

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

DOCKETED

October 31, 2011 (2:51 p.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Michael C. Farrar, Chairman
Lawrence G. McDade
Dr. Nicholas G. Trikouros

In the Matter of:

SHAW AREVA MOX SERVICES, LLC

(Mixed Oxide Fuel Fabrication Facility
Possession and Use License)

October 31, 2011

Docket No. 70-3098-MLA

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

**SHAW AREVA MOX SERVICES, LLC's PARTIALLY UNOPPOSED
MOTION TO DISMISS AND MOTION TO STRIKE**

I. **Introduction**

Pursuant to 10 CFR §§ 2.323 and 2.337 and the Atomic Safety and Licensing Board's ("Board") September 9, 2011 Order (Summarizing Determinations Related to August 31, 2011 Teleconference), Applicant Shaw AREVA MOX Services, LLC ("MOX Services") hereby moves as follows:

1. MOX Services moves, on an unopposed basis, to dismiss Intervenors' Contention 4 (relating to high-alpha waste storage and disposition) in its entirety;

2. MOX Services moves to dismiss those aspects of Intervenor's Contention 9 (Item Monitoring) that relate to verifying the *integrity*, as opposed to the *presence*, of strategic special nuclear material (SSNM) items;
3. MOX Services moves to strike Intervenor's Exhibits INT000003 and INT000004 and the portions of Intervenor's Direct Pre-filed Testimony on Contention 9 that are based upon those two Exhibits (EURATOM-related evidence); and
4. MOX Services moves to strike Intervenor's Exhibit INT000009 and the portions of Intervenor's Direct Pre-filed Testimony on Contention 9 that are based on that Exhibit (speculative future events).

II. Legal Standards

A. Motion to Dismiss

Although the Applicant bears the ultimate burden of proof on whether the license should be issued, Intervenor's bear the burden of going forward with evidence in support of their contention.¹ Failure to carry that burden may result in

¹ *Pub. Serv. Co. of N.H.* (Seabrook Station Units 1 & 2), LBP-83-20A, 17 NRC 586, 589 (1983); *Phila. Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-262, 1 NRC 163, 191 (1975); *see also Metro. Edison Co.* (Three Mile Island Nuclear Station Unit 1), ALAB-772, 19 NRC 1193, 1245 (1984) (contention challenging ability to operate safely gives rise to "burden of going forward"), *rev'd in part on other grounds*, CLI-85-2, 21 NRC 282 (1985); *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-697, 16 NRC 1265, 1271 (1982) ("Of course, licensee generally bears the ultimate burden of proof. But intervenors must give some basis for further inquiry." (citations omitted)).

Licensing boards have similarly held that arguments that an intervenor fails to advance in its written presentations for a Subpart L proceeding, should be "treated as waived":

The relevant regulation requires the Intervenor to submit a written presentation that "describe[s] in detail any deficiency or omission in the license application, with ... a detailed statement of reasons why any particular sections or portion is deficient." Arguments that the Intervenor failed . . . to raise or develop in their written presentation

dismissal of the contention.² The Commission recently recognized exactly this burden shifting framework in the Oyster Creek license renewal proceeding:

The ultimate burden of proof on the question of whether the permit or license should be issued is . . . upon the applicant. But where . . . one of the other parties contends that, for a specific reason . . . the permit or license should be denied, that party has the *burden of going forward* with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a *prima facie* case, the burden shifts to the applicant who, as part of his overall burden of proof, must provide sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.³

Where an intervenor fails to carry that burden— or elects not to carry it, the intervenor forfeits any entitlement to further adjudication of the contention⁴ and the contention may be dismissed.⁵ Further, once forfeited, it is out for all time; an

will be treated as waived for several reasons. First, the Intervenor's failure to raise an argument in their written presentation deprives [the applicant] of a fair opportunity to discern and attempt to rebut that argument. Second, my function as the Presiding Officer of this Licensing Board is to be an impartial arbiter of the challenges raised by the Intervenor, and the integrity of this function would be undermined if I were required to search the record for evidence to construct and develop the Intervenor's arguments. Finally, judicial economy and efficiency are promoted by a rule that relieves the Licensing Board from the task of searching for the Intervenor's arguments by "dig[ging] through the reams of paper which [they] have deposited . . . , particularly [when the Intervenor] did not consider the [arguments] sufficiently important to raise [them] in [their written presentation]."

