRC Staff both concede that these contentions meet the substantive

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[56] CLI-09-2, 69 NRC 55, 58 (2009) (affirming on this ground, LBP-08-11, 67 NRC at 494-95).

[57] See 72 Fed. Reg. at 12,204.

[58] 10 C.F.R. § 2.309(c).

[59] See Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

[60] See Tennessee Valley Authority (Watts Bar Nuclear Plant, Unit 2) CLI-10-12, 71 NRC __, __ (slip op. at 4) (Mar. 23, 2010) (citing Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 564 (2005)); Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1, 5-8 (2008).

requirements for admission under 10 C.F.R. § 2.309(f)(1), but both contest their admission on the basis of untimeliness. Their respective positions on this point are, however, vastly different.

Applicant argues that Intervenors should have submitted Contentions 9, 10, and 11 more than three years earlier, subsequent to the availability of the application in 2007.[61] The NRC Staff sees the delay as far more benign, asserting that Intervenors were entitled to file new contentions 60 days after the issuance of the 2010 FNMCP but that they submitted these contentions 70 days thereafter, i.e., ten days too late.[62]

In their reply, Intervenors largely agreed with the Staff (assuming that their May 17, 2010 receipt of the 2010 FNMCP initiated the 60-day time period), but urged that they had initially regarded the trigger for the 60-day period not as that date but rather 10 days later, when they received related, non-public documents (the 2006 FNMCP and 2009 RAI and responses thereto).[63] By focusing on the later trigger date, they missed – by ten days – the 60-day filing deadline as calculated from the earlier trigger date. Intervenors maintain that this was an understandable error and translates into good cause for miscalculating the start of the deadline period, and that, on balance, the remaining factors of 10 C.F.R. § 2.309(c)(1) otherwise also weigh in favor of granting their motion to admit these contentions.[64]

Details. More specifically, Applicant contends that the 2010 FNMCP merely "highlights information previously contained in the original 2006 FNMCP" associated with the 2006 submission of the application, and that the information contained in the 2010 FNMCP is therefore not new information.[65] Applicant cites the notice of docketing of the application in the

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[61] Applicant Answer at 2.

[62] Staff Answer at 8.

[63] Reply at 3.

[64] Id.

[65] Applicant Answer at 14.

Federal Register published on March 15, 2007, which references the 2006 FNMCP as a nonpublic document.[66] According to Applicant, the deadline for Intervenors to file Contentions 9, 10, and 11 lapsed over three years before they were filed, and Intervenors have not shown that good cause, or a balance of the 10 C.F.R. § 2.309(c)(1) factors, exists to justify their admission now.[67]

Applicant further contends that the protected status of the 2006 FNMCP document (as "SUNSI") does not give Intervenors good cause for nontimely filing of Contentions 9, 10, and 11. According to Applicant, Intervenors had an "ironclad" obligation to request the SUNSI documents that form the basis of the instant contentions at the outset of this proceeding in 2007 in order to challenge the adequacy of the FNMCP.[68]

On the other hand, the NRC Staff agrees with Intervenors that Contentions 9, 10, and 11 are not three years late, but rather that the contentions are "grounded" in the 2010 FNMCP, not the 2006 FNMCP.[69] The NRC Staff concedes that all three new contentions would have been timely had Intervenors filed them ten days prior to the date of their actual submission on July 26, 2010 – 60 days after receiving notice of the nonpublic 2010 FNMCP.[70]

The NRC Staff argues that Intervenors were not justified in taking an additional ten days at that point to obtain the 2006 FNMCP and other SUNSI documents (i.e., the 2009 RAI and RAI responses), because those documents were previously accessible to Intervenors.[71] The NRC Staff rejects Intervenors' argument that it was reasonable and consistent with Commission

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[66] See 72 Fed. Reg. at 12,204.

[67] Id.

[68] Id. at 17.

[69] Staff Answer at 8.

[70] Id.; see LBP-08-11, 67 NRC at 495.

[71] See Staff Answer at 8.

policy – limiting public access to SUNSI – for Intervenors to avoid requesting the 2006 FNMCP or any other information classified as SUNSI until it became clear that it was necessary in order to resolve their concerns.[72] Staff states that there is no such requirement underlying the protective order in this proceeding.[73]

Accordingly, the NRC Staff insists that Intervenors have not shown good cause for filing Contentions 9, 10, and 11 ten days beyond the 60-day deadline initiated upon their receipt of the nonpublic 2010 FNMCP. In support of its argument, the NRC Staff cites North Atlantic Energy Service Corp. (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.[74]

In their Reply, Intervenors argue that the May 2010 revised FNMCP is materially different from the 2006 FNMCP in that the 2010 version purports to satisfy the NRC's MC&A regulations in 10 C.F.R. Part 74, whereas Applicant stated in the 2006 version that it did not satisfy those regulations.[75] Therefore, Intervenors argue that they could not have proffered an admissible contention three years ago, as Applicant claims, because "the 2006 FNMCP contained no assertion of regulatory compliance that Intervenors could have disputed."[76]

Intervenors acknowledged in their reply that, by submitting Contentions 9, 10, and 11 on July 26, 2010, they filed ten days after July 16, which is the sixtieth day after they received a

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[72] See id. at 11.

[73] Staff Answer at 8-9 ("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.'") (citing Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2 Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)); MOX Services, 69 NRC at 55 n.47 (2009).

[74] Seabrook Station, CLI-99-6, 49 NRC at 223.

[75] Reply at 2.

