

Thereafter, answers to the Sea Petitions were filed by USEC and the Staff on March 23, 2005 and March 25, 2005, respectively. "USEC Inc. Answer to Petition to Intervene by Geoffrey Sea," March 23, 2005 ("USEC Answer"); "NRC Staff's Response to Petition to Intervene Filed by Portsmouth/Piketon Residents for Environmental Safety and Security (Press) and Geoffrey Sea," March 25, 2005 (Staff Response). Pursuant to 10 C.F.R. § 2.309(h)(2), Mr. Sea filed replies to the Staff's and USEC's answers. "Reply by Geoffrey Sea to Answer of USEC Inc.," March 30, 2005 ("Reply to USEC"); "Reply by Geoffrey Sea to Answer of NRC Staff," April 1, 2005 ("Reply to Staff"). On April 8, 2005, USEC filed its Motion.

DISCUSSION

In its Motion, USEC asserts that Mr. Sea improperly raised new legal arguments and facts in his Replies concerning his standing to intervene in this proceeding. Motion at 2. Specifically, USEC asserts that Mr. Sea raised new information and a new legal argument concerning his residency in the Piketon area and alleged, for the first time, that he has standing to intervene based on an alleged injury to his interests protected by the National Historic Preservation Act (NHPA). *Id.* at 2, 5. As discussed below, the Staff agrees with the Motion.

As a general matter, USEC correctly asserts that replies to answers to petitions to intervene filed pursuant to 10 C.F.R. § 2.309(h)(2) "should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answers." *Id.* at 2 *citing* Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004). With respect to new information and new arguments raised in a reply brief related to the admission of contentions filed pursuant to 10 C.F.R. § 2.309(h)(2), the Commission specifically ruled that "new arguments may not be raised for the first time in a reply brief." *Louisiana Energy Services. L.P.* (National Enrichment Facility), CLI-04-24, 60 NRC 223, 224-25 (2004). This principle should apply equally

to new arguments raised in support of standing and they should not be permitted in replies filed pursuant to 10 C.F.R. § 2.309(h)(2).² See Motion at 2.

USEC first argues that Mr. Sea changed his theory of standing from relying on past residence near the American Centrifuge Plant (ACP) site and his contract to purchase property in the area, to a theory based on actual residence. Motion at 4. USEC asserts that Mr. Sea argued, for the first time in his Reply to Staff, that he has frequent contacts with the area sufficient to confer on him residency in the immediate vicinity of the site and that he has established a “pattern of residency” in the area. *Id.* at 3, *citing* Reply to Staff at 4, 6, 8. The Staff agrees with USEC that Mr. Sea is raising a new argument, supported by new information, that is not narrowly focused on the arguments presented in the answers filed by USEC and the Staff.

Mr. Sea based his standing, in part, on the fact that he had “equitable title” to the Barnes Home that borders the site of the proposed ACP.³ Sea Petition at 4, 7. In response, the Staff argued that Mr. Sea had not established residency by virtue of his obtaining “equitable title” to the Barnes home. Staff Response at 6-7. The Staff further noted that Mr. Sea had also not established the necessary frequency of contact with the area sufficient to establish standing in the absence of residency. *Id.* In his Reply to Staff, Mr. Sea again asserts that he has established residency based on his commitment to purchase the Barnes Home. Reply to Staff at 2. However, Mr. Sea also asserts that he has “dual residency” in both Piketon and New York and that his attendance at public events in Pike County established a pattern of residency. *Id.* at 4,6. *See also* Reply to USEC at 7. To support his new theory, Mr. Sea alleges new facts concerning his visits

² The Staff submits that the requirement for replies to be narrowly focused on the arguments raised in the applicant’s and Staff’s answers is particularly significant here, where it is not contemplated that a pre-hearing conference will be held before the Commission decides on standing. *See USEC*, CLI-04-30, 60 NRC at 429 (“[T]he Commission will issue an order determining standing and refer petitions from persons with the requisite standing to the Board for further processing in this proceeding.”).

³ Mr. Sea’s other bases for standing included his alleged “occupational interests.” Sea Petition at 7.

to Piketon. *Id.* at 3-5. See also Reply to USEC at 6-7. The new theory and the new information supplied to support it are not narrowly focused on the arguments raised by the Staff and USEC in their answers. They should not, therefore, be considered by the Commission.

The Staff agrees with USEC that Mr. Sea for the first time in his Replies argued that he has an injury to an interest falling within the “zone of interests” protected by the NHPA and that the NHPA is one of the statutes governing this proceeding. See *id.* at 5 citing Reply to Staff at 6-8 and Reply to USEC at Exhibit V, pp.3-4. In his initial Petition, Mr. Sea did not assert he had any injury to an interest protected by the NHPA. Rather, Mr. Sea, quoting from Commission precedent, recognized that any injury to an interest must fall within the “zone of interests” to be protected by the Atomic Energy Act or the National Environmental Policy Act. See Petition at 3 citing *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-04, slip op., (Mar. 4, 2004) at 11-12. Because Mr. Sea did not raise this argument in his initial Petition, neither the Staff nor USEC addressed it in their respective answers. Further, neither USEC nor the Staff could have anticipated such an argument as prior Commission case law has not recognized that the NHPA is a statute governing this proceeding. Accordingly, this new legal theory is not “narrowly focused” on the legal arguments presented in the USEC’s or NRC staff answers. It should not, therefore, be considered by the Commission.

In sum, as discussed above, the Staff supports the Motion because Mr. Sea in his Replies raises new arguments not narrowly focused on the arguments in USEC’s and the Staff’s answers. In addition, the Staff requests that if the Commission does not grant USEC’s Motion, both it and USEC should be permitted to file surreplies.

CONCLUSION

For the reason discussed above, USEC's Motion should be granted. In the event that the Motion is not granted, surreplies should be permitted.

Respectfully submitted,

/RA/

Marian L. Zabler
Counsel for NRC Staff

Dated at Rockville, Maryland
this 14th day of April, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO MOTION TO STRIKE INFORMATION OR IN THE ALTERNATIVE TO FILE A SURREPLY" in the above-captioned proceeding has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 14th day of April, 2005.

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