Hydro Res., Inc. (P.O. Box 777, Crownpoint, NM 87313), LBP-05-17, 62 NRC 77, 98 n.14 (2005) (citations omitted). Although the regulation that was at issue in *Hydro Resources* has been superseded and is no longer applicable to Subpart L proceedings, the board's logic in that case is transferable to current proceedings, such as this one, in which a party fails to advance a particular issue.

² See *Seabrook*, LBP-83-20A, 17 NRC at 590.

³ *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 269 (2009) (quoting *La. Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983) (quoting *Consumers Power Co.* (Midland Plant, Units 1 & 2) ALAB-123, 6 AEC 331, 345 (1973))).

⁴ *N. States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-288, 2 NRC 390, 393 (1975); see also *Pub. Serv. Co. of N.H.* (Seabrook Station Units 1 & 2), LBP-90-12, 31 NRC 427, 429-431 (having abandoned an issue, intervenor has no further say on that issue), *aff'd*, ALAB-934, 32 NRC 1 (1990).

⁵ Licensing Board Order (Dismissing GANE Contention 9) (Jan. 28, 2003) (unpublished) (dismissing admitted contention with prejudice where intervenor stated, in response to a request for interrogatory, that it had dropped the contention) (referring to Georgians Against Nuclear Energy's Response to Applicant's

intervenor may not “step into and out of consideration of a particular issue at will.”⁶

B. Motion to Strike

NRC regulations governing the admission of evidence provide that “[o]nly relevant, material, and reliable evidence . . . will be admitted. . . . Immaterial and irrelevant parts of an admissible document will be segregated and excluded so far as is practicable.”⁷ Based on this standard, licensing boards may exclude or accord no weight to testimony, exhibits, and statements of position on issues that are outside the scope of the admitted contention, that are unrelated to the issues in the proceeding, or that seek to raise issues that were not properly raised in earlier pleadings.⁸

The Intervenor is not allowed to change the scope of the contention as admitted by the Board. As the Commission has stated: “Our own longstanding practice requires adjudicatory boards to adhere to the terms of admitted

Second Set of Interrogatories at 23 (Dec. 20, 2002) (“[w]hile [intervenor] is not satisfied with the discussion of costs in [applicant’s] revised ER, [intervenor] has nevertheless decided to drop contention 9”); *Boston Edison Co.* (Pilgrim Nuclear Generating Station Unit 2), LBP-76-7, 3 NRC 156, 157-58 (1976) (intervenor who informed the Board that he elected not to participate in the evidentiary hearing held in default and contentions dismissed).

⁶ *Prairie Island*, ALAB-288, 2 NRC at 393.

⁷ 10 C.F.R. § 2.337(a).

⁸ See, e.g., *S. Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), Memorandum and Order (Ruling on In Limine Motions) at 3-6 (Jan. 26, 2009) (unpublished) (granting in part motion to exclude testimony and exhibits outside the scope of the admitted contentions); *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), Memorandum and Order (Ruling on Motions in Limine and Motion for Clarification) at 12 (Aug. 9, 2007) (unpublished) (granting in part motion to exclude evidence on topics outside scope of contention); *La. Energy Servs., L.P.* (Nat’l Enrichment Facility), Memorandum and Order (Ruling on In Limine Motions and Providing Administrative Directives) at 4-10 (Jan. 21, 2005) (unpublished) (granting in part motions to exclude testimony on topics outside the scope of the admitted contention, including topics raised and rejected at the pleadings stage) (“*L.E.S.*”).