[76] Id. at 4.

copy of the nonpublic 2010 FNMCP on May 17, 2010.[77] Accordingly, Intervenors withdrew their earlier claim that Contentions 9, 10, and 11 were timely under 10 C.F.R. § 2.309(f)(2) and the 60-day filing requirement established in LBP-08-11.[78]

Intervenors nonetheless argue that they had good cause for believing they could take an additional ten days (before the 60 days began to run) to obtain additional nonpublic SUNSI documents (namely, the RAI, RAI responses, and the 2006 FNMCP) in the preparation and submission of Contentions 9, 10, and 11.[79] Intervenors' view is that the nonpublic (SUNSI) 2006 FNMCP, the NRC Staff RAI and Applicant's RAI responses were "available" only in the sense that Intervenors were entitled to request access to them earlier in this proceeding.[80] Intervenors point to the CAR proceeding as providing "assurances" that the design of the facility would comply with the NRC's MC&A requirements in 10 C.F.R. Part 74, and thus argue that they did not earlier request access to the 2006 FNMCP for this reason.[81]

As Intervenors see it, the Applicant's December 17, 2009, exemption request, in opposition to which they promptly filed a contention, was the first indication that Applicant did not comply with those regulations and that the April 2010 FNMCP revision constituted "the first document issued in this proceeding in which [Applicant] claims to comply with those regulations."[82] Intervenors assert that Applicant's 2010 FNMCP in fact does not comply with the agency's Part 74 MC&A requirements, and that the 2006 FNMCP, the RAI, and the RAI responses provide the necessary support for their claims in Contentions 9, 10, and 11. For

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[77] Id. at 3, 7.

[78] Id. at 3.

[79] Id.

[80] Id. at 7.

[81] Id.

[82] Id. at 7, 9.

these reasons, Intervenors argue that they have good cause for thinking the filing period started on May 27, 2010, not May 17, to enable their receipt of the additional nonpublic documents critical to preparation and submission of their challenges to the 2010 FNMCP in Contentions 9, 10, and 11.[83]

Although recognizing their "ironclad obligation" to obtain publicly-available documents in ordinary circumstances,[84] Intervenors argue that no Commission precedent applies this rule to SUNSI-designated documents.[85] They argue that "[s]uch a rule would be inconsistent with NRC procedures for access to SUNSI information in licensing proceedings, which require a demonstration of 'need for the information.'"[86]

During the oral argument, Intervenors also noted Dr. Lyman's prior difficulty in obtaining access to design-related documents containing safeguards information in another proceeding.[87] According to Intervenors, in that other proceeding, despite Dr. Lyman's valid security clearance and a board ruling determining his "need to know," the NRC Staff appealed the board ruling. The Commission reversed, finding that Dr. Lyman did not have a "need to know" the information.[88] With this in mind, Intervenors anticipated a strict application of the more uncertain "need to access" standard for SUNSI access, and waited to request necessary

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[83] Id. at 7-8.

[84] Id. at 8 (citing McGuire/Catawba, CLI-02-28, 56 NRC at 386).

[85] Id.; see also Supplemental Brief at 3 (distinguishing USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 460 (2006) upon which the Dissent at 1 relies).

[86] Reply at 8 (citing Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information (Feb. 29, 2008) (ADAMS Accession No. ML080380626)).

[87] Tr. at 726-28; see Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 67 (2004) (reversing a board determination of expert's "need to know" with regard to a document withheld as safeguards information).

[88] Tr. at 726-28.

FNMCP documentation until they believed they could meet this standard in terms of needing that documentation to challenge the positions of the Applicant that they opposed.[89]

Furthermore, Intervenors argue that because they were able to submit Contention 8, which challenges Applicant's December 17, 2009, exemption request, without the need for access to the 2006 FNMCP, they had no reason to request that document at that time.[90] Intervenors maintain that they needed the 2006 FNMCP, the RAI, and the RAI responses to enabled them to evaluate more fully the 2010 FNMCP, and that it was therefore reasonable for Intervenors to think the filing period would be built on the additional ten days it took them to obtain those documents.[91]

Intervenors argue that the remaining factors in 10 C.F.R. § 2.309(c)(1) also weigh in their favor and justify admission of Contentions 9, 10, and 11.[92] In that regard, Intervenors argue that by establishing standing in this proceeding, they already have demonstrated their property, financial, health, and safety interests in relation to operation of the facility.[93] They argue that they contribute to the record of this proceeding by providing, through their expert, Dr. Lyman, a high level of technical detail and analysis of the application.[94]

Finally, Intervenors argue that any delay resulting from their ten-day miscalculation of the filing deadline is very minor when compared to the amount of time Applicant has taken, since the inception of this second proceeding in 2006, to attempt to comply with the NRC's MC&A regulations governing monitoring and accounting for plutonium in Applicant's

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[89] See Reply at 8-9.

[90] Reply at 9.

[91] Id.

[92] Motion at 18; Reply at 10-11.

[93] Id. at 10; Motion at 18; see 10 C.F.R. § 2.309(a), (d).

[94] Reply at 10.

possession.[95] Intervenors note that the NRC Staff itself failed even to raise the problem of this noncompliance until issuing its RAI to Applicant in early 2009, and that the Staff continued, during the debate over this matter, to postpone evaluation of MC&A issues until it issued the final safety evaluation report (FSER) for this facility.[96]

Intervenors point to additional delay Applicant caused by submitting its request for exemption from these regulations – and then withdrawing it after Intervenors challenged it. Intervenors lastly emphasize that, notwithstanding the additional ten days they took to submit their new contentions, they promptly raised the issues in those contentions as they arose, and that any real delay in this proceeding has been caused not by their submitting slightly late contentions but "by [Applicant's] tardiness in acknowledging a very serious design defect and the NRC Staff's slowness to recognize it . . . ."[97]

IV. ANALYSIS AND RULING

A. Analysis of Admissibility Under 10 C.F.R. § 2.309(f)(1)

Both Applicant and Staff make the concession that Contentions 9, 10, and 11 meet the substantive pleading requirements set out under 10 C.F.R. § 2.309(f)(1).[98] We find their unusual concession to be well-founded, for our own independent examination leads us to conclude that these contentions readily satisfy each of the six contention admissibility standards

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[95] Id. at 11.

[96] Id. (citing Draft Safety Evaluation Report for the License Application to Possess and Use Radioactive Material at the Mixed Oxide Fuel Fabrication Facility in Aiken, SC (July 2010) at 9); see also Letter from Kimberly A. Sexton, Counsel for the NRC Staff, to Michael C. Farrar, Licensing Board Chair, (Dec. 21, 2010) (ADAMS Accession No. ML103560306) (informing the Board that the nonpublic FSER for the MOX Fabrication facility had been issued).

[97] Reply at 11.

[98] The NRC Staff conceded explicitly in its brief that Contentions 9, 10, and 11 satisfy those substantive pleading requirements. NRC Staff Response at 1. Applicant conceded the same at oral argument. Tr. at 722.

