

May 5, 2006 (2:54pm)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**Before Administrative Judges:
Lawrence G. McDade, Chairman
Paul B. Abramson
Richard E. Wardwell**

In the Matter of)	
)	May 5, 2006
)	
USEC Inc.)	Docket No. 70-7004
(American Centrifuge Plant))	
)	ASLBP No. 05-838-01-ML
)	

**USEC INC. ANSWER TO NRC STAFF MOTION
FOR MODIFICATION AND CLARIFICATION OF
BOARD ORDER REQUESTING DOCUMENTS AND BRIEFING**

I. INTRODUCTION

USEC Inc. (USEC) hereby files its answer to the Nuclear Regulatory Commission (NRC) Staff's (Staff) May 1, 2006 "Motion for Modification and Clarification of the Board Order Requesting Documents and Briefing" (Staff Motion). On April 19, 2006, the Board issued an order requesting that the Staff provide the Board with specific documents and briefings related to the mandatory hearing in this proceeding.¹ On May 1, the Staff sought modification and clarification of that Order. USEC believes that many of the Staff's requested clarifications and modifications will facilitate meeting the Commission's schedule for completing this proceeding in a timely fashion by providing the Board with information and documents in a timely and effective manner. As discussed further below, USEC: (1) generally concurs with the Staff's Motion; but (2) does not concur with the Staff's suggestion that the Board refer its ruling or

¹ Order (Request for Documents and Briefings), *slip op.* (April 19, 2006) (Order).

certify a question to the Commission. USEC encourages the Board to promptly rule on the Staff Motion itself. Certification of the procedural requests raised by the Staff for resolution by the Commission could needlessly delay the hearing and is not justified under Commission rules.

II. DISCUSSION

A. Timely and Efficient Completion of the Hearing is Imperative

USEC filed its application for construction and operation of the American Centrifuge Plant (ACP) in August 2004. Completion of this hearing is on the critical path for USEC to begin construction of the ACP.² Recognizing the importance, *inter alia*, of “avoiding unnecessary delays in NRC’s review and hearing process,” the Commission directed “the Board to set a schedule for the hearing in this proceeding ... that establishes as a goal the issuance of a final Commission decision on the pending application within two-and-one-half years (30 months) from the date that the application was received.”³ To meet that goal, a final Commission decision must be issued by February 2007.⁴ For the reasons stated below, USEC believes the Staff’s requested clarifications and modifications generally are reasonable, and will aid in the timely and efficient completion of the hearing.

B. The Staff Should Provide Existing Documentation and the SER to the Board

By June 5, 2006 the Staff has proposed to provide the Board with: (1) the complete License Application; (2) separate submittals for each classification of documents (*e.g.*, classified information, official use only information, and public information) and only one paper copy of the classified documents; (3) the Staff’s presentation, the meeting minutes, and the meeting

² Under Section 193 of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2243), a license to construct and operate a uranium enrichment facility may be issued only after the hearing is completed and the decision issued.

³ *USEC Inc. (American Centrifuge Plant) Notice of Hearing*, CLI-04-30, 69 Fed. Reg. 61,411, 61,413 (Oct. 18, 2004) (Notice of Hearing).

⁴ It should be noted that the schedule established by the Commission provided for the potential adjudication of contentions. There are, however, no admitted contentions in the proceeding.

summary from the Staff's presentation to the Advisory Committee on Nuclear Waste (ACNW) on the American Centrifuge Plant; (4) the Environmental Impact Statement (EIS); and (5) the NRC Staff Requests for Additional Information (RAIs), USEC's replies to the RAIs, and the Staff's technical analysis of the RAIs.⁵ The Staff also proposes to provide the Board with the Safety Evaluation Report (SER) on or about June 29, 2006 – the currently scheduled date for its completion.⁶ USEC concurs with the Staff regarding all of these points. USEC is currently working with the Staff to ensure that the Board receives all of these documents, other than the SER, by June 5, 2006 and receives the SER as soon as possible.

