RAS 10650

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of

USEC Inc.
American Centrifuge Plant (ACP)

Docket No. 70-7004

ASLBP No. 05-383-01-ML

Notice of Appeal and Brief and Motion for Leave to Augment Appeal by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS)

Portsmouth/Piketon Residents for Environmental Safety and Security submits this notice and brief to appeal the recent decision against us by the Atomic and Safety Licensing Board Panel (ASLBP, Panel, or Board) in the above-captioned proceeding.

10 C.F.R. §2.341(c)(2) regulations limit the length of this brief to 30 pages, but our treatment is incomplete in 30 pages, so we also move for leave to augment this appeal to finish the treatment.

TEMPLATE = SECY-041

SECY-02

Contents

Key Documents

Abbreviation	Document
LA	USEC License Application
ER	Environmental Review
LA Documents	LA and associated documents
Petition	PRESS Petition to Intervene
USEC Reply	USEC Reply to PRESS Petition
NRC Staff Reply	NRC Staff Reply to PRESS Petition
Reply to USEC Reply	PRESS Reply to USEC Reply
Reply to NRC Staff Reply	PRESS Reply to NRC Staff Reply
Teleconference	Transcript of pre-hearing teleconference
ASLBP Order	ASLB Panel Memorandum and Order

1 Introduction

In contrast to the vast bulk of NRC licensing and relicensing cases, the ACP application proposes to employ an unproven new technology involving novel issues that are unfamiliar to the applicant and the NRC alike. Moreover, although it is widely acknowleged to be among the dirtiest nuclear-related sites in the nation[1], nobody really understands the full extent of the contamination at the Piketon Atomic Reservation, not least because much of the early contamination there is undocumented, having occurred prior to the development of modern environmental standards and industrial regulations. Furthermore, the ACP represents a major construction project, followed by 30 years of operation, by USEC, which is far and away the NRC's leading violator of materials license regulations.

Considering the magnitude and novelty of these circumstances it appears overly strict for the Panel to expect that petitioners would be able to compile a robust and comprehensive set of contentions in just sixty days, the bare minimum allowed in law[2].

Yet we had a mere sixty days[3], in our spare time, in which to analyse over a thousand

[1]See, for example, the ACP Environmental Report (ER), at page 2-22, wherein USEC acknowleges that, "D&D of the PORTS GDP will be a very large project (potentially the largest cleanup in Ohio) that will require a significant funding commitment from DOE (estimated at $1-2 billion) and create thousands of jobs over several years." We note, in passing, that this aspect of the "no action" alternative seems to have been overlooked in the bulk of the impact analysis.

[2]10 C.F.R §2.309(b)(3)(i), on the timing specified in any notice of hearing in proceedings for which a Federal Register notice of agency action is published, states that, "[t]he time specified in any notice of hearing ... *may not ... be less than 60 days* from the date of publication of the notice in the Federal Register;" (emphasis supplied.)

[3]The Federal Register Notice of Availability of Applicant's Environmental Report (69 FR 61411 (October 18, 2004), CLI-04-30), asserts that "[c]opies of USEC's application, safety analysis report, and environmental report (except for portions thereof subject to withholding from public inspection in accordance with 10 CFR 2.390, Availability of Public Records) are available for public inspection ...," and that "[t]hese documents are also available for review and copying" by any of several methods, including "enter the NRC's Agency-wide Document Access and Management System (ADAMS) at http://www.nrc.gov/reading-rm/adams.html, where the accession numbers for USEC's application (including USEC's safety analysis report and USEC's environmental report) is [sic] ML042800551."

However a Commission Order docketed in this proceeding on December 29, 2004 noted that the NRC temporarily suspended public access to these and other documents on October 25, 2004. The Order states that, "[t]he documents relevant to USEC Inc.'s application have just been made publicly available again," considers that "[t]he requesters argue that they cannot prepare such contentions or even determine whether

pages of heavily redacted application documents and the references provided therein, to verify data and calculations presented in the application documents, to become familiar with the NRC regulations in 10 CFR and the related case law, to assemble our contentions, to locate references in support of our contentions, and to articulate them in an acceptable form.

As we mentioned in our replies to USEC's Reply and the NRC Staff's reply, we ran short of time in preparing the Petition and we estimate that we were several drafts from a properly composed product at the deadline. We sent what we had, confident that our concerns were filed in a timely manner, and that the nature of our concerns was unambiguously discernible, on the whole, even if they were formally deficient. We refrained from submitting a tidier version out of respect for the orderliness of the proceeding.

In our reply (at 4) to the NRC Staff reply, we acknowledged that we had relied too much on implied connections, assuming that what was obvious to us would be unambiguously obvious to our readers. Furthermore, we offered that we would be happy to restate our intentions explicitly "should we be so ordered by the Commission." That was before the Panel was assigned. We note that there is a precedent in CLI-99-04 in which a petitioner was "[d]irected by the Board to 'address any shortcomings in [their] petition,'" but we received no such order.

they wish to intervene if they cannot examine the license application and supporting documentation," and orders that "[b]ecause the application was initially available to the public for only a week, the Commission finds that the time for filing intervention petitions should be extended for a full sixty days from the date of this Order," applicable to a small group of specific parties, including PRESS.

Note that to this day the Safety Analysis Report has never been publicly available, contrary to multiple assertions in 69 FR 61411.

2 Standards Governing Contention Admissibility

2.1 General Considerations

The ASLBP Order summarizes 10 C.F.R. §2.309(f)(1), governing contentions, at page 5. On pages 6 through 11, it expands its explanation of the six elements of §2.309(f)(1) under the headings

1. Brief Explanation of the Basis of the Contention,
2. Within the Scope of the Proceeding,
3. Materiality,
4. Concise Allegation of Supporting Facts or Expert Opinion,
5. Genuine Dispute Regarding Specific Portions of Application, and
6. Challenges to NRC Regulations.

We have come to understand that this kind of summary of §2.309(f)(1) requirements is something of a standard practice. Though we detect a few variations in this treatment between the ASLB version and those of USEC and the NRC Staff, we have noticed that all three of the parties invariably finished their analysis of each of our contentions, using some combination of these six elements to dismiss the contention.

We were aware of these six requirements, and we did attempt to communicate our genuine concerns with the correct formalism.

The Panel at page 6 points out that "[t]he Commission has ... emphasized that the rules on contention admissibility are 'strict by design.'" USEC's Reply to our Petition, at page 13, elaborates on the rationale behind this "strict by design" philosophy with reference to *Duke Energy Corp.*, CLI-99-11, and we reproduce that quote here (citations omitted), adding bullet points for clarity.

Our strict contention rule serves multiple interests.

