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67 FR 61932

(103)

Mr. Michael Lesar
Chief, Rules Review and Directives Branch
Division of Administration Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

**RE: USEC Comments on Policy Issues Related to Licensing a Uranium Enrichment Facility
(67 FR 61932)**

Dear Mr. Lesar:

The purpose of this letter is to respond to the Nuclear Regulatory Commission (NRC) request in the Federal Register (Reference 1) for public comments on policy issues raised by Louisiana Energy Services (LES) in six white papers submitted to the NRC relating to licensing a Uranium Enrichment Facility (UEF). In Reference 2, USEC Inc. (USEC) provided initial comments on these issues. Since that time, additional information has become available prompting USEC to supplement and in some cases supplant our initial comments.

USEC supports the overall objective of obtaining clarity in defining the licensing standards to be applied to a UEF. Applicants are rightfully concerned about the time it can take and has taken to complete the NRC adjudicatory process associated with the review of a UEF license application. The NRC's desire to achieve procedural expedition through more vigorous Commission guidance to the Licensing Board and the parties with the use of enforced, detailed deadlines are positive steps to address this issue.

USEC supports clear and appropriate regulatory requirements that apply equally to all license applicants. As the NRC is aware, USEC plans to apply for a license to construct and operate a UEF using centrifuge technology and would be affected by any changes or clarifications of regulatory policies and positions related to licensing a UEF. It is important to the successful future of the nuclear industry in the United States that this licensing process be both expeditious and transparent.

USEC seeks an evenhanded regulatory process in which all license applicants for a UEF are evaluated according to the same standards. In the last few years, the uranium enrichment market has

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Mr. Michael Lesar
November 4, 2002
AET 02-0007, Page 2

experienced dynamic changes. USEC believes that it is inappropriate to allow the elimination of legitimate licensing issues from consideration during the pre-application stage based on previous, now dated, decisions made for a different license application, specifically, those associated with the licensing proceedings of the original LES action for a different plant size, at a different location, and at a different time, specifically between 1991 and 1998 (Original LES).

In the order listed in the *Opportunity To Provide Public Comments*, below you will find, for each white paper, USEC's comments on the issue. For completeness and ease of reference, USEC has subsumed the information originally provided in Reference 2 into these comments. Thus, this letter provides USEC's complete and current comments.

1. Analysis Of Need for the LES Facility and the No-Action Alternative Under the National Environmental Policy Act

Statutory/Regulatory Requirements:

In establishing the one-step licensing process for uranium enrichment facilities in 1990, Congress required that the issuance of such a license be considered a major federal action. Such actions are deemed to significantly affect the quality of the human environment for purposes of the National Environmental Policy Act (NEPA). NRC regulations clearly require any license applicant to submit an Environmental Report. Subsequently, the NRC prepares a full Environmental Impact Statement (EIS) for the proposed facility (10 C.F.R. 70.23 (a) (7)). NRC regulations regarding the preparation of an EIS require NRC to consider the "need" for the proposed action and the thorough review of a "no action" alternative (10 C.F.R. 70.23 and 10 C.F.R. 51, Subpart A).

LES Proposal:

LES has recommended that the NRC presume that a "need" exists for new, domestic enrichment capacity and that no consideration of a "no action alternative" be required in the Environmental Report. The justification for the waiver of these statutory requirements is language from the Original LES proceeding quoting language from the USEC Privatization Act stressing uranium enrichment as a "strategically important domestic industry" of "vital national interest", "essential to the national security and energy security of the United States", and necessary "to avoid dependence on imports".

USEC Comment:

The LES proposal misses the very point of the quoted Congressional language. A presumption of need for a new UEF within the U.S. based upon language from the USEC Privatization Act needs to be evaluated within the context of foreign ownership, national security and energy policy. The USEC Privatization Act, in fact, mandated that there be domestic ownership of the privatized entity, USEC, for important national security and energy policy considerations. Although the LES ownership structure still appears to be in flux, it is likely that LES will emerge as predominantly owned and controlled by foreign corporations and indirectly by foreign governments.

Mr. Michael Lesar
November 4, 2002
AET 02-0007, Page 3

The uranium enrichment market has changed significantly since the Original LES licensing action. Maintaining a stable enrichment market is central to national security and maintaining a domestic enrichment industry as mandated by Congress. Specifically, the 1993 United States-Russia nonproliferation agreement to convert Highly Enriched Uranium (HEU) taken from dismantled Russian nuclear warheads into Low-Enriched Uranium (LEU) fuel requires a stable enrichment market in order to facilitate \$8 billion of ongoing purchases by USEC of LEU from Russia on sustainable commercial terms. A September 4, 2002, statement by Standard and Poor's Ratings Services independently noted that the building of the LES plant in the United States could destabilize industry pricing for LEU.

