

August 29, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO GEOFFREY SEA'S
MOTION TO SUPPLEMENT REPLIES AND AMENDED CONTENTIONS

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its response to the "Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea" which was accompanied by the supplement to Mr. Sea's replies and the "Amended Contentions of Geoffrey Sea" (Sea Amended Petition).¹ For the reasons set forth herein, the Staff submits that Mr. Sea's amended contentions should be rejected.

BACKGROUND

On August 23, 2004, USEC, Inc. (USEC) filed an application for a license to possess and use source, byproduct, and special nuclear material and to enrich natural uranium to a maximum of 10 percent U-235 by the gas centrifuge process. *USEC, Inc. (American Centrifuge Plant)*, CLI-04-30, 60 NRC 426 (2004). The Commission subsequently issued an order noticing receipt of the License Application (LA) and consideration of issuance of the license, and

¹ Although Mr. Sea styles his pleading as a "Motion for Leave to Supplement Replies" he provides no basis for such a motion other than the new information contained in his amended contentions. Indeed, the "supplement" attached to the motion merely repeats most of what is contained in his amended contentions. Therefore, the Staff treats his overall filing as a request to amend his initial contentions.

noticing the hearing. 69 Fed. Reg. 61411 (Oct. 18, 2004). In response to the Notice of Hearing, a petition to intervene was filed by Geoffrey Sea on February 28, 2005.² "Petition to Intervene by Geoffrey Sea" (Feb. 28, 2005) (Sea Petition). On May 12, 2005, the Commission ruled that Mr. Sea and PRESS had established standing to intervene in the proceeding and referred the question of the admissibility of the proposed contentions to the Atomic Safety and Licensing Board (ASLB). *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309 (2005).

By Order dated July 12, 2005, the ASLB designated in this proceeding scheduled a prehearing conference for July 19, 2005 to discuss the admissibility of the various contentions proffered by Mr. Sea and PRESS.³ Memorandum and Order (Order Scheduling Oral Argument on the Admissibility of Contentions), July 12, 2005 (ADAMS Accession No. ML051930476). On July 19, 2005, a prehearing conference was held. On August 17, 2005, Mr. Sea filed a "Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea" which was accompanied by the supplement to Mr. Sea's replies, "Amended Contentions of Geoffrey Sea," and various exhibits.⁴

² In addition to Mr. Sea's petition, a petition to intervene was filed by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS). "Petition to Intervene by Portsmouth/Piketon Residents for Environmental Safety and Security" (Feb. 28, 2005) (PRESS Petition).

³ One day before the prehearing conference, Mr. Sea filed "Geoffrey Sea's Motion for Leave to File an Amended Petition" (July 18, 2005) (July 18 Motion). In that Motion, Mr. Sea requested a delay of the hearing schedule and for leave to file an amended petition. July 18 Motion at 1; 6. Mr. Sea requested a similar delay on August 10, 2005. See "Letter from Geoffrey Sea to ASLB" (August 10, 2005); see *also*, "USEC Inc. Response to Geoffrey Sea Request to Delay ASLB Ruling on Contentions" (August 10, 2005) and "NRC Staff's Response to Geoffrey Sea's Request for Delay" (August 12, 2005).

⁴ The Staff notes that Mr. Sea's certificate of service states that copies were served via U.S. mail and electronic mail on August 17, 2005. However, the Staff did not receive a hard copy of the pleading, including some exhibits which could not be reproduced electronically by Mr. Sea, until August 25, 2005. Nevertheless, the Staff has elected to respond to the amended contentions on August 29, 2005.

DISCUSSION

I. Standard for Late-Filed Contentions

Because the time for filing contentions in the proceeding has passed, the contentions proposed by Mr. Sea must meet the standard established for late filings in 10 C.F.R. § 2.309(c)(1).⁵ That regulation provides that non-timely contentions may be admitted based on a balancing of, among others, the following factors:

- (i) Good cause, if any, for the failure to file on time;
- ...
- (v) The availability of other means whereby petitioner's interest will be protected;
- (vi) The extent to which petitioner's interests will be represented by existing parties;
- (vii) The extent to which petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which petitioner's participation may reasonably be expected to assist in developing a sound record.