- First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.
- Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing.
- Finally, the rule helps to assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

We certainly don't intend to attack NRC requirements, regulations, or policies, and we don't believe our Petition expresses anything like that. We have done our best to identify specific disputes, and we believe our pleadings are sufficiently detailed to give the other parties a "good idea" of the claims we will support and oppose. As to our ability, we recognize that aspects of our Petition may be construed as evidence that we are not able "to proffer at least some minimal factual and legal foundation in support of [our] contentions." However, we offer that the Petition's formal and organizational shortcomings are due to the hurried circumstances under which we were operating at the time that we submitted the Petition, faced with a task of giant proportion, rather than our lack of ability. Furthermore, we offer two additional pieces of evidence that we have the ability to support our contentions. The first piece of evidence being this Appeal itself, which we trust you will find demonstrates that we are indeed able to "proffer at least some minimal factual and legal foundation." The second, which has been almost entirely overlooked in the ASLBP Order, was our conduct and performance in preparation for, and execution of, the July 19 pre-hearing teleconference, in which we defended issues arising from our contentions 8 ("Scioto Survey"), 11 ("Ground

and Surface Water"), 13 ("D & D Plans Inadequate") and 18 ("USEC Incompetence"). The transcript of that three-hour conference is available under the ADAMS accession number ML052070174. We invite the Commission to read it.

We'd like to elaborate a little further here on the text of CLI-99-11, as it sheds light on the spirit behind the letter of the law regarding the admissibility of contentions. The passage quoted above by USEC was the first of five paragraphs (which we reproduce for convenience in Appendix B herein) in which the Commission explains the intent of the "strict by design" rules. We relate this, not to inform the Commission, but to illustrate our intuition that perhaps the institutional culture of the NRC Boards and Staff has, after many seasons of cutting and pasting case law footnotes, turned the contention rule into a "fortress to deny intervention."

The passage goes on to explain how the Commission consciously "toughened its contention rule" in 1989. Congress had called for these fundamental changes because, under the previous rule, Licensing Boards had admitted contentions that appeared to be based on little more than speculation. Intervenors could meet the rule's requirements merely "by copying contentions from another proceeding involving another reactor." Admitted intervenors often had negligible knowledge of nuclear power issues, had no direct case to present, but instead attempted to unearth a case through cross-examination. The new requirements, we learn, "are intended to 'preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.'"

Sure, there are things we want to discover. For example we'd like to see a robust justification for why USEC requires a 10% license, not content to accept a 5% license like LES. USEC has been singularly silent on this issue, at least in the public documents. We'd also like to get an idea of some of the physical process parameters so that we can evaluate for ourselves whether the physical containment of the centrifuges really can prevent the "domino effect" we described. The public hasn't been privileged to see one word of the Safety Analysis

Report. And we'd like to compel a thorough investigation of the alternative consequences of simply cleaning the site up, once and for all, and turning it over for the threefold purposes of development as parkland, for reindustrialization, and for development of the Hopewell archeological resources. We believe that this ought to be the NRC's "preferred alternative," per 40 CFR 1502.14(e). But we hardly think these discoveries are so vague as to constitute "fishing expeditions."

Nor do we think the PRESS Petition reveals us to be the kind of old-school obstructionists characterized in the pre-1989 description. We do have "Environmental" in our name, and we continue our traditional interest to ensure that workers are adequately protected and that adequate provision is made to compensate workers for all plausible occupational health problems. But we also attempted to reverse-engineer one of the LA's SWU-modeling calculations in our contention 7, we have recently gotten hold of the software to reproduce the LA's transport risk models, we have suggested a comprehensive analysis and survey method at pre-hearing, and we have written computer programs to enable us to study the slopes of the land surfaces around the site using US Geological Survey elevation data. We think that these competencies at least rise above "negligible knowledge of nuclear power issues." Hopefully our skills in legal communication are improving too. And our contentions are all original: there's no "copying contentions from another proceeding" going on here. On the contrary, it is the LA and the case law from the other parties that appear to have been copied from another proceeding.

In short, we believe that our adversarial participation will be essential in assisting the NRC to develop a sound record in this uniquely important case.

2.2 10 C.F.R. §2.309(f)(1)(i)

The ASLBP Order offers no explicit elaboration of this rule, which states that a contention must "[p]rovide a specific statement of the issue of law or fact to be raised or controverted."

2.3 10 C.F.R. §2.309(f)(1)(ii) – Brief Explanation of the Basis of the Contention

For every contention we "provide some sort of minimal basis indicating the potential validity of the contention," (ASLBP Notice at 6, quoting 54 Fed. Reg. 33,168, 33,170.) Indeed we don't believe the Panel has faulted any of our contentions for failing to provide a brief explanation.

2.4 10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding

The ASLBP Order, at 7, states that the scope of the proceeding is "defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board." The panel doesn't identify these documents, but we take the "initial hearing notice" to be 69 FR 61411 (October 18, 2004), CLI-04-30, and the "order referring the proceeding to the Licensing Board" to be 70 FR 29544 (May 23, 2005).

70 FR 29544 is a simple announcement that a Licensing Board is established and says nothing about the scope of the proceeding. It does reference Commission Order CLI-05-11 (12 May, 2005), in which the Commission finds that PRESS has standing to intervene, but CLI-05-11 too says nothing about scope.

We are left with 69 FR 61411 as the definitive reference regarding scope. 69 FR 61411 dicusses scope only in sections II.C and IV. Section II.C states that, "[t]he matters of fact and law to be considered are whether the application satisfies the standards set forth in this Notice and Commission Order and the applicable standards in 10 CFR 30.33, 40.32, and 70.23, and whether the requirements of 10 CFR Part 51 have been met." This leaves section IV as the principal statement of the scope of this proceeding. For convenience, we reproduce the entire text of section IV as Appendix A herein.

2.4.1 10 C.F.R §2.335(a) – Challenges to NRC Regulations

In addition to the six requirements of §2.309(f)(1), the ASLBP Order at 10 reminds us that "any contention that amounts to an attack on applicable statutory requirements must be rejected by a licensing board as outside the scope of its proceeding."

2.5 10 C.F.R. §2.309(f)(1)(iv) – Materiality

Regarding materiality, a "dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'" (USEC Reply at 15, based on explanation, in CLI-99-11, of 10 C.F.R. §2.714(b)(2)(iii) (predecessor to §2.309(f)(1)(iv)), which explanation is in turn based on 54 Fed. Reg. at 33,172.)

We submit that every one of our contentions, should it be decided in our favor, would "make a difference in the outcome of the licensing proceeding," as indicated in Table 1.

