

May 1, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
USEC, Inc.)	Docket No. 70-7004
)	
(American Centrifuge Plant))	ASLBP No. 05-838-01-ML

NUCLEAR REGULATORY COMMISSION STAFF MOTION FOR MODIFICATION
AND CLARIFICATION OF BOARD ORDER REQUESTING DOCUMENTS AND BRIEFING

INTRODUCTION

Pursuant to the Board's Order of April 19, 2006,¹ the Staff hereby requests certain modifications and clarification of the Board's directive to provide documents and briefing for the mandatory hearing concerning the license application by USEC, Inc. For the reasons discussed below, the Staff respectfully submits that modifications are appropriate in light of the scope of the review mandated by the Commission for uncontested issues, the information which will be provided in the Staff's review documents, and to account for differing security requirements for various portions of the application and review documents.²

BACKGROUND

In the Order, the Board has requested that the Staff provide a number of documents relating to the license application and Staff review. These include (1) specified portions of the license application, (2) Staff review documents, (3) Staff Requests for Additional Information

¹ *Order* (Request for Documents and Briefings), unpublished ("Order") at 5.

² The Staff has contacted counsel for USEC regarding the substance of this motion. Counsel concurred with the Staff's proposals regarding providing documents according to security requirements and has no objection to allowing the Staff an opportunity to respond to any findings or exceptions to findings filed on behalf of USEC. With respect to the other matters addressed, USEC has expressed no view pending receipt of the written filing.

and the applicant's responses, (3) documentation of any Advisory Committee on Reactor Safeguards (ACRS) or Advisory Committee on Nuclear Waste (ACNW) meetings (4) standard review plans (SRPs) and (5) all applicable regulatory guides. Order at 2. Any additional documents the Staff believes should be utilized by the Board are to be listed with a brief explanation of why the Staff believes they are relevant and necessary to the Board's review. *Id.* at 3.

In addition, the Staff has been directed to prepare a narrative summary identifying all regulatory guidance documents used in its review of the license application and an in-depth explanation of how these documents were used by the Staff in its review, referring to each subsection of the relevant SRPs and regulatory guides. *Id.* at 2-3. The Staff's narrative summary is to highlight the areas where relevant portions of the guidance documents were not used and to explain what was done to review the application for those areas. *Id.* For those areas, the Staff is directed to explain in full why it chose the particular course of review that was performed. *Id.* Additionally, the Staff is to include a summary describing the key areas of the Staff review and identify the particular individual who was in charge of each portion of the review. *Id.*

The Staff has been directed to provide four paper copies of all requested documents, including all regulatory guides and the narrative summary, in addition to one electronic copy on CD or DVD. *Id.* at 3. The documents, including the narrative summary, are to be provided on or before June 5, 2006. *Id.* For those documents which are not available as of that date, the Staff is to provide an estimate of when the documents will be provided. *Id.*

DISCUSSION

I. Legal Standards and Commission Guidance

The Commission recently examined the role of the Licensing Board in uncontested hearings in a decision addressing certified questions relating to four pending mandatory

hearings in *Exelon Generation Co., LLC* (Early site Permit for Clinton ESP Site) *et al.*, CLI-05-017, 62 NRC 5, 34 (2005) (“Exelon”). Overall, the Commission stated that a Licensing Board is expected to take an independent “hard look” at the Staff’s safety and environmental findings, but not to replicate the Staff’s work. *Id.* at 34. While affording appropriate deference to the Staff’s technical expertise, Boards are to probe the logic and evidence supporting Staff findings and decide whether the Staff’s findings are sufficient to support license issuance. *Id.*

The Commission’s practice of deferring to Staff expertise is longstanding, as evidenced by the a policy statement issued by the Atomic Energy Commission stating that:

In considering those [mandatory AEA] issues, . . . the board will, as to matters not in controversy, be neither required nor expected to duplicate the review already performed by the Commission’s regulatory staff and the ACRS; the Board is authorized to rely upon the uncontroverted testimony of the regulatory staff and the applicant and the uncontroverted conclusions of the ACRS.

