UNITED STATES OF AMERICA
RAS 11444 NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
USEC Inc.	)	Docket No. 70-7004
	)	
(American Centrifuge Plant)	)	
	)	

CLI-06-10

MEMORANDUM AND ORDER

I. Introduction

This proceeding stems from an application by USEC Inc. ("USEC") for a license to construct and operate a uranium enrichment facility in Piketon, Ohio. In this decision, we consider an appeal by Portsmouth/Piketon Residents for Environmental Safety and Security ("PRESS") of LBP-05-28, an Atomic Safety and Licensing Board ("Board") decision that rejected all of PRESS's contentions, and accordingly denied PRESS's petition to intervene in this proceeding.[1] Both USEC and the NRC staff support the Board's decision. For the reasons the Board outlined in LBP-05-28 and those we give below, we find none of PRESS's contentions admissible. We affirm LBP-05-28.

II. Background

On October 18, 2004, the NRC issued a public notice announcing the receipt and

[1] LBP-05-28, 62 NRC 585 (2005). Another portion of the Board decision rejected Mr. Geoffrey Sea's petition to intervene. Like PRESS, Mr. Sea appeals to the Commission. We address Mr. Sea's appeal in a separate decision (CLI-06- __) we issue today.

availability of the USEC license application, and the opportunity to intervene in the hearing on USEC's application.[2] The notice set forth December 17, 2004 as the deadline for submitting petitions for intervention. Out of concern, however, that all parts of the USEC application had not been adequately screened for information that could be used by a potential adversary, the NRC suspended public access to the USEC application on October 25, 2004. On December 17, 2004, the original deadline for intervention petitions, PRESS filed a request for an extension of time in which to file its petition. Given that public access to the USEC application had been interrupted, the NRC extended the petition filing deadline by sixty days from the date the application was again made publicly available, thus giving PRESS (and other petitioners who requested an extension) until February 28, 2005 to file their intervention petitions.[3]

PRESS timely filed an intervention petition containing 22 proposed contentions. The Board held a telephone prehearing conference, giving PRESS an opportunity to clarify its arguments on four of its submitted contentions.[4] In LBP-05-28, the Board issued its decision finding all of PRESS's proposed contentions inadmissible. The decision noted that "PRESS's contentions were presented in a vague, disorganized and repetitive fashion," which made it difficult for USEC and the NRC staff to understand and respond to the contentions.[5] Nonetheless, the Board noted that because "PRESS is proceeding *pro se* and has attempted to present its numerous concerns regarding the proposed ACP [American Centrifuge Plant]," the Board would "address each contention in depth to ensure that [it did] not overlook any

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[2] 69 Fed. Reg. 61,411 (Oct. 18, 2004) (Hearing Notice).

[3] Order (Dec. 29, 2004) (unpublished).

[4] *See* Memorandum and Order (Order Scheduling Oral Argument on the Admissibility of Contentions) (July 12, 2005) (unpublished).

[5] LBP-05-28, 62 NRC at 599.

legitimate issue simply because of the way it is articulated."[6]

PRESS appealed the Board's decision. Together with its appeal filing, however, PRESS filed a motion requesting that the Commission allow it to supplement its appeal with additional pages. PRESS explained that its "treatment" of the appeal was "incomplete in 30 pages" (the applicable page limit on appeal brief length), and requested that the Commission allow it the opportunity to "augment [its] appeal to finish the treatment."[7] Even though PRESS waited until the day the appeal was due to make this request for additional time and pages, and did not comply with our procedural requirements for motions,[8] the Commission granted PRESS the opportunity to submit an additional 20 appeal brief pages.[9] PRESS then supplemented its appeal with an additional brief.[10]

In its appeal, PRESS claims that the Licensing Board "applied too strict a [contention] standard to the admission of our contentions."[11] PRESS argues that it "by and large ...

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[6] *Id.*

[7] Notice of Appeal and Brief and Motion for Leave to Augment Appeal by PRESS (Oct. 18, 2005) (Initial Brief) at 1, 29.

[8] In general, motions "must ... state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order." They also must "include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact the other parties in the proceeding and resolve the issue(s) raised in the motion ... ." *See* 10 C.F.R. § 2.323(b).

[9] Order (Nov. 18, 2005) (unpublished).

[10] We note, parenthetically, that PRESS was late in filing these supplemental pages, which were due on November 28, 2005, but not submitted until after 1:30 P.M. the next day. A cover note submitted with the electronic submission explained that PRESS "believe[d]" it "would have made the submission by deadline at midnight [on November 28, 2005]," but that there had been a neighborhood power failure from 9 P.M. until "some hours after midnight." PRESS should have, nonetheless, alerted the NRC and other litigants as soon as possible. Because we find none of PRESS's contentions admissible, we will not inquire further into this delay.

[11] Reply to USEC and NRC Staff Regarding PRESS Appeal (Nov. 1, 2005) (First Reply) at 4.

provide[d] *enough* support to pass the standard of admissibility."[12] Because our decision today turns on the adequacy of PRESS's contentions, we begin our look at PRESS's appeal by once again describing the NRC's strict contention admissibility standards.[13]

III. Requirements for Contentions

To gain admission as a party, a petitioner for intervention must submit at least one admissible contention.[14] In 1989, we raised the admission standards for contentions in an effort to "obviate serious hearing delays caused in the past by poorly defined or supported contentions."[15] Prior to this rule revision, "'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'"[16] Consequently, "'[a]dmitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination.'"[17] "Serious hearing delays – of months or years – occurred, as licensing boards admitted and then sifted through poorly defined or supported contentions."[18] We therefore amended our contention rules, responding to Congress's call that our adjudicatory hearings

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[12] *Id.* at 3 n.1 (emphasis in original).

[13] *See, e.g.*, *Exelon Generation Co., L.L.C.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004).

[14] *See* 10 C.F.R. §§ 2.309(a), 2.309(f).

[15] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

[16] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

[17] *Id.* at 358 (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

[18] *Id.*

"serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors."[19]

Since 1989, our contention rule has "insist[ed] upon some reasonably specific factual or legal basis for a petitioner's allegations."[20] To be admissible, a contention must provide a specific statement of the issue of law or fact to be raised or controverted; a brief explanation of the basis for the contention; and a concise statement of the alleged facts or expert opinions which support the contention, and upon which the petitioner will rely at the hearing, together with references to those documents or other sources of which the petitioner is aware and upon which he intends to rely.[21]

A contention must also identify the disputed portion of the application, and provide "supporting reasons" for the challenge to the application.[22] Similarly, if a petitioner believes that an application fails to contain information on a "relevant matter as required by law," the contention must identify each failure and the supporting reasons for the petitioner's belief.[23] The issue raised in a contention must fall within the scope of the proceeding, and reflect a genuine dispute with the applicant or licensee on a material issue of law or fact.[24]

The Commission recently re-emphasized that "no contention will be admitted for

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[19] *Oconee,* CLI-99-11, 49 NRC at 334 (citation omitted); *accord Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003).

[20] *Millstone*, CLI-03-14, 58 NRC at 213 (internal quotations omitted).

[21] 10 C.F.R. § 2.309(f). In 2004, we again revised our adjudicatory procedural rules. The general threshold contention admission standards remained substantively the same, but were renumbered as part of the overall reorganization of Part 2. Prior to this 2004 revision, the contention admissibility standards were found in 10 C.F.R. § 2.714(b)(2).

[22] 10 C.F.R. § 2.309(f)(1)(vi).

[23] *Id.*

[24] *See* 10 C.F.R. §§ 2.309(f)(1)(iii) and (vi).

litigation in any NRC adjudicatory proceeding unless these [contention] requirements are met."[25] The contention standards now have been in effect for over 15 years and have proved "effective in focusing litigation" on genuine safety and environmental issues that are relevant to the licensing action.[26] At the same time, these threshold standards have not unduly restricted public participation in our proceedings. Licensing boards continue to grant hearing requests and admit for litigation numerous contentions in a variety of adjudicatory proceedings. Indeed, in another ongoing proceeding similarly involving an application for a uranium enrichment facility, the licensing board admitted several safety and environmental contentions for hearing.[27]

We recognize, nonetheless, that our contention rules require petitioners "to work within a limited time frame to review the license application and any available related licensing documents," and that this "can pose a significant burden, especially for *pro se* petitioners who are likely to have less available time and resources."[28] But those participating in our proceeding must be prepared to expend the necessary effort. We are unwilling to convene costly and time-consuming hearings "unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[29] Of course, whether or not particular contentions are admitted for hearing, the NRC Staff conducts a full safety and environmental review of every proposed licensing action, and may not issue a license until all necessary findings have been made.

