RAS 10394



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:**
**Lawrence G. McDade, Chairman**
**Paul B. Abramson**
**Richard E. Wardwell**

| | | |
|---|---|---|
| In the Matter of | ) | August 29, 2005 |
| USEC Inc. | ) | Docket No. 70-7004 |
| (American Centrifuge Plant) | ) | ASLBP No. 05-838-01-ML |

## USEC INC. ANSWER TO GEOFFREY SEA MOTION FOR LEAVE TO SUPPLEMENT REPLIES AND AMENDED CONTENTIONS

By motion filed on August 17, 2005, Mr. Geoffrey Sea (Petitioner) has requested leave to supplement his March 23 and March 25, 2005 replies to the answers filed by applicant USEC Inc. (USEC) and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff.[1] Along with this Motion, Petitioner filed a supplement to his replies as well as amended contentions, based on purportedly new material information.[2] For the reasons set forth below, USEC opposes both the Motion for Leave to Supplement Replies and the admission of Petitioner's amended contentions.

---

1 *Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea* (Aug. 17, 2005) [hereinafter, "Motion for Leave to Supplement Replies" or "Motion"].

2 Supplement to Replies to USEC and the NRC Staff by Geoffrey Sea (Aug. 17, 2005); Amended Contentions of Geoffrey Sea (Aug. 17, 2005) [hereinafter, "Amended Contentions"].

TEMPLATE = SECY-035

SECY-02

## I. BACKGROUND

USEC submitted a license application for the construction and operation of the American Centrifuge Plant (ACP) over one year ago, on August 23, 2004. From the very beginning of this proceeding, Petitioner (and others) have attempted to delay its timely prosecution. On December 17, 2004 (the final day that petitions for hearing were due to be filed), Petitioner filed an eleventh hour request for an extension of time to submit his initial Petition.[3] The Commission ultimately granted a 60-day extension.[4]

Petitioners Geoffrey Sea and Portsmouth/Piketon Residents for Environmental Safety and Security then submitted petitions to intervene. The Commission found that both Petitioners had demonstrated standing, and on May 12, 2005, referred the question of the admissibility of the Petitioners' contentions to the Atomic Safety and Licensing Board Panel.[5]

This Atomic Safety and Licensing Board (Board) was formed on May 17, 2005.[6] On July 18, 2005 Petitioner requested permission to amend his Petition and delay the hearing schedule.[7] On July 19, 2005 the Board rejected Petitioner's motion and heard oral argument on the admissibility of Petitioner's contentions.[8] Petitioner then requested that the Board delay any ruling on the admissibility of his contentions until after August 15, 2005, the date he anticipated filing a motion to supplement his replies and amended

---

3 Notice of Intent to File Petition of Intervention and Request for Extension of Time Period for Filing Petitions of Intervention Submitted by Geoffrey Sea (December 17, 2004).

4 Commission Order (Dec. 30, 2004) (unpublished).

5 *USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309 (2005).

6 70 Fed. Reg. 29,544 (May 23, 2005).

7 Geoffrey Sea's Motion for Leave to File an Amended Petition (July 18, 2005).

8 Prehearing Conference Transcript (July 19, 2005) at 62-110 [hereinafter, "Tr."].

contentions.[9] Following responses from USEC and the Staff opposing Petitioner's request for delay,[10] Petitioner filed his Motion and Amended Contentions on August 17, 2005.

## II. DISCUSSION

### A. Petitioner's Motion Should Be Rejected

Petitioner's Motion for Leave to Supplement Replies should be rejected. It is untimely and is part of a pattern of delaying tactics already established by Petitioner in this proceeding. Furthermore, it fails to comply with NRC regulations governing the filing of motions.

First, Petitioner's Motion is untimely. Pursuant to 10 CFR § 2.323(a), a motion must be filed no later than ten days after the occurrence from which the motion arises. With the exception of a single news article, the "new" information that prompted the filing of Petitioner's Motion was available to the Petitioner prior to August 7, 2005 (more than ten days before Petitioner filed the Motion). Specifically, Petitioner relies on:

- Information gathered during an August 5, 2005 visit to the X-6609 well field;
- A photograph of the entrance gateway to the Southwest Access Road indicating security enhancements that Petitioner acknowledges have been in place for four to five months;
- Excerpts from the July 1, 1993 lease agreement between the Department of Energy (DOE) and the United States Enrichment Corporation that has been available in the Corporation's Securities and Exchange Commission filings since 1998;
- A USEC informational brochure featuring the ACP, which has been publicly available on USEC's website since June 2004, that Petitioner received on August 5, 2005;

---

9 Letter from Geoffrey Sea to Administrative Judges (Aug. 10, 2005).

10 USEC Inc. Response to Geoffrey Sea Request to Delay ASLB Ruling on Contentions (Aug. 10, 2005); NRC Staff's Response to Geoffrey Sea's Request for Delay (Aug. 12, 2005).