10 C.F.R. § 2.309(c)(1).⁶

Mr. Sea, as the proponent of the admission of its late-filed contentions, bears the burden of demonstrating that a balancing of these factors weighs in favor of their admission by affirmatively addressing the lateness factors in his petition. *See Baltimore Gas and Electric Co.*

⁵ Although Mr. Sea has justified his late-filing under 10 C.F.R. § 2.309(c), the Commission has, in the past, referenced 10 C.F.R. § 2.309(f)(2) as an alternative to § 2.309(c)(1). *See Dominion Nuclear Connecticut* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 n.5 (2004). For this reason, the Staff considers its discussion of the good cause factor as also covering the factors in 10 C.F.R. § 2.309(f)(2)(i)-(iii). Regardless, under either standard, Mr. Sea's amended bases are not admissible.

⁶ Because they relate primarily to standing to intervene, the Staff does not contest factors (ii), (iii) and (iv) regarding whether an existing party's late-filed contention's should be admitted. *Compare* 10 C.F.R. § 2.309(c)(1)(ii)-(iv) *with* 10 C.F.R. § 2.309(d)(1)(ii)-(iv); *see also*, USEC, CLI-05-11, 61 NRC 309 (finding that Mr. Sea has standing to intervene).

(Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998), *aff'd. sub nom. National Whistleblower Center v. NRC*, 208 F. 3d 256 (D.C. Cir. 2000). Thus, Mr. Sea must demonstrate that a balancing of the factors warrants overlooking the lateness of his contentions. *Boston Edison Co.* (Pilgrim Nuclear Power Station), ALAB-816, 22 NRC 461, 466 n.22 (1985). It has long been held that the first factor, good cause for lateness, carries the most weight in the balancing test. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-00-27, 52 NRC 216, 221 (2000); *aff'd*, CLI-04-04, 59 NRC 31 (2004). Absent a showing of good cause, a compelling showing that the remaining factors outweigh the lack of good cause for the untimely filing is necessary. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986).

In making a judgment about good cause, emphasis is placed on when sufficient information was made available to the petitioner so as to make it possible for the petitioner to raise and frame the contention with reasonable specificity and basis. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-99-43, 50 NRC 306, 313 (1999), *citing*, *Duke Power Co.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 338 (1999). An intervention petitioner has an "ironclad obligation" to carefully examine publicly available documents in order to "uncover any information that could serve as the foundation for a specific contention." *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982); *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983). Thus, good cause does not exist when the late-filed contentions are not based on new information arising after the original deadline.

In addition to demonstrating that a balancing of the late-filing criteria warrants admission, the petitioner must meet the requirements for admissible contentions in 10 C.F.R. § 2.309(f)(1). That regulation provides that a contention must include: (1) a specific statement of the issue of law or fact raised, (2) a brief explanation of the basis for the contention, (3) a

demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action which is the subject of the proceeding, (5) a concise statement of the alleged facts or expert opinions supporting the contention and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

II. Geoffrey Sea's Amended Contentions⁷

Sea Contention 1.1:

Petitioner contends that USEC has failed to identify cultural resources potentially impacted by the American Centrifuge Plant.

Amended Basis:

On August 5, 2005, three experts in culture resource assessment—John Hancock, Frank L. Cowan, and Cathryn Long—had the opportunity to visit the riverbank site in question, which is called The GCEP Water Field or the X-6609 Raw Water Wells. Dr. Cowan is an expert in Hopewell archaeology; Dr. Hancock is an expert in ancient architecture; Dr. Long has spent eight years doing Hopewell cultural studies. The experts have collaborated on a joint declaration that summarizes their findings and is attached as Exhibit AA. At the site they did locate and visually assess a definite artificial earthwork of considerable size, right in the midst of the water field (actually crossing it). Though the age of this earthwork has yet to be determined with confidence, since only visual inspection has so far been allowed, it definitely predates DOE and USEC activity at the site. Even if the structure turns out, upon analysis, not to be Hopewell, it may well have historic significance.

...

