

RAS 9958

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 05/12/05

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Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

_____)	
In the Matter of USEC, Inc.)	
_____)	
(American Centrifuge Plant))	Docket No. 70-7004
_____)	
_____)	

CLI-05-11

MEMORANDUM AND ORDER

I. Introduction

At the outset of this proceeding to license a uranium enrichment facility in Piketon, Ohio, the Commission indicated that it would make threshold standing determinations itself, and that it would refer the petitions of persons with requisite standing to the Atomic Safety and Licensing Board for further adjudicatory proceedings.¹ The Commission has received two petitions to intervene.

One intervention petition is from the Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS). PRESS claims representational standing to intervene, based upon members who live in close proximity to the proposed American Centrifuge Plant and oppose the proposed facility on alleged health and safety grounds. The NRC staff supports a finding of standing for PRESS. The applicant, USEC, argues that PRESS has not

¹ CLI-04-30, 60 NRC 426, 429 (2004); *see also* 69 Fed. Reg. 61,411 (Oct. 18, 2004).

demonstrated standing to intervene. The other intervention petition is from Mr. Geoffrey Sea. Both the NRC staff and USEC argue that Mr. Sea has not shown standing to intervene.

For the reasons below, the Commission finds that both PRESS and Mr. Sea have standing to intervene, and we accordingly refer their petitions and contentions to the Board for further appropriate action. In addition to today's rulings on standing, we also resolve or refer to the Board certain procedural questions raised in a number of pending motions.

II. Analysis

Under the Atomic Energy Act, the Commission must grant a hearing upon the request of any person whose "interest may be affected by the proceeding."² In judging whether a petitioner's asserted interests provide a sufficient basis for intervention, the Commission has long looked for guidance to current judicial concepts of standing, which require "a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision."³ The potential for injury must be "actual or imminent."⁴

PRESS is a nonprofit organization whose stated purpose is to protect "economic vitality, environmental quality, health, and justice." PRESS seeks to intervene in this proceeding as a representative of members who live near the proposed American Centrifuge Plant and have health and safety concerns.⁵ PRESS provided statements by several members authorizing the

² Atomic Energy Act § 189a, 42 U.S.C. § 2239(a).

³ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998)(citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)). See also *Pacific Gas & Elec. Co.*, CLI-02-2, 57 NRC 19, 26 (2003).

⁴ *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

⁵ See Petition to Intervene By PRESS (Feb. 28, 2005) at 7, 9.

organization to represent their interests in this proceeding. PRESS states that it has “presumptive standing” to intervene because its identified members live near to the proposed enrichment facility.⁶

For construction permit and operating license proceedings involving nuclear power reactors, the Commission generally has recognized a presumption of standing to intervene for those persons who have frequent contacts with the area.⁷ In non-reactor cases, however, there is no presumption of standing based upon geographic proximity, absent “a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”⁸ “Whether and at what distance a petitioner can be presumed to be affected must be judged on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”⁹ Where there is no “obvious” potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner’s “burden to show a specific and plausible means” of how the challenged action may harm him or her.¹⁰

At least three of PRESS’s listed members reside within a mile of the proposed facility. At that distance, the NRC staff states that it is reasonable to apply the presumption of standing to PRESS. The staff explains that “while no specific geographic zone of possible harm has

⁶ *Id.* at 9.

⁷ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 95 (1993).

⁸ *Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 116; *see also Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

⁹ *Georgia Tech Research Reactor*, CLI-95-12, 42 NRC at 116-17.

¹⁰ *See NFS*, CLI-04-13, 59 NRC at 248 (no presumption of standing for petitioner who owned property 20 miles from proposed site to downblend high-enriched uranium because there was no obvious potential for radiological harm at that distance).

been established for enrichment facility licensing matters, it is reasonable to assume that the 1 mile distance from the proposed site is within the geographical zone that might be affected by construction, operation, or decommissioning of the facility.”¹¹ The staff accordingly concludes that PRESS has representational standing based upon these three identified members who, because of their proximity to the proposed facility, would “have standing to intervene in their own right.”¹²

