

RAS 10805

Docket 70-7004: USEC ACP - PRESS Appeal, Continued

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE SECRETARY

November 29, (1:37pm)

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

Notice of Appeal and Brief, Continued
by
Portsmouth/Piketon Residents
for Environmental Safety and Security
(PRESS)

Portsmouth/Piketon Residents for Environmental Safety and Security submits this brief to complete our appeal of the recent decision against us by the Atomic and Safety Licensing Board Panel (ASLBP, Panel, or Board) in the above-captioned proceeding. The Commission, on November 18, 2005, authorized PRESS to supplement our appeal by "no more than an additional 20 pages." We appreciate the opportunity.

As this brief represents a continuation of our appeal, we resume page numbering at page 29, and section numbering at section 3.5. This will allow us to regard the two submissions (the original Appeal and this continuation) as a single document (the PRESS Appeal) in a natural fashion. So, for example, if we refer to "§2.6.1 on page 11 above," we refer to §2.6.1 on page 11 of the initial Appeal.

We note that we have a three-line "Motion for Leave to Augment Appeal" at page 29, a signature page at 30, and two appendices at pages 31 to 37 in the original submission. In practice, we believe the convenience of continuing the page numbering at 29 marginally outweighs any potential ambiguities. References to page numbers over 28 will refer to this submission unless explicitly attributed to the original submission.

TEMPLATE = SECF-021

SECF-02

Contents

1	Introduction	1
2	Standards Governing Contention Admissibility	3
2.1	General Considerations	3
2.2	10 C.F.R. §2.309(f)(1)(i)	6
2.3	10 C.F.R. §2.309(f)(1)(ii) – Brief Explanation of the Basis of the Contention	7
2.4	10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding	7
2.4.1	10 C.F.R. §2.335(a) – Challenges to NRC Regulations	8
2.5	10 C.F.R. §2.309(f)(1)(iv) – Materiality	8
2.6	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	9
2.6.1	Requirement to Provide Documents	11
2.6.2	Character Issues	11
2.7	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	14
3	Rulings on PRESS Contentions	14
3.1	Contention 21: Unnecessary Censorship	15
3.1.1	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	15
3.1.2	Discussion	16
3.2	Contention 20: Need for Proposed Action	18
3.2.1	10 C.F.R. §2.309(f)(1)(i) – Specific Statement of the issue of Law or Fact to be Raised or Controverted	18
3.2.2	10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding	18
3.2.3	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	19
3.2.4	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	21
3.3	Contention 19: Enrichment Freeze	22
3.3.1	10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding	22
3.3.2	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	22
3.3.3	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	24
3.4	Contention 18: USEC Incompetence	26

3.4.1	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	26
A	CLI-04-30, section IV, “Applicable Requirements”	31
B	Excerpt from CLI-99-11	35
3	Rulings on PRESS Contentions, Continued	29
3.5	Contention 17: ACP Project Failure	29
3.5.1	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	29
3.5.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	30
3.6	Contention 16: Alternative Site Use	30
3.6.1	10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding . . .	31
3.6.2	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	31
3.6.3	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	32
3.7	Contention 15: National Security	32
3.7.1	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	33
3.7.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	33
3.8	Contention 14: Application Inadequate	34
3.8.1	10 C.F.R. §2.309(f)(1)(ii) – Brief Explanation of the Basis of the Contention	34
3.8.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	34
3.9	Contention 13: D& D Plans Inadequate	35
3.10	Contention 12: Radiological Impacts	36
3.10.1	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	36
3.10.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	38
3.11	Contention 11: Ground and Surface Water	38
3.11.1	10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding . . .	38
3.11.2	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	39

Docket 70-7004: USEC ACP – PRESS Appeal, Continued

3.11.3	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	40
3.12	Contention 10: Independent Environmental Reporting	41
3.12.1	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	41
3.12.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	41
3.13	Contention 9: LLMW Exemption	41
3.14	Contention 8: Scioto Survey	42
3.14.1	10 C.F.R. §2.309(f)(1)(iv) – Materiality	42
3.14.2	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	42
3.14.3	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	43
3.15	Contention 7: 3.9% Feedstock	43
3.16	Contention 6: Health Risks	44
3.17	Contention 5: Domino Effect	45
3.17.1	10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion	45
3.17.2	10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application	45
3.18	Contention 4: 10% Assay	46
3.19	Contention 3: Cylinder Labeling	46
3.20	Contention 2: Radiation Work Permits	46
3.21	Contention 1: Criticality Monitoring Exemption	47
4	Summary and Conclusions	47

Key Documents

Abbreviation	Document
LA	USEC License Application
ER	Environmental Review
LA Documents	LA and associated documents
Petition	PRESS Petition to Intervene
USEC Reply	USEC Reply to PRESS Petition
NRC Staff Reply	NRC Staff Reply to PRESS Petition
Reply to USEC Reply	PRESS Reply to USEC Reply
Reply to NRC Staff Reply	PRESS Reply to NRC Staff Reply
Teleconference	Transcript of pre-hearing teleconference
ASLBP Order	ASLB Panel Memorandum and Order

3 Rulings on PRESS Contentions, Continued

3.5 Contention 17: ACP Project Failure

The Board correctly discerns twice (at pages 36 and at 37) that the implication of this contention is that “USEC is not financially qualified to build, own, and operate the ACP”. This is confirmed in our basis 17.3, which points to 10 CFR §70.23(a)(5), governing the requirements for approval of an application, “[a]n application for a license will be approved if the Commission determines that ... the applicant appears to be financially qualified to engage in the proposed activities.”

