

October 20, 2010 (4:07pm)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

ATOMIC SAFETY AND LICENSING BOARD

Michael C. Farrar, Chair
Dr. Nicholas G. Trikourios
Lawrence G. McDade

In the Matter of

October 20, 2010

Shaw AREVA MOX Services, LLC
(Mixed Oxide Fuel Fabrication Facility
Possession and Use License)

Docket No. 70-3098-MLA

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

**ANSWER OF SHAW AREVA MOX SERVICES, LLC TO INTERVENORS' MOTION
FOR ISSUANCE OF AN ORDER ESTABLISHING PROCEDURES FOR PUBLIC
DISCLOSURE OF INFORMATION AND REDACTION OF SENSITIVE DOCUMENTS**

Pursuant to 10 C.F.R. § 2.323(c), Shaw AREVA MOX Services, LLC ("MOX Services") provides this Answer to Intervenor's (Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service) October 18, 2010 motion regarding the public disclosure of information presented to and issued by the Atomic Safety and Licensing Board ("Board") in the above captioned proceeding.¹

As correctly noted by Intervenor in their motion, MOX Services, Intervenor, and the U.S. Nuclear Regulatory Commission ("NRC") Staff have worked together in an effort to reach an agreement regarding the public disclosure of information that is not required, pursuant to NRC regulations and policy, to be protected as proprietary or sensitive unclassified non-safeguards information ("SUNSI").² Indeed, MOX Services does not object to Intervenor's

¹ Intervenor's Motion for Issuance of an Order Establishing Procedures for Public Disclosure of Information and Redaction of Sensitive Documents (Oct. 18, 2010) ("Intervenor's Motion").

² See, e.g. 10 C.F.R. § 2.390; COMSECY-05-0054, Attach. 2, at 1 (Oct. 26, 2005) (NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information); NRC Regulatory Issue Summary 2005-31, Control of Security-Related Sensitive Unclassified Non-Safeguards Information

proposals set forth in paragraphs III.A, III.B, III.C, III.D, and III.F of the October 18, 2010 motion.³ MOX Services' departure from Intervenor's positions pertains to paragraph III.E, which states as follows:

E. With respect to redaction of pleadings submitted by the parties, however, Intervenor's do not seek an order requiring immediate redaction of documents. Pursuant to 10 C.F.R. § 2.390(b)(6), Intervenor's would wait until the conclusion of any merits proceeding or the dismissal of the contentions to seek redactions or public disclosure of pleadings and licensing correspondence. In the meantime, Intervenor's would use the NRC's Freedom of Information Act ("FOIA") procedures to request redacted versions of licensing correspondence and pleadings, including materials related to the FNMCP.

Given that the NRC's FOIA program is administered by the NRC Staff, which is a party to this proceeding, Intervenor's would not consider the FOIA process to constitute an equivalent substitute for the Board's exercise of its authority under 10 C.F.R. § 2.390(b)(6). Thus, Intervenor's would reserve their right to seek redaction or disclosure of pleadings if the FOIA process did not result in timely or adequate disclosures.⁴

MOX Services is not opposed to Intervenor's proposal to use the FOIA process to obtain redacted versions of pleadings and the underlying licensing documents. Intervenor's have full access to protected information in this proceeding, including SUNSI and proprietary materials, pursuant to the Protective Order approved by the Board on December 23, 2008. The public has

Handled by Individuals, Firms, and Entities Subject to NRC Regulation of the Use of Source, Byproduct, and Special Nuclear Material (Dec. 22, 2005); NRC Management Directive 12.6, NRC Sensitive Unclassified Information Security Program (Dec. 20, 1999).

MOX Services would like to clarify that its basis to date for protection from public disclosure of Material Control and Accounting ("MC&A") related materials has been the security-related sensitivity of the information, which is in the first instance the province of the NRC Staff and the Department of Energy, as applicable. Some of the information protected to date may also constitute confidential *commercial/proprietary* information. MOX Services has made no determination in that regard as yet, but any such determination would be for MOX Services to make, subject to applicable Freedom of Information Act ("FOIA") procedures. MOX Services understands that the Department of Energy also may undertake additional review in accordance with the Department of Energy's classification guide, and that such information would be protected under FOIA.

³ See Intervenor's Motion at 5-7.

⁴ *Id.* at 6-7.

access to information relevant to this hearing – albeit not SUNSI, proprietary, or otherwise protected information – via the NRC’s regulations implementing the FOIA requirements.⁵ Those regulations provide that the NRC Staff must redact any protected information before publicly disclosing the document.⁶ Accordingly, Intervenors may also obtain redacted versions of pleadings and licensing materials suitable for public disclosure via the FOIA process.

NRC regulations provide that a FOIA requester may appeal a denial of access to agency records to the appropriate office within the NRC.⁷ If the requester remains unsatisfied after resolution of that appeal, judicial review of the disclosure determination is available in a federal district court.⁸ Accordingly, if Intervenors are unsatisfied with the results of the FOIA process, there is a well-established avenue for appeal of those determinations. While the Intervenors have “reserve[d] their right to seek redaction or disclosure of pleadings if the FOIA process did not result in timely or adequate disclosures,”⁹ MOX Services does not agree that such a right to seek relief from the Board on a FOIA determination exists.