(listed in footnote 55 above), and thus are substantively admissible. With respect to those standards, see also our discussion below (page 26) agreeing with the Dissent's suggestion that the nature of the issues underlying the contentions is so serious as to have warranted review on our own motion if not otherwise considered.

B. Analysis of Timeliness Under 10 C.F.R. § 2.309(c)

1. Applicant's argument

Contrary to the Applicant's claim, we agree with the NRC Staff that the new contentions are based on new information in the 2010 FNMCP that was not previously available, and that the new 2010 FNMCP is materially different than the 2006 FNMCP. Therefore, the Intervenors were not required to have filed the contentions at the outset of the proceeding three years ago.

The 2010 FNMCP is materially different from the 2006 FNMCP because in the 2010 FNMCP, the Applicant changed its legal position and for the first time claimed that its plan complies with the Commission's MC&A regulations. In contrast, in the 2006 FNMCP, the Applicant admitted that it could not satisfy the regulations,[99] a position with which the Intervenors agreed. With no challenge to the application in that regard, Intervenors assert that they could not have proffered a contention that, for example, demonstrated a genuine dispute with the applicant on a material issue of law or fact. It was thus reasonable for them to take the approach that such a contention would likely have not been admissible under the requirements of 10 C.F.R. § 2.309(f)(1)(vi).[100]

Additionally, in our view, the 2010 FNMCP is also materially different from the 2006 plan insofar as the Applicant now identifies additional means/systems to satisfy Subpart E of 10

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[99] We note the unusual circumstance of Applicant submitting an application in which it concedes it cannot comply with the applicable regulations. At oral argument, the NRC Staff explained that it viewed Applicant's concession as implicitly stating that it would need an exemption from compliance with the regulations. Tr. at 761.

[100] See, e.g., Dep't of Energy (High-Level Waste Repository), LBP-10-11, 71 NRC __, __ (slip op. at 36) (June 29, 2010).

C.F.R. Part 74. Although the 2006 FNMCP mentions these means/systems, the Applicant did not take credit for them to comply with the Commission's MC&A regulations. The Applicant's reliance on these means/systems to satisfy Subpart E of 10 C.F.R. Part 74 is new, materially different information. And Intervenors' new contentions, which challenge the adequacy of the Applicant's reliance on these means/systems to satisfy Subpart E, could not have been based upon the 2006 FNMCP. The factual predicate for the contentions was simply not available at the outset of the proceeding. Accordingly, the new contentions are not three years late.

Our dissenting colleague reaches a contrary result.[101] He reasons that because "the 2010 FNMCP adds to the 2006 FNMCP without taking anything away from it" (i.e., nothing was deleted), then if Intervenors can now challenge the 2010 plan, they could also at the outset of the proceeding have challenged the 2006 plan as failing to satisfy Subpart E.[102] For its support, the Dissent relies on another licensing board's reasoning that "as a matter of law and logic," if Intervenors challenge the adequacy of an enhanced program, the prior unenhanced program was also inadequate and should have been challenged at the outset of the proceeding.[103]

We are in general agreement with that maxim, but believe it does not fit the circumstances before us. Here, the Applicant did delete a material portion of the 2006 FNMCP, namely, its admission that the plan could not satisfy the regulations. We view that change in legal position to be new information upon which Intervenors appropriately based new contentions that they were not required to bring when the Applicant conceded its non-compliance, a position with which the Intervenors had no dispute.

In drawing this conclusion, we have been mindful that at the outset of this phase of the proceeding, Intervenors lacked counsel and thus appeared pro se. Since then, Intervenors have retained experienced counsel – but the Applicant's arguments, and our colleague's

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[101] See Dissent at 1.

[102] Id. at 2.

[103] Id.

Dissent, involve events transpiring at the outset when the Intervenors were pro se. In reaching our conclusion that there were plausible reasons to support their inaction at that time, we have been guided by the Commission's direction that we treat "pro se litigants more leniently than litigants with counsel,"[104] which allows us to acknowledge the complex procedural hurdles presented to the pro se Intervenors when this proceeding commenced, and to structure our ruling accordingly.

2. Staff's argument

Having rejected the notion that the contentions are governed by what occurred three years ago, we turn to the present. Here, we are also not persuaded by the Staff's claim that we should reject the Intervenors' new contentions because they were filed ten days late.

Despite their plausible arguments that Contentions 9, 10, and 11 were timely under 10 C.F.R. § 2.309(f)(2) and the 60-day filing period for new contentions in this proceeding, Intervenors concede in their reply, albeit perhaps unnecessarily, that Contentions 9, 10, and 11 "are not presumptively timely under § 2.309(f)(2)."[105] In that regard, Intervenors maintain that the contentions should nonetheless be admitted because they have demonstrated good cause for the miscalculation that led to the ten-day delay in submitting these contentions and that the balance of the Section 2.309(c) factors favors admitting the contentions.[106]

We agree that Intervenors have provided a reasonable and understandable explanation for misapprehending the start of the filing period for these contentions. Under 10 C.F.R. § 2.309(c), this establishes good cause for believing that they were meeting the filing deadline

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[104] Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC __, __ (slip op. at 56 n.246) (July 8, 2010) (citing U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001)).

[105] Reply at 3.

[106] Id.

when they were instead missing it by the correlative ten day period. This good cause is the primary factor for determining whether to excuse the untimeliness.