C. There Are Alternative Approaches For Providing the Summary of the Staff's Deliberations that the Board Desires

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" and that it not be required to submit a separate "narrative" summary at this time.⁷

USEC's fundamental concern is that the Board receive the supplementary information it believes is necessary to facilitate the efficient completion of its responsibilities without jeopardizing the Staff's ability to issue the SER in a timely manner.⁸

The Staff has committed to providing a more detailed SER than the standard SER. In particular, the Staff has committed to include in the SER: (1) an explanation of whether the applicable Standard Review Plan was followed in the Staff's review, including a description of any deviations; (2) an identification of the regulatory guidance utilized by the Staff for the

⁵ Staff Motion at 4-6.

⁶ Staff Motion at 6.

⁷ Staff Motion at 8.

⁸ Commission rules require that "In establishing a schedule, the presiding officer shall take into consideration the NRC's staff's projected schedule for completion of its safety and environmental evaluations to ensure that the hearing schedule does not adversely impact the staff's ability to complete its reviews in a timely manner." 10 CFR §2.332(d).

relevant portions of its review; (3) a listing of the principal contributors and their individual areas of expertise; and (4) both the FEIS and SER will contain Executive Summaries which set forth the key areas in the Staff's review and a brief description of the Staff's findings.⁹ If the Board concludes that this additional information will be sufficient to provide for its efficient review of the Staff's deliberations, USEC supports the Staff's proposal. If the Board believes, however, that additional information is necessary, USEC recommends that the Staff be given the option of either providing the additional information in the SER (if it will not interfere with the schedule for SER issuance) or providing the additional information in a separate submittal after the SER is issued. In either event, USEC respectfully requests that the Board set a tentative schedule for issuance of Board questions, prefiled testimony, findings of fact and conclusions of law, and other necessary procedural steps that will ensure issuance of a final Commission decision by February 2007. USEC would be pleased to work with the Staff to propose a schedule for the Board's consideration.

Finally, in the interest of saving the Board the time necessary to review extraneous documentation, USEC also concurs with the Staff that it should provide the Board with only the regulatory guidance documents that were used, rather than all potentially applicable regulatory guidance documents. We believe that was the Board's intent in issuing its April 19 Order.

D. USEC Concurs with the Staff's Request to Clarify the Hearing Process

The Staff requests that the Board: (1) require the submission of all testimony and exhibits before any findings of fact and conclusions of law are submitted; (2) modify its Order to require both the Staff and Applicant to file findings of fact and conclusions of law after the submission of prefiled testimony and exhibits; and (3) permit the Staff an opportunity to reply to

⁹ Staff Motion at 7. The Staff further states that it believes that the information "will be sufficient for the Board to reach the necessary findings for the mandatory hearing." Staff Motion at 7.

the Applicant's filing.¹⁰ USEC concurs with these points. It is prudent to require the submission of prefiled testimony and exhibits before the findings of fact and conclusions of law, because the testimony and exhibits likely will be necessary to make an adequate record on the issues of interest to the Board and to serve as the basis for the findings of fact and conclusions of law.

Furthermore, USEC agrees that since it has the burden of proof, it should file its findings of fact and conclusions of law at least concurrently with the Staff. The Commission's Order directs that "[u]nless otherwise justified, the Board shall provide for the simultaneous filing of . . . proposed findings of fact, and other similar submittals."¹¹ In the interest of meeting the Commission's schedule for this proceeding, USEC suggests that it would also be appropriate and beneficial if USEC be required to file its findings of fact and conclusions of law first, followed by the Staff.

E. The Board Should Not Refer its Ruling to the Commission or Certify a Question to the Commission

Finally, the Staff suggests in a footnote that "[i]n light of the common issues raised [in other recent mandatory hearings] 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."¹² USEC does not concur with this suggestion because: (1) the issues in the Staff's Motion are essentially procedural issues that are well within the Board's authority and expertise¹³; (2) referring the Board's ruling or certifying a question to

¹⁰ Staff Motion at 9.