- A July 25, 2005 press release announcing proposed legislation involving the Rocky Flats National Wildlife Refuge;
- A March 10, 2005 DOE Office of Inspector General Audit Report;
- Information gathered during a July 14, 2005 DOE public meeting; and
- A May 23, 2005 magazine article.

Petitioner's Motion should have been filed prior to August 17, 2005 and is, therefore, untimely.

Furthermore, the Commission's Rules of Practice do not permit the filing of supplemental replies without authorization of the Commission or the Board. Section 2.309(h)(3) states that after a petitioner files its reply to the answers of the applicant and Staff, unless otherwise specified by the Commission or Board, "[n]o other written answers or replies will be entertained." Petitioner availed himself of the opportunity to respond to USEC and Staff arguments by filing replies to the USEC and Staff answers in March 2005. Petitioner was given a second opportunity to further respond to USEC and Staff arguments during the July 19, 2005 prehearing conference. Petitioner should not be given a *third* opportunity to respond to the USEC and Staff answers and further delay this proceeding.

Already, Petitioner has made several attempts to delay the proceeding. We encourage the Board to reject this pattern of delaying tactics. As USEC has stated in the past, since this proceeding is on the critical path to a licensing decision, reasonable expedition and efficiency are warranted. Endless responsive pleadings are inconsistent with that goal, the Rules of Practice, and the Commission's expectations.

Finally, Petitioner has failed to certify that he made a sincere effort to contact USEC and the Staff to resolve the issues raised in the Motion, as required by 10 CFR § 2.323(b). Therefore, under section 2.323(b), Petitioner's Motion "must be rejected."[11]

**B. Petitioner's Late-Filed Amended Contentions Are Inadmissible**

Petitioner's two principal allegations are that the ACP will have an adverse effect on a physical feature near the X-6609 raw water well field that may be of Hopewell origin, and that the reopening of the Southwest Access Road will have adverse effects on his residence, the Barnes Home. There is no proposal before the NRC related to the X-6609 well field. The well field (itself constructed in the 1980s) is a part of an existing overall raw water supply system that draws from a single aquifer that supplies the entire Portsmouth site. DOE (and later USEC) has been pumping from this aquifer since the 1950s. While the ACP will utilize the X-6609 well field during operations, Petitioner has provided *no* information to suggest that the ACP's contribution to the ongoing supply of raw water to the site will have any impact on the alleged Hopewell mound.

With respect to the Southwest Access Road, Petitioner has refused to acknowledge the information provided by USEC counsel during the July 19 prehearing conference that this road was temporarily reopened for purposes unrelated to the ACP, and that the road will be *closed* prior to commencement of ACP operations. Indeed, the road will be closed prior to commencement of ACP construction. Thus, there will be no impacts attributable to the ACP.

In any event, Petitioner has completely failed to address the principal legal standards for the admission of late-filed amended contentions. He has made *no* effort to

---

[11] USEC is not providing a detailed substantive response to Petitioner's Supplemental Reply because it largely duplicates the allegations set forth in Petitioner's Amended Contentions, to which we do respond in detail.

address the substantive requirements of section 2.309(f) that expressly apply to the admission of amended contentions – despite explicit direction from the Board and input from the Staff, and has not satisfied the nontimely filing standards set forth in 10 CFR § 2.309(c)(1). As discussed below, application of those standards demonstrates that the late-filed amended contentions are not admissible.

1. Legal Standards

Under section 2.309(f)(2), contentions may be amended only with leave of the presiding officer and only upon a showing that:

(1) The information upon which the amended or new contention is based was not previously available;

(2) The information upon which the amended or new contention is based is materially different than information previously available; and

(3) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

In promulgating this rule, the Commission explained that petitioners must file amended contentions "*promptly* after the new information purportedly forming the basis for the new or amended contention becomes available" and that it must "be shown" that the amended contention was indeed filed promptly.[12]

Petitioner's failure to even address these standards is inexcusable – even for a *pro se* litigant. During the July 19, 2005 prehearing conference, the Board explicitly directed Petitioner that "with any subsequent filing there are requirements under the regulation 2.309(c) *and 2.309(f)* procedurally that you would have to establish in order to

---

[12] Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,221 (Jan. 14, 2004) (emphasis added). In *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 642 (2004), the Commission affirmed the licensing board's denial of a motion to amend contentions where the petitioner "did not attempt to demonstrate" that it had met the requirements of 10 CFR § 2.309(f)(2).

support any additional filing."[13] Furthermore, in the Staff's August 12 Response to Geoffrey Sea's Request for Delay, it specifically referred Petitioner to the requirements of 10 CFR § 2.309(f).[14]

In addition, an amended contention must also meet the admissibility standards set forth in section 2.309(f)(1)(i)-(vi). Each contention must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(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;

(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

(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 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.[15]

A contention that fails to meet any one of these requirements must be rejected.[16]

---

[13] Tr. at 64: 17-21 (emphasis added).

