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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	March 23, 2005
USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004

USEC INC. ANSWER TO PETITION TO INTERVENE BY PORTSMOUTH/PIKETON RESIDENTS FOR ENVIRONMENTAL SAFETY AND SECURITY (PRESS)

I. INTRODUCTION

USEC Inc. ("USEC") has submitted to the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") a License Application ("Application") for the construction and operation of the American Centrifuge Plant ("ACP"). In the Commission's October 7, 2004 "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," it stated that any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a petition for leave to intervene in accordance with the provisions of 10 CFR § 2.309.[1] The Commission subsequently granted a request for extension of time to, among others, Portsmouth/Piketon Residents for Environmental Safety and Security ("PRESS"

[1] Notice and Order, CLI-04-30, 69 Fed. Reg. 61,411, 61,412 (Oct. 18, 2004).

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or "Petitioner") to file petitions to intervene.[2] PRESS has now submitted its petition to intervene in this proceeding.[3]

To be admitted as a party to this proceeding, Petitioner must make two separate showings: first, that it has legal standing to request a hearing regarding the ACP Application; and second, that it has submitted at least one admissible contention related to the Application.[4] PRESS has done neither.

Section II below summarizes the legal standards governing standing and demonstrates why PRESS has failed to establish any basis for standing to intervene in this proceeding. Section III addresses the standards governing the admissibility of proposed contentions and demonstrates why PRESS has failed to identify a single admissible contention. For the reasons discussed below, the PRESS Petition must be denied.

II. PRESS HAS FAILED TO DEMONSTRATE LEGAL STANDING

A. Applicable Legal Standards

The Commission's Notice and Order required petitioners to set forth "with particularity" not only their interests in the proceeding but also how those interests may be affected by the results of the proceeding.[5] In addition to providing its name, address, and telephone number, a petitioner must also "specifically explain" why it should be permitted to intervene, with particular reference to the following factors: (1) the nature

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2 Order, slip op. at 3 (Dec. 29, 2004) (granting extension).

3 PRESS Petition to Intervene (Feb. 28, 2005) (received on Mar. 4, 2005). It should be noted that PRESS' Petition was not accompanied by the required proof of service. *See* 10 CFR §2.302(b).

4 Notice and Order, 69 Fed. Reg. at 61,412.

5 *Id.*

of its right under the Atomic Energy Act ("AEA") to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest. These requirements are embedded in both the Commission's Notice and Order for this proceeding and its general rules of practice.[6]

To determine whether a petitioner has established the requisite interest to intervene in a proceeding, the NRC applies judicial concepts of standing.[7] Accordingly, a petitioner in this proceeding must demonstrate that if the NRC grants the license to USEC as requested:

(1) It will likely suffer a direct, palpable injury;

(2) The injury is within the zone of interests protected by the governing statutes, e.g., the AEA or the National Environmental Policy Act of 1969 ("NEPA");

(3) The injury is traceable to the NRC's approval of the USEC Application (*i.e.*, causation); and

(4) The injury can be redressed by a decision in this proceeding.[8]

These elements, which constitute the "irreducible constitutional minimum" requirements for standing in federal courts, also apply to NRC proceedings and are further discussed below.[9]

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6 *Id.*; 10 CFR § 2.309(d)(1) (2005).

7 *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004); *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

8 *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

9 *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *Department of the Army* (Aberdeen Proving Ground, Maryland), LBP-99-38, 50 NRC 227, 229 (1999).

1. Required Elements For Standing

a. Injury In Fact

To demonstrate standing in this proceeding, a petitioner must first show that NRC issuance of the requested license is likely to cause it to suffer a distinct and palpable injury:[10]

> [T]he asserted injury must be "distinct and palpable," and "particular [and] concrete," as opposed to being "conjectural...[,] hypothetical," or "abstract"... [W]hen future harm is asserted, it must be "threatened," "certainly impending," and "real and immediate."[11]

An injury in fact showing also "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[12]

b. Zone of Interests

A petitioner must also demonstrate that its injury falls within the zone of interests of the statutes governing this proceeding.[13] To make this assessment, the Commission has observed that "it is necessary to 'first discern the interests arguably . . . to be protected by the statutory provision at issue' and 'then inquire whether the plaintiff's interests affected by the agency action are among them.'"[14]

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10 *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

11 *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

12 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

13 *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001).

14 *Id.* at 272-73 (quoting *National Credit Union Administration v. First National Bank*, 522 U.S. 479, 492 (1998) (internal quotations omitted)).

c. Causation

A petitioner must also establish that the injury is fairly traceable to the proposed activity – in this case, the approval of the Application.[15] Although a petitioner is not required to demonstrate that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is plausible."[16]

d. Redressability

Finally, the Commission has observed that a petitioner is required to show that "its actual or threatened injuries can be cured by some action of" the NRC.[17] Furthermore, "it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."[18]

2. Standing Based On Geographic Proximity

Under NRC case law, a petitioner may in some instances be presumed to have fulfilled the judicial standards for standing based on the petitioner's geographic proximity to a facility or source of radioactivity.[19] Although the NRC has presumed the standing of petitioners in power reactor license proceedings where petitioners have resided within "the zone of possible harm from the nuclear reactor or source of radioactivity" (generally considered to be within a 40-50 mile radius),[20] such a presumption based purely upon

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15 *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994).

16 *Id.*

17 *Sequoyah Fuels*, CLI-01-2, 53 NRC at 14.

18 *Sequoyah Fuels and General Atomics*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

19 *Id.* at 75 n.22.

20 *Florida Power and Light Co.* (Turkey Point, Units 3 and 4), LBP-01-06, 53 NRC 138, 146 (2001).

geographic proximity is not available in this non-reactor case. In contrast to reactor proceedings, proximity alone is not sufficient to establish standing in materials licensing cases.[21] Rather, the "proximity presumption" may be applied in materials licensing proceedings only when it has been demonstrated that the activity at issue involves a "significant source of radioactivity producing an obvious potential for offsite consequences."[22]

3. Standing of Organizations

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representational capacity (by demonstrating harm to the interests of its members).[23] To intervene in a proceeding in its own right, an organization must allege – just as an individual petitioner must allege – that it will suffer a palpable injury to its organizational interests that can be fairly traced to the proposed action and redressed by a favorable decision.[24] To invoke representational standing, an organization must show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating injury within the zone of protected

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21 *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998).

22 *Sequoyah Fuels and General Atomics,* CLI-94-12, 40 NRC at 75 n.22 (citing *Armed Forces Radiobiology Research Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); and *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990).

23 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994).

24 *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528-30 (1991).

interests, causation, and redressability) and has authorized the organization to represent his or her interests.[25]

B. PRESS Has Not Established Standing to Intervene

As described in its Petition, PRESS is a nonprofit organization that was formed "to represent the interest in economic vitality, environmental quality, health, and justice."[26] PRESS also asserts that its members are "from the community and workers that have been affected by the Portsmouth Gaseous Diffusion plant."[27] PRESS has made no effort to demonstrate standing on the basis of its organizational interests and relies exclusively upon representational standing.[28]

1. PRESS Has Not Demonstrated Representational Standing

a. The Proximity Presumption

PRESS claims that its members have presumptive standing, exclusively on the basis that they live near the proposed ACP site.[29] PRESS attached to its Petition the declarations of 18 members who indicate that their residences are located within one to 22 miles of the proposed facility. With the exception of the members' identifying

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25 *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

26 Petition at 7.

27 *Id.* In the section entitled "Description of Petitioners," the Petition states that "Petitioner is Vina K. Colley president of PRESS and Co-chair of National Nuclear Workers for Justice (NNWJ), filing for standing on behalf of PRESS." *Id.* Because the remaining portions of the Petition indicate that PRESS is the actual petitioner, USEC responds to PRESS' assertions of standing. In either event, the Petition fails to demonstrate standing.

28 *Id.* at 9.

29 *Id.* The Petition does, very generally, state that PRESS members "seek to protect their lives and health by op[p]osing the licenses sought by USEC" and that the issuance of the license "could have an adverse effect on these individuals' interests in protecting their health and safety by allowing the construction of an unsafe nuclear facility." These generalities do not allege a particularized injury to PRESS' members, nor do they allege that the ACP represents an obvious potential for offsite consequences.

information and distances from the site, the declarations are identical to one another and contain only the following information:

> I am a member of PRESS and I live about [__] miles from the Piketon/Portsmouth, Ohio site.
>
> I appoint Vina Colley, President of PRESS to represent my interests in the matter of: USEC, Inc. (American Centrifuge Plant) docket No. 70-7004.[30]

Absent from the Petition and the accompanying declarations is any justification for the application of the proximity presumption to this materials licensing proceeding.[31]

The Commission has made clear that proximity alone is not sufficient to establish standing to intervene in materials licensing cases,[32] and PRESS has made no effort to demonstrate that this proceeding involves a "significant source of radioactivity producing an obvious potential for offsite consequences."[33] Although petitioners in a similar licensing proceeding involving uranium enrichment facilities have been granted standing, that proceeding involved circumstances different from those here.

For example, in the pending *Louisiana Energy Services, L.P.* proceeding ("*LES II*"), which also involves an application to enrich uranium using gas centrifuge technology, the Commission granted standing to two organizations whose members live

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30 *See* Petition at attached declarations.

31 Also absent from each declaration is a statement authorizing PRESS to represent the member's interest. Notably, each declarant appoints Ms. Colley, rather than PRESS, to represent his or her interests in the proceeding. This deficiency is an independent ground for a finding that PRESS lacks representational standing. *See Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 407-11 (1984) (Licensing Board denied standing to organization which had relied upon the declaration of a member who had designated only the group's co-director, rather than the group itself, as his legal representative).

32 *International Uranium Corp.*, CLI-98-6, 47 NRC at 117 n.1.

33 *Sequoyah Fuels and General Atomics,* CLI-94-12, 40 NRC at 75 n.22.

within 2 ½ to 22 miles of the proposed site.[34] In that case, members of the petitioner organizations submitted "declarations" that not only specified their proximity to the plant, but also at least made an effort to particularize how the plant might adversely affect their interests.[35]

It is interesting to note that PRESS' discussion of standing and its declarations in this case appear to have been taken directly from the NIRS/PC Petition in LES II, yet they differ in at least one significant respect. Unlike the members of NIRS/PC in LES II, the declarations in this case do nothing more than identify the alleged distances between the declarants' homes and the ACP, and do not even attempt to describe any potential impacts of the type set forth in the LES II declarations.

