

RAS 10708

DOCKETED
USNRC

October 28, 2005 (8:30am)

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

_____)	October 27, 2005
In the Matter of)	
)	Docket No. 70-7004
USEC Inc.)	
(American Centrifuge Plant))	ASLBP No. 05-838-01-ML
_____)	

**USEC INC. BRIEF IN RESPONSE TO
PRESS NOTICE OF APPEAL AND BRIEF AND
MOTION FOR LEAVE TO AUGMENT APPEAL**

Donald J. Silverman
MORGAN, LEWIS & BOCKIUS, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20005
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com

Dennis J. Scott
Assistant General Counsel
and Director, Corporate Compliance
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scottd@usec.com
Counsel for USEC Inc.

TEMPLATE = SECY-021

SECY-02

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

I.	INTRODUCTION	1
II.	APPLICABLE LEGAL STANDARDS	2
III.	PRESS HAS IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION WITH RESPECT TO ITS OPPORTUNITY TO DEVELOP CONTENTIONS.....	2
IV.	PRESS' ACCOUNT OF THE STANDARDS GOVERNING CONTENTION ADMISSIBILITY IDENTIFIES NO ERROR OF LAW OR ABUSE OF DISCRETION.....	5
V.	THE BOARD COMMITTED NO ERROR OF LAW OR ABUSE OF DISCRETION IN RULING ON CONTENTIONS 21, 20, 19 AND 18	10
	A. Contention 21 – Unnecessary Censorship	10
	B. Contention 20 – Need for Proposed Action.....	12
	C. Contention 19 – Enrichment Freeze	15
	D. Contention 18 – USEC Incompetence	17
VI.	PRESS' MOTION TO AUGMENT ITS BRIEF IS UNSUPPORTED AND SHOULD BE DENIED	18
VII.	CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Stations, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001)	17
<i>Dominion Nuclear Connecticut, Inc.</i> (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004)	2
<i>Private Fuel Storage</i> (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004)	17
<i>Yankee Atomic Electric Co.</i> (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996)	5

FEDERAL STATUTES

Nuclear Non-Proliferation Act of 1978, Pub.L. No. 95-242, § 101, 92 Stat. 120 (1978), 42 U.S.C. § 2201 (2000)	16
USEC Privatization Act, 42 U.S.C. § 2243(f)(2)(B) (1996)	16
USEC Privatization Act, 42 U.S.C. § 2297h-1 (1996)	16

FEDERAL REGULATIONS

10 CFR § 2.309(f)(1)(vi)	15
10 CFR § 2.323(b)	19
10 CFR § 2.390	11
10 CFR § 30.33	11
10 CFR § 40.32	11
10 CFR § 70.23	11
10 CFR Part 9	11

MISCELLANEOUS

Agreement Between the U.S. Department of Energy and USEC Inc., Article 3 (June 17, 2002)	16
<i>Louisiana Energy Servs., L.P.</i> , Notice of Receipt of Application for License; Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License; And Notice of Hearing and Commission Order, CLI-04-03 (Jan. 30, 2004)	7
<i>Statement of Policy on Conduct of Adjudicatory Proceedings</i> , CLI-98-12, 48 NRC 18, 22 (1998), 63 Fed. Reg. 41872, 41874 (1998)	4, 14

BEFORE THE COMMISSION

)	October 27, 2005
In the Matter of)	
)	Docket No. 70-7004
USEC Inc.)	
(American Centrifuge Plant))	ASLBP No. 05-838-01-ML
)	

I. INTRODUCTION

PRESS has now filed a “Notice of Appeal and Brief and Motion for Leave to Augment Appeal” (PRESS Brief) in which it argues that its proposed contentions should be admitted. Because PRESS has failed to demonstrate that there has been any error of law or abuse of discretion in the Board’s Decision, the Commission should affirm that Decision and dismiss the PRESS Petition to Intervene. In addition, PRESS’ Motion to Augment its Brief with an additional submittal is unsupported and should be denied.

1-WA/2471827.1

II. APPLICABLE LEGAL STANDARDS

The legal standards applicable to the Commission's review of the Board's decision were previously set forth by the Commission. "The Commission affirms Board rulings on admissibility of contentions if the appellant 'points to no error of law or abuse of discretion.'"² "The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims."³

III. PRESS HAS IDENTIFIED NO ERROR OF LAW OR ABUSE OF DISCRETION WITH RESPECT TO ITS OPPORTUNITY TO DEVELOP CONTENTIONS

The "Introduction" to PRESS' Brief asserts that due to the "unproven" nature of the ACP uranium enrichment technology, and the "magnitude and novelty" of the ACP, it "appears overly strict for the [Board] 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." PRESS Brief at 1. PRESS also states that a "mere sixty days" to, among other things, analyze the ACP application, familiarize itself with NRC regulations and caselaw, and assemble its contentions, was not sufficient, and that it was "several drafts from a properly composed product at the deadline." PRESS Brief at 1-2. Thus, PRESS' first objection is to the time allotted for it to submit its contentions. For the reasons discussed below, PRESS has failed to identify any error of law or abuse of discretion by the Board with respect to the time it was provided to formulate contentions.