[14] NRC Staff's Response to Geoffrey Sea's Request for Delay (Aug. 12, 2005) at 3.

[15] 10 CFR § 2.309(f)(1)(i)-(vi).

[16] *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 (1991).

Finally, pursuant to 10 CFR § 2.309(c)(1), Petitioner also must demonstrate that his amended contentions should be admitted based upon a balancing of the eight factors set forth in that regulation. Petitioner has failed to make that demonstration.[17] In the following sections, USEC addresses each of Petitioner's amended contentions.

2. Contention 1: Assessment of Cultural Resources

a. Contention 1.1

In the original basis statement for contention 1.1, Petitioner alleged that "segmented earthen walls" were situated on the DOE reservation's riverfront land and that the Atomic Energy Commission (AEC) and DOE had used the barriers to shield the well fields that supply water to the reservation.[18] Petitioner further asserted that the effects of pumping water from underneath the structures had never been studied.[19]

Petitioner's new basis purportedly arises from information he and three cultural resource experts gathered during an August 5, 2005 tour of the X-6609 well field.[20] During this tour, Petitioner "identified a human-made earthwork on the site, whose origin is unknown but which appears to predate the U.S. Department of Energy ("DOE") water

---

17 In his Amended Contentions, Petitioner dispenses with any discussion of five of the eight criteria as "not applicable," because he is "not seeking to enter the proceeding late" and is "merely adding new bases for [existing] contentions." Amended Contentions at 16. Petitioner's failure to address those factors should result in a finding by the Board in USEC's favor on each of those factors. Furthermore, his repetition of the basic assertions made in his original petition does not provide "good cause" for his late filing. Finally, there are other means available for protecting Petitioner's interests (in particular, the public participation provisions of the NHPA and of the Commission's NEPA process), and Petitioner's participation in this proceeding will clearly broaden the issues and delay the proceeding. This is evident from his actions to date seeking delays in Board decisions and filing unauthorized pleadings.

18 Petition to Intervene by Geoffrey Sea (Feb. 28, 2005) at 15-16 [hereinafter, "Petition"].

19 *Id.* at 16.

20 At this time, USEC takes no position regarding the qualifications of Dr. Cowan, Professor Hancock, or Ms. Long.

system which is also visible on the site."[21] Based on this assertion, Petitioner alleges that USEC's failure to identify this alleged earthwork in its Environmental Report "is the clearest example of USEC's failure to identify important cultural resources potentially impacted by ACP."[22]

Petitioner has failed to demonstrate how the information gathered during the August 5 site visit was previously unavailable, as required by 10 CFR § 2.309(f)(2)(i). Petitioner contends that he, Dr. Cowan, Professor Hancock, and Ms. Long "could not accomplish the site visit or written assessment any earlier" than August 5.[23] Petitioner claims that he first made a request to visit the water field site to Bill Murphie, manager of DOE's Portsmouth-Paducah Projects office, on December 2, 2004.[24] According to Petitioner, Mr. Murphie agreed and offered to personally host the site visit.[25] Petitioner, however, specifically states that he did not follow-up on Mr. Murphie's offer until March 10, 2005, – over three months later.[26] Indeed, the first instance that Petitioner claimed that a site tour was necessary to support his contention was in his July 18, 2005 motion for leave to amend petition and request for delay.[27]

---

21 Amended Contentions, Exh. AA, Declaration by John Hancock, Frank L. Cowan, and Cathryn Long Regarding August 5, 2005 Visit to GCEP Water Field (Aug. 17, 2005), ¶ 5 [hereinafter, "Declaration"].

22 Amended Contentions at 3. (Petitioner did not insert page numbers for this filing; for ease of reference, USEC has numbered the pages and referred to those page numbers).

23 *Id.* at 19-20.

24 *Id.* at 16.

25 *Id.*

26 *Id.* at 17. In fact, a careful reading of Petitioner's account of his efforts to follow-up discloses no suggestion that he actually attempted to schedule the tour until July 2005. Petitioner never states that he made any request for the tour prior to that time. *Id.*

27 Geoffrey Sea's Motion for Leave to File an Amended Petition (July 18, 2005) at 3-4.

Regardless of how the events leading up to the August 5 site tour actually transpired (and as described in USEC's August 10, 2005 filing, USEC vigorously disputes Petitioner's characterization of those events) the key point is that Petitioner apparently took months to follow-up on DOE's offer of a site tour. Thus, he has failed to meet his burden of demonstrating that the information gathered during the site tour was previously unavailable.