In this case, PRESS' members' minimalist declarations do not meet either the letter or the spirit of the Commission's standing requirements. PRESS cannot meet the "irreducible constitutional minimum" requirements of direct, palpable injury within the zone of interests protected by governing statutes, causation and redressability purely on the basis of a set of residential addresses. A petitioner must do more to become a formal party to an NRC licensing proceeding.

Furthermore, Petitioner's minimalist effort to demonstrate standing is made more egregious by the fact that this is not the first time that this Petitioner has sought participation in an NRC proceeding, and that on the prior occasion it was "cautioned" by the Commission as to the need in the future to adhere to the Commission's standards for

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34 *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-15, 59 NRC 256, 257 (2004). Neither LES nor the NRC Staff contested the standing of either petitioner organization, and in summary fashion, the Commission granted standing to both organizations.

35 Petition to Intervene By Nuclear Information and Resource Service and Public Citizens (LES II, April 6, 2004) (*see e.g.*, Declaration of Rose Gardner).

demonstrating legal standing. In the context of the initial issuance of Certificates of Compliance for the Paducah and Portsmouth Gaseous Diffusion Plants (GDPs), PRESS sought Commission review of the Director's Decision granting the certifications. The Commission noted that PRESS did not directly address standing.[36] However, since this was the "first time the Commission ha[d] entertained petitions under Part 76 and petitioners, who are appearing *pro se*, may not have understood their obligation to explain their 'interested person' status," the Commission chose to consider (but ultimately rejected) PRESS' petition on the merits.[37] It went on to state, however, that:

> The Commission cautions...that in future Part 76 certification decisions, it will expect petitioners to more specifically explain their 'interested person' status. For guidance petitioners may look to the Commission's adjudicatory decisions on standing.[38]

In the *Georgia Institute of Technology* case to which PRESS was referred by the Commission, there was an assessment by the Licensing Board of the "geographic area that could be affected by an accidental release of radiation."[39] There, both the applicant and the petitioner had expressed their views on this subject. Here, PRESS' Petition and the accompanying declarations are devoid of any such effort to allege, let alone demonstrate that there is an obvious potential for offsite consequences.

The Commission has established reasonable standards for demonstrating standing to participate as a party in an NRC adjudicatory proceeding. As discussed above, these

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36 *U.S. Enrichment Corp.* (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 236 (1996).

37 *Id.*

38 *Id.*, (citing *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115-17 (1995).

39 *Georgia Institute of Technology*, CLI-95-12, 42 NRC at 115.

standards generally entail a specific showing of: (1) a particularized injury; (2) in the zone of protected interests; (3) causation; and (4) redressability. While proximity, coupled with a showing that there is a significant source of radiation with an obvious potential for offsite consequences, may be a sufficient basis for standing, allowing PRESS to participate as a party based on nothing more than the locations of its members' residences would contravene the Commission's standards.

III. PRESS HAS FAILED TO PROFFER AN ADMISSIBLE CONTENTION

A. Applicable Legal Standards

1. Requirements for One Admissible Contention

To intervene in an NRC licensing proceeding, an individual or group must propose at least one admissible contention.[40] The NRC will deny a petition to intervene and request for hearing from a petitioner who has standing but has not proffered at least one admissible contention.[41]

2. Petitioners Have the Burden

As the Commission has observed, "[i]t is the responsibility of the Petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and demonstrate that a genuine dispute exists within the scope of this proceeding."[42] In addition, "[a] contention's proponent, not the licensing board, is

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[40] 10 CFR § 2.309(a) (2005).

[41] *Florida Power & Light Co.* (Turkey Point Nuclear Power Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 5 (2001).

[42] *Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions."[43]

3. Contentions Must Satisfy the Requirements in 10 CFR § 2.309

Pursuant to the Commission's Notice and Order,[44] the admissibility of contentions is governed by 10 CFR § 2.309. Section 2.309(f)(1) requires a petitioner to "set forth with particularity the contentions sought to be raised," and with respect to each contention proffered, the petitioner must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
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> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if

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

44 Notice and Order, CLI-04-30, 69 Fed. Reg. at 61,412.

> the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[45]

A contention that fails to meet any one of these requirements must be rejected.[46]

The Commission has described the agency's contention standard, now found in Section 2.309(f), as "strict by design."[47] This strict rule serves several purposes:

> First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. Second, the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing. Finally, the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.[48]

Sections (a) through (f) below summarize the requirements of Section 2.309(f)(1) as they have been further developed by NRC case law.

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45 10 CFR § 2.309(f)(1)(i)-(vi) (2005) (emphasis added).

46 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI- 99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

47 *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001); *see also Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 334 (1999). In January 2004, the Commission adopted substantial revisions to 10 CFR Part 2, the NRC's Rules of Practice, which became effective on February 13, 2004. *See Changes to Adjudicatory Process*, 69 Fed. Reg. 2,182, 2,183 (Jan. 14, 2004). In the Statements of Consideration accompanying the Final Rule, however, the Commission noted that the contention standard set forth in new Section 2.309(f)(1) is the same standard that has been in effect since 1989 (*i.e.*, the same standard that was set forth in former 10 CFR § 2.714(b) and developed in NRC case law prior to the adoption of the current rule). *Id.* at 2,189-90.

48 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 334 (citations omitted).

a. Petitioners Must Specifically State the Issue of Law or Fact to Be Raised

Section 2.309(f)(1)(i) requires that petitioners "'articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.'"[49]

b. Petitioners Must Briefly Explain the Basis for the Contention

Pursuant to Section 2.309(f)(1)(ii), a petitioner must also provide a brief explanation of the basis for the contention.

c. Contentions Must Be Within the Scope of the Notice of the Proceeding

In addition, a petitioner must demonstrate that its contention falls within the scope of the proceeding.[50] The scope of permissible contentions is bounded by the issues specified in the Notice of Opportunity for Hearing.[51] Therefore, a contention that raises matters that are not within the scope defined by the notice cannot be admitted.[52]

d. Contentions Must Raise a Material Issue

To be admissible, a contention must raise a material issue.[53] As the Commission has observed, "[t]he dispute at issue is 'material' if its resolution would 'make a

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49 *Dominion Nuclear Connecticut, Inc.*, CLI-01-24, 54 NRC at 359 (quoting *Duke Energy Corp.*, CLI-99-11, 49 NRC at 388).

50 10 CFR § 2.309(f)(1)(iii) (2005).

51 *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Georgia Institute of Technology,* CLI-95-12, 42 NRC at 118.

52 *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *see also Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

53 10 CFR § 2.309(f)(1)(iv) (2005).

difference in the outcome of the licensing proceeding.'"[54] In this regard, "[e]ach contention must be one that, if proven, would entitle the petitioner to relief."[55] In addition, contentions alleging a deficiency or error in an application must also "indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment."[56]

e. Contentions Must Be Supported by Facts or Expert Opinions

A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits, but instead only 'bare assertions and speculation.'"[57] So too will "vague, unparticularized issues"[58] and "open-ended or ill-defined contentions lacking in specificity or basis."[59] As the Commission has observed, a petitioner "must do more than submit 'bald or conclusory allegation[s]' of a dispute with the applicant."[60] If a petitioner fails to provide the requisite support for its contentions, a

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54 *Duke Energy Corp.*, CLI-99-11, 49 NRC at 333-34; *see also Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989).

55 Notice and Order, CLI-04-30, 69 Fed. Reg. at 61,412.

56 *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004), *aff'd in part by* CLI-04-25, 60 NRC 223 (2004).

57 *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)).

58 *Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 27 (2003).

59 *Dominion Nuclear Connecticut, Inc.*, CLI-01-24, 54 NRC at 359.

60 *Id.* at 358 (quoting 54 Fed. Reg. at 33,171).

Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking.[61]

f. Contentions Must Raise a Genuine Issue of Material Fact or Law

Section 2.309(f)(1)(vi) requires a petitioner to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. For a contention to be admissible, it must refer to those portions of the license application that the petitioner disputes and indicate supporting reasons for each dispute.[62] As the Commission recently explained:

> [r]equiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself. It also precludes an intervenor from making general allegations, with the hope of generating through discovery sufficient facts to show there is a genuine dispute.[63]

If the petitioner does not believe that the application adequately addresses a relevant issue, the petitioner is required to explain why the application is deficient.[64] Additionally, in such cases, the petitioner must provide "supporting grounds" for its contention that the application must but does [not] consider some information required by law.[65] Furthermore, a contention that does not directly controvert a position taken in the

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61 *Louisiana Energy Services, L.P.*, LBP-04-14, 60 NRC at 56 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

62 *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 19.

63 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 130 (2004).

64 *Arizona Public Service Co.*, CLI-91-12, 34 NRC at 155-56.

65 *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 19.

application is subject to dismissal, as is a contention that mistakenly asserts the application fails to address a relevant issue.[66]

4. Petitioners May Not Rely on Broad, Unexplained References to Documents Allegedly Supporting Their Position

In addition, a petitioner may not simply refer to voluminous documents as the basis for its contention without providing any analysis of or explanation for why particular sections of those documents provide a basis for the contention.[67] Merely "attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention."[68] Under these principles, a contention basis that provides only selected excerpts from a document or only minimal identifying information to permit retrieval of a document – without any attempt to substantively discuss the document's relevance to the contention – cannot be considered adequate support for the contention.

5. Contentions May Not Challenge NRC Rules and Regulations

In addition, a licensing proceeding is an improper forum for challenging the validity of previously-issued NRC rules and regulations.[69] The NRC will reject as inadmissible any contention that attacks applicable statutory requirements or Commission

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66 *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

67 *Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

68 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 298 (1998) (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 338 (1991)).

69 10 CFR § 2.335 (2005); *Florida Power & Light Co.*, CLI-01-17, 54 NRC at 16; *Yankee Atomic Elec. Co.*, CLI-96-7, 43 NRC 235, 252 (1996).

regulations,[70] as well as any contention that seeks to impose stricter requirements than those set forth by the regulations.[71]

B. Analysis of Petitioner's Contentions

In its Petition, PRESS has proposed 22 contentions for litigation in this proceeding. As discussed below, not one of those proposed contentions satisfies the applicable standards for admissibility. As a result, PRESS' Petition should be denied.