First, it was the Commission, not the Board, that established the initial 60 day period for submission of contentions in its October 7, 2004 notice and order (published in the Federal

² *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Stations, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004) (citing *Private Fuel Storage, L.L.C.*, CLI-0021, 52 NRC 261, 265 (2000)).

³ *Id.* at n.25 (quoting *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994)).

Register on October 18, 2004).⁴ Second, PRESS itself acknowledges that the time allotted by the Commission was in accordance with existing law, in particular 10 CFR § 2.309(b)(3)(i). (PRESS states that the 60 day period was the “bare minimum allowed in law.”) PRESS Brief at 1.

Furthermore, PRESS has been afforded more than ample time in which to submit its contentions. USEC’s application was filed over a year ago on August 23, 2004. PRESS well understood that it was the Commission that had established the initial 60 day period, since on December 17, 2004 – the last day on which contentions could be filed under the initial deadline established by Commission’s October 7, 2004 Notice and Order – PRESS filed a request to extend the time for submission of its petition to intervene. The Commission granted this request and extended the time for PRESS to file its petition until February 28, 2005, which was more than 6 months after USEC’s license application was filed and more than 4 months after the Commission’s Notice and Order.⁵

In addition, PRESS has had a considerable period of time – over 7 months since it submitted its contentions – to modify or clarify those contentions and to seek the Board’s approval for such modifications or clarifications, but failed to do so. At no time prior to its

⁴ See USEC, Inc. (American Centrifuge Plant), Notice of Receipt of Application for License, Notice of Availability of Applicant’s Environmental Report; Notice of Consideration of Issuance of License; and Notice of Hearing and Commission Order, CLI-04-320, 60 NRC 426; 69 Fed. Reg. 61411 (Oct. 18, 2004) (Notice and Order).

⁵ See Order, Docket No. 70-7004, slip op. (Dec. 29, 2004). The NRC issued a press release announcing the Notice of Hearing and the availability of the application in ADAMS on October 7, 2004. As a result, Mr. Ewan Todd, PRESS principal representative in this proceeding began interacting with the NRC Staff about the ACP application, and viewing the application, well before the Federal Register Notice had even appeared. See E-mail between Ewan Todd and the NRC Staff (Oct. 12-14, 2004) available as Accession No. ML043090341, in NRC ADAMS at <http://www.nrc.gov/reading-rm/adams/login.html>. Indeed, Mr. Todd’s E-mails make clear that he in fact had access to the application no later than October 12, 2004, thirteen days before public access was withdrawn on October 25, 2004. Order (Dec. 29, 2004). Until such access was withdrawn, PRESS easily could have made a copy of the application, simply by downloading the files. Furthermore, PRESS had ample time and knowledge of USEC’s planned submittal of the application, even before it was filed, to familiarize itself with NRC regulations and prepare for its intervention.

appeal has PRESS filed any request for additional time or sought to modify, supplement or amend its contentions.

In addition, although PRESS points to NRC precedent in which a petitioner was “[d]irected by the Board to ‘address any shortcomings in [its] petition,’” and objects that it “received no such order,” those assertions clearly do not indicate any error of law or abuse of discretion by the Board. PRESS Brief at 2. Neither the Board nor the Commission was, of course, under any obligation to issue such an order.⁶ The Commission in its Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998), 63 Fed. Reg. 41872, 41874 (Aug. 5, 1998), stated explicitly that “the burden of coming forward with admissible contentions is on the proponent. A contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions”

Contrary to PRESS’ assertions, the Board provided every opportunity for PRESS to present and explain its contentions. Although not required to, the Board, in fact, held a telephonic prehearing conference on July 19, 2005, for the express purpose of giving PRESS and the other petitioner a further opportunity to explain a number of their contentions.⁷ PRESS simply failed to make the showing required by NRC regulations to have any contentions admitted.

⁶ The Commission in its October 7, 2004 Notice and Order directed that “In the interest of providing a fair hearing, avoiding unnecessary delays in NRC’s review and hearing process, and producing an informed adjudicatory record that supports the licensing determination to be made in this proceeding, the Commission expects that both the Board and NRC staff, as well as the applicant and other parties to this proceeding, will follow the applicable requirements contained in 10 CFR Part 2 and guidance in the Commission’s Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18 (1998) [63 FR 41872 (August 5, 1998)], to the extent such guidance is not inconsistent with specific guidance in this Order.” Notice and Order, 69 Fed. Reg. at 61413.

⁷ Memorandum and Order (Order Scheduling Oral Argument on the Admissibility of Contentions), Docket No. 70-7004, slip op., (July 12, 2005).