More importantly, the information upon which Petitioner's amended contention is based is not "materially different" from previously available information. Petitioner's original basis statement alleged the existence of "segmented earthen walls" along the reservation's riverfront property, from underneath which wells pumped water to the reservation. The Declaration Petitioner submits in support of this amended contention does not add any information that could be considered materially different from that previously available to Petitioner. Far from characterizing the "earthwork" as an "important cultural resource[] potentially impacted by [the] ACP," as Petitioner claims,[28] Petitioner's experts state that "[t]hough the structure is man-made, it is impossible to say upon partial visual inspection what this structure is, how old it is (though it is not very recent), or who built it."[29] They note that although it is "within the realm of possibility" that the structure is an Indian earthwork of the Middle Woodland period, "[i]t is also possible that the structure is a 19th or 20th century construction."[30] Mere speculation about the nature and age of the X-6609 well field structure – even the speculation of experts – does not constitute information that is materially different from information

---

28 *Id.* at 3.

29 Decl. ¶ 11.

30 *Id.* ¶¶ 11, 13.

previously available to Petitioner or from the information provided by Petitioner in his original Petition.

In short, amended contention 1.1 fails to satisfy section 2.309(f)(2)(i) and (ii), in that Petitioner has not shown that the information gathered during the August 5 site visit was previously unavailable or that it is "materially different" from previously available information. Accordingly, the amended contention is inadmissible.

b. Contention 1.2

Petitioner's original contention listed several potential impacts of the ACP on cultural resources, including "[p]otential direct damage to the Scioto River earthworks caused by renewed water pumping once ACP is in operation" and "[a]dditional degradation, contamination and obliteration of priceless archeological sites caused by additional road-building, traffic congestion, waste storage and plant emissions."[31] Petitioner did not offer any facts or expert opinion to support his assertions and merely stated that the listed impacts "deserve serious study and consideration."[32] Petitioner now submits two new bases in support of this contention.

(i) New Basis 1

Petitioner's first new basis purportedly relies on the Declaration provided by Dr. Cowan, Professor Hancock, and Ms. Long. Petitioner contends that the potential impacts of ACP operations on the earthworks are "obvious and include subsidence; erosion; destruction due to well-head maintenance and grounds keeping; lack of access to the site for cultural resource professionals and the public; [and] aesthetic damage."[33] This

---

31 Petition at 23.

32 *Id.*

33 Amended Contentions at 4.

statement is little more than a modest elaboration on Petitioner's original allegation of "[p]otential direct damage . . . caused by renewed water pumping."[34]

Furthermore, the Declaration provides no support whatsoever for Petitioner's assertion. On the contrary, the Declaration states that "[w]hether pumping of water from beneath the structure damages the structure is a question that should be evaluated by hydrology experts."[35] None of the declarants claim to be such experts. Nor is there any mention in the Declaration of what potential or "obvious" impacts could result from water pumping. Furthermore, the Declaration's suggestion that hydrology experts should conduct studies of the potential impacts is no different than Petitioner's original assertion that potential impacts "deserve serious study and consideration."[36] Thus, the Declaration does not provide new, materially different information.

In addition, contrary to section 2.309(f)(1)(vi), Petitioner has not provided sufficient information to show that there is a genuine dispute on a material issue of fact or law. Specifically, Petitioner fails to provide reason to believe that additional water pumping from the existing well field due to ACP operations will have any impacts (much less "obvious" impacts) on the surrounding environment and has provided no factual or expert opinion to support this claim.

Accordingly, Petitioner's first amended basis fails to provide any new, material information to support this contention. Nor has Petitioner provided sufficient information to show that there is a genuine dispute on a material issue of fact or law as required by section 2.309(f)(1)(vi).

---

34 Petition at 23.

35 Decl. ¶ 16.

36 Petition at 23.

(ii) New Basis 2

Petitioner's second new basis statement is based upon the past reopening of the Southwest Access Road. The Southwest Access Road was reopened on January 14, 2005 – before Petitioner filed his original contention. During the July 19, 2005 prehearing conference, Petitioner asserted that the "road has now been reopened for the purpose of providing access to the ACP."[37] Petitioner's belief that the road reopening was undertaken to support the ACP apparently stemmed from the fact that the road is "directly in front of the ACP."[38] During that same prehearing conference, counsel for USEC explained that the Southwest Access Road was temporarily reopened for a Gaseous Diffusion Plant-related DOE change.[39] USEC intends to re-close the road for ACP construction and operations. Prior to filing this new basis statement, Petitioner had been informed that the temporary reopening of the Southwest Access Road was not related to the ACP. Petitioner has chosen to ignore this fact. Accordingly, the road's reopening cannot be considered new information that is materially different from previously available information.