Exelon at 35.³ As the Commission observed, this practice is grounded in sound policy in that it leaves prime responsibility to the Staff for technical fact finding and promotes efficient case management and prompt decision making by concentrating the Board’s attention on resolving disputes rather than redoing Staff work. *Id.*

Based on this policy, the Commission has directed that when considering uncontested issued, Boards should conduct a simple “sufficiency” review - meaning that they should decide simply whether the safety and environmental record is sufficient to support license issuance. *Id.* at 39. While the Board is expected to conduct an independent review rather than “rubber stamp” the Staff’s findings, this is not tantamount to conducting a duplicative review of the uncontested matters considered by the Staff. *Id.* at 40. While Boards are afforded considerable

³ *quoting* “Statement of General Policy: Conduct of Proceedings for the Issuance of Construction Permits for Production and Utilization Facilities for Which a hearing is Required Under Section 189a, of the Atomic energy Act of 1954, as amended,” attached as Appendix A to 10 C.F.R. Part 2, *promulgated in* Miscellaneous Amendments, 31 Fed. Reg. At 12,780 (section VI(b)).

flexibility in determining how to accomplish the review, they are expected to select the most appropriate and expeditious approach given the specific circumstances of each case. *Id.* at 42-43.

The “sufficiency” review required by the Commission requires an assessment of whether the Staff has made the necessary technical and environmental determinations to support its conclusions and, where necessary, to require supplementary information and to ask the Staff any questions to reach this assessment. *Id.* at 40. The Board is not to duplicate the Staff’s review. *Id.* Importantly, the Board is not charged with the responsibility of reviewing the manner or process by which the Staff conducted its review. Commission case law is clear that Licensing Boards have no supervisory or other authority over the Staff’s conduct of its review of license applications. *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, ALAB-772, 19 NRC 1193, 1263 (1984) *rev’d in part on other grounds* CLI-85-2, 21 NRC 282 (1985); *Rockwell International Corp. (Rocketdyne Division)*, ALAB-925, 30 NRC 709, 721-22 (1989) *aff’d on other grounds* CLI-90-5, 31 NRC 337 (1990).

II. License Application Documentation

Certain documentation requested by the Board are portions of the license application or the Integrated Safety Analysis required to be submitted with the application. These include the following:

- 1) Emergency Plan
- 2) Physical Security Plan
- 3) Fundamental Nuclear Material Control Plan
- 4) Environmental Report
- 6) Integrated Safety Analysis

Order at 2. While these represent portions of the license application and associated licensee documents, they do not represent the complete application. Therefore, the Staff proposes that the Board obtain the remaining portions of the license application in order to ensure that the adjudicatory record is complete.

The documents relating to the license application are handled and stored according to the sensitivity of the information. Specifically, the documents are categorized as (1) classified information, (2) export controlled information, (3) unclassified controlled nuclear information, (4) business proprietary information, (5) security proprietary information, (6) official use only information as designated by the Department of Energy, and (7) public information. With regard to handling requirements, export controlled information is treated as official use only, and unclassified controlled nuclear information is treated as safeguards information. The proprietary and official use information are all subject to the same, less restrictive handling requirements. Only the proprietary, official use only and public information is placed into ADAMS.

Given the different handling requirements for these documents, they are segregated and handled separately. If combined, they would be required to be handled at the highest level of security - in this case, classified information. Accordingly, the Staff proposes that separate binders be provided for each level of handling requirements to minimize the amount of classified storage required and to simplify the labeling of the information. Additionally, the Staff requests modification of the direction to provide four paper copies of this information in addition to an electronic version on CD or DVD. For the classified information, the Staff proposes providing one paper copy as this information is not maintained in electronic format and requires special handling and storage. The documents can be provided as proposed with the assistance of the licensee within the time period set by the Board.

