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United States General Accounting Office
Washington, DC 20548

B-286661

January 19, 2001

The Honorable Pete Domenici
United States Senate

Subject: USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan

Dear Senator Domenici:

You asked us to review the availability of funds for a reported plan of the Department of Energy (DOE) to (1) keep the Portsmouth gaseous diffusion plant, leased and operated by the United States Enrichment Corporation (USEC or Corporation), in a "cold standby" status and (2) build an advanced centrifuge technology demonstration plant for gas centrifuge uranium enrichment. DOE intends to cover the cost of this plan from $725 million transferred from the USEC Fund to miscellaneous receipts of the Treasury on September 30, 1998, and subsequently transferred back to the USEC Fund on October 20, 2000.

The USEC Privatization Act of 1996 authorized use of the USEC Fund to pay expenses of USEC privatization. DOE has taken the position that it may pay the costs of implementing its plan from the USEC Fund. DOE views the costs of implementing its plan as expenses of privatization and hence allowable charges to the USEC Fund.

As set forth below, we conclude that the $725 million was properly credited back to the USEC Fund and remains available for obligation. We further conclude, however, that "expenses of privatization" authorized by the USEC Privatization Act do not include costs such as those associated with the DOE plan and, accordingly, the USEC Fund is not available to cover such costs.

BACKGROUND

USEC leases and operates DOE uranium enrichment plants in Piketon, Ohio and Paducah, Kentucky, but has not been able to operate both uranium enrichment plans at an economically efficient level. Under a July 1998 agreement with the Department of the Treasury, USEC is not allowed to close either plant before January 2005, except under specified circumstances. This agreement included exceptions that would allow USEC to close a plant if a "significant event" occurred, including the downgrading of USEC's corporate credit rating below investment grade or a reasonable expectation of such downgrading within 12 months. In February 2000, Standard and Poor's and Moody's Investors Service revised their credit ratings of USEC's long term debt to below investment grade. In June 2000, USEC announced that it intended to close the Portsmouth gaseous diffusion plant, located in Piketon, Ohio, by June 2001, leaving the Corporation operating only its Paducah, Kentucky plant. See generally Nuclear Nonproliferation, Implications of the U.S. Purchase of Russian Highly Enriched Uranium, GAO-01-148, December 2000.

On October 6, 2000, DOE announced that it intended to implement a plan to keep the Portsmouth plant in "cold standby"[1] for 5 years for possible restart in the event of a significant disruption in the nation's supply of enriched uranium. Under the plan, DOE would retain many of the Portsmouth plant operations, maintenance, utilities, and support personnel to maintain a portion of the facility in a standby status, until an advanced enrichment technology is demonstrated in about 5 years.

DOE also plans to build an advanced centrifuge technology demonstration plant for uranium enrichment in Piketon. The centrifuge project would be managed by DOE's Oak Ridge National Laboratory and projected for completion in 5 years. Initial work would be done in Oak Ridge, Tennessee, shifting later to Piketon, where existing facilities would be refurbished to house the demonstration project. The resulting centrifuge technology developed in the project would be available to the gaseous diffusion plants in Piketon and Paducah to help ensure the continued competitiveness of the domestic uranium enrichment industry.

The role of USEC in the DOE plan is unclear. DOE has advised us that, "The analysis that formed the basis of the energy security plan, and those of the other options considered, did not assume the participation of any particular private entity for the implementation of the plan. This is not to say that USEC or another private entity could not have some role in the implementation of the plan."

STATUTORY BACKGROUND

The Energy Policy Act of 1992, Pub. L. No. 102-486, Title IX, 106 Stat. 2776, 2923, 42 U.S.C. §§ 2297 et seq. (1994), created USEC as a government corporation.[2] Among

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[1] "Cold standby" is a status achieved by removing UF6 inventory from enrichment cells and maintaining those cells in a negative pressure, moisture-free environment. Restart from "cold standby" would take 2 to 3 years.