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[25] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

[26] *See id.* at 2190.

[27] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40 (2004).

[28] *Oconee*, CLI-99-11, 49 NRC at 338.

[29] 69 Fed. Reg. at 2202.

IV. PRESS's Contentions

Like the Board, we have examined PRESS's contentions, and we agree with the Board that they do not satisfy the threshold standards for admission. PRESS's contentions overwhelmingly lack the necessary minimal factual or legal support. It is simply insufficient, for example, for a petitioner to point to an internet website or article and expect the Board on its own to discern what particular issue a petitioner is raising, including what section of the application, if any, is being challenged as deficient and why. A contention must make clear why cited references provide a basis for a contention.[30] On appeal, PRESS repeatedly suggests that the Board had an "obligation" to examine referenced articles to find support for contentions. We expect our licensing boards to examine cited materials to verify that they do, in fact, support a contention.[31] But it is not up to the boards to search through pleadings or other materials to uncover arguments and support never advanced by the petitioners themselves; boards may not simply "infer" unarticulated bases of contentions.[32] It is a "contention's proponent, not the licensing board," that "is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[33]

On appeal, PRESS suggests that the Board rejected contentions because PRESS had

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[30] *See, e.g., Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003).

[31] *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 49 (1989), *vacated in part on other grounds*, CLI-90-4, 31 NRC 333 (1990).

[32] *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); *see also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999), *petition for review denied*, *Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000).

[33] *Statement of Policy On Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 22 (1998).

not attached copies of referenced documents. While the Board frequently noted that PRESS had failed to provide a particular cited document, the Board did not reject any contention solely on the ground that a document was not provided with the petition. Ultimately, it rejected contentions that did not make clear how referenced items supported the contention.[34] On appeal, out of an abundance of caution, we examined all cited references that are readily accessible electronically on the internet.

An additional general issue that bears mention is that PRESS's appeal briefs repeatedly raise new arguments to support its contentions. Indeed, several of these new claims effectively amount to distinct new contentions, never presented to the Board. Allowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of our contention-pleading rules.[35] Therefore, absent extreme circumstances, we will not consider on appeal "either new arguments or new evidence supporting the contentions, which the Board never had the opportunity to consider."[36] This includes PRESS's effort on appeal to revive particular contentions by directing the Commission to consider the bases that were proffered in support of *other* contentions.[37]

We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) is ample time

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[34] Similarly, the Board noted that PRESS's contentions repeatedly make a "bare reference" to an NRC regulation, "without explaining its significance or establishing any connection to the proffered contention." *See* 62 NRC at 599 n.39. The Board did not individually address these unexplained citations to regulations, and we likewise do not do so here.

[35] *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004).

[36] *Private Fuel Storage*, CLI-04-22, 60 NRC at 140; *see also, e.g., Sequoyah Fuels Corp.* (Gore Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004); *Zion*, CLI-99-4, 49 NRC at 194.

[37] *See, e.g.,* Notice of Appeal and Brief, Continued by PRESS (Nov. 29, 2005)(Augmented Brief) at 46; Initial Brief at 19-20.

for potential intervenors to review an application and develop contentions.[38] In the event of exigent circumstances or other compelling reasons, our rules allow a late-filed petition and contentions.[39] Here, PRESS claims that it was "several drafts away from a properly composed product" when it submitted its contentions.[40] But PRESS neither sought additional time for filing its petition (beyond the 60-day extension it already had received), nor sought later to amend any of its contentions. The purpose of an appeal to the Commission is to point out errors made in the Board's decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.[41]

With these points in mind, we turn now to PRESS's particular arguments on appeal. PRESS's appeal reversed the numerical order in which its contentions had been presented in the PRESS petition. In other words, on appeal PRESS begins with its arguments on Contention 21 and ends with Contention 2. PRESS apparently reversed the order of the presentation because it considers "the most important, and most consequential" issues to be those that were raised in the contentions found "towards the end" of its petition.[42] USEC followed this same backwards progression in its answering brief. For clarity's sake, we do the same.

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[38] *See* 69 Fed. Reg. at 2199-2200.

[39] *National Enrichment Facility*, CLI-04-35, 60 NRC at 623; *see also* 10 C.F.R. § 2.309(c); *Final Rule*, 69 Fed. Reg. at 2200.

[40] Initial Brief at 2.

[41] Additionally, we note that our regulations do not provide for reply briefs on appeals of Board decisions denying intervention. *See* 10 C.F.R. § 2.311. PRESS filed two reply briefs, one following the responses to its initial appeal brief, and another following responses to its supplemental appeal brief. The replies inappropriately refer to our regulation governing appeals of decisions on the merits. We have considered the replies, but not to the extent that they raise any new arguments not presented to the Board.

[42] Initial Brief at 15.

Contention 21: Unnecessary Censorship

Contention 21 complains that "some of the public censorship of the USEC documents was unnecessary." As bases, the contention identifies several items that were redacted from the original publicly available version of the application. For one of the identified redactions, PRESS states that it was "clearly not necessary" to redact a figure because it can be found in a separate – and publicly available – document.[43]

PRESS's contention does nothing more than identify particular redactions. One of the redacted items is a consultation letter on USEC's environmental review. Before the Board, USEC explained that the NRC staff inadvertently had failed to enter consultation letters into the NRC electronic docket file, but that the letters had since been entered in the file. The other redacted items were clearly identified in the application as having been withheld pursuant to 10 C.F.R. § 2.390. That regulation allows certain information to be withheld from public disclosure, including, for example, trade secrets and other confidential financial information, or information that concerns an applicant's physical protection, classified matter protection, or material control and accounting program that is otherwise not designated as Safeguards Information or classified as National Security Information or Restricted Data.[44]

PRESS's petition did not suggest that it needed any of the listed items to develop one or more proposed contentions. Indeed, PRESS itself makes the point that some redacted information can be found "in any number of publicly available documents."[45] Regardless of whether USEC's redactions were appropriate under 10 C.F.R. § 2.390, PRESS simply did not link any of them to a specific safety or environmental question within the scope of this licensing

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[43] *See* Petition to Intervene By PRESS (Feb. 28, 2005)("Petition") at 52.

[44] 10 C.F.R. § 2.390(d)(1).

[45] Initial Appeal at 15.

proceeding.

On appeal, PRESS argues that USEC's application included redactions that "significantly impeded [PRESS's] understanding of the LA [license application] documents," and indeed that it was "frustrated at every turn, in attempting to analyze the LA documents, by missing information that had been 'withheld pursuant to 10 C.F.R. 2.390.'"[46] But as originally presented to the Board and participants, PRESS's "unnecessary censorship" contention suggested nothing more than that some specific redactions may have been unnecessary. Before the Board, PRESS nowhere complained that the redactions had inhibited framing contentions.

Petitioners cannot revive their case on appeal on the basis of new arguments that the Board never had the opportunity to consider. PRESS, in any event, never requested any of the redacted items identified in its "unnecessary censorship" contention, or requested other redacted items in the application at large.[47] Under longstanding agency precedent, petitioners or intervenors may request and, where appropriate, obtain – under protective order or other measures – information withheld from the general public for proprietary or security reasons.[48]

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[46] *Id.* at 16-17.

[47] At most, PRESS complained during a telephonic prehearing conference before the Board that it had had trouble understanding an issue related to Contention 11 because particular figures had been redacted, although it still had obtained a "good idea" of the issue of concern. *See* Transcript (Telephone Conference)(July 19, 2005) at 31-37.

