UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

LBP-05-28

RAS 10547

DOCKETED 10/07/05

ATOMIC SAFETY AND LICENSING BOARD

SERVED 10/07/05

Before Administrative Judges:

Lawrence G. McDade, Chairman
Dr. Paul B. Abramson
Dr. Richard E. Wardwell

In the Matter of	Docket No. 70-7004
USEC, Inc.	ASLBP No. 05-838-01-ML
(American Centrifuge Plant)	October 7, 2005

MEMORANDUM AND ORDER
(Ruling on the Admissibility of Contentions)

Before the Board are two petitions to intervene related to the application of USEC, Inc. (USEC) for authorization to possess and use source, byproduct, and special nuclear material to enrich uranium to a maximum of ten percent uranium-235 (U_{235}) by the gas centrifuge process. USEC proposes to do this at a facility – denominated the American Centrifuge Plant (ACP) – to be constructed near Piketon, Ohio. The Petitions were filed by the Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS),[1] a public interest group representing the interests of various individuals who live in close proximity to the proposed ACP, and Geoffrey Sea (Sea),[2] an individual who has become the owner of, and a resident in, a private structure adjacent to the ACP. The Commission determined that both petitioners have standing to intervene in this proceeding and referred their petitions to the Board for a

[1] Petition to Intervene by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) (Feb. 28, 2005) [hereinafter PRESS Petition to Intervene].

[2] Petition to Intervene by Geoffrey Sea (Feb. 28, 2005) [hereinafter Sea Petition to Intervene].

determination of whether either, or both, have presented one or more admissible contentions.[3]

For the reasons set forth below, we find that neither PRESS nor Geoffrey Sea has submitted an admissible contention concerning USEC's application. Accordingly, we do not admit either petitioner as a party to this proceeding.

Before presenting our analysis of the admissibility of Petitioners' contentions, we first must address the multiple, non-identical petitions to intervene filed by Mr. Sea. The Petitioner submitted his original petition electronically on February 28, 2005. This petition was timely filed.[4] Mr. Sea then submitted a modified petition that was substantively different from the electronically filed petition. This second Petition to Intervene, which conformed to the format requirements set out at 10 C.F.R. § 2.304(b), was submitted via Federal Express on March 1, 2005. However, the second petition, because it was substantively different from the document previously filed electronically, must be treated as a new petition.[5] As a new petition, it was not timely filed.

Pursuant to 10 C.F.R. § 2.302(a)(3), petitions to intervene in Commission proceedings may be filed by e-mail. However, such documents "may be refused acceptance for filing" (10 C.F.R. § 2.304(g)) unless, within two (2) days after the electronic filing, an original and two copies of these documents, in the format specified at Section 2.304(b), are mailed to the Commission's Rulemakings and Adjudications Staff. 10 C.F.R. § 2.304(f). Because the

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[3] CLI-05-11, 61 NRC 309, 310 (2005).

[4] The initial deadline for filing a petition to intervene in this proceeding was December 17, 2004. 69 Fed. Reg. 61,411, 61,412 (Oct.18, 2004). The deadline was subsequently extended to February 28, 2005. Commission Order (Granting Motions for Time Extension) (Dec. 29, 2004) (unpublished).

[5] See USEC Inc. Answer to Petition to Intervene by Geoffrey Sea (Mar. 23, 2005) [hereinafter USEC Answer to Sea Petition] Attachment A at 1-56. That document provides a clear description of the substantial differences between the two versions of the Sea Petition to Intervene.

documents Mr. Sea submitted via Federal Express on March 1, 2005, were substantively different from the documents initially filed electronically, the electronic version failed to comply with Section 2.304(f), and could have been refused acceptance for filing.[6] Likewise, the mailed documents, which comply with the format requirements of 10 C.F.R. § 2.304(b), cannot be considered as filed on the date of the electronic submission because they were substantively different. Accordingly, the mailed documents were not timely filed. Furthermore, there was no petition (as required by 10 C.F.R. § 2.309(c)) requesting the Board to accept them as a nontimely filing.

In this case, because the documents sent to the Commission via Federal Express on March 1, 2005, were not timely filed and did not meet the requirements for late filing, only the electronically submitted petition is properly before this Board. Nevertheless, because of Mr. Sea's status as a pro se intervenor, the Board did fully consider all the information contained in the March 1st version of Mr. Sea's petition, as well as that contained in all of his subsequent filings.[7] We note that neither version of Mr. Sea's petition to intervene, nor any of his subsequent filings, contains information which adequately supports the admissibility of any of his proposed contentions.[8]

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[6] In this case, the Commission accepted the petition for filing, and ruled on the issue of standing. We need not revisit the Commission's decision to accept the electronic version of Mr. Sea's petition for filing.