Before addressing PRESS' individual contentions, USEC would like to briefly provide its overall view of Petitioner's claims and allegations. Despite running some 42 pages in length, Petitioner's contentions are almost uniformly insubstantial and lacking in any reasonable basis warranting the Commission's expenditure of resources in a formal licensing hearing. Petitioner frequently raises issues outside the scope of the proceeding, fails to provide adequate supporting facts or expert opinions, and raises no genuine dispute of material fact or law. Petitioner simply does not appear to have taken its responsibilities seriously, as evidenced by many of the contentions (*see e.g.*, Contention 22 on "Gender Discrimination" in which USEC is accused of gender discrimination based upon a table in its Decommissioning Funding Plan referring to the "# of men" to be hired to assist with the decommissioning effort).

Moreover, throughout the Petition PRESS repetitively cites various NRC enforcement actions taken against the United States Enrichment Corporation ("Corporation") as the holder of the Certificates of Compliance for the Paducah and

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[70] *Private Fuel Storage*, CLI-04-22, 60 NRC at 129.

[71] *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987).

Portsmouth GDPs.[22] PRESS attempts to create the false impression that USEC, through the enforcement history of its subsidiary at the GDPs, is in constant violation of NRC requirements and cannot be trusted with an NRC license.

Petitioner's frequent and repetitive citation to old enforcement actions represents a superficial effort to suggest that there is substance to its contentions when there is none. The cited enforcement actions are generally old (almost all at least six to eight years old), and PRESS has made no attempt to show how they are relevant to, or characteristic of, current performance. Moreover, PRESS frequently cites enforcement actions whose subject has nothing to do with the underlying contention. For example, PRESS references an eight year old notice of violation relating to storage of security badges in a contention addressing requirements for Radiation Work Permits. *See* Petition at 17.

In any event, merely citing various violations does not give a true assessment of licensee performance. The NRC uses the Licensee Performance Review (LPR) program to provide NRC Senior Management with a high level picture of facility performance. The LPR program is an integrated assessment across the key functional areas of safety operations, radiological controls, facility support, and licensing activities. The NRC has conducted several LPRs at both GDPs and has consistently concluded that the plants are conducting their activities safely. In most cases the NRC has noted an improving performance trend. While the NRC has generally recommended further improvements in certain areas in each LPR, it has also concluded that continuation of the core inspection

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[22] The Corporation is a wholly-owned subsidiary of USEC – which is the ACP license applicant.

program is warranted.[73] This is indicative that the Corporation's safety performance was adequate, even in the areas identified for improvement.

Furthermore, unique to the GDPs is the requirement in Section 1701 of the AEA that the NRC provide a periodic report to Congress. The report discusses the status of health, safety, and environmental conditions at the GDPs. There have been three reports: 1997, 1998, and 2003. In each of the reports, the NRC has concluded that Paducah and Portsmouth have provided adequate protection of public health, safety, safeguards, security, and the environment.[74] In addition, the Corporation's Certificates of Compliance were just renewed in 2003 for the full five year term authorized by law. (*See* Letter, Martin J. Virgilio to J. Morris Brown (undated, Certificates dated December 29, 2003). In short, PRESS' mischaracterization of the Corporation's record does not support its contentions.

In the discussion below, USEC addresses each of PRESS' proposed contentions, along with the supporting Basis Statements, and demonstrates that none are admissible.

1. Contention 1: Criticality Monitoring Exemption

PRESS Contention 1 alleges:

> Petitioners contend that USEC's request for an exemption from 10 CFR 70.25(e) is not justified. 10 CFR 70.25(e) requires, in part, that "the decommissioning funding plan must also contain a certification by the licensee that financial assurance for decommissioning has been provided

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[73] *See e.g.*, Letters, Douglas M. Collins to J. Morris Brown (November 5, 2004, September 22, 2004); Letters, Marc L. Dapas to J. Morris Brown (March 13, 2003, November 26, 2002); and Letter, J. E. Dyer to J. Morris Brown (December 28, 2000).

[74] Reports to Congress on the Gaseous Diffusion Plants Located Near Paducah, Kentucky and Portsmouth, Ohio (Oct. 1, 1998 to Sept. 30, 2003).

in the amount of the cost estimate for decommissioning," is not justified. [sic][75]

Petition at 11. PRESS provides four Bases to support this contention. In those Bases, PRESS fails to even describe why it believes that USEC has not met the criteria for the grant of an exemption, raises "issues" that have no legal import and that have nothing to do with its contention, and misrepresents USEC's Application.

PRESS' first Basis (Basis 1.1) is that the amount of uranium-235 that will be present in the ACP uranium hexafluoride ("UF_6") cylinder storage yards "exceeds the threshold" specified in 10 CFR §70.24 for the maintenance of a CAAS. PRESS states that "[t]he ACP would handle a markedly increased number of cylinders compared with the GDP [and that] GDP exemptions ought not to be automatically transferred to the ACP." Petition at 13-14. This Basis fails to raise a genuine dispute of material fact, lacks adequate specificity, and provides no alleged facts or expert opinions to support the contention.

USEC acknowledges that the amount of uranium-235 in the cylinder storage yards would "exceed the threshold" for maintenance of a CAAS set forth in 10 CFR §70.24. That is, of course, why it is seeking a specific exemption from the 10 CFR §70.24 CAAS requirements pursuant to the exemption criteria set forth in 10 CFR §70.17.

USEC's Application specifically addresses the exemption criteria in Section 1.2.5. PRESS has made no effort to challenge USEC's compliance with those criteria. It has

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[75] Although it is labeled as a contention relating to USEC's request for an exemption from the criticality accident alarm system (CAAS) requirements for the ACP cylinder storage yards, Contention 1 references the portion of the NRC regulations relating to decommissioning funding (10 CFR §70.25). USEC presumes that PRESS intended to refer to the CAAS requirements set forth in 10 CFR §70.24.

failed to identify in any respect why the requested exemption is not "authorized by law...will not endanger life or property or the common defense and security and [is] otherwise [not] in the public interest." *See* 10 CFR §70.17. Instead, PRESS has merely stated that sufficient quantities of U-235 are present to warrant maintenance of a CAAS absent the requested exemption. Thus, PRESS has not directly controverted any aspect of the Application and has presented no genuine dispute of material fact or law.[76]

Similarly, contrary to PRESS' claims, USEC is not seeking an "automatic" transfer of the similar exemptions previously granted by the NRC Staff to the Corporation for the cylinder storage yards at the Paducah and Portsmouth GDPs. On the contrary, USEC independently justifies the basis for granting the exemption for the ACP in the Application, and simply points out that the request is "[s]imilar to the exemption granted for the GDP." Application §1.2.5 (p. 1-53). Thus Basis 1.1 does not support the contention.

The second Basis for Contention 1 (Basis 1.2) has absolutely nothing to do with the contention. In Basis 1.2, PRESS discusses a separate USEC request for exemption from the cylinder posting and labeling requirements set forth in 10 CFR Part 20. That exemption request is based upon the exemption criteria set forth in 10 CFR §20.2301. Since Contention 1 relates to USEC's request for an exemption from Part 70 CAAS requirements, this Basis is totally irrelevant.

Nevertheless, PRESS has again failed to raise any genuine dispute of material fact or law, has provided insufficient specificity, and has proffered no facts or expert opinions to support even its allegations related to Part 20 posting and labeling requirements. In

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[76] *Safety Light Corp.* (Bloomburg, Pennsylvania Site), LBP-04-25, __ NRC __, slip op. at 11-12 (Nov. 9, 2004).

particular, aside from quoting the Application, PRESS simply states that "USEC has not indicated who has deemed it impractical to label each and every container, or their rationale" and cites a 1998 NRC enforcement action against USEC. Petition at 14-15.

"Impracticability" is not the standard for approval or denial of the requested exemption. Thus, even if PRESS were to "prove" that cylinder labeling and posting was "practical" – a point that PRESS has not even alleged – that would not entitle it to relief. Furthermore, PRESS again has made no effort to challenge USEC's compliance with the exemption criteria set forth in 10 CFR §20.2301. PRESS provides no facts or expert opinion challenging USEC's exemption request.

Moreover, PRESS' reference to the seven year old enforcement action taken against the Corporation as holder of the GDP Certificates of Compliance is insufficient to support the contention. Contention 1 alleges that USEC's request for an exemption from the CAAS requirement is not justified. The two alleged deficiencies cited in the notice of violation – one having to do with criticality safety posting and labeling requirements and the other addressing criticality safety training and qualification of personnel – have nothing to do with the contention itself, let alone provide a sufficient substantive basis for its admission. Thus Basis 1.2 does not support the contention.

The third Basis (Basis 1.3) also relates to a portion of the Application which is unrelated to the cylinder storage yard exemption request that is the apparent subject of the contention. In Section 5.4.4 of the Application, USEC states that "exceptions to CAAS coverage [in areas of fissile materials operations] are documented in NCS evaluations and are based on a conclusion in the NCSE that a criticality accident is non-credible in the area.... In addition, CAAS is not required for [certain] areas" pursuant to specific

provisions in 10 CFR Part 71. PRESS alleges that USEC has "failed to furnish specific detail...regarding the exemptions it seeks," that it should "identify the NCS evaluations to which it refers and itemize the specific exemptions it seeks," and that its statements regarding the non-credibility of a criticality accident are "nebulous" and "erronious" [sic]. Petition at 16.

PRESS misunderstands and misrepresents both the Application and the applicable regulation. USEC has not requested a specific exemption from the CAAS coverage requirements based upon non-credibility or Part 71 requirements. (*See* Application Section 1.2.5). Indeed, there is no need to do so since the "exceptions" discussed by USEC do not require any such specific exemption. In Section 5.4.4 of the Application, USEC is simply describing how it will determine those areas that will require CAAS coverage under the regulations themselves (10 CFR §70.24 and 10 CFR Part 71), and is committing to document compliance with the regulations through formal Nuclear Criticality Safety Evaluations.

PRESS' assertions that USEC's statements regarding "non-credibility" are "nebulous" and "erronious" [sic] are disingenuous at best. PRESS ignores the fact that the same section of the Application specifically defines "non-credibility." In particular, Section 5.4.4 states that "[c]onclusions of non-credibility require at a minimum that the inventory of [235U] in the area is less than 700g, less than 50g per square meter, or less that 5g in any 10 liter volume. Areas that do not contain fissile material operations do not require a NCSE and do not require CAAS coverage." Since USEC's Application is consistent with the applicable regulations, PRESS' allegations constitute an unlawful challenge to the regulations.

In any event, PRESS has failed to provide anything beyond mere allegations to support its position that the Application lacks sufficient detail. No facts, law or expert opinion support that assertion. PRESS also argues in Basis 1.3 that USEC's "record on safety is questionable," again generally referencing "eight safety violations" only one of which it even identifies in its Petition. Petition at 16. PRESS makes no effort to explain the relevance of these violations to the contention. Thus, Basis 1.3 does not support the contention.