Finally, PRESS' objection to the amount of time that it was afforded to frame its contentions is now being raised for the first time in this appeal, and can be rejected on that basis alone.⁸ Accordingly, PRESS' assertions regarding the time allotted to prepare contentions identify no error of law or abuse of discretion by the Board.

IV. PRESS' ACCOUNT OF THE STANDARDS GOVERNING CONTENTION ADMISSIBILITY IDENTIFIES NO ERROR OF LAW OR ABUSE OF DISCRETION

In Section 2 of its Brief, PRESS discusses the legal standards applicable to decisions on the admissibility of contentions. It begins by summarizing those legal standards, and then concludes that it has "done [its] best" and that it "believe[s] [its] pleadings are sufficiently detailed." PRESS Brief at 3-4. These conclusions are, of course, insufficient to demonstrate any legal error or abuse of discretion by the Board.

PRESS goes on to provide "two additional pieces of evidence that [it has] the ability to support [its] contentions" – the appeal itself that it has filed with the Commission, and its performance at the July 19, 2005 prehearing conference. PRESS Brief at 4-5. PRESS also: (1) challenges the "institutional culture of the NRC Boards and Staff (concluding that "perhaps" that culture has "turned the [] rule [governing admissibility of contentions] into a 'fortress to deny intervention'" (PRESS Brief at 5); (2) generally describes the type of discovery it would like to undertake (PRESS Brief at 5-6); and (3) attempts to explain why it believes that its "adversarial participation will be essential in assisting the NRC to develop a sound record in this uniquely important case." PRESS Brief at 6.

⁸ E.g., *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996) ("First, Petitioners improperly raise this argument for the first time on appeal and fail to address the five balancing factors for admission of late-filed contentions We reject the argument for that reason alone." (Citations omitted)).

Again, none of these assertions points to any legal error or abuse of discretion by the Board. Moreover, the degree to which PRESS believes it may or may not be able to contribute to development of a sound record is not the relevant standard for the Commission to consider in evaluating PRESS' appeal of the Board's Decision on admissibility.

PRESS then goes on in Sections 2.2 through 2.7 of its Brief to discuss individually the various legal standards applicable to the admission of contentions in NRC proceedings. In Section 2.2, PRESS merely states that the Board "offers no explicit elaboration" on the principle that a petitioner must provide a "specific statement of the issue of law or fact to be raised or controverted." PRESS Brief at 6. The Board was not required to provide any such elaboration. There is ample NRC precedent on this point which PRESS could have reviewed if it desired a better understanding of this legal standard.

In Section 2.3, PRESS simply states that "we don't believe the [Board] has faulted any of our contentions for failing to provide a brief explanation" of the basis for the contentions. PRESS Brief at 7.² Of course, this assertion, as well, points to no legal error or abuse of discretion.

In Section 2.4, PRESS raises vague objections to the manner in which the scope of the proceeding was defined. PRESS Brief at 7-8. Of course it was the Commission, not the Board, that defined the scope of this proceeding, and it did so in accordance with all applicable

² Contrary to PRESS' assertion, the Board at the outset of its discussion of PRESS' contentions stated "[i]t is apparent to the Board, because PRESS' contentions were presented in a vague, disorganized, and repetitive fashion, that USEC and the NRC staff had some difficulty understanding and responding to the PRESS petition. Nonetheless, because PRESS is proceeding *pro se* and has attempted to present its numerous concerns regarding the proposed ACP, we address each contention in depth to ensure we do not overlook any legitimate issue simply because of the way it is articulated." Decision at 11.

requirements, and consistent with past practice and other comparable hearing notices.¹⁰ No legal error or abuse of discretion by the Board is alleged.

In Section 2.5, PRESS attempts to argue that its contentions are “material” and that if they were decided in its favor, it would “make a difference in the outcome of the licensing proceeding.” PRESS Brief at 8. PRESS makes this argument primarily on the basis of “Table 1” in its Brief. That Table does little more than juxtapose the phrases “License Conditions Imposed” or “License Denied” with its various contentions. PRESS Brief at 9, Table 1. PRESS completely misses the point. The Commission’s standard is that, in order to be admissible, a contention must raise issues material to the substantive findings to be made by the NRC. One cannot decide whether a contention is “material” merely by stating that, PRESS’ desired remedy for its contention would be for the NRC to impose license conditions or deny the license. Instead, the NRC must consider the actual *substance* and *content* of the allegations in the contention, in order to determine if those allegations identify any noncompliances with any NRC regulatory requirements and are material to the determinations that must be made by the NRC in deciding whether or not to issue a license under the standards established by the NRC.¹¹

¹⁰ See, *Louisiana Energy Servs., L.P.*, Notice of Receipt of Application for License; Notice of Availability of Applicant’s Environmental Report; Notice of Consideration of Issuance of License; And Notice of Hearing and Commission Order, CLI-04-03 (Jan. 30, 2004). In PRESS’ discussion of the scope of the proceeding, it quotes Section II.C of the Commission’s October 7, 2004 Notice and Order and then states that “this leaves Section IV [of the Notice and Order] as the principal statement of the scope of the proceeding.” PRESS Brief at 7. To the extent that PRESS has any issues with respect to Section IV of the Commission’s Notice and Order, it was obligated to move for reconsideration within 10 days of the Commission’s ruling on standing. Notice and Order, 69 Fed. Reg. at 61415. PRESS has never filed such a motion.