Considering that the 60-day filing deadline is triggered only when a defined set of somewhat imprecise circumstances exists under 10 C.F.R. § 2.309(f)(2), the exact time at which those circumstances come into being is not always entirely clear. The trigger date for this filing period can be especially unclear here, considering the multitude of documents, both public and nonpublic, associated with this proceeding generally and with the issue of Applicant's compliance with the agency's MC&A requirements. Recognizing the uncertainty inherent in determining the starting point of this 60-day deadline, and the import of the additional nonpublic SUNSI documents Intervenors had yet to receive after their receipt of the 2010 FNMCP, we find that Intervenors have shown good cause for being somewhat uncertain, but by only ten days, regarding the start of the rolling deadline period as it pertained to the submission of Contentions 9, 10, and 11.[107]

The NRC Staff maintains that we should not excuse Intervenors' ten day delayed filing, arguing that the protected nature of the additional SUNSI documents is not relevant to demonstrating good cause. The Staff contends that there is no merit in Intervenors' claim 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.'"[108]

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[107] Contrary to the NRC Staff's argument, we consider the Commission's decision in Seabrook Station, CLI-99-6, 49 NRC 201 (1999) to be inapposite. In Seabrook, the Commission found that a petitioner who had both constructive and actual notice of the filing deadline lacked good cause for filing its intervention petition seven days late. Id. at 223. Here, there was inherent uncertainty in the trigger date for the rolling deadline, and this provides the Intervenors' good cause that was missing in Seabrook. As Chairman Jaczko recognized in this proceeding, given "the unique circumstances of this case, the appropriate timing for filing contentions will continue to be a challenge." CLI-09-2, 69 NRC at 67 (Comm'ner Jaczko, concurring).

[108] Staff Answer at 11 (quoting Motion at 17).

While we agree that the Staff's position is now consistent with the Commission's recent clarification regarding its SUNSI policy, [109] we acknowledge that Intervenors earlier foresaw difficulties regarding access to SUNSI in this proceeding. Lack of clarity in the terms and application of the agency's newly established SUNSI policy contributed to Intervenors' misapprehension that they were required to demonstrate a "need for the information" in order to request SUNSI documents. Applicant submitted its application in 2006, prior to the Commission's 2008 promulgation of 10 C.F.R. §§ 2.307(c) and 2.311, governing access to SUNSI.[110]

Moreover, only recently did the Commission explain that those rules governing access to SUNSI apply only to potential parties, whereas party access to SUNSI is governed by protective orders and non-disclosure agreements.[111] The Commission also noted the difficulty in surmounting regulatory hurdles that complicate access to SUNSI, and admonished the NRC Staff in the South Texas proceeding for having imposed a stricter-than-necessary standard of "need" for access to SUNSI.[112] In addition, Intervenors' expert in this proceeding, Dr. Lyman, experienced significant impediments to access to non-public information in another proceeding in 2004, in which the Commission denied him access to a safeguards-protected design-related document on the basis of his lacking a "need to know."[113]

A combination of these factors may have caused confusion on the issue of access to protected information, and led Intervenors to believe, incorrectly but understandably, that the NRC Staff and the Commission might limit their access to SUNSI in this adjudicatory

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[109] See South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC __, __ (slip op. at 3-6) (Sept. 29, 2010).

[110] See id.

[111] Id. at __ (slip op. at 5).

[112] See id. at __ (slip op. at 21-29).

[113] See Duke Energy, CLI-04-6, 59 NRC at 67-69.

proceeding. It makes sense that Intervenors would have hoped to avoid, if possible, the need to undergo what was then a seemingly convoluted process for accessing SUNSI materials.[114]

In addition to our finding that Intervenors had good cause for submitting their contentions under a ten-day miscalculation of the filing deadline, we also conclude that the remaining factors of 10 C.F.R. § 2.309(c)(1) strongly weigh in favor of admission of the pending contentions:

Factors (ii) through (iv) focus on the status of the requestor/petitioner seeking admission to a proceeding, which parallel the requirements of standing (e.g., demonstration of the nature of the requestor/petitioner's affected interests), rather than on new contentions submitted by already-admitted parties.[115] Thus, our earlier admission of Intervenors as parties to this proceeding carries forward with it the conclusion that Intervenors have interests in this proceeding and could be affected by the proceeding, as per 10 C.F.R. § 2.309(c)(1)(ii), (iii), and (iv), respectively.[116]

Similarly, in the posture of this proceeding, Intervenors – the only parties admitted – satisfy 10 C.F.R. § 2.309(c)(1)(v) and (vi) related to showing that their interests are not adequately represented by other means or by other parties.[117] In this regard, the Applicant and Staff suggest (see Tr. at 815), as they often do, that the Intervenors' interests can be represented by other means, namely by the NRC Staff through its ordinary review efforts outside of the adjudication. Even if that argument has force in other contexts, it does not carry the day here. In the first place, the NRC Staff has already done, via the RAI and the FSER, a specific and thorough review of the matters underlying the new contentions and has concluded, in effect, that the Intervenors' contentions lack substantive merit. So any Staff avenue of "other

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[114] Tr. at 726-28.

[115] 10 C.F.R. § 2.309(c)(1).

[116] LBP-08-11, 67 NRC at 468.

[117] See id.

means" relief is essentially foreclosed here. And, in any event, the balance of all the other factors weighs so heavily in the Intervenors' favor that this "other means" factor, even if given some weight against the Intervenors, could not possibly tip the overall balance against them.

Looking to factor (vii), we find that Intervenors' participation addressing the issues in Contentions 9, 10, and 11 will not cause untoward delay in this proceeding. Applicant has taken substantial amounts of time in submitting the entirety of its application and associated documents (spanning from November 2006 to April 2010), and first requested exemption from the MC&A regulations, only to later withdraw that request after Intervenors promptly filed a contention challenging the exemption request. The NRC Staff likewise took a number of years to raise the problem of Applicant's noncompliance with the MC&A requirements, taking until early 2009 to issue the relevant RAI.

Noting the existence of that delay is not intended as criticism, for we are mindful that the public interest can well be served by revisions to an application that end up "getting it right" and by the Staff's expected thorough analysis of such revisions.[118] Those necessary processes, invoked by the Applicants or at its behest, can be quite time-consuming. In comparison, the mere ten-day delay caused here by the Intervenors' miscalculation is miniscule.

Furthermore, Contentions 9, 10, and 11 address an important security issue regarding Part 74's strict requirements for the proposed facility – which the Applicant previously admitted it failed to satisfy.[119] We thus find that litigation of these substantively admissible contentions

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[118] See LBP-08-11, 67 NRC at 507 (Judge Farrar concurring) (citing Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-05-29, 62 NRC 635, 710 n.12 & accompanying text (2005)) ("[I]f the Staff detects deficiencies in an application before or after a notice of hearing opportunity is issued, the applicant will freely be given (outside the adjudicatory process) ample opportunity to amend it. This is as it should be, for it serves the public interest in safety for a facility application to be as good as it can be. But it can also serve the public interest in safety, one would think, for a facility opposition to be as good as it can be.").

