

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

SHAW AREVA MOX SERVICES

(Mixed Oxide Fuel Fabrication Facility)

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

September 9, 2011

ORDER

(Summarizing Determinations Related to August 31, 2011 Teleconference)

On August 31, 2011, we held a teleconference with the parties to discuss the scheduled path forward to an evidentiary hearing, including concerns identified since issuance of our July 26, 2011 Scheduling Order.¹ We cover below the substitute or supplemental items that emerged from that teleconference and that will now guide the procedures leading to that evidentiary hearing.

To reflect those revisions, we attach as Appendix 1 to this Order a new version of the “Draft Working Timetable” we included in our August 19, 2011 Order. This version of the Timetable makes allowances for the alternative paths this proceeding could take, depending on whether, at various stages, the several parties, or any of them, file motions challenging aspects of other parties’ pre-filed testimony.

¹ Tr. at 900-77; see also Licensing Board Order (Regarding Pre-Hearing Teleconference) (Aug. 19, 2011) (unpublished) [hereinafter Aug. 19, 2011 Licensing Board Order].

I. Evidentiary Hearing

Because of the security classification of, and the protection afforded to, the information to be contained in the evidence adduced, the hearing cannot be opened to the public and thus no purpose would be served by holding it in the vicinity of the site. Accordingly, as previously contemplated, it will take place in Rockville, Maryland, either in the Atomic Safety and Licensing Board Panel's Hearing Room or, if a more secure venue is required to protect classified information, elsewhere in the NRC Headquarters complex.

Because it is now unknowable which of the procedural alternatives, enumerated below, will be followed, it is not possible at this time to set a fixed date for the hearing. A more definitive perspective will emerge as the evidentiary filings and responsive motions are submitted. Toward that end, the appended update to the Timetable will allow tracking of the progress toward the hearing date.

II. Security Information

During the August 31, 2011 teleconference, counsel for Shaw AREVA MOX Services (the Applicant) and the NRC Staff represented that they expect their respective evidentiary statements to include Sensitive Unclassified Non-Safeguards Information (SUNSI) and Unclassified Controlled Nuclear Information (UCNI). Both parties predicted their evidentiary statements would be bereft of classified information or Safeguards Information (SGI).²

Counsel for Blue Ridge Environmental Defense League, Nuclear Watch South, and the Nuclear Information and Resource Service (collectively, the Intervenor) also predicted that their testimony would not include classified information or SGI. The Intervenor's counsel wished, however, to preserve the possibility of requesting access to classified information or SGI to respond to the Applicant's or the NRC Staff's evidentiary statements.³

² Tr. at 908-09.

³ Id. at 910.

To that end, Intervenor's motions for access to protected information shall be filed no later than ten (10) days after the Applicant's or the Staff's respective evidentiary filings. Answers thereto shall be filed within ten (10) days of the motion. As outlined below at Part IV.B, the filing of any motions for access to classified information or SGI will operate to defer all subsequent evidentiary steps until the Board rules on such motions.⁴

Intervenor's counsel also expressed a desire that all parties submit publicly available non-protected versions of their evidentiary filings that could not be made public because they contain SUNSI, UCNI, SGI, or classified information. During the teleconference, we declined to impose such an obligation on the parties but indicated that any party could voluntarily undertake to do so, recognizing that the burden would be on that party to assure that no non-public information was released.⁵

Upon further reflection as to the risk involved, we have decided to revoke our approval of such voluntary action. Instead, we revert to another alternative that was proffered as a means to keep the public informed as to the general, if not the specific, progress of the case. Specifically, each party is directed to file publicly-available cover letters, for inclusion in ADAMS, stating the general title of each filing; such cover letters shall refrain from further describing the filings' contents.

⁴ See also Working Timetable at steps 3.a, 4.a, 5.a, 6.a.

⁵ See Tr. at 964-74.