Although the Panel uses the word "material" in dismissal of almost every one of our contentions, it is not always clear whether the Panel intends to dismiss the contention because it fails §2.309(f)(1)(iv) ("material to the findings the NRC must make") or because it fails §2.309(f)(1)(vi) ("to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact"). However, in most cases, The Panel uses "material" in the context of the phrase "material fact or law," or similar, (see ASLBP Order discussions of our contentions 1, 2, 3, 6, 7, 8, 10, 13, 14, 15, 16, 17, 19, and 21) which indicates that the Panel's opinion is that the contention fails §2.309(f)(1)(vi), which we address below. The exception is in the Panel's discussion of our Contention 4 ("[t]his contention ... is not material to any finding which the NRC must make"), therefore it appears that the Panel find that our contentions satisfy §2.309(f)(1)(vi) except in the case of Contention 4 ("10% Assay"). We think it obvious that the Panel would have to impose license conditions on USEC that they may only possess uranium enriched to 5% ^{235}U if they found in favor of our Contention 4, and that Contention 4, therefore, does satisfy §2.309(f)(1)(vi), contrary to the

Contention	Potential Outcome
1 Criticality Monitoring Exemption	License Conditions Imposed
2 Radiation Work Permits	License Conditions Imposed
3 Cylinder Labeling	License Conditions Imposed
4 10% Assay	License Conditions Imposed
5 Domino Effect	License Denied: Application Inadequate
6 Health Risks	License Denied: Application Inadequate
7 3.9% Feedstock	License Denied: Application Inadequate
8 Scioto Survey	License Denied: Application Inadequate
9 LLMW Exemption	License Conditions Imposed
10 Independent Environmental Reporting	License Denied: Application Inadequate
11 Ground and Surface Water	License Denied: Application Inadequate
12 Radiological Impacts	License Denied: Application Inadequate
13 D & D Plans Inadequate	License Denied: Applicant Financially Unqualified
14 Application Inadequate	License Denied: Application Inadequate
15 National Security	License Denied: Application Inadequate
16 Alternative Site Use	License Denied: Application Inadequate
17 ACP Project Failure	License Denied: Applicant Financially Unqualified
18 USEC Incompetence	License Denied: Applicant Unqualified
19 Enrichment Freeze	License Denied: Applicant Financially Unqualified
20 Need for Proposed Action	License Denied: Application Inadequate
21 Unnecessary Censorship	License Denied: Application Inadequate

Table 1: Potential Material Outcomes of PRESS Contentions

Panel's finding.

2.6 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The ASLBP Order at 8 *et seq.* explains as follows.

> Determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits. A petitioner does

> not have to prove its contention at the admissibility stage. However, supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. The contention admissibility threshold is less than is required at the summary disposition stage. See 10 C.F.R. §2.710(c)[4]. "[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." Although a "Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner," a petitioner must provide some support for his contention, either in the form of facts or expert testimony....
>
> At the contention admissibility stage, a petitioner must provide "some alleged fact or facts in support of its position." This "does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention." Nonetheless, a petitioner cannot satisfy this requirement by mere references to voluminous documents without providing analysis demonstrating that they provide factual support for the proposed contention. In short, the information, facts, and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed indicate the existence of adequate support for the contention.

The only PRESS contention that the Panel doesn't fault for non-compliance with 10 C.F.R §2.309(f)(1)(v) is contention 21 ("Unnecessary Censorship"). The Panel's criticisms on this criterion can be grouped into ten categories as shown in Table 2.

[4]sic.

Class of objection	Contentions
assertion that the contention failed to offer facts or opinion	1, 2, 3, 4, 5, 7, 13, 14, 15, 16, 17, 19, 20
contention makes vague allegations	6
[fact] has nothing to do with contention	1, 5, 6, 9, 12, 15
[fact] without discussion is inadequate	1, 6, 12, 16
failure to explain how [fact] supports contention ("no nexus")	6, 7, 8, 10, 11, 18, 19
[reference] not provided	6, 11, 12, 19, 20
failure to indicate which information in [reference] the contention relies upon	6
failure to explain the significance of [reference]	11, 12
failure to describe [reference]	11, 12
an argument about "character issues"	10, 18

Table 2: Classes of Objection under 10 C.F.R §2.309(f)(1)(v)

2.6.1 Requirement to Provide Documents

As the ASLBP Order states on page 8, a contention's "concise statement of the alleged facts" should be accompanied by "*references to* the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue" (emphasis supplied). 10 C.F.R. §2. 309(f)(1)(v) nowhere requires that those documents must be *provided* with the Petition, it just requires that we identify them.

2.6.2 Character Issues

In its objection to PRESS Contention 10 ("Independent Environmental Reporting"), the Panel states that "as the NRC Staff correctly notes, to rely on past enforcement history as a basis for a contention, there must be a direct and obvious relationship between the character issues and the licensing action in dispute," (Ruling at page 28), referring in a footnote to NRC Staff Response at 43.

The NRC Staff Response, in turn, provides the following citation of case law.

Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999), *citing Vogtle*, CLI-93-16, 38 NRC at 32. *See also Millstone,* CLI-01-24, 54 NRC at 365-66.

We were able to locate CLI-99-4 and CLI-01-24 online, but not CLI-93-16.

In CLI-99-4, the Commission reviews an appeal by filed by Edwin D. Dienethal to an Atomic Safety and Licensing Board Memorandum and Order that denied his petition for leave to intervene and request for hearing. The case concerned a license amendment application filed by the Commonwealth Edison Company for the Zion Nuclear Power Station, Units 1 and 2, intended to facilitate and reflect the plant's new shutdown and defueled condition.

We don't have access to Mr. Dienethal's Appeal Brief, Petition or Amended Petition, but the Commission speaks of Mr. Dienethal's "*allegations* of deliberate violations of regulatory or plant requirements" (emphasis supplied). The Commission goes on to state that, "[a]t bottom, his is a broad-brushed claim of wholesale corruption at Plant Zion – corruption allegedly condoned and thus perpetuated by 'the highest levels' and indeed 'every level of management.'" And concludes, "Mr. Dienethal's position is much too open-ended. The NRC has no legal duty, and also lacks the resources and expertise, to assess management integrity and character every time the agency considers a reactor license amendment request (which annually number nearly a thousand)."

The context of CLI-01-24 is similar. Like CLI-99-4, it involves a relatively routine license amendment application. The ASLB "Board found the petitioners' sole contention inadmissible, and thus denied the petition for intervention." In fact, the Board's decision was a split decision 2-1, with a lengthy dissent. The petitioners appealed, and CLI-01-24 is the Commission's ruling on the appeal.

We gain an insight into the nature of CLI-93-16 in CLI-01-24, where the Commission states that, "[i]n some past cases, the Commission or its hearing boards have admitted contentions based upon claims of poor licensee 'character' or 'integrity' .... We have, for instance, admitted 'character'-based issues in a proceeding to transfer total operational authority and

control to a new management organization, whose particular and current highranking officers allegedly displayed a pattern of deliberately violating safety regulations. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). Similarly, we found character allegations directly pertinent when, in a license renewal proceeding, the allegations specifically concerned the current director of the facility, and the current organizational structure of the facility, and were supported by expert witnesses alleged to have knowledge of the current management. See Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111 (1995)."

In this case (CLI-01-24), "the petitioners ... acknowledge that *the ownership and control of Millstone has changed.* NNECO is no longer the owner or operator of Millstone Units 2 and 3, the subject of the current amendments. Having provided no indication that there are any current or directly pertinent 'character' concerns, the petitioners state only that they 'are not prepared to allow the new owners of Millstone the benefit of a doubt with regard to their radiation emissions.'" (Emphasis supplied.)