Finally, Basis 1.4 is no more than a bare reference to portions of Appendices to the Petition which quote certain NRC regulations. This unexplained and unparticularized reference clearly falls short of the recognized specificity standards for admissibility of a contention established by the Commission.[77]

In summary, PRESS fails to meet the admissibility requirements set forth in 10 CFR §2.309(f). It provides no concise statement of the alleged facts or expert opinion supporting Contention 1, and it fails to provide sufficient information to show that there is a genuine dispute on a material issue of law or fact. Thus, Contention 1 should be dismissed.

2. Contention 2: Radiation Work Permits

PRESS Contention 2 states:

> USEC Inc. fails to specify, in its application, the approved procedures in which the Radiation Protection Manager may exempt the requirement for a Radiation Work Permit in certain Radiation Areas. Moreover, it fails to identify the

[77] Throughout the Petition, virtually all of PRESS' proposed contentions are "supported" by a similar vague reference to NRC regulations set forth in the Appendices to the Petition. These can be found in Bases 2.2, 3.2, 4.3, 5.3, 6.8, 7.5, 8.2, 9.2, 10.2, 11.5, 12.3, 13.2, 16.3, 17.3, 18.6, 19.2, 20.8, and 21.4. Since these "Bases" are clearly inadequate under the applicable contention admissibility standards (and indeed many of the cited regulations have nothing to do with the particular contention they allegedly support), they will not be discussed further in this Answer.

> specific Radiation Areas in which the Radiation Protection Manager may exempt the requirement for a Radiation Work Permit.

Petition at 16-17. PRESS' Basis for this contention (Basis 2.1) simply restates the contention, references an unrelated, eight year old notice of violation issued to the Corporation relating to maintenance of security badges, and states that "USEC demonstrated a relaxed approach to keeping unused security badges in an insecure place. One may expect USEC to adopt a similar approach to Radiation Work Permits." Petition at 17. Clearly this Basis is insufficient to support the contention.

PRESS has provided no facts, expert opinion or any other sources reasonably supporting the contention. Nor has it alleged how the level of information in the Application fails to meet applicable requirements governing the submission of applications. (It is, of course, common for NRC license applicants to generally state in their applications that certain types of decisions will be made via separate approved procedures.) To the extent that PRESS is arguing that such procedures should be included in the Application itself, it is engaging in an impermissible challenge to the NRC's regulations, which require no such thing.

Instead, PRESS relies on a bare reference to an old, unrelated enforcement action, and speculates without any basis whatsoever, that USEC will adopt a "relaxed approach" in issuing Radiation Work Permit (RWP) exemptions. Furthermore, the Basis statement does not even logically support the contention, since USEC's alleged attitude towards compliance (its so-called "relaxed approach") has nothing to do with the premise of the contention – a lack of specificity in the Application. Thus, contrary to 10 CFR §2.309(f), Contention 2 fails to provide sufficient supporting facts or expert opinion and fails to

raise a genuine dispute of material fact or law. Accordingly, this contention should be dismissed.

3. Contention 3: Cylinder Labeling

Contention 3 states:

> Petitioners contend that USEC's request for exemption from labeling UF_6 cylinders is not warranted.

Petition at 17. The Basis for this contention merely repeats Contention 1, Basis 1.2 (quoting the same portion of USEC's Application). That contention and basis was addressed on pp. 22, 23 above. Thus it adds nothing to PRESS' claims. PRESS also references (now for the third time in its Petition) a seven year old notice of violation that provides an inadequate basis for admitting the contention. PRESS utterly fails to even acknowledge the criteria relevant to USEC's exemption request, let alone explain why USEC's discussion of those criteria in the Application is inadequate to support the requested exemption. Contrary to 10 CFR §2.309(f), Contention 3 fails to provide any supporting facts or opinion, and raises no genuine dispute of material fact or law. Thus, it is not admissible.

4. Contention 4: 10% Assay

Contention 4 states:

> Petitioners contend that USEC has not demonstrated that it has a market for 10% assay 235 U. Furthermore, USEC has exceeded its possession limit for enriched uranium previously.

Petition at 18. In Basis 4.1, PRESS states that "USEC makes no attempt to explain why it requires a license for 10% assay 235 U" and that "[i]t is not clear that USEC would suffer any disadvantage if, in an alternative scenario, it obtained a license that allowed only 5% assay." Petition at 19.

The "market" or rationale for USEC's decision to seek NRC approval for authority to produce 10% assay enriched uranium is not a material issue in this proceeding. USEC, as the license applicant, may request approval of whatever enrichment level it deems appropriate. It is of course up to the NRC to determine if USEC has demonstrated that it can possess such material consistent with public health, safety and security considerations. There is no requirement for USEC to justify its business rationale for seeking such authority, and PRESS has failed to even allege that such a showing is required by law. Thus, this part of the contention and its accompanying Basis (Basis 4.1) is beyond the scope of the proceeding and raises no genuine dispute of fact or law.

Contention 4 is styled as a "safety" contention (*see* Petition Table of Contents), yet it appears to use the language of an environmental contention – referring to 5% assay as an "alternative scenario." Petition at 19. In either event, it alleges neither an adverse safety or environmental impact arising out of the requested 10% assay level.

In addition, in its Environmental Report (ER), USEC addresses a reasonable range of alternatives to the proposed action including the "No Action" alternative and various other alternatives. (*See* ER §2.0) USEC was not required to consider a 5% assay possession limit as a reasonable alternative, and PRESS does not allege to the contrary. Instead, all it alleges is that it is not clear that USEC would "suffer any disadvantage" if the license was limited to 5% assay. Petition at 19. Whether or not that is the case is beyond the scope of the proceeding. Even if proven, it would not entitle Petitioner to relief since it is not material to the NRC's licensing determination.

Basis 4.2 is directed at the second allegation in Contention 4 -- that USEC has exceeded its possession limits in the past. In particular, it references various 1998 enforcement actions in which the NRC "determined that USEC Inc., exceeded its possession limit for uranium: greater than 10wt%." Petition at 19-20. The Corporation was issued one non-cited violation in 1998 arising out of the discovery of greater than 10% assay enriched uranium that was left over as "legacy" material from DOE's prior operation of the GDP. *See* EA 98-249, 250 and 251. Thus, PRESS' account is misleading at best. In any event, as discussed earlier, PRESS' reference to this old enforcement action is not a sufficient basis to admit the contention.

Furthermore, the alleged exceedance does not logically support the contention. Whether or not USEC has or will in the future exceed possession limits is unrelated to the particular possession limits contained in the Application. Accordingly, contrary to 10 CFR §2.309(f), Contention 4 raises issues that are beyond the scope of the proceeding, provides no supporting facts or expert opinion, and creates no genuine dispute of material fact or law. As a result, Contention 4 is inadmissible.

5. Contention 5: Domino Effect

Contention 5 states:

> Petitioners contend that the Application exhibits no evidence that USEC has attempted to model the catastrophic scenario associated with centrifuge cascades: the "Domino Effect." Further, the petitioners contend that the Application has not exhibited sufficient design specification data to allow the public to assess the likelihood of the occurence [sic] of such an accident. This is contrary to 10 CFR 70.22(h)(2)(i)(1)(ii).

Petition at 20. Under this contention PRESS erroneously asserts that USEC has not considered the alleged "domino effect" in its safety analyses, and has violated the

regulation calling for the development of an Emergency Plan. PRESS also raises unsubstantiated and erroneous claims about USEC's planned centrifuge machine manufacturing rate, and relies on old, unrelated notices of violation.

The first Basis for this contention (Basis 5.1) briefly describes the "domino effect" and asserts that the Application does not provide detail on the "angular speed of the centrifuges, or the AC frequency that they operate on...[or] the construction of the centrifuge cylinders, by which to estimate the centrifuges' moments of inertia." Petition at 20. This fails to explain how or why "angular speed," "AC frequency" or "construction" may cause or contribute to the alleged domino effect. PRESS again has provided no facts or expert opinion to support its assertions. Its bare, unexplained reference to a particular website (*see* Petition at 20, n.1) is insufficient.

Furthermore, a centrifuge machine crash scenario was, in fact, evaluated in the Integrated Safety Analysis (ISA), which conservatively assumed that the casing was penetrated. The design of the centrifuge machines prevents propagation of failures—the so called "domino effect." The machines are designed to ensure the debris generated from a centrifuge failure during operation remains confined in the machine. The ER, Section 2.1.2.2, states that the casing "provides physical containment of components in the unlikely event of a catastrophic failure of the gas centrifuge machine." In addition, as discussed in section 1.1.5.5.3.2 of the Application, "the centrifuge mount system is designed so that each machine responds to its operating environment independently of other machines." Thus, Petitioner's assertion that USEC has not considered a "domino effect" event is erroneous.

Finally, PRESS alleges, in error, that USEC's application is "contrary to 10 CFR 70.22(h)(2)(i)(1)(ii)." That section of the NRC regulations simply requires certain license applicants to develop an Emergency Plan. Apart from the fact that the contention relates to USEC's alleged failure to adequately consider the consequences or likelihood of the "domino effect" (a subject which has nothing to do with whether or not USEC has complied with the requirements for an Emergency Plan), PRESS ignores the fact that USEC has submitted a proposed Emergency Plan conforming to applicable NRC guidance. (*See* Application §8.0 and "Emergency Plan for the American Centrifuge Plant in Piketon, Ohio" submitted along with the Application.)

In Basis 5.2, PRESS discusses USEC's plans for the manufacture of the centrifuges and speculates that "Cranking out 20 centrifuges a day for two years has to elevate the [likelihood] for a catastrophic event like the 'domino effect.'" Petition at 21. PRESS provides no explanation or support for this statement.

There is no basis for concluding that the planned manufacturing rate is unduly hasty, or that appropriate quality controls will not be applied, and no evidence to suggest that the manufacturing rate will increase the likelihood of a "domino effect." In fact, the ER, Section 2.1.2 states that "Each of the manufacturing/assembly areas has multiple workstations and equipment sets to allow for the production of up to 20 machines per day."

USEC has partnered with experts in the field of centrifuge manufacturing, the manufacturing personnel are external to plant operations organizations, adequate equipment will be available, and rigorous quality assurance will be applied to the manufacturing process. (*See e.g.*, Quality Assurance Program Description for the

American Centrifuge Plant, Section 2.0, submitted along with the ACP Application.) Thus, there will be no impact on safety from production of centrifuge machines.