[48] *See, e.g.*, *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-19, 60 NRC 5 (2004) (safeguards information); *Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775 (1980) (security plan); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 160, *aff'd*, CLI-98-13, 48 NRC 26 (1998) (security plan); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station) (Order Approving Joint Proposed Memorandum and Order – Protective Order and Procedures for Handling Safeguards Information and Proposed Affidavit) (Mar. 24, 2003) (unpublished); *Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) (Memorandum and Order – Protective Order Governing Disclosure of Proprietary Information) (June 19, 2002) (unpublished); *Nuclear Fuel Services, Inc.* (Erwin, TN) (Order– Protective Order for Use in NFS Project Proceeding) (May

On appeal, PRESS states that it was not "confident" that it was allowed to request the withheld information.[49] But it is not apparent that PRESS even attempted to do so, by making relevant inquiries or otherwise. Notably, under 10 C.F.R. § 2.390, documents withheld from general public inspection may still be made available under protective order, as appropriate, to "persons ... directly concerned to inspect the document." [50] In addition, in a pleading filed months before the Board's decision, USEC expressly noted that "procedures have existed for Petitioners to have sought access" to redacted information.[51] PRESS did not request redacted documents.

At bottom, the issue raised in PRESS's "unnecessary censorship" contention is that "there exists at least one unnecessary redaction" in USEC's application.[52] Even if true, this by itself does not amount to a material issue for litigation in this proceeding.[53]

Contention 20: Need for Proposed Action

Contention 20 claims that there is no need for the proposed action because the "future of power generated by enriched uranium is very uncertain," and there is a "growing

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18, 2004) (unpublished) (proprietary information); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) (Protective Order) (June 29, 2001) (unpublished) (proprietary information); *see also* Hearing Notice, 69 Fed. Reg. at 61,415 (re: access to classified information).

[49] First Reply at 4.

[50] *See* 10 C.F.R. § 2.390(b)(6).

[51] *See* Response of USEC, Inc. to Board Inquiries Regarding PRESS Access to Withheld Figures (July 27, 2005) at 2.

[52] First Reply at 4.

[53] Eventually, much of the redacted information was made public. *See* Environmental Report (Rev. 4)(Aug. 2005), enclosed with letter from Steven Toelle, USEC, to Jack Strosnider, NRC (Aug. 16, 2005)(ML052420300). None of the participants' briefs mentions this.

understanding among decision makers that nuclear power is not only unsafe and generating huge amounts of dangerous wastes but is also expensive and unessary [sic]."[54]

As bases for the proposed contention, PRESS argued that: (1) nuclear power is expensive; (2) states and businesses (and the Sierra Club) are promoting or pursuing renewable energy sources; (3) leading authorities on nuclear proliferation are calling for a "production pause" in nuclear enrichment facilities and therefore USEC's Environmental Report should have addressed "this contingency"; and (4) that if the "Megatons to [M]egawatts program[55] were accelerated and expanded to accommodate the megatons, perhaps that would obviate the necessity for a centrifuge plant," and therefore the "Megatons to Megawatts" program "should be considered an alternative to licensing the ACP [American Centrifuge Plant]."[56]

As the Board found, while the contention purports to challenge the Environmental Report's analysis of the purposes of and need for the facility, it nowhere specifically addresses or calls into question that analysis.[57] Specifically, the Environmental Report outlines: (1) long-term demand for enriched uranium from more than 24 reactors in other countries that are under construction, as well as from 18 pending and 26 already granted domestic reactor license renewal applications (with most U.S. reactors expected to apply for license renewal); (2) the national energy security goal of a reliable and competitive domestic source of enriched uranium; (3) the national government's interest in developing advanced technologies for

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[54] Petition at 48.

[55] "Megatons to Megawatts" is the commonly used expression for a United States-Russia purchase agreement, in which the U.S. agreed to purchase from Russia highly enriched uranium extracted from dismantled nuclear weapons.

[56] Petition at 48-51.

[57] *See* LBP-05-28, 62 NRC at 620-21.

uranium enrichment; and (4) USEC's own commercial need to replace higher cost and aging production with new lower cost production.[58]

Contention 20's references to news or other articles on renewable energy sources, energy costs and trends, and speculation about potential global non-proliferation ideas or efforts simply do not challenge any of the factors outlined in the Environmental Report's discussion of the need for the facility. The cited articles on renewable energy sources, for example, merely describe a potential for growth in renewable energy sources, given growing oil and natural gas prices, concerns about carbon dioxide emissions, and a national interest in decreasing dependence on foreign energy sources. They do not raise a genuine dispute with the applicant on a material issue relating to this application for a uranium enrichment facility.[59]

In addition, PRESS apparently failed to note that the Environmental Report does in fact discuss the alternative of relying upon down-blended Highly Enriched Uranium from nuclear warheads, such as that obtained through the Megatons to Megawatts program. The Environmental Report rejects this alternative for several reasons. The Report points out, for instance, that the Megatons to Megawatts program currently is scheduled to expire in 2013 and it is uncertain whether the program would be extended. It is "doubtful," the Environmental Report says, "that the U.S. Government would extend this agreement to replace rather than

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[58] Environmental Report for the American Centrifuge Plant (Aug. 2004)(Environmental Report) at 1-10 to 1-12.

[59] On appeal, PRESS presents the new argument that USEC's Environmental Report is deficient because it "fails to discuss the ameliorating effect of conservation measures on demand in its discussion of need [for the facility]." *See* Initial Appeal at 21. PRESS suggests that its contention in several places "specifically focused on conservation issues." *See id.* But PRESS's original contention itself nowhere even mentions conservation, much less "focuses" upon it. In any event, PRESS provides mere speculation that conservation measures will bring about "reduced demand for nuclear energy" and "hence reduced demand for enrichment services." *Id.* at 20. PRESS points to no requirement that an applicant for a uranium enrichment facility must also specifically consider potential electricity conservation measures. *Cf. Clinton,* CLI-05-29, 62 NRC at 805-08.

complement domestic SWU [separative work unit] production."[60] PRESS did not even mention the Environmental Report's analysis of this alternative. We therefore agree with the Board's conclusion that this contention lacks adequate factual or expert support, fails to raise a genuine material dispute with the applicant, and raises policy questions outside the scope of this proceeding.

Contention 19: Enrichment Freeze

Contention 19 asserts that "there may be an international freeze on uranium enrichment," in which case "USEC would not be able to survive."[61] The contention cites a draft report by the Carnegie Endowment for International Peace, which proposed a temporary moratorium, or "pause," on activities that produce highly enriched uranium [HEU] or weapons-usable plutonium, including all uranium enrichment and reprocessing activities.[62]

On appeal, PRESS claims that it is simply asking the NRC to "consider what impact a five year moratorium on uranium enrichment would have on USEC's financial condition."[63] PRESS "believe[s] that a five year moratorium on uranium enrichment would be so devastating to USEC that it bears serious consideration whatever the [license application] says about USEC's financial position."[64] PRESS concedes that its proposed contention failed to meet our contention requirement to identify the disputed portion of the application. PRESS now depicts this contention as focusing on USEC's need to "consider[] the rather significant all-around

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[60] Environmental Report at 2-19.

[61] Petition at 47.

[62] *Id.*

[63] Initial Appeal at 22.

[64] *Id.* at 24.

impacts that a five-year moratorium on uranium enrichment would cause," and calls this a contention "of omission."[65]

As the Board found,[66] this contention provides only speculation about USEC's financial capabilities, and raises issues of international policy unrelated to the NRC's licensing criteria and therefore beyond the scope of this proceeding. Potential nuclear non-proliferation initiatives depend upon the actions and decisions of the President, Congress, international organizations, and officials of other nations. As such, non-proliferation goals and concerns "span a host of factors far removed from the licensing action at issue."[67] Moreover, as USEC shows, "[c]urrent U.S. law not only permits, but encourages the development of U.S. advanced uranium enrichment production," and therefore an enrichment freeze "would require a complete reversal of the U.S. energy policy." [68] PRESS's speculative assertions of a potential five-year freeze on the ACP's operation and of such a freeze's impact on USEC's financial qualifications are not nearly sufficient to satisfy our contention admissibility standards.

Contention 18: USEC Incompetence

Contention 18 argues that "as the leading violator of the NRC materials licensees, USEC is incompetent to hold a license to operate a centrifuge plant."[69] It references various

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[65] *Id.* at 25.

[66] LBP-05-28, 62 NRC at 619.

[67] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 724 (2005).

[68] USEC Inc. Brief in Response to PRESS Notice of Appeal and Brief (Oct. 27, 2005)(USEC Response to Initial Appeal) at 15-16.

[69] Petition at 42.