The USEC ACP case is significantly different from the two cases described above. CLI-99-4 describes a licensing adjustment prior to plant closure, and CLI-01-24 describes a mandatory licensing adjustment in response to new NRC rules. In contrast to these relatively minor license amendment applications, the ACP application represents a major construction project, followed by 30 years of operation.

Moreover, the PRESS Petition is significantly different from those of the two cases above. Unlike Mr. Dienethal's mere *allegations*, we have provided 12 pages of extensive analysis, in Appendix B of the PRESS Petition, relating USEC's record of NRC violations in safety and security.

Further, unlike the case in CLI-01-24, in which the owner and operator of Millstone changed, not only are the organizational structure and operating methods of USEC substantially the same as they have been since it became subject to NRC regulatory oversight, but USEC also intends to employ the same workforce, save for some downsizing.

The PRESS Petition has provided direct references to USEC's violations record in support of various contentions, wherever a USEC violation has contradicted an assertion, by USEC, in the ACP License Application.

Indeed, as the leading violator of all of NRC's materials licensees, USEC has placed itself in an unprecedented situation that merits close scrutiny.

2.7 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The Panel here refers to 10 C.F.R §2.309(f)(1)(vi):

> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

3 Rulings on PRESS Contentions

We were a little concerned on account of the presented order of our contentions. They were more or less presented in order of the earliest page from the LA and ER upon which each concern is based. Consequently, the parties analysed the contentions in the order in which they were presented.

This was a problem for two reasons. First, our most glaring compositional gaffes happened to occur near the beginning, which opened us to ridicule early in the analysis by each party. Second, and more importantly, the parties appeared to lose steam by the end of

their analyses, causing them to pay less attention to the contentions at the end of the order. However, the most important, and most consequential, issues tend to occur towards the end.

Accordingly, we are reversing the order of our treatment here. We don't believe this will introduce unnecessary confusion.

3.1 Contention 21: Unnecessary Censorship

The ASLBP Order rejects this contention solely on the grounds of 10 C.F.R. §2.309(f)(1)(vi), so we need not address the other criteria for acceptance here. However, we'd like to discuss the contention's intent with regard to some of the other criteria.

3.1.1 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The ASLBP Order at 42 states that "[w]hether or not the censored material is or was available, PRESS has not suggested any issue with regard to the LA or the ER which might have been implicated by this "censorship" and thus fails to raise a genuine dispute with regard to any issue of material fact or law in this contention."

On the contrary, Contention 21 identifies several specific places in the ER and LA in which it appears obvious, or plausible, from the title or description that redacted material doesn't satisfy the exceptions to 10 C.F.R §2.390(a) which requires that "NRC records and documents ... shall not be exempt from disclosure and will be made available for inspection and copying at the NRC Web site."

In particular, one specific example is Figure 3.4.1-1, ER at 3-24, entitled "U.S. Department of Energy Environmental Resoration Quadrants." This figure, by its title, is commonly available in any number of publicly available documents, including D.O.E. Environmental Reviews. We identified this figure in our Basis 21.1.

3.1.2 Discussion

Contention 21 was not intended to be a complete catalog of all unnecessary redactions in the LA documents. It comprised a few selected examples selected to illustrate how at least some of the redactions were unnecessary. For instance, we draw attention to redacted ER Figure 3.4.1-1, entitled "U.S. Department of Energy Environmental Restoration Quadrants." Maps of the DOE restoration quadrants are openly available in many public documents. There is simply no need to conceal this figure "pursuant to 10 CFR §2.390."

We were frustrated at every turn, in attempting to analyse the LA documents, by missing information that had been "withheld pursuant to 10 CFR §2.390." Moreover, we have little means to evaluate whether any given redaction is legitimately concealed. Two layers of secrecy – classified information and proprietary information – already veil many crucial details from public scrutiny. We have good reason to believe that some of that secrecy is unnecessary.

One of the few points that the NRC Staff viewed sympathetically in our oral Teleconference presentation occurred when we were invited to discuss our Contention 11, "Ground and Surface Water" (Teleconference at 31. et seq.)

> **MR. TODD [for PRESS]:**
>
> .... I spoke to the author of this contention yesterday and it turned out that one of the points that she was making was that it's a very frustrating passage, the passage between – this is the environmental report now, not the main body of the license application – between pages 3[-]18 and 3[-]23, very frustrating for us with only public access, because there are nine inaccessible references there in six pages.
>
> There are three figures, figure 3.4.1-1; 3.4.2-1; 3.4.2-2 that are referred to in this passage that we can't read. Plus, there are four references to USEC-02 which I explained about earlier and two other figures that we can't read.

> And the types of things those figures have are pictures of the DOE environmental restoration quadrants, the GDP license application safety analysis report, ponds and lagoons on the USDOE reservation, USDOE reservation drainage map and elevation of roadways. So we really haven't had a very good opportunity to respond to the substance of this because it's very difficult to follow the argument with such big gaps.

We should point out that, although we were discussing "nine inaccessible references [] in six pages" in this context, we encountered the same obstacles throughout the thousand or so pages of the LA documents.

Further evidence that the Panel is unaware just how much information is unavailable in the public version of the LA documents is found, for example, in ASLBP Order at 20, where the Panel discusses our Contention 5, "Domino Effect": " PRESS fails to discuss or analyze USEC's ISA [Integrated Safety Analysis]." This suggests two things. First, that the Panel considers the contents of the ISA suitable for review by the public, and second, that the Panel believes that the ISA is available for review by the public. In fact, the ISA is not available for review by the public.

We invite the Commission to review the publicly available versions of the LA documents, which are found at

http://www.nrc.gov/materials/fuel-cycle-fac/lic-app-docs.html

We suggest that some of the many redactions are, in fact, not authorized under 10 CFR §2.390, and that they have significantly impeded our understanding of the LA documents. Contrary the the ASLBP Order, this contention is material to the decision they must make, as remedies would include ordering a critical review of all redacted information, and allowing the public sufficient opportunity to review the newly available information.

The Commission has the authority under 10 CFR §2.390(c) to deny a request for withholding under this section.

3.2 Contention 20: Need for Proposed Action

The ASLBP Order denies the admission of Contention 20 on the grounds of 10 C.F.R. §2.309(f)(1)(i), (iii), (v) and (vi).

3.2.1 10 C.F.R. §2.309(f)(1)(i) – Specific Statement of the issue of Law or Fact to be Raised or Controverted

The ASLBP Order, at 41, states that this contention "raises no genuine issue of law or fact." On the contrary, the contention raises the issue that "there is no need for the proposed action.[5]" Therefore we disagree that the contention raises no issue of fact.

3.2.2 10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding

The ASLBP Order states, at 41, that the contention "raises policy questions outside the scope of this proceeding."

We acknowledge that, if one were to assume that it would be possible for us to convince the panel that the nuclear power industry has no future, it would set a precedent that would make the NRC's future unrealistically easy.

