

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

March 15, 2007 (1:57pm)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:  
Lawrence G. McDade, Chairman  
Peter S. Lam  
Richard E. Wardwell

In the Matter of	)	March 15, 2007
USEC Inc.	)	Docket No. 70-7004
(American Centrifuge Plant)	)	ASLBP No. 05-838-01-ML

**USEC INC. BRIEF ON LICENSING BOARD HEARING TOPICS RELATED TO LIABILITY INSURANCE AND THE DOE INDEMNITY (HTS – 11.A and B)**

**I. Introduction**

On March 2, 2007, the Atomic Safety and Licensing Board (Board) issued a “Memorandum and Order (Issuing Additional Questions and Hearing Topics)” (Memorandum and Order) in which it posed a number of inquiries related to: (1) USEC Inc.’s (USEC) request for an exemption from the requirement to obtain nuclear liability insurance; and (2) the related agreement between the U.S. Department of Energy (DOE) and USEC, under which DOE will indemnify USEC for public liability arising out of a nuclear incident at the American Centrifuge Plant (ACP). The Board’s inquiries were set forth in Hearing Topics HTS-11.A and B. Memorandum and Order at 2. The Board stated that if USEC (or the Staff) concludes that all or part of these questions could more appropriately be answered by counsel it is “encouraged by the Board to adopt that approach.” *Id.* USEC has concluded that the most effective and efficient means for addressing the Board’s questions is by way of a legal response from counsel. Thus, it is respectfully submitting the instant brief.

## II. USEC Response to Hearing Topic HTS-11.A

Hearing Topic HTS-11.A states:

- A. In regards to USEC's request for an exemption from the requirement to obtain liability insurance (SER at 1-13), the NRC Staff responded (NRC Staff's Response at 19-20) that:
1. Pursuant to an agreement between DOE and USEC, the ACP must be constructed on land leased by USEC from the DOE reservation at either the Portsmouth Gaseous Diffusion Plant (GDP) or the Paducah GDP;
  2. American Nuclear Insurers (ANI) has declined to sell insurance to USEC for the operation of the ACP on an existing DOE site, because the site for the ACP is not a new "clean" site;
  3. The lease agreement between USEC and DOE provides that DOE will indemnify USEC against claims arising from nuclear incidents to the extent that USEC cannot obtain commercial insurance at reasonable rates.

Explain how DOE's indemnification meets the regulation – *i.e.*, relieves USEC from obtaining commercially-available liability insurance – and, if no one will insure the ACP because it is not a "clean" site, why this condition does not preclude it from siting considerations.

Memorandum and Order at 2. The Board first asks for an explanation of "how DOE's indemnification meets the regulation- *i.e.*, relieves USEC from obtaining commercially – available liability insurance."

10 CFR §§ 40.31(l) and 70.22(n) require an applicant for a uranium enrichment facility license to have and maintain nuclear liability insurance in accordance with 10 CFR § 140.13b. Section 140.13b specifies that each holder of a uranium enrichment facility license shall obtain such insurance of "the type and in the amounts the Commission considers appropriate to cover" public liability claims. The NRC requires licensees to have and maintain liability insurance to the extent such insurance is commercially available. See "NRC Staff Response to Atomic Safety and Licensing Board Order of February 6, 2007" (NRC Staff Response to Board Questions) at 20-21.

In the case of the ACP, as previously discussed in the NRC Staff Response to Board Questions at 19, the only insurer that provides such coverage is American Nuclear Insurers (ANI), which has declined to issue full liability coverage as contemplated by 10 CFR § 140.13b. Thus, full coverage is not commercially available.

As a result, USEC applied for, and the NRC Staff has proposed to grant, an exemption from the requirements to obtain nuclear liability insurance. 10 CFR §§ 40.14 and 70.17 authorize the NRC to grant such exemptions from the requirements of Parts 40 and 70 as it determines are “authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.”

The NRC Staff correctly concluded that the exemption was authorized by law because there is no legal prohibition on granting the exemption. See Staff Exhibit 1 at 1-13.