Yet USEC has never identified the earthwork or admitted its existence to the outside world. USEC mentioned nothing about this earthwork in its Environmental Report, nor has USEC acknowledged the earthwork in these

⁷ Initially, the Staff notes that Mr. Sea is not really amending his bases for the contentions, but rather providing additional expert testimony and factual information that is more appropriately suited for subsequent stages of this proceeding in the event any of his contentions are admitted. The Board should not allow Mr. Sea to continually supplement and update his request every time he comes across information on some aspect of the project. Nor should Mr. Sea be allowed to continually rebut other participants' answers to and cure defects in his initial petition. See *e.g.*, Sea Amended Petition, at 5 (responding to concerns that his bases were "speculative"). Instead of the iterative and piecemeal process favored by Mr. Sea, the Commission's rules of practice provide a set of procedures for addressing and evaluating any contentions which are admitted in an orderly fashion.

proceedings. This is the clearest example of USEC's failure to identify important cultural resources potentially impacted by ACP.

Amended Sea Petition, at 2-3.

On balance, Mr. Sea does not meet his burden of showing that the 10 C.F.R. § 2.309(c)(1) criteria weigh in his favor. The Staff opposes the amended basis for Sea Contention 1.1 because Mr. Sea has not demonstrated good cause for the lateness of his additional bases. Although the amended petition describes the efforts taken by Mr. Sea to secure access for cultural resource professionals, the timeline provided shows that these efforts were not initiated until after the time for filing his initial petition to intervene. Mr. Sea first requested a site visit on December 2, 2004 and apparently a DOE employee agreed to host the visit. Amended Sea Petition at 16. However, Mr. Sea apparently failed to "follow[] up" on the request until mid-March 2005 – a few weeks after his initial petition was filed. See *id.* at 17. Mr. Sea cannot leverage his failure to pursue a site visit into good cause for late-filing. Further, Mr. Sea has provided no explanation for his delay in pursuing a site visit between the December 2, 2004 meeting where he initially sought a site visit and the post-petition contact in March 2005. See *id.*, at 16-20. Thus, Mr. Sea's amended contention 1.1 lacks good cause.

Absent a showing of good cause for his late filing, Mr. Sea must make a compelling case that the other four factors warrant admission of his amended bases. See *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 79 (2000). In evaluating these other factors, factors (v) and (vi) – *i.e.*, the availability of other means to protect Mr. Sea's interest, and the ability of other parties to represent Mr. Sea's interest – are the least important, and are thus not given as much weight as factor (vii) (the potential for broadening the issues and causing delay) and factor (viii) (the potential contribution to the development of a sound record). See *Texas Util. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-92-12, 36 NRC 62, 74 (1992). Here, Mr. Sea has not

provided any justification regarding any of the four factors, regardless of their relative weight.

Thus, absent good cause for the failure to include the additional information in the amended petition and absent any showing with respect to the other factors, Mr. Sea's amended basis should be rejected as untimely.⁸

Sea Contention 1.2

Petitioner contends that USEC has failed to identify potential impacts of the American Centrifuge Plant on nearby historic and prehistoric sites.

Amended Basis:

Among the potential adverse impacts of the ACP on cultural resources, none mentioned by USEC, are the following:

1. Potential damage to the Scioto River earthworks caused by renewed water pumping once ACP is in operation.
2. Reopening of a road with an entrance "festooned" with new security barriers, adorned with fluorescent decals, road posts, and gate markers.

Amended Sea Petition at 3-6.

Mr. Sea does not meet his burden of showing that the 10 C.F.R. § 2.309(c)(1) criteria weigh in his favor. First, Mr. Sea has failed to demonstrate good cause for the lateness of the additional information contained in his amended petition. As discussed *supra*, Mr. Sea did not attempt to obtain site access until mid-March 2005 – well after he first raised the issue in December 2004 and after his February 28, 2005 petition to intervene. Second, Mr. Sea fails to satisfy factor (viii) – the extent to which petitioner's participation may reasonably be expected to assist in developing a sound record. Mr. Sea was obligated to identify the precise issues he was addressing, and to summarize the proposed supporting testimony of its prospective witnesses. See *Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2)*, CLI-93-4, 37 NRC 156, 165-66 (1993). Mr. Sea's statements regarding the "obvious" potential