contentions.”⁹ Additionally, the Commission has stated that “[w]here an issue arises over the scope of an admitted contention, NRC opinions have long referred back to the bases set forth in support of the contention.”¹⁰

III. Discussion

A. Contention 4 Should Be Dismissed in Its Entirety

Intervenors’ Contention 4 asserted that MOX Services’ license application failed to address hazards posed by unplanned interruptions in the transfer of certain radioactive waste.¹¹ In response to this Contention, on September 29, 2011, MOX Services submitted 189 pages of testimony methodically and thoroughly demonstrating that, under the circumstances postulated in Contention 4, MOX Services fully meets all applicable NRC requirements.¹² That demonstration is contained in MOX Services’ Safety Evaluation and in the sworn Prefiled testimony of Dr. Sven Bader and Mr. Emory Collins. In doing so, MOX Services overwhelmingly satisfied its burden of coming forward with evidence demonstrating that the Board should find in its favor on this Contention. The evidence is uncontroverted. The NRC Staff’s Safety Evaluation Report and

⁹ *La. Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 105 (1998).

¹⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 379 (2002); *see also Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 & n. 11 (1988) (stating that the “intervenor is not free to change the focus of its admitted contention, at will, as the litigation progresses”), *aff’d in part and remanded in part on other matters sub nom., Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991) (mem.).

¹¹ *See* Petition for Intervention and Request for Hearing at 23 (May 14, 2007), *available at* ADAMS Accession No. ML071410426; *Shaw AREVA MOX Servs.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 487-88 (2008).

¹² *See* [MOX Services’] Initial Statement of Position on Contentions 4, 9, 10, and 11 (Sept. 29, 2011); Ex. APP000002, [MOX Services’] Prefiled Direct Testimony on Contention 4 (Sept. 29, 2011).

Direct Prefiled Testimony fully support MOX Services' position.¹³

However, the Intervenor's Direct Testimony presents *no* evidence on this Contention. Rather, having put the Board, MOX Services, and the Staff to bear the burden of this proceeding, including three years of mandatory disclosures, and literally hundreds of hours of preparing hundreds of pages of testimony and exhibits, Intervenor's have decided to abandon the issue. Intervenor's "Initial Statement of Position on Contentions 9, 10, and 11" ("Intervenor's Initial Statement") specifically states:

This Initial Statement does not address Contention 4. While the Intervenor's do not concede that MOX Services has demonstrated satisfaction of the issues raised in Contention 4, *they [have] chosen not to take a position on it in the evidentiary proceeding.*¹⁴

Intervenor's election not to participate in resolution of the Contention concedes it.¹⁵ Under the circumstances, Contention 4 should be dismissed. There is, and will be, no evidence in the record to contradict MOX Services' extensive and thorough testimony, or the concurring testimony submitted by the NRC Staff's expert. It was the Intervenor's legal obligation, at this stage of the proceeding, to

¹³ See Ex.NRC000002, NRC Staff's Prefiled Direct Testimony of James Hammelman Concerning Contention 4 (Oct. 19, 2011).

¹⁴ Intervenor's Initial Statement at 2 n.1 (Oct. 10, 2011) (emphasis added).

Similarly, in the Construction Authorization Request proceeding, Georgians Against Nuclear Energy ("GANE") (the lead intervenor at the time) stated, as to an admitted contention, that "[w]hile GANE is not satisfied with the discussion of costs in [the Applicant's] revised ER, GANE has nevertheless decided to drop Contention 9." [GANE's] Response to Applicant's Second Set of Interrogatories at 23 (Dec. 20, 2002). That licensing board subsequently granted an unopposed motion to dismiss the contention. Order (Dismissing GANE Contention 9) (Jan. 23, 2003) (unpublished).