However, we note that the ER is prepared "in accordance with the guidance in NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs.*" (ER at 1.) NUREG-1748 describes at page 5-1 that the section "'Purpose and Need for the Proposed Action' ... describes the underlying need for the proposed action and should not be written merely as a justification of the proposed action." We note that the introduction to Chapter 5 of NUREG-1748 indicates that the guidance is following 10 C.F.R. §§51.70 and 51.71, and that §51.70 recommends that the "format provided in section 1(a) of appendix A of this subpart should be used." We quote subpart 4 of Appendix A to Subpart A of §51 in full:

4. Purpose of and need for action.

[5]PRESS Petition at 48.

> The statement will briefly describe and specify the need for the proposed action. The alternative of no action will be discussed. In the case of nuclear power plant construction or siting, consideration will be given to the potential impact of conservation measures in determining the demand for power and consequent need for additional generating capacity.

Now, while this directive clearly discusses the case of "nuclear power plant construction or siting," and not enrichment plant construction or siting, we believe the spirit of this direction is to assess whether "the potential impact of conservation measures" will affect the need for the facility. Accordingly, we believe that the issues raised here are within the scope of the proceeding.

3.2.3 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The ASLBP Order criticizes PRESS twice, at 41, for not providing to the Panel documents cited in the contention. Further, the Panel asserts that "[t]his contention is based wholly on speculation," that it "fails to present facts or expert opinion to support the contention," and that it "makes vague and general assertions."

We argued above, in section 2.6.1, that a petitoner is nowhere required to *provide* cited documents, but that our obligation under 10 C.F.R. §2.309(f)(1)(v) is simply to provide "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." As the Panel points out at pages 9 and 10, "the information, facts and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed indicate the existence of adequate support for the contention.[6]" We would have been happy to assist the Panel in obtaining the references.

We agree that Bases 20.4, and 20.5, supporting the likelihood that there will be an enrich-

[6]citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-04, 31 NRC 333 (1990).

ment pause, are misplaced. Clearly, they belong naturally with Contention 19, "Enrichment Freeze." Basis 20.7, "Megatons to Megawatts as an alternative," does support the contention that there is no need for the ACP inasmuch as if the downblending of warhead material, in accordance with international obligations to reduce nuclear arsenals, were found to be sufficient to satisfy domestic requirements for low enriched uranium, then there would be no need to enrich new supplies of natural uranium.

However, we believe that the remaining bases, 20.1 ("Nuclear Power Expensive"), 20.2 ("States Pushing for Renewable Energy"), 20.3 ("Businesses Pursuing Renewable Energy"), and 20.6 ("Sierra Club Seeks '21st Century Solutions'") do support the evaluation of the need for an enrichment plant in terms of reduced demand for nuclear energy on account of conservation measures, hence reduced demand for enrichment services. If the Panel has examined the references in these four bases, "to confirm that they do indeed indicate the existence of adequate support for the contention," as the Panel appears to be obliged, then there is no evidence for it in their Order. We maintain that we have presented facts and expert opinion. Thus, we don't agree with the Panel that "[t]his contention is based wholly on speculation." Nor do we accept that it makes baseless assertions, "vague and general" or otherwise. Thus, we have exhausted the Panel's stated objections that the contention fails the criterion of 10 C.F.R. §2.309(f)(1)(v).

One unstated question about the contention's admissibility under §2.309(f)(1)(v) remains, and that is whether the information in the citations is adequate to establish the conclusion of the contention. It is not clear to us that this question must be addressed at this juncture, since, as the ASLBP Order states at 9, "At the contention admissibility stage, a petitioner must provide 'some alleged fact or facts in support of its position.' This 'does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.'" Perhaps, if the Commission decides that the contention (or indeed any contention) is admissible, the Commission

would be kind enough to state the boundaries for us regarding the extent to which we may introduce stronger facts to support the same basis.

3.2.4 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The ASLBP Order, at 41, states that the contention "does not offer any analysis of USEC's discussion of need," that it "fails to challenge any specific portion of the application," and that it makes "general assertions without nexus to the pending application."

The subject of the contention is the "need for the proposed action," a subject that is raised in just one place in the ER. In fact, in USEC's Reply at 52, USEC has no trouble identifying ER §1.1 as the disputed portion of the ER. Thus, although we didn't cite ER §1.1 by section number, we did identify the portion quite unambiguously by reference to its content. Thus, we disagree with the Panel that we fail "to challenge any specific portion of the application."

Our bases 20.1, 20.2, 20.3, and 20.6 all discuss various conservation measures, and we hold not only that they represent facts and expert opinion, as explained above, rather than assertions, but that they are specifically focused on conservation issues, rather than "general assertions". ER §1.1 fails to discuss the ameliorating effect of conservation measures on demand in its discussion of need, and so there is a well-defined nexus between the contention and the ER, and a genuine dispute.

We acknowledge that the Petition did fail to discuss ER §1.1 or provide the nexus, but we have checked our notes, and that is indeed where the contention came from. However, as the ASLBP Order states at 8, "Although a 'Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner,'[7] a petitioner must provide some support for his contention, either in the form of facts or expert testimony." We have established that we have provided some support for our contention, in the form of

[7]Palo Verde, CLI 91-12, 34 NRC at 155.

facts and expert testimony, and we appeal thereby for favorable light.

Thus we have exhausted the Panel's stated objections that the contention fails the criteria of 10 C.F.R. §2.309(f)(1).

3.3 Contention 19: Enrichment Freeze

The ASLBP Order denies the admission of Contention 19 on the grounds of 10 C.F.R. §2.309(f)(1)(iii), (v) and (vi).

3.3.1 10 C.F.R. §2.309(f)(1)(iii) – Within the Scope of the Proceeding

The ASLBP Order, at 39 and 40, states that "this contention raises issues of international policy that are unrelated to the licensing criteria of the NRC and so are beyond the scope of this proceeding."

We disagree that the contention raises issues of international policy that are unrelated to NRC licensing criteria. We were not asking the Panel to consider the merits of implementing an international moratorium on uranium enrichment any more than we would ask them to adjudicate the merits of a tornado, an earthquake or a flood.

We simply ask that the Panel consider what impact a five year international moratorium on uranium enrichment would have on USEC's financial condition. We hold that this consideration is within the scope of the proceeding.

3.3.2 10 C.F.R. §2.309(f)(1)(v) – Concise Allegation of Supporting Facts or Expert Opinion

The ASLBP Order, at 39, faults us for failing to provide the cited document, and states that "PRESS' assertions, even if accurate, would be insufficient to support its contention", and that "PRESS does not provide any facts or expert opinion to support this contention, only speculation about USEC's future financial capabilities. "

We argued above, in section 2.6.1, that a petitoner is nowhere required to *provide* cited

documents, but that our obligation under 10 C.F.R. §2.309(f)(1)(v) is simply to provide "references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue." As the Panel points out at pages 9 and 10, "the information, facts and expert opinions provided by the petitioner will be examined by the Board to confirm that they do indeed indicate the existence of adequate support for the contention.[8]" We note that in a footnote on page 39, the Panel expresses regret that "USEC failed to supply a copy of the final Carnegie Report." It appears that the Panel is obliged to examine the the information, facts and expert opinions provided by the petitioner, but there is no evidence in the Order that they have done so.