[119] See Letter from David Stinson, MOX, to NRC, sent by e-mail from David Tiktinsky to Tom Pham, et al. (Oct. 7, 2009) (ADAMS Accession No. ML092870426); Shaw AREVA MOX Services, LLC – Responses to Requests for Additional Information re the Review of

addressing this important security issue will not inappropriately broaden the issues – these are issues of the highest safety order that deserve to be heard, especially in light of the varied approaches that have been presented to justify the Applicant's proposal.

We believe this so strongly that had we found that timeliness concerns do bar admission of these contentions, we would have joined the Dissent's suggestion that the matter deserves sua sponte review under 10 C.F.R. § 2.340(a) and referred the matter to the Commission on that basis. In that regard, we agree in its entirety with the Dissent's explanation that the new contentions raise significant public safety and national security issues.[120]

Finally, in addressing factor (viii), regarding the ability of Intervenors to contribute to the development of a sound record, we note Intervenors' consistently diligent participation in this proceeding. Intervenors have made sincere efforts to submit well-thought-out contentions throughout this proceeding and its predecessor, the earlier CAR proceeding begun in 2001.[121] Intervenors now raise important security issues regarding plutonium monitoring, following on their presenting at an earlier stage another serious legitimate issue for litigation.[122] And the Intervenors have put forward in support of those contentions the views of an experienced expert, Dr. Edwin Lyman.[123]

Fundamental Nuclear Control Plan & Instrumentation & Control Security Aspects for License Application Request (Oct. 17, 2009) (ADAMS Accession No. ML093570532); see also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 223 (2000) (citing South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 887 n.5 (1981)).

[120] See Dissent at Section 2; and Part V below.

[121] Tr. at 726-28.

[122] LBP-07-14, 66 NRC at 190, 206; LBP-08-11, 67 NRC at 464.

[123] Dr. Lyman's extensive curriculum vita is attached to his July 26, 2010 declaration, and the Commission has recognized his expert qualifications in other NRC proceedings. See Lyman Declaration at 1 & attach.; Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 27-28 (2004) (affirming Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), 60 NRC 33, 36-37 (2004). More recently, Dr. Lyman has been called to testify as an

In summary, we conclude that Intervenors had good cause for the ten-day miscalculation of the starting of the filing period for Contentions 9, 10, and 11. The trigger date for the issues Intervenors raise in these contentions was uncertain, given the unsettled nature of the start of the 60-day filing period. Intervenors thus did not ignore a deadline – at worst, they merely miscalculated the start of a filing period, in good faith. They had a rationally-based belief that they needed, and were entitled, to take the additional time to obtain other relevant SUNSI documents which were necessary to the preparation of the contentions, including the RAI, RAI responses, and the 2006 FNMCP. Intervenors made an understandable assumption that the deadline for timely filing of the instant new contentions would be 60 days after receiving all of those documents.[124]

In comparison to the extremely large expanses of time otherwise consumed in this unique proceeding, it is reasonable to excuse Intervenors' ten-day miscalculation of the deadline for filing the instant motion. This minor delay stemmed from a reasonable misunderstanding. We therefore conclude that Intervenors have demonstrated good cause for filing of new Contentions 9, 10, and 11 under a ten-day misapprehension of the trigger date of the filing period for these contentions, and that a balance of the 10 C.F.R. § 2.309(c)(1) factors favors admission of these contentions.

V. THE DISSENT'S APPROACH

Ordinarily, our analysis would have concluded with the foregoing. But in Section 2 of his Dissent, our colleague suggests that the substantive matters involved here would warrant the Board's sua sponte review were the Intervenors' contentions barred, as he says they are, by untimeliness.

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expert before the Department of Energy's Blue Ribbon Commission on America's Nuclear Future. Tr. at 804-05.

[124] Tr. at 748.

We have already indicated above (page 26) our informal agreement with that suggestion, and pause here only to say it formally: the Board Majority agrees, for the reasons well-stated in Section 2 of the Dissent, that – were the holding to be that the pending contentions are barred by untimeliness – the matter should be referred to the Commission in order to request its authorization for the Board, on its own motion, to examine and decide the serious safety or common defense and security matters underlying those contentions.[125]

VI. CONCLUSION AND ORDER

For the reasons set forth above, the Board finds that Contentions 9, 10, and 11 satisfy the substantive admissibility requirements of 10 C.F.R. § 2.309(f)(1). As to their timeliness, we find that the Intervenors have shown good cause for a ten-day miscalculation of the filing period trigger date, and on balance, that the factors in 10 C.F.R. § 2.309(c)(1) weigh in favor of admission of these contentions. We therefore ADMIT Contentions 9, 10, and 11.

[125] We recognize that the applicable regulation appears to allow this approach only for matters "not put into controversy by the parties." 10 C.F.R. § 2.340(a) (emphasis added). But as the Dissent correctly points out (see footnote 11 and accompanying text), binding agency precedent in the form of an Appeal Board decision allows this approach also to be used for matters that were initially raised by a party, where that party later withdrew. See South Texas, ALAB-799, 21 NRC at 382, 384-85. By parity of reasoning, this approach should also be allowable for matters that a party tried to raise, if it turns out that it failed to do so properly.

Because a separate, previously admitted contention is currently pending before us, NRC regulations and Commission precedent do not allow for an appeal as of right of this decision; any such appeal must await the issuance of a full or partial decision, pursuant to 10 C.F.R. § 2.341(b). Any petition for discretionary interlocutory review pursuant to 10 C.F.R. § 2.341(f)(2) must be filed within fifteen days of service of this Memorandum and Order.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD[126]

_____***/RA/***_____
Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

_____***/RA/***_____
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 1, 2011

Copies of this Order were sent this date by e-mail to counsel for (1) Applicant Shaw AREVA MOX Services, (2) the NRC Staff, and (3) Intervenors Blue Ridge Environmental Defense League (BREDL), Nuclear Watch South (NWS), and the Nuclear Information and Resource Service (NIRS).

[126] Judge McDade does not subscribe to the above opinion. His dissenting views are set forth on the following pages.