After discussing USEC’s and the NRC Staff’s response to this contention, the Board rejects the contention on the grounds of 10 C.F.R. §2.309(f)(1)(v) and (vi).

3.5.1 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board (at 37) states that “PRESS has not presented any ... fact or expert opinion which support the proposition that that USEC is not financially qualified to build, own, and operate the ACP.” However, we have presented the fact that USEC has once before abandoned a \$2.5 billion project (AVLIS). This occurred after USEC raised only \$1.5 billion for AVLIS in its IPO, a \$1 billion shortfall. This minimally addresses the Board’s objection under 10 C.F.R. §2.309(f)(1)(v). Additionally, we take the Staff’s point that Paducah D&D is assured separately. This is fine, so long as such funds are not claimed as assets in USEC’s SEC filings.

However, the issue does deserve serious scrutiny. USEC states that the ACP would take up to \$1.5 billion to build (LA at 1-49), “excluding capitalized interest, tails disposition, decommissioning, and any replacement equipment required during the life of the plant outside of normal spare equipment.” Operational costs are concealed in Appendix C, which is withheld as proprietary information. Although operational costs are also withheld in the DEIS, the DEIS at page 7-2 gives the cost of building the ACP, *with centrifuges*, as \$2.872 billion. Moreover, the cost of tails disposition, based on 571,000 metric tons of tails (7 MSWU plant) and \$4.83/kg disposition cost (a figure from RAI discussions) is \$2.758 billion (cf. the LA at 10-16, which estimates \$0.728 billion for tails disposition). Thus, even without the withheld information about running costs, USEC must guarantee \$6.065 billion in order to satisfy the claim that it is financially qualified, not \$1.5 billion. Here we have a company that is unable to raise money for a \$2.5 billion project in its IPO – surely one of the best fundraising opportunities any company has – and whose annual profits are on the order of \$0.1 billion.

There is serious doubt that USEC will be able to fund a \$6+ billion project.

3.5.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board (at 37) states that “PRESS has not presented any criticism of USEC’s submission (which includes a section devoted to its financial qualifications),” and that “there is no genuine dispute with regard to any issue of material fact or law proffered by this contention.”

The Board appears to have overlooked that the Petition does, in fact, reference ER pages 3 and 2-2 in bases 17.1 and 17.2 respectively, in full compliance with 10 C.F.R. §2.309(f)(1)(vi) that “information must include references to specific portions of the application” to establish a genuine dispute. In this light, basis 17.1 is fairly paraphrased as saying that “if USEC judges (ER at 3) that ‘AVLIS was not an economically viable technology’ then ACP, with higher costs than AVLIS and less favorable fundraising circumstances (the USEC IPO) must therefore be a less viable technology, economically, than AVLIS.” Thus, Contention 17 establishes a genuine dispute of fact regarding USEC’s financial qualification “to engage in the proposed activities” under 10 CFR §70.23(a)(5).

Thus we have exhausted the Board’s objections to Contention 17, “ACP Project Failure.”

3.6 Contention 16: Alternative Site Use

Contention 16 offers two quite different arguments. The first is that the no-action alternative is more beneficial to the site than the proposed action. One purpose of this argument is to alert the Commission to the sleight of hand that USEC has subtly shifted the purpose, under NEPA, of comparing a proposed action to a no-action alternative. The shift of purpose is from considering the impacts of the two alternatives *on the site*, to considering the impacts of the two alternatives *on the applicant*. Furthermore, USEC’s treatment of the no-action alternative gives short thrift to the consequences of the no-action alternative. There is ample documentary evidence to suggest that DOE was moving towards remediation of the site and that the development of the site as a conventional community resource is interrupted by USEC’s plan to site the ACP there. We believe that this topic, should we be permitted to develop it, is the strongest argument we have to convince the Commission that the its correct determination should be to reject the license application, because under 40 CFR 1502.14(e) the Commission should prefer the no-action alternative. Note that the DEIS has similarly under-represented the benefits of the no-action alternative, so if the topic is not admitted as a challenge to the ER, we may introduce it as a challenge to the DEIS. We suggest that it

will be more expeditious to admit the topic at this juncture, rather than force us to introduce it as a late-filed contention.

The second argument, regarding AVLIS, gives the Applicant an alternative way to conduct its business once the license is denied.

However, the issue at hand is that the Board denied the admission of this contention under 10 C.F.R. §2.309(f)(1)(iii), (v), and (vi).

3.6.1 10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding

The Board states (at 36) that “PRESS has failed to raise any genuine dispute of material fact or law *that is within the scope of this proceeding*. (Emphasis added.) However, the Board nowhere suggests that Contention 16 raised issues outside the scope of the proceeding, therefore, the Board has no grounds to reject Contention 16 under 10 C.F.R. §2.309(f)(1)(iii).

3.6.2 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states (at 36) that “[PRESS] has failed to offer ... any legal or factual basis to support its contention.” But Contention 16 does offer the factual bases that (a) as an industrial park, Piketon will employ many thousands, (b) the ACP would inhibit this development, and (c) AVLIS should be considered seriously as an alternative. It also offers a legal basis (since NEPA is the origin of the no-action comparison) that the site should be the subject of any comparison of alternatives, not the applicant.

