

RAS 9841

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

April 8, 2005 (4:01pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of USEC Inc. (American Centrifuge Plant)))))))))))	Docket No. 70-7004 April 8, 2005
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**USEC INC. ANSWER TO MOTION
FOR LEAVE TO AMEND REPLY BY GEOFFREY SEA**

Geoffrey Sea (Petitioner) filed a "Motion for Leave to Amend Reply to Answer of USEC Inc." and an "Amendment to Reply to Answer of USEC Inc." on April 1, 2005.¹ In his Motion, Petitioner accuses USEC Inc. (USEC) of "an intentional omission designed to support its false allegation."² Petitioner bases that accusation on Attachment 1 to USEC's March 23 Answer, which is an electronic comparison of Petitioner's two Petitions to Intervene.³ Petitioner's Motion should be denied because Petitioner's late-filed amendment to his Reply does not satisfy the nontimely filing factors set forth in Commission regulations. Furthermore, Petitioner's accusation regarding alleged misconduct by USEC is patently incorrect.

¹ Petitioner did not contact USEC before filing his motion as required by 10 CFR § 2.323(b). If Petitioner had, USEC would have been able to explain the circumstances that are the subject of his motion and negate the need for the motion. Furthermore, despite USEC's prior discussion of Petitioner's failure to provide proof of service as required by 10 CFR § 2.302(b), Petitioner still has not provided proof of service on any of his submittals. See USEC Inc. Answer to Petition to Intervene by Geoffrey Sea, March 23, 2005 at 3.

² Motion for Leave to Amend Reply to Answer of USEC Inc. By Geoffrey Sea, April 1, 2005 at 2.

³ Petitioner e-mailed a Petition to Intervene on February 28, 2005. He subsequently sent via Federal Express a different Petition on March 1. Then, on March 2, Petitioner e-mailed a copy of his March 1 Petition.

Petitioner's Motion should be denied because it is a late-filed amendment that does not satisfy the nontimely filing factors set forth in 10 CFR § 2.309(c). Pursuant to Section 2.309(h)(2), Petitioner was required to submit his Reply to USEC's Answer by March 30 – seven days after USEC's March 23 Answer. Accordingly, any attempt to file a further Reply or amendment after March 30 is late, and to be accepted, must satisfy the nontimely filing factors set forth in 10 CFR § 2.309(c). Petitioner's only attempt to explain his lateness is that he "wishes to complete the record by amending his Reply[.]"⁴ This statement fails to satisfy any of the 10 CFR § 2.309(c) criteria. Accordingly, Petitioner's Motion should be denied.

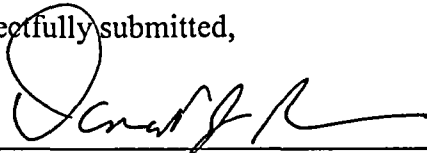
Furthermore, Petitioner's accusation that USEC has intentionally omitted information is patently incorrect. Petitioner accuses USEC of intentionally omitting the cover letter to his second Petition from a comparison of Petitioner's two Petitions which USEC attached to its March 23 Answer. On the contrary, Petitioner's February 28 e-mail attached a file labeled "NRC USEC Intervention Petition.doc," and his March 2 e-mail attached a file labeled "NRC USEC Intervention Petition F.doc." Petitioner included his cover letter in the attachment sent on February 28, but did not include his cover letter in the attachment sent on March 2. Instead Petitioner placed his cover letter in the body of the March 2 e-mail. USEC electronically compared these two attachments for the purpose of showing the differences in the two Petitions -- thus the second cover letter was not included in the electronic comparison. In any event, USEC's Answer specifically

⁴ Motion for Leave to Amend Reply to Answer of USEC Inc. By Geoffrey Sea, April 1, 2005 at 2.

discusses the second cover letter which Petitioner claims USEC intentionally omitted.⁵

For the reasons discussed above, Petitioner's Motion should be denied.

Respectfully submitted,



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Dated April 8, 2005

⁵ USEC Inc. Answer to Petition to Intervene by Geoffrey Sea, March 23, 2005 at 4. ("Petitioner's letter transmitting the second Petition attempts to provide an excuse for his late filing. . . .")

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**MOTION TO STRIKE INFORMATION IN REPLIES BY
GEOFFREY SEA TO ANSWERS OF USEC INC. AND NRC STAFF**

USEC Inc. ("USEC") hereby moves to strike certain new information presented for the first time in this proceeding in the Replies filed by Geoffrey Sea ("Petitioner") to the Answers of USEC Inc. and the NRC Staff ("Petitioner's Replies"). USEC's Motion should be granted because Petitioner's Replies contain new legal arguments and facts not contained in Mr. Sea's Petition to Intervene, contrary to applicable NRC regulations and Commission precedent.¹ Alternatively, if the Commission does not strike the new information in Petitioner's Replies, USEC respectfully requests leave to file a Surreply.