¹¹ For example, PRESS states that “it [is] obvious that the [Board] would have to impose license conditions on USEC that they may only possess uranium enriched to 5% ²³⁵U if they found in favor of our Contention 4” PRESS Brief at 8. (PRESS’ Contention 4 alleges that “USEC has not demonstrated a market for 10% assay” enriched uranium. PRESS Petition at 18). But Contention 4 never identifies any NRC requirement for USEC to demonstrate that there is a “market” for 10% enriched uranium, and in fact no such requirement exists. Thus, a mere statement that a license condition is PRESS’ desired remedy falls far short of demonstrating the requisite materiality.

Thus, PRESS' Table 1 identifies no legal error or abuse of discretion and provides no basis for admitting any of PRESS' contentions.

Section 2.6 of PRESS' Brief places some of the Board's various bases for denying the admissibility of the PRESS contentions into "class[es] of objection" that are set forth in PRESS' Table 2. PRESS also takes issue with statements by the Board that it failed to provide copies of documents that it referenced in its Petition. PRESS argues that it was not required to "provide" actual documents, but could merely reference them. PRESS Brief at 11-12.

Clearly, PRESS' Table 2 alleges no legal error or abuse of discretion. As for whether PRESS was required to "provide" documents, the point made by the Board is that PRESS did not adequately support its contentions with sufficient facts or expert opinion. The Board repeatedly found that PRESS had failed to provide sufficient information to support its contentions. For example, with respect to PRESS Contention 6, which is the first contention in PRESS' Table 2 labeled as "[reference] not provided" the Board stated:

"Basis 6.2 refers to a letter which PRESS states was addressed to [NIOSH] and signed by Daniel J. Minter, the President of [PACE] Local 5-689, which, according to PRESS, states: 'There are an estimated 100 personal interviews that Dr. Michaels [we are not told anything about this individual] conducted on our Site assessment that NIOSH would have access to that would be very helpful, as well as available congressional testimony on the website.' PRESS provides no further information. The letter is neither provided nor explained. Likewise, PRESS does not discuss the nature of the interview information, or how it would be helpful to support its proposed contention."

Decision at 22. PRESS clearly failed to provide sufficient information to support its contention. It failed to provide an explanation of the relevance of the document or the information contained in its petition, and because it failed to provide the document, the Board could not give it further review. Furthermore, PRESS does not identify a single contention that was rejected by the Board exclusively because PRESS failed to provide a copy of a referenced document. Indeed, the Board did not reject any contention on that basis alone.

In Section 2.6.2, PRESS discusses some of the NRC case law relating to “character” in NRC licensing proceedings. PRESS Brief at 11-14. PRESS asserts that the circumstances with the ACP are “significantly different” than the two previous NRC cases it discusses, because the ACP application “represents a major construction project, followed by 30 years of operation.” PRESS Brief at 13. The significance of this alleged distinction to the Commission’s determination as to whether there has been a legal error or abuse of discretion by the Board is not evident.

PRESS also alleges that its circumstances are different because it “provided 12 pages of extensive analysis” in Appendix B of its Petition “*relating* USEC’s record of NRC violations.” PRESS Brief at 13 (emphasis added). PRESS’ Appendix B does indeed “relate” or describe various historical violations by the United States Enrichment Corporation – USEC’s subsidiary. It does not, however, “analyze” those in a way that provides any nexus or connection to the anticipated personnel or organization to be employed at the ACP.¹² Thus, the Board correctly concluded that PRESS had not demonstrated the requisite nexus or relationship between the character issues and the licensing actions under consideration.¹³

Furthermore, contrary to PRESS’ argument, the principle enunciated in the cited Commission decisions reflects a common sense approach to contentions that seek to attack an applicant’s character on the basis that it has been cited for violations in its previous licensed activities. Unless a petitioner is required to show that there is a direct relationship between the violations and the current application, the Commission’s objective of avoiding meritless litigation would be frustrated. Accordingly, PRESS has failed to give the Commission any basis for questioning the Board’s determination.

¹² See PRESS Petition at Appendix B.

¹³ Decision at 28-29.