PRESS goes on to state that "[i]f there were a catastrophic event, it's not clear that USEC could be counted on to do the right thing," relying entirely on a 1999 notice of violation relating to a fire event at one of the GDPs. Petition at 21-22. Apart from the fact that PRESS' speculation about USEC's reliability has nothing to do with its contention that USEC failed to adequately consider the impacts or likelihood of a "domino effect" event, the reference to this enforcement action is an insufficient basis for admitting the contention.

In summary, contrary to 10 CFR §2.309(f), Contention 5 provides no supporting facts or expert opinion and raises no genuine dispute of material fact or law. Thus, Contention 5 should be dismissed.

6. Contention 6: Health Risks

Contention 6 states:

> Petitioners contend that ER 3.11 "Public and Occupational Health" dangerously underestimates the health risks and damage already effecting worker and public health as a result of operations on the site.
>
> Calculations of "Air releases of radionuclides from the operations at the site in radiation exposure to people in the vicinity well within regulatory limits" are understated.
>
> Also "beryllium" exposure and "certain chemicals" and their "health effects" relies on contested evidence.

Petition at 22. PRESS provides eight Bases for this contention. None of them supports its admissibility. As described below, those Bases contain bare references to voluminous documents with no explanation of their relevance to the contention, discuss events that

took place many years ago prior to USEC's commencement of activities at the Portsmouth site, and level criticisms at DOE that are beyond the scope of this proceeding.

First and foremost, Bases 6.1 through 6.6 provide only brief, unexplained references to various documents, letters, "worker testimonials" and reports that allegedly support the contention.[78] As discussed in Section III.A.4 above, a Petitioner may not simply refer to voluminous documents as the basis for its contention without providing any analysis of or explanation for why particular sections of those documents provide a basis for the contention. On this basis alone, PRESS has failed to meet its burden of adequately supporting the contention.

Furthermore, there are numerous other reasons why this contention is inadmissible. First, while PRESS alleges that calculations of airborne radiological releases from existing site operations are "understated," it provides no support for that statement. The Application itself references USEC's National Emissions Standards for Hazardous Air Pollutants (NESHAP) Radionuclide Emissions Report and states that:

> Air releases of radionuclides from the operations at the site result in radiation exposures to people in the vicinity well within regulatory limits. Based on the year 2002 total radionuclide releases from United States Enrichment Corporation operations, the radioactive dose calculated to the [maximally exposed individual] MEI is 0.026 mrem/yr. The collective dose to population within 80 km (50 mi) of the site is 0.10 person-rem.... This calculated MEI dose of 0.026 mrem/yr is much lower than the EPA standard of 10 mrem/yr and the NRC TEDE limit of 100 mrem/yr.

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[78] Basis 6.1 refers the NRC to a website. Basis 6.2 cites a letter, providing a cryptic quotation apparently from that letter. Basis 6.3 provides excerpts from statements by Petitioner's President at the NRC scoping meeting on the ACP. Basis 6.4 excerpts "worker testimonials" extracted from a website. Bases 6.5 and 6.6 reference various reports. None of these documents is either provided or explained.

See ER §3.11, p.3-82. The Application clearly shows that radiological exposures from existing site operations are very small fractions of applicable limits. PRESS provides no facts or expert opinion to contradict that information.

While PRESS cryptically refers to "contested evidence" related to beryllium exposures and "certain chemicals," it provides no further explanation of such evidence. ER Section 3.11 of the Application discusses historical beryllium and other chemical exposures. PRESS provides no facts or expert opinion to contradict that information.

In Basis 6.3, the quoted excerpts from the statements by Petitioner's President at the NRC public scoping meeting, on their face, relate to alleged events occurring in 1978, 1980 and 1992 that could not possibly be relevant today – at least 13 year later – to the impacts of ongoing site activities and that involved operations that preceded USEC's activities at the site. Furthermore, Petitioner's own public statements do not provide facts or expert opinions sufficient to demonstrate admissibility.

Similarly, Basis 6.4 quotes "[t]ypical testimonials by workers who [even according to PRESS] were employed at the plant pre-USEC...." Petition at 24 (emphasis added). As with Basis 6.3, this information is irrelevant to the impacts of ongoing site operations. Furthermore, several of the testimonials that appear to relate to more recent activities criticize DOE, and/or refer to activities at the Paducah GDP, and therefore are beyond the scope of this proceeding on USEC's license application for the ACP at Portsmouth. None of these references raises a genuine dispute of fact or law material to this proceeding.

Basis 6.7 raises vague questions regarding DOE's disposition of appropriated funds that appear to have nothing to do with the ACP and this proceeding. According to

PRESS, "DOE must account to the public for how this tax money is being spent and it should be fully made public in USEC's filing papers." Petition at 26 (emphasis added). PRESS' vague allegations against DOE have no apparent relationship to its contention on the health effects of ongoing site operations, are clearly beyond the scope of this proceeding, and fail to raise any genuine dispute of material fact or law.

Thus, contrary to 10 CFR §2.309(f), PRESS has provided no supporting facts or expert opinion, raises issues that are beyond the scope of the proceeding, and has failed to raise any genuine dispute of material fact or law. Accordingly, Contention 6 is inadmissible.

7. Contention 7: 3.9% Feedstock

Contention 7 states:

> Petitioners contend that USEC is primarily interested in LEU feedstock of about 3.9% assay. This is contrary to the general impression of the Application that the feedstock would be natural assay. Moreover, petitioners contend that 4000 (14-ton equivalent) containers of feedstock would be required per year, and that 3000 containers of product would be produced. Petitioners contend that USEC should have been more forthright in the Application and quoted these figures in addition to the figures for tails.

Petition at 27. PRESS' allegations that USEC has misled the NRC are without merit. USEC generally anticipates feeding normal uranium to the ACP. However, Table 1.2-2 of the Application (pp. 1-61 to 1-62) specifically indicates that USEC is seeking authorization for, among other things, "[h]eating cylinders [containing special nuclear material] and feeding [their] contents into the enrichment process." Thus, USEC has not misled the NRC and the NRC need not inquire any further to conclude that this aspect of the contention is inadmissible.

Nevertheless, PRESS bases its allegation regarding USEC's intent to utilize 3.9% enriched material as feedstock on a calculation prepared by Petitioner's Technical Coordinator that contains both calculational errors and erroneous assumptions (Basis 7.1). Petition at 27-29. While, as described above, USEC is seeking authorization to be able to feed enriched uranium into the process, PRESS' calculation is based on, among other things, the flawed assumption that one Separative Work Unit (SWU) of enrichment is required for each unit of feed.

Finally, PRESS' assertion that USEC would act contrary to its statement in the Application is erroneous, baseless, and improperly alleges that USEC would violate applicable NRC requirements. The Commission has observed on several occasions that "in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations."[79]

Basis 7.2 purports to support Petitioner's statements in the contention regarding the number of feedstock and product cylinders needed or produced at the ACP. But PRESS fails to describe the significance of its estimates. Petition at 30. These statements allege no error or omission in the Application or any noncompliance with NRC requirements. As such, even if true,[80] they would not entitle PRESS to any relief and do not raise a genuine dispute of material fact or law.

Basis 7.3 vaguely refers to a portion of the Application regarding "UF_6 feed cylinders, cylinders containing enriched product (such as Russian LEU material), ..."

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[79] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001). *See also GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000); *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995).

[80] PRESS' estimates of feedstock and product cylinders are in error because they were derived from Petitioner's erroneous assumptions in Basis 7.1 regarding feed assay.

Petition at 30. That portion of the Application (Section 1.1.5.5.1, p. 1-16) describes ACP "Receiving Operations." As the Application clearly indicates (*see e.g.*, ER §1.1), USEC may receive LEU.

In Basis 7.4, PRESS states that it is "not clear" what the "HEU program" referenced in the ER is, and that "[i]f the HEU program is sited at Piketon, this certainly has grave implications for the petitioners." Petition at 30. Section 1.1 of the ER, however, specifically describes the referenced "HEU program" as follows:

> In addition, as Executive Agent for the U.S. Government, the United States Enrichment Corporation agreed to purchase, if made available by the Russian Executive Agent, 5.5 million SWU per year of LEU that is derived from down blending of HEU from Russian warheads (Megatons to Megawatts Program). The agreement under which the United States Enrichment Corporation supplies LEU from this source expires in 2013. Nearly every commercial nuclear power reactor in the United States has been refueled at some point in the past decade with low-enriched uranium from this program. About one in ten homes and businesses in the United States are powered with fuel from the Megatons to Megawatts program.

See also ER §2.2.

Furthermore, as to PRESS' unspecified "grave implications" regarding the HEU (*i.e.*, "megatons to megawatts") program, it should be noted that USEC receives, under the program, only LEU derived from HEU blended down by the Russian government in Russia. *See* ER §1.1 Thus, Petitioner's concerns are vague and outside the scope of this proceeding.

In summary, contrary to 10 CFR §2.309(f), Contention 7 raises issues that are beyond the scope of the proceeding and creates no genuine dispute of material fact or law.

8. Contention 8: Scioto Survey

Contention 8 states:

> Petitioners contend that the use of an average figure for uranium concentration in the Scioto is a misleading way to characterize the transport of uranium in water. A full survey should be undertaken.

Petition at 31. Petitioner's Bases for this contention are wholly inadequate. All PRESS does is quote, without any explanation whatsoever, a portion of the Application. PRESS makes no effort to explain how or why the information in the Application is "misleading" or to provide any basis for concluding that applicable NRC requirements have not been met. It is not even clear, within the contention itself, what PRESS is referring to when it states that "[a] full survey should be undertaken."

In any event, the quoted portion of the Application (Section 1.3.4.7) provides only a historical description of past discharges of the Scioto River (with appropriate references to USEC's source for the data), and PRESS makes no effort to dispute the accuracy of that description or to challenge the source document. Thus, contrary to 10 CFR §2.309(f), PRESS has failed to meet the specificity and bases requirements, has provided no supporting facts or expert opinion, and has raised no genuine issue of material fact or law. Contention 8 therefore is inadmissible.

9. Contention 9: LLMW Exemption

Contention 9 states:

> Petitioners contend that LLMW Exemption doesn't apply to material generated offsite. (See OAC 3745-266.)