¹⁵ See *Boston Edison Co.*, LBP-76-7, 3 NRC at 157-58 (dismissing contentions of intervenor who informed the Board that he elected not to participate in the evidentiary hearing).

come forward with evidence to rebut MOX Services' position.¹⁶ Intervenors have not only failed to do so, they have explicitly stated their intention not to do so, and have subsequently expressed their intent (through counsel) not to oppose this motion. The NRC Staff supports the motion. As such, the Board should dismiss Intervenors' Contention 4 in its entirety.¹⁷

B. Those Aspects of Contention 9 Addressing Item Monitoring for SSNM Item "Integrity" Should Be Dismissed

Intervenors' Contention 9 challenged MOX Services' capability to verify both the "presence" and "integrity" of SSNM items at the MOX Facility.¹⁸ In MOX Services' Direct Testimony, it discussed the distinction between verifying the presence of an SSNM item and the integrity of that item.¹⁹ MOX Services first explained how it verifies the presence of SSNM items.²⁰ It is this aspect of MOX Services' testimony that is challenged by the Intervenors in their Direct Testimony.²¹ Intervenors' fundamental premise appears to be that MOX Services cannot solely rely on its MMIS and PLC systems, and that it must "quantitatively" validate the accuracy or reliability of the data provided by these systems by way

¹⁶ See *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-05-12, 61 NRC 319, 326 ("the burden of going forward on any issues that make it to the hearing process is on the intervenor that is pursuing that issue"), *aff'd*, CLI-05-19, 62 NRC 403 (2005).

¹⁷ MOX Services wishes to note that it has expended extensive resources and incurred very significant costs both in meeting its Mandatory Disclosure obligations on this Contention over a period of three years, and in preparing and submitting its Direct Testimony on this Contention. As a matter of fairness, as well, this Contention should now be dismissed.

¹⁸ See Motion for Admission of Contentions 9, 10, and 11 Regarding [MOX Services'] Revised Fundamental Nuclear Control Plan (July 26, 2010).

¹⁹ Ex. APP000014, [MOX Services'] Prefiled Direct Testimony on Contentions 9-11, at 47, 52 (Sept. 29, 2011).

²⁰ See *id.* at 47-52.

²¹ Ex. INT000001, Direct Testimony of Dr. Edwin S. Lyman in Support of Intervenors' Contentions 9, 10, and 11, at Contention 9, §§ 1-20 (Oct. 19, 2011). (Intervenors' Testimony does not have page numbers).

of periodic physical inventories.²²

However, it is important to recognize what is absent from Intervenor's testimony. In demonstrating how it verifies the *integrity* of SSNM items, MOX Services did not rely on or ever reference the MMIS or PLCs. Instead, it specifically relied upon:

- The sealing and tamper-safing of SSNM item storage locations;
- The identification of "containment boundaries" around each such storage location;
- Monitoring of, and access controls over, the storage area boundaries;
- The triggering of security alarms upon unauthorized access and the mobilization of Protective Force personnel; and
- Daily inspection of TID seal integrity and crane access logs.²³

A review of the Intervenor's testimony discloses *no* challenge to MOX Services' position on SSNM item integrity verification, or to any of the features upon which MOX Services relies to perform such verification.²⁴ Intervenor focus on the MMIS/PLC systems and data, and the alleged need for validation via physical inventories. They completely fail to challenge the approaches, systems, controls and procedures (summarized in the bullets above, and detailed in MOX Services' testimony) that will be used to verify the integrity of SSNM items. There is no discussion of the acceptability of MOX Services' designation, monitoring, or protection of the SSNM item storage areas. Thus, Intervenor have failed to meet

²² *Id.* § 5.

²³ *See Ex. APP000014*, at 52-56.

²⁴ *Ex. INT000001*, at Contention 9, §§ 1-20.

their burden on this aspect of Contention 9 and have effectively waived their right to present evidence on this point. For these reasons, the portion of Contention 9 relating to SSNM item integrity verification should be dismissed.