In addition, contrary to 10 CFR § 2.309(f)(2)(iii), the photograph Petitioner offers in support of this new basis was not submitted in a timely fashion. Despite the photograph having been taken on August 14, 2005, the information documented in the photograph was clearly available much earlier. Indeed, Petitioner points out that he

---

37 Tr. at 72: 17-19.

38 *Id.*

39 *Id.* at 89: 19-25.

became aware of the road reopening four to five months prior to submitting his amended contention, "at some point in the early spring of 2005."[40]

Furthermore, because the road's reopening is not an impact caused by the ACP, the issue of whether and how this temporary action taken by DOE may affect Petitioner's property falls outside the scope of this proceeding. Thus, Petitioner's second new basis both fails to raise an issue that is material to the Staff's findings in this proceeding, and fails to identify a genuine dispute on a material issue of fact or law.

In sum, Petitioner has not shown that the information supporting this new basis is materially different from previously available information, as required by 10 CFR § 2.309(f)(2)(ii). In addition, contrary to section 2.309(f)(2)(iii), Petitioner has not submitted the "new" information in a timely fashion. Finally, the new basis does not satisfy the substantive criteria of section 2.309(f)(1)(iii), (iv), or (vi). Consequently, amended contention 1.2 is inadmissible.

3. Contention 2: Compliance with Federal Historic Preservation Laws

Contentions 2.1 and 2.2 assert that the "USEC-DOE collaborative agreement is out of compliance with the National Historic Preservation Act [(NHPA)] and related legislation" and that this alleged "[n]oncompliance with federal preservation law has undermined the legitimacy and legal basis of the USEC-DOE agreement."[41] In a new basis statement intended to support the amendment of both contentions 2.1 and 2.2, Petitioner contends that because "we now know that a historic property exists on the

[40] Amended Contentions at 5; *see also* Tr. at 73: 9-11.

[41] Amended Contentions at 6.

federally-owned GCEP [X-6609] Water Field site . . . , it is now clear that Section 110 has been violated."[42]

As an initial matter, no "historic property" has been confirmed to exist on the X-6609 well field site. Dr. Cowan, Professor Hancock, and Ms. Long attested that based on their inspection of the structure, it was "impossible to say" what the structure is, how old it is, or who built it.[43]

Petitioner next asserts that due to the existence of the well-heads and pipes, "it is now clear that Section 110 has been violated . . . . The question then is: Who is responsible for the violation?"[44] The well-heads and pipes Petitioner refers to were installed by DOE and its predecessor agencies in the 1950s and 1980s, long before USEC was created.[45] Petitioner acknowledges that because DOE acquired the reservation on which the ACP is sited, "DOE is the responsible federal agency under Section 110 of NHPA. That much is clear."[46] Later in his pleading, Petitioner also states that "Section 110 addresses the agency that owns a historic property."[47]

Despite Petitioner's recognition that Section 110 compliance is the responsibility of the cognizant federal agency, he nevertheless claims that USEC has assumed DOE's responsibility for compliance with Section 110 by virtue of: (1) provisions in the 1993 DOE-United States Enrichment Corporation lease; (2) the alleged connection between the

---

42 *Id.* at 6.

43 Decl. ¶ 11.

44 Amended Contentions at 6-7.

45 The United States Enrichment Corporation, a government corporation, was created on July 1, 1993. In 1998, the U.S. government privatized it, and USEC Inc. and its wholly-owned subsidiary, the United States Enrichment Corporation, both Delaware corporations, were formed and sold to the public through an initial public offering on July 28, 1998.

46 Amended Contentions at 7.

47 *Id.* at 10.

former GCEP and ACP projects; and (3) the fact that USEC sent consultation letters to the Ohio Historic Preservation Office concerning the ACP.[48] Even if Petitioner was correct that USEC had assumed (or legally could assume) DOE's Section 110 responsibilities, any questions about DOE's past compliance with the NHPA are, as USEC has stated before, outside the scope of NRC's authority and this proceeding. In any event, as demonstrated below, none of the information presented by Petitioner is materially different from previously available information.

Petitioner's assertions regarding the 1993 lease do not in any way support his thesis that USEC has assumed any responsibility for Section 110 compliance. Neither the lease itself, nor the incorporated Regulatory Oversight Agreement to which Petitioner refers addresses Section 110. Nor has Petitioner cited any requirement to do so.[49] Moreover, despite Petitioner's assertion that he "could not have known how to obtain the document earlier" than approximately one week before he filed his amended contention,[50] Petitioner states in his filing that he did not even make his first attempt to obtain a copy of the lease until March 2005 – after the February 28, 2005 filing deadline for intervention petitions. Thus, Petitioner has not shown that the information in the 1993

---

48 *Id.* at 7-11.