Further, it may be that the Carnegie Endowment withdrew its recommendation for an international moratorium on uranium enrichment. We note that, at this stage, we are only required "to indicate what facts or expert opinions, be it one fact or opinion or many, of which [we are] aware at that point in time which provide the basis for its contention,[9]" not to make our case. We believe we have satisfied this burden. And so we disagree that "PRESS does not provide any facts or expert opinion to support this contention."

Note however, that the point is not moot. There is a serious initiative, advocated by the IAEA's El-Baradei, to initiate a five-year moratorium. There are many articles about this [10]. The definitive references are a report by the UN High-Level Panel on Threats, Challenges and Change, entitled "A More Secure World: Our Shared Responsibility,"[11] and the 22

[8]citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-04, 31 NRC 333 (1990).

[9]ASLBP Order at 9.

[10]For example, an IAEA News story, on 2 May, 2005, at
http://www.iaea.org/NewsCenter/News/2005/npt_2005.html
describes seven steps proposed by E-B "to strengthen the NPT regime and with it, world security." Of these, the *first* is the five-year moratorium.

> 1. A five-year moratorium on building new facilities for uranium enrichment and plutonium separation. "There is no compelling reason for building more of these proliferation-sensitive facilities, the nuclear industry already has more than enough capacity to fuel its power plants and research facilities," Dr. ElBaradei said.

[11]UN Panel on Threats, Challenges and Change (2004), "A More Secure World: Our Shared Responsibil-

February 2005 IAEA Expert Group Report[12]

Now, we acknowlege that the wording of the contention is a little strong, that "USEC would not be able to survive," if there were a five year moratorium on uranium enrichment. And it may be that we wouldn't be able to demonstrate that at hearing, so the Panel's assertion that "PRESS' assertions, even if accurate, would be insufficient to support its contention" may be literally correct. And we would be prepared to weaken our claim somewhat. However, we are only obliged to provide "some alleged fact or facts in support of [our] position[13]" at the contention admissibility stage, which we believe we have done.

Finally, we believe that a five year moratorium on uranium enrichment would be so devastating to USEC that it bears serious consideration whatever the LA says about USEC's financial position. In this sense, we feel that the "nexus" is pretty self evident.

Additionally, as we discussed above, we believe that Bases 20.4 and 20.5 were misplaced, and that they are properly placed in support of this contention (and not with Contention 20), providing more facts and expert opinion in support of this contention.

Thus we exhaust the Panel's objections based on 10 C.F.R. §2.309(f)(1)(v).

3.3.3 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The ASLBP Order, at 39, states that, "PRESS does not provide any facts or expert opinion to support this contention, only speculation about USEC's future financial capabilities. Ac-

ity," http://www.un.org/secureworld/report3.pdf

[12] "Multilateral Approaches to the Nuclear Fuel Cycle: Expert Group Report submitted to the Director General of the International Atomic Energy Agency," IAEA, 2005, http://www.iaea.org/Publications/Documents/Infcircs/2005/infcirc640.pdf This is probably the definitive report for the idea of a moratorium. Interestingly, USEC's ACP is described therein as follows: "For the future, unlike Areva and LES, USEC is banking on a new technology that has never operated on a commercial scale. The USEC centrifuge machines will incorporate a number of enhancements that modern industrial techniques and computer technology now make possible. Each one of them is said to be about 12 metres tall and roughly 50 centimetres in diameter, far larger than Urenco's latest model. This represents major engineering challenges and makes for a rather technically risky nuclear project."

[13] ASLBP Order at 9.

cordingly, PRESS has not raised a genuine issue of material fact or law with regard to this contention," and "[t]o the extent that this contention can be construed as aimed at USEC's financial qualifications, it provides no nexus to that concern or any specific criticism of the financial qualifications of USEC that are set out in the LA."

In the first of these quotes, the word "[a]ccordingly," seems to imply that the statement "PRESS has not raised a genuine issue of material fact or law with regard to this contention," (which is an objection in the language of 10 C.F.R. §2.309(f)(1)(vi)) is a conclusion drawn from the first statement, "PRESS does not provide any facts or expert opinion to support this contention, only speculation about USEC's future financial capabilities" (which is an objection under 10 C.F.R. §2.309(f)(1)(v), and which we dealt with above). It seems the Panel has conflated the issue of providing facts and expert opinions with the issue of demonstrating dispute, here. Since we have dealt with the facts and opinions issue already, and since the dispute-demonstration is erroniously claimed as a consequence, we think this point doesn't need to be defended.

Regarding the second quote, we agree with the Panel that we failed to state the dispute explicitly. This was a quite straightforward oversight on our part. We'd like to appeal for clemency on the grounds that it was a simple oversight, but that the moratorium issue has potentially serious consequences, and that the case law[14] seems to suggest that contentions failing to controvert the application "may" be dismissed, not that they "must" be dismissed. The nexus, of course, is that USEC hasn't considered the the rather significant all-round impacts that a five year moratorium on uranium enrichment would cause. It's a claim of omission.

[14]ASLBP Order at 10, cites LBP-93-23, CLI-94-02, LBP-92-37 in relation to §2.309(f)(1)(vi). The case law is too old to appear on the NRC Website, and predates §2.309(f)(1)(vi) itself by a decade. We wonder if the parties would "return the favor" and send as attachments any case law that is older than, say, 1999, which is roughly where the NRC Website cuts off.

3.4 Contention 18: USEC Incompetence

In Contention 18, we produce USEC's violations history, relate it to various aspects of the ER, and conclude (Basis 18.6) that USEC fails the requirements for the approval of applications under 10 C.F.R §70.23(a).

This raises the very interesting question. How much does a licensee need to violate the NRC regulations before their behavior is recognized as a pattern? Clearly, repeat offenders are not dissuaded by the tiny fines or the stigma of having enforcement notices. And USEC is the NRC's number one materials license violator, by a significant margin[15].

The Board has presented a fairly extensive discussion of what it frames as "character issues." We addressed them above in section 2.6.2.

However, the ASLBP Order denies the admission of Contention 18 solely on the grounds of 10 C.F.R. §2.309(f)(1)(vi). Therefore, we need not address the other criteria.

3.4.1 10 C.F.R. §2.309(f)(1)(vi) – Genuine Dispute Regarding Specific Portions of Application

The ASLBP Order, at 39, states, "If USEC's current management is unfit, it would be a cause to deny the license. Here however, PRESS has not presented any information indicating that any person or procedure associated with past violations will be employed at, or involved with, the ACP. Therefore PRESS has not raised a genuine dispute with regard to a material issue of fact or law."

This contention was one of four contentions that the Panel invited us to answer questions about at the July 19 pre-hearing teleconference. Clearly, USEC hasn't identified any personnel associated with the proposed ACP at this point, so we are unable to present any information indicating that any individual person associated with past violations will be employed at, or involved with, the ACP. (At least, not without a corporate personhood argument.) However, we did present an argument based on continuity of *procedure.* In the

[15]See PRESS Petition, Appendix B for a graphic representation and comprehensive analysis.