NRC enforcement actions taken against the United States Enrichment Corporation[70] for violations at the Portsmouth, Ohio or Paducah, Kentucky gaseous diffusion plants, mostly in the years 1998 and 1999. The Board correctly rejected the proposed contention, noting that "[a]llegations of management improprieties must be of more than historical interest,"[71] and that PRESS had not presented any information calling into question USEC's current willingness and ability to follow NRC regulations.

On appeal, PRESS quotes from a portion of its oral argument before the Board, in which it catalogued by year various NRC enforcement actions against the United States Enrichment Corporation: 2 in 1997; 5 in 1998; 4 in 1999; 2 in 2000; 1 in 2001; 1 in 2002; 0 in 2003; 1 in 2004. PRESS thus concludes that "if USEC has 15 enforcement actions in seven years, then .... over the course of 30 years, we can expect that they shall receive 60, including four level 2 assessments."[72] PRESS also states that at oral argument before the Board it "presented information indicating that procedures associated with past violations would be employed at, or involved with, the ACP."[73] And PRESS argues that because the United States Enrichment Corporation is a wholly-owned subsidiary of USEC, "there isn't much difference between the GDP [gaseous diffusion plant] operators and the ACP operators."[74]

We have reviewed PRESS's oral argument before the Board, but find that PRESS presents no basis for its assertion that USEC is unqualified or "incompetent" to operate a centrifuge facility. Not only did the bulk of the cited violations occur five to eight years ago, but

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[70] The United States Enrichment Corporation is a wholly-owned subsidiary of USEC.

[71] LBP-05-28, 62 NRC at 618 (citing *Georgia Inst. of Technology* (Georgia Tech Research Reactor, Atlanta, GA), CLI-95-12, 42 NRC 111, 120 (1995)).

[72] Initial Appeal at 28.

[73] *Id.*

[74] *Id.*

they spanned two different facilities – the Portsmouth and Paducah gaseous diffusion plants. We see no explanation at oral argument or in PRESS's contention that would tie specific procedures or wrongdoing associated with the cited violations to any particular procedures at USEC's proposed new facility, the ACP. PRESS merely identified the nature of the enforcement actions, not actual "procedures" used. This proposed contention presents mere assertions and speculation that USEC officials or personnel would encourage or condone violations of NRC regulations. It does not present any *ongoing* pattern of violations or disregard for regulations that might be expected to occur in the future.[75]

Contention 17: American Centrifuge Plant Project Failure

Contention 17 complains that "USEC's request for incremental payment is a symptom of its weak financial position."[76] The proposed contention does not explain what is meant by "incremental payment," but presumably it is a reference to USEC's intention to obtain funding for the ACP in incremental stages, to accompany the planned incremental construction and installation of the facility.[77] In one of the submitted bases, the contention argues that USEC provided no "assurance that its centrifuge plans won't go the way of its AVLIS plans," a reference to USEC having abandoned earlier efforts to develop an alternate technology for enriching uranium with lasers, called Atomic Vapor Laser Isotopic Separation ("AVLIS").[78]

The Board ruled that PRESS had not presented sufficient facts or expert opinion to challenge USEC's financial qualifications to build, own, and operate the ACP facility, and thus

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[75] *See Millstone*, CLI-01-24, 54 NRC at 365-66; *Zion*, CLI-99-4, 49 NRC at 189.

[76] Petition at 41-42.

[77] *See, e.g.,* USEC License Application (Aug. 2004) at 1-49 to 1-50 ("License Application").

[78] Petition at 42.

did not raise a genuine material issue for litigation.[79] We agree.

On appeal, PRESS argues that USEC abandoned the AVLIS project, a project that was estimated to cost $2.5 billion, after "USEC raised only $1.5 billion dollars for AVLIS in its IPO [Initial Public Offering]."[80] PRESS then goes on to make the new claim that "USEC must guarantee $6.065 billion" to demonstrate sufficient financial qualifications, and that there is "serious doubt" that it would be able to fund a $6 billion project, since it was unable to raise 2.5 billion dollars for the AVLIS project.[81] As PRESS's argument goes, if AVLIS was not an economically viable technology, then the ACP facility, "with higher costs than AVLIS ... must therefore be a less viable technology, economically, than AVLIS."[82]

But PRESS provides no support for its claim that USEC's decision to abandon AVLIS calls into question USEC's current financial qualifications to construct and operate the ACP. As USEC argues, "[t]he economic viability of the AVLIS using *laser enrichment technology* has nothing to do with the economic viability of the ACP using *centrifuge enrichment technology*."[83] Moreover, as USEC further stresses, PRESS incorrectly "appears to assume that USEC must have all funds available at the beginning of the project, despite the fact USEC is planning to incrementally fund ACP construction."[84]

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[79] *See* LBP-05-28, 62 NRC at 617.

[80] Augmented Brief at 29.

[81] *Id.* at 29-30.

[82] *Id.* at 30.

[83] USEC Inc. Brief in Response to PRESS Augmented Appeal Brief (Dec. 8, 2005)(USEC Response to Augmented Brief) at 5 (emphasis in original). In addition, USEC provides unrebutted arguments challenging what it calls PRESS's "erroneously inflate[d]"estimate of funding the ACP, and its "unfounded assumption" that the AVLIS IPO proceeds were intended to be used to fund AVLIS, both of which were, in any case, new arguments on appeal. *See id.* at 4-5.

[84] *Id.* at 5.

USEC's application specifies that "[c]onstruction of each incremental phase of the facility shall not commence before funding for that increment is available or committed."[85] It further specifies that operation of the facility will not commence until USEC has achieved particular financial milestones. PRESS nowhere indicates why this incremental funding plan is not viable. PRESS provides no fact-based or expert support for its claim that "USEC doesn't have a hope of funding the ACP."[86] For these reasons, we agree with the Board that this proposed contention is inadmissible.

Contention 16: Alternative Site Use

Contention 16 argues that the no-action alternative would be "more beneficial to the site than the proposed action" because "Piketon could be an industrial heaven employing many thousands if it were cleaned up," and that "USEC will block alternative uses because of the security arrangements that would have to be made."[87] PRESS's first proffered basis notes that USEC has an agreement with the Department of Energy ("DOE"), which requires USEC to locate the ACP at either the DOE reservation located in Piketon, Ohio or at the site of the Paducah, Kentucky gaseous diffusion plant location, but claims that USEC's commitments are irrelevant to whether "the ACP is more beneficial to the site than no ACP."[88] A second basis claims that "AVLIS, while beyond USEC's pocket, would be a reasonable alternative to consider."[89] The Board found this proposed contention inadmissible for several reasons,

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[85] License Application at 1-50.

[86] PRESS Reply to USEC and NRC Staff Regarding PRESS Appeal (Continued)(Dec. 16, 2005)(Second Reply) at 5.

[87] Petition at 40-41.

[88] *Id.* at 41.

[89] *Id.*

including that PRESS did not identify, with factual basis, any material error in USEC's analyses of the impacts of the no-action alternative, and that "USEC was only required to discuss alternatives that produce enriched uranium."[90] Again, we agree with the Board.

On appeal, PRESS argues that the NRC should prefer the no-action alternative – because of its (allegedly) superior jobs-creation potential – and therefore "reject" the ACP license application.[91] NEPA, however, is a procedural statute that "does not require [an] agency [to] select any particular options."[92] Indeed, the NRC arguably need not consider the jobs issue at all, as nothing in the Atomic Energy Act gives the agency authority to base licensing decisions on a project's potential to create or eliminate jobs.[93]

Further, PRESS erroneously appears to assume that the NEPA analysis of "alternatives" should ignore the stated purposes of the project and the applicant's needs. Here, the specific purposes of the proposed ACP facility include the national energy security goal of maintaining a reliable, economical, secure and domestic source of enriched uranium, developing advanced technologies for uranium enrichment, and USEC's need to replace aging production facilities with more efficient and lower cost technology.[94] The Environmental Report concluded that the "no action" alternative would not meet the stated "need" or purposes of the proposed licensing

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[90] *See* LBP-05-28, 62 NRC at 616-17.

[91] Augmented Brief at 30.

[92] *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 44 (2001); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). In addition, an agency's primary duty under NEPA is to look at environmental impacts. "Determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion." *Private Fuel Storage,* CLI-04-22, 60 NRC at 145 (quotation and citation omitted).

[93] *See generally Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004).