49 Although the issue is not material, Petitioner criticizes USEC for "its silence on . . . whether it does or does not, in fact, lease the GCEP well field." Amended Contentions at 7. As explained in the License Application, the United States Enrichment Corporation – a wholly-owned subsidiary of applicant USEC Inc. – leases a significant portion of the reservation from DOE, including the well fields, buildings, and facilities to be used by the ACP. License Application at 1-48, 1-64. USEC Inc., in turn, subleases the buildings and facilities to be used by the ACP from the United States Enrichment Corporation – but not the X-6609 well field. *Id.* at 1-64. Thus, the X-6609 well field is leased to the United States Enrichment Corporation – not USEC. USEC did not identify the well field as an ACP facility, not as "an extraordinary evasion of plain fact" (Amended Contentions at 7), but because: (1) it is not a facility dedicated to the ACP; (2) it is not a facility being subleased by USEC; and (3) USEC has no present intention of subleasing it from the United States Enrichment Corporation. All of this information was presented in USEC's License Application and Environmental Report and cannot be considered new or materially different information.

50 Amended Contentions at 21.

lease was previously unavailable or materially different from information previously available.[51]

Petitioner also alleges a connection that does not exist between DOE's former GCEP project and the ACP. Relying on an informational brochure featuring the ACP, Petitioner concludes that the GCEP and the ACP "are the same project."[52] What the brochure demonstrates, however, is that DOE cancelled the federally-funded GCEP program in 1985.[53] USEC did not even exist at that time. Fourteen years later, in 1999, USEC began to review DOE's centrifuge technology.[54] After considering various separation technologies, USEC decided to deploy the American Centrifuge technology in 2002 at private expense, and pursuant to an agreement with DOE, established milestones for the operation of the ACP.[55] Although the ACP uses some buildings and facilities that were part of the previously-planned GCEP, and builds on the centrifuge technology developed by DOE for the GCEP, it is simply inaccurate to describe the GCEP and the ACP as the "same project." It should be noted that this brochure has been available on USEC's website since June 2004 and that the License Application fully describes the history of the centrifuge program.[56] Thus, information concerning the history of the centrifuge program is neither new nor materially different from previously available information.

---

51 The 1993 lease was an exhibit to the registration statement filed in 1998 with the Securities and Exchange Commission (SEC) in connection with the initial public offering that created USEC Inc. and is available on the SEC's EDGAR website.

52 Amended Contentions at 8.

53 Amended Contentions, Exh. DD.

54 *Id.*

55 *Id.*; License Application at 1-14.

56 License Application at 1-14.

In addition, contrary to Petitioner's assertion, USEC did not "interpret[] itself as inheriting NHPA responsibility" under the DOE-United States Enrichment Corporation lease agreement.[57] To support his argument, Petitioner points to "formal compliance letters" sent by USEC to the Ohio Historic Preservation Office "in supposed fulfillment of [USEC's] Section 106 responsibilities" under the NHPA.[58]

In accordance with NRC guidance document NUREG-1748, USEC consulted the State Historic Preservation Officer by letter dated November 12, 2003,[59] but at no time has USEC acted or attempted to usurp the responsibilities of either DOE or the NRC under the NHPA. For its part, the NRC Staff has acknowledged that it is the NRC's – and not USEC's – obligation to consult with the appropriate parties under Section 106.[60] Petitioner may not have had access to USEC's consultation letters at the time he filed his Petition, but the letters do not contain any information that is materially different from what was previously available. In addition, Petitioner has not demonstrated that he filed his amended contention in a timely manner either after receiving copies of the letters from the Staff or after their public release in NRC's ADAMS database on March 3, 2005.[61]

Finally, Petitioner asserts that USEC assumed responsibilities under Section 112 of the NHPA by virtue of the United States Enrichment Corporation's status as a lessee

---

57 Amended Contentions at 9.

58 *Id.*

59 NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (Aug. 2003), §§ 6.4.8, 1.4; Environmental Report at Appendix B, Letter from Peter J. Miner, USEC Regulatory Manager, to Mark Epstein, Archeology Reviews Manager (Nov. 12, 2003).

60 Tr. at 82: 14-18.

61 The letters appear in Appendix B to USEC's Environmental Report (ADAMS accession number ML050620471).

of the ACP site.[62] Section 112 does not, however, effect a transfer of the DOE's NHPA obligations to USEC. Section 112 requires federal agencies that own or control historic properties (in this case DOE), to impose professional and qualification standards upon those agency employees and contractors who are responsible for historic resources.[63] Regardless of whether USEC is a DOE contractor, Section 112 clearly puts the burden on *DOE* to impose appropriate standards on its contractors. Even more clearly, Section 112 does not in any way transfer the obligations of DOE, and certainly not of the NRC, under the NHPA to USEC. To the extent that Petitioner takes issue with DOE's Section 112 compliance, such a concern cannot be redressed by the NRC, and falls outside the scope of this proceeding.