It is also important to note that PRESS' assertions regarding the United States Enrichment Corporation's enforcement history at the gaseous diffusion plants (GDP) are misleading and do not represent an accurate characterization of that history. As USEC discussed in its Answer to PRESS' original Petition, the NRC's Licensee Performance Reviews, its Annual Reports to Congress regarding the GDPs, and the 2003 renewals of the GDP Certificates of Compliance for full five year terms all clearly demonstrate that GDP activities are being conducted safely and securely.¹⁴

Finally, in Section 2.7, PRESS does no more than quote a provision of 10 CFR § 2.309. PRESS Brief at 14.

In short, after 14 pages of PRESS' Brief, there is no basis presented for concluding that the Board committed any error of law or abuse of discretion. Thus, the only remaining question for the Commission to consider is whether PRESS' assertions with respect to the four contentions it discusses in Section 3 of its Brief identify any error of law or abuse of discretion. Each of those contentions is addressed below.

V. THE BOARD COMMITTED NO ERROR OF LAW OR ABUSE OF DISCRETION IN RULING ON CONTENTIONS 21, 20, 19 AND 18

A. Contention 21 – Unnecessary Censorship

In this Contention, PRESS alleges that there were "unnecessary redactions" in license application documents. PRESS Brief at 16. In particular, the Contention reads: "Petitioners contend that some of the public censorship of the USEC documents was unnecessary." PRESS Petition at 51.

The Board correctly concluded that "PRESS has not suggested any issue with regard to the LA [License Application] or ER [Environmental Report] which might have been implicated

¹⁴ Answer to Petition to Intervene By Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) at 18-20 (March 23, 2005).

by this ‘censorship’ and thus fails to raise a genuine dispute with regard to any issue of material fact or law in this contention.” Decision at 42.

Contention 21 simply focuses on the public availability of portions of the ACP application materials, and not on any deficiency in those materials. As such, as the Board recognized, it does not raise any matter within the scope of this proceeding. As defined by the Commission, the scope of the proceeding encompasses: “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.”¹⁵ Contention 21 focuses on the application of 10 CFR § 2.390 governing “Public Inspections, exemptions, requests for withholding,” and not on any aspect of Sections 30.33, 40.32, 70.23 or Part 51.

PRESS states that it has been “frustrated” by [two] layers of secrecy – classified information and proprietary information.” PRESS Brief at 16. However, PRESS has made no attempt to request the withheld information or to avail itself of any of the procedures available under NRC regulations for seeking such access. In particular, it could have filed a Freedom of Information Request pursuant to 10 CFR Part 9 or sought a protective order for access to proprietary information. It also could have utilized procedures set forth in the Commission’s regulations governing access to classified information. There is no indication that it pursued any of these paths.

Moreover, PRESS also has failed to show that the withholding of certain parts of the application in accordance with Section 2.390 and NRC policies for withholding sensitive information, had any effect on its ability to frame its contentions. For example, PRESS

¹⁵ Notice and Order, 60 NRC at 428.

emphasizes the withholding of ER figures 3.4.1-1, 3.4.2-1 and 3.4.2-2. PRESS Brief at 16. In the prehearing conference, however, PRESS indicated that it was able to develop a “fairly good idea” of the redacted information from other sources. Transcript at 36.

In short, PRESS has alleged no error of law or abuse of discretion in the Board’s decision not to admit this contention.¹⁶ For the reasons discussed above, the Board’s decision not to admit this contention should be affirmed.

B. Contention 20 – Need for Proposed Action

Contention 20 reads: “Petitioners contend that there is no need for the proposed action. The future of power generated by enriched uranium is very uncertain. There is a growing understanding among decision makers that nuclear power is not only unsafe and generating huge amounts of dangerous wastes but is also expensive and unnessary (sic).” Petition at 48. The Board’s Decision discusses the alleged bases of Contention 20 and correctly concludes that Contention 20 is not admissible. Decision at 40-41.

PRESS first argues that the Board erroneously concluded that this contention fails to raise a genuine issue of fact or law. PRESS Brief at 18. The only basis for PRESS’ challenge to the Board’s decision in this regard is its statement that “[o]n the contrary, the contention raises the issue that ‘there is no need for the proposed action.’” PRESS Brief at 18. This superficial response to the Board’s reasoning fails to satisfy PRESS’ burden of identifying an error of law or

¹⁶ PRESS states correctly that the ACP Integrated Safety Analysis (ISA) Summary is not available for public review and quotes, as error, a statement by the Board in the context of a different contention that “PRESS fails to discuss or analyze USEC’s ISA [Summary].” PRESS Brief at 17. PRESS fails to state that USEC in its Answer to PRESS’ contention regarding the “domino effect” stated that a centrifuge crash event had been analyzed and discussed in the ISA Summary and also pointed out that the Environmental Report – which is publicly available - had also mentioned that the casing provides containment such that debris remains confined in the machine in the unlikely event of a machine failure. USEC Answer to PRESS Petition at 30. PRESS, however, failed to avail itself of procedures which might have afforded it access to the ISA Summary. Thus the Board’s statement is not in error.

abuse of discretion by the Board, and does no more than express disagreement with the Board's ultimate conclusion without any basis or explanation.