⁸ The Staff notes that it did not oppose admission of Mr. Sea's original Contention 1.1 and, if it had been timely, the Staff would likely not have opposed the admission of the amended basis. See Staff Response, at 11.

impacts to the alleged earthworks are wholly unsupported by expert testimony. Amended Sea Petition, at 4. Mr. Sea's experts simply note that whether pumping water beneath the structure would damage the structure is a question that should be evaluated, but they offer no support for Mr. Sea's assertion that it will impact the alleged earthworks. Sea Exhibit AA, at 4. Further, Mr. Sea provides a photograph of the security barrier at the Southwest Access Road to show how it "pollutes the first view" of the Barnes Home. Sea Amended Petition at 5. However, the photograph does not raise any specific concerns with USEC's Environmental Report and lacks any legal context. *i.e. Id.*, at 5-6. Whether this photograph relates to the proposed Act. Thus Mr. Sea has failed to demonstrate that his participation will help develop a sound record. Also, since Mr. Sea does not have the necessary expert testimony to support his claims of environmental impact, his participation would likely confuse issues and lead to delay in the proceeding. See 10 C.F.R. § 2.309(c)(1)(vii). On balance, Mr. Sea fails to satisfy the criteria for admissible late-filed contentions and Contention 1.2 should be rejected.

The amended Contention 1.2 also fails to satisfy the general requirements for an admissible contention at 10 C.F.R. § 2.309(f)(1). The Staff originally opposed basis 1 because it did not include a statement of facts or expert opinions that support the contention and on which Petitioner could rely at the hearing nor did Petitioner provide support for his statement that water pumping will potentially damage the Scioto works. See 10 C.F.R. § 2.309(f)(1)(v); "NRC Staff's Response to Petitions to Intervene Filed by [PRESS] and Geoffrey Sea" at 13-14 (March 25, 2005) ("Staff Response"). The same defects still exist. While Mr. Sea may have provided some expert statements, those statements fail to support (or even discuss) his argument that "potential impacts are obvious." See Amended Sea Petition, at 4-5. Indeed, as discussed *supra*, Mr. Sea's experts simply note that whether pumping water beneath the structure would damage the structure is a question that should be evaluated, but do not allege that pumping will damage the alleged earthworks. See Sea Exhibit AA, at 4. Thus, the

amended basis 1 lacks sufficient information to demonstrate a genuine issue of fact and should not be admitted.

Mr. Sea's amended basis 2 appears to be an elaboration of or documentation for one of his original bases for Contention 1.2, *i.e.*, maintenance of the "national security" regime, with its profusion of barbed wire fences and security gates. However, the Staff continues to oppose amended basis 2 because it is not within the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii); Sea Amended Petition, at 5. Mr. Sea provides a photograph ostensibly to demonstrate that the potential reopening or widening of the road will impact his property and also "pollute the first view" of the Barnes Home. *Id.* However, the photograph does not establish any connection between the ACP and the gate nor does it document any increased traffic or noise. Thus, the issues raised are outside the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Additionally, the photograph neither raises any legal questions regarding National Historic Preservation Act compliance nor has Mr. Sea made any such connection. Thus, the photograph also fails to provide sufficient information to demonstrate a genuine issue of material law or fact with respect to the ER. 10 C.F.R. § 2.309(f)(1)(iv), (vi). Thus, amended basis 2 should be rejected.

For these reasons, the Staff submits that Mr. Sea's amended bases for Sea Contention 1.2 do not satisfy the late-filed contention criteria and, further, do not correct defects in his original contention. Thus, Mr. Sea fails to meet the requirements of 10 C.F.R. § 2.309(f).

Sea Contention 2.1:

The Petitioner contends the USEC-DOE collaborative arrangement is out of compliance with the National Historic Preservation Act and related legislation.

Sea Contention 2.2:

Noncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement.

Amended Basis:

The 1993 Lease Agreement between DOE and USEC is silent on the question of compliance with federal preservation laws. However, the Lease does include a “Regulatory Oversight Agreement” (ROA) between DOE and USEC.

...

The problem is not with DOE, or with NRC or with USEC singly. The problem is in the DOE-USEC collaborative arrangement, which has not been corrected since 1993. In so far as the DOE-USEC lease agreement fails to provide for compliance with federal preservation law, it is illegal and incomplete. And that situation must be reviewed by NRC as part of the licensing process.