¹¹ Notice of Hearing at 61,414.

¹² Staff Motion at 10, n.4.

¹³ 10 CFR §2.319. The Commission, in adopting changes to Part 2, emphasized the authority of the Boards to address procedural issues such as these, stating "[s]trong case management is an integral part of an efficient and effective hearing process. The Commission expects presiding officers/boards to manage all adjudications carefully and attentively. Tools to be used to this end are reflected in the final rule." "Changes to Adjudicatory Process, Final Rule," 69 Fed. Reg. 2,182, 2,188 (Jan. 14, 2004). The Commission in its "Policy on Conduct of Adjudicatory Proceedings; Policy Statement" 63 Fed. Reg.

the Commission at this critical time in the proceeding could jeopardize meeting the Commission's goal that this proceeding be completed by February 2007;¹⁴ (3) completion of this hearing is on the critical path for USEC to begin construction of the American Centrifuge Plant; and (4) the issues presented by the Staff are not the type of "significant and novel legal or policy issues" contemplated by 10 CFR § 2.341(f) because: (a) the Commission has already addressed mandatory hearing requirements in *Exelon Generation Co. (Early Site Permit for Clinton ESP Site) et al.*, CLI-05-17, 62 NRC 5 (2005); (b) other Boards have already conducted mandatory hearings and therefore have resolved similar issues;¹⁵ and (c) the procedural issues raised relate solely to case management which are clearly within the purview of the Board. Accordingly, USEC encourages the Board to promptly decide these issues itself and not refer its ruling or certify a question to the Commission.

41,872 (Aug. 5, 1998) states that the "Commission expects licensing boards to establish schedules for promptly deciding the issues before them The Commission's regulations . . . provide licensing boards all powers necessary to regulate the course of proceedings"

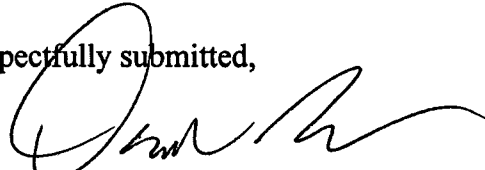
¹⁴ Notice of Hearing at 61,413 ("The Commission directs the Board to set a schedule for the hearing in this proceeding consistent with this order that establishes as a goal the issuance of a final Commission decision on the pending application within two-and-one-half years (30 months) from the date the application was received." The application was received in August 2004.)

¹⁵ See *Louisiana Energy Servs. L.P., (National Enrichment Facility)*, Docket 70-3103.

III. CONCLUSION

For the reasons stated above, USEC generally concurs with the Staff, except with respect to the need to refer the ruling or certify a question to the Commission. We encourage the Board to rule on the Staff's Motion expeditiously.

Respectfully submitted,



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Dated May 5, 2006

Counsel for USEC Inc.

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NOTICE OF APPEARANCE

The undersigned, being an attorney at law in good standing admitted to practice before the courts of the District of Columbia, hereby enters his appearance as counsel on behalf of Applicant, USEC Inc., in any proceeding related to the above-captioned matter.

Respectfully submitted,



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Dated May 5, 2006

Counsel for USEC Inc.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Answer to NRC Staff Motion for Modification and Clarification of the Board Order Requesting Documents and Briefing" and the Notice of Appearance of D. Bruce McPherson were served upon the persons listed below by U.S. mail, first-class, postage prepaid, and by electronic mail, on this 5th day of May, 2006.

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Attn: Rulemakings and Adjudication Staff
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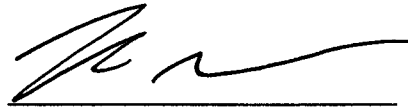
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A handwritten signature in black ink, appearing to read 'D. Bruce McPherson', written over a horizontal line.

D. Bruce McPherson
Counsel for USEC Inc.