III. ACRS and ACNW Documents

The Board has requested documentation regarding meetings of the Advisory Committee on Reactor Safeguards and the Advisory Committee on Nuclear Waste, requesting:

9) Minutes and/or transcripts of any Advisory Committee on Reactor Safeguards (ACRS) or Advisory Committee on Nuclear Waste (ACNW) meetings relevant to USEC's LA and any reports, letters, or memoranda prepared by or on behalf of the ACRS or the ACNW which relate to the USEC LA.

Order at 2. The application at issue was not reviewed by the ACRS. The Staff proposes to provide copies of the Staff's presentation to the ACNW, the transcript of the meeting and the meeting summary. If any other documentation of the ACNW exists, however, it is not within the possession of or readily available to the Staff.

IV. Staff Review Documentation

The Board has also requested documentation of the Staff's review of the license application. Specifically, the Board has requested the following:

- 5) Environmental Impact Statement (EIS)
- 7) Safety Evaluation Report (SER)
- 8) NRC Staff Requests for Additional Information (RAIs) and USEC's replies thereto, and any written analyses of those replies that have been prepared by the NRC Staff

Currently, the Staff expects that the Final Environmental Impact Statement will be issued on or about May 19, 2006, and therefore will be able to comply with the Board's deadline of June 5, 2006. The Staff is in the process of conducting its technical review of the license application and currently expects that the Safety Evaluation Report will be issued on or about June 29, 2006. When the document is issued, it will be promptly provided to the Board and the applicant. The Staff, with the assistance of the licensee, expects to be able to provide all RAI's and all written responses to the Board by June 5, 2006, as these contain information that further explains and documents the contents of the application. As of this time, the Staff has not prepared any written analyses relating to licensee responses to Staff RAI's

V. Narrative Summary

The Staff expects that much of the information the Board is seeking in the narrative summary will be duplicative of the information that will be contained in the SER and FEIS. Specifically, the SER will explain whether the applicable Standard Review Plan was followed in the Staff's review, including a description of any deviations. Additionally, the SER will identify the regulatory guidance utilized by the Staff for the relevant portions of its review. Both the FEIS and the SER will contain listings of the principal contributors and specify the area of expertise for each individual. Finally, both the FEIS and the SER will contain Executive Summaries which set forth the key area of the Staff's environmental review and a brief description of the Staff's findings.

The Staff believes that the information described above will be sufficient for the Board to reach the necessary findings for the mandatory hearing. Should the Board have any questions regarding the basis for the Staff's regulatory conclusions once the SER is reviewed, the Staff will provide any necessary clarifications. However, the Staff believes that the preparation of a report explaining "in depth" how the Staff conducted its review, as required by the Order, is not necessary for the purpose of performing the "sufficiency" review described by the Commission. As the Commission has made clear, the Board is not expected to replicate the Staff's review or to evaluate the manner in which the Staff performed its review function.

Given the information that will be in the SER and FEIS, the Staff respectfully submits that development of an additional, detailed narrative "referring subsection-by-subsection to the SRPs or regulatory guides, how these documents were used by the Staff in its review" and explaining "what was done to review the LA in those areas where it was not able to, or otherwise did not, follow relevant portions of the published guidance, and explain in full why the chosen course of review was followed" should not be necessary to allow the Board to determine whether the Staff's review is sufficient to support its regulatory conclusions. In addition, the

Staff believes that the answer to these questions lies in large part in the general process followed when the Staff reviews an application and need not be explained for each subsection of the SRP.