I. BACKGROUND

Petitioner has submitted a Petition to Intervene in this proceeding.² USEC and the NRC Staff filed Answers to the Petition on March 23, 2005 and March 25, 2005,

¹ USEC counsel hereby certifies that he contacted the Petitioner and made a sincere effort to resolve the issues raised in this Motion. Petitioner does not concur with the relief sought in this Motion. USEC counsel also contacted the NRC Staff, who stated that they take no position regarding this motion.

² Petitioner e-mailed a Petition to Intervene on February 28, 2005. Petition to Intervene by Geoffrey Sea (Feb. 28, 2005). Then on March 1, Petitioner sent via Federal Express a different Petition to Intervene. Petition to Intervene by Geoffrey Sea (Mar. 1, 2005) (Sea Petition to Intervene).

respectively.³ Petitioner then filed his Replies to USEC's Answer on March 30, 2005 and to the NRC Staff's Answer on April 1, 2005.⁴

II. DISCUSSION

Section 2.309(h)(2) of the Commission's regulations authorizes the submittal of replies to answers to petitions to intervene. In promulgating that regulation, the Commission stated that the scope of such a reply "should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."⁵ In its August, 2004 decision in the *Louisiana Energy Services* ("LES") case, the Commission affirmed the Atomic Safety and Licensing Board's decision to decline to consider new information presented for the first time in such replies. Although the new information at issue in that case related to the substantive bases for proposed contentions, the same principle should apply to new information submitted in a reply and intended to expand upon a petitioner's asserted bases for standing. In LES the Commission broadly stated:

In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.⁶

In this proceeding Petitioner has improperly alleged new legal arguments and facts that were not presented in his original Petition to Intervene.

³ USEC Inc. Answer to Petition to Intervene by Geoffrey Sea (Mar. 23, 2005); NRC Staff's Response to Petition to Intervene Filed by Geoffrey Sea (Mar. 25, 2005).

⁴ Reply By Geoffrey Sea to Answer of USEC Inc. (Mar. 30, 2005); Reply By Geoffrey Sea to Answer of NRC Staff (Apr. 1, 2005).

⁵ 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004), *pet. for rev. den'd*, CLI-04-35, 60 NRC 619 (2004).

⁶ *Louisiana Energy Services*, CLI-04-25, 60 NRC at 225.

A. New Information Regarding Petitioner's Residency

In his Petition to Intervene, Petitioner set forth the fundamental premise of his argument on standing:

Petitioner's standing . . . is demonstrated by his past residence and current property interests in Pike County, and by his past and current occupational interests in the Piketon atomic site.⁷

In support of that position, Petitioner stated that he "lived in the Piketon area intermittently between 1980 and 1982, and [that the area] served "as [his] principal residence between 1982 and 1986"⁸ He further stated that he "intends to make his permanent residence in Scioto Township."⁹ *Id.* Thus Petitioner's original basis for standing relied upon: (1) his previous residency in the Piketon area; (2) his stated contract to purchase nearby property; and (3) his stated intention to relocate to the Piketon area in the future.

In Petitioner's Reply to the NRC Staff, however, he offers a newly found theory on standing. In particular, in that later pleading, Petitioner now claims for the first time that he "established residency" in the "immediate vicinity of the ACP project site in August 2004" and that he has "establish[ed] a pattern of residency" in the area.¹⁰ This position is supported by numerous new factual assertions relating to his physical ties to the Piketon area that were not previously presented, including the following:

⁷ Sea Petition to Intervene at 3 (emphasis added).

⁸ Sea Petition to Intervene at 2.

⁹ In its Answer, USEC responded to the limited factual information contained in Mr. Sea's Petition to Intervene regarding his current residence and physical contacts.

¹⁰ Petitioner's Reply to NRC Staff at 2, 4, and 6.

- Since August 2004, “Petitioner has divided his time roughly equally between Pike County and New York . . . ;”
- Petitioner has engaged in “five extended stays in Ohio” and has “often stayed at the Rittenour Home . . . that is proximate to the Barnes Home . . . ;”
- “Since October, Petitioner has stored a significant amount of his clothing, books, furnishings and other items at the Rittenour Home and at other nearby locations, pending permanent relocation;”
- “Petitioner had access to a key and a standing arrangement with the occupants of the Rittenour Home since October of 2004;”
- “Petitioner has also stayed at local motels . . . ;”
- “Since August of 2004, Petitioner has attended numerous public events in Pike County and nearby in Ohio, testifying to his regular presence there.” Mr. Sea then chronicles several such events which “establish a pattern of residence . . . ;” and
- Mr. Sea provides for the first time an affidavit of his Pike County real estate attorney and a letter from his New York real estate broker for the sale of his New York residence.¹¹

Petitioner has significantly changed his “theory” of standing. Initially, he requested that the Commission decide the issue on the basis of his “past residence” and his contract to purchase property in the area. Under those circumstances, the Commission was confronted with a decision as to whether a contract to purchase property in the future is sufficient to confer standing.