Thus, Petitioner has not identified previously unavailable, material information, contrary to sections 2.309(f)(2)(i) and (ii). Furthermore, both contentions raise issues that are beyond the scope of this proceeding. Accordingly, amended contentions 2.1 and 2.2 are inadmissible.

4. Contention 3.1: USEC Has Failed to Consider a Broad Range of Alternatives to the Proposed Action

Petitioner's original contention asserted that USEC's discussion of alternatives to the proposed action was "wholly inadequate," because it only considered "alternatives for USEC, not for the Piketon site or community."[64] Petitioner now asserts that proposed legislation provides "powerful pragmatic support" for his assertion that transferring portions of the DOE reservation to the Department of Interior (DOI) for use as parkland

---

62 Amended Contentions at 11.

63 16 U.S.C. § 470h-4(a)(1).

64 Petition at 28.

or a wildlife refuge is a feasible alternative to the proposed action.[65] Petitioner points to a legislative proposal by two Colorado senators that, if adopted, would "clear the way" for DOE to convert undeveloped portions of the Rocky Flats site into a wildlife refuge and for the developed portions to be operated as the Rocky Flats Environmental Technology Site.[66]

The Rocky Flats press release does not provide new, materially different information, since developments associated with the Rocky Flats site have no relationship to the ACP project. The press release cited by Petitioner addresses proposed legislation intended to resolve a mineral rights dispute at Rocky Flats and is dated July 25, 2005 (more than three weeks before Petitioner filed his amended contentions).[67] Moreover, the legislation to create the wildlife refuge upon which Petitioner is now basing his claims was enacted four years ago in 2001.[68] Petitioner has not shown that this information was submitted in a timely fashion.

In addition, contrary to section 2.309(f)(1)(iv), Petitioner has not demonstrated how this development in Colorado is even remotely relevant or material to the ACP licensing proceeding. The Rocky Flats site, which has been in the remediation and closure process for the past decade,[69] has nothing to do with the ACP or the Piketon site. USEC has considered a reasonable range of alternatives in its Environmental Report, in

---

65 Amended Contentions at 12.

66 *Id.*

67 *Id.*, Exh. EE, Senators Allard, Salazar Offer Amendment to Resolve Rocky Flats Mineral Rights Issue (July 25, 2005).

68 *Id.*

69 *See* Patricia Buffer, Beyond the Buildings at the Place Called "Rocky Flats" at 4 (July 2003), available at http://192.149.55.183/HAER/RockyFlats_HistoryBook_rev2.pdf.

accordance with NRC guidance.[20] Petitioner's reference to this press release lends no support for his speculative proposition that transferring the Piketon DOE reservation to DOI is a reasonable alternative that must be considered in USEC's Environmental Report. Consequently, Petitioner also fails to show that there is a genuine dispute on a material issue of fact or law.

In short, amended contention 3.1 should be rejected, because it fails to meet the requirements of 10 CFR §§ 2.309(f)(2) and (f)(1)(iv) and (vi).

5. 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

Petitioner's original basis statement for this contention asserted that "USEC has been financially unstable, subject to wild fluctuations in its stock price, and the subject of ongoing speculation as to its viability."[21] Petitioner claims that since the filing of his intervention petition, his warnings concerning USEC's financial prospects "have received astounding confirmation."[22] Specifically, Petitioner cites to a March 10, 2005 DOE Office of Inspector General (IG) report regarding the GCEP Cleanup Project, in which the IG concluded that DOE will incur an estimated $17 million for non-cleanup-related activities that appear to be outside the scope of the June 2002 DOE-USEC collaborative agreement concerning the cleanup of the former GCEP buildings.[23] The IG concluded

---

20 Environmental Report at 2-10 to 2-18.

21 Petition at 36.

22 Amended Contentions at 13-14.

23 Amended Contentions, Exh. A to Exh. FF, Audit Report: Gas Centrifuge Enrichment Plant Cleanup Project at Portsmouth (Mar. 10, 2005) at 1 [hereinafter, "Audit Report"]. Contrary to Petitioner's assertion that the "IG warned that $250 million were at risk of suffering a similar fate," (Amended Contentions at 14), the IG's report makes no mention of any potential $250 million expenditures.

that confusion over the apportionment of costs stemmed from the agreement's failure to outline the specific costs to be borne by each party and from DOE's failure to develop a comprehensive baseline for accelerated GCEP cleanup.[24] Petitioner states that, according to a July 14, 2005 statement by a DOE official, USEC has "made no offer to reimburse" DOE.[25] Finally, Petitioner points to two newspaper articles (dated May 23 and August 15, 2005) that set forth a reporter's views on USEC's investment quality.[26] Based on this information, Petitioner asserts that "severe economic challenges, combined with possible legal action from DOE to recover past improper taxpayer subsidies of USEC, spell certain problems for USEC in its ability to complete ACP in a competitive industry."[27]

Petitioner has not demonstrated that the information relied upon in the amended contention is materially different from information that was previously available to him. Moreover, Petitioner fails to show that he filed the amended contention – which as described above is based in large part on the March 10, 2005 IG report, a July 14, 2005 public statement, and a May 23, 2005 article – in a timely fashion.

