

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

Docket No. 70-7004

USEC Inc.
American Centrifuge Plant (ACP)

ASLBP No. 05-383-01-ML

Reply to USEC and NRC Staff Regarding PRESS Appeal

Following 10 CFR 2.341(b)(3), Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) submits this brief in the above captioned matter in reply to "USEC Inc. Brief in Response to PRESS Notice of Appeal and Brief and Motion for Leave to Augment Appeal" ("USEC Reply," dated Oct 27), and "NRC Staff's Brief in Opposition to Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) Appeal of LBP-05-28" ("Staff Reply," also dated Oct 27).

The USEC Reply states at page 1 that, "[b]ecause PRESS has failed to demonstrate that there has been *any* error of law or abuse of discretion in the Board's Decision, the Commission should affirm that Decision and dismiss the PRESS Petition to Intervene." (Emphasis supplied.) This conclusion is repeated twice in USEC's Conclusion on pages 19 and 20. Thus USEC's direction that the Commission should affirm the Board's Decision may be dismissed by the Commission if the Commission finds either that the Board has made either one error of law or one abuse of discretion.

Indeed, USEC uses the phrase, "error of law or abuse of discretion," no less than 18 times. USEC establishes this phrase in its section "Applicable Legal Standards" on page 2, where it is sourced to CLI-04-36, which sources it to CLI-00-21, which sources it to CLI-98-6 and CLI-98-21. The earliest source we were able to locate was CLI-00-21, involving a petitioner who filed a petition "[n]early three years after the deadline for filing timely intervention petitions." The NRC Staff is silent on the applicable standards for consideration of an appeal, and the USEC discussion mentions no 10 CFR standards. The closest we could find was 10 CFR 2.341(b)(4):

- (4) The petition for review may be granted in the discretion of the Commission, giving due weight to the existence of a substantial question with respect to the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

We note that USEC's "error of law or abuse of discretion" is sufficient to satisfy 10 CFR 2.341(b)(4)(iii), but not 10 CFR 2.341(b)(4) in its entirety. However, although our Appeal never assumes the demeanor of directly stating that "the Board has abused its discretion in its Decision," USEC correctly identifies that discretion is at the heart of our appeal. Moreover, our initial Appeal starts the meticulous process of identifying the Board's objections to our contentions, under the six standards of 10 C.F.R. §2.309(f)(1), addressing them one-by-one, and identifying errors of law, either on our part, or on the part of the Board. It is a well-defined treatment, so to answer both USEC and the NRC Staff, we estimate that the "augmented" part of the Appeal will take an extra 30 to 35 pages, and can be completed in 10 days – or perhaps 5 days. Further, we feel that the Appeal itself is helping to supply any specificity of detail that was absent in the original Petition.

The NRC Staff overlooked the first 14 pages of our Appeal in its entirety, suggesting that they constitute "background material" and are "not clearly articulated" (Staff footnote 4, pages 2 and 3). Similarly, USEC concludes on page 10, that "after 14 pages of PRESS' Brief, there is no basis presented for concluding that the Board committed any error of law or abuse of discretion." In fact, only pages 1 and 2 contained material that was strictly of a background nature, to frame the discussion. The remaining discussion, in section 2, was quite pointed. First, it elaborates on the case law upon which the parties had relied to make a case for "strict by design." We argued that the case law wasn't designing as strict a standard as the parties were applying. The discussion on the various parts of §2.309(f)(1) layed out the rationale for the identifications we would make in the point-by-point analysis of the Board's dismissal of our contentions. In particular, Table 2 analyses the 10 phrases that the Board used to indicate their opinion that we failed the test of §2.309(f)(1)(v), "concise allegation of supporting facts or expert opinion." Additionally, we pointed out that we are not required to make our case at this stage, just to serve notice about the points we wish to litigate. Plus, we took issue with the idea that we were *required* to provide easily-available documents, and we pointed out that the Board is required to examine referenced information

to see if it supports a contention. Finally, we provided (pages 11 to 14) an in-depth analysis of the case law surrounding violations issues that had been used to discard many of our contentions. We concluded, reasonably, that the case law referred to circumstances that were quite different to those at hand. In sum, the bulk of those first 14 pages provided, in one place, the discussions that we would need to refer to repeatedly throughout the detailed analysis to follow.