[94] *See* Environmental Report at 3, 1-10 to 1-12.

action.[95]

On appeal, PRESS dismisses as "irrelevant" both USEC's commercial needs and the project's national energy security goal.[96] But when a Federal agency "acts, not as a proprietor, but to approve ... a project being sponsored by a local government or private applicant, the Federal agency is necessarily more limited."[97] Thus, when reviewing a license application filed by a private applicant, the agency "may appropriately 'accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project,'"[98] and "should take into account the needs and goals of the parties involved in the application."[99] In selecting the preferred alternative, it is appropriate for an agency to consider the stated purposes of a project.[100]

PRESS's contention puts forth the idea of an "industrial heaven" employing thousands at the Piketon site if the ACP license is denied and if the site "were cleaned up."[101] Yet not only

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[95] *See, e.g.*, *id.* at 5, 2-1 to 2-2. The DEIS similarly concludes that "[t]he proposed action better satisfies DOE's policy and technical objectives for meeting future demand for enriched uranium, improved national energy security, and desired technological upgrades, relative to the no-action alternative." *See* Environmental Impact Statement for the Proposed Centrifuge Plant, Draft Report (Aug. 2005)("DEIS") at 7-10.

[96] Augmented Brief at 31.

[97] *Hydro Resources,* CLI-01-4, 53 NRC at 55 (quoting *Citizens Against Burlington v. Busey,* 938 F.2d 190, 197 (D.C. Cir.), *cert. denied,* 502 U.S. 994 (1991)).

[98] *Id.* at 55 (quoting *City of Grapevine v. Dep't. of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir.), *cert. denied,* 513 U.S. 1043 (1994)); *see also Clinton*, CLI-05-29, 62 NRC at 805-08.

[99] *Hydro Resources,* CLI-01-4, 53 NRC at 55-56 (quoting *Citizens Against Burlington,* 938 F.2d at 196); *see also Clinton*, CLI-05-29, 62 NRC at 805-08.

[100] *See, e.g., Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067 (9th Cir. 1998).

[101] Petition at 40.

did the contention lack support for this claim, as the Board found,[102] but the "no-action" alternative "is most simply viewed as maintaining the status quo."[103] For the "industrial heaven" idea to become reality would involve numerous future, yet-uncertain steps by unknown third parties. In effect, PRESS is proposing another objective altogether, its concept of an "industrial heaven."[104] But agencies need only consider those alternatives that can achieve the purposes of the proposed action.[105] When the purpose of a project "is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."[106]

PRESS also argues on appeal that "AVLIS should be considered seriously as an

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[102] *See* LBP-05-28, 62 NRC at 617.

[103] *Hydro Resources,* CLI-01-4, 53 NRC at 54 (citing *Association of Public Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1188 (9th Cir. 1997)).

[104] *See* Second Reply at 3. On appeal, PRESS provides an "idea" of what this "industrial heaven" alternative might be like. PRESS cites to a DOE Environmental Assessment evaluating the potential impacts of a reindustrialization program at the Portsmouth Gaseous Diffusion Plant site. This is new evidence submitted improperly for the first time on appeal (in a reply brief, no less). The NRC's Draft Environmental Impact Statement, in any event, shows that building the new USEC facility is not incompatible with developing other parts of the Piketon reservation property for industrial use. *See* DEIS at 4-115 to 4-116. The facilities and grounds currently leased to USEC for the proposed ACP, the DEIS notes, likely would be "unavailable for reindustrialization and would be expected to be used in some other way related to uranium enrichment, if not used for the ACP." *Id.*

For the first time on appeal, PRESS also argues that the proposed facility would "result in a net loss of 623 direct jobs." *See* Augmented Brief at 32 & n.17. This is, yet again, an improper new argument on appeal that we will not address.

We further note that PRESS on appeal also seemingly appears to challenge the DEIS, claiming that it has "similarly under-represented the benefits of the no-action alternative." *See id.* at 30. The NRC staff issued the DEIS in August 2005. PRESS may not seek to revive its contention on the basis of late arguments about the DEIS on appeal. Late-filed environmental contentions are governed by the procedures set forth in 10 C.F.R. § 2.309(f)(2). The claims are, nonetheless, inadequately supported, for reasons we already outlined.

[105] *Hydro Resources,* 53 NRC at 55 (citing *Citizens Against Burlington,* 938 F.2d at 195).

[106] *Id.* at 55 (quoting *Citizens Against Burlington*, 938 F.2d at 195).

alternative."[107] While PRESS's contention described the AVLIS alternative as "beyond USEC's pocket," PRESS nonetheless, and with no further elaboration, claims that it "gives the Applicant an alternative way to conduct its business once the license is denied."[108] Yet as the Board found, "USEC did consider AVLIS as an alternative, eliminated it, and adequately stated its reasons for doing so in the ER."[109] PRESS never challenged the AVLIS discussion in the Environmental Report. As such, the Board correctly rejected this contention on alternative site use.

Contention 15: National Security

Contention 15 argues that USEC has not demonstrated that the proposed facility "would advance national security goals."[110] In support, PRESS quotes a newspaper editorial in which Congressman David Hobson describes two particular nuclear weapons initiatives as an "unwise and unnecessary use of limited resources," and argues that "it is hypocritical for the United States to embark on new weapons and testing initiatives" when it seeks to persuade "countries such as Iran and North Korea to abandon nuclear weapons and testing initiatives."[111]

On appeal, PRESS acknowledges that the Board "correctly point[ed] out that the Hobson editorial focuses on nuclear weapons initiatives, not enrichment technology."[112]

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[107] Augmented Brief at 31.

[108] *Id.*

[109] LBP-05-28, 62 NRC at 616 (citing Environmental Report at § 2.2).

[110] Petition at 39.

[111] *Id.* at 40.

[112] Augmented Brief at 33 (internal quotation omitted).

PRESS argues, however, that the editorial's "*logic* applies directly to the ACP."[113] More specifically, PRESS argues that the Board should have been aware that "the most significant issue with Iran's weapons program concerns their proposed ... [uranium] enrichment plant."[114] PRESS claims that constructing the ACP would encourage other countries to pursue nuclear weapons.[115]

PRESS's generalized concerns about national security and non-proliferation do not amount to an admissible contention.[116] The Board correctly found that PRESS offered no facts or expert opinion to support its claim that the proposed ACP would be inimical to common defense and security, and that PRESS's "policy preference for a ban on uranium enrichment does not raise a litigable issue in this proceeding."[117]

Further, the proposed contention references and thus appears to challenge the Environmental Report's statement that one purpose of the ACP is to promote the national *energy security* goals of maintaining a reliable, economical, and domestic source of uranium enrichment.[118] The contention, however, does not specifically challenge the ACP's role in promoting these domestic energy security goals.

Contention 14: Application Inadequate

Contention 14 claims that USEC's Fundamental Nuclear Materials Control Plan

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[113] *Id.* (emphasis in original).

[114] *Id.*

[115] *See* Second Reply at 5.

[116] *See Louisiana Energy Services, L.P.*, (National Enrichment Facility), CLI-05-28, 62 NRC 721, 724 (2005).

[117] LBP-05-28, 62 NRC at 616.

[118] *See* Petition at 39.

("FNMCP") "doesn't satisfy the requirements of 10 C.F.R. § 74.13(a)," and "therefore the application is inadequate."[119] As support, the contention merely quotes a paragraph from USEC's application, which describes USEC's request for an exemption from § 74.13(a), a rule on material status reporting procedures. The quoted section notes that USEC intends to perform material status reporting for the ACP utilizing a reporting program similar to that used for the gaseous diffusion plants, and that USEC thus requests "a similar exemption [from § 74.13(a)] to that currently in effect for the GDPs [gaseous diffusion plants]."[120]

PRESS's exemption challenge is seemingly moot, as our records show that USEC no longer requests an exemption from 10 C.F.R. § 74.13(a).[121] Apparently, USEC withdrew its exemption request prior to the Board's decision on PRESS's contention. But neither the NRC Staff nor USEC informed the Board, the Commission, or PRESS. We take this occasion to remind the participants of their obligation to inform the Board and Commission, as well as other litigants, of relevant new developments in a proceeding.

PRESS's contention challenging the exemption request lacked support, in any event. As the Board found, the contention "neither addresse[d] the criteria for granting such an exemption nor provide[d] any discussion of why USEC's requested exemption should not be granted."[122] Indeed, PRESS's contention did nothing more than quote a portion of the application, verbatim. The contention thus evinced no particular understanding of the reporting regulation at issue, or of the explanation provided by USEC in support of the exemption request.