The Commission agrees with the NRC staff that there is an obvious potential that those residing within one mile of the proposed American Centrifuge Plant may be affected by the construction, operation, or decommissioning of the facility. This view is consistent with our decision on standing in the ongoing *Louisiana Energy Services* proceeding, which like the present case involves a proposed uranium enrichment facility that would use a gas centrifuge process. In *LES*, the Commission considered the representational standing of groups with members living at 2.5 and 4.9 mile distances, respectively, from the proposed facility.¹³ Agreeing with the NRC staff, the Commission stated that “petitioners who live in [such] close proximity to the proposed LES facility” would have an obvious potential to be affected by the facility.¹⁴ Similarly, in an earlier *LES* proceeding from several years ago involving the proposed Claiborne Enrichment Center, the Licensing Board remarked that the petitioner (who had

¹¹ NRC Staff’s Response to Petitions to Intervene Filed by PRESS and Geoffrey Sea (“Staff Response”)(Mar. 25, 2005) at 9.

¹² *Id.*

¹³ See NRC Staff’s Response to Petition to Intervene By Nuclear Information and Resource Service and Public Citizen (May 3, 2004) at 6.

¹⁴ See Order, CLI-04-15, 59 NRC 256, 257 (2004).

several members residing within one mile – in “close proximity” – of the proposed facility) could have relied on a “presumption of injury” from an “accidental release of fission products.”¹⁵

Given that PRESS has at least three members who reside within a mile of the proposed American Centrifuge Plant site, the Commission agrees with the NRC staff that PRESS has established standing to intervene in this proceeding.¹⁶ The Commission, therefore, refers PRESS’s petition to the Licensing Board to evaluate the admissibility of the submitted contentions. We turn next to Mr. Sea’s petition for intervention.

Mr. Sea claims to have standing based upon “his past residence and current property interests in Pike County, ... his past and current occupational interests in the Piketon atomic site” and “his longstanding commitment to historic preservation in Scioto Township and to industrial conversion of the Piketon atomic site.”¹⁷ Before considering Mr. Sea’s more specific claims, we begin by noting that Mr. Sea’s *past* residence and other activities in the area do not bear directly on the standing question before us. Today, we focus not on the past but on whether the proposed American Centrifuge Plant poses plausible risk of *future* injury to Mr.

¹⁵ See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), Memorandum and Order (July 16, 1991)(unpublished) at 6.

¹⁶ Contesting PRESS’s standing, USEC argues that the declarations of PRESS members do nothing more than identify the distances of their homes from the proposed American Centrifuge Plant. USEC argues that the ongoing *LES* proceeding is distinguishable because the members of the petitioning organizations in that case “made an effort to particularize how the [LES] plant might adversely affect their interests.” See USEC Answer to Petition to Intervene by PRESS (Mar. 23, 2005) at 9. The Commission finds the distinction insignificant. The declarations of the organization members in *LES* contained identical one paragraph statements depicting the same sort of generalized health and safety concerns (e.g. fear of harm from an accident, waste storage and disposal, and potential impacts to groundwater) that PRESS alleges, albeit in PRESS’s discussion of petitioners and their standing instead of in the individual members’ declarations. See PRESS Petition at 10-11.

¹⁷ Petition to Intervene By Geoffrey Sea (“Sea Petition”)(Feb. 28, 2005) at 4-5.

Sea.¹⁸ The same is true of any past occupational interests. Mr. Sea's past activities are relevant only to the extent that they might help substantiate a serious intention by Mr. Sea to frequent the area to a significant degree in the future.

Mr. Sea claims to have a current property interest in close proximity to the American Centrifuge Plant. Specifically, he states that in September 2004 he paid a deposit and entered into a contract for purchase of an approximately 200-year old house – commonly referred to as the Barnes Home – and its surrounding 87 acres of land. Since then, Mr. Sea entered into two purchase option agreements extending the time to complete the purchase of the property while he has sought to obtain financing. Mr. Sea's intervention papers identified April 6 as the estimated closing date to complete the purchase of the property. In a recent filing, Mr. Sea indicates that on April 15, 2005, he did in fact complete the purchase of the property, and "now has full title to the property."¹⁹ His filing includes a copy of the deed for the Barnes Home.