[2] Section 3116 of the USEC Privatization Act, Pub. L. No. 104-134, 110 Stat. 1321, 1321-349, Apr. 26, 1996, repealed the statutes governing the government corporation. 42 U.S.C. § 2297 note (Supp. II 1996).

its authorities, the Corporation was authorized to "enrich uranium, provide for uranium to be enriched by others, or acquire enriched uranium," "conduct, or provide for conducting, those research and development activities related to uranium enrichment and related processes and activities," and to "enter into transactions regarding uranium, enriched uranium, or depleted uranium." 42 U.S.C. §§ 2297b-2(4)-(6) (1994) (repealed 1996). In practice, USEC's chief activities included leasing and operating DOE's uranium enrichment facilities at Piketon and Paducah, and otherwise acquiring and marketing uranium and enriched uranium. The 1992 Act also required USEC to prepare a strategic plan for transferring ownership of the Corporation to private investors by July 1, 1995. 42 U.S.C. § 2297d(a) (1994) (repealed 1996).

The 1992 Act established a revolving fund in the Treasury of the United States known as the United States Enrichment Corporation Fund (the "Fund"). 42 U.S.C. § 2297b-7(a) (1994) (repealed 1996). The Fund was "available to the Corporation, without need for further appropriation and without fiscal year limitation, for carrying out its purposes, functions, and powers . . . " Id.[3]

The 1992 Act also provided for "payment of dividends" by the Corporation to the Treasury:

> "The Corporation shall pay into miscellaneous receipts of the Treasury of the United States or such other fund as is provided by law, dividends on the capital stock, out of earnings of the Corporation, as a return on investment represented by such stock. Until privatization occurs under section 2297d-1 of this title, the Corporation shall pay as dividends to the Treasury of the United States all net revenues remaining at the end of each fiscal year not required for operating expenses or for deposit into the Working Capital Account established in section 2297b-15 of this title."

42 U.S.C. § 2297c-3(b) (1994) (repealed 1996) (emphasis added). The Congressional Budget Office analysis in the House report on the 1992 legislation described this provision as follows:

> "The corporation may be sold to private owners, but as long as it remains a government-owned entity, it would pay any net profits—after accounting for all operating costs, debt service payments, and lease payment—as dividends to the Treasury."

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[3] The Fund, prior to privatization, was available for the costs of research and development activities related to uranium development processes. 42 U.S.C. §§ 2297b-2(4-6), 2297b-7(a) (1994) (repealed 1996).

H.R. Rep. No. 474(VIII), 102nd Cong., 2nd Sess. 231 (1992) (CBO analysis) (emphasis added).

In 1996, Congress enacted the USEC Privatization Act. Pub. L. No. 104-134, Title III, Chapter 1, Subchapter A, 110 Stat. 1321-355, Apr. 26, 1996. The Privatization Act authorized the establishment of a private, for-profit corporation and the transfer of ownership of the assets and obligations of the government-owned USEC to that private corporation. 42 U.S.C. §§ 2297h-1 – 2297h-3 (Supp. II 1996). Proceeds from the sale of the United States' interest in the Corporation were to be "deposited in the general fund of the Treasury." 42 U.S.C. § 2297h-1(b) (Supp. II 1996).

Section 3116 of the Privatization Act repealed "as of the date of privatization" the statutes governing the government corporation. 42 U.S.C. § 2297 note (Supp. II 1996). Paragraph 3116(a)(1) provided, "Chapters 22 through 26 of the Atomic Energy Act of 1954 (42 U.S.C. 2297 – 2297e-7) are repealed as of the privatization date." These statutes included 42 U.S.C. § 2297b-7(a), above, which established the Fund and 42 U.S.C. § 2297c-3(b), above, which provided for "payment of dividends." The Act defined the term "privatization date" as "the date on which 100 percent of the ownership of the Corporation has been transferred to private investors." 42 U.S.C.§ 2297h(8) (Supp. II 1996). DOE advises that that date was July 28, 1998.

The Privatization Act also provided for transfer to the new private corporation of specified assets and liabilities of the government-owned corporation. <u>See</u> 42 U.S.C. § 2297h-4 (Supp. II 1996). With respect to Corporation funds, the Act required that "[c]oncurrent with privatization," the Corporation transfer to the private corporation "such funds in accounts of the Corporation held by the Treasury or on deposit with any bank or other financial institution as approved by the Secretary of the Treasury." 42 U.S.C. § 2297h-4(5) (Supp. II 1996). Additionally, the Act specifically provided, "Expenses of privatization shall be paid from Corporation revenue accounts in the United States Treasury." 42 U.S.C. § 2297h-2(e) (Supp. II 1996). Such revenue accounts included the USEC Fund.