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[119] *Id.* at 38.

[120] *See id.* at 38-39 (quoting USEC Application at 1-55).

[121] *See* License Application (Revision 6)(Aug. 2005) at § 1.2.5.

[122] LBP-05-28, 62 NRC at 615.

The mere fact that an application requests an exemption from a particular regulatory provision does not render an application deficient. Our regulations specifically allow the NRC to grant exemptions that will not threaten the common defense and security, or endanger life or property, and that are otherwise in the public interest.[123]

On appeal, PRESS raises two entirely new arguments (indeed amounting to entirely new contentions) claiming that USEC was obliged to follow other particular regulatory reporting requirements. But PRESS never presented these claims to the Board. As we have reiterated throughout this order, it is impermissible to raise new contentions for the first time on appeal. Although PRESS's complaint falls outside the hearing process, we expect our Staff to require that USEC meet all applicable reporting requirements.

Contention 13: D & D Plans Inadequate

On appeal, PRESS concedes that it did not adequately support this contention on decontamination and decommissioning plans. PRESS thus states that Contention 13 is withdrawn but "with the proviso that it lends support to our claim of unnecessary redactions."[124]

PRESS, however, cannot wait until an appeal to transfer arguments appearing under one contention to those of another. We earlier addressed PRESS's contention on "unnecessary redactions," which complained that some redactions in USEC's application were not necessary, but offered no litigable claim. As originally submitted, Contention 13 did not

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[123] *See, e.g.*, 10 C.F.R. § 74.7. On appeal, PRESS argues that its contention did not "challenge the exemption *per se*" because it did not have access to USEC's Fundamental Nuclear Material Control Plan, and did not have knowledge of the material reporting program for the gaseous diffusion plants, and therefore had "no way" to evaluate the exemption request. *See* Augmented Appeal at 35. At no point, however, did PRESS request either access to, or any additional information on, gaseous diffusion plant material status reporting procedures or the USEC Fundamental Nuclear Material Control Plan. In short, PRESS never intimated that it needed additional information to understand the exemption request.

[124] Second Reply at 2.

even refer to particular redactions. It alleged a lack of information on subjects which the Board found either did not need to be addressed in the Environmental Report, or in fact already were addressed in the Environmental Report.[125]

Contention 12: Radiological Impacts

Contention 12 argues that the discussion of "Radiological Impacts," "Pathway Assessment," "Accident Analysis," and "Public and Occupational Expose [sic]" in the Environmental Report is inadequate.

The Board rejected the contention, noting that PRESS's references to articles or correspondence, without "explanation or analysis" of their relevance, did not provide an adequate basis for admitting the contention.[126] The Board further concluded that the contention did not identify any error or omission in the Environmental Report. We agree. The contention, for example, quotes brief statements by Mr. Sergei Pashenko, a Russian physicist. Mr. Pashenko's brief remarks are difficult to comprehend and appear largely conclusory. It is not apparent that even PRESS understands Mr. Pashenko's statements, which it presented "without any attempt to interpret the language."[127]

On appeal, PRESS erroneously suggests that conclusory statements provide "sufficient"

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[125] *See* LBP-05-28, 62 NRC at 614.

[126] *Id.* at 613.

[127] Petition at 36. Further, it is unclear just what Mr. Pashenko reviewed. It appears that he may have been provided only with the brief Environmental Report passages quoted by PRESS in the contention. For example, Mr. Pashenko apparently expresses the need for more information on the model used in the cited Environmental Report section. But the Environmental Report provides data on the model used, and neither Mr. Pashenko nor PRESS explains why this information is deficient. *See, e.g.,* Environmental Report at 4-110, 4-76 to 4-79, 3-47 to 3-50.

support for a contention, so long as they are made by an expert.[128] But "an expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing a reasoned basis or explanation for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion ...."[129] PRESS also argues on appeal that reports cited in the contention support the contention because they "contain more complete information than the ER."[130] Even if true, this claim by itself does not point to an actual material deficiency in the application.

Contention 11: Ground and Surface Water

Contention 11 claims that the Environmental Report "does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45."[131] Specifically, the contention challenges the Environmental Report's sections on "Water Resources," "Groundwater," and "Surface Water," claiming that they "fail[ed] to address ... concerns" said to be set forth in the contention's bases.[132] The contention's bases refer to various reports, and also quote from a letter from the Ohio Environmental Protection Agency ("EPA"), addressing DOE's obligations under the Resource Conservation and Recovery Act ("RCRA") to perform particular activities at the Portsmouth gaseous diffusion plant site.

The Board found the contention inadmissible because "[t]he bases offered by PRESS

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[128] *See* Augmented Brief at 37.

[129] *PFS*, LBP-98-7, 47 NRC at 181.

[130] Augmented Brief at 37.

[131] Petition at 34.

[132] *See id*.

do not contain an explanation of the significance of the information cited therein,"[133] and PRESS had not specified how the Environmental Report sections were deficient. The Board further noted that DOE compliance with RCRA is outside of the scope of this proceeding.

On appeal, PRESS complains that it had no obligation to explain or "paraphrase[]" the documents cited.[134] PRESS again mistakenly assumes that the Board had an obligation to search for some potential unidentified supporting information, and that this Board "responsibility ... obviate[d] the necessity for any discussion on [PRESS's] part."[135]

On its face, this contention purports to be about *potential* impacts *from the proposed project* on ground and surface water, but the Environmental Report sections cited and the references cited in the bases all appear to relate to baseline conditions. A different chapter altogether of the Environmental Report, chapter 4, addresses the potential environmental impacts of the ACP. Indeed, the Board at the prehearing conference specifically questioned PRESS's representative about whether "any of the information you're referring to ... ha[s] anything to do with the proposed ... ACP" facility.[136] PRESS confirmed that all of the referenced information related to historic or baseline conditions.

On appeal, PRESS refers without explanation to a 25-page section of the prehearing conference transcript, suggesting that at the conference PRESS satisfactorily answered the Board's questions about the contention. PRESS, however, has the obligation on appeal to clearly identify asserted errors in the Board's decision,[137] an obligation that is not met by a

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[133] LBP-05-28, 62 NRC at 612.

[134] Augmented Brief at 40.

[135] *Id.*

[136] Transcript at 47-48.

[137] *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004).

generalized claim followed by multi-page citation.

In any event, we discern no support for the contention in the transcript. At the prehearing conference, PRESS suggested that its references to baseline information are relevant to this contention because they showed that if, historically, pollutants "escaped the site, then we can expect pollutants also to escape the site under the ACP."[138] PRESS also made the unsupported claim that a "high resolution survey [of baseline conditions] is required ... to determine what impacts the ACP does have on the land," and inquired about what "cumulative effects" the ACP would have.[139] These vague assertions are far from the factual or legal support we require for an admissible contention. Notably, PRESS never addressed the sections in the Environmental Report that specifically describe cumulative impacts, potential impacts to water resources, including surface and groundwater quality, or USEC's program to control liquid effluents.[140]

On appeal, PRESS also insists that the Ohio EPA letter that it cited, which concerns DOE compliance with RCRA, is relevant because it criticizes a report which was used as a reference in the Environmental Report. But as USEC explains, "[t]he Ohio EPA letter ... does not take issue with any of the factual information referenced in the USEC's ER." [141] In short, PRESS never established a link between the EPA letter and the challenged portions of the Environmental Report.

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[138] Transcript at 48.

[139] *Id.*

[140] *See, e.g.,* Environmental Report at 4-52 to 4-61; 2-19 to 2-23; 6-2 to 6-7.

[141] USEC Response to Augmented Appeal at 14 n.28.

Contention 10: Independent Environmental Reporting

The contention argues that "USEC has a very poor record of self-assessment, and that an independent assessment of the environmental base-state is justified."[142] In support, PRESS claims USEC has a "documented history of misleading the NRC" and therefore "[a]ny environmental assessment for the EIS should be undertaken by an independent third party, because USEC Inc. cannot be relied upon to do that impartially."[143] The contention also cites six enforcement actions issued by the NRC Staff to the United States Enrichment Corporation.