Sea Amended Petition, at 6-11.

Mr. Sea does not meet his burden of showing that the 10 C.F.R. § 2.309(c)(1) criteria weigh in his favor with respect to Contentions 2.1 and 2.2. The Staff opposes the amended bases because Mr. Sea has again failed to demonstrate good cause for his late-filing. Mr. Sea asserts that he requested a copy from DOE in written requests in March 2005 – after his initial petition was filed on February 28, 2005. Sea Amended Petition, at 21. Further, the lease agreement itself was signed on July 1, 1993, more than 10 years prior to Mr. Sea’s petitions, and, as Mr. Sea notes, a non-proprietary version was available previously through the NRC. *Id.* Since an intervention petitioner has an “ironclad obligation” to carefully examine publicly available documents in order to “uncover any information that could serve as the foundation for a specific contention” (*Catawba*, ALAB-687, 16 NRC at 468), Mr. Sea has failed to demonstrate good cause for his late-filing. Mr. Sea also neglects to discuss any of the other factors governing admission of late-filed contentions with respect to Contentions 2.1 and 2.2. Accordingly, Mr. Sea fails to satisfy the criteria for admissible late-filed contentions and Contentions 2.1 and 2.2 should be rejected.

Further, even if his amended basis was not inexcusably late, his proposed contentions would still not be admissible for the reasons outlined in the Staff's response to his initial petition. See Staff Response, at 15-19. Specifically, both Sea contentions challenge the conduct of DOE, which is beyond the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). Further, the "Regulatory Oversight Agreement" cited by Mr. Sea (Amended Sea Petition, at 8) has no bearing on the ACP – rather, it is related to the Gaseous Diffusion Plant (GDP) at Piketon. See "Exhibit A - Leased Premises." A copy of the redacted lease is available publically at ADAMS Accession No. LL9604190049 (April 15, 1996), Microfiche #87963:001. Thus, his basis fails for the additional reason that it is not material to the findings that the Staff must make. 10 C.F.R. § 2.309(f)(1)(iv).

For these reasons, the amended basis for Sea Contentions 2.1 and 2.2 does not satisfy the criteria for late-filed contentions and fails to correct defects in Mr. Sea's initial petition. Accordingly, the Board should reject Sea Contentions 2.1 and 2.2.

Sea Contention 3.1:

Petitioner contends that USEC has failed to consider a broad range of alternatives to the proposed action.

Amended Basis:

The Rocky Flats facility is a former DOE production site with far more severe contamination problems than Piketon. On July 25, 2005, Colorado's two US Senators—one a Republican and one a Democrat—introduced legislation that will clear the way to the undeveloped areas of the Rocky Flats site being transferred from DOE to DOI, thus creating the "Rocky Flats National Wildlife Refuge." The developed shops and labs at Rocky Flats will remain as part of the "Rocky Flats Environmental Technology Site."

In essence, this is precisely the mixed alternative use scenario proposed by the Petitioner. The only reason that Piketon is not on track toward site cleanup, environmental restoration, and a mixed alternative use plan as at other closed DOE production sites, is USEC's empty wishful thinking that it can complete and operate the ACP, a small project that will condemn the whole site to public unavailability. As USEC's economic prospects look increasingly dismal (see Contention 7 below), it appears that all that USEC is accomplishing is to delay

Piketon's reclamation and conversion planning by years. Thus, NRC must consider alternative prospects for the entire site in its alternate use scenarios, under both NEPA and NHPA authority.

Sea Amended Petition, at 12-13.

Although good cause for late-filing may exist as the legislation was only recently proposed, on balance, Mr. Sea has failed to satisfy the late-filed contention requirements for Contention 3.1 since he has not demonstrated an ability to contribute to the development of the record. See 10 C.F.R. § 2.309(c)(1)(viii). A prospective intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize proposed testimony. See *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986). Here, Mr. Sea simply copies newspaper articles about an unrelated project in Colorado as "evidence" that parkland is an alternative to the ACP. Such articles are no substitute for the type of "special expertise" required of intervenors. See e.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-90-1, 31 NRC 19, 35-36 (1990), *aff'd on other grounds*, ALAB-936, 32 NRC 75 (1990). Accordingly, Mr. Sea's attempts to amend his contention should be rejected.

