

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

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Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Paul B. Abramson
Dr. Richard E. Wardwell

In the Matter of

USEC, INC.

(American Centrifuge Plant)

Docket No. 70-7004-ML

ASLBP No. 05-838-01-ML

May 31, 2006

MEMORANDUM AND ORDER

(Ruling on Motion for Modification and Clarification)

INTRODUCTION

Before the Board is the application of USEC, Inc. (USEC) for authorization to possess and use source, byproduct, and special nuclear material in order to enrich natural uranium to a maximum of ten percent uranium-235 (U^{235}) by the gas centrifuge process. USEC proposes to do this at a facility – denominated the American Centrifuge Plant (ACP) – to be constructed near Piketon, Ohio. On August 23, 2004, USEC filed an application with the Nuclear Regulatory Commission (NRC) to obtain a thirty-year 10 C.F.R. Part 70 license to operate its proposed ACP. Thereafter a public interest group, the Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) and an individual, Geoffrey Sea (Sea), filed petitions to intervene. Based on the pleadings submitted, and after hearing argument from the putative intervenors, this Board determined that neither Petitioner had presented an admissible contention.¹ Both PRESS and Sea appealed the Board's Order and, on April 3, 2006, the

¹ LBP-05-28, 62 NRC 585 (2005).

Commission affirmed the Board's rulings as to both Petitioners.² Therefore, the only matter remaining before this Board is satisfaction of the Mandatory Hearing requirement with regard to USEC's License Application. 42 U.S.C. § 2243(b)(1) (2000); 10 C.F.R. §§ 70.23(a), 70.31(e).

Preliminarily, this Board issued an Order on April 19, 2006,³ which directed the NRC Staff and USEC to submit documents, and briefing, which we had concluded would be of assistance to us in expeditiously conducting and concluding the mandatory hearing. In response the NRC Staff filed a Motion for Modification and Clarification⁴ of the April 19 Order and USEC filed an Answer to the NRC Staff Motion.⁵ We grant the NRC Staff Motion in part and deny it in part.

By way of preface, we believe that it would be helpful to outline this Board's understanding of its role, and the role of the NRC Staff and USEC, in this proceeding in order to ensure that the parties understand our ruling on their motions, better understand the rationale behind our April 19 Order, and provide maximum assistance to the Board as we move expeditiously toward the completion of this proceeding. Specifically, in this mandatory hearing on uncontested issues it is not our intent to repeat the NRC Staff's review of USEC's License Application. Rather, the Board contemplates that it will perform a "sufficiency" review of the NRC Staff's actions.⁶ This means that we do not intend to evaluate USEC's License

² CLI-06-09, 63 NRC __ (slip op.) (Apr. 3, 2006); CLI-06-10, 63 NRC __ (slip op.) (Apr. 3, 2006).

³ See Licensing Board Order (Request for Documents and Briefing) (April 19, 2006) (unpublished) [hereinafter April 19 Order].

⁴ See [NRC] Staff Motion for Modification and Clarification of Board Order Requesting Documents and Briefing (May 1, 2006) [hereinafter NRC Staff Motion].

⁵ See USEC Inc. Answer to NRC Staff Motion for Modification and Clarification of Board Order Requesting Documents and Briefing (May 5, 2006) [hereinafter USEC Answer].

⁶ USEC Inc. (American Centrifuge Plant), CLI-05-17, 62 NRC 5, 39 (2005). The
(continued...)

Application de novo. Rather, we intend to determine “whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact.”⁷ CLI-05-17, 62 NRC at 39.

Accordingly, although the Board is tasked with determining “whether the application and the record of the proceeding contain sufficient information” to support approval of USEC’s License Application, 10 C.F.R. § 2.104(b)(2)(i), in this proceeding, we will not be adjudicating challenges to USEC’s License Application nor directly evaluating its adequacy, rather the Board will be determining the Application’s adequacy by scrutinizing the NRC Staff’s review of that Application. As we understand the Commission’s guidance in its answer to the ASLBP’s certified questions (CLI-05-17), once USEC has established to the satisfaction of the NRC Staff that its application should be favorably acted upon, the NRC Staff must then explain and justify, to the satisfaction of this Board, the adequacy of its review and the logic supporting its findings.⁸

⁶(...continued)