We have been disappointed, in this baptism by fire, in the position that the Staff has adopted. We expected that USEC would argue for the industry, and that the Staff would tend to argue for the public interest. In practice, however, the experience has been like simultaneously facing off against two USECs. The Staff's opposition to our Appeal, though, was less robust than USEC's. For example, the Staff, at page 3, cites CLI-99-10 to show that failure to comply with *any* of the six requirements of §2.309(f)(1) is grounds for dismissal. On review, CLI-99-10 only addresses four of the six (and, at that, in the context of the old §2.714 rules). Moreover, it turns out that CLI-99-10 is a secondary source, relying on CLI-91-12 for the "dismissal" language. As we pointed out in our Appeal, CLI-91-12 also states that a "Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner."¹

Throughout the USEC Reply, USEC misconstrues our intentions, often with the result that USEC casts our Appeal as having made some allegation against the Board that we didn't make. It appears that USEC failed to read the fine logic of the Appeal closely enough. For example, USEC devotes several pages (2 to 5) to an argument about a PRESS "objection" regarding the time allotted to prepare contentions. It is not an objection – we don't challenge the Board, or the Commission, on this point. We simply wish that this consideration be weighed as a discretionary factor regarding the formal completeness of our Petition.

On the other hand, USEC appears to conclude, wrongly, in several places that we failed to address some argument presented in the Board's Decision. A close reading of our analyses of the four contentions we have addressed will reveal that we have been quite meticulous in this. There is no need, for example, for USEC to point out on page 9 our use of the word "relating," or to emphasize that the word means "to describe." Whatever formal weaknesses our Petition has, we chose our words quite deliberately in the Appeal. And it is intended for close scrutiny.

In other places, USEC proceeds prematurely to argue the issue, rather than the admission of the issue. For example, USEC discusses Performance Reviews and Reports to Congress on page 10 to counter our Petition's arguments about USEC's position as the leading violator

¹Appeal, page 21, citing Board Decision at 8. The Board continues to state that a petitioner must provide *some* support for their contention either in the form of facts or expert testimony. In general, we argue that, by and large, we do indeed provide *enough* support to pass the standard of admissibility. It is a separate question whether we will later be able to prove our case.

among NRC materials licensees. USEC presents a similar premature argument in its footnote 22, page 18.

Both USEC and the NRC Staff appear to have grabbed the wrong end of the stick in seizing our simple admission that we don't know the identities of any individual personnel associated with the ACP. It is completely unfair for the Staff (at 8) to characterize contention 18 as a "contention ... based on lack of management integrity," a phrase we don't believe we have used. If our inclusion of the transcript excerpt didn't make it plain enough, perhaps the text of our Petition is a better place to look. We're arguing procedures, not people. The actor in all of the violations notices is the Corporation (See, for example, EA-99-256). The procedures involved include activation of the Emergency Response Facility; compliance with ASME regulations; computers processing classified information; assessment and tracking reports; police training; computer staff training; criticality safety training; maintenance and surveillance of safety valves; valve replacement; alarm response procedures; auditing vendors; and many more. The Corporation would employ these procedures for the ACP.

The Staff argues (at 4) that PRESS "misconstrues" the Board's ruling on contention 21 ("Unnecessary Censorship") regarding its opinion that PRESS had not implicated a genuine dispute over an issue of fact or law. The thrust of the Staff's argument here is that PRESS didn't identify some issue in the LA or ER for which redaction obstructed our understanding of that issue. But how could we know if we can't see it. USEC suggests that "PRESS has made no attempt to request the withheld information." We weren't confident that we were allowed to do that. In any case, we identify both an issue of fact and an issue of law, neither of which depends on whether we exercised some entitlement that we missed due to inexperience. The issue of fact is that there exists at least one unnecessary redaction, and we have identified some candidates. The issue of law is that 10 CFR §2.390(a) requires that "NRC records and documents ... shall not be exempt from disclosure and will be made available for inspection and copying at the NRC Web site."

We have more observations about the detailed shortcomings of USEC's and the Staff's replies to our Appeal, but we've offered a few examples here, and we'll let the Appeal speak to those points.

In sum, we have analyzed meticulously the Board's discussion of four of our contentions, and we suggest that it will not stress the Commission's resources or obligations unduly for us to finish the treatment in thirty five more pages and ten extra days. The complete analysis of the Board's discussion of our contentions will point out legal errors in the Board's Decision in places, and concede errors on our part in other places.

In general, we feel that the Appeal articulates our concerns that the Board applied too strict a standard to the admission of our contentions, and that it accorded too little discretion in our favor.

Respectfully submitted,

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Date: Nov 1, 2005

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November 2, 2005

Certificate of Service

I hereby certify that copies of the "Reply to USEC and NRC Staff Regarding PRESS Appeal" ("PRESS Appeal Reply") by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) was served upon the persons listed below by email on the 1st of November, 2005, and by deposit in the United States mail on this day, the 2nd of November, 2005.

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Docket 70-7004: PRESS Appeal Reply Service Certificate

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