Additionally, the amended Contention 3.1 does not satisfy the general requirements for an admissible contention. 10 C.F.R. § 2.309(f)(1). The Staff opposes the admission of the amended basis because the legislative proposal cited by Mr. Sea is insufficient to demonstrate a genuine dispute as to whether conversion to parkland is a reasonable alternative to the project's purpose and need. A legislative proposal is hardly the type of "specific statement" necessary to support a contention. See 10 C.F.R. § 2.309(f)(1). In at least one proceeding, the Commission stated that an actual decision constitutes a "tangible plan" requiring consideration, but dismissed a news report suggesting the possibility of a change in the future as merely "speculative." *Florida Power & Light Co.* (Turkey Point Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 24 and n.18 (2001). Similarly, enacted legislation might rise to the level

of a tangible plan, but a mere legislative proposal lacks certainty and, indeed, may never come to pass, especially where, as here, the legislation has no relationship to Piketon and there is no indication that similar considerations exist in any event. Thus, the legislative proposal cannot form the basis for an admissible contention.

But, most important, Mr. Sea's amended contention continues to fail for the same reason the Staff opposed his initial contention, namely that it fails to raise a genuine dispute on a material law or fact with the applicant. See 10 C.F.R. § 2.309(f)(1)(vi); Staff Response, at 20-21. Mr. Sea suggests that NEPA requires the NRC to consider the public's alternatives for the use of the land on which the ACP is to be constructed, even though those alternatives would bear no relation to the proposed project. Sea Petition at 28. This assertion misconstrues NEPA, however, as the NRC is only required under NEPA to consider reasonable alternatives that serve the purpose and need of the project. See *Citizens Against Burlington v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). Agencies are only required to discuss those alternatives that "will bring about the ends" of the proposed project. *Id.* "When the purpose is to accomplish one thing, it makes no sense to consider alternative ways by which another thing might be achieved." *Id.*

Since the stated mission of the ACP is "to provide the United States with a reliable and economical sources of enrichment uranium" (LA, at 1), the alternative Mr. Sea suggests – mixed alternative use plan – is not a reasonable alternative to bring about the ends of the proposed action. See Sea Amended Petition at 12. Mr. Sea's suggestions are, instead, "alternative ways by which another thing might be achieved." *Burlington*, 938 F.2d at 195. Since Mr. Sea's alternative is not required to be considered under NEPA, and as Mr. Sea does not challenge the adequacy of the alternatives that are considered in the ER, he fails to demonstrate that a genuine dispute exists with the applicant on a material question of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi). For these reasons, amended Contention 3.1 should not

be admitted to this proceeding.

Sea Contention 7.1:

USEC has not clarified the company's stability or long-term prospects, or how its relationship with the Department of Energy is intended to function, or how that relationship might evolve over time.

Amended Basis:

In regard to the DOE-USEC relationship, the DOE Office of Inspector General issued a report on March 10, 2005, showing that the line between DOE and USEC on site was so muddled, DOE had improperly paid \$17 million in private USEC expenses in preparing the GCEP buildings for ACP. The IG warned that \$250 million were at risk of suffering a similar fate. On July 14, 2005, Bill Murphie, the DOE field office manager, publicly announced that USEC has made no offer to reimburse the government, and that DOE may consider legal action to recover the improperly paid costs.

...

Regarding USEC's economic prospects, Spencer Jakab of Dow Jones Newswires has published the first two articles in a series of dire warnings to investors about USEC. The first, titled "Slow Decay," was published in Barron's on May 23, 2005 and it presented a detailed analysis of USEC's vanishing profit prospects, calling USEC's appeal for investors "radioactive." The second, titled "Losing Power" was published Monday, August 15, in Barron's. It notes that the May forecasts of doom are being realized, since USEC stock dropped 11.3% in one day on August 4, on news that ACP is delayed for at least six months for undisclosed reasons.

Sea Petition 36-37.