USEC PRIVATIZATION AND TRANSFER OF FUNDS

As privatization approached in 1998, Congress enacted legislation reserving a portion of the USEC Fund for disposition of depleted uranium stored at the DOE enrichment plants. The "McConnell Act," Pub. L. No. 105-204, 112 Stat. 681, July 21, 1998, "fenced off" an amount of the USEC Fund to finance the construction and operation of facilities to treat and recycle depleted uranium hexafluoride at the Portsmouth and Paducah plants. USEC indicates in its financial statements that this amount is approximately $373 million. The legislative history of the McConnell Act indicates that Congress feared that balances in the USEC Fund would be transferred to the Treasury upon privatization, and acted to preserve a portion of the Fund for environmental clean-up:

> "As part of this [privatization] transaction, a $1.7 billion 'exit dividend' is to be paid to the Treasury. This legislation assures that an

> appropriate portion of those funds will be available for clean up at the existing USEC facilities. * * *
>
> "A second great myth associated with privatization is that there is a large pot of money laying around which could be spent on clean up. That is not the case. First of all, upon privatization, the authority to spend the so-called 'exit dividend' will expire unless we pass this bill. Time is of the essence."

144 Cong. Rec. S8422, July 16, 1998 (remarks of Sen. Ford).

On or about the privatization date, July 28, 1998, proceeds from the transfer of the government's interest, $1.885 billion, were deposited in a special receipt account in the Treasury (Account 20X2613), in accordance with 42 U.S.C. § 2297h-1(b), above. In accordance with 42 U.S.C. § 2297h-4, above, specified assets of the government corporation were transferred to the private corporation. On privatization, remaining balances in the USEC Fund (Account 95X4054) were retained on the books of the Treasury.

As of July 29, 1998, the USEC Fund had a balance of $1.209 billion. Treasury advises that "DOE would be the certifying official as to the availability of [those] funds." As a result of the Privatization Act and the McConnell Act, the USEC Fund remains available only for two statutorily authorized uses: (1) environmental clean-up expenses pursuant to the "McConnell Act," above, and (2) "expenses of privatization" pursuant to 42 U.S.C. § 2297h-2(e). We concur in DOE's position in its submission in this matter that, "Beyond these provisions, Congress has authorized no other uses of monies in the USEC Fund."[4]

On September 30, 1998, DOE transferred $725 million from the USEC Fund to miscellaneous receipts in the Treasury (Account 892814). The record is unclear as to DOE's intention in effecting this transfer. Some documents in the record indicate that the Office of Management and Budget (OMB) may have prompted the transfer on the ground that the funds could no longer be obligated. A facsimile dated August 24, 1998 from an OMB budget officer to the DOE Office of the Chief Financial Officer advised: "[T]here is nothing in the statutes that require the excess funds in the USEC account to be transferred to the General Fund. There is no remaining authority to obligate funds from the account, however, and it is definitely Administration policy to make the transfer." The transfer may have been an attempt at payment of an "exit dividend" contemplated in the legislative history of the Privatization Act and contemporaneous documents. <u>See</u> <u>USEC Privatization Act, Hearing Before the Committee on Energy and Natural Resources, United States Senate</u>, S. Hearing 104-

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[4] The Energy and Water Development Appropriations Act, 2000, authorized transfer of $5,000,000 from the USEC Fund to the DOE appropriation for "Energy Supply." Pub. L. No. 106-60, 113 Stat. 483, 490, Sept. 29, 1999.

105, 104th Cong., 1st Sess., June 13, 1995, 67-68; 144 Cong. Rec. S8251-8253 (daily ed. July 15, 1998) (discussion of need for "McConnell Act").

As discussed above, in June 2000, USEC announced that it intended to close the Portsmouth gaseous diffusion plant. On October 6, 2000, DOE announced the essential elements of the plan. On October 20, 2000, DOE transmitted to Treasury a form FMS 224 "to transfer $725,000,000.00 into account 95X4054." According to the transmittal memorandum,

> "This will reverse the action taken on September 30, 1998, which erroneously, inter alia prematurely [sic] transferred these funds into Treasury account 892814. Based on study by Department of Energy and the Office of Management and Budget of the authorities and limitations of the funds in account 95X4054, these funds are needed for the purpose for which the funds were originally made available. These funds are needed to pay for the expenses of privatization of the United States Enrichment Corporation as provided in P.L. 104-134, section 3104(e)."