In addition, the amended contention does not meet the substantive criteria of 10 CFR § 2.309(f)(1). Petitioner has not shown how an internal DOE investigation's findings concerning DOE cost allocations in the DOE cleanup program have any bearing on USEC's license application or are material to this NRC proceeding. To the extent that Petitioner's new basis statement challenges USEC's financial qualifications, Petitioner has not identified any error or omission in Section 1.2.2 of the License Application,

---

24 Audit Report at 2.

25 Amended Contentions at 14; Exh. FF, Declaration by Geoffrey Sea Regarding Department of Energy Semi-annual Environmental Review Meeting and the DOE IG Report on USEC (Aug. 15, 2005).

26 Amended Contentions at 14-15.

27 *Id.* at 15.

which discusses USEC's financial qualifications.[28] Thus, Petitioner has failed to show the existence of a genuine issue of material fact or law.

In short, amended contention 7.1 does not meet the criteria of 10 CFR §§ 2.309(f)(2) and (f)(1)(iv) and (vi), and is, therefore, inadmissible.

## III. CONCLUSION

Petitioner's Motion for Leave to Supplement Replies represents another in a series of efforts to delay the proceeding and must be rejected as untimely. Moreover, Petitioner has been given ample opportunity to respond to USEC and Staff arguments, and the Motion does not comply with the requirements governing the filing of motions.

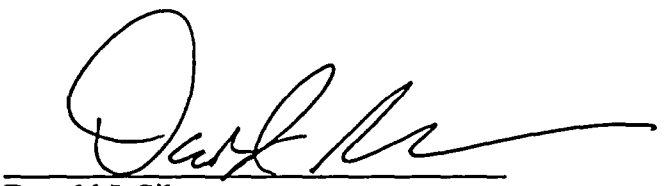
With respect to Petitioner's late-filed amended contentions, he has failed to comply with the requirements of 10 CFR § 2.309(f)(2) to demonstrate that the information he submitted was: (1) previously unavailable; (2) materially different from previously available information; and (3) submitted in a timely fashion. Furthermore, Petitioner's amended contentions do not satisfy the substantive requirements of section 2.309(f)(1), in that they: (1) raise issues that are beyond the scope of this proceeding; (2) are not material to the findings the NRC must make in this proceeding; and (3) fail to identify any genuine dispute of material fact or law. Finally, Petitioner has not satisfied the standards for late-filing set forth in 10 CFR § 2.309(c)(1). Accordingly, Petitioner's

---

[28] *See* License Application at 1-49 to 1-50.

amended contentions should not be admitted. USEC respectfully requests that the Board promptly rule on Petitioner's contentions as presented in his original Petition.

Respectfully submitted,



Donald J. Silverman
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 August 29, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

**Before Administrative Judges:**
**Lawrence G. McDade, Chairman**
**Paul B. Abramson**
**Richard E. Wardwell**

| | | |
|---|---|---|
| In the Matter of | ) | August 29, 2005 |
| USEC Inc. | ) | Docket No. 70-7004 |
| (American Centrifuge Plant) | ) | |
| | ) | ASLBP No. 05-838-01-ML |

## CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Answer to Geoffrey Sea Motion for Leave to Supplement Replies and Amended Contentions" were served upon the persons listed below by U.S. mail, first-class, postage prepaid, and by electronic mail, on this 29th day of August, 2005.

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

Dr. Richard E. Wardwell
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: rew@nrc.gov)

Lawrence G. McDade, Chair
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: lgm@nrc.gov)

Sara E. Brock
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: seb2@nrc.gov)

Dr. Paul B. Abramson
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: pba@nrc.gov)

Melissa L. Duffy
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: mld5@nrc.gov)

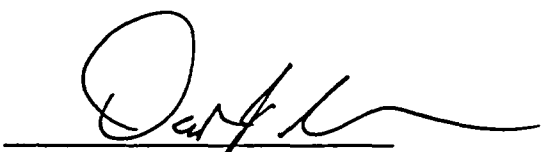
* E-mail, original and two copies

Marian L. Zobler
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(E-mail: mlz@nrc.gov)

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

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

Geoffrey Sea
The Barnes Home
1832 Wakefield Mound Road
Piketon, Ohio 45661
(E-mail: sargentspigeon@aol.com)



Donald J. Silverman
Counsel for USEC Inc.