Mr. Sea again fails to satisfy the criteria for admissible late-filed contentions. Although good cause may exist for late-filing based on the availability of the news articles and Inspector General report, a balancing of the other factors militates against allowing the amended contention. Similar to the Staff's response to amended Contention 3.1, Mr. Sea has failed to demonstrate an ability to contribute to the development of the record and, thus, his amended Contention 7.1 should not be admitted. See 10 C.F.R. § 2.309(c)(1)(viii). Pulling publicly-available articles off the internet does not assist the Board in resolving any technical or legal issues that might arise in the course of the proceeding. Absent a demonstration that he has

any expert witnesses or testimony relating to USEC's financial qualifications, Mr. Sea fails to satisfy factor (viii). See *Commonwealth Edison*, 23 NRC at 246. Moreover, the introduction of DOE-USEC issues unrelated to the ACP could unduly broaden the issues under consideration and lead to delay in the proceeding. See 10 C.F.R. § 2.309(c)(1)(vii). Accordingly, Mr. Sea does not make the required showing for late-filed contentions.

Additionally, the amended Contention 7.1 does not satisfy the general requirements for an admissible contention. 10 C.F.R. § 2.309(f)(1). The Staff opposes the amended basis to Contention 7.1 to the extent that it brings into question the conduct of DOE and its relationship to USEC, which is beyond the scope of this proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). As discussed above, "DOE activities are not part of USEC's operations and are not subject to NRC jurisdiction." See *U.S. Enrichment Corp.* (Paducah, Kentucky, and Piketon, Ohio) CLI-96-12, 44 NRC 231, 243 (1996).

The Staff also opposes the amended bases for Contention 7.1 because the vague assertions attacking the financial stability of USEC are not sufficiently supported and do not raise a genuine dispute on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(v)(vi). Mr. Sea appears to be repeating his initial claim that USEC is not financially able to construct and viably operate the ACP over the long-term. Sea Petition, at 36-37. However, as the Staff noted in its response to the initial petitions to intervene (see Staff Response, at 27-28), USEC is required, pursuant to 10 C.F.R. §§ 70.20(a)(8) and 70.23(a)(5) to submit information concerning its financial qualifications to engage in the proposed activity. *USEC, Inc.*, CLI-04-30, 60 NRC at 437. In order to meet the financial qualifications requirements, USEC proposed two license conditions which it asserts will ensure that adequate funding will be in place before construction

of each phase and before operations will begin.⁹ LA, at 1-49. In addition, as described in its decommissioning funding plan, USEC will set aside sufficient funds to provide reasonable assurance that, when needed, the facility will be decommissioned and any depleted uranium tails dispositioned appropriately. See 10 C.F.R. § 70.25. Mr. Sea fails to provide any basis for his assertion that USEC is financially unstable and that USEC faces long-term uncertainty other than reference a few articles on the company. Mr. Sea does not reference the financial proposal in the License Application or take any specific issue with USEC's proposal to ensure that adequate funding will be available for construction, operation, and decommissioning. The Staff, therefore, continues to oppose amended Contention 7.1 on the grounds that it does not demonstrate that a dispute exists with the applicant on a material issue of law or fact and it lacks a sufficiently specific statement of alleged facts or expert opinion. 10 C.F.R. § 2.309(f)(1)(v)(vi).

In summary, none of Geoffrey Sea's amended contentions satisfy the requirements for late-filed contentions, nor do the amended bases cure the defects in his initial petition with respect to Contentions 1.2, 2.1, 2.2, 3.1 and 7.1. Thus, none of Mr. Sea's amended contentions should be admitted.

CONCLUSION

For the reasons discussed above, all of Mr. Sea's amended bases should be rejected. Accordingly, his motion should be denied.

Respectfully submitted,

/RA/

Marian L. Zabler

⁹ In CLI-04-30, the Commission explicitly noted that it had found similar licensing conditions an acceptable means to demonstrate compliance with the financial assurance requirements. *USEC, Inc.*, CLI-04-30, 60 NRC at 437, *citing Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309.

Counsel for the NRC Staff

Dated at Rockville, Maryland
this 29th day of August, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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 RESPONSE TO GEOFFREY SEA'S MOTION TO SUPPLEMENT REPLIES AND AMEND CONTENTIONS" 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 (**)

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