The form FMS 224 indicated a transfer from account 20X1807, a Treasury account for "Refund of Moneys Erroneously Received and Covered," to account 95X4054, the USEC Fund.

TRANSFER OF $725 MILLION FROM MISCELLANEOUS RECEIPTS

The first issue for resolution is whether DOE and Treasury properly transferred and credited the $725 million in question to the USEC Fund on October 20, 2000. We conclude that they did.

In general, transfers between accounts are prohibited without statutory authority. 31 U.S.C. §§ 1301, 1532 (1994). See, e.g., 65 Comp. Gen. 881 (1986); 33 Comp. Gen. 216 (1953). We find no such statutory authority for the September 30, 1998 transfer of $725 million from the USEC Fund to miscellaneous receipts.

The document effecting the September 30, 1998 transfer included the following citation as authority for the transfer:

> "P.L. 104-134, 110 STAT 1321-336, of the Omnibus Consolidated Rescission & Appropriations Act of 1996, dated April 26, 1996." [sic].

The cited page of the Statutes at Large, part of the Privatization Act, includes only one provision authorizing transfer of funds, section 3103(b), 42 U.S.C. § 2297h-1(b). That provision reads as follows:

> "(b) Proceeds.—Proceeds from the sale of the United States' interest in the Corporation shall be deposited in the general fund of the Treasury."

42 U.S.C. § 2297h-1(b)(Supp. II 1996). If DOE intended this citation to the page of the Statutes at Large to reference section 2297h-1(b), it clearly was incorrect and did not provide authority for the September 30, 1998 transfer. The $725 million in question were not proceeds "from the sale of the United States' interest in the Corporation." Rather, the $725 million identified for transfer were moneys resulting from USEC's business operations that were not transferred at the time of sale to the privatized corporation. Accordingly, the September 30, 1998 transfer was not a transfer of sale proceeds pursuant to section 3103(b).

The timing and circumstances of the transfer are more consistent with a year-end Capital Transfer to the General Fund pursuant to 42 U.S.C. § 2297c-3(b) (1994) (repealed 1996). Prior to the privatization of the government-owned corporation, section 2297c-3(b) had required the government-owned corporation, at the end of each fiscal year, to pay dividends into miscellaneous receipts of the Treasury. Some documents in the record indicate that this was, in fact, the intention of DOE. See, e.g., Memorandum by Robert Damus, General Counsel, OMB, Oct. 6, 2000. The Department of the Treasury's submission in this matter and the actual transfer document indicate that the $725 million was transferred to Treasury Account 892814. The Treasury Financial Manual Supplement describes this type of "2814" account as a miscellaneous receipts account for "Repayments of Capital Investment, Government-owned enterprises" including "repayments of investments and recoveries." Treasury Financial Manual, Supplement to Vol. 1, p. R-14 (June 2000).

The Privatization Act, however, repealed section 2297c-3(b) "as of the privatization date." 42 U.S.C. § 2297 note (Supp. II 1996). The Act defines the term "privatization date" as "the date on which 100 percent of the ownership of the Corporation has been transferred to private investors." 42 U.S.C. § 2297h(9) (Supp. II 1996). The record indicates that that date was July 28, 1998, approximately 2 months before the September 30, 1998 transfer. Section 2297c-3(b), therefore, could not have provided authority for that transfer. The legislative history of the Privatization Act indicates that Congress decided to repeal section 2297c-3(b) because it would be "unnecessary after privatization." S. Rep. No. 173, 104th Cong., 1st Sess. 31 (1995).

Clearly, therefore, the September 30, 1998 transfer was made either without statutory authority or pursuant to a statutory authority that had been repealed. Accordingly, we conclude that it was unauthorized by statute and therefore contrary to law. DOE therefore was permitted, and in fact required, to reverse the unauthorized transfer.[5]

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[5] The authority to "correct" an erroneous transfer extends only to clerical and administrative errors, not all misjudgments and miscalculations by government officials. 72 Comp. Gen. 343, 346 (1993). Here, DOE points to the erroneous citation to "P.L. 104-134, 110 STAT 1321-336" on the transfer document as cause for correction of the unauthorized September 30, 1998 transfer. The remedy for this incorrect citation, however, would be issuance of a corrected document or simple interlineation of the incorrect original, citing available authority for the transfer. This error would not serve as justification for retrieval of an otherwise authorized transfer