The Board correctly rejected the contention. The NRC Staff already is responsible for conducting an independent assessment of USEC's Environmental Report and preparing the Environmental Impact Statement for the ACP. The Staff "will independently evaluate and be responsible for the reliability of any information which it uses" in complying with its NEPA obligations.[144] Moreover, as the Board found, the isolated items of "past enforcement history" cited by PRESS have no apparent direct link to the ACP application.[145]

On appeal, PRESS acknowledges that its contention failed to meet our contention rule's requirement to identify the disputed portions of the application, but "suggest[s]" that the contention "be read as disputing the application at any point that cited data was obtained by USEC."[146] PRESS states that the "implication[]" of this contention is that "it would require any base-line environmental data in the final EIS to be obtained anew by a disinterested third

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[142] Petition at 33.

[143] *Id.*

[144] 10 C.F.R. § 51.41.

[145] LBP-05-28, 62 NRC at 611.

[146] Augmented Brief at 41.

party."[147] PRESS's sweeping and speculative assertions provide no basis for requiring that baseline environmental information that the NRC staff has independently evaluated must be "obtained anew" by another party.

Contention 9: LLMW Exemption

On appeal, PRESS withdraws Contention 9, "subject to the contingency that we did, indeed, misapprehend the low-level waste classification issue." [148] PRESS explains that Contention 9 "probably arose from our confusion between LLMW (Low Level Mixed Waste) and the [Commission's] categorization of depleted uranium as 'Low Level Waste' ... about which we had heard at the time that we submitted our petition."[149] The contention had suggested that LLMW generated offsite or at another facility would be shipped to the ACP, an assumption which the Board found unsupported.[150] As PRESS indicates, this contention appears to be based upon a misunderstanding of the different classifications of nuclear waste, and we thus deem the contention withdrawn. In any event, as the Board found, the contention failed to raise a genuine material issue for litigation and lacked basis.

Contention 8: Scioto Survey

Contention 8 states that "the use of an average figure for uranium concentration in the Scioto [River] is a misleading way to characterize the transport of uranium in water," and that

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[147] *Id.* at 41.

[148] Second Reply at 2.

[149] Augmented Brief at 41.

[150] LBP-05-28, 62 NRC at 610-11.

"[a] full survey should be taken."[151] The sole basis for this contention is a paragraph quoted from USEC's application, which includes an estimate of the average uranium concentration in the Scioto River based upon historical information.

On appeal, PRESS suggests that it provided support for this contention at the prehearing conference, where it explained both what was deficient about USEC's reference to an average uranium concentration in the Scioto River and what PRESS meant by calling for a "full survey" of the river. PRESS's appeal again fails to identify the particular arguments that it made before the Board, and thus fails to identify specific errors in the Board's decision. Our page limits on appeal briefs are intended to encourage parties to make their strongest arguments as concisely as possible. Thus, generalized claims followed by unelaborated references to oral arguments and multiple pages "run[] afoul" of page limitation rules.[152]

Moreover, PRESS incorrectly assumes that new claims presented during oral argument before the Board can cure a deficient contention. In calling for a prehearing conference, the Board expressly advised the litigants that they were not "to make general statements or provide information not already contained in the existing filings."[153] At the prehearing conference, however, PRESS improperly presented new arguments that neither the Staff nor USEC had had an opportunity to consider and answer in their answers to PRESS's contentions. Indeed, a number of the new claims that PRESS presented effectively amounted to distinct new contentions, such as a challenge to the application's estimated probable maximum flood.[154] These new arguments and claims are barred on lateness grounds.

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[151] Petition at 31.

[152] *See Hydro Resources,* CLI-01-4, 53 NRC at 46.

[153] Memorandum and Order (July 12, 2005)(unpublished) at 2.

[154] *See, e.g.,* Transcript at 9-11.

In any event, PRESS's answers at the prehearing conference do not support admission of the proposed contention. When asked what it meant by calling for a "full survey," PRESS described that it would be "something ... like a very accurate time series modeling of storm water flow showing all the different flow fields around about 10 centimeter resolution."[155] Under questioning by the Board, PRESS conceded that a model that analyzes at 10 centimeter increments an area that may be approximately as large as 5 miles would be "a pretty big model," and stated that "the resolution was just suggested."[156] PRESS also "suggest[ed]" that the survey it seeks should be based on a geologic cross section model provided in USEC's application, "combined with a surface model for the surface water, combined with various combinations of regular running discharges at the locations at which they're discharged and perhaps some models of extraordinary events."[157]

Ultimately, the Board found PRESS's arguments unpersuasive.[158] Contentions admitted for litigation must be based on alleged facts or expert opinion pointing to an actual error or deficiency in the application, not petitioners' "suggestions" or ideas of additional details or description that conceivably could be included. It is always possible to come up with more details or areas of discussion that could have been included in an application or Environmental Report. A petitioner's mere "demand for more precision does not justify an NRC adjudicatory hearing."[159]

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[155] *Id.* at 8.

[156] *Id.* at 18.

[157] *Id.* at 19.

[158] *See* LBP-05-28, 62 NRC at 610.

[159] *See System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 19 (2005). Moreover, PRESS's apparent concern is that "it's not clear ... that the uranium hexafluoride would be homogeneously dispersed throughout the Scioto [River]." *See* Transcript at 15. But the application and Environmental Report provide data on

Contention 7: 3.9 % Feedstock

In this contention, PRESS submitted a lengthy calculation intended to show that "USEC is primarily interested in LEU [low enriched uranium] feedstock of about 3.9% assay," and that "[t]his is contrary to the general impression of the Application that the feedstock would be natural assay."[160] PRESS also provided its own estimate of how many containers of feedstock would be required per year, and how many containers of product would be produced. PRESS contended that "USEC should have been more forthright in the Application and quoted these figures in addition to the figures for tails." [161]

On appeal, PRESS states that its calculation of the uranium concentration of the feedstock "was, indeed, in error," and that it therefore withdraws its claim that USEC "concealed its proposed use of feedstock of higher assay than natural uranium."[162] Nonetheless, PRESS maintains that the contention "stands as a claim of omission" because "USEC should have been more forthright" in its application, by providing not only the quantity of tails that the ACP will produce, but also the quantity of feedstock that will be used and the number of containers of product that will be produced.[163]

PRESS claims on appeal that the absence of "the informative figures for feedstock and product ... creat[ed] the false impression that the total quantities involved were much smaller

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the *maximum* levels of uranium concentration detected at various water sampling points, including locations upstream and downstream on the Scioto River, and locations at nearby creeks. *See, e.g.,* Environmental Report at 3-22; Application at 9-32 to 9-33. On appeal, PRESS apparently alludes to this data, but merely claims that "[d]ata from a half-dozen locations or so, as presented in the ER, seems woeful." *See* Second Reply at 4.

[160] Petition at 27.

[161] *Id*.

[162] Augmented Brief at 43.

[163] *Id.* at 44.

than the actual proposal."[164] PRESS's cursory assertions about "forthright[ness]" do not point to any violation of our regulations. We nonetheless reviewed the challenged Environmental Report and application sections on depleted uranium hexafluoride tails, but noted no obvious "false" or misleading impression depicted. PRESS's arguments on appeal are so unclear that it is difficult to discern PRESS's ultimate concerns.[165] We agree with the Board that this contention neither indicated a deficiency or error in the application, nor raised a genuine material dispute within the scope of this proceeding.[166]

Contention 6: Health Risks

Contention 6 asserts that the Environmental Report's discussion of "Public and Occupational Health," found at ER § 3.11, "dangerously underestimates the health risks and damage already effecting [sic] worker and public health as a result of operations on the site."[167] The contention further claims that the calculations of air releases of radionuclides from operations on the site are "understated," and that information on "'beryllium' exposure and 'certain chemicals' and their 'health effects' relies on contested evidence." [168]

As the Board pointed out, PRESS provided only "unexplained references to various

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[164] *Id.*

[165] An appellant "bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims." *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff'd Advanced Medical Systems, Inc. v. NRC,* 61 F.3d 903 (6th Cir. 1995)(unpublished); *see also Davis-Besse*, CLI-04-23, 60 NRC at 158.

[166] LBP-05-28, 62 NRC at 610.

[167] Petition at 22.

