

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

May 30, 2012 (6:41 p.m.)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

THE ATOMIC SAFETY AND LICENSING BOARD

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)

May 30, 2012

Docket No. 70-3098-MLA

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

SHAW AREVA MOX SERVICES, LLC'S
ANSWER TO INTERVENORS MOTION FOR LEAVE TO SUBMIT SURREPLY

In accordance with 10 C.F.R. § 2.323(c), Shaw AREVA MOX Services, LLC (MOX Services) herein answers Intervenors' May 25, 2012 "Motion for Leave to Submit Surreply to [MOX Services'] Proposed Reply Findings of Fact and Conclusions of Law." The Atomic Safety and Licensing Board (Board) should deny Intervenors' May 25 Motion because it is not consistent with the schedule and process voluntarily negotiated and agreed to by the parties, and because Intervenors have had many months and many opportunities to raise the issues that allegedly give rise to the Motion.

First, the Board should deny Intervenors' Motion because it is inconsistent with the schedule for filings negotiated and agreed to by the parties and approved by this Board.

Intervenors specifically agreed to the order and timing of the final submittals by the parties, and

with MOX Services and the NRC Staff, jointly proposed that schedule to the Board.¹ After an apparent change of heart, Intervenors cannot now simply alter that schedule.

Second, the requested departure is particularly unwarranted because Intervenors have not shown good cause for this extraordinary step. Intervenors identify two allegedly “incorrect statements” in MOX Services’ May 18, 2012 “Proposed Reply Findings of Fact and Conclusions of Law” (Reply Findings), and conclude that a surreply is warranted because “Intervenors do not believe these [two] statements were previously made by MOX Services.”² Intervenors are incorrect.

The first statement raised by Intervenors pertains to Contention 10. Intervenors suggest that MOX Services indicated for the first time in its May 18, 2012 Reply Findings that it does not intend to re-measure items or conduct a physical inventory as part of alarm resolution.³ In support, Intervenors cite a statement in footnote 133 of MOX Services’ Reply Findings that, *in the context of the inventory at issue in Contention 10*, MOX Services does not intend to re-measure items or conduct a physical inventory.⁴ But MOX Services’ statement provided no new

¹ See Email from A. Jones, Counsel for MOX Services, “Docket No. 70-3098-MLA” (Mar. 14, 2012), available at ADAMS Accession No. ML12095A310.

² Intervenors’ Motion for Leave to Submit Surreply to [MOX Services’] Proposed Reply Findings of Fact and Conclusions of Law at 1 (May 25, 2012) (“Intervenors’ Motion”).

³ *Id.* at 1-2.

⁴ *Id.* at 1 (“MOX Services states that it has ‘not represented – in testimony or in legal statements of position – any intention of conducting a physical inventory or measuring items as part of alarm resolution.’”). The full footnote reads:

Intervenors note that MOX Services’ timing projections for item inventories ‘do not take into account the time needed to perform other activities that would be conducted during a physical inventory, including assay of the contents.’ *Id.* ¶ 4.53 n.4; *see also id.* ¶ 4.47 (referring to the time required for an ‘actual inventory (which may require re-measurement of item contents)’). But MOX Services’ alarm resolution methods include an *item* inventory, not a *physical* inventory. *See* Exhibit APP000020, at 147. MOX Services has not represented - in testimony or in legal statements of position - any intention of conducting a physical inventory or measuring items as part of alarm resolution.

[MOX Services’] Proposed Reply Findings of Fact and Conclusions of Law for Contentions 9, 10, and 11 at ¶ 3.58 n. 133 (“MOX Services’ Reply Findings”). MOX Services provided the full footnote as

information warranting Intervenor's Motion. Rather, in its September 2011 initial statement of position and first evidentiary filing, MOX Services first made clear that it understood Contention 10 to pertain to an *item* inventory of the four storage areas in question.⁵ In support of that position, MOX Services provided four engineering calculations that described the timing estimates for completing such an inventory of the four storage areas in question.⁶ Those calculations plainly did not include assays or steps required for a physical inventory.⁷ If Intervenor's wanted to challenge the nature of the inventory described by MOX Services in the context of Contention 10, they could have done so *as early as October 2011*, in their first statement of position and evidentiary filing. Intervenor's have no basis to raise the matter anew at this late stage of the proceeding.

The second statement raised by Intervenor's pertains to the scope of Contention 11. Intervenor's suggest that MOX Services first raised the notion that Contention 11 pertains only to

clarification after the word "inventory" in the following sentence: "And Intervenor's are troubled that MOX Services cannot complete an inventory of the four storage areas that are the subject of Contention 10 (were those areas to be filled to maximum capacity), within three days." *Id.* at 2 (citing MOX Services' Reply Findings at ¶ 3.58 n. 133).