Commission’s guidance came in response to a number of certified questions issued by the Chief Administrative Judge of the ASLBP seeking clarification of the breadth and depth of the Board’s mandatory hearing role. LBP-05-07, 61 NRC 188 (2005). The Commission suggested that “applying a less stringent ‘sufficiency’ standard when examining uncontested issues merely recognizes ‘the inherent limitations on a board’s review . . .’ [and] ‘[a]s a practical matter . . . it would simply not be possible for the two technical members of the panel to evaluate the totality of the material relevant to safety matters that the Staff and [the Advisory Committee on Reactors Safeguards] have generated through many months of work.’” CLI-05-17, 62 NRC at 40 (citation omitted).

⁷ In regards to environmental issues, the Board will independently consider the final balance among conflicting factors in determining whether the requirements of the National Environmental Policy Act have been complied with in the proceedings and whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values. See id. at 46. However, our final weighing of alternatives will still be based on our review of the sufficiency and adequacy of the NRC Staff’s analyses presented in their Environmental Impact Statement.

⁸ In making this determination the Board has been directed by the Commission to accord deference to the NRC Staff’s technical expertise. See CLI-05-17, 62 NRC at 34. The Commission clarified this directive by advising that we “should inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact.”

(continued...)

In determining the adequacy of the NRC Staff's review it will be necessary for the Board to analyze the logic and facts supporting the Staff's conclusions – matters which are not, in many instances, readily apparent from the content of the Safety Evaluation Report (SER) and the Environmental Impact Statement (EIS).⁹ The purpose of our April 19 Order was to facilitate an efficient evaluation of the Staff's review. Accordingly, in crafting that Order, we took guidance from the Commission's statement that it "do[es] not dictate any particular procedure in the current cases, but . . . would expect the boards to select the most appropriate and expeditious approach given the circumstances of a case." CLI-05-17, 62 NRC at 43. However, the Commission advised that it does not "think the task need consume anything close to 1000 (or 2000) person-hours." Id. at 41. Accordingly, for the Board to carry out its review function in anything approaching the limited time period anticipated by the Commission, it will be necessary for the NRC Staff to provide material assistance. It was for this reason, along with the obvious fact that it was a task the NRC Staff was best equipped to perform, that we initially asked the Staff to prepare and deliver the requested narrative summaries.

⁸(...continued)

Id. at 39. This guidance is fully consistent with the requirement that this Board is vested with the ultimate responsibility for determining (1) whether the application and the record of the proceeding contain sufficient information to support the issuance of the requested permit and (2) whether the review of the application by the NRC Staff has been adequate. 10 C.F.R. § 2.104(b)(2)(i). Furthermore, nothing in the Commission's regulations or case law advises that the review underlying our determinations places any burden of proof (as that term of art is customarily used) on either the NRC Staff or the Applicant. Accordingly, the task of review and determination in this mandatory hearing falls singularly upon the Board, and the roles of the NRC Staff and the Applicant in this proceeding will be to respond to our inquiries and thereby aid the Board in completing its task.

⁹ The Board has been directed by the Commission that its task is to analyze the logic and facts supporting the NRC Staff's conclusions; the Commission has further made clear that it does not expect us, nor will it permit us, to take a more cursory, hands-off approach. Specifically, the Commission stated that "we anticipate that our boards will carefully probe those findings by asking appropriate questions and by requiring supplemental information when necessary." CLI-05-17, 62 NRC at 40.

The April 19 Order embodied this Board's preliminary determination that the most efficient approach to prepare for our review was to allocate support efforts to the party that could most efficiently carry them out. We concluded that the approach we outlined – i.e. initially requiring summary documentation of the NRC Staff's logic and underlying facts to be followed up with preliminary, proposed findings of fact and conclusions of law – would be more efficient than performing our review of the record without such a roadmap.

Nothing submitted in the motion before us has altered our general thinking in this area. Nevertheless, as will be explained below, at the request of the NRC Staff and USEC, we have modified our previous Order and will try another course for the time being.

SPECIFIC RULINGS

A. License Application Documentation

In our April 19 Order this Board directed the NRC Staff to provide to the Board certain portions of USEC's License Application. The Staff suggested that it should provide the entire license application in order to ensure that the record in this proceeding is complete. See NRC Staff Motion at 4. We agree.

