




## Department of Energy

Washington, DC 20585

July 9, 2010

MEMORANDUM FOR THE DEPUTY SECRETARY OF ENERGY

FROM:

  
Gregory H. Friedman  
Inspector General

SUBJECT:

INFORMATION: Former Uranium Enrichment Workers: Questions  
Regarding Equity in Pension Benefits, OAS-L-10-06

### INTRODUCTION

On June 8, 2010, the Office of Inspector General (OIG) received a request from Henry Waxman, Chairman, Committee on Energy and Commerce, United States House of Representatives, soliciting our opinion on matters related to legislation being considered by the Committee that would provide relief to certain retirees who worked at the former Department of Energy sites in Portsmouth and Paducah. The relief under consideration was for former contractor employees that produced enriched uranium for the Department of Energy (Department). The purpose of this report is to provide our perspective on the specific questions posed by Chairman Waxman and, consistent with his request, to provide our judgment on the pension equity issues involved. In separate correspondence, we responded directly to Chairman Waxman.

In reaching our conclusions, we reviewed a significant amount of historical information and conducted interviews with knowledgeable officials within the Department. We reviewed a number of relevant communications between the Department and Congressman Whitfield, Governor Strickland (in his former capacity as a Member of Congress) and Senator Bunning. In addition, we analyzed legal decisions, the available legislative history and a Congressional Research Service Memorandum which specifically addressed this pension issue. The Congressional Research Service Memorandum was prepared in response to a request from Senator McConnell. Our staff also discussed this matter with senior Departmental procurement and financial officials, and with General Counsel staff that have been involved with this matter for a number of years. Our preliminary findings on this issue were also discussed at a recent meeting with staff members of the Committee and Congressman Whitfield's staff.

### BACKGROUND

Prior to the creation of the United States Enrichment Corporation (USEC) in July 1998, the Department of Energy, through a contract with Lockheed Martin Utility Services, Incorporated (LMUS), operated the government-owned gaseous diffusion plants at the Portsmouth Plant located in Piketon, Ohio, and the Paducah Plant located in Paducah, Kentucky. These facilities began operation in the mid-1950's as part of a U.S. Government program for the production of highly enriched uranium to fuel military reactors and to sustain the Nation's nuclear defense program. At privatization, the Department leased the enrichment facilities at Paducah to USEC



and they are now used to produce low-enriched uranium for civilian electric-generating nuclear reactors around the world.

About one year after it began operation, USEC elected to terminate the LMUS contract and began using its own workforce. Virtually all of the LMUS employees who had been working at Portsmouth and Paducah became employees of USEC. Concurrently, all employees and the then retired workers were transferred from the pension plan administered by Lockheed Martin Energy Systems, Inc. (LMES, the parent of LMUS), to one created by USEC. According to Department officials, there were 2,641 retirees transferred from the LMES to the USEC plan. To protect the benefits of retirees and active workers in the event that the LMUS contract was cancelled, the USEC Privatization Act, Section 3110(a)(2), required the “transfer all plan assets and liabilities relating to accrued pension benefits of such plan’s participants and beneficiaries from such plant to a pension plan sponsored by...the private corporation (USEC).” Other participants of the plan working at Department facilities in Oak Ridge, Tennessee, remained in the LMES plan. All assets of the LMES plan over and above those necessary to cover the accrued assets and liabilities associated with the employees and retirees moved to the new USEC plan remained in the LMES sponsored plan. Department officials noted that at the time of transfer, the benefits of employees in both the USEC pension plan and those that remained in the LMES plan were equivalent.

In 2001 and again in 2004, the Department took action that ultimately permitted contractors at Oak Ridge to increase annuity payments for retirees. These increases occurred subsequent to the breakup of the LMES plan and spin-off of other Oak Ridge contractor plans. In contrast, employees that retired prior to privatization and were transferred to the USEC pension plan have not, to the best of our knowledge, received similar increases. Now and for a number of years, these USEC retirees and their representatives have asserted that, as a matter of equity, they should have received a portion of the “surplus” assets (deposits and investment earnings exceeding plan obligations, estimated at about \$873 million at the time the plan was separated) from the LMES plan, funds that they believe could have permitted the USEC plan to provide increases in their annuities similar to those now enjoyed by Oak Ridge retirees.