Petition at 32. In support of this contention (Basis 9.1), PRESS cites an Ohio regulation that provides that low-level radioactive mixed waste (LLMW) is eligible for a conditional exemption from Resource Conservation and Recovery Act (RCRA) storage and treatment

permit requirements "if it is generated and managed ... under a single ... license. (Mixed waste generated at a facility with a different license number and shipped to your facility for storage or treatment requires a permit and is ineligible for this exemption....)" Petition at 32. It is not at all apparent why PRESS believes that LLMW will be generated at another facility (*i.e.*, "offsite") and shipped to the ACP for storage or treatment. USEC has no plans to do so and the portion of the ER quoted by PRESS makes no such statement.

Furthermore, whether or not LLMW is subject to an exemption from RCRA permitting requirements is beyond the scope of this proceeding and the NRC's jurisdiction. Even if true, it would not entitle PRESS to any relief from the NRC in this proceeding. Contrary to 10 CFR §2.309(f), Contention 9 raises matters that are beyond the scope of the proceeding and fails to identify a genuine dispute of material fact or law. Contention 9 is therefore inadmissible.

10. Contention 10: Independent Environmental Reporting

Contention 10 states:

> Petitioners contend that USEC has a very poor record of self-assessment, and that an independent assessment of the environmental base-state is justified.

Petition at 33. In support of this contention, PRESS alleges that because of USEC's "documented history of misleading the NRC" an "environmental assessment for the EIS should be undertaken by an independent third party." According to PRESS, "USEC cannot be relied upon to do that." Petition at 33.

Of course, the NRC Staff is required by law, and fully intends, to conduct an independent review of USEC's ER and to prepare a full environmental impact statement (EIS). The Staff is required by NRC regulation to "independently evaluate and be

responsible for the reliability of any information which it uses" in meeting its responsibilities under the National Environmental Policy Act (*see* 10 CFR §51.41), and to prepare a full EIS for the ACP (*see* 10 CFR §51.20(b)(10)). Thus, the "independent assessment" sought by Petitioners will be performed and no genuine issue of material fact or law has been raised. If PRESS is asking for more, then it is impermissibly challenging the NRC's statutory authority and jurisdiction, as well as the applicable NRC regulations.

Furthermore, USEC strongly disputes Petitioner's assertion that it has a history of misleading the NRC. For the reasons described in Section III.B above relating to the enforcement history at the GDPs, Petitioner's allegations do not support admission of its contention. Contrary to 10 CFR §2.309(f), PRESS has raised no genuine dispute of material fact or law. Accordingly, Contention 10 should be dismissed.

11. Contention 11: Ground and Surface Water

Contention 11 states:

> Petitioner contends that the Environmental Report (ER) 3-18 through 3-23 contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 CFR 51.45.
>
> The ER 3.4 Water Resources, 3.4.1 "Groundwater" and 3.4.2 "Surface Water" has failed to address the following concerns. The factual basis for such contention is set forth below:

Petition at 34. PRESS provides several Bases for this contention, none of which point out any errors or omissions in the ER. Those Bases vaguely and misleadingly reference reports which are not provided by PRESS on the basis of alleged "security" concerns and which are irrelevant to the contention.

In Basis 11.1, PRESS references a report from an unnamed source and does no more than state that: "Each of the 12 pages of this report may contain information similar to what has been redacted from the ER 'pursuant to 19 [sic] CFR 2.390'.... This above reference is vital to petitioner's arguments and we await NRC directions pertaining to the manner in which we can present these facts without disclosing the 'security' intent of 19 [sic] CFR 2.390." Petition at 34.

Clearly, as discussed in Section III.A.3.e above, Petitioner's bare reference to this report without further explanation is wholly inadequate to support this contention. All that PRESS alleges about the content of the report is that it is "vital to petitioner's arguments." Petition at 34.

The report in question ("Danger Lurks Below: The Threat to Major Water Supplies from U.S. Department of Energy Nuclear Weapons Plants," Alliance for Accountability, April 2004) is readily available on the Internet. USEC is aware of no requirement (and PRESS has cited none) that would have precluded Petitioner from submitting this supposedly "vital" report to the NRC and the Applicant in this proceeding or, at least, from explaining its significance. Nor, to the best of our knowledge, did PRESS ever seek advice or direction from the NRC Staff on whether there were any constraints on its distribution of this information. Certainly, in the time PRESS had available to it to prepare its Petition (133 days), it had ample opportunity to do so.

Finally, our examination of the report indicates that it "summarizes the contamination found at 13 of the major U.S. Department of Energy nuclear weapons sites" (Report at vii), acknowledges that "DOE remains responsible for the remediation activities" on the Portsmouth site (Report at 168), and that the discussion of the

Portsmouth site is silent with respect to the potential impacts of the ACP (Report at pp.167-179). Clearly, this report is not relevant to the potential impacts of "the proposed [ACP] project" which is the subject of the contention. Thus, this Basis fails to support the contention.

In Basis 11.2, PRESS again refers without explanation to a report PRESS commissioned that relates to the Portsmouth GDP and not to the ACP itself. (The report is entitled "Groundwater Movement at the Portsmouth Gaseous Diffusion Plant," PRESS and Uranium Enrichment Project (February 2002) and it too is available on the Internet.) Contention 11 very clearly, however, proposes to litigate the impacts of "the proposed [ACP] project." Thus GDP operations are generally outside the scope of the proceeding. PRESS again attempts to hide behind unwarranted concerns about public disclosure rather than provide a sufficient analysis or discussion of the significance of this report to its contention. Like Basis 11.1, this Basis fails to support the contention.

In Basis 11.3, PRESS again provides an inadequate reference to a report prepared by Dr. Sergey E. Pashenko, a "[c]ompleted" copy of which "is not [even] available at this time." Petition at 35. Moreover, apparently the report addresses the results of "over 100 samples of water and soil around the Portsmouth Gaseous Diffusion Plant." Petition at 35. Since this contention relates specifically to the impacts of the "proposed [ACP] project," the report on its face appears to be irrelevant and beyond the scope of the proceeding.

In any event, it appears that this Basis refers to environmental samples taken near the Portsmouth site by Dr. Pashenko that were discussed by Petitioner's President, Ms. Colley, at a December 2, 2004 public meeting. In response to those concerns, DOE

corresponded with Ms. Colley on February 24, 2005, describing the efforts undertaken to investigate her concerns and reporting only normal background levels of radiation in the areas investigated near the plant. *See* Letter, William E. Murphie to Vina Colley (Feb. 24, 2005) (*See* Attachment A.)

In Basis 11.4, PRESS quotes from a letter apparently authored by an Ohio EPA official regarding a "draft RBES" report that appears to relate to DOE RCRA compliance activities at the Portsmouth site and to a "Consent Decree" to which USEC is not a party.[81] Petition at 35. Even if properly supported with an adequate factual or legal basis (which is not the case here), allegations regarding DOE activities, particularly related to its RCRA obligations, are outside the scope of this proceeding and raise no genuine issue of material fact or law related to the impacts of the "proposed [ACP] project," as discussed in the contention.

In summary, contrary to 10 CFR §2.309(f), Contention 11 raises matters outside the scope of the proceeding and demonstrates no genuine dispute of material fact or law. Thus, Contention 11 is inadmissible.

12. Contention 12: Radiological Impacts

Contention 12 states:

> Petitioners contend that ER 4.12.3.2 "Radiological Impacts" and "Pathway Assessments," "Accident Analysis" and "Public & Occupational Expose [sic]" is inadequate.

Petition at 36. PRESS' Bases for this contention suffer from the same infirmities as its Bases for Contention 11. In Basis 12.1, PRESS again vaguely references one particular GAO report (that discusses DOE's cleanup of the Paducah plant), and "[m]any" others

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[81] The draft RBES report is a DOE "Risk Based End State" report that discusses DOE's vision of the end state of a facility undergoing remediation (DOE/OR/11-3137 & D1).

that are "typical" of some unstated point that Petitioner desires to make. Petition at 36. No effort is made to discuss the content or significance of these reports, and no error or omission in the ER is identified. Petitioners are unwilling to even provide "the location of these reports" pending "'security' instructions from NRC." Petition at 36. Presumably these unidentified GAO reports are publicly available through the GAO itself. Viewed in even the most charitable light to PRESS, at best this Basis suggests that there may be information publicly available in GAO reports that has been redacted in the ER pursuant to 10 CFR §2.390. Even if true, this identifies no genuine issue of material fact or law within the scope of this proceeding.

In Basis 12.2, PRESS quotes "personal correspondence" from Dr. Pashenko that is so unintelligible that even PRESS makes no "attempt to interpret the language." Petition at 36-37. Basis 12.2 fails to provide the requisite level of clarity and specificity to support this contention. Contrary to 10 CFR §2.309(f), Contention 12 provides no supporting facts or relevant expert opinion and raises no genuine dispute of material fact or law. Accordingly, Contention 12 should be dismissed.

13. Contention 13: D&D Plans Inadequate

Contention 13 states:

> [P]etitioners contend that ER 4.13.2.4 "Operations Phase Feed Withdrawal, and Customer Services Facilities does not contain viable Decontamination & Decommissioning plans or adequate information about radioactive and hazardous materials.

Petition at 37-38. Petitioner's Basis for this contention is its unsupported assertion that "disposal facilities [for ACP-generated waste] must be identified and accompanied by statements from the facilities that they will receive them and the cost." Petition at 38.

PRESS also finds two other statements (presumably from the ER) "unacceptable," but does not explain why.

Aside from the lack of sufficient specificity and basis for this contention, it also misinterprets, and constitutes an impermissible challenge to, multiple NRC regulations. First, under 10 CFR Part 51, the ER is not required to include either USEC's Decommissioning Plan ("DP") or its Decommissioning Funding Plan ("DFP"). Second, the DP is not even required to be submitted until the license has expired or the licensee has permanently ceased principal operations (10 CFR §70.38(d)), and the DFP which was submitted with the Application is not required to provide statements from disposal facilities that they will accept ACP wastes (10 CFR §70.25(e)).

The contention also asserts that ER Section 4.13.2.4 "does not contain...adequate information about radioactive and hazardous materials." Petition at 38. The ER Section to which PRESS is referring is actually Section 4.13.3.4 (there is no Section 4.13.2.4). But that section is not intended to address radioactive or hazardous materials. Throughout the ER, there are extensive discussions and analyses of such materials (*see e.g.*, ER §§3.12 and 4.13). Therefore, contrary to 10 CFR §2.309(f), Contention 13 provides no supporting facts or expert opinion, raises no genuine dispute of material fact or law, and is inadmissible.