III. Site Visit

We sought the views of the parties regarding the utility of conducting a site visit prior to the evidentiary hearing. Counsel for the Applicant believed that, in light of the status of construction at the MOX facility, nothing would be observable at the site that would assist the Board or the parties in understanding the issues implicated by the four pending contentions. Nevertheless, the Applicant voiced no objection to a site visit.⁶

Staff counsel concurred in this assessment.⁷ Intervenors' counsel said, however, that they would not have a complete sense of whether a site visit will be useful until they receive the Applicant's testimony.⁸

Therefore, we direct Intervenors to submit any request for a site visit no later than ten (10) days after the Applicant's testimony is submitted. If the Intervenors file such a request, the Applicant and the Staff shall have ten (10) days to respond to such a request. We will weigh these pleadings, along with our own then-understanding of the issues, to determine whether a site visit is in order.⁹

IV. Calendar

A. Format of Evidentiary Submissions

Parties shall serve four (4) paper copies of their evidentiary submissions to the Board. Each evidentiary submission shall begin with an exhibit list containing four columns: the exhibit's number,¹⁰ the exhibit's sensitivity level (e.g., ----, SUNSI, UCNI, SGI, or classified), the

⁶ Id. at 918-19.

⁷ Id. at 920-21.

⁸ Id. at 918, 920.

⁹ See id. at 921-22; see also Working Timetable at step 3.a. In any event, after our review of the testimony filed by the parties, the Board may direct a site visit sua sponte.

¹⁰ Despite the need for each exhibit itself to contain the nine character zero-filled identification number described in the DDMS Protocol (Appendix 2), column one of each party's initial exhibit list should reflect only the basic numeric sequence of each exhibit (i.e., 1, 2, 3).

exhibit's name (including date of creation, if useful), and the exhibit's submission date.¹¹ That exhibit list will constitute each respective party's first exhibit. Each party's second exhibit will consist of its pre-filed testimony (which, at the party's option, may be broken into more than one exhibit). This will be followed in numerical order by each of the exhibits supporting that testimony.

Subsequent to the August 31 teleconference, the Board decided to use the Digital Data Management System (DDMS) for tracking documents. As the parties preferred, they will still file paper copies of evidentiary submissions,¹² but they shall also file a compact disc containing electronic versions of these documents. To achieve DDMS compatibility, each exhibit shall display (on the upper-right corner of the first page, if possible) its exhibit number; this number shall be entered on the exhibit electronically and shall follow the Protocol listed in Appendix 2 of this Order, which has been standard in other proceedings.

If there are any questions regarding the administration of this Protocol, each party may contact the Board's DDMS Administrator, Andrew Welkie at Andrew.Welkie@nrc.gov or (301) 415-6541. On a general level, although this proceeding will not use e-filing per se, parties shall consult the NRC's e-filing guidance for instructions regarding the electronic handling of protected information.¹³

B. Schedule for Motions In Limine and Motions to Strike

A key question we posed in our August 19, 2011 Order was whether "the pendency of any motions in limine or motions to strike [should] result in deferring the filing of the moving

¹¹ Appendix 3 of this Order is an example of the format for the list the parties should submit.

¹² See Tr. at 891-93.

¹³ U.S. Nuclear Regulatory Commission, Guidance for Electronic Submissions to the NRC, Rev. 6 (May 17, 2010), available at <http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub-r6.pdf>.

party's evidence, which would otherwise then be due."¹⁴ At the teleconference, the parties answered that they would prefer to receive a ruling, and an explanation for such ruling, as to each such motion before proceeding to the next round of evidentiary filings.¹⁵

Therefore, pursuant to the parties' request, and to give the parties the opportunity to shape subsequent evidentiary filings to reflect the nature of our rulings on the legitimacy of the earlier filings, we adopt the following procedure, which amends pro tanto what was set out in Part III, Sections 2-4 of our July 26, 2011 Scheduling Order:

Motions in limine, motions to strike, and requests for protected information may be filed no later than ten (10) days after each evidentiary filing. Answers to such motions shall be filed no later than ten (10) days thereafter.¹⁶

If such motions are filed at any stage of the evidentiary submissions, then the filing of responsive testimony, and all subsequent steps in this proceeding, shall be held in abeyance until the Board rules on such motions. The time for filing such responsive testimony, or other filings, shall begin to run upon the issuance of the Board's ruling(s) on the pending motions (unless otherwise ordered therein).¹⁷ (If motions in limine, motions to strike, or requests for protected information are not filed at a particular stage of evidentiary submissions, then the time for the next filing will remain unaltered.)