C. Motion to Strike EURATOM-Related Evidence

Three sections (Sections 7 to 9, Contention 9) in Intervenor's Direct Testimony are based upon papers (Exhibits INT000003 and INT000004) presented at a 1995 and a 2001 conference sponsored by the "European Safeguards Research and Development Association."²⁵ Sections 7 to 9 and Exhibits INT000003 and INT000004 should be stricken from Intervenor's testimony because they are irrelevant to, and outside the scope of, the Contention.

Contention 9 challenges MOX Services' compliance with a particular Nuclear Regulatory Commission (NRC) regulation, 10 CFR § 74.55(b)(1), pertaining to item monitoring. The Sections and exhibits in question do not speak to that requirement, but instead discuss alleged components of the European Atomic Energy Community ("EURATOM") *safeguards* system.

EURATOM is an organization of European countries that, among other things, coordinates member-state research programs for the peaceful use of nuclear energy, promotes member-state non-proliferation, and conducts nuclear safeguards inspections.²⁶ EURATOM member states are the same European countries that are members of the European Union. Assertions as to how

EURATOM conducts its activities under its own requirements and standards first

²⁵ MOX Services located the papers and the respective dates of the conference via an internet search.

²⁶ See The European Atomic Energy Community (EURATOM), European Commission, http://ec.europa.eu/energy/nuclear/euratom/euratom_en.htm (last visited Oct. 28, 2011); Nuclear Safeguards, European Commission, http://ec.europa.eu/energy/nuclear/safeguards/safeguards_en.htm (last visited Oct. 28, 2011).

and foremost are utterly irrelevant to what is needed to comply with 10 CFR § 74.55(b)(1). Nothing in Contention 9 or 10 CFR § 74.55(b)(1) addresses EURATOM requirements or standards.

Moreover, the applicability and scope of EURATOM safeguards are different than the applicability and scope of the Part 74 MC&A requirements. NRC MC&A requirements are intended to control and account for nuclear material at certain NRC-licensed facilities within the U.S. These MC&A requirements are separate from safeguards requirements, such as those established by EURATOM for its member states (whose purpose includes ensuring that no nuclear material is diverted from its intended peaceful use).

Intervenors' witness, Dr. Lyman, makes no effort to explain the relevance or relationship of the EURATOM requirements to 10 CFR § 74.55(b)(1). At most, he states that the "MMIS and PLC mapping system...appear to be very similar to systems installed at AREVA's Melox...plant," and quotes a statement in Exhibit INT000004 regarding EURATOM "Safeguards Goals."

In fact, Dr. Lyman notes that EURATOM "weighing and NDA measurements...are *not required by NRC item monitoring regulations*," and that "EURATOM also requires a weekly manual verification approach...*that goes beyond NRC requirements*."²⁷ Whether MOX Services' MC&A procedures and systems would satisfy EURATOM requirements is entirely irrelevant to whether MOX Services complies with 10 CFR § 74.55(b)(1). Thus, the references to

²⁷ Ex. INT000001, at Contention 9, §§ 7-8 (emphasis added).

EURATOM are outside the scope of Contention 9, and the Board should strike Intervenor Exhibits INT000003 and INT000004, as well as Sections 7-9 under Contention 9.

D. The Evidence Involving Speculative Future Events Should Be Stricken

Finally, Intervenor's Direct Testimony on Contention 9 also contains a Section 16, which states in part:

[MOX Services] is apparently *considering* asking the NRC to relax the requirement to conduct *100% physical inspections* of all items in vault storage during inventories [and] it may not be possible to actual [sic] comply with NRC's *physical inventory* requirements....²⁸

In addition, Section 17 states:

And if MOX Services is successful in convincing the NRC that 100% measured bi-annual inventories are no longer necessary, then such inventories will also no longer serve as an independent check. Thus at least one mitigating factor could no longer be credited.²⁹

This testimony references Intervenor Exhibit INT000009. The testimony regarding potential, future actions by MOX Services, that are not part of the current license application, is premature, speculative and irrelevant to the Contention.