(…continued)

Accordingly, the October 20, 2000 transfer of $725 million to the USEC Fund was proper.[6]

EXPENSES OF PRIVATIZATION

DOE has determined that at least some of the costs of the project constitute "expenses of privatization" that may be paid from the Fund pursuant to the Privatization Act.[7] As noted above, the Privatization Act provides that, "Expenses of privatization shall be paid from Corporation revenue accounts in the United States Treasury." 42 U.S.C. § 2297h-2(e). (Such "revenue accounts" include the USEC Fund.) DOE advises in its submission that it "will seek other appropriations from Congress to pay for those expenses not determined to be 'expenses of privatization.'"[8]

We do not agree that the costs of the DOE plan constitute "expenses of privatization" within the meaning of the Privatization Act. Generally, the interpretation of a statute

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of the funds in question from miscellaneous receipts. Similarly, the September 30, 1998 transfer apparently was motivated at least in part by an understanding that the funds would not be needed for "expenses of privatization." This ministerial judgment, in itself, also would not constitute a clerical or administrative error that would have justified return of the $725 million to the USEC Fund.

[6] We believe that account 20X1807, a Treasury account for "Refund of Moneys Erroneously Received and Covered," authorized by 31 U.S.C. § 1322(b)(2) (1994), is not available here. This case involves the unauthorized intra-governmental transfer of appropriated funds from one account to another. It does not involve a "refund" of funds "erroneously received" by the government. The authority of section 1322(b)(2) is meant to permit restitution to persons and entities that have made erroneous payments to the government. See 63 Comp. Gen. 189, 193 (1984). We are aware of no case in which it has been applied to an unauthorized intra-governmental account transfer. In the instant case, involving an improper transfer between the USEC Fund (Account 95X4054) and the miscellaneous receipts account (Account 892814), no statutory authority is necessary to take appropriate corrective action. Accordingly, Treasury should adjust its records to show the corrective transfer between account 892814 and account 95X4054.

[7] DOE advises, "All activities contemplated by the energy security plan have not yet been analyzed to determine if they are 'expenses of privatization.'"

[8] As lessor of the Piketon plant, DOE may have funds available in other appropriations to secure and maintain the site, upon its reversion to DOE. See, e.g., Pub. L. No. 106-60, 113 Stat. 483, 490, Sept. 29, 1999 ("Energy Supply" appropriation). These funds may to be available for at least part of the costs of the "cold standby" conversion. Here, we deal only with the availability of the USEC Fund for those costs, as "expenses of privatization."

by the agency Congress has charged with the responsibility for administering it is entitled to considerable weight. Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."); 49 Comp. Gen. 510 (1970) (Agency had discretion to conclude that "overtime" charges included "holiday" pay.). This discretion, however, is not without limits. The agency's interpretation must be reasonable and must be based on a permissible construction of the statute. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Here, DOE's determination that the "expenses of privatization" may include the costs of the plan here in question is not based on a reasonable construction of the Privatization Act.

DOE essentially proposes a definition of "expenses of privatization" that would include not only expenses necessary to bring about privatization, but also expenses that could be said to be a consequence of privatization. In our view, this expansive definition exceeds the bounds of the Privatization Act and violates the requirement of 31 U.S.C. § 1301(a) (1994) that appropriations "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

First, DOE's interpretation is inconsistent with the plain language of the Privatization Act. Although the Privatization Act does not define the phrase "expenses of privatization," it does define "privatization" as "the transfer of ownership of the Corporation to private investors." 42 U.S.C. § 2297h(8) (Supp. II 1996). The Act also provides a date certain for this transfer by defining the phrase "privatization date" as "the date on which 100 percent of the ownership of the Corporation has been transferred to private investors." 42 U.S.C. § 2297h(9) (Supp. II 1996). The record indicates that this date was July 28, 1998. These definitions, taken together, suggest a definition of "expenses of privatization" as expenses related to the July 28, 1998 transfer of ownership of the Corporation to private investors. This definition contemplates a transaction, not a continuing status, and would not include costs incurred years after the privatization date within the "expenses of privatization."

