

RAS 12956

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/01/07

COMMISSIONERS:

SERVED 02/01/07

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)

USEC, Inc.)

(American Centrifuge Plant))

Docket No. 70-7004-ML

CLI-07-05

MEMORANDUM AND ORDER

The Atomic Safety and Licensing Board in this proceeding recently denied a motion by USEC, Inc. to accelerate the Board's proposed mandatory hearing schedule.¹ In denying USEC's motion, the Board stressed that its hearing schedule, which contemplates a Board decision by May 9, 2007, is based on Commission guidance provided in the Commission's Notice of Hearing for this proceeding.

The Commission, however, expressly "direct[ed] 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 [USEC] application within 2 ½ years (30 months) from the date that the application was received."² USEC submitted its application on August 23, 2004, and therefore

¹ See Memorandum and Order Denying USEC's Motion to Accelerate Mandatory Hearing Schedule and Establishing Guidelines for the Submission of Pre-filed Testimony by the Applicant (Dec. 22, 2006).

² See "Notice of Receipt of Application for License, Notice of Availability of Applicant's Environmental Report, Notice of Consideration of Issuance of License, and Notice of Hearing

it was the Commission's expectation that the Board would establish a hearing schedule that would allow for a final agency decision on USEC's application by late February 2007.

Instead, the Board inappropriately has based its mandatory hearing schedule on a particular "milestone" set forth in the Commission's hearing notice – the milestone deadline of a 240-day period between the issuance of the Final Environmental Impact Statement ("FEIS") and Safety Evaluation Report ("SER") and an initial decision by the Board.³ This milestone, however, explicitly was provided for "a contested proceeding."⁴ Indeed, the 240-day milestone encompasses time for a host of procedural steps that would not be at issue in an uncontested proceeding, including completion of discovery on admitted contentions, summary disposition motions, and motions to amend contentions.⁵

The Commission is mindful that there were delays in this proceeding beyond the Board's control. The Board originally sought to have all principal licensing-related documents, including the FEIS and SER, by June 5, 2006.⁶ The NRC Staff indicated that the FEIS would be available by that time but that the SER would only be issued likely by the end of June 2006.⁷ But it was not until September 11, 2006, that the Staff issued the SER and provided it to the Board. This delayed the filing of the Staff's proposed findings of fact and conclusions of law for the mandatory hearing, which the Board had requested be filed by August 11, 2006, but which

and Commission Order, CLI-04-30, 60 NRC 426, 432 (2004); 69 Fed. Reg. 61,411, 61,413 (Oct. 18, 2004).

³ CLI-04-30, 60 NRC at 435.

⁴ *Id.* at 433.

⁵ *Id.* at 433-34.

⁶ See Order (Request for Documents and Briefings)(April 19, 2006) at 2-3.

⁷ See NRC Staff Motion for Modification and Clarification of Board Order Requesting Documents and Briefing (May 1, 2006) at 6.

the Staff was only able to submit two months later.⁸

Nonetheless, the Board now has had the FEIS since late May 2006, and the SER since September 2006. Yet its mandatory hearing schedule – contrary to the Commission’s clear directive in this proceeding – nowhere adheres to nor even acknowledges the goal of issuing a final Commission decision in this proceeding within 30 months of the USEC application’s filing. While the Board found the specific accelerated schedule proposed by USEC to be unduly abbreviated, we believe that the Board should be able to expedite the start of the mandatory hearing, which currently is not scheduled to begin until April 10, 2006.⁹ We expect our boards to make concerted and express efforts and take the necessary steps to assure that they meet our scheduling goals. We have reviewed this mandatory hearing schedule and believe that the Board can and must set more immediate deadlines: *e.g.*, require (1) NRC staff filing of its written direct testimony by March 5, 2007, which would be approximately three weeks after the Board issues its hearing questions and issues (February 13, 2007); (2) USEC filing of any supplemental, clarifying, or correcting testimony by March 8, 2007;¹⁰ and (3) commencement of the mandatory hearing about one week after the staff submits its written direct testimony. We

⁸ See NRC Staff Motion for Extension of Time for Submission of Preliminary Findings of Fact and Conclusions of Law (July 17, 2006)(noting that “the Staff review of technical issues is taking longer than expected which has extended time for completion” of the SER, and requesting that the Board-imposed deadline for submission of proposed findings of fact be extended until after the SER is issued).

⁹ Mandatory hearings do not involve a *de novo* review of the NRC Staff’s findings, but rather “whether the safety and environmental record is ‘sufficient’ to support license issuance,” or in another words, whether the NRC Staff “made findings with reasonable support in logic and fact.” See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site) *et al.*, CLI-05-17, 62 NRC 5, 39 (2005). In addition, we observe that the *LES* proceeding, a proceeding also involving a uranium enrichment facility, was contested and was completed within 30 months, including the mandatory hearing. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-17, 63 NRC 747 (2006).

¹⁰ We note that USEC had suggested simultaneous submission of direct prefiled testimony in its motion to accelerate the schedule.

therefore direct the Board to revise its mandatory hearing schedule to begin the hearing no later than March 13, 2007, and to issue its decision by April 13, 2007.

Commissioner Jaczko disapproved this order.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of February 2007.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-05) 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, or through NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 1st day of February 2007