Because regulatory guides represent only one means of demonstrating compliance with the regulations, applicants are not required or expected to follow all relevant guidance. USEC, like many applicants, chose to use only certain regulatory guides, and frequently only selected portions of some of those regulatory guides, when developing its application. The Staff's review, in turn, relied on the regulatory guidance documents to the extent they were used by the applicant. When USEC used regulatory guidance in its application this will be referenced in the SER. When an applicant chooses means to meet regulatory requirements that are not specified in regulatory guidance, the Staff's practice is to evaluate the proposal to determine compliance with the regulatory requirements. In doing so, the reviewer relies on his or her technical expertise, experience and judgement, which is informed by knowledge of related regulatory guidance, but does not follow specific alternative procedures or processes. The basis for the Staff's determination of whether the specific portion of the application is adequate to demonstrate regulatory compliance is explained in the relevant portion of the SER.

For these reasons, the Staff requests that the Board await issuance of the SER before requiring any additional supplementation of the record, including any necessary explanation of the Staff's review. The Staff will attempt to address issues concerning the application of the SRP and the regulatory guidance used by the applicant in the SER and can provide any additional clarifying information as necessary after review by the Board. This process would also allow Staff resources to be devoted to completing the technical review currently being conducted. Preparation of the narrative summary requested would require a substantial dedication of resources and, even if begun now, could not be completed until after the Staff's SER is issued without impacting the Staff's review process. The Staff also requests that the

Board relax the request that the Staff provide copies of all applicable regulatory guidance documents. As noted above, if the applicant has relied on a regulatory guidance document, the Staff has already reviewed the applicant's proposal to determine whether the guidance document has been properly applied. Under the Commission's guidance, this review need not be duplicated by the Board. Other guidance documents were not relied on by the applicant, and therefore not the basis for the Staff's assessment of the adequacy of the application. In this regard, the Staff notes that numerous regulatory guides relate to certain subject areas reviewed by the Staff (e.g. radiation protection) but have only limited relevance to the specific application subject to this proceeding.

VI. Clarification of the Hearing Process

The Staff requests clarification of the order and timing of the submissions for the mandatory hearing, including the filing of preliminary proposed findings of fact and conclusions of law. While the Order provides that the Staff shall file such findings sixty after completing the submission of the documents requested, there is no provision for the timing of filing pre-filed testimony. The Staff anticipates that such testimony will likely be necessary to respond to questions by the Board. In that case, the findings would be vastly more useful to the Board if prepared after the submission of all testimony and exhibits. In addition, the applicant, as the proponent of the license, ordinarily has the burden of proof and is expected to make initial filings to which the Staff responds (subject to reply by the applicant). See 10 C.F.R. §§ 2.324 and 2.325. Accordingly, the Staff respectfully requests that the Board modify the order of procedure to require preliminary findings by both the Staff and applicant and to permit the Staff the opportunity to reply to the filings of the applicant.

CONCLUSION

For the reasons stated, the Staff requests that the Board modify and clarify its Order requesting documents and briefing from the Staff.⁴

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of May, 2006

⁴ Licensing Boards have issued similar orders in the Exelon Generating Co., Inc. proceeding (Early Site Permit for Clinton ESP Site, Docket No. 52-007-ESP, ASLBP No. 04-821-01-ESP, *Order* (Request for Documents and Briefing), unpublished, April 17, 2006, and the System Energy Resources, Inc. proceeding (Early Site Permit for Grand Gulf ESP Site) Docket No. 52-009-ESP, ASLBP No. 04-823-03-ESP. *Order* (Request for Documents and Briefings), unpublished, April 19, 2006. The Staff has filed motions for reconsideration or clarification in each proceeding raising similar issues. In light of the common issues raised the Board may wish to refer its ruling on this motion to the Commission in accordance with 10 C.F.R. § 2.323(f) or certify questions to the Commission with respect to matters addressed in the orders.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NUCLEAR REGULATORY COMMISSION STAFF MOTION FOR MODIFICATION AND CLARIFICATION OF BOARD ORDER REQUESTING DOCUMENTS AND BRIEFING" in the above-captioned proceeding has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 1st day of May, 2006.

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