C. Intervenors'/Staff's Responses to their Evidentiary Statements

Because our July 26, 2011 Scheduling Order contemplated simultaneous evidentiary statements from the Intervenors and the Staff, that schedule did not permit those two possibly-adversarial parties to respond to each other's evidentiary statements. Upon discussion during

¹⁴ Aug. 19, 2011 Licensing Board Order at 2.

¹⁵ Tr. at 923-26.

¹⁶ See Working Timetable at steps 3.a, 4.a, 5.a, 6.a.

¹⁷ See id. at steps 4, 5, 6.

the teleconference, the parties suggested that the Board insert such an opportunity into the schedule.¹⁸

Therefore, an additional step is being added to the evidentiary submissions procedure: after the Intervenor's and Staff's initial evidentiary statements, and before the Applicant's rebuttal testimony, the Intervenor and the Staff may submit rebuttal testimony to each other's initial testimony. Consistent with the framework established above at Part IV.B, if motions in limine, motions to strike, or requests for protected information are filed challenging Intervenor's or the Staff's original or rebuttal testimony, parties shall have twenty (20) days from the date of our ruling on such motions to file the next round of evidentiary submissions. If such motions are not filed, then the next evidentiary submission shall be filed within twenty (20) days of the previous round.¹⁹

D. Confidential Questions for the Board to Ask

In order to minimize motion practice and to create efficiencies in the course of this proceeding, the following language shall supplement Part III.5-6 of our July 26, 2011 Scheduling Order:

Within twenty (20) days after the final round of evidentiary filings or, if any motions in limine, motions to strike,²⁰ or requests for protected information are filed, within ten (10) days after our ruling on any such motions, parties shall submit confidential questions to us in accordance with our instructions below and those contained in Part III.5-6 of our July 26, 2011 Scheduling Order.²¹

¹⁸ See Tr. at 926-39.

¹⁹ See Working Timetable at steps 4, 4.a, 4.b, 5, 5.a, 5.b, 6, 6.a, 6.b.

²⁰ See Licensing Board Memorandum and Order (Summarizing Prehearing Conference Call, Revising Protective Order, and Scheduling Evidentiary Hearing) (July 26, 2011) at Part III.3-4 (unpublished).

²¹ See Tr. at 939-41. We elaborate on the instructions for such filings in Part IV.E below and in the Working Timetable. See Working Timetable at steps 6.a, 6.b, 7.

Parties shall not submit motions for cross-examination before the evidentiary hearing (see Part IV.E below). Nonetheless, to assist us in pursuing the suggested questions purposefully and in properly asking follow-up questions, parties should submit in camera, along with their proposed confidential questions, a brief statement (analogous to that required by 10 C.F.R. § 2.1204(b)(1)(ii)) of “the objective to be achieved by” their respective confidential questions or blocks of questions.²²

During this Subpart L evidentiary hearing, parties will not have the right to put questions directly to witnesses. But, after the Board has completed its oral examination of witnesses, parties will be granted the opportunity to submit additional suggested questions for the Board to propound to the witnesses.²³

E. Motions for Cross-Examination

During the teleconference, the parties and the Board agreed that motions for cross-examination should be postponed until after we have completed our oral examination of witnesses.²⁴ This agreement resulted, in part, because motions for cross-examination may prove unnecessary in light of the additional opportunity for submitting suggested questions,

²² See id. at step 7; see also Tr. at 951-54.

²³ See Tr. at 952.

²⁴ See id. at 951-54.

outlined in Part IV.D above.²⁵ Subsequent to the Board's posing any additional questions to the witnesses, motions for cross-examination will be entertained.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

/RA/

Lawrence G. McDade
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 9, 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).

²⁵ See id. at 941-56.