## **QUESTIONS POSED AND OIG RESPONSES**

In the June 2010 letter, Chairman Waxman raised four specific issues regarding this matter. These are addressed as follows:

1. Was the Department of Energy’s retention of the surplus assets in the Oak Ridge plan appropriate?

**Response:** As noted in a Supreme Court case dealing with the question of entitlement to surplus pension assets (*Hughes Aircraft Co., et al., v. Jacobson, et al.*, 525 U.S. 432, 439-441 [1999]) and as a general proposition, defined benefit pension plan participants do not have a right to surplus assets in those plans. In the instant case, the language of section 3110(a)(2) of the USEC Privatization Act only required the transfer of assets and liabilities “relating to accrued pension benefits” (emphasis supplied). Thus, it was the Department’s Office of General Counsel opinion, as well as that of the Congressional

Research Service, that the Portsmouth and Paducah retirees were not entitled to a portion of the “surplus” assets, at least not as the USEC Privatization Act was structured. As such, it appears the Department’s decision to not provide a portion of the surplus assets to the USEC plan was reasonable.

As an aside, we recently learned that the multi-employer pension plan at Oak Ridge presently was underfunded (liabilities exceed accrued assets and liabilities) by more than \$500 million as of September 20, 2009.

2. Would inequities have been created if Paducah and Portsmouth retirees had remained in the Oak Ridge plan?

**Response:** We see no equity barrier had the Paducah and Portsmouth retirees remained in the Oak Ridge Plan. This presumes that all changes to the Oak Ridge plan, both past and future, were/are equally applied to all retirees.

3. How do the pension and health benefits of the retirees under the two plans compare?

**Response:** USEC is a private corporation. Under the fact pattern in this matter, we do not believe that we have standing to examine USEC pension and health benefit plan records.

4. Whether and how any lump-sum payments authorized by Congress to off-set differences in retiree benefits could be effectively administered by the Department.

**Response:** Based on our body of financial-related work over the last few years, including an annual review of accounting treatment for pension and post-retirement liabilities, nothing has come to our attention to indicate that the Department is not capable of effectively administering any lump sum payments that may be funded and directed as part of contemplated legislation. Because of the number of plan participants and other factors, including complex actuarial computations, this would be a challenging task requiring expert advice. However, we see no fundamental barriers to such actions. In fact, a number of options would be available to manage any payments authorized, including contracting for such services through a third-party fiduciary.

## **EQUITY CONSIDERATIONS**

Although this would require a formal legal opinion, it is our view that, without the passage of specific legislation to provide directed relief, there does not appear to be a clear path to government-sponsored increases in annuities for the Portsmouth and Paducah retirees. Based on the limited amount of data available to us regarding the split of the plans, retirees transferred to the USEC plan have received the benefits that they were originally promised.

It is clear, however, that through the operation of many intervening factors related to the administration and compensation of the Department’s contractors at Oak Ridge, differences in benefits packages have developed. While we are unable to quantify the difference because of the

issues noted in our response to question three posed by Chairman Waxman, it is apparent that annuitants under the Oak Ridge plan are receiving pension payments higher than those provided to the retirees in the USEC plan. Based on statements by Department officials, some differences in post-retirement medical benefits have also developed over time for the Oak Ridge retirees – differences that may or may not offset the increases in annuities for the Oak Ridge group if one were to consider the value of the total retiree benefits package. The undeniable perception of the retirees transferred to the USEC pension plan is, however, that have not been treated fairly. These retirees find themselves in a situation where they were participants in the same defined benefit pension plan as their Oak Ridge colleagues, performed similar work for similar periods, yet they are receiving smaller annuities than their counterparts.

Under the circumstances, the concern of the USEC retirees is understandable. Yet, the position that USEC is now a private entity and that the Federal government has no authority to require changes to private sector employee benefit programs, including the provision of cost of living increases, is persuasive. Thus, this becomes an issue requiring special legislation, if it is to be resolved to the satisfaction of the Portsmouth and Paducah retirees. The special authority contemplated to remedy this situation by providing for a lump-sum settlement also could have unintended impacts, introduce inequities with other Department of Energy funded plans that do not currently provide for cost of living adjustments, and establish precedent for intervening in private sector plans.

Under the circumstances, we plan no additional work in this area. We appreciate the prompt assistance of the Department officials who provided data and information during this review.

cc: General Counsel  
Director, Office of Management  
Chief Financial Officer