Regarding this latter, legal, basis, the Board misapprehends its import in stating (at 35) that “[b]asis 16.1 states that the no-action alternative should be considered relative to other potential uses of the site, rather than in connection with USEC’s proposed use of the site.” This misses the point entirely, suggesting that the Board didn’t understand the point.

Basis 16.1 cites ER page 3, which presents the results of its comparison of the no-action and proposed alternatives as follows: “The Proposed Action will satisfy the national energy security goal of maintaining a reliable and economical domestic source of uranium enrichment as well as corporation’s commercial need for a new production facility,” but that “The No Action Alternative will not meet the national energy goal, will have serious economic impact on the region around the proposed ACP and will not meet the commercial needs of the corporation.” On our view, discussion of any national security goal that may be satisfied independently of a plant at Piketon is irrelevant to a comparison of the NEPA impacts of a Piketon plant vs. no Piketon plant. Further, our basis 16.2 argues that the commercial needs of the corporation are irrelevant to a comparison of the NEPA impacts of a Piketon

plant vs. no Piketon plant. With national energy security and corporate needs excluded as genuine bases for comparison of the environmental impacts, there remains just one factor to distinguish the proposed action from the no-action alternative: that “The No Action Alternative ... will have serious economic impact on the region around the proposed ACP.” Clearly, we would argue that the economic impact of the no-action alternative, modeled correctly with reindustrialization, is overwhelmingly positive by comparison to the net loss of 1,558 jobs¹⁷ anticipated with the ACP. This makes the no-action alternative the preferred alternative.

3.6.3 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that “[PRESS] has failed to offer any specific criticism of the application¹⁸,” and that “PRESS has failed to raise any genuine dispute of material fact or law¹⁹.”

We disagree that Contention 16 fails the criterion of 10 C.F.R. §2.309(f)(1)(vi), which requires that “information must include references to specific portions of the application” to establish a genuine dispute. As noted above, Basis 16.1 references ER page 3. Clearly, the contention raises the genuine dispute of material fact that the No-action Alternative, if treated correctly, proves to be superior to the Proposed Action in terms of both cost and benefit. Thus, we exhaust the Board’s objections that Contention 16 fails the criterion of §2.309(f)(1)(vi).

Thus, we have exhausted the Panel’s stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.7 Contention 15: National Security

The Board rejects Contention 15 on the grounds of 10 C.F.R. §2.309(f)(1)(v) and (vi).

¹⁷On page 3-50 of the DEIS we find that USEC currently employs 1,223 workers at the site. On page 4-34 of the DEIS we learn that, in the operations phase the ACP is expected to create 600 direct full-time jobs. This is clarified on page 4-94 of USEC’s ACP application, where it states that “operation of the ACP is projected to employ 600 personnel.” In other words, the ACP would result in a net loss of 623 direct jobs. Additionally, we estimate that the indirect jobs lost, based on 900 indirect ACP jobs created, would be about 935 ($\approx 900 \times 623/600$), for a total net loss of 1,558 jobs caused by the ACP. For comparison, under the no-action alternative, the Enterprise Zone program of Ohio would require the *creation* (as opposed to reallocation) of about 15,000 new jobs for an investment of \$3 billion, the cost of building the ACP and furnishing it with centrifuges.

¹⁸Decision at 36.

¹⁹Id.

3.7.1 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states that “PRESS has not offered any facts or expert opinion to support its contention that the proposed ACP would be inimical to the common defense and security²⁰.”

However, in the initial paragraph of Contention 15, we contend that the ACP may have the opposite effect on national security goals than those claimed by USEC. In support of our contention, we juxtapose USEC’s evidence in support of its claim that the ACP would advance national security (a mere assertion by Spencer Abraham, the subject of our Basis 15.1) with an editorial by David Hobson in which the congressman suggests that certain new US nuclear weapons initiatives may risk national security by providing disincentives for North Korea and Iran to abandon their nuclear weapons initiatives. The Board correctly points out that the Hobson editorial focuses “on nuclear weapons initiatives, not enrichment technology.” However, the Hobson argument does provide a mechanism whereby US actions in nuclear development may be regarded as undermining national security. We expect that the Board, having an obvious interest in nuclear issues, is aware that the most significant issue with Iran’s weapons program concerns their proposed 0.25 million SWU per year enrichment plant at Natanz²¹. Therefore, we suggest²² that “Hobson’s *logic* applies directly to the ACP” (emphasis added). Certainly, we have provided sufficient expert opinion to support the admission of this contention. Thus, we disagree that the contention fails the criterion of 10 C.F.R. §2.309(f)(1)(v).

3.7.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board errs in stating²³ that “PRESS has not raised a genuine dispute with regard to any issue of material fact or law with this contention.”

The material issue of law, as we point out in our Basis 15.3²⁴ is that the Commission is required to deny an ACP license under 10 CFR 70.40(b)(1) if “[t]he issuance of such a license would be inimical to [t]he common defense and security of the United States.” Thus, we dispose of the Board’s objection to Contention 15 under 10 C.F.R. §2.309(f)(1)(vi). However, we note that Contention 15 also satisfied 10 C.F.R. §2.309(f)(1)(vi) by providing

²⁰Decision at 34, 35.

²¹See, for example, http://www.isis-online.org/publications/iran/natanz03_02.html.

²²Petition at 40.

²³Decision at 35.

²⁴Petition at 40.

reference to ER pages 1 and 1-10.

Thus, we have exhausted the Panel's stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.8 Contention 14: Application Inadequate

The Board rejects Contention 14 on the grounds of 10 C.F.R. §2.309(f)(1)(ii) and (vi).