The NRC Staff also suggested that paper copies of the Application be submitted in binders segregated by the applicable level of handling requirements, and that only a single paper copy of any classified information should be provided to the Board. See id. at 5. Again, we agree.

B. Advisory Committee Documents

The Staff advised that the application at issue was not reviewed by the Advisory Committee on Reactor Safeguards (ACRS) and proposed to submit to the Board "copies of the Staff's presentation to the ACNW [Advisory Committee on Nuclear Waste], the transcript of the meeting and the meeting summary." NRC Staff Motion at 6. This Staff proposal satisfies the

Board's request.

C. Staff Review Documentation

The Board considers the schedule proposed by the NRC Staff for providing copies of the EIS, SER, and documents related to the Requests for Additional Information (RAIs) to be satisfactory. In our April 19 Order, the Board directed the Staff to provide “any written analyses of [replies to NRC Staff RAIs] that have been prepared by the NRC Staff.” April 19 Order at 2, # 6. The Staff represents that it “has not prepared any written analyses relating to licensee responses to Staff RAIs.” NRC Staff Motion at 6. Since our April 19 Order only directed the Staff to produce any written analyses already in existence, and not to generate such documents, the Staff's response adequately responds to our request.

D. Narrative Summary

The NRC Staff next asks that the Board reconsider the requirement contained in our April 19 Order for a narrative summary that discusses the process they used in reviewing USEC's License Application. See April 19 Order at 2-3; NRC Staff Motion at 7-9. The narrative summary envisioned by the Board would identify all regulatory guidance documents that were used, or are being used, by the NRC Staff in its review of USEC's License Application. This submission would also include copies of the applicable Standard Review Plans (SRPs) and regulatory guides, and would explain in depth – referring subsection-by-subsection to the SRPs or regulatory guides – how these documents were used by the NRC Staff in its review of USEC's License Application. It would also highlight those areas where relevant portions of the published guidance documents were not used. The NRC Staff was asked to explain what was done to review the Application in those areas where the Staff 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. Additionally, the Board envisioned that this narrative would

describe the key areas of the NRC Staff's review of USEC's License Application (safety and environmental issues) with references to the SER and the EIS, and would identify the particular individual(s) who was/were in charge of each portion of the review. Further, to the extent not already included in response to the foregoing provisions of our April 19 Order, we asked the NRC Staff to attach copies of all documents referenced and discussed within the narrative summary.

In its Motion, the NRC Staff states that much of the information the Board requested in the narrative summary would be duplicative of the information that will be provided in the SER and EIS. See NRC Staff Motion at 7. The Staff then goes on to explain its belief 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." Id. We disagree.

The role of the Board in an uncontested proceeding, such as is presented here, is to "inquire whether the NRC Staff performed an adequate review and made findings with reasonable support in logic and fact." CLI-05-17, 62 NRC at 39. This Board concluded that the narrative summary we requested would facilitate our understanding of the process followed by the NRC Staff in its review, and help us to better understand the thinking that led to the Staff's conclusion in each section of the SER and EIS.

Having said this, it is the NRC Staff's position that the SER and EIS will contain the summary information requested by the Board (the SER summarizes the guidance used in its review, and the SER and EIS contain concise statements of the key review areas). Based on these representations, the Board will defer our requirement for the narrative summary, and all attachments thereto, pending review of these documents. We caution the NRC Staff that a future request for summary information to supplement the SER, the EIS, or both may well be

forthcoming, and would lengthen our review schedule.¹⁰

E. Clarification of the Hearing Process

The NRC Staff next asks the Board to reconsider the timing for the filing of preliminary, proposed findings of fact and conclusions of law until after the submission of pre-filed testimony. See NRC Staff Motion at 9; see also USEC Answer at 4-5. We do not grant this request.

At this point, the Board does not know what form the mandatory hearing in this proceeding will take. As the Commission pointed out “[t]he word ‘hearing’ can refer to any of a number of events, including trial-type evidentiary hearings, ‘paper hearings,’ paper hearings accompanied by oral arguments, [or] hearings employing a mixture of procedural rules.” CLI-05-17, 62 NRC at 42-43 (footnotes omitted). Accordingly, the Commission did “not dictate any particular procedure in the current case[.]” Id. at 43. Until our preliminary review of the record is complete, we will not know whether additional oral or written testimony or exhibits will be necessary in order for the Board to evaluate the NRC Staff’s review of USEC’s License Application.