Further, although the legislative history of the Privatization Act does not explain the phrase "expenses of privatization," S. Rep. No. 173, 104th Cong., 1st Sess. 21 (1995); 142 Cong. Rec., S1579-1584, Jan. 26, 1996, there is no indication in either the language or the legislative history of the Act that Congress contemplated that the "expenses of privatization" might include the costs of the major research and construction project planned by DOE, possibly without participation by USEC, taking place years after the statutorily defined "privatization date," and only tangentially related to USEC privatization. In fact, the Act, taken as a whole, includes numerous indications that Congress considered privatization to be a discrete event, not an ongoing, extended process. The following are examples:

> "The Secretary of the Treasury shall not allow the privatization of the Corporation unless before the sale date the Secretary of the Treasury determines that the method of transfer will provide the maximum

> proceeds to the Treasury . . . . 42 U.S.C. § 2297h-2(c) (Supp. II 1996) (emphasis added).
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> "Beginning on the privatization date, the restrictions stated in [statutes governing post-government employment restrictions] shall not apply to the acts of an individual done in carrying out official duties . . . ." 42 U.S.C. § 2297h-3(c) (Supp. II 1996) (emphasis added).
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> "Concurrent with privatization, the Corporation shall transfer to the private corporation [certain assets of the government corporation]." 42 U.S.C. § 2297h-4 (Supp. II 1996) (emphasis added).
>
> "[A]ll liabilities arising out of the operation of the Corporation between July 1, 1993, and the privatization date shall remain the direct liabilities of the United States." 42 U.S.C. § 2297h-7(a)(2) (Supp. II 1996) (emphasis added).
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> "As of the privatization date, the private corporation shall be subject to and comply with the Occupational Safety and Health Act of 1970." 42 U.S.C. § 2297h-13(a)(1) (Supp. II 1996) (emphasis added).

See also 42 U.S.C. §§ 2297h-7(a)(3), 2297h-7(c), 2297h-9(b), 2297h-6(a) (Supp. II 1996). Congress clearly viewed privatization as a single occurrence culminating on a date certain. This is inconsistent with DOE's position that the "expenses of privatization" could include the costs of its plan incurred years after the privatization transaction. Such costs would be only remotely related to privatization, having nothing to do with the actual expenses of sale of the government's interest to the private sector and possibly not even involving the privatized USEC. At most, the costs of the DOE plan could arguably be said to be a remedy for adverse consequences of privatization. An interpretation of the Privatization Act that includes such tangential costs within the phrase "expenses of privatization" is, in our opinion, simply too expansive to be consistent with the Privatization Act and 31 U.S.C. § 1301(a), above.[9]

Additionally, until very recently, DOE gave the phrase "expenses of privatization" a much more limited meaning, inconsistent with its current position. For example, DOE, USEC, and Treasury entered into a Memorandum of Agreement as of July 27, 1998, the day prior to privatization, relating to privatization expenses. The MOA defines "Privatization Expenses" as "expenses incurred on or before the Privatization Date by USEC-Government in connection with the privatization transaction that were not paid by USEC-Government prior to the Privatization Date." Attachment 1 to the MOA includes examples of privatization expenses that are chiefly clerical and administrative, such as attorney and accountant fees and underwriting expenses.

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[9] Congress has, in the past, provided specific authority for the development and demonstration of new technology. See, e.g., 42 U.S.C. §§ 2297a(6), 2297e-2 (1994) (repealed 1996) (USEC research and development authorizations).

Under the MOA, the expenses of the DOE plan would not be payable, since the MOA limits "privatization expenses" to those incurred on or before the privatization date. In addition, the examples provided in Appendix 1 to the MOA are wholly unlike the costs of the DOE plan.

The MOA provides an interpretation of "expenses of privatization" virtually contemporaneous with privatization and therefore entitled to significant weight. DOE suggests in its submission that the MOA is not controlling here, since it "did not address expenses of privatization incurred after the privatization date." The MOA itself, however, does not indicate that the parties did not intend to cover all privatization expenses. In fact, taken as a whole, the definition of "privatization expenses" contained in the MOA appears consistent with the view that privatization expenses could not be incurred after the privatization date. If the Act permitted privatization expenses to be incurred years after the privatization date, it is unclear why DOE, USEC, and Treasury would enter into a MOA dealing only with pre-privatization expenses.