3.8.1 10 C.F.R. §2.309(f)(1)(ii) – Brief Explanation of the Basis of the Contention

The Board states that "PRESS failed to provide any basis for the contention." However, Contention 14²⁵ is a simple observation of USEC's own admission that "the FNMCP²⁶ will ... not ... satisfy the [twice yearly "Material Balance Reports concerning special nuclear material that the licensee has received, produced, possessed, transferred, consumed, disposed of, or lost"] requirements of 10 CFR 74.13(a)²⁷," together with our claim that the LA is, therefore, technically, inadequate. We disagree with the Board that this fails to provide "a brief explanation of the basis for the contention" as required by 10 C.F.R. §2.309(f)(1)(ii).

3.8.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that "PRESS ... has not raised any genuine issue of material fact or law²⁸." However, the Contention does indeed raise the genuine issue that the FNMCP doesn't satisfy 10 CFR 74.13(a), an indisputably true fact. It also introduces the dispute of law that this failure renders the application inadequate. Thus, we dispose of the Board's objection to Contention 14 under 10 C.F.R. §2.309(f)(1)(vi), hence we exhaust its stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

However, we have extra remarks on this contention. The first is that although the contention may be rendered moot quite simply (for example, if the Commission granted USEC's requested exemption), or otherwise summarily disposed, these considerations are not grounds for denying the contention admissibility under 10 C.F.R. §2.309(f)(1).

²⁵Petition at 39,40.

²⁶Fundamental Nuclear Materials Control Plan.

²⁷ER at 1-55

²⁸Decision at 33.

Second, our position, on behalf of the residents who signed our Petition, is naturally to oppose any measure that weakens our members' safety or security. As such, although this contention doesn't challenge the exemption *per se* (which accounts for the Staff, USEC and Board observations that we didn't actually challenge the exemption), we do oppose the exemption because it appears to represent a weakening of reporting standards inasmuch as it causes the FNMCP to fail the standards of 10 CFR 74.13(a). However, we are unable to challenge the requested exemption adequately because (a) we have no access to the FNMCP text²⁹, and (b) the ER at 1-55 simply states that "[t]he material status reporting for the ACP will be performed utilizing a program similar to the GDPs," without elaborating what that program is. Consequently, although we would not object to the exemption if a comparison of the proposed standard and the 10 CFR 74.13(a) showed that the proposed standard was stricter, we have no way to make the comparison.

Third, it isn't even clear that 10 CFR 74.13(a) is the governing standard here. The ACP would be an "installation" under 10 CFR 75.4(k)(6), hence it is eligible for IAEA safeguards under the US/IAEA Safeguards Agreement. According to 10 CFR 74.13(b), therefore, routine Material Status Reports should be prepared and submitted pursuant to §75.35, instead of 74.13(a). This point also renders the LA inadequate.

Fourth, and finally, because the ACP application is for a 10% license, the possibility is open that some material would be "special nuclear material of *moderate* strategic significance" (under 10 CFR 74.4 definitions) rather than "special nuclear material of *low* strategic significance," which means that the application should account for material status reporting under §74.41, 43 and 45 in addition to §74.31 and 33. The LA documents neglect any discussion of the §74.41, 43 and 45 requirements, so again, the LA is inadequate.

3.9 Contention 13: D& D Plans Inadequate

We concede that we failed to offer specific bases to support the contention that USEC's D&D plans are inadequate. Accordingly, we withdraw this contention.

The subject of Contention 13 is ER §4.13.3.4 entitled "Operations Phase." However, many subsections of ER §4.13.3.4 are not numbered sections, so they don't appear in the table of contents. In fact, some of these subsections actually deal with D&D, not operations. Our notes indicate that the omission of D&D topics in this section from the table of contents almost caused us to overlook them.

Further, we note that many crucial details that would enable us to evaluate the validity of

²⁹See <http://www.nrc.gov/materials/fuel-cycle-fac/lic-app-docs.html> for the publicly available canon of license application documents.

the D&D plan are redacted. (For instance, hard numbers of cylinders of DUF_6 are redacted on ER page 4-123, as are an unknown number of rows of table 4.13.3.3-2.) However, these facts support our Contention 21 on unnecessary censorship, rather than any claim about D&D plans, since the redactions obscure our understanding of D&D plans.

Finally, we should alert the Commission and its delegated representatives to some facts about the UDS conversion facility. The UDS conversion facility is a facility proposed at the Piketon site for converting already-existing inventories of chemically unstable UF_6 to stable oxides of uranium. USEC indicates on ER page 4-123 that the UDS conversion facility is a possible channel for tails disposition. However, the conversion facility is only designed for existing stocks of UF_6 . It is to be decommissioned 16 years before the ACP would finish operations, and it has a design capacity of 243,000 metric tons, not including any of the proposed 571,000 metric tons of ACP waste.

3.10 Contention 12: Radiological Impacts

The Board rejects Contention 12 on the grounds of 10 C.F.R. §2.309(f)(1)(v) and (vi).

3.10.1 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states that

1. “Basis 12.1 again refers to various reports without providing copies of the reports or presenting analysis of their content from which the Board could evaluate their relevance³⁰,”
2. “PRESS 12.2 proffers quotations from ... Sergei Pashenko (again without providing the correspondence itself), in which Pashenko ... makes bare conclusory remarks³¹,”
3. “PRESS does not discuss either the content or significance of the reports it cites³²,”
4. “We do not see that anything ... originating from Pashenko supports PRESS’ Contention³³,” and

³⁰Decision at 30.