Transcript, it's at page 56 et seq.

> JUDGE McDADE: Okay. And with regard to the last contention, we want to move on here. There is an allegation here with regard to past enforcement actions taken against USEC.
>
> MR. TODD [for PRESS]: Right.
>
> JUDGE McDADE: At least what I was about to discern, there was nothing in there indicating that any of the people who were the basis for the enforcement actions in the past are going to be in any way connected with the ACP, if it gets approved, or that that any of the procedures were the basis of enforcement actions in the past are going to be incorporated into the procedures of the ACP. Do you have any evidence in the record that indicates that any of those people or features will be involved in the proposed ACP?
>
> MR. TODD: Yes sir, the license application, page 1 shows us that the existing facilities will be refurbished to accommodate the ACP, so the same facilities. I'd suggest, although I wasn't able to find an organizational structure for the gaseous diffusion plant, but I'd suggest that the organizational structure is remarkably similar. This is talk [sic] you're going to process. [16]
>
> In page of the environmental report there's a quote here. It says "No sites other than the DOE reservation in Piketon, Ohio or PGDP" meaning Paducah, I presume "offered the unique combination of existing skilled work force and existing environmental data, regulatory programs and infrastructure relevant to uranium enrichment." That suggests that USEC intends to draw from the same population of people and to apply the same techniques as they did at the GDP.
>
> Regarding corporate identity, the license application 1[-]47, Section 1.2.1, called corporate identity says "the NRC has issued certificates of compliance to the

[16] i.e, we're arguing process, not people.

United States Enrichment Corporation a wholly-owned subsidiary of USEC to operate Paducah and portions of GDPs." This is to persuade the NRC of their experience, but it also shows there isn't so much difference between the GDP operators and the ACP operators.

Let's see, the license application has examples of extrapolation, for example, in Section 1.3.4 they use flood history which uses historical data and a third party model by the U.S. Army Corps of Engineers. Historical data from 1930 to 2001 to predict that the ACP site will not be flooded.

Here, we've presented some historical data. The staff again, made an error in saying that the latest was in 1999, I believe they said. Here's how it goes. There's two in 1997; five in 1998; four in 1999; two in 2000, one in 2001; then the Piketon Plant went on standby, cold standby, so the inciden[ce] goes down.

In 200[2], there's one. USEC had a break in 2003. There wasn't an enforcement action notice there and in 2004, there's a new one which is also in the same subject as the Level 2, the Level 2 assessment. It concerns the quality control managers suspended and terminated for raising safety concerns. That's [E]A-04123.

So the argument is that if USEC has 15 enforcement actions in seven years, then we have no other baseline data to assess how frequently these are going to occur in the future. Then over the course of 30 years, we can expect that they shall receive 60, including four level 2 assessments.

The Panel has neglected to consider that in the oral testimony we presented information indicating that procedures associated with past violations would be employed at, or involved with, the ACP. PRESS has raised a genuine dispute with regard to a material issue of fact or law.

Moreover, in our bases, we relate specific violations to specific portions of the ER.

Thus we exhaust the Panel's objection to this contention.

Motion for Leave to Augment Appeal

10 C.F.R. §2.341(c)(2) regulations limit the length of this brief to 30 pages, but our treatment is incomplete in 30 pages, so we move for leave to augment this appeal to finish the treatment.

Respectfully submitted,

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Date: October 17, 2005

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A CLI-04-30, section IV, "Applicable Requirements"

IV. Applicable Requirements

A. The Commission will license and regulate byproduct, source, and special nuclear material at the American Centrifuge Plant in accordance with the Atomic Energy Act of 1954, as amended. Section 274c.(1) of the Act was amended by Public Law 102-486 (October 24, 1992) to require the Commission to retain authority and responsibility for the regulation of uranium enrichment facilities. Therefore, in compliance with law, the Commission will be the sole licensing and regulatory authority with respect to byproduct, source, and special nuclear material for the American Centrifuge Plant, and with respect to the control and use of any equipment or device in connection therewith.

Many rules and regulations in 10 CFR chapter I are applicable to the licensing of a person to receive, possess, use, transfer, deliver, and process byproduct, source and special nuclear material in the quantities that would be possessed at the American Centrifuge Plant. These include 10 CFR Parts 19, 20, 21, 30, 40, 51, 70, 71, 73, 74, 95, 140, 170, and 171 for the licensing and regulation of byproduct, source, and special nuclear material, including requirements for notices to workers, reporting of defects, radiation protection, waste disposal, decommissioning funding, and insurance.

With respect to these regulations, the Commission notes that this is the third proceeding involving the licensing of an enrichment facility. The Commission issued a number of decisions in an earlier proceeding regarding a proposed site in Homer, Louisiana. These final decisions, Louisiana Energy Services (Clairborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992); Louisiana Energy Services (Clairborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997); and Louisiana Energy Services (Clairborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998); resolve a number of issues concerning uranium enrichment licensing and may be relied upon as precedent.

Consistent with the Act, and the Commission's regulations, the Commission is providing

the following direction for licensing uranium enrichment facilities:

1. Environmental Issues

a) General: 10 CFR Part 51 governs the preparation of an environmental report and an EIS for a materials license. USEC's environmental report and the NRC staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative.

b) Treatment of depleted uranium hexafluoride tails: As to the treatment of the disposition of depleted uranium hexafluoride tails (depleted tails) in these environmental documents, unless USEC demonstrates a use for uranium in the depleted tails as a potential resource, the depleted tails will be considered waste. An approach for disposition of tails that is consistent with section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for disposition of the USEC depleted tails. The Commission is considering matters of law applicable to disposition of tails which may be dispositive of matters arising in a USEC proceeding. See Louisiana Energy Services (National Enrichment Facility), CLI-04-25, slip op. at 5 (Aug. 18, 2004). The NRC staff may consider the DOE EIS in preparing the staff's EIS. Alternatives for the disposition of depleted uranium tails will need to be addressed in these documents. As part of the licensing process, USEC must also address the health, safety, and security issues associated with the storage of depleted uranium tails on site pending removal of the tails from the site for disposal or DOE dispositioning.

2. Financial Qualifications

Review of financial qualifications for enrichment facility license applications is governed by 10 CFR Part 70. In Louisiana Energy Services (Clairborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997) the Commission held that the 10 CFR Part 70 financial criteria, 10 CFR 70.22(a)(8) and 70.23(a)(5), could be met by conditioning the LES license to require funding commitments to be in place prior to construction and operation. The specific license condition approved in that proceeding, which addressed a minimum equity contribution of 30% from the parents and affiliates of LES partners prior to construction

of the associated capacity and having in place long term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts prior to constructing or operating the facility is one way to satisfy the requirements of 10 CFR Part 70.