Mr. Sea describes the Barnes Home as located between a half mile and a mile from the proposed American Centrifuge Plant buildings, the closest residence to the facility. He states that "existing buildings for the American Centrifuge Plant are clearly visible from the back fence line of the property ... and the new proposed buildings would be even closer."²⁰ He notes that the Barnes Home "is in the direction of prevailing winds ... and of previous offsite migrations of uranium hexafluoride gas, including the large accidental release that occurred in March,

¹⁸ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)(that individuals "had visited" areas at issue and expressed generalized intentions of returning to areas at some point did not support a finding of "actual or imminent" injury).

¹⁹ See Petitioner's Response to Applicant's Motion to Strike Information in Replies by Geoffrey Sea to Answer's of USEC Inc. and NRC Staff ("Sea Response to USEC Motion to Strike")(April 18, 2005) at 2.

²⁰ Sea Petition at 6.

1978.”²¹ He further claims that he intends to reside in the Barnes Home and that “in the case of a catastrophic event” he would be “the guy who would get the largest dose.”²² He stresses, however, that his primary concern is potential harm to the property itself, such as would occur for example, if there were an “explosion” or accident at the American Centrifuge Facility that caused damage to the property.²³ Other stated concerns include “environmental pollution” and “traffic congestion,” and whether provisions of the National Historic Preservation Act have been followed.²⁴

In opposing Mr. Sea’s standing, the NRC staff stresses that “standing based on proximity is only created by residence or by frequent contact, rather than merely owning property.”²⁵ This is incorrect. The Atomic Energy Act authorizes the Commission “to accord protection from radiological injury to both health and *property* interests.”²⁶ Thus, a genuine property interest in the Barnes Home is sufficient to accord Mr. Sea standing, given that the home is located within the same distance we already found sufficient as a basis to accord PRESS standing to intervene. In any event, having completed the purchase of the property, Mr. Sea plans to become a resident. He says he is now in the process of moving to the Barnes Home, which will be his “primary and permanent residence.”²⁷

²¹ *Id.* at 7.

²² Reply By Geoffrey Sea to Answer of USEC (“Sea Reply to USEC”)(Mar. 30, 2005) at 10.

²³ Reply By Geoffrey Sea to Answer of NRC Staff (“Sea Reply to Staff”)(Apr. 1, 2005) at 10.

²⁴ See Sea Petition at 10.

²⁵ Staff Response at 6.

²⁶ *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48 (1994)(citing AEA §§ 103b, 161b, 42 U.S.C. §§ 2133(b), 2201(b))(emphasis added).

²⁷ Sea Response to USEC Motion to Strike at 2-3.

At the time he filed his intervention petition, Mr. Sea had not yet completed the purchase of the Barnes property. Therefore, his intervention petition emphasized his property interest as that of holding “equitable title” to the property, and he stressed that he intended to reside at the Barnes Home, and had paid a “substantial sum” as a deposit on the home, and for the extended purchase options and legal fees associated with the home’s purchase.²⁸ Mr. Sea’s intervention petition, however, did not provide copies of the purchase contract and extension agreements. He stated that these were being “withheld for proprietary reasons.”²⁹ As a result, USEC questioned the authenticity of Mr. Sea’s contractual arrangements, arguing that Mr. Sea’s “claims of ‘equitable title’ cannot be credited when he has chosen to withhold the details that would explain the full extent of his property interest.”³⁰ It is now apparent, however, that Mr. Sea has completed the purchase of the Barnes property. In practicality, we see no point to further inquiries into whether Mr. Sea in fact has a sufficient interest for standing.³¹

In addition to his property interest, Mr. Sea made several other arguments in support of his standing, including claims that he is a writer currently under contract to write a book about the Piketon, Ohio area, that he intends to write the book “on location,” and that he has had a longstanding research interest in the historic and cultural aspects of the area near the proposed American Centrifuge Plant. Given that we find his property interest in the Barnes Home sufficient for standing, we need not reach whether Mr. Sea’s other claims of contact with the area suffice for standing to intervene.

²⁸ Sea Petition at 3, 5, 7.

²⁹ Sea Petition at 7.

³⁰ See USEC Answer to Petition to Intervene By Geoffrey Sea (Mar. 23, 2005) at 10.

³¹ If a future question arises about Mr. Sea’s property interest, USEC and the NRC staff can challenge his standing then. See, e.g. *Gollust v. Mendell*, 501 U.S. 115, 126 (1991).