Now, however, Petitioner has asked the Commission to find that he has standing on the basis of new assertions that he has already established residency near the American Centrifuge Plant site. This information cannot be viewed as a “legitimate amplification” of information presented in the Petition to Intervene. In fact, the argument

¹¹ See Petitioner’s Reply to USEC at 4-7 and Petitioner’s Reply to NRC Staff at 2-6. The real estate attorney’s affidavit and real estate broker’s letter were referenced in Petitioner’s Replies and were submitted as exhibits to a separate “Request for Privacy Protection By Geoffrey Sea” dated March 30, 2005.

presented in his Reply appears inconsistent with his previous position. USEC could not have anticipated this new and different argument in preparing its Answer. Such basic information, such as where Petitioner is a resident, can and should have been provided in the Petition itself. Accordingly, it is new information that the Commission should decline to consider, consistent with its decision in the LES case.

B. New Argument Based on the National Historic Preservation Act

Petitioner also has presented a novel legal argument for the first time in his Replies, that if accepted would significantly expand Commission precedent on standing. Petitioner argues that he “qualifies for presumptive standing because his ‘zone of interest’ is defined by the National Historic Preservation Act.”¹² The essence of Petitioner’s argument apparently is that, even if his contract to buy a house is not sufficient for standing on the basis of traditional Atomic Energy Act or National Environmental Policy Act protected interests, the National Historic Preservation Act provides an independent and sufficient basis for his standing.¹³ This legal argument was not presented in the Petition to Intervene, and Petitioner essentially admits that fact in his Reply to USEC.¹⁴ Again, this argument cannot be viewed as a “legitimate amplification” of information presented in the Petition to Intervene, and USEC could not have anticipated it in preparing its Answer. Such information can and should have been provided in the Petition itself.

¹² Petitioner’s Reply to NRC Staff at 6; Petitioner’s Reply to USEC at Exhibit V, pp. 3-4.

¹³ Petitioner’s Reply to NRC Staff at 6-8, 12-13.

¹⁴ In his Reply to USEC, Petitioner advises the Commission that he intends to “include[e] references to legal precedent on standing under NEPA and NHPA” in his Reply to the NRC Staff. Petitioner’s Reply to USEC at 10.

Moreover, acceptance of Petitioner's novel argument would expand standing law well beyond the principles recognized in existing Commission precedent. The NRC typically affords standing only to persons who actually reside, or otherwise have a significant presence, in the area of the facility to be licensed. The Commission should not consider such a theory without providing an adequate opportunity for the other parties to submit their views. Accordingly, the Commission should decline to consider this new argument as well.

III. CONCLUSION

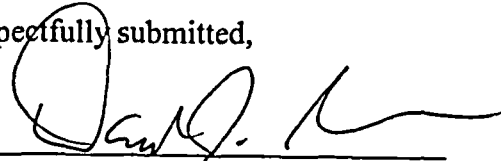
It is contrary to Commission regulations and fundamentally unfair for Petitioner to make new assertions in his Replies. As with the contentions in the LES proceeding, Petitioner's Replies constitute "a late attempt to reinvigorate thinly supported [positions] by presenting entirely new arguments in the reply briefs."¹⁵

Accordingly, USEC respectfully requests that the Commission strike the new information from the Petitioner's Replies and decline to consider such information in

¹⁵ *Louisiana Energy Services*, CLI-04-25, 60 NRC at 224.

reaching its determination on Petitioner's standing. Alternatively, if the Commission chooses to consider such new arguments and assertions, USEC requests leave to file a Surreply.

Respectfully submitted,



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Dated April 8, 2005

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CERTIFICATE OF SERVICE

I hereby certify that copies of: (1) the "USEC Inc. Answer to Motion for Leave to Amend Reply by Geoffrey Sea" and (2) the "Motion to Strike Information in Replies by Geoffrey Sea To Answers of USEC Inc. and NRC Staff" 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 8th day of April, 2005.

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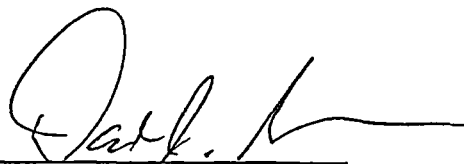
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