Additionally, it appears inappropriate to dismiss *a priori* current issues such as the need for and environmental impact of building an additional enrichment plant in the United States versus the alternative of incremental enrichment capacity expansion in Europe by Urenco. The guidance in NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs," requires that a cost benefit analysis for a proposed action be included in the Environmental Report of an Applicant for a UEF. Since LES plans to manufacture centrifuge machines in Europe, it appears that the United States would be asked to bear the environmental impact cost associated with operation of the UEF while sharing only in a fraction of the economic benefits.

Other impacts to the common defense and security of the United States and on the environment — such as the potential proliferation risk of continuous shipments of classified uranium enrichment technology components across the Atlantic instead of low enriched uranium which is not a proliferation risk, dependence on a foreign manufacturer for the production of critical enrichment machines, and the impacts of increased tails generation in the United States — should be fully considered and compared to the no-action and other alternatives. Accordingly, for both licensing actions and United States public policy, an open and transparent review process, based on the proposed UEF application, is appropriate and ultimately the most expeditious. Failure to comply with such requirements has subjected federal actions to challenge and delay and could do so in this instance as well (See e.g. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997)).

2. Environmental Justice

Statutory/Regulatory Requirements:

Congress has specified that licenses for enrichment facilities are major federal actions significantly affecting the quality of the human environment for purposes of NEPA review and requiring preparation of an EIS. One of the issues the NRC reviews, and on which it seeks public comment, is the effect any proposed facility will have on minority and low-income populations. This concept of Environmental Justice (EJ) was formalized in 1994 in Presidential Executive Order 12898. The

Mr. Michael Lesar
November 4, 2002
AET 02-0007, Page 4

Order and the Interagency Working Group established by the Order, however, did not provide quantitative measures to ascertain whether an EJ issue exists.

LES Proposal:

LES has recommended that the NRC adopt a fairly limiting, six-part, quantitative criterion to provide a clear standard for resolution of this issue.

USEC Comment:

USEC agrees that a clear standard for satisfactorily addressing the EJ issue would promote effective and efficient regulation. USEC notes, however, that establishing such criteria has broader implications for licensing not just other UEFs, but any other nuclear facilities as well. Refinements to the generic environmental impact standards applicable to all license applications should be implemented through a proposed rulemaking or other approach with public comment. Such important precedent, determined outside any actual proceeding, based only on LES' white paper, is too narrow a platform for arriving at the greater certainty we all seek in the area of EJ.

3. Financial Qualifications

Statutory/Regulatory Requirements:

Regulations require the NRC determine that an applicant appears to be financially qualified to engage in the proposed activities associated with a UEF. However, neither the regulations in 10 C.F.R. Part 70 nor the implementing Standard Review Plan (NUREG-1520) provide specific guidance regarding what constitutes financial qualification. Recently, the NRC acknowledged that its current guidance (NUREG-1520) is inadequate and stated its intention to amend this guidance to incorporate financial qualification standards developed in a proposed Mixed Oxide Fuel Fabrication Facility project (NUREG-1718) and which the NRC recently imposed on USEC's Gaseous Diffusion Plants (GDPs) as a Policy and Guidance Directive (SECY 02-0122).

LES Proposal:

LES has recommended that the NRC use the same criteria adopted in the Original LES licensing action, establishing two conditions that must be satisfied prior to constructing the new UEF proposed by LES. The first condition is that the construction of the UEF would not begin until all funding is fully committed, with a minimum of equity contributions of 30 percent of project costs from the parents and affiliates of the partners and with the balance taking the form of "firm commitments". The second condition is that work on the UEF project would not proceed unless LES has "long-term" (i.e., 5 years) enrichment contracts with sufficient prices to cover construction and operating costs, including a return on investment for the entire term of the contracts.

USEC Comment:

While the criteria proposed by LES in the Original LES licensing action and by incorporation in this UEF application may be one way of choosing to satisfy the regulatory requirements, it is not the only way these requirements may be satisfied. Consequently, to the extent that the criteria proposed by LES are meant to establish the only means of satisfying the regulatory requirements, USEC believes that the LES recommendation is excessively prescriptive for a UEF because of the uniqueness of each project's ownership, structure and financing. Treating this UEF application as if it had already gone through the Original LES licensing action ignores this uniqueness — particularly since the ownership, the size of the project, the financial conditions of the sponsors, the state of financial markets and the national policy issues involving safety and viability are clearly different. NRC should address this issue in a revision to NUREG-1520 as it has stated its intention to do in SECY 02-0122, not in the Initial Order establishing NRC's review of a specific application for a UEF.