³¹Id.

³²Id. at 31.

³³Id.

5. “PRESS’ reference to the Pashenko correspondence without explanation or analysis does not provide an adequate basis to support the admissibility of a contention.³⁴”

Objections 1 and 3 above refer to Basis 12.1 in which we reference a 2000 GAO report subtitled “DOE’s Cleanup Plan for the Paducah, Kentucky Site Faces Uncertainties and Excludes Costly Activities,” and a webpage of reports from the WISE Uranium Project focussing on models of cylinder degradation scenarios. As we noted in §2.6.1, at page 11 above, a petitioner is nowhere required to *provide* cited documents, but that our obligation under 10 C.F.R. §2.309(f)(1)(v) is simply to provide “references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” We have done this, and have thus met our burden under §2.309(f)(1)(v). Thus we disagree that the Board’s objection 1 is valid.

As the Board points out at pages 9 and 10, “the information, facts and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed indicate the existence of adequate support for the contention.³⁵”. In preparing this appeal, we were able to locate our cited references by online search in less than five minutes. There is no evidence in the Decision that the Board attempted to locate these documents. In our Basis 12.1, we pointed out that the cited reports contain more complete information than the ER, thus supporting our contention that ER §4.12.3.2 is inadequate. That the references support this conclusion would have been evident to the Board had it exercised its obligation to examine the references. Thus we disagree that Basis 12.1 fails to discuss the significance of the cited reports.

(Note, also, that ER §4.12.3.2, on pages ER 4-109 to 4-113, contains 6 redactions “in accordance with 10 CFR 2.390,” and at least 5 references to the ISA³⁶, which is similarly withheld from public inspection, for a total of no fewer than 11 inaccessible references in 5 pages.)

Objections 2, 4 and 5 refer to Basis 12.2 in which we present the reaction of Dr. Pashenko to passages from ER §4.12.3.2. They are presented as is, and *in toto*, rendering Objection 2, concerning provision of the correspondence, moot. That Pashenko’s remarks are conclusory should be sufficient, since he is an expert, as shown by the inclusion of his resumé in the Petition’s Appendices. Certainly, Pashenko’s remarks are no more conclusory than most of the remarks in the ER passage in question, in which numbers are produced with no supporting reasoning. We hold that Pashenko’s remarks are self-evident inasmuch as he

³⁴Id.

³⁵citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-04, 31 NRC 333 (1990).

³⁶Integrated Safety Analysis

opines that “officials information about radiation situation is very poor and very unconcrete,” and that the model of airborne contaminant dispersal (aerosols are a field of Pashenko’s particular expertise) is a “very bad model.” Moreover, we maintain that Dr. Pashenko’s opinions do indeed support the contention that ER §4.12.3.2 is inadequate. Thus we exhaust the Board’s final two objections based on 10 C.F.R. §2.309(f)(1)(v).

3.10.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that, “[PRESS] does not identify any error or omission in the ER³⁷.” However, we dispute the adequacy of specific section 4.12.3.2 of the ER. We believe this is sufficient under 10 C.F.R. §2.309(f)(1)(vi) for the admissibility of this contention.

Thus, we exhaust the Board’s stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.11 Contention 11: Ground and Surface Water

The Board rejects Contention 11 on the grounds of 10 C.F.R. §2.309(f)(1)(iii),(v) and (vi). We note that this is one of four contentions that the Board invited us to discuss by pre-hearing telephone conference with all parties. The section of the transcript³⁸ relating to this contention is on pages 31 to 55, in which many of the Board’s expressed concerns are addressed. No information from those 25 pages appears to have made it into the Board’s Decision.

3.11.1 10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding

The Board states³⁹ that “[PRESS] raises issues outside the scope of this proceeding, such as DOE compliance with RCRA,” and⁴⁰ that “DOE compliance with RCRA is outside the scope of this proceeding.” This appears to be a reference to Basis 11.4, the Ohio EPA letter regarding the RBES⁴¹ Report. As we stated at pre-hearing⁴², “USEC makes liberal reference to [the RBES Report] in the passage cited in the contention[], [i.e. ER pages] from 3-18 to 3-26 For instance, on page ... 3-19 every single paragraph there[,] almost[,] references the

³⁷Decision at 31.

³⁸ADAMS accession number ML052070174.

³⁹Decision at 29.

⁴⁰Id. at 30.

⁴¹Risk-Based End State

⁴²Transcript at 45.

risk-based end state [report].” It is significant that the Ohio EPA objected very strongly to the RBES document upon which this section of the ER is largely based. The issue about DOE RCRA compliance is an incidental point, raised as a red herring by USEC, and held by the Board as an objection under §2.309(f)(1)(iii). We disagree that it is sufficient to reject the entire contention.

3.11.2 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states that,

1. “PRESS did not provide the three reports that it cites⁴³,”
2. “PRESS ... fails to explain the significance of these reports⁴⁴,”
3. “[t]he bases offered by PRESS do not contain an explanation of information cited therein,⁴⁵” and
4. “Bases 11.1, 11.2, and 11.3 cite reports without explaining how these reports support the contention. Basis 11.4 provides a quotation without any explanation⁴⁶.”

The last of these objections is followed by the explanation that, “[a]s we have repeatedly stated above, offering bare conclusions, and without even providing the documents on which they are purportedly based, provides no basis for admission of a contention⁴⁷. This vague presentation by PRESS does not constitute an adequate statement of facts or expert opinion within the meaning of 10 C.F.R. §2.309(f)(1)(v)⁴⁸.”