[168] *Id*.

documents, letters, 'worker testimonials,' and reports that it alleges support the contention."[169] The Board therefore properly concluded that the contention's bases were "factually unsupported, ... unrelated to the assertions in the contention, ... outside the scope of this proceeding, and refer to Web sites and documents ... whose connection to the proffered contentions has not been established."[170] In short, PRESS's highly generalized references to interviews, presentations, and testimonials – many relating to incidents from ten or more years ago -- are not linked to the particular claims PRESS made in this contention, which include a challenge to particular data on year 2002 air releases of radionuclides, and information on beryllium exposure.[171]

Contention 5: Domino Effect

Contention 5 claims that USEC's application "exhibits no evidence that USEC has attempted to model the catastrophic scenario associated with centrifuge cascades: the 'Domino Effect.'" The "domino effect" accident scenario is described as "proceed[ing] from the failure of one centrifuge ... [where] [s]hrapnel from the failed centrifuge destroys adjacent centrifuges."[172] The contention additionally claims that the application "has not exhibited sufficient design specification data to allow the public to assess the likelihood of the occurrence of such an

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[169] LBP-05-28, 62 NRC at 606.

[170] *Id.* at 609.

[171] For example, the challenged section of the Environmental Report states that the Department of Labor has documented eight cases of beryllium sensitization and 14 cases of Chronic Beryllium Disease among current and former workers at the Portsmouth gaseous diffusion plant, but also makes clear that only about 1,200 of a total of 28,000 personnel who have worked at the Portsmouth facility ever received a test for beryllium sensitivity. It further notes that levels of beryllium that are "significant" have been found, and that at least one credible exposure pathway has been identified. *See* Environmental Report at 3-82. It is unclear what, if any, of this discussion PRESS contests.

[172] Petition at 20.

accident," and that "[t]his is contrary to 10 C.F.R. 70.22(h)(2)(i)(1)(ii)."[173]

The Board rejected the contention on two grounds. First, it noted that "PRESS ha[d] again merely presented unrelated facts, bare assertions, and no analysis or expert opinion ...." [174] Second, the Board noted that USEC in fact had evaluated a "centrifuge machine crash scenario" in its Integrated Safety Analysis (ISA), and therefore the contention erroneously had alleged an omission in the application.[175] The Board additionally noted that § 70.22(h)(2)(i)(1)(ii), a rule requiring submission of an emergency plan, "has nothing to do" with PRESS's assertions in this contention, and that moreover USEC had in fact submitted an emergency plan.[176]

On appeal, PRESS argues that it provided sufficient "analysis" to support the contention because it estimated that the ACP centrifuges "would be 290 SWU per year machines," and therefore would be "spinning very rapidly indeed."[177] Not only does this claim lack adequate factual or expert support, but it also does not by itself present a material dispute for litigation.

As to USEC's analysis of the "domino effect" scenario in its Integrated Safety Analysis, PRESS stresses on appeal that the Integrated Safety Analysis is not publicly available. PRESS proposes "to perform [its] own physics to determine the veracity of USEC's claim to have covered [its] concern, but there is insufficient data currently available in order to make that

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[173] *Id.*

[174] *See* LBP-05-28, 62 NRC at 606.

[175] *Id.* at 605. The Board further noted that USEC's Environmental Report states that a casing "provides physical containment of [centrifuge] components in the unlikely event of a catastrophic failure of the gas centrifuge machine" (internal quotation omitted).

[176] *Id.*

[177] Augmented Brief at 45.

determination." [178]

Contentions, however, must be based on a genuine material dispute, not the possibility that petitioners, if they perform their own additional analyses, may ultimately disagree with the application. In responding to this "domino effect" contention, USEC made clear that its Integrated Safety Analysis had evaluated a centrifuge machine crash scenario. Once PRESS was made aware that this analysis in fact had been provided, it was incumbent upon PRESS to take additional action then, either to seek to review the ISA analysis, and/or to amend its contention.[179] Yet as USEC says, "PRESS does not even claim that it made any effort to seek access to [the ISA analysis of the machine crash scenario]."[180] Indeed, in PRESS's reply to USEC before the Board, PRESS nowhere even mentioned this "domino effect" contention or the availability of the ISA. It is too late now for PRESS to raise an interest in performing its own "physics" or analysis to judge the adequacy of the Integrated Safety Analysis description of a centrifuge machine crash scenario.

Contention 4: 10% Assay

Contention 4 claims that "USEC has not demonstrated that it has a market for 10% assay 235U," and that "USEC has exceeded its possession limit for enriched uranium previously."[181] As bases, the contention claims that the Environmental Report does not discuss "the assay that USEC's potential or existing customers might require," and that "[i]t is not clear that USEC would suffer any disadvantage if, in an alternative scenario, it obtained a license that allowed

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[178] *Id.* at 46.

[179] *See Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-785, 20 NRC 848, 878 (1984).

[180] USEC Response to Augmented Appeal at 19.

[181] Petition at 18.

only 5% assay."[182] The petition also cites to 1998 enforcement actions taken against the United States Enrichment Corporation, which PRESS claims shows that the possession limit for enriched uranium was exceeded.

On appeal, PRESS claims that USEC's application documents "nowhere make the case that a 10% license is necessary."[183] But as USEC argues, "PRESS has not identified any requirement that USEC show that possession of 10% assay enriched uranium is 'necessary' or any inconsistency with its proposed possession limit."[184] USEC must show that the proposed facility will be consistent with public health and safety and with security, and must also demonstrate adequate financial assurance, but need not outline the reasons behind its own commercial strategies. For its part, the NRC need not gather information not pertinent to its licensing decision. The Board correctly rejected this contention on several grounds, including lack of expert or factual support, lack of materiality to any finding that the NRC must make, and no genuine material dispute. [185]

Contention 3: Cylinder Labeling

Contention 3 claims that "USEC's request for exemption from labeling UF6 cylinders is not warranted."[186] In support, the contention quotes two paragraphs from USEC's application, which discuss posting and labeling exemptions sought, and USEC's grounds for seeking the

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[182] *Id.* at 19.

[183] Augmented Brief at 46.

[184] USEC Response to Augmented Appeal at 19.

[185] LBP-05-28, 62 NRC at 604. On appeal, PRESS also raises the entirely new claim that USEC must meet reporting requirements applicable to licensees with special nuclear material of moderate strategic significance. As we have stated herein, it is impermissible to raise new claims for the first time on appeal.

[186] Petition at 17.

exemptions.

The Board correctly rejected the contention, finding that PRESS had not "provided any facts or expert opinion raising a material issue with regard to the adequacy of USEC's exemption requests."[187] On appeal, PRESS states only that the contention can be "easily remedied, by denying the exemption regarding cylinder labeling," and adds that "this would [not] be any great burden to USEC."[188] PRESS points to no error in the Board's decision.

Contention 2: Radiation Work Permits

In Contention 2, PRESS claims that the USEC application fails to specify the procedures that the Radiation Protection Manager would use to determine whether and where to grant an exemption from the requirement of a Radiation Work Permit. The Board rejected the contention, noting that there is "no regulatory requirement that an applicant submit its proposed radiation protection procedures at this stage of the application process."[189] PRESS identifies no error in the Board's decision.

The Commission recognizes that PRESS has put forth effort to petition for hearing and pursue this appeal. But PRESS's contentions do not come close to meeting our contention standards. Those standards are not designed to discourage petitioners, but to assure that those admitted to our hearings bring actual knowledge of safety and environmental issues that

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[187] LBP-05-28, 62 NRC at 603.

[188] Augmented Brief at 46.

[189] LBP-05-28, 62 NRC at 603.

bear on the decision to license a facility. Our adjudicatory proceedings utilize tremendous resources -- administrative, legal, and technical. We therefore have an obligation to assure that those resources are focused, squarely, on examining potential safety or environmental issues of significance. We (and the Board) have carefully examined each of PRESS's contentions, but find none warranting full-scale litigation.

V. Conclusion

Both for the reasons given in LBP-05-28 and those in this decision, we find PRESS's contentions inadmissible. The Commission *affirms* LBP-05-28.

IT IS SO ORDERED.

For the Commission

/RA/

_____
Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 3rd day of April 2006.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
USEC Inc.	)	Docket No. 70-7004-ML
	)	
	)	
(American Centrifuge Plant)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-10) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, on April 4, 2006.

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Dated at Rockville, Maryland,
this 3rd day of April 2006