The regulatory focus of financial qualification should assess whether the applicant's plans provide reasonable assurance that they now have or will have the financial resources at each stage of project activity (i.e., construction and operations) to protect health, safety, common defense, security and the environment. While this assessment is limited to the financial resources required to protect health and safety and the environment rather than all the financial factors necessary to make the project commercially viable, it is important that this review be based on uniform standards freshly applied to the unique nature of each project's financial structure and set of sponsors.

4. Antitrust Review

Statutory/Regulatory Requirements.

Changes made in 1990 to the Atomic Energy Act (AEA) relating to uranium enrichment facilities removed the requirement that NRC conduct an antitrust review as part of the UEF licensing process.

LES Proposal:

Although the applicable NRC statutes and rules no longer require an antitrust review as part of a uranium enrichment licensing process, LES is requesting that the NRC's Initial Order establishing the review of LES' application specifically exclude any antitrust review as part of the NRC licensing process for a UEF.

USEC Comment:

Although NRC statutes and rules no longer require an antitrust review, it would be unwise to exclude such a review either by NRC or by another authoritative government agency. Analysis of the rather unique market dynamics involving the increasing concentration and vertical integration presented by an LES project may not support the LES conclusion that no review of the essential competitive character of this vital fuel market is needed. In view of the statutory importance of maintaining a

reliable and economic, domestically owned enrichment capability, ignoring those market realities altogether could carry an adverse national security and energy policy cost in several future scenarios.

For example, the LES partnership involves the three largest domestic nuclear generating utilities as well as USEC's major government-owned, vertically integrated, foreign competitors (Urenco and Areva). Significantly, Urenco and Areva, historically major competitors of each other, have just announced a worldwide joint venture for the development of centrifuge enrichment technology. With an LES license, the domestic utilities with the greatest nuclear generating market power also would become vertically integrated. As a bare minimum, the creation of LES itself implies a long term collaboration among various parties who have either previously been competitors or dealt with each other in an arms length manner in a market that is already an oligopoly.

Additionally, the government subsidized foreign enrichers (Urenco and Eurodif, a subsidiary of Areva), who have already been found to have engaged in unfair trade practices in the United States by the Department of Commerce and the International Trade Commission, would be bringing this potentially anti-competitive combination to the United States. Such facts would suggest that the more prudent course would be to require a competitive-antitrust impact assessment by either the NRC, the Justice Department or the Federal Trade Commission as part of, or parallel with, the LES licensing process.

5. Foreign Ownership

Statutory/Regulatory Requirements:

As previously summarized, in 1990, Congress modified the Atomic Energy Act (AEA) for the licensing of a UEF to bring it under the nuclear materials licensing provisions of the AEA (Sections 53 and 63). As a result of this change for licensing a UEF, the applicable statutory authority governing the assessment of foreign involvement in a UEF is set forth in Section 57 of the AEA. Section 57 requires that issuance of the license not be "inimical to the common defense and security." Further, Section 161(b) of the AEA provides NRC with the authority to prescribe such orders "as may be necessary to promote the nation's common defense and security with regard to control, ownership or possession" of uranium enrichment equipment. Based in part on these statutory requirements, the U.S. government and the NRC in 1998 established as a matter of national policy stringent foreign ownership restrictions on USEC.

LES Proposal:

LES recommends that the NRC affirm as a matter of law that the "inimicality" standard does not prohibit foreign ownership, control or domination of up to and including 100 percent ownership, control or domination.

Mr. Michael Lesar
November 4, 2002
AET 02-0007, Page 7

USEC Comment:

USEC believes that the LES recommendation would render the inimicality standard meaningless and contravene Congressional intent. USEC believes that the NRC cannot reach an *a priori* determination that 100 percent foreign ownership is permissible. Instead, under the inimicality standard, each UEF application must be evaluated consistently with existing practices and established United States public policy. Furthermore, a specific determination of non-inimicality should be made evaluating the countries involved and their policies relative to nuclear power and United States national interests, the applicant's record, and the applicant's country's record of safeguarding nuclear materials, technology and information.

The most recent pronouncement by Congress on this issue was the USEC Privatization Act in which Congress required that the sole domestic enricher not be "owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." (Section 3116 of the USEC Privatization Act and 10 C.F.R. 70.40). Moreover, in SECY 02-0122, the NRC clearly articulated the critical link between foreign ownership and the USEC Privatization Act (Section 193(f)(2)(B) of the AEA), requiring maintenance of a reliable and economical source of enrichment. Specifically, the NRC noted that this requirement "is principally directed to the possibility of foreign entities gaining control and undermining U.S. domestic enrichment capabilities" (SECY 02-0122, Attachment 1, Section 16.4.2.3).