Dissenting Opinion of Judge Lawrence G. McDade

1. The newly proffered contentions were not timely filed.

It is my judgment that Contentions 9, 10, and 11, which challenge the adequacy of the Applicant's Fundamental Nuclear Material Control Plan (FNMCP), were not timely filed. Accordingly, I cannot concur with the Majority's decision to admit these contentions.

As noted in the Board's decision, the 2006 FNMCP which addresses the MC&A design information was included in the pending application that was submitted on November 17, 2006.[1] Thereafter on March 15, 2007, the NRC published a notice of opportunity to request a hearing[2] and, in response, the Intervenors requested, and received, a copy of the application which listed the FNMCP in the index, but withheld the substance of the plan as confidential proprietary information.[3] In the section entitled "safeguards and security," the application made clear that the Applicant "submitted under separate cover the Fundamental Nuclear Material Control Plan for the MOX Fuel Fabrication Facility."[4]

The Intervenors should have, but did not, request access to the FNMPC at that time even though the Commission had recently reiterated its directive that petitioners have an affirmative obligation to request confidential and proprietary information, that had not been made publicly available, in order to support a proposed contention.[5] However, instead of requesting the FNMCP, which is central to the safety of this facility, the Intervenors proceeded

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[1] See LBP-11-09, 73 NRC __, __ (slip op. at 4) (April 1, 2011) [hereinafter April 2011 Order].

[2] 72 Fed. Reg. 12,204, 12,206 (Mar. 15, 2007).

[3] See Mixed Oxide Fuel Fabrication Facility License Application (Sept. 27, 2006) (ADAMS Accession No. ML062750195).

[4] Id. at 13-1.

[5] USEC, Inc. (American Centrifuge Plant) CLI-06-10, 63 NRC 451, 460 (2006); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 123 n.71 (2006).

to submit a petition for intervention and request for hearing which proffered several contentions, none of which addressed the adequacy of the MC&A design.[6]

Since the application was submitted in 2007, no material portion of the FNMCP has been deleted. Rather, after a dialogue with the NRC Staff regarding the adequacy of the plan, which is fully outlined above by the Board,[7] the Applicant submitted a revised FNMCP (2010 FNMCP) on May 17, 2010,[8] in which it proposed to rely on additional means/systems in conjunction with existing portions of its FNMCP, in order to comply with Subpart E of 10 C.F.R. Part 74.

In short, the 2010 FNMCP adds to the 2006 FNMCP without taking anything away from it. Accordingly, if the 2010 plan fails to satisfy Subpart E, the 2006 plan also failed to satisfy Subpart E and was subject to challenge by the Intervenors at the outset of the proceeding. As the board in Oyster Creek clearly articulated: "as a matter of law and logic if – as [Intervenors] allege – [Applicant's] enhanced program is inadequate, then [Applicant's] unenhanced program . . . was a fortiori inadequate, and [Intervenor] had a regulatory obligation to challenge it in their original Petition to Intervene."[9]

The Commission has long directed putative intervenors "to raise issues as early as possible."[10] Had the Intervenors challenged the adequacy of the FNMCP in May of 2007, the Applicant and the NRC Staff would have been put on notice of the alleged deficiencies when the

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[6] See Petition for Intervention and Request for Hearing (May 14, 2007).

[7] April 2011 Order at 5-7.

[8] See Revised Fundamental Nuclear Material Control Plan (May 17, 2010) (ADAMS Accession No. ML101450359) (certifying that copies of the 2010 FNMCP were served on the parties on May 17, 2010).

[9] Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), LBP-06-22, 64 NRC 229, 246 (2006) (emphasis in original), aff'd, Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 274 (2009); cf. International Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001).

[10] Duke Power Co. (Catawba Nuclear Power Station, Units 1 and 2), CLI 83-19, 17 NRC 1041, 1050 (1983).

proposed facility existed only on paper instead of well after construction was underway and changes to the design may well be extremely expensive, or even impossible. I believe that it is to avoid such situations that the Commission requires intervenors to raise issues as early as possible.

The FNMCP is central to the safety of this facility. I see no valid excuse for the Intervenors' failure to request and evaluate the FNMCP prior to the submission of their intervention petition in 2007. Having decided in 2007 not to review the FNMCP as a prerequisite to a possible challenge to its adequacy, but instead to rely on the NRC Staff, based on its independent review, not to approve the application unless it complied with its regulations, in my judgment, it is now too late for Intervenors to revisit that decision as a matter of right.

2. The serious underlying issues deserve Board scrutiny.

Notwithstanding my conclusion that timeliness concerns bar the admissibility of the new contentions proffered by Intervenors as a matter of right, I believe that the matters sought to be raised by the newly proffered contentions involve issues of the highest safety significance that should be explored before this Board – accordingly, had my colleagues ruled differently on the timeliness issue, I would have urged that these issues be examined pursuant to the procedures set out at 10 C.F.R. § 2.340(a), which allow the Board limited authority to consider matters in addition to those properly put into controversy by the parties.

Pursuant to Section 2.340(a) the Board may consider

> any matter . . . but only to the extent that the [Board] determines that a serious safety, environmental, or common defense and security matter exists, and the Commission approves of an examination of and decision on the matter upon its referral by the [Board].

I believe that this safety valve applies equally well to matters that the parties tried but failed to "put into controversy"[11] as well as to ones that a Board uncovers entirely on its own – for one of

[11] Houston Lighting & Power Co. (South Texas Project, Units 1 and 2), ALAB-799, 21 NRC 360, 382, 384-85 (1985) (remanding to the Board for further consideration of whether issues

the purposes of the regulation is to insure that serious matters not escape scrutiny in a hearing if the Board and the Commission believe that the public interest would benefit from such scrutiny.

Board review of matters sua sponte has a long history at this agency. During the 1970's, the governing regulation was Section 2.760a, which was amended in 1975 (see 40 Fed. Reg. 2973, 2974 (Jan. 17, 1975)) to indicate that sua sponte review – framed along the lines of the current regulation as involving the existence of "a serious safety, environmental, or common defense and security matter" – was to be conducted "only in extraordinary circumstances" and that such authority was "to be used sparingly."[12] Thereafter, the rule went through a number of iterations, but the Board's authority to seek to trigger review in extraordinary circumstances remained and was put to good use.[13]

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originally raised by a later-withdrawing party presented serious safety or environmental questions that warrant Board examination pursuant to its sua sponte authority).