[7] See, e.g., Geoffrey Sea's Motion for Leave to File an Amended Petition (July 18, 2005); Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea (Aug. 17, 2005); Supplement to Replies to USEC and the NRC Staff by Geoffrey Sea (Aug. 17, 2005); Amended Contentions of Geoffrey Sea (Aug. 17, 2005); Geoffrey Sea's Reply to Answer of USEC and Response of NRC Staff to Filings of August 17 (Sept. 6, 2005).

[8] Due to Mr. Sea's pro se status, this Board overlooked certain procedural defects associated with the version of his Petition to Intervene submitted via Federal Express on March 1, 2005, and fully reviewed and considered the full content of that petition, because we did not want to risk overlooking any significant fact based solely on a pro se litigant's lack of familiarity with the NRC Rules of Practice and Procedure.

Before leaving this issue, the Board notes its belief that it is inimical to the conduct of an orderly adjudicative proceeding for a litigant to file non-identical versions of any pleading. If an error or omission is noted by a litigant in a document that it has served and/or filed, the proper procedure is to file a document that is clearly marked as an amended or corrected version of the pleading, and to accompany that amended pleading with a motion requesting leave to substitute the amended pleading for the original. This motion should also fully explain the differences between the amended pleading and the original, as well as the circumstances justifying the filing of the amended pleading. See 10 C.F.R. § 2.323. Failure to follow such a procedure will ordinarily result in the second pleading being stricken. See 10 C.F.R. § 2.319.[9] As noted above, this may also result in the electronic version being rejected, because an "original" of the petition, which conforms with the requirements of Section 2.304(b), will not have been submitted to the Agency. See 10 C.F.R. § 2.304(g).

BACKGROUND

On August 23, 2004, USEC filed an application with the NRC to obtain a thirty-year 10 C.F.R. Part 70 license to operate its proposed ACP. This application included a safety analysis report (SAR), an environmental report (ER), an emergency plan (EP), a physical security plan (PSP), and a fundamental nuclear material control plan (FNMCP). The proposed process at the ACP, which is intended to produce enriched uranium for use in commercial nuclear power plant fuel, is adequately described in the license application and need not be repeated here.

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[9] See Northeast Nuclear Energy Co. (Millstone Nuclear Power Station, Unit No. 2), LBP-92-26, 36 NRC 191 (1992) (the striking of a pleading was viewed as an appropriate sanction to educate a litigant on the need to comply with NRC Rules of Practice and directives from the Board).

ANALYSIS

NRC regulations require that any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must (1) establish that it has standing; and (2) offer at least one admissible contention. 10 C.F.R. § 2.309(a).[10]

A. The Commission Has Determined That Both Petitioners Have Standing

Because the Commission has determined that both Petitioners have standing, the Board need not address that issue.

B. Standards Governing Contention Admissibility

An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. 10 C.F.R. § 2.309(f)(1)(i) - (vi).

The purpose of the contention rule is to "focus litigation on concrete issues and result in

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[10] The current regulation covering, inter alia, contention requirements is 10 C.F.R. § 2.309, adopted on January 14, 2004, effective February 13, 2004. 69 Fed. Reg. 2,182 (Jan. 14, 2004). The current regulation is, in pertinent part, substantially the same as the prior regulation, 10 C.F.R. § 2.714. The case law cited herein generally refers to the prior regulation or its predecessors.

a clearer and more focused record for decision." 69 Fed. Reg. at 2,202.[11] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." Id. The Commission has also emphasized that the rules on contention admissibility are "strict by design."[12] Failure to comply with any of these requirements is grounds for the dismissal of a contention. Id. at 2,221.[13]

The application of these requirements has been further developed as summarized below.

1. Brief Explanation of the Basis for the Contention

A "brief explanation of the basis for the contention" is a necessary prerequisite of an admissible contention. 10 C.F.R. § 2.309(f)(1)(ii). "[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention." 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). The brief explanation helps define the scope of a contention – "[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases."[14]

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[11] See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 553-54 (1978); BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974); Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974).

[12] Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), pet. for reconsideration denied, CLI-02-01, 55 NRC 1 (2002).

[13] See also Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); Arizona Pub. Serv. Co. (Palo Verde Nuclear Station, Units Nos. 1, 2 and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

[14] Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), aff'd sub nom. Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991), cert. denied, 502 U.S. 899 (1991). See also Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

2. Within the Scope of the Proceeding

A petitioner must demonstrate that the "issue raised in the contention is within the scope of the proceeding," 10 C.F.R. § 2.309(f)(1)(iii), which is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board.[15] Any contention that falls outside the specified scope of the proceeding must be rejected.[16]

3. Materiality

A petitioner must demonstrate that the contention asserts an issue of law or fact that is material to the findings the NRC must make to support the action that is involved in the proceeding; that is, the petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application. 10 C.F.R. § 2.309(f)(1)(iv). "Materiality" requires that the petitioner show why the alleged error or omission is of possible consequence to the result of the proceeding.[17] This means that there must be some significant link between the claimed deficiency and either the health and safety of the public or of the environment.[18]

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[15] See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985).