The Board made clear in its Decision that, although the contention was labeled "Need for Proposed Action," PRESS did "not offer any analysis of USEC's discussion of need" in its ER. Decision at 41. Thus, PRESS identified neither error nor omission in USEC's analysis of the need for the facility. This was only one of the bases upon which the Board relied in rejecting this contention.

PRESS next argues that the Board erred in concluding that the contention "raises policy questions outside the scope of the proceeding." PRESS Brief at 18. PRESS relies on the fact that a portion of 10 CFR Part 51 that addresses the format of Environmental Impact Statements (EIS), rather than the content of USEC's ER, calls for an EIS for "nuclear power plant construction or siting" to consider "potential impact of conservation measures in determining the demand for power and consequent need for additional generating capacity." PRESS Brief at 18-19. On its face, this provision does not apply to the ACP. Furthermore, USEC was under no obligation to consider the impact of potential future electricity conservation measures on the need for new nuclear power plants in connection with its application for the ACP – a uranium enrichment facility. Such an inquiry is clearly beyond the scope of this proceeding. Thus, the Board was correct in ruling that PRESS' vague references to various articles and reports relating to such topics as the cost of nuclear power and renewable energy resources did not raise an issue within the scope of this proceeding.

PRESS next argues that the Board erroneously concluded that it had not alleged sufficient supporting facts or expert opinions. PRESS Brief at 19-21. PRESS bases its challenge to the Board's reasoning on: (1) its assertion that it was "nowhere required to *provide* cited

documents,” and (2) its “belief” that the references it cited relating to the costs of nuclear power and renewable energy resources support its contention. PRESS Brief at 18-19 (emphasis in original).

The Board correctly ruled that referencing numerous articles and documents “without providing them” was insufficient to support this contention, and that the various references raise “policy questions outside the scope of this proceeding.” Decision at 41. “A contention’s proponent not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement”¹⁷ PRESS was required to provide sufficient factual information to support its contention. By electing not to provide copies of its references, PRESS effectively limited the Board to consideration of its description of those references.

PRESS objects to the Board’s finding that Contention 20 “fails to challenge any specific portion of the application” (Decision at 41), by arguing that “although we didn’t cite ER § 1.1 by section number, we did identify the portion quite unambiguously by reference to its content.” PRESS Brief at 21. This does not address the Board’s point, which concerns a matter of substance, not mere form. Contention 20 does not mention, let alone challenge, the factors cited in the ER concerning the demand for uranium enrichment services. It does not cite any fact or opinion that is a purported basis for disputing any statement in the ER, or for asserting that the ER failed to address some necessary matter. Section 2.309(f)(1)(vi) specifically requires contentions to address the application, not simply be related to a subject discussed in the application. Contention 20 does not meet this standard. Consequently the Board had ample

¹⁷ Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 22 (1998).

reason to find that Contention 20 did not provide sufficient supporting facts or expert opinions. PRESS' Brief identifies no facts or expert opinions which the Board overlooked or ignored.

Next, PRESS again argues that by questioning the "need" for the ACP, and by providing references to documents that "discuss various conservation measures," it has met its burden to identify a genuine dispute of material fact or law. PRESS Brief at 21. As discussed above, these general statements and documentary references are insufficient to support the contention. Thus, PRESS has failed to identify any error of law or abuse of discretion.¹⁸ For the reasons discussed above, the Board's decision not to admit this contention should be affirmed.

C. Contention 19 – Enrichment Freeze

In this Contention, PRESS alleged that "there may be an international freeze on uranium enrichment. In that case USEC would not be able to survive." Petition at 47.

PRESS' first argument is that the subject of the contention is not whether there should be an international freeze on uranium enrichment, but rather what impact such a freeze would have on USEC's financial condition, and that this issue is within the scope of the proceeding. PRESS Brief at 22. The Board correctly rejected this contention on several bases. One of those was that to the extent that the contention raised the issue of a potential international uranium enrichment freeze, it "raises issues of international policy that are unrelated to the licensing criteria of the NRC." Decision at 39-40. Furthermore, PRESS' assertions regarding the potential for such a freeze and its implications for USEC's financial qualifications were, as the Board recognized, speculative at best. Decision at 39. Current U.S. law not only permits, but encourages the development of U.S. advanced uranium enrichment production.¹⁹ For PRESS' speculative

¹⁸ PRESS goes on to acknowledge that, as the Board concluded, "the Petition did fail to discuss ER § 1.1 [relating to need for the facility] or provide the nexus" to the ACP application. PRESS Brief at 21.

¹⁹ The USEC Privatization Act clearly reflects the U.S. Government's intention to "provide for the public interest" by, among other things, maintaining a "reliable and economical domestic source of enrichment

“enrichment freeze” to become reality, it would require a complete reversal of the U.S. energy policy and the repeal of current federal law.²⁰ There is no requirement, nor has PRESS pointed to any requirement, in NRC regulations that would require USEC to analyze or the NRC to consider such speculation.