[12] 40 Fed. Reg. at 2974. The amendment to the regulation was designed to reflect the Commission's holding in Consolidated Edison Co. of New York (Indian Point Nuclear Generating Unit 3), CLI-74-28, 8 AEC 7, 8-9 (1974) (interpreting the 1972 restructuring of the Rules of Practice and opining that "[t]o tie a Board's hands, when it sees an issue that needs to be explored, would be utterly inconsistent with its stature and responsibility" of "these expert tribunals" and that simply referring such a matter to the Staff for resolution "would [not] be an adequate solution").

[13] See, e.g., Tennessee Valley Authority (Hartsville Nuclear Plant Units 1A, 2A, 1B and 2B), LBP-76-44, 4 NRC 637, 648-49 (1976) (ordering that a reactor turbine building not be constructed until resolution of safety issues – regarding seismic qualification of a reactor building and systems and components contained therein – that the licensing board raised); Duquesne Light Co. (Beaver Valley Power Station, Unit), ALAB-408, 5 NRC 1383, 1385 (1977) (affirming a decision of the licensing board in which that board predominantly "dealt with safety questions which had been raised by the Board itself, exercising its prerogative under 10 C.F.R. § 2.760a to examine any safety matter which, though uncontested, is sufficiently serious in the Board's mind to warrant inquiry"); see also Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 111 (1977) (Farrar, dissenting) (urging, inter alia, that the licensing board's grant of a construction permit should be reversed on the basis that applicants had not shown sufficiently the financial qualifications necessary to carry out construction safely and that "[t]he Board below should have made inquiry into [a financial qualifications question], on a sua sponte basis if not sufficiently well prompted by one of the parties").

The newly proffered contentions in this proceeding challenge the Applicant's ability to track the nuclear material entrusted to it. This is no small matter, as evidenced both by the nature and quantities of such material that will be on hand and by the rigorous regulatory requirements that govern this facility.

Moreover, the Applicant has known from the outset that it would be required, under Subsection (a) of 10 C.F.R. § 74.51, entitled "Nuclear material control and accounting for strategic special nuclear material" (SSNM), to "establish, implement, and maintain a Commission-approved material control and accounting (MC&A) system that will achieve the following objectives:"

> (1) Prompt investigation of anomalies potentially indicative of SSNM losses;
>
> (2) Timely detection of the possible abrupt loss of five or more formula kilograms of SSNM from an individual unit process;
>
> (3) Rapid determination of whether an actual loss of five or more formula kilograms occurred;
>
> (4) Ongoing confirmation of the presence of SSNM in assigned locations; and
>
> (5) Timely generation of information to aid in the recovery of SSNM in the event of an actual loss.[14]

Apparently these Board sua sponte actions were viewed with some favor, because in 1979 the Commission amended Section 2.760(a) to delete the "extraordinary circumstances" and "sparing use" limitations. Soon thereafter, however, the Commission directed, by way of an adjudicatory decision reinforcing an earlier policy directive, that rulings seeking to invoke sua sponte review be transmitted to the Commission for approval. See Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-81-24, 14 NRC 614 (1981). This practice, whereby a board was not to proceed with sua sponte issues absent the Commission's approval, was stressed in the Commission's 1998 Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22-23 (63 Fed. Reg. 41,872, 41,874 (Aug. 5, 1998)) and later codified in the 2004 revision of 10 C.F.R. Part 2. That revision enacted a replacement for Section 2.760a in the form of Section 2.340(a), specifically limiting sua sponte review to situations wherein "the Commission approves such examination and decision upon referral of the question" by the Board. (The current version of that Section, adopted in 2007 as part of a larger initiative (72 Fed. Reg. 49,352, 49,414, 49,475 (Aug. 28, 2007)), has syntax that differs only slightly, i.e., it conditions sua sponte review (in operating license proceedings for production or utilization facilities) upon "the Commission approv[ing] of an examination of and decision on the matter upon its referral" by the Board.)

[14] 10 C.F.R. § 74.51(a).

To these ends and those set out in Subsection (b), the Applicant was required to submit an FNMCP that describes how the MC&A system will satisfy the regulatory requirements.[15]

The safety significance of this matter is of paramount importance. The ability to detect the loss of plutonium in a timely manner (10 C.F.R. § 74.55(b)) and the ability to resolve within approved time periods the nature and cause of any MC&A alarm signaling the possible loss or theft of SSNM (10 C.F.R. § 74.57(b)), to allow for an effective response, are crucial security requirements.

In considering amendments to the agency's MC&A regulations, the Commission discussed that its primary goals for the new detection section were:

> (1) Prompt investigation of anomalies potentially indicative of SSNM to discover material losses so that response actions may be taken before losses accumulate to strategic quantities;
>
> (2) to perform this discovery function in a way that permits (a) localization of losses in time and space, (b) traceability of a loss to a small number of people potentially involved and (c) securing evidence of the cause of the loss; and
>
> (3) in the event that the discovery is not made before 5 formula kilograms [FKG] have been lost, to discover the loss in a timely enough fashion to permit loss assessment and search and recovery operations.[16]

Accordingly, deterring and detecting the loss or diversion of SSNM has been at the forefront of the licensing process for this facility since the beginning of the process.

In the construction authorization request (CAR) proceeding , the Staff indicated in the final safety evaluation report (FSER) that "[t]he applicant committed to an item monitoring program, which establishes item identification and the basis for verifying the presence and integrity of licensed nuclear materials."[17] As indicated in the Majority opinion, the previous

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[15] Id. § 74.51(c).

[16] 46 Fed. Reg. 45,144, 45,145 (Sept. 10, 1981).

[17] U.S. Nuclear Regulatory Commission Office of Nuclear Material Safety and Safeguards, Final Safety Evaluation Report of the Construction Authorization Request for the Mixed Oxide Fuel Fabrication Facility at the Savannah River Site, South Carolina, Docket No. 70-3098, Duke

proceeding ended essentially with the promise that the Applicant would design and construct the facility and implement the program with these crucial requirements in mind. It is far from clear that that promise was fulfilled, and this is the matter that requires attention from the Board.