3. Antitrust Review

The USEC enrichment facility is subject to sections 53 and 63 of the Act, and is not a production and utilization facility licensed under section 103. Consequently, the NRC does not have antitrust responsibilities for USEC similar to the antitrust responsibilities under section 105 of the Act. The NRC will not entertain or consider antitrust issues in connection with the USEC application in this proceeding.

4. Foreign Ownership

Section 193(f) of the Act addresses foreign ownership, control and domination of enrichment facilities with regard to USEC and its successors. The requirements of section 193(f) are incorporated in 10 CFR 70.40.

5. Creditor Requirements

Pursuant to section 184 of the Act, the creditor regulations in 10 CFR 50.81 shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235. In addition, the creditor regulations in 10 CFR 70.44 shall apply to the creation of creditor interests in special nuclear material. These creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by 10 CFR 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States.

6. Classified Information

All matters of classification of information related to the design, construction, operation, and safeguarding of the American Centrifuge Plant shall be governed by classification guidance in "DOE Classification Guide for Isotope Separation by the Gas Centrifuge Process

(CG-IGC-1)" (June 2002) and any later versions. Any person producing such information must adhere to the criteria in CG-IGC-1. All decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to de novo review in this proceeding.

7. Access to Classified Information

Portions of USEC's application for a license are classified Restricted Data or National Security Information. Persons needing access to those portions of the application will be required to have the appropriate security clearance for the level of classified information to which access is required. Access requirements apply equally to intervenors, their witnesses and counsel, employees of the applicant, its witnesses and counsel, NRC personnel, and others. Any person who believes that he or she will have a need for access to classified information for the purpose of this licensing proceeding, including the hearing, should immediately contact the NRC, Division of Fuel Cycle Safety and Safeguards, Washington, D.C., 20555, for information on the clearance process. Telephone calls may be made to Linda Marshall, Licensing Assistant, Special Projects Branch. Telephone: (301) 415-8129.

8. Obtaining NRC Security Facility Approval and for Safeguarding Classified Information Received or Developed Pursuant to 10 CFR Part 95

Any person who requires possession of classified information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC's Division of Nuclear Security (NSIR), Washington, D.C., 20555. Telephone calls may be made to A. Lynn Silvious, Chief, Information Security Section. Telephone: (301) 415-2214.

B. Reconsideration

The above guidance does not foreclose the applicant, any person admitted as a party to the hearing, or an entity participating under 10 CFR 2.315(c) from litigating material factual issues necessary for resolution of contentions in this proceeding. Persons found by the Commission to have standing and entities participating under 10 CFR 2.315(c) as of the

date of the Commission's order on standing may also move the Commission to reconsider any portion of Section IV of this Notice and Commission Order where there is no clear Commission precedent or unambiguously governing statutes or regulations. Any motion to reconsider must be filed within 10 days after the Commission's order on standing. The motion must contain all technical or other arguments to support the motion. Other persons granted standing and entities participating under 10 CFR 2.315(c), including the applicant and the NRC staff, may respond to motions for reconsideration within 20 days of the Commission's Order. Motions will be ruled upon by the Commission. A motion for reconsideration does not stay the schedule set out above in section III.D.(4). However, if the Commission grants a motion for reconsideration, it will, as necessary, provide direction on adjusting the hearing schedule.

B Excerpt from CLI-99-11

Our strict contention rule serves multiple interests. First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. See North Atlantic Energy Serv. Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 NRC ___ (Mar. 5, 1999), slip op. at 11 n.8; Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974). Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.

In 1989 the Commission toughened its contention rule in a conscious effort to raise the threshold bar for an admissible contention and ensure that only intervenors with genuine

and particularized concerns participate in NRC hearings. See Final Rule, Contentions, 54 Fed. Reg. at 33,168. By raising the admission standards for contentions, the Commission intended to obviate serious hearing delays caused in the past by poorly defined or supported contentions. At the time, hearings often were "delayed by months and even years of pre-hearing conferences, negotiations, and rulings on motions for summary disposition." Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1996) (citing Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410 (1985), where 500 contentions were submitted, 60 were admitted, and only 10 were actually litigated after a period of two and a half years of negotiations).

Prior to the contention rule revisions, Licensing Boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation. Indeed, in practice, intervenors could meet the rule's requirements merely "by copying contentions from another proceeding involving another reactor." Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986). Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination. See Cotter, Nuclear Licensing: Innovation Through Evolution in Administrative Hearings, 34 Admin. L. Rev. 497, 505, 508 (1982). Congress therefore called upon the Commission to make "fundamental changes" in its public hearing process to assure that "hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors." H.R. Rep. No. 177, 97th Cong. 1st Sess. at 151 (1981).

The 1989 revisions to the contention rule thus insist upon "some factual basis" for an admitted contention. 54 Fed. Reg. at 33,171. The intervenor must "be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the applicant on a material issue." Id. These requirements are intended to "preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which

might produce relevant supporting facts." Id. Although in quasi-formal adjudications like license renewal an intervenor may still use the discovery process to develop his case and help prove an admitted contention, contentions shall not be admitted if at the outset they are not described with reasonable specificity or are not supported by "some alleged fact or facts" demonstrating a genuine material dispute. Id. at 33,170.

This is not to say that our contention rule should be turned into a "fortress to deny intervention." Peach Bottom, 8 AEC at 21. The Commission and its Boards regularly continue to admit for litigation and hearing contentions that are material and supported by reasonably specific factual and legal allegations. See, e.g., Seabrook, 49 NRC at ___, slip op. at 13-17; Private Fuels Storage, L.L.C. (ISFSI), LBP-98-7, 47 NRC 142 , aff'd, CLI-98-13, 48 NRC 26 (1998).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of

USEC Inc.
American Centrifuge Plant (ACP)

Docket No. 70-7004

ASLBP No. 05-383-01-ML

October 18, 2005

Certificate of Service

I hearby certify that copies of the " **Notice of Appeal and Brief and Motion for Leave to Augment Appeal** by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS)" ("PRESS Appeal") was served upon the persons listed below by email on the 17th of October, 2005, and by deposit in the United States mail on this day, the 18th of October, 2005.

The original, signed, paper copy is "Copy 1" to the Secretary of the Commission. The remainder of the paper copies are initialled duplicates.

This service list accounts for several practical developments under Docket No. 70-7004. In particular, we note that Lisa Clark and Margaret Bupp effectively replaced Melissa Duffy and Marian Zobler for the NRC Staff on September 6, 2005, and that Mr. Sea's email address is now SargentsPigeon@aol.com.

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Additionally, following Karen Valloch, who executed the email distribution of the Licensing Board Memorandum and Order of October 7, 2005, we sent email copies only to the following.

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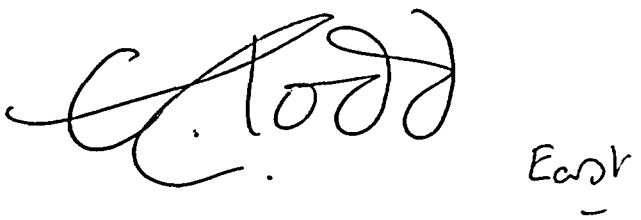

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