Additionally, the record indicates that the September 30, 1998 transfer of $725 million from the Fund to miscellaneous receipts, also substantially contemporaneous with privatization, was motivated by "the expectation at that time that balances remaining in the Fund after that transfer would be sufficient to meet the expenses of privatization that were then anticipated." Memorandum by Mary Anne Sullivan, DOE General Counsel, Oct. 10, 2000. See also Facsimile from Bob Civiak, OMB, Aug. 24, 1998 ("There is no remaining authority to obligate funds from the account, however, and it is definitely Administration policy to make the transfer.").

DOE essentially contends that Congress intended privatization to be an ongoing process leading to the establishment of a viable and reliable domestic commercial enrichment source, and not merely the transfer of government assets to the private sector. DOE points to section 3103 of the Privatization Act, 42 U.S.C. § 2297h-1(a) (Supp. II 1996), which directs the transfer of the interest of the United States in USEC,

> "in a manner that provides for the long-term viability of the Corporation, provides for the continuation by the Corporation of the operation of the Department of Energy's gaseous diffusion plants, provides for the protection of the public interest in maintaining a reliable and economical domestic source of uranium mining, enrichment and conversion services, and to the extent not inconsistent with such purposes, secures the maximum proceeds to the United States."

DOE also points to recent financial and operational difficulties besetting the privatized USEC that place the health of the private corporation in jeopardy. DOE concludes:

> "The recent announcement by USEC that it will cease enrichment operations at the Portsmouth gaseous diffusion plant and USEC's prior abandonment of development of advanced enrichment technology put at risk two of the explicit objectives of the Privatization Act: the continued operation of DOE's gaseous diffusion plants and the protection of the public's interest in maintaining a reliable and economical domestic source of uranium enrichment services. Moreover, as a direct result of that decision by the privatized USEC, DOE is likely to incur additional expenses that can reasonably be characterized as 'expenses of privatization' for which the Fund properly could be used."

We agree that 42 U.S.C. § 2297h-1(a) and other provisions in the Privatization Act indicate that Congress intended that the transfer of the United States' interest in USEC be conducted in a manner designed to achieve certain specific policy goals. Nonetheless, the question for resolution here is whether Congress, by making the USEC Fund available for "expenses of privatization," intended to make the Fund available for the costs of DOE's plan to address the consequences of privatization. The difficulties experienced by USEC after privatization are unrelated to the "expenses of privatization" as we understand that phrase, based on our reading of the language of the statute and applicable principles of statutory construction. Here, DOE's expansive reading of "expenses of privatization" is inconsistent with the plain language of the Privatization Act, the structure of the Act as a whole, and DOE's own contemporaneous interpretations. If the policy goals of the Privatization Act are not being met, and DOE concludes that its plan is necessary to achieve those goals, DOE should approach the Congress, which can appropriate additional funds or make the USEC Fund specifically available for the project, as it determines necessary and appropriate.[10]

Accordingly, we conclude that the costs of the DOE plan here in question do not constitute "expenses of privatization" within the meaning of the Privatization Act and therefore are not payable from the USEC Fund. Unless DOE can identify further "expenses of privatization" payable from the USEC Fund consistent with this opinion, Congress may wish to consider a rescission or transfer of the balance of the USEC Fund not reserved under the McConnell Act.

It is unclear whether, at this date, DOE has obligated funds from the USEC Fund for the costs of the plan. Consistent with this opinion, unless DOE can identify other available funds to cover such an obligation, such an obligation would constitute a violation of the Antideficiency Act, which prohibits officers or employees of the

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[10] Congress clearly recognized that a consequence of "privatization" could be failure of USEC as an operating entity in whole or in part. See, e.g., 144 Cong. Rec. S8251 daily ed., July 15, 1998 ("[U]nion and community leaders feel that closure of one of the two plants is a very real possibility.") (statement of Sen. McConnell).

government from making or authorizing an expenditure “exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. § 1341(a) (1994). If DOE has obligated funds from the USEC Fund for the costs of its plan, it should report a violation of the Antideficiency Act to the President and the Congress. 31 U.S.C. § 1351 (1994). See OMB Circular A-34, Section 40, “Requirements for Reporting Antideficiency Act Violations” (2000).

We hope that this has been responsive to your request. We are sending similar versions of this letter to Chairman Callahan of the Subcommittee on Energy and Water Development, House Committee on Appropriations, and Chairman Tauzin of the House Committee on Energy and Commerce.

/s/Anthony H. Gamboa
Acting General Counsel