These objections appear to boil down to just two objections, (a) that the documents were not provided, and (b) that the references were not explained. Regarding objection (a), we noted in §2.6.1, at page 11 above, that a petitioner is nowhere required to *provide* cited documents, but that our obligation under 10 C.F.R. §2.309(f)(1)(v) is simply to provide “references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue.” We have done this, so we disagree that objection (a) is valid.

⁴³Decision at 29.

⁴⁴*Id.*

⁴⁵*Id.* at 30.

⁴⁶*Id.*

⁴⁷Board footnote 91 states, in full, “See Private Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1988); see also Seabrook, CLI-89-3, 29 NRC at 240-41.”

⁴⁸Decision at 30

Regarding objection (b), the Board's basis for claiming the the Petitioner has a burden to explain cited reports appears to be founded upon LBP-98-7, 47 NRC 181, as found in Decision footnote 91 (reproduced in our footnote 47 at 39 herein; 47 NRC 142 appears simply to mark the start of LBP-98-7, rather than to indicate a page relevant to the present discussion). 47 NRC 181 clearly states that, "the Board is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention. In the case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention." There is no evidence in the Decision that the Board has, in fact, "review[ed] the information provided." Further, there is no statement at 47 NRC 181 regarding the "offering [of] bare conclusions ... provid[ing] no basis for admission of a contention," as the Board suggests 47 NRC 181 does provide. However, we find somewhat close language at 47 NRC 180, at the head of the same section, stating that "[t]he bald assertion that a matter ought to be considered or that a factual dispute exists so as to merit further consideration of a matter is not sufficient. Nor does mere speculation provide an adequate basis for a contention. Instead, a petitioner must provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention." (Citations omitted.) Thus, we believe that any analysis should be contained in the cited documents, not in our paraphrasing of those documents. Moreover, it would be the Board's responsibility to verify that the documents contained supporting information regardless of whether we paraphrased the documents, which obviates the necessity for any discussion on our part. Thus, we believe the Board has erred in its objection (b). This exhausts the Panel's stated objections to this contention under §2.309(f)(1)(v). However, we admit that we could have provided more helpful commentary to assist the Board in this matter⁴⁹. We have explained our rushed circumstances at the time we submitted the Petition, and we suggest that discretion is appropriate here.

3.11.3 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that, "PRESS ... fails to point out any specific deficiency in the ER⁵⁰." However, Contention 11 clearly identifies ER 3-18 through 3-23, containing ER 3.4 as the

⁴⁹We note, too, that the promised Pashenko report of Basis 11.3 is available at <http://www.isar.org/docs/GuideMay2005.pdf>. Additionally, a supplementary report focused more tightly on his gamma spectrometer data from Piketon is expected soon, to be published by TRAC (www.radioactivist.org).

⁵⁰Decision at 29.

portion of the ER at dispute. Thus, we disagree that Contention 11 fails the criterion of 10 C.F.R. §2.309(f)(1)(vi). Thus we exhaust the Board's stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.12 Contention 10: Independent Environmental Reporting

The Board rejects Contention 10 on the grounds of 10 C.F.R. §2.309(f)(1)(v) and (vi).

3.12.1 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states⁵¹ that, "PRESS has failed to establish a direct and obvious relationship between these enforcement actions and the licensing action in dispute." We have addressed this point above, in section 2.6.2 on page 11. Accordingly, we disagree that the supporting facts we have supplied fail the criterion of §2.309(f)(1)(v).

3.12.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that, because of the Staff's obligations under NEPA, "the "independent assessment" sought by the Petitioners will be performed, and no genuine issue of material fact or law has been raised⁵²," and that "PRESS has failed to dispute any portion of the LA⁵³." The Board may have underestimated the implications of this contention, inasmuch as it would require any base-line environmental data presented in the final EIS to be obtained anew by a disinterested third party. We acknowledge that the contention failed to refer to specific parts of the LA documents, but we suggest that it can be read as disputing the application at any point that cited data was obtained by USEC.

3.13 Contention 9: LLMW Exemption

This contention probably arose from our confusion between LLMW (Low Level Mixed Waste) and the categorization of depleted uranium as "Low Level Waste" (expressed in CLI-05-05, relating to a decision in the LES NEF case), about which we had heard at the time that we submitted our Petition. The idea was to compel a discussion of USEC's intentions and

⁵¹Decision at 28, 29.

⁵²Decision at 28.

⁵³Id. at 29.

the legitimacy of USEC transferring its uranium inventory to Piketon from Paducah in the event that the ACP was licensed and the Paducah site was decommissioned. To the extent that these concerns are likely not to fall within the purview of OAC 3745-226, we accept that this contention is beyond the scope of the proceeding.

3.14 Contention 8: Scioto Survey

The Board rejects Contention 8 on the grounds of 10 C.F.R. §2.309(f)(1)(iv),(v) and (vi).

3.14.1 10 C.F.R. §2.309(f)(1)(iv) – Materiality

The Board states that “[PRESS fails] to indicate how [a full survey] could answer questions relevant to its challenge to the pending license application⁵⁴.” However, this contention was one of four discussed at pre-hearing. In the transcript⁵⁵ the relevant pages are pages 7 to 31. At page 30, Judge Abramson (Board) asks Ms. Zobler (Staff) what the relevance is for a new application of considering historic discharges, “to build a new base line?” Ms. Zobler confirms, “It’s a baseline, so that the staff knows the current condition of the site.” So the Board actually ascertained the materiality of this question, but failed to record it in its Decision.