In evaluating the potential impact of the exemption on life, property or the common defense and security, the Staff also correctly concluded that “DOE’s indemnification of the ACP is an adequate alternative means for meeting the intent of the requirements of 10 CFR 104.13b.” *Id.* The DOE Indemnity Agreement is contained in Section 10.1- “Price-Anderson Nuclear Hazards Indemnification by the Department” of the “Lease Agreement Between the United States Department of Energy and the United States Enrichment Corporation for the Gas Centrifuge Enrichment Plant” (Lease Agreement). See Staff Exhibit 5 at App. 1-41 to 1-45. The DOE Indemnity Agreement provides full coverage, under the Price-Anderson Act, as amended, for any public liability arising out of a nuclear incident. *Id.* As discussed in the Lease Agreement, DOE has agreed to indemnify USEC, or any other person subject to public liability, against claims of public liability arising out of a nuclear incident as defined in the Price-Anderson Act. *Id.* The DOE indemnity covers public liability arising out of any occurrence,

including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. 42 U.S.C. § 2014q. (2003). The DOE indemnity extends to the full limit of liability established by the Price-Anderson Act, which is currently at \$10 billion. 42 U.S.C. § 2210d.(2)(b)(2006). In addition, the Staff indicated that its grant of the exemption was contingent upon USEC providing a copy of its signed Lease Agreement with DOE with the appropriate indemnification language included, and documentation of the DOE determination that liability insurance is unavailable from commercial sources at commercially reasonable rates. See Staff Exhibit 1 at 1-13. USEC has provided a copy of the Lease Agreement to NRC (*see* Staff Exhibit 5), and is continuing discussions with ANI regarding the possibility of some form of limited coverage. The DOE indemnity provides more than ample assurance that public liability claims will be covered, far in excess of the \$300 million in nuclear liability insurance that would otherwise be required under the NRC regulations. Thus, the terms of the exemption fully satisfy the underlying intent of the regulations.

Furthermore, as discussed by USEC in its License Application, the exemption also is in the public interest because it will facilitate deployment of the ACP, thereby maintaining domestic enrichment capacity using more efficient centrifuge technology, and because requiring separate nuclear liability insurance would at best impose an unnecessary financial burden on USEC and at worst preclude construction of the ACP. See USEC Exhibit 2 at 1-58, 59.

Thus, so long as the exemption is granted, USEC is relieved of the obligation to provide nuclear liability insurance to the extent such insurance remains commercially unavailable.

Furthermore, the Indemnity Agreement makes clear that, should insurance become commercially available, USEC would be obligated to obtain such insurance. Section 10.1 of the Lease Agreement specifically states:

(c). Financial protection. The Corporation shall obtain and maintain, at its expense, financial protection to cover public liability . . . in such amount and of such type as is commercially available at commercially reasonable rates, terms and conditions, provided that in the event NRC grants a license for a uranium enrichment facility not located on federally-owned property, the amount is no more than the amount required by the NRC for the other facility.

See Staff Exhibit 5 at App 1-41. Thus, under the Lease Agreement, if USEC is able to obtain liability insurance at commercially reasonable rates, it is required to do so.

In addition, the NRC Staff has proposed issuance of the following license condition that makes clear that, if liability insurance becomes commercially available, USEC must provide a justification to the NRC if it proposes to provide any less than \$300 million in coverage:

USEC Inc. shall provide to the Commission, at least 120 days prior to the planned date for obtaining licensed material, documentation of any liability insurance required to be obtained by USEC Inc. under its lease with DOE for the ACP by that time or, alternatively, the status of USEC Inc.'s efforts to obtain any such liability insurance. During the time that USEC Inc. is engaged in efforts to obtain liability insurance, USEC Inc. shall provide the Commission with status reports regarding those efforts. The status reports shall be submitted at a frequency of at least once every six months following issuance of a license. USEC Inc. shall notify the Commission within 30 days upon receiving notification of denial or approval of commercial liability insurance for the ACP. If commercial liability insurance is required to be obtained under its lease with DOE, within 60 days of receiving notification of approval of commercial liability insurance, USEC Inc. shall provide proof of liability insurance coverage and a justification, for Commission review and approval, if USEC Inc. is proposing to provide less than \$300 million of liability insurance coverage.

See Staff Exhibit 1 at 1-8 (emphasis added).

The Board next asks "if no one will insure the ACP because it is not a "clean" site, why this condition does not preclude it from siting considerations." Memorandum and Order at 2.