⁵ See MOX Services' Initial Statement of Position on Contentions 4, 9, 10, and 11 at 31-32 (Sept. 29, 2011) ("MOX Services' Initial Statement of Position") (discussing timing requirements for an alarm resolution inventory of the four storage areas in question, and citing MOX Services' Direct Testimony and Exhibits APP000025 to 28); see also Exhibit APPR00014, [MOX Services'] Revised Prefiled Direct Testimony on Contentions 9-11, at Q 49 (Mar. 1, 2012) (discussing the inventory as involving presence verification, *not measurement or assay of items*).

⁶ See Exhibit APPR00014 at Q 47 – Q 48 (citing engineering calculations in Exhibits APP000025 to 28 for the inventory timing estimates).

⁷ See Exhibit APP000025, MFFF PuO₂ 3013 Container Storage Unit (DCM) Inspection Time Engineering Calculation, (Sept. 29, 2011) (describing calculations for the inventory timing estimate for DCM, and including no reference to measuring or assaying the contents of SSNM items); Exhibit APP000026, MFFF Buffer Storage Unit (DCE) Inspection Time Engineering Calculation (Sept. 29, 2011) (describing calculations for the inventory timing estimate for DCE, and including weighing but not assaying the contents of SSNM items); Exhibit APP000027, MFFF Rod Tray Storage Unit (DCE) Inspection Time Engineering Calculation (Sept. 29, 2011) (describing calculations for the inventory timing estimate for STK, and including no reference to measuring or assaying the contents of SSNM items); Exhibit APP000028, MFFF TAS Fuel Assembly Storage Unit (TAS) Inspection Time Engineering Calculation (Sept. 29, 2011) (describing calculations for the inventory timing estimate for TAS, and including no reference to measuring or assaying the contents of SSNM items).

the *presence* of SSNM items in MOX Services' May 18, 2012 Reply Findings.⁸ Intervenor are again mistaken; MOX Services presented this very position eight months ago, in its initial statement of position and its first evidentiary filing.⁹ MOX Services reiterated this position in its reply statement of position,¹⁰ reply testimony,¹¹ at the hearing,¹² and most recently and explicitly in its initial findings of fact and conclusions of law.¹³ Intervenor have had multiple opportunities – in statements of position, live or prefiled testimony, questions for the Board, questioning of experts at the hearing, and findings of fact and conclusions of law – to clarify or challenge the scope of Contention 11. Intervenor cannot now, at the eleventh hour and in this extraordinary manner, attempt to raise matters that could have been raised earlier.

⁸ Intervenor's Motion at 1-2.

⁹ See MOX Services' Initial Statement of Position at 34 ("Contention 11 challenges MOX Services' ability to meet the eight and 72 hour commitments regarding 'presence' of items in vaults or PCAAs."); Exhibit APPR00014 at Q 53 ("Q: Please discuss the relevant requirements of 10 CFR § 74.57(e). A: [All] That regulation simply states that '[t]he licensee shall provide an ability to rapidly assess the validity of alleged thefts.' It parallels the requirement addressed under Contention 9 and required by 10 CFR § 74.55(b)(1), because both address the presence of SSNM items."); *id.* at Q 54 ("It should be noted that Contention 11 only challenges MOX Services' compliance with its 8 and 72 hour commitments, and only challenges MOX Services' ability to confirm the 'presence' of SSNM items.").

¹⁰ See MOX Services' Reply Statement of Position on Contentions 9, 10, and 11 at 24 (Jan. 24, 2012) ("Contention 11 challenges MOX Services' ability to meet the eight and 72 hour commitments regarding the 'presence' of items in vaults or PCAAs.").

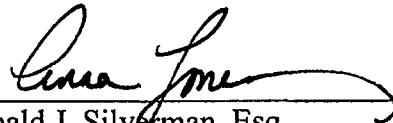
¹¹ See Exhibit APP000031, [MOX Services'] Prefiled Reply Testimony on Contentions 9-11, at Q 48 (Jan. 24, 2012) ("[T]he regulations require only that '[t]he licensee shall provide an ability to rapidly assess the validity of alleged thefts.' 10 CFR § 74.57(e). As we explained in our Direct Testimony, MOX Services has committed, consistent with NRC guidance, to locate all items within a vault within 72 hours. See Exhibit APP000014 at Q 54 – Q 55. Thus, Dr. Lyman's assertion that MOX Services is required to conduct 'a complete inventory of the facility' in order to assess the validity of alleged thefts, is inconsistent with NRC rules and guidance.").

¹² See Tr. at 1090 – 91 (Jones) ("The last contention, Contention 11, challenges MOX Services' ability to rapidly assess the validity of alleged thefts as required by 10 CFR 74.57(e). Again, the regulation does not specify a time frame. Rather MOX Services has committed to assess alleged thefts by confirming the presence of a single item within eight hours and all items in vault storage within 72 hours."); *id.* at 1535 (Jones) ("The next page [of the FNMCP], 3.3.1.6, speaks to confirmation of SSNM presence. That's the matter that's the focus of this contention [Contention 11] and on which we had prepared testimony to date, the idea can we verify the presence of items in storage within the time frames to which we had committed.").