Nevertheless, MOX Services acknowledges that the Board has the authority to issue orders consistent with NRC regulations at 10 C.F.R. § 2.390 regarding proprietary or security-sensitive documents.¹⁰ MOX Services also acknowledges that the Board may resolve disputes

⁵ See 10 C.F.R. §§ 9.17, 9.19, 2.390.

⁶ See *id.* § 9.19.

⁷ See *id.* § 9.29.

⁸ See *id.*

⁹ Intervenors’ Motion at 7.

¹⁰ See 10 C.F.R. § 2.390(f). Intervenors suggest that MOX Services does not believe that 10 C.F.R. § 2.390(b)(6) applies to this proceeding. See Intervenors’ Motion at 2. This is not the case. To the contrary, MOX Services believes that 10 C.F.R. § 2.390(b)(6) provides that parties to a proceeding may have access to proprietary information under a protective order, as Intervenors have in this proceeding. See 10 C.F.R. § 2.390(b)(6) (“the Commission may require information claimed to be a trade secret or privileged or confidential commercial or financial information to be subject to inspection . . . under protective order by the parties to a proceeding”). Section 2.390(b)(6) also provides that if information that is withheld under § 2.390 is later determined not to be protected, that information and any transcript containing such information may be made publicly available. See *id.* (“*In camera* sessions of hearings may be held when

regarding the protected nature of *pleadings* after the end of the merits proceeding.¹¹ MOX Services maintains, however, that the question of whether or not the Board has the authority to direct MOX Services or the NRC Staff to redact other SUNSI or proprietary *licensing materials* (e.g., the FNMCP) is not ripe and should not be decided by the Board at this time. Indeed, the Commission has very recently stated that it intends to review the NRC Staff's practice of withholding documents in their entirety, and has refrained from deciding a licensing board's authority to direct the NRC Staff to redact a licensing document.¹² Because this question is before the Commission, it is not appropriately resolved here.

In light of the above, MOX Services does not object to the Board's adoption of the elements set forth in paragraphs III.A, III.B, III.C, III.D, and III.F of the Intervenor's October 18, 2010 motion, along with the following revised paragraph III.E:

E. With respect to redaction of pleadings submitted by the parties, however, Intervenor does not seek an order requiring immediate redaction of documents. Intervenor would wait until the conclusion of any merits proceeding or the dismissal of the contentions to seek redactions or public disclosure of pleadings. Intervenor reserves their right to request that the Board resolve any dispute over the redaction or disclosure of pleadings at that time.

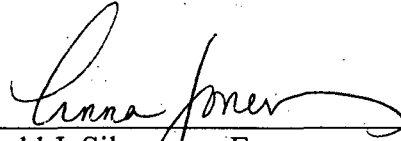
the information sought to be withheld is produced or offered in evidence. If the Commission subsequently determines that the information should be disclosed, the information and the transcript of such *in camera* session will be made publicly available.”).

¹¹ See *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-00-6, 51 NRC 101, 135 (2000) (“we see no reason at this juncture to engage in the considerable effort that may be involved in parsing the various parties’ pleadings to identify and then resolve the question of what information has that protected status. This is a matter that is best left to the conclusion of the merits of this litigation”). See also *Wis. Elec. Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982) (“The Commission’s rules contemplate a resolution of proprietary information disputes after the merits are resolved in order to avoid delay in proceedings.”).

¹² See *S. Tex. Project Nuclear Operating Co.* (S. Tex. Project, Units 3 & 4), CLI-10-24, 72 NRC ___, slip op. at 13, n.53 (Sept. 29, 2010) (“we need not reach the question of the Board’s authority to direct the Staff to redact the document”); *id.* at 25, n.99 (“The Board raised several questions concerning the Staff’s apparent practice of withholding in their entirety documents containing SUNSI, as well as the potential impact of this practice on our adjudicatory proceedings. The Board’s concerns are not without force; we intend to look further into these questions outside of the adjudicatory process.” (citation omitted)).

In the meantime, Intervenor would use the NRC's Freedom of Information Act ("FOIA") procedures to request redacted versions of licensing correspondence and pleadings, including materials related to the FNMCP. If Intervenor is not satisfied with the FOIA process, they may appeal those determinations in accordance with 10 C.F.R. § 9.29.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

**Michael C. Farrar, Chairman
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	)	

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2010, copies of Shaw AREVA MOX Services, LLC's "Answer to Intervenor's Motion for Issuance of An Order Establishing Procedures for Public Disclosure of Information and Redaction of Sensitive Documents" were served upon the persons listed below, by email and first class mail.

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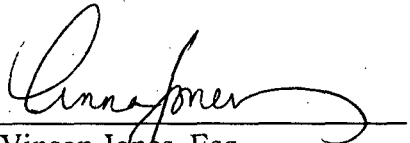
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