APPENDIX 1

WORKING TIMETABLE (Revised 09/9/2011)
LEADING TO SHAW AREVA MOX SERVICES EVIDENTIARY HEARING
(See Orders dated July 26, 2011 and September 9, 2011, and 10 C.F.R. Part 2)

Step #	Action	Time Allowed	Due Date
1	Final Mandatory Disclosures	-----	Su. July 31
2	Pre-hearing Conference Call	-----	Wed. Aug. 31

3	Applicant Initial Evidentiary Statement	60 days from # 1	Th. Sept. 29
3.a.i	Motion in Limine / to Strike / Request for Protected Information / Request for Site Visit	10 days from # 3	Tu. Oct. 11
ii	Answer to # 3.a.i Motions	10 days from # 3.a.i	Fri. Oct. 21
iii	Board ruling		
3.b	<i>No # 3.a.i motions filed--Go to step # 4</i>	-----	

4	Intervenor/Staff Evidentiary Statements	20 days from # 3 or # 3.a.iii, as applicable	
4.a.i	Motion in Limine / to Strike / Request for Protected Information	10 days from # 4	
ii	Answer to # 4.a.i Motions	10 days from # 4.a.i	
iii	Board ruling		
4.b	<i>No # 4.a.i motions filed--Go to step # 5</i>	-----	

5	Intervenor/Staff Rebuttal Statements	20 days from # 4 or # 4.a.iii, as applicable	
5.a.i	Motion in Limine / to Strike / Request for Protected Information	10 days from # 5	
ii	Answer to # 5.a.i Motions	10 days from # 5.a.i	
iii	Board ruling		
5.b	<i>No # 5.a.i motions filed--Go to step # 6</i>	-----	

6	Applicant Reply Statement (<i>last evidence</i>)	20 days from # 5 or # 5.a.iii, as applicable	
6.a.i	Motion in Limine / to Strike / Request for Protected Information	10 days from # 6	
ii	Answer to # 6.a.i Motions	10 days from # 6.a.i	
iii	Board ruling		
6.b	<i>No # 6.a.i motions filed--Go to step # 7</i>	-----	

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7	All Parties' Suggested <i>Confidential Questions</i>	20 days from # 6 or 10 days from # 6.a.iii, whichever is later	
8	Board Studies Pre-Filed Evidence and Proposed Questions	<i>to be determined</i>	
9	Final Pre-hearing Conference Call	<i>to be determined</i>	
10	Start Evidentiary Hearing	<i>to be determined</i>	
11	Conclude Evidentiary Hearing	≈3 days from # 10	
12	Transcript Corrections / Close Record	<i>to be determined</i>	
13	All Parties' Proposed Findings & Conclusions	30 days from # 11	
14	All Parties' Reply to Findings & Conclusions	20 days from # 13	
15	Board Decision	<i>[Per Regs. = 90 days from # 12]</i>	

(As of 09/9/2011)

APPENDIX 2

DDMS PROTOCOL

The following provides the parties with certain administrative direction regarding pre-filed evidentiary materials, including details of using the Digital Data Management System (DDMS) for the hearing.

A. Use of the DDMS System

The Board intends to use the DDMS at the evidentiary hearing to mark exhibits and enter the exhibits into the record. The Board directs that each party have available at the hearing one properly marked paper copy of each document for use in the event there are any operational issues with the DDMS. Further, if any party has documentary material in addition to its exhibits and pre-filed testimony that it anticipates might become relevant during the course of the hearing, that party should ensure it has available an electronic copy of the document, properly marked and formatted per agency e-filing guidelines,¹ and has properly marked paper copies of such material at the hearing for distribution to all Board members, the Board's law clerk, counsel for the other parties, and the Court Reporter.

B. Providing Pre-Filed Testimony and Exhibits for DDMS Use

Pre-filed testimony and exhibits for the hearing shall be filed in accordance with the following instructions:

1. Although this proceeding does not use the NRC's E-Filing system, consistent with 10 C.F.R. § 2.304(g), each item of pre-filed testimony and each exhibit must be filed as a separate electronic file on the parties' submitted compact discs. Pre-filed testimony shall be received into evidence in exhibit form using the DDMS system. See 10 C.F.R. § 2.1207(b)(2).

2. All pre-filed testimony and each exhibit shall be marked (in the upper right hand corner of each exhibit's first page, if possible) in the following manner: The parties shall number

¹ See U.S. Nuclear Regulatory Commission, Guidance for Electronic Submissions to the NRC, Rev. 6 (May 17, 2010), available at <http://www.nrc.gov/site-help/e-submittals/guide-electronic-sub-r6.pdf>; see also 10 C.F.R. § 2.302.