14. Contention 14: Application Inadequate

Contention 14 states:

> The Fundamental Nuclear Materials Control Plan (FNMCP) doesn't satisfy the requirements of 10 CFR 74.13(a), therefore the Application is inadequate.

Petition at 38. The only thing PRESS does to support this contention is to quote USEC's request for an exemption from certain Part 74 reporting requirements. PRESS never even

addresses the criteria for granting an exemption and seems to misunderstand even the concept of an exemption request. PRESS alleges no error or omission in the Application. Contrary to 10 CFR §2.309(f), Contention 14 provides no supporting facts or expert opinion and raises no genuine dispute of material fact or law.

15. Contention 15: National Security

Contention 15 states:

> Petitioners contend that USEC hasn't demonstrated that [the] ACP would advance national security goals. The editorial of Congressman David Hobson suggests that it may well be the opposite.

Petition at 39. There are numerous deficiencies in the Bases for this contention, not the least of which is that the quoted statements of former DOE Secretary Abraham (Basis 15.1) are directly contrary to the contention, and that the Washington Times editorial by Congressman David Hobson (Basis 15.2) has absolutely nothing to do with the ACP. The "initiatives" of concern to Congressman Hobson (cited misleadingly by PRESS) are "nuclear weapons" initiatives and there is nothing in that editorial that addresses the ACP. *See* Petition, Appendix A.

Nor is the NRC required to find that the ACP "advances" national security goals. The legal standard, of course, is that the Application is "not inimical" to the common defense and security and any assertion by PRESS to the contrary is an impermissible attack on the AEA and NRC regulations.

In Basis 15.3, PRESS urges the NRC to "consider the Hobson doctrine, determine that the issuance of a license for the ACP would be inimical to the common defense and security...and deny the license." Petition at 40. PRESS has provided no basis whatsoever for this request. Its own policy preference for a ban on uranium enrichment

does not raise a litigable issue in this proceeding. Thus, contrary to 10 CFR §2.309(f), Contention 15 raises matters beyond the scope of the proceeding, lacks any supporting facts or expert opinion, and fails to raise a genuine dispute of material fact or law. Thus, this contention should be dismissed.

16. Contention 16: Alternative Site Use

Contention 16 states:

> Petitioners contend that the no-action alternative is more beneficial to the site than the proposed action. Piketon could be an industrial heaven employing many thousands if it were cleaned up. USEC will block alternative uses because of the security arrangements that would have to be made.

Petition at 40-41. While PRESS may prefer the "no-action" alternative, it does not allege that USEC has failed to consider it in its ER.

In Basis 16.1, PRESS states that "[w]e should consider the impact of the no-action alternative on the site, not on USEC's commitments." Petition at 41. USEC's ER, in fact, does consider the impacts of the no-action alternative on the Portsmouth site in detail. In Section 4 of the ER, thirteen different impact areas are considered (*e.g.*, land use impacts, water resources, etc.). Even a cursory review of the ER shows that the impacts of the no action alternative on the site were considered in each of these areas. As a result, PRESS has failed to identify any error or omission in the Application or to raise any genuine dispute of material fact or law.

Finally, there is no requirement to evaluate alternative site uses as PRESS has, without legal citation, suggested. "Under NEPA, an agency need only consider the range

of alternatives 'reasonably related' to the scope and goals of the proposed action"[82] and the "no action" alternative.[83] The purpose and need for the ACP is to provide enriched uranium.[84] Accordingly, aside from the "no action" alternative, the NRC is only required to consider alternatives that produce enriched uranium.

PRESS next alleges that "AVLIS, while beyond USEC's pocket, would be a reasonable alternative to consider," and alludes to the concentration of U-234 which is a consequence of centrifuge enrichment technology (Basis 16.2). Petition at 41. USEC, of course, did consider AVLIS as an alternative. In ER §2.2 USEC discusses AVLIS as one of several alternatives considered but eliminated. USEC's reasons for eliminating those alternatives is also described in ER §2.2. Contrary to 10 CFR §2.309(f), Contention 16 lacks any supporting facts or expert opinion, and fails to raise any genuine dispute of material fact or law. Accordingly, Contention 16 is inadmissible.

17. Contention 17: ACP Project Failure

Contention 17 states:

> Petitioners contend that USEC's request for incremental payment is a symptom of its weak financial position.

Petition at 41-42. This contention again does no more than express PRESS' unsupported views without regard to any alleged USEC failure to meet applicable requirements. USEC is not certain if PRESS' cryptic, unexplained reference to "incremental payment" is referring to USEC's plans to incrementally build the ACP, incrementally fund tails

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82 *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 144-45 (1993) (citing *Process Gas Consumers Group v. U.S. Department of Agriculture*, 694 F.2d 728, 769 (D.C. Cir. 1981)).

83 40 CFR § 1502.14(d)(2005).

84 Environmental Report at 1-10 to 1-12.

disposition costs, or something else. In any event, neither Basis purporting to support this contention says even a word about such "incremental payment." As a result, the Bases do not support the contention.

Furthermore, Basis 17.1 broadly states that "USEC doesn't provide any assurance that its centrifuge plans won't go the way of its AVLIS plans" and alludes to a class action shareholder lawsuit in which USEC was a defendant. Petition at 42. On the first point, USEC has provided its basis for concluding that it has the financial qualifications to construct and operate the ACP (*see* Application §1.2.2, pp.1-49 through 1-51), and it is not within the scope of this proceeding or of the NRC's authority to require a license applicant to provide "assurance" that it will not cancel a proposed project. As for the shareholder suit, that litigation had nothing to do with PRESS' contention that USEC is in a weak financial position and thus does not support the contention.[85]

Finally, Basis 17.2 merely poses the following question: "What effect would D&D at Paducah have on USEC's ability to pay for ACP development and operation"? Petition at 42. Raising such a general question falls far short of the pleading standards required for the admission of a contention. In any event, USEC has addressed the NRC's financial qualifications requirements in its Application and PRESS has pointed to no error or omission in the Application. Furthermore, funding of decontamination and decommissioning activities at Paducah is provided by DOE pursuant to its responsibility under Section 3107(d) of the USEC Privatization Act, and by the Corporation through its Decommissioning Funding Plan submitted to the NRC as part of the Paducah Certificate

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[85] In *Cohen v. USEC*, No. 02-1459, slip op. (4th Cir. July 21, 2003), the U.S. District Court dismissed plaintiff's claims relating to certain information in a USEC registration statement and prospectus on the basis of defendants' Rule 12(b)(6) motion, and the U.S. Court of Appeals for the Fourth Circuit affirmed. *Id.*, slip op. at 4.

of Compliance application. Thus, contrary to 10 CFR §2.309(f), PRESS provides no supporting facts or expert opinion and raises no genuine dispute of material fact or law. Thus, Contention 17 should be dismissed.

18. Contention 18: USEC Incompetence

Contention 18 states:

> 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. Bases 18.1 and 18.2 merely summarize various enforcement actions taken against the Corporation from 1998 through 2000, a period of five to seven years ago. From this, PRESS jumps to the conclusion that USEC has a "documented culture of reluctance to comply with [various requirements and standards] regarding nuclear criticality safety," a "documented history of discrimination against employees who exercise protected activities," and that USEC's "training programs deserve particular scrutiny." Petition at 44, 45. As discussed in Section III.B, PRESS has distorted the Corporation's overall compliance and enforcement record. Bases 18.3-18.5 simply repeat Petitioner's unfounded assertions regarding the "domino effect" and again reference past enforcement actions. As a result, contrary to 10 CFR §2.309(f), Contention 18 lacks any supporting facts or expert opinion and fails to raise any genuine dispute of material fact or law. Accordingly, Contention 18 is inadmissible.

19. Contention 19: Enrichment Freeze

Contention 19 states:

> Petitioner contends that there may be an international freeze on uranium enrichment. In that case USEC would not be able to survive.

Petitioner at 47. PRESS bases its speculation that there "may" be an international enrichment "freeze" on a draft "Carnegie" Report that "recommends" worldwide suspension of, among other things, low-enriched uranium ("LEU") enrichment activities. Petition at 48. These broad assertions are entirely insufficient to support the contention and raise broad matters of executive branch policy that are beyond the scope of this proceeding.

Even if that were not the case, the Carnegie Endowment for International Peace has now issued its final report and has abandoned its recommendation for a suspension of LEU activities. In modifying its recommendations, the Carnegie Endowment stated that "the marginal benefits of a comprehensive pause on enrichment [to include LEU] were outweighed by the technical, economic, and security challenges such a pause would entail." *See* "Universal Compliance, A Strategy for Nuclear Security," Carnegie Endowment for International Peace, Final Report (March 2005), pp.97, 211. Thus, the basis for Contention 19 is erroneous. Contrary to 10 CFR §2.309(f), Contention 19 raises matters beyond the scope of this proceeding and demonstrates no genuine dispute of material fact or law. The contention is inadmissible.

20. Contention 20: Need for Proposed Action

Contention 20 states:

> 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 unessary [sic].

Petition at 48. This contention is a thinly-veiled diatribe against nuclear power that is beyond the scope of the proceeding. Basis 20.1 cites information, purportedly from the

Energy Information Administration ("EIA"), indicating that new nuclear power plants "are not expected to be economical." Although PRESS' references are not clear, they appear to be based upon a "summary" of EIA information prepared by "ANA" (presumably the Alliance for Nuclear Accountability). Petition at 49. Basis 20.2 cites a Wall Street Journal article indicating that "the move to adope [sic] renewable energy sources is gaining momentum," but says nothing about nuclear power. Petition at 49. Basis 20.3 cites a Business Week article referring to the "boom in renewables" but again says nothing about nuclear power.

All of these vague references about the future of nuclear power and renewable energy sources are entirely insufficient to raise a genuine issue of material fact with respect to the "need" for the ACP. PRESS provides no facts or expert opinion to support its contention, and utterly ignores the discussion of "need" in ER §1.1. It fails to even attempt to address the key elements supporting the need for the ACP discussed explicitly in the ER including:

- The current 20% of electricity generated in the U.S. through nuclear power;
- The importance of advanced enrichment technology in supporting U.S. energy security goals;
- The considerably lower operating costs of advanced centrifuge technology over gaseous diffusion technology;
- The modularity of centrifuge technology allowing flexible response to market conditions;
- The USEC-DOE Agreement calling for development of an advanced technology enrichment facility; and
- Ongoing construction of over two dozen reactors overseas and NRC extension of 26 reactor licenses

with 18 additional pending license renewal applications.