USEC's inability to obtain nuclear liability insurance does not preclude siting of the ACP at the

Portsmouth gaseous diffusion plant site for two reasons. First, as discussed above, the exemption allows USEC to proceed using the DOE Indemnity Agreement as a fully effective alternative to nuclear liability insurance. Second, USEC believes that by seeking such insurance from the only available carrier and determining that no such insurance is commercially available, it has satisfied the regulations, since the regulations afford the NRC the discretion to determine the "type and amount" of insurance required. Thus, the NRC has the discretion to conclude that no liability insurance is required in light of the DOE indemnity. Given the breath of the DOE indemnity (coverage greatly exceeds that provided by private nuclear liability insurance alone), such a determination is entirely appropriate.

### **III. USEC Response to Hearing Topic HTS-11.B**

Hearing Topic HTS-11B states:

- B. The Staff noted (NRC Staff Response at 22) that for certain claims, USEC has agreed in its Lease Agreement to waive certain defenses. List all the defenses that USEC has agreed to waive in the Lease Agreement, discuss how these waivers relate to claims against it, and explain how the Staff proposes that these waiver agreements will be incorporated into the license.

The Board has first asked for a list of "all the defenses that USEC has agreed to waive in the Lease Agreement." Memorandum and Order at 2. As reflected in Staff Exhibit 5, USEC has agreed to waive the following defenses:

- In the event of a nuclear incident, USEC has agreed to waive "any issue or defense as to charitable or governmental immunity."
- In the event of an "extraordinary nuclear occurrence,"<sup>1</sup> USEC agrees to waive:

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<sup>1</sup> The Lease Agreement defines an "extraordinary nuclear occurrence" as an event which the Department has determined to be an extraordinary nuclear occurrence as defined in the Act. See Staff Exhibit 5 at App. 1-41. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR Part 840.

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or the fault of persons indemnified, including but not limited to:

1. Negligence;
2. Contributory negligence;
3. Assumption of risk; or
4. Unforeseen intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

Staff Exhibit 5 at App. 1-42 to 1-43. It is important to note that the above waivers are consistent with both DOE's standard Price-Anderson indemnity agreement (48 CFR § 952.250-70) and the explicit provisions of the Price-Anderson Act itself (42 U.S.C. §§ 2210d.(1)(B)(i)(II) & (n.)(1) (2003).

The Board has also asked for an explanation of "how these waivers relate to claims against [USEC]." Memorandum and Order at 2. The waivers of defenses relate to claims against USEC in the following manner. Should a nuclear incident occur resulting in public liability as defined in the Price-Anderson Act, USEC would be barred from defending against any lawsuit that might be brought on the basis of any claim of charitable or governmental immunity which it might otherwise be entitled to assert. In the event of an extraordinary nuclear occurrence, USEC would be barred from defending against any lawsuit that might be brought for public liability arising out

of such an occurrence on the basis of a broader set of defenses, including, among others, negligence, contributory negligence or statute of limitations under certain circumstances.

Finally, the Board has asked how the Staff “proposes that these waiver agreements will be incorporated into the license.” Memorandum and Order at 2. The waiver agreements are part of the indemnity agreement entered into between DOE and USEC and are a condition of the maintenance of that agreement under the language of the Lease Agreement, the standard DOE Price-Anderson indemnity clause, and the Price-Anderson Act itself. These waivers of defenses cannot be modified or eliminated without statutory changes. In addition, USEC has committed to maintain the indemnity agreement, and thus, this commitment will be addressed in the tie-down references which the Staff intends to incorporate into the ACP license.

**IV. Conclusion**

As discussed above, there is a strong basis for the issuance of the exemption from the NRC's nuclear liability issuance requirements, in accordance with the criteria in 10 CFR §§ 40.14 and 70.17. The DOE indemnity provides more than ample public protection in the event of public liability claims arising out of the operation of the ACP.

Respectfully submitted,

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Dated: March 15, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the "USEC Inc. Brief on Licensing Board Hearing Topics Related to Liability Insurance and the DOE Indemnity (HTS-11.A and B)" were served upon the persons listed below, by e-mail and first class mail, this 15th day of March 2007.

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