III. Procedural Claims

We last turn to various procedural claims or motions raised by USEC or Mr. Sea. We begin with the USEC claim, made in its answer to Mr. Sea's petition, that Mr. Sea filed not one but two distinctly different intervention petitions. Specifically, USEC argues that Mr. Sea submitted an initial petition electronically on February 28, 2005, the deadline for the petition, but failed to perfect the service of the petition by mailing the original petition and two copies, as required by 10 C.F.R. § 2.304(f). USEC claims that Mr. Sea also did not provide proof of service, as required by 10 C.F.R. § 2.302(b). USEC therefore claims that this electronically submitted petition should be denied as improperly filed. USEC goes on to claim that the next day Mr. Sea mailed a petition that was not a copy of the electronically sent petition, but a substantially different and effectively second petition for intervention, which therefore should have addressed the factors for late submissions. USEC thus argues that this mailed petition should be denied as late filed.

Mr. Sea, on the other hand, claims that USEC has mischaracterized his submissions, which consisted of a "single filing, with a correction."³² Mr. Sea argues that "[a] corrected petition submitted within a day, with two explanatory cover letters, cannot be construed as two separate filings."³³ Mr. Sea suggests there would have been no reason for him to have mailed both the "uncorrected and corrected" copies of the petition, and further notes that he electronically submitted the corrected version on March 2, 2004, in which case USEC "had a corrected version before they ever would have received the mailed uncorrected version."³⁴

³² Sea Reply to USEC at 3.

³³ *Id.*

³⁴ *Id.* at 4.

The Commission has compared the two submissions. There do appear to be several additional claims – entire paragraphs – made in the mailed petition, particularly in the section on contentions. Our standing discussion (above) does not consider new material in the mailed petition. The potentially more significant differences in the mailed and initial electronically filed petition relate to Mr. Sea’s contention arguments, where entirely new bases may have been presented in support of certain contentions. Accordingly, in examining Mr. Sea’s contentions, the Licensing Board should consider the arguments that have been presented by USEC and Mr. Sea in regard to the filing of Mr. Sea’s intervention petition. The NRC staff has taken no position on the propriety of the mailed (“corrected”) petition.³⁵

USEC also moved to have the Commission strike arguments on standing allegedly provided for the first time in Mr. Sea’s replies to USEC and the staff, or alternatively, to allow USEC to file a surreply.³⁶ The NRC staff joined in this motion.³⁷ The arguments made in the USEC motion have been rendered moot, however, by our finding that Mr. Sea has demonstrated standing to intervene based upon his property interest in the Barnes Home, and thus we need not resolve whether other arguments were improperly submitted.

Lastly, we note that Mr. Sea has requested that two exhibits, which were attached to his reply filings and which contain the names of individuals not involved in this proceeding, not be

³⁵ Additional filings on this dispute that the Board should consider and as appropriate rule upon include Mr. Sea’s Motion for Leave to Amend Reply to Answer of USEC (April 1, 2005) and attached Amendment to Reply; USEC’s Answer to Motion for Leave to Amend Reply (April 8, 2004); Petitioners’ Reply to USEC Inc. Answer to Motion For Leave to Amend Reply (April 18, 2005); and NRC Staff’s Answer to Motion For Leave to Amend Reply to Answer of USEC (April 14, 2005).

³⁶ USEC Motion to Strike Information In Replies By Geoffrey Sea To Answers of USEC and NRC Staff (April 8, 2005).

³⁷ NRC Staff’s Answer to Motion to Strike Information or in the Alternative to File a Surreply (April 14, 2005).

released to the general public.³⁸ The Board can address this request and take appropriate steps to assure that privacy material not be made publicly available. It is our understanding that these exhibits have not yet been disseminated to the public, via our ADAMS database or otherwise.

IT IS SO ORDERED.

For the Commission³⁹

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of May, 2005.

³⁸ See Request for Privacy Protection by Geoffrey Sea (Mar. 30, 2005).

³⁹ Commissioner Lyons was not present for affirmation of this Memorandum and Order. Had he been present, he would have affirmed his prior vote.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-05-11) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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Docket No. 70-7004
COMMISSION MEMORANDUM AND ORDER (CLI-05-11)

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of May 2005