As alleged by the Intervenors in their newly proffered contentions, the ability of the Applicant to satisfy the requirements of the regulations is problematic given its 2006 submission in relation to the requirements of 10 C.F.R. § 74.55. The Intervenors have noted that when this submission was questioned by the NRC Staff in a February 26, 2009, set of RAIs, the Applicant responded (on October 7, 2009) that it would seek an exemption request and, according to the Intervenors, by filing that exemption request (which was later withdrawn), the Applicant conceded that it did not meet the regulatory requirements given the design of the facility.

The reasons given for requesting an exemption from the regulations[18] may be indicative of a potential flaw in the MOX fuel fabrication facility with respect to its ability to meet the regulatory criteria – because the FSER at the CAR stage indicated that the Staff believed that the facility would be capable of meeting the MC&A regulatory requirements regarding the timely detection of loss or theft of SSNM by design.[19]

To be sure, the Applicant has now proposed alternative arrangements that on their face appear to take a different approach. It may well turn out that the Applicant's proposal will accomplish all the objectives that the regulations demand in some different fashion (whether such an approach can be sanctioned without an exemption may be a lingering question).

Cogema Stone & Webster NUREG-1821, at 13-1 (Mar. 2005) (ADAMS Accession No. ML0509604470).

[18] See Request for Exemption from Aspects of Process and Item Monitoring (Dec. 17, 2009) at 3 (ADAMS Accession No. ML093561015).

[19] Petitioners' Motion for Admission of Contentions 9, 10, and 11 Regarding Shaw MOX Areva Services' Revised Fundamental Nuclear Material Control Plan (July 26, 2010), attach., Declaration of Dr. Edwin S. Lyman in Support of Intervenors' Contentions 9, 10, and 11at 6-7 (July 26, 2010) [hereinafter Lyman Declaration].

But that is not obvious, notwithstanding the Staff's finding in the current proceeding's FSER regarding the adequacy of the revised 2010 FNMCP. This Board warned earlier in this proceeding about the dangers of regulatory shortcuts,[20] and this matter of preventing loss or diversion of SSNM is one in which patchwork solutions must be closely scrutinized. As the Commission emphasized long ago, it is not enough – in an agency which values the hearing process and has preserved the opportunity for Boards to look at matters on their own motion – just to "refer the matter to the staff for resolution."[21]

In short, the question of a serious safety inadequacy in the MOX fuel fabrication facility remains. And any question regarding the ability to meet these requirements can have serious consequences with respect to the possibility of loss or diversion of nuclear materials from the MOX facility.

The Applicant may well be able to answer these questions and put all safety and security concerns to rest. It has not yet had the opportunity in this adjudication to do so. In exercising that opportunity, it may well have the support of the Staff, whose current FSER finds that "the applicant's program is capable of providing timely plant wide detection of the loss of items and verifying the presence and integrity of nuclear material items at a required frequency."[22] The Staff also found that the Applicant provided an "adequate item monitoring program with real-time status of nuclear materials, a system of item identification and classification, tamper-safing procedures, material accessibility, item accounting and control procedures, item measurements, sample items, and item verification tests, as required in 10 CFR 74.55, "Item Monitoring.""[23]

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[20] See LBP-08-11, 67 NRC 460, 498-99 (2008) (Judge Farrar, concurring).

[21] Indian Point, CLI-74-28, 8 AEC at 8.

[22] Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Final Safety Evaluation Report for the License Application to Possess and Use Radioactive Material at the Mixed Oxide Fuel Fabrication Facility in Aiken, SC, at 13-6 (Dec. 2010) (ADAMS Accession No. ML103430615).

[23] Id.

Be that as it may, the Staff's Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility (NUREG-1718) requires that the applicant's design basis for MC&A will lead to an FNMCP that will meet or exceed the regulatory criteria in Section 13.2.4 of the Standard Review Plan, which includes both the item monitoring and alarm response requirements in 10 C.F.R. §§ 74.55 and 74.57, respectively.[24] In turn, Section 74.57(b) requires that "Licensees shall resolve the nature and cause of any MC&A alarm within approved time periods." The 2010 FNMCP indicates that the alarm resolution procedures of Sections 3.1.1.4 and 3.1.4.1 of this Plan will normally be completed within an appropriate period. [25] The Intervenors, however, have raised a question as to whether the facility will have the ability to meet the alarm resolution response time estimates provided in the 2010 FNMCP.[26]

As noted above, earlier versions of the sua sponte rule required that it be sparingly used and only in extraordinary circumstances. Those requirements are met here. Board use of this authority has certainly been sparing – as best I can determine, no Board has attempted to invoke sua sponte review in the past 20 years. And the circumstances here are certainly extraordinary – this is an extraordinary facility with an extraordinary mission, and the application process has led to serious questions about whether, and how, the Applicant will meet the Agency's regulatory requirements governing the issues that the Intervenors raised in their recently proffered contentions.

For all these reasons, I believe that it would be prudent for the Board to look into these matters whether or not they were timely raised by the Intervenors.

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[24] U.S. Nuclear Regulatory Commission, Office of Nuclear Materials and Safeguards, Standard Review Plan for the Review of an Application for a Mixed Oxide (MOX) Fuel Fabrication Facility, NUREG-1718, at 13.2-12 (Aug. 2000) (ADAMS Accession No. ML0037415810).

[25] See 2010 FNMCP at 152.

[26] See Lyman Declaration ¶ 50.

My colleagues in the Majority share my view of the significance of the issues (see Part V above) and would have followed this same course had they found the new contentions barred by untimeliness. In effect then, a unanimous Board would join in urging the Commission to insure that these issues be examined regardless of whether they were raised timely or not.

_____***/RA/***_____
Lawrence G. McDade
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
Shaw AREVA MOX Services, LLC	)	Docket No. 70-3098-MLA
	)	
(Mixed Oxide Fuel Fabrication Facility Possession and Use License)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (ADMITTING NEW CONTENTIONS 9, 10, AND 11) (LBP-11-09) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Dated at Rockville, Maryland,
this 1st day of April 2011