We directed the filing of preliminary, proposed findings of fact and conclusions of law at this point in order to focus the attention of the NRC Staff and USEC on exactly what they think

¹⁰ In our April 19 Order we requested, as part of the narrative summary, that the NRC Staff “identify the particular individual who was in charge of each portion of the review.” April 19 Order at 3. Although we are deferring our direction that the NRC Staff submit a narrative summary at this time (including the list of individuals involved), we nevertheless urge the NRC Staff to prepare such a list at this time. While we recognize that the Executive Director for Operations has the authority to determine who will speak for the NRC Staff, 10 C.F.R. § 2.1207(b)(4), we must decide whether the Staff has met its burden of establishing the adequacy of its review of USEC’s License Application. Accordingly, if it is necessary to direct specific questions to the NRC Staff, it will be necessary for the person responding to not only be able to answer our questions but to also be able to explain the basis on which their testimony is grounded. Accordingly, if it has not already done so, we urge the NRC Staff to document the identity of the specific individuals who were responsible for each aspect of the NRC Staff’s review in order to ensure that the hearing will proceed expeditiously.

the Board would need to find in order to satisfy the mandatory hearing requirement in this case, and thereby help focus the Board as we review the record before us. Recognizing that the preliminary, proposed findings of fact and conclusions of law will, in all probability, be revised before we conclude this proceeding, we believe that this exercise, at this time, will help expedite the Board's review of the record. Accordingly, the NRC Staff's request in this regard is denied, and we direct that preliminary, proposed findings of fact and conclusions of law be submitted as specified in our April 19 Order.

The NRC Staff has suggested – and USEC agrees – that USEC should submit its proposed findings at the same time as the NRC Staff. See NRC Staff Motion at 9; USEC Answer at 5. However, since the main focus of the proceeding before this Board will be for the NRC Staff to explain and justify the adequacy of its review and the logic supporting its findings, we have placed the burden on the Staff to file first, subject to comment by USEC. We do not alter that obligation.

F. Staff Suggestion That the Board Certify Questions to the Commission

We reject the NRC Staff's suggestion that, because various Boards have taken different approaches and requested somewhat different assistance in the various cases, this Board should certify the questions raised by the NRC Staff Motion to the Commission. See NRC Staff Motion at 10 n.4. As noted above, the Commission has made clear that a "one size fits all approach" is not required. CLI-05-17, 62 NRC at 43. Accordingly various Boards will properly try different approaches in order to expeditiously conduct the hearings to which they have been assigned.

CONCLUSION

In our April 19 Order we directed that the initial submission of documents pursuant to that Order should occur on or before June 5, 2006. Because of any uncertainty that may have existed while the parties waited for a ruling on the NRC Staff Motion, we change the date for the initial submission of documents until June 12, 2006. Accordingly, the preliminary proposed findings of fact and conclusions of law will be due on August 11, 2006, sixty (60) days after June 12, 2006.

Objections to any portion of this Order shall be filed no later than June 9, 2006.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD¹¹

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 31, 2006

¹¹ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to: (1) Counsel for USEC and (2) Counsel for the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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USEC Inc.)	Docket No. 70-7004-ML
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)	
(American Centrifuge Plant))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON MOTION FOR MODIFICATION AND CLARIFICATION) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Paul B. Abramson
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Administrative Judge
Richard E. Wardwell
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Lisa B. Clark, Esq.
Margaret J. Bupp, Esq.
Office of the General Counsel
Mail Stop - O-15 D21
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Donald J. Silverman, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20005

Docket No. 70-7004-ML
LB MEMORANDUM AND ORDER (RULING ON
MOTION FOR MODIFICATION AND CLARIFICATION)

Dennis J. Scott, Esq.
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817

Ewan Todd
403 E. Oakland Avenue
Columbus, OH 43202

Vina K. Colley
Portsmouth/Piketon Residents for
Environmental Safety and Security (PRESS)
3706 McDermott pond Creek
McDermott, OH 45652

Geoffrey Sea
1832 Wakefield Mound Road
Piketon, OH 45661

[Original signed by Evangeline S. Ngbea]
Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 31st day of May 2006