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their pre-filed testimony and any exhibits in a format that consists of a three-character party designation, followed by a six-character zero-filled number. The three-character designation to be used by each of the parties is as follows: Applicant – APP, NRC Staff – NRC, Intervenors – INT. Consequently, a typical numbering sequence for the NRC Staff's exhibits would be as follows:

NRC000001

NRC000002

* * * * *

NRC000100

To the extent possible, the parties should order and number their pre-filed exhibits in the sequence the parties plan to identify and present them for inclusion in the record.

3. If a submission exceeds fifteen (15) megabytes, then the exhibit should be separated into multiple submissions, each less than fifteen (15) megabytes. If an exhibit needs to be separated due to this size limitation, each segment of the document should be given the same numerical designation (using a five-character zero-filled number) along with a unique alpha designation in the ninth character position for that segment (e.g., NRC00001A, NRC00001B, etc.).

4. Once any exhibit or pre-filed testimony is submitted using this numbering protocol, if a party subsequently needs to amend, revise, or otherwise make a substitution for its submission, the new exhibit or pre-filed testimony should be numbered with an "R" as the fourth character (e.g., NRCR00001), with any subsequent revision of that same exhibit or pre-filed testimony given a sequential designation in the fifth character slot (e.g., NRCR20001).

5. All pre-filed testimony and exhibits must be marked with their dates of submission on the first page below the numerical identifier.

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6. Pre-filed testimony and exhibits that are not provided in the preceding format shall not be considered to have been submitted as evidence in the proceeding. Moreover, the citations or discussion in pre-filed testimony (other than citations to legal authorities, including statutes, regulations, and judicial or NRC decisions) should be accompanied by an evidentiary exhibit that includes the relevant portions of the supporting material cited.

7. Only one copy of each document should be offered into evidence as an exhibit. Accordingly, the parties should confer with one another to determine whether more than one party intends to introduce the same document, and if so, should coordinate the introduction of the exhibit so that only one copy is included as evidence. For example, if the NRC Staff offers a certain exhibit into evidence, Intervenors or the Applicant need only refer to the Staff's exhibit number identified in its pre-filed testimony or statement of position. In each such instance, the parties should determine which party will offer the exhibit into evidence. If the parties prefer, rather than using the initial submitting party's identifier, shared exhibits may be identified with the prefix JNT. If parties rely on different portions of the same exhibit, they should submit separate portions as separate exhibits.

8. At the time pre-filed testimony and exhibits or revised exhibits are filed, each party should submit an electronic copy (preferably in Microsoft Word format) of its pre-filed exhibit list, using the exhibit list template included in Appendix 3. Upon request, the Board's law clerk, Mr. Joshua Kirstein, Esq. (Josh.Kirstein@nrc.gov) will provide the parties with the template of the exhibit list in Microsoft Word format.

C. Document Handling at the Evidentiary Hearing

At the evidentiary hearing, the parties should present documentary materials in the form and manner set forth below:

1. As the party with the ultimate burden of persuasion under 10 C.F.R. § 2.325 relative to the issuance of the requested license, the Applicant's witnesses and exhibits shall be

presented first for Board questioning. NRC Staff shall follow Applicant's presentation, and the Intervenors shall follow NRC Staff.

2. Provided the parties correctly submit electronic copies of their pre-filed testimony and exhibits on compact discs, the parties need not provide additional paper copies to the Board and the other parties at the hearing, although the parties should have paper copies available, as specified above (see section A).

3. Although strongly discouraged, if a party must revise its pre-filed testimony at hearing, it will be required to provide that revised testimony, marked appropriately, per the guidance specified above, both electronically and in hard copy with a sufficient number of paper copies for the Board, the Board's law clerk, counsel for the other parties, and two paper copies for the Court Reporter.

D. Miscellaneous Matters

1. To maintain the confidentiality of each party's proposed confidential questions, those questions should not be served on the other parties. See 10 C.F.R. § 2.1207(a)(3)(iii). Instead, counsel should submit their proposed questions directly to the Board via e-mail directed to the Board's law clerk. The proposed questions must be submitted in PDF format.

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 **ORDER (Summarizing Determinations Related to August 31, 2011 Teleconference)** have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3098-MLA

ORDER (Summarizing Determinations Related to August 31, 2011 Teleconference)

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of September 2011