Based on this statutory requirement and the other requirements in the AEA, the U.S. government and the NRC in 1998 determined as a matter of national policy that USEC could not be more than 10 percent foreign owned. While an argument could be formulated that under the applicable statutory criteria, USEC's 10 percent foreign ownership limitation may be too strict, USEC believes that the NRC cannot reach an *a priori* determination that 100 percent foreign ownership is permissible for other UEFs.

In view of the statutory language regarding "control or ownership of enrichment equipment that promotes the nation's common defense and security" (42 U.S.C. 2221 (b)), the NRC should require a review of the impact that the facility and its foreign ownership could have on a broad range of national security and energy policy issues. This review most certainly should include any impact on safeguarding sensitive nuclear technology and equipment and the administration of one of the nation's most important non-proliferation programs — the Russian HEU Agreement.

6. Disposition of Depleted Uranium Tails

Statutory/Regulatory Requirements:

NRC regulations require that an applicant for an enrichment license address the issue of depleted UF₆ (tails) disposal. Section 3131 of the 1996 USEC Privatization Act obliges the U. S. Department of Energy (DOE) to accept tails for disposal upon the request of “any person licensed by the NRC to operate a uranium enrichment facility...under...the Atomic Energy Act” if two conditions are satisfied. First, such tails are declared to be Low-Level Waste (LLW) and second, the generator reimburses DOE for the cost of disposal.

LES Proposal.

LES recommends that pursuant to findings made in the Original LES licensing action, the NRC consider this disposal path as a “plausible strategy” for disposing of the tails created by a UEF.

USEC Comment:

Pursuant to the NEPA requirement described earlier, DOE has already filed a programmatic EIS on its proposed tails conversion facility that includes materials generated by DOE and tails generated by USEC at its existing GDPs but does not include the tails generated from an additional increment of 3 million SWU per year production from the UEF in the United States being proposed by LES. Currently, DOE has over 704,000 metric tons of tails in its inventory, of which 56,000 metric tons remain at DOE’s Oak Ridge, Tennessee facility. DOE’s programmatic EIS never considered the generation or storage of tails generated at the LES-proposed UEF at Hartsville, Tennessee, nor the transportation to the planned tails conversion facilities at the Portsmouth, Ohio or the Paducah, Kentucky GDPs. Neither has any government agency reviewed the policy implications of the U.S. government accepting tails from a foreign owned or controlled company (see LES’ petition under 5. “Foreign Ownership” herein).

LES’ new UEF would generate approximately 5,000 metric tons of tails annually, a 9 percent increase each year over the amount currently being stored in Tennessee. Given the likely drawn out schedule for processing these tails at the planned DOE tails conversion facilities at the Portsmouth and Paducah GDPs, NRC is required to consider the impacts and management plans for long term storage over decades at the proposed Hartsville, Tennessee LES facility in order to utilize this disposal path as a “plausible strategy” for disposing of the tails created by a UEF discussed in the Original LES license action. Further, an applicant also must demonstrate that it has met the decommissioning funding requirements for tails disposition.

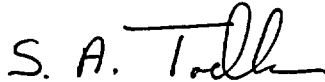
Mr. Michael Lesar
November 4, 2002
AET 02-0007, Page 9

Conclusion

Finally, it should be noted that USEC is presently in the pre-application license phase for its Lead Cascade centrifuge facility to be followed by a licensing process for a UEF. Both expedition and precedent in the licensing process are very important to USEC. A level playing field that subjects all applicants to the statutorily required reviews of the unique characteristics of each new project, under tight deadlines with enforced supervision, serves the best interests of all stakeholders in the process — enrichers, customers, governments and local interests.

USEC appreciates the opportunity to provide these comments on these important issues. If you have any questions on this matter, please contact me at 301-564-3250.

Sincerely,

A handwritten signature in black ink, appearing to read "S. A. Toelle".

Steven A. Toelle, Director
Nuclear Regulatory Affairs

References:

1. Federal Register Notice, "Louisiana Energy Services Gas Centrifuge Enrichment Facility," Volume 67, Number 19, dated October 2, 2002.
2. Letter from Steven A. Toelle (USEC) to Martin J. Virgilio (NRC), "USEC Comments Regarding Licensing of Uranium Enrichment Facility," AET 02-0003, dated June 19, 2002.

cc: M. Virgilio, NRC HQ
J. Giitter, NRC HQ
M. Leach, NRC HQ
T. Johnson, NRC HQ
Y. Faraz, NRC HQ