In the transcript⁵⁶ the relevant pages are pages 7 to 31, in answer to the Board’s question⁵⁷, “What do you view as erroneous, deficient or flawed in USEC’s analysis of the potential uranium concentration in the Scioto River?”

3.14.2 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states that “[PRESS] fails to explain why or how the use of an average concentration level is misleading or inadequate⁵⁸,” “PRESS fails to explain what a ‘full survey’ is⁵⁹,” and “[t]his contention is not supported by fact or expert opinion⁶⁰.” Regarding the misleading use of average concentration, this is addressed in the pre-hearing transcript at pages 16 and 17 (and at 13 pp, as well as at other locations). Regarding articulation of

⁵⁴Decision at 27.

⁵⁵ADAMS accession number ML052070174.

⁵⁶ADAMS accession number ML052070174.

⁵⁷Transcript at 7

⁵⁸Decision at 27

⁵⁹Id.

⁶⁰Id.

what a full survey is, this is addressed in the pre-hearing transcript starting at the bottom of page 8, and elaborated at points up through page 31, including at pages 14 and 15. Since the third Board objection, as listed above, is a consequence of the other two, we disagree that the contention is not supported by fact. Thus, we exhaust the Board's objections under §2.309(f)(1)(v).

3.14.3 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states⁶¹ that, “[t]his contention ... does not raise any genuine issue of material fact or law.” However, the contention challenges the adequacy of section 1.3.4 of the LA. The contention does, in fact, establish a genuine dispute of fact and law, so we disagree that the contention fails the criterion of §2.309(f)(1)(vi).

Thus we exhaust the Board's stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

Additionally, the issue of uranium transport in water necessarily involves consideration of the transport of effluents through ground and surface water, and we identify in the pre-hearing transcript, many further weaknesses of the LA between 1-66 and 1-88. Some of these deficiencies are quite astounding, such as the flooding model that, although it has a river flow rate five times higher than that of the historical flood of 1937, still predicts a lower level of flooding!

3.15 Contention 7: 3.9% Feedstock

In this contention, we presented a calculation to reconstruct the missing data from a statement in the LA at 4-121. On review, we admit that our calculation was, indeed, in error, though not for the reasons offered by the Staff or USEC: the error was a simple evaluation error. We now believe the correct figure is that the assay of stock is 0.6%. This, more reasonable, figure changes some of the conclusions of the contention. We are concerned, however, that the Board wasn't alarmed at some of the consequences of the original calculation. Also, we suggest that the best way to have resolved the question of the concealed values would have been (and remains) for USEC to ask the technician who originally executed the calculation.

We withdraw the claim that USEC concealed its proposed use of feedstock of higher assay than natural uranium. However, we had to work very hard, and waste much time, to discover the parameters that were missing from the calculation (and they remain unconfirmed), so

⁶¹Id.

we maintain the contention's original claim that USEC should have been more forthright. As such, the contention stands as a claim of omission, which satisfies the requirements of 10 C.F.R. §2.309(f)(1)(vi), contrary to the Board's sole remaining objection.

We note that the Board's interpretation⁶² that PRESS' "proposition that ... (2) the number of containers of feedstock *or tails* would be anything different than that presented in the license application" (emphasis added) is imprecise. Of course, our point was that *only* the tails figure was provided, and that the informative figures for feedstock and *product* were omitted, creating the false impression that the total quantities involved were much smaller than the actual proposal.

3.16 Contention 6: Health Risks

We believe that it is unambiguous that Contention 6 expresses PRESS' desire to litigate on the subject of occupational health, and we have clearly identified ER §3.11 as the passage in dispute in accordance with 10 C.F.R. §2.309(f)(1)(vi). We have addressed, in §2.6.1, at page 11 above, that a petitioner is nowhere required to *provide* cited documents, but that our obligation under 10 C.F.R. §2.309(f)(1)(v) is simply to provide "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." We acknowledge that it may appear that we have "simply refer[red] to voluminous documents⁶³." However, we offer here the clarification that Basis 6.1 provides the location where the documents referenced in Bases 6.2 to 6.7 may be found. As such, we have identified the specific documents upon which we intend to rely, and we have provided excerpts that indicate adequately that the cited documents do support the contention. Of course, the Board was obliged to inspect the documents, as we have argued above in several places, to verify that they support the contention.

The remarks above address the bulk of the Board's objections, which are mainly under 10 C.F.R. §2.309(f)(1)(v) and (vi). Additionally, the Board states⁶⁴ that, "the bases ... are outside the scope of the proceeding." However, the scope of the proceeding⁶⁵ includes "requirements for notices to workers, ... radiation protection, ..., and insurance," together with a host of 10 CFR regulations concerning occupational safety. Accordingly, we disagree

⁶²Decision at 26.

⁶³Decision at 22, citing Seabrook, CLI-89-3, 29 NRC at 240-41. We note that the NRC website carries only NUREG-0750 volumes 46 to 58 at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0750/>, so we are unable to challenge the Board's interpretation of 29 NRC at 240-41.

⁶⁴Decision at 25.

⁶⁵We identified the scope of the proceeding at page 7 herein as being primarily stated by CLI-04-30, section IV, which we reproduced as Appendix A of the original submission of this appeal.

that the subject of the contention is beyond the scope of the proceeding.