PRESS next takes issue with the Board’s determination that it did not provide adequate facts or expert opinion to support its contention. PRESS Brief at 22-23. PRESS’ basis for disagreement with the Board is its position that it is not required to provide supporting documents as opposed to simply providing references. PRESS Brief at 22-23. As discussed earlier, PRESS misses the point. The Board’s discussion of the absence of the cited document is part and parcel to its overall determination that PRESS did not meet its burden of supporting the contention with adequate facts or opinions. Moreover, nowhere in its Brief does PRESS identify any specific facts or opinions which it provided and which were ignored by the Board.

PRESS then goes on to improperly cite, for the first time in its Brief, *new* references, including a May 5, 2005 news story, a 2004 United Nations report, and a February 2005 IAEA report. PRESS Brief at 23-24. Those newly referenced materials cannot serve as the basis for overturning the Board’s decision.²¹ Further, even if considered, at most they amount to no more

services.” 42 U.S.C. §§ 2297h-1, 2243(f)(2)(B) (1996). Article 3 of the Agreement Between the U.S. Department of Energy (“DOE”) and USEC Inc. (“USEC”), dated June 17, 2002 calls for, among other things, the “deployment of new, cost-effective advanced enrichment technology in the U.S. on a rapid schedule.” Finally, the Nuclear Non-Proliferation Act of 1978 establishes as a policy of the United States that the U.S. “shall ensure that it will have available the capacity on a long-term basis to enter into new fuel supply commitments consistent with its nonproliferation policies and domestic energy needs” Pub. L. No. 95-242, 101, 92 Stat. 120, (1978), 42 U.S.C. § 2201 (2000).

²⁰ In addition, a review of PRESS’ full contention and basis statement shows that while it made the bare allegation in the contention itself that “USEC would not be able to survive” in the face of an international freeze on enrichment, it said nothing at all about the implications of such a freeze on USEC’s financial condition. See PRESS Petition at 47-48.

²¹ *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004) (citing *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000), *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1966)).

than recommendations and do not make such an “enrichment freeze” in the U.S. any less speculative.

Finally, in connection with the requirement to demonstrate that there is a genuine dispute of material fact or law, PRESS admits that it “failed to state the dispute explicitly” and therefore “appeal[s] for clemency.” PRESS Brief at 25. Clearly, this does not allege any error or abuse of discretion by the Board. For the reasons discussed above, the Board’s decision not to admit this contention should be affirmed.

D. Contention 18 – USEC Incompetence

Contention 18 asserts: “Petitioner contends that as the leading violator of the NRC materials licensees, USEC is incompetent to hold a license to operate a centrifuge plant.” Petition at 42.

The Board found: (1) that PRESS did not allege that any persons who would work on the ACP were involved in any of the past enforcement actions cited by PRESS; and (2) that all of these actions occurred over 5 years ago; and (3) at different facilities operating under different regulations. Decision at 37-38. The Commission cited just such considerations in rejecting a similar contention in *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365-66 (2001). There, the Commission rejected a contention because of its failure to demonstrate a nexus between the proposed licensing action and the enforcement history. Here the Licensing Board correctly found that PRESS also failed to demonstrate such a nexus. Decision at 38. Indeed, PRESS acknowledges in its Brief that it is “unable to present any information indicating that any individual person associated with past violations will be employed at, or involved with, the ACP.” PRESS Brief at 26.

PRESS quotes at length from the transcript of the July prehearing conference, and claims that the Board “neglected to consider that in oral testimony we presented information indicating

that procedures associated with past violations would be employed at, or involved with, the ACP.” PRESS Brief at 28. This characterization of PRESS’ statements at the prehearing conference is wrong. The PRESS elaboration in the prehearing conference did not cite any specific procedures or personnel. Instead, what PRESS’ representative stated at the conference (as reflected in the transcript excerpt quoted by PRESS) is that: (1) “existing facilities” will be used for the ACP; (2) PRESS “wasn’t able to find an organizational structure for the gaseous diffusion plants, but [it nevertheless] suggest[ed] that the organizational structure is remarkably similar;” and that (3) USEC plans to utilize the existing Portsmouth GDP “skilled work force” for the ACP. PRESS Brief at 27. PRESS did not present any direct connection between enforcement actions that spread over some 7 or more years (the most recent of which was almost 3 years old), and two separate facilities – the Paducah and Portsmouth facilities – and failed to show that such information has any probative value for the current proceeding.²² For the reasons discussed above, the Board’s decision not to admit this contention should be affirmed.

VI. PRESS’ MOTION TO AUGMENT ITS BRIEF IS UNSUPPORTED AND SHOULD BE DENIED

PRESS concludes with its “Motion for Leave To Augment Appeal,” in which it cryptically cites the 30 page limit in 10 CFR § 2.341(c)(2) and states that “our treatment is incomplete in 30 pages, so we move for leave to augment this appeal to finish the treatment.”