¹³ See MOX Services' Proposed Findings of Fact and Conclusions of Law For Contentions 9, 10, and 11 at ¶ 4.131 (Apr. 13, 2012) ("As with the regulation at issue in Contention 9, Section 74.57(e) addresses the ability to verify *presence* of SSNM items. See Exhibit APPR00014 at Q 53. Verification of item *integrity* is not a component of 10 CFR § 74.57(e).").

The Board has, on several occasions, commended the parties for their cooperation to date.¹⁴ MOX Services has worked diligently to achieve that objective. In this case, however, we cannot agree with the Intervenor's request, and urge the Board to deny it. Especially because the Motion pertains to issues Intervenor could have raised as early as October 2011, the Board must deny Intervenor's request for this gratuitous filing.

Respectfully submitted,



Donald J. Silverman, Esq.
Anna Vinson Jones, Esq.
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Ave, N.W.
Washington, DC 20004
Phone (202) 739-5502
E-mail: dsilverman@morganlewis.com

Counsel for Shaw AREVA MOX Services, LLC

¹⁴ See, e.g., Tr. 1596 (McDade) (“[W]hat I would like to do is . . . to commend counsel for the professionalism and spirit of cooperation that has been exhibited throughout this proceeding”); Tr. 897-98 (Farrar) (commenting on the parties’ negotiation of a hearing schedule, and stating “I for one am very happy with the tone and tenor and context of this discussion.”).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

THE ATOMIC SAFETY AND LICENSING BOARD

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)

May 30, 2012

Docket No. 70-3098-MLA

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

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2012, copies of "Shaw AREVA MOX Services, LLC's Answer to Intervenor's Motion for Leave to Submit Surreply," were served upon the persons listed below by email and first class mail.

Secretary of the Commission
Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: 0-16 C1
Washington, D.C. 20555-0001
Hearing.Docket@nrc.gov

Michael C. Farrar, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Mike.Farrar@nrc.gov

Lawrence G. McDade
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Lawrence.McDade@nrc.gov

Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Nicholas.Trikouros@nrc.gov

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-7 H4M
Washington, DC 20555-0001
OCAAMAIL.Resource@nrc.gov

Diane Curran
Harmon, Curran, Spielberg, & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, D.C. 20036
DCurran@harmoncurran.com

Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O-15 D21
Washington, DC 20555-0001
Christopher Hair
Christopher.Hair@nrc.gov
Brett Klukan
Brett.Klukan@nrc.gov
Catherine Scott
Catherine.Scott@nrc.gov
Marcia Simon
Marcia.Simon@nrc.gov

Law Clerk
Atomic Safety and Licensing Board Panel
Law Clerks
Mail Stop: T-3 E2B
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Joshua A. Kirstein
Josh.Kirstein@nrc.gov
Shelbie Lewman
Shelbie.Lewman@nrc.gov

Glenn Carroll
Nuclear Watch South
P.O. Box 8574
Atlanta, GA 31106
Atom.Girl@mindspring.com

Mary Olson
Nuclear Information and Resource Service
P.O. Box 7586
Asheville, NC 28802
MaryOlson@main.nc.us

Louis A. Zeller
Blue Ridge Environmental Defense League
P.O. Box 88
Glendale Springs, NC 28629
BREDL@skybest.com



Anna V. Jones, Esq.
Counsel for Shaw AREVA MOX Services, LLC

Dated: 30 May 2012

K-285

Hearing Docket

From: Jones, Anna V. [anna.jones@morganlewis.com]
Sent: Wednesday, May 30, 2012 6:41 PM
To: 'Diane Curran'; Klukan, Brett; Scott, Catherine; Hair, Christopher; Silverman, Donald J.; 'Glenn Carroll (atom.girl@mindspring.com)'; 'Janet Marsh and Lou Zeller (bredl@skybest.com)'; Kirstein, Josh; McDade, Lawrence; Simon, Marcia; 'Mary Olson (maryolson@main.nc.us)'; Farrar, Mike; Trikouros, Nicholas; Docket, Hearing; OCAAMAIL Resource; Harich, Patricia; Lewman, Shelbie
Cc: 'Gwyn, Dealis W.'; 'King, Sue'; Silverman, Donald J.
Subject: Docket No. 70-3098-MLA
Attachments: (69959104)_1)_Answer to Motion for Leave to File Surreply.PDF

Dear Administrative Judges and Parties,

MOX Services herein submits its Answer to Intervenors' Motion for Leave to Submit Surreply. We are providing hard copies by first class mail as well.

Regards,

Anna Vinson Jones
Counsel for MOX Services

Anna Vinson Jones

Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004
Direct: 202.739.5881 | Main: 202.739.3000 | Fax: 202.739.3001
anna.jones@morganlewis.com
Assistant: Rhonda Rollerson | 202.739.5157 | rrollerson@morganlewis.com

DISCLAIMER

This e-mail message is intended only for the personal use of the recipient(s) named above. This message may be an attorney-client communication and as such privileged and confidential and/or it may include attorney work product. If you are not an intended recipient, you may not review, copy or distribute this message. If you have received this communication in error, please notify us immediately by e-mail and delete the original message.