See ER §1.1. When viewed against USEC's discussion of the need for the ACP in the ER, it is clear that PRESS' Bases 20.1–20.3 are grossly inadequate.

Similarly, Basis 20.4 states that because "[l]eading authorities" are allegedly calling for a "production pause," USEC should discuss "this contingency" in its ER. Clearly at least the Carnegie Endowment for International Peace is no longer calling for such a pause. In any event, the question of a potential international "pause" in enrichment has nothing to do with Contention 20, which relates to the "need" for the ACP, and USEC is clearly not required to consider such speculative changes in global nonproliferation policies in the ER.

Basis 20.5 again cites the abandoned draft recommendations of the Carnegie Endowment as well as a United Nations report. PRESS quotes the recommendation of the panel chartered by the United Nations calling for a voluntary moratorium on construction of new enrichment facilities. Again, this has nothing to do with the contention. Basis 20.6 cites the "national advertising campaign" of the Sierra Club. This Basis is grossly insufficient to support the contention. Finally, Basis 20.7 states that expansion of the "megatons to megawatts" program "should be considered as an alternative to licensing the ACP." Petition at 51. Had PRESS reviewed USEC's ER carefully, it would have seen that it was. *See* ER §2.2, p.2-19. In summary, contrary to 10 CFR §2.309(f), Contention 20 raises matters beyond the scope of the proceeding, provides no supporting facts or expert opinion, and fails to demonstrate a genuine dispute of material fact or law. Accordingly, this contention is inadmissible.

21. Contention 21: Unnecessary Censorship

Contention 21 states:

> Petitioners contend that some of the public censorship of the USEC documents was unnecessary.

Petition at 51. Basis 21.1 identifies various redactions to the ER. PRESS queries "[w]hy are the consultation letters redacted? Appendix B [to the ER] is empty." Petition at 52.

USEC did not redact these letters. They were included in the non-proprietary version of the ER transmitted to the NRC. Apparently, the NRC Staff inadvertently omitted the letters from ADAMS.[86] The letters are now publicly available on ADAMS. The remaining redacted information mentioned in Basis 21.1, as well as Bases 21.2-21.3 was withheld pursuant to 10 CFR §2.390. Contrary to 10 CFR §2.309(f), Contention 21 provides no supporting fact or expert opinion and the cited redactions do not raise a genuine issue of material fact or law relating to the licensing of the ACP. Thus, Contention 21 should be dismissed.

22. Contention 22: Gender Discrimination

Finally, Contention 22 states:

> Petitioners suggest that a wording change would be in order in the decommissioning funding plan, C-10, *et seq.*

Petition at 52-53. PRESS' Basis for this final contention is incredible. It underscores the lack of substance and seriousness with which that organization has approached its obligations as a petitioner for intervention in an NRC adjudicatory proceeding. In particular, Basis 22.1 states "The fact that USEC entitles a table column "# of Men" suggests that they intend to hire no women for these jobs." Petition at 53. It is common

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[86] PRESS had ample time to inquire and seek copies of the letters from the NRC. To the best of our knowledge, Petitioner never did so.

industry practice to generically refer to similar terms such as "man-hours" or "man-years." This contention raises a matter that is well beyond the NRC's jurisdiction.[87] Contrary to 10 CFR §2.309(f), it creates no genuine dispute of material fact or law. Thus, Contention 22 should be dismissed.

IV. CONCLUSION

The proposed ACP is an important step in the effort to improve the nation's energy security and to provide a reliable and economical domestic source of enriched uranium well into the future. PRESS has submitted a Petition to Intervene in the ACP licensing proceeding, and is seeking the opportunity to participate as a party in an adjudicatory hearing process that, by law, must be completed before the license to construct and operate the ACP can be issued.

Under these circumstances, the NRC should most carefully consider whether PRESS has demonstrated legal standing and whether it has proffered any contentions that will meaningfully contribute to a reasoned and thorough licensing decision. As discussed above, PRESS has failed on both accounts. It has provided only the barest of information regarding its members' interests and has proffered a set of contentions lacking in substance, supporting bases, relevance to the proceeding, and accuracy. Petitioner's

[87] USEC, of course, has a firm corporate policy of nondiscrimination in its hiring practices.

contentions consistently fail to meet the applicable standards for admissibility on multiple grounds. Accordingly, USEC respectfully requests that PRESS' Petition to Intervene be denied.

Respectfully submitted,

Donald J. Silverman, Esq.
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
USEC Inc.
6903 Rockledge Drive
Bethesda, MD 20817
Phone: (301) 564-3352
E-mail: scottd@usec.com

Counsel for USEC Inc.

Dated March 23, 2005

ATTACHMENT

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Department of Energy

Portsmouth/Paducah Project Office
1017 Majestic Drive, Suite 200
Lexington, Kentucky 40513
(859) 219-4000

8 2005

FEB 2 4 2005

Ms. Vina Colley
Portsmouth/Piketon Residents for Environmental
Safety and Security (PRESS)
3706 McDermott Pond Creek Road
McDermott, OH 45652

PPPO-01-277-05

Dear Ms. Colley

ADDITIONAL INFORMATION REGARDING RADIATION LEVELS ASSOCIATED WITH OFF-SITE CREEK FOAM

The purpose of this letter is to provide additional information regarding an issue you raised during the December 2, 2004, public meeting updating the community on Department of Energy (DOE) programs at the Portsmouth Gaseous Diffusion Plant (PORTS). The issue is related to the presence of foam in creeks and associated radiation levels near PORTS.

DOE understands that the issue regarding the creek foam was first raised at a November 18, 2003 press conference held by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS). At that time, Sergei Paschenko stated that foam and water samples he had taken from creeks near the plant showed field readings of beta radiation "at least 100 times higher than normal background levels." The site responded immediately by forming a team to evaluate the situation.

On November 19, 2003, the United States Enrichment Corporation (USEC) dispatched environmental and health physics professionals to the locations of concern referenced at the press conference to take radiation readings with state-of-the-art sampling and radiological monitoring instrumentation. Samples were collected from foam, surface water, and soil west of the plant at a drainage ditch near Wakefield Mound Road/Sargents Lane and at a location just west of Big Run Road, south of the plant property. Representatives from the Ohio Environmental Protection Agency's Southeast District Office observed the sampling activities.

Background radiation readings were taken with radiation detection field instruments capable of detecting below one-millionth of a Roentgen (microR). These instruments, known as Ludlum 12S mircoR meters, indicated normal background radiation levels of 10 microR per hour in both sample locations. As a reference, average background levels for the area surrounding the plant are historically 8-12 microR per hour. Radiation readings were also taken with a Geiger-Mueller equipped radiation detection meter.

All readings were less than 100 counts per minute (100 counts per minute is considered the minimum count rate detectable with this type of instrument). The results from this instrument provide additional confirmation that no unusual radiation was present at any sample location.

In addition to background radiation readings, environmental media samples were taken from both locations and analyzed at a laboratory. Results from the analysis of one of the two foam samples indicated gross beta radiation of 1.01pCi/ml (one-trillionth of a Curie of activity per milliliter of liquid). The second foam sample was 0.3pCi/ml. These results were at or near the limits of detection for the laboratory equipment used to conduct the analyses. These results did not indicate the presence of radionuclides above normal background levels. No Technetium-99 (^{99}Tc) was detected in the analyzed samples, and the historical surface water monitoring data has not indicated elevated ^{99}Tc levels. Additionally, soil and water samples analyzed from these locations did not indicate the presence of radionuclides above normal background levels. The analytical results were provided by USEC to the Ohio Environmental Protection Agency on December 10, 2003.

The appearance of foam on streams and creeks may be due to a number of causes. Streams that originate from woody areas often have a brown tint in the water caused by the presence of tannin, which is a substance that gives wood its color. Tannin is released during the decomposition of wood along with other materials that often cause foaming when they are introduced in water. Foam is common in dark-colored streams, especially in the late fall and winter when plant materials are decomposing in the water. During the November 19, 2003 sampling event, furniture and other man-made debris were observed in the off-site portions of the ditches/streams. These objects can also contribute to the formation of foam.

A comprehensive environmental monitoring program has been in place at the PORTS for many years to ensure the protection of the public and environment in accordance with all state and federal regulations. Water discharges are monitored periodically. Historical monitoring data shows that water discharges have not exceeded the applicable Nuclear Regulatory Commission discharge limits for radionuclides or corresponding DOE discharge requirements (DOE Order 5400.5). DOE provides monitoring data annually to the public in the Portsmouth Annual Environmental Report, which is available to stakeholders in the Environmental Information Center or by calling (740) 289-3317. We sent a copy of the most recent Annual Environmental Report to you under separate cover.

Please note that Lucy Henry with the Institute for Soviet and American Relations (ISAR), the organization that sponsored Mr. Pashenko's visit, was contacted in an effort to obtain the sampling data collected by Mr. Pashenko. Ms. Henry indicated that a report is not expected to be published until the spring of 2005. Accordingly, DOE has not had an opportunity to review the data from Mr. Pashenko's sampling activities.

If you have any additional questions or need further information, please contact Ms. Laura Schachter at (859) 219-4010.

Sincerely,

William E. Murphie
Manager
Portsmouth/Paducah Project Office

cc:
R. Miskelley, DOE/PPPO
K. Dewey, OH-EPA
J. Meersman. BJC/PORTS
P. Musser, USEC/Piketon

Sandy Childers
Jack Williams
Rosemary Richmond
Patrick Willis

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of USEC Inc. (American Centrifuge Plant)	)	Docket No. 70-7004 March 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Answer to Petition to Intervene by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS)" were served upon the persons listed below by U.S. mail, first class, postage prepaid, and where indicated by asterisks also by electronic mail, on this 23rd day of March, 2005.

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

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

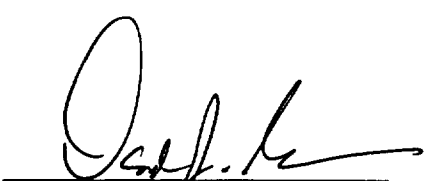
Vina K. Colley*
PRESS
3706 McDermott Pond Creek
McDermott, Ohio 45652
(E-mail: vcolley@earthlink.net)

** e-mail, original, and two copies

Stephen H. Lewis*
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: shl@nrc.gov)

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

Geoffrey Sea*
340 Haven Ave. Apt. 3C
New York, NY 10033
(E-mail: GeoffreySeaNYC@aol.com)



Donald J. Silverman
Counsel for USEC Inc.