3.17 Contention 5: Domino Effect

The Board rejects Contention 5 on the grounds of 10 C.F.R. §2.309(f)(1)(v) and (vi).

3.17.1 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The Board states that “PRESS has ... merely presented unrelated facts, bare assertions, and no analysis or expert opinion to support its conclusions⁶⁶,” and that “the proposition is unsupported by expert or factual evidence⁶⁷.” Although Basis 5.1 doesn’t quantify our estimate that the centrifuges are “spinning very rapidly indeed, and that they therefore store a large amount of kinetic energy⁶⁸,” we do quantify our estimate that they would be “290 SWU per year machines⁶⁹.” We suggest that this qualifies as “analysis” and these facts are not “unrelated” to a domino effect (a term we believe we have defined sufficiently well to convey the nature of the concern). Moreover, we don’t believe this analysis constitutes “bare assertions.” Further, we believe the human errors described in Basis 5.2 are entirely germane to the issue at hand. Accordingly, we disagree that contention 5 fails the criterion of 10 C.F.R. §2.309(f)(1)(v).

3.17.2 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Board states that, “this contention ... erroneously alleges an omission⁷⁰,” and that “PRESS does not raise a genuine issue with regard to any matter that must be decided by the Commission⁷¹.” However, there is no evidence in the publicly available application documents to suggest that our allegation is erroneous. The Board suggests that “a ‘centrifuge machine crash scenario’ was in fact evaluated in the Integrated Safety Analysis (ISA)⁷².” However, as USEC has acknowledged⁷³, the ISA is not publicly available. We propose to perform

⁶⁶Decision at 21.

⁶⁷Id.

⁶⁸Petition at 20.

⁶⁹Id.

⁷⁰Decision at 21.

⁷¹Id.

⁷²Decision at 19, citing USEC Answer to PRESS Petition at 30.

⁷³USEC Reply to PRESS Appeal.

our own physics to determine the veracity of USEC's claim to have covered our concern, but there is insufficient data currently available in order to make that determination. We suggest that it is premature for the Board to declare that our allegation is erroneous. Moreover, the issue is clearly material to the Commission's deliberations. Accordingly, we disagree that the contention fails the criterion of 10 C.F.R. §2.309(f)(1)(vi). Thus we exhaust the Board's stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.18 Contention 4: 10% Assay

The LA documents nowhere make the case that a 10% license is necessary. This is an omission. The contention that USEC has no demonstrated need is material inasmuch as its license may be conditioned to a 5% limit.

Moreover, as we mentioned in the last paragraph of section 3.8.2 above, on page 35, the fact that USEC is requesting a 10% license introduces regulatory complications regarding "special nuclear material of moderate strategic significance" (under 10 CFR 74.4 definitions) which means that the application should (but doesn't) account for material status reporting under §74.41, 43 and 45 in addition to §74.31 and 33. The fact, in Basis 4.2, that USEC has, in the past exceeded 10% enrichment, intensifies the need for considerations of this issue.

Accordingly, we disagree that this contention fails the criteria of 10 C.F.R. §2.309(f)(1). To the extent that it is insufficient, we believe the issue is sufficiently important as to merit discretion.

3.19 Contention 3: Cylinder Labeling

This contention is easily remedied, by denying the exemption regarding cylinder labeling. We don't believe this would be any great burden to USEC. However, it may be more appropriately organized as a sub-issue of Contention 6 on occupational health risks.

3.20 Contention 2: Radiation Work Permits

This contention too is easily remedied, by denying the exemption regarding radiation work permits. We don't believe this would be any great burden to USEC. However, it may be more appropriately organized as a sub-issue of Contention 6 on occupational health risks.

3.21 Contention 1: Criticality Monitoring Exemption

The statement of Contention 1 (regarding decommissioning funding) is out of place, the title of the contention is more indicative of its intention. Similarly, Basis 1.2 properly supports Contention 3. We accept that the remaining text is too disorganized to be admissible as a contention. It is unfortunate that it was this text that greeted the reader. However, we trust that the Commission will consider the underlying concerns, regarding criticality monitoring, seriously in its deliberations.

4 Summary and Conclusions

- We discussed the rationale for "strict by design," arguing by reference to the case law that the standards were applied inappropriately in our case
- The Petition served correct notice of the issues we wish to litigate
- In many cases, the Board has incorrectly rejected our contentions, even without appealing for discretion
- However, even in those contentions that do require discretion, our concerns will be formulated sufficiently well at the point they are required to be withstand summary disposition motions
- We have withdrawn some Contentions herein
- The remaining Contentions should be admitted

Respectfully submitted,

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY**

In the Matter of

Docket No. 70-7004

USEC Inc.
American Centrifuge Plant (ACP)

ASLBP No. 05-383-01-ML

November 29, 2005

Certificate of Service

I hearby certify that copies of the "Notice of Appeal and Brief, Continued" ("PRESS Appeal, Continued") by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) was served upon the persons listed below by email on the 29th of November, 2005, and by deposit in the United States mail on this day, the 29th of November, 2005.

Please excuse the late submission. We believe we would have made the submission by deadline at midnight yesterday, but there was a neighborhood power failure here last night at 9 pm, until some hours after midnight. The resulting computer crash lost a minimal amount of work, but interrupted electronic composition and email transmission. We believe we have recovered from the setback as promptly as can reasonably be expected.

Secretary of the Commission
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Docket 70-7004: PRESS Appeal, Continued – Service Certificate

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