This motion does not comply with 10 CFR § 2.323(b), which requires that a motion:

²² As the Commission knows, licensees are required to take corrective action in response to enforcement actions, and when there are subsequent violations the NRC considers their relationship to previous corrective actions. Indeed, under the NRC’s Enforcement Policy, a violation is considered to be “repetitive” if it could reasonably have been prevented by the licensee’s corrective action for a previous violation or a previous license finding that occurred “within the past 2 years . . . or the period within the last two inspections, whichever is longer.” NRC Enforcement Policy at 17, n.7. The Commission has acted forcefully when it finds that it cannot have confidence that a licensee will comply with NRC requirements. The NRC has not made such a finding here. To the contrary, the NRC’s Licensee Performance Reviews, its Annual Reports to Congress regarding the GDPs, and the 2003 renewals of the GDP Certificates of Compliance for full five year terms all clearly demonstrate that GDP activities are being conducted safely and securely.

... state with particularity the grounds and the relief sought, be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order. A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

PRESS' motion does not provide adequate grounds, since it does not explain why it could not comply with the page limit. It does not state with adequate particularity the relief sought, since it fails to propose a new page limit, the content of the augmentation or even the time such an augmentation would be filed. In addition, PRESS has not certified that it made an effort to contact the other parties concerning this request, and USEC has not been contacted.

Not only is the PRESS motion wholly inadequate, but the further delay it would cause is clearly unjustified. There is no reason that, if PRESS felt that additional pages were needed to express its views, it could not have filed a motion earlier, rather than on the date its filing was due and could not have filed a proffer of the additional pages. Accordingly, the motion should be denied.

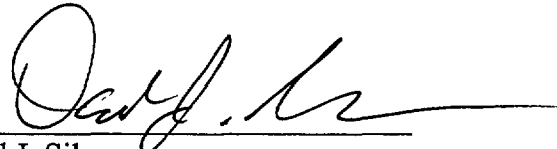
VII. CONCLUSION

There is a clear legal standard that governs the Commission's review of the Board's Decision on the admissibility of contentions and its disposition of PRESS' Brief. The Board's Decision should be upheld absent an error of law or abuse of discretion.

PRESS' Brief belatedly objects to the time it was allotted to formulate contentions, superficially discusses the legal standards governing the admission of contentions without even pointing out any specific legal error or abuse of discretion in the Board's application of those standards, and challenges the Board's determination on four of its contentions based upon its differences of opinion with the Board and its misunderstanding of the Board's rationales. Since

PRESS has failed to identify any error of law or abuse of discretion, the Board's Decision should be affirmed. Finally, PRESS' motion to augment its brief should be denied.

Respectfully submitted,



Donald J. Silverman
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20005
Phone: (202) 739-5502
E-mail: dsilverman@morganlewis.com

Dennis J. Scott, Esq.
Assistant General Counsel and
Director, Corporate Compliance
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scotttd@usec.com
Counsel for USEC Inc.

Dated October 27, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)

) October 27, 2005

)
USEC Inc.)
(American Centrifuge Plant))

) Docket No. 70-7004

) ASLBP No. 05-838-01-ML
_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Brief in Response to PRESS Notice of Appeal and Brief and Motion for Leave to Augment Appeal" were served upon the persons listed below by U.S. mail, first-class, postage prepaid, and by electronic mail (except where noted with an asterisk), on this 27th day of October, 2005.

Secretary of the Commission¹
Attn: Rulemakings and Adjudication Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: hearingdocket@nrc.gov)

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

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: rew@nrc.gov)

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm1@nrc.gov)

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: pba@nrc.gov)

Sara E. Brock
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: seb2@nrc.gov)

¹ E-mail, original and two copies

* Served by U.S. mail, first-class, postage prepaid only.

Lisa B. Clark
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15D21
Washington, DC 20555-0001
(E-mail: lbc@nrc.gov)

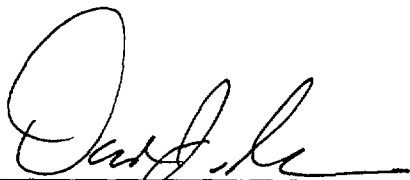
Vina K. Colley
PRESS
3706 McDermott Pond Creek
McDermott, Ohio 45652
(E-mail: vcolley@earthlink.net)

Geoffrey Sea
The Barnes Home
1832 Wakefield Mound Road
Piketon, Ohio 45661
(E-mail: sargentspigeon@aol.com)

Dated: October 27, 2005

Margaret J. Bupp
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: 0-15D21
Washington, DC 20555-0001
(E-mail: mjb5@nrc.gov)

Ewan Todd
PRESS
403 E. Oakland Ave.
Columbus, OH 43202
(E-mail: ewan@mathcode.net)


Donald J. Silverman