Moreover, the reference to these potential future actions relates to the *separate* NRC requirement for 100% physical inventories set forth in 10 CFR § 74.59(f), which is not the subject of *any* admitted contention in this proceeding.

This regulatory requirement is not within the scope of the Contention. While the

²⁸ *Id.* § 16 (emphasis added).

²⁹ *Id.* § 17.

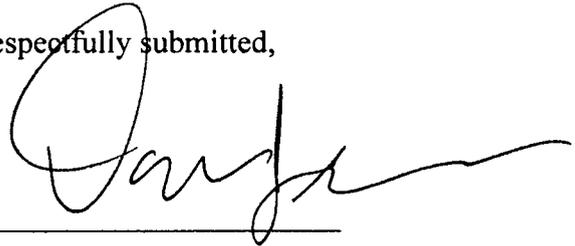
Intervenors argue that some form of physical inventory is needed to verify the accuracy of MMIS/PLC data for item monitoring purposes under 10 CFR § 74.55(b)(1), they may not expand the scope of the Contention to suggest MOX Services fails (or in this case may in the future propose an action that, if taken, would fail) to meet the 100% physical inventory requirement set forth in 10 CFR § 74.59(f).

Therefore, Intervenors' Exhibit INT000009, the first two paragraphs in Section 16 of Intervenors' Contention 9 testimony, and the statement quoted on page 11 above from Section 17 should be stricken.

IV. **Conclusion**

For the reasons discussed above, MOX Services' Motions to Dismiss and to Strike should be granted.

Respectfully submitted,



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CERTIFICATIONS

I certify that counsel for MOX Services conferred with counsel for Intervenors and the NRC Staff in an attempt to resolve the issues raised in this Motion. On October 27, 2011, counsel for NRC Staff indicated that it supports MOX Services' motion to dismiss Contention 4, but takes no position at this time with respect to the remainder of the motion. On October 28, 2011, counsel for Intervenors indicated that the Intervenors will not oppose MOX Services' motion to dismiss Contention 4.



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

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, copies of "Shaw AREVA MOX Services, LLC's Partially Unopposed Motion to Dismiss and Motion to Strike" were served upon the persons listed below by email and first class mail.

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A handwritten signature in black ink, appearing to read "Anna V. Jones", written over a horizontal line.

Anna V. Jones, Esq.

Counsel for Shaw AREVA MOX Services, LLC

Dated: 31 October 2011

Hearing Docket

From: Jones, Anna V. [anna.jones@morganlewis.com]
Sent: Monday, October 31, 2011 2:51 PM
To: Farrar, Mike; McDade, Lawrence; Trikouros, Nicholas; Docket, Hearing; Klukan, Brett; Scott, Catherine; Hair, Christopher; Diane Curran; Kirstein, Josh; Lewman, Shelbie
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Subject: Docket No. 70-3098-MLA: MOX Services' Motion to Dismiss and Motion to Strike
Attachments: (68420936)_ (1)_ Motion to Dismiss and Motion to Strike.PDF

Dear Administrative Judges and Parties,

Shaw AREVA MOX Services, LLC's ("MOX Services") herein submits an electronic copy of its Partially Unopposed Motion to Dismiss and Motion to Strike. MOX Services is also serving hard copies via first class mail.

Sincerely,

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x-workshareprotect-dsp:
acceptlanguage: en-US
x-ems-proccessed: Q/C4TKuMQud1ZsPcuJv0Lg==
x-ems-stamp: JZN+56MEj/LdvuMyRvVfjQ==
MIME-Version: 1.0
X-WSS-ID: 62B02DBC4341676160-01-01
Content-Type: multipart/mixed;
 boundary="_004_499C76E0A679354CA0E738669C4333CF3FC59ED1B6COPXCMS02
morg_"
Return-Path: anna.jones@morganlewis.com