[16] See Portland Gen. Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

[17] Portland Cement Ass'n. v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Adm'r, E.P.A., 417 U.S. 921 (1974).

[18] Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996), rev'd in part on other grounds, CLI-96-7, 43 NRC 235 (1996). See also Pacific Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), pet. for review denied, CLI-03-12, 58 NRC 185, 191 (2003).

4. Concise Allegation of Supporting Facts or Expert Opinion

Contentions must be supported by "a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position." 10 C.F.R. § 2.309(f)(1)(v). It is the obligation of a petitioner to present the factual information and expert opinions necessary to adequately support its contention.[19] Failure to do so requires that the contention be rejected.[20]

Determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion is not a hearing on the merits.[21] A petitioner does not have to prove its contention at the admissibility stage. However, supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny.[22] The contention admissibility threshold is less than is required at the summary disposition stage.[23] Although a "Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner,"[24] a petitioner must provide some support for his contention, either in the form of facts or expert testimony.

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[19] Georgia Institute of Tech. (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds and aff'd in part, CLI-95-10, 42 NRC 1, and CLI-95-12, 42 NRC 111 (1995).

[20] Palo Verde, CLI-91-12, 34 NRC at 155.

[21] Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982).

[22] Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004); Yankee Nuclear, LBP-96-2, 43 NRC at 90.

[23] See 10 C.F.R. § 2.710(c). "[A]t the contention filing stage the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion." 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

[24] Palo Verde, CLI 91-12, 34 NRC at 155.

Under the standards for contention admissibility, "[m]ere 'notice pleading' is insufficient."[25] A contention will be inadmissible "if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"[26] Further, if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking.[27] Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention.[28]

At the contention admissibility stage, a petitioner must provide "some alleged fact or facts in support of its position."[29] This "does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention."[30] Nonetheless, a petitioner cannot satisfy this requirement by mere references to voluminous documents without providing analysis demonstrating that they provide factual support for the proposed contention.[31] In short, the information, facts, and expert opinions

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[25] Fansteel, Inc. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 208 (2000)).

[26] Id. (quoting Oyster Creek, CLI-00-06, 51 NRC 193, 208 (2000)).

[27] Georgia Tech, LBP-95-6, 41 NRC at 305. See also Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

[28] See Fansteel, CLI-03-13, 58 NRC at 205.

[29] 54 Fed. Reg. at 33,170.

[30] Id.

[31] See Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

provided by the petitioner will be examined by the Board to confirm that they do indeed indicate the existence of adequate support for the contention.[32]

5. Genuine Dispute Regarding Specific Portions of Application

All contentions must "show that a genuine dispute exists" with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application, or that mistakenly asserts that the application does not address a relevant issue, may be dismissed.[33]

6. Challenges to NRC Regulations

In addition to the requirements set out above, with limited exceptions not applicable in this case, "no rule or regulation of the Commission . . . is subject to attack . . . in any [NRC] adjudicatory proceeding." 10 C.F.R. § 2.335(a).[34] By the same token, any contention that amounts to an attack on applicable statutory requirements must be rejected by a licensing board as outside the scope of its proceeding.[35] The NRC adjudicatory process is not the proper venue for the evaluation of a petitioner's personal view regarding the direction regulatory policy should take.[36]

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[32] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), vacated in part on other grounds and remanded, CLI-90-04, 31 NRC 333 (1990).

[33] Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), pet. for review declined, CLI-94-02, 39 NRC 91 (1994). See also Texas Util. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

[34] See also Millstone, CLI-03-14, 58 NRC 207, 218 (2003).

[35] Pub. Serv. Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing Peach Bottom, ALAB-216, 8 AEC at 20-21).

[36] See id.

We apply the foregoing standards in making our rulings on the petitioners' various contentions below.

C. Rulings on PRESS Contentions

PRESS submitted 22 contentions, of which 7 are termed "Safety Issues" and 6 "Environmental Issues." The remaining 9 contentions were grouped into a general category. Contention 22, relating to gender discrimination, was subsequently withdrawn by PRESS.[37]

It is apparent to the Board, because PRESS' contentions were presented in a vague, disorganized, and repetitive fashion, that USEC and the NRC Staff had some difficulty understanding and responding to the PRESS petition.[38] Nonetheless, because PRESS is proceeding pro se and has attempted to present its numerous concerns regarding the proposed ACP, we address each contention in depth to ensure that we do not overlook any legitimate issue simply because of the way it is articulated.[39]

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[37] Reply to NRC Staff's Response to Petitions to Intervene Filed by [PRESS] and Geoffrey Sea (Apr. 4, 2005) [hereinafter PRESS Reply] at 4.

[38] See, e.g., USEC Inc. Answer to Petition to Intervene by [PRESS] (Mar. 23, 2005) at 18 [hereinafter USEC Answer to PRESS Petition] (stating that "[d]espite running some 42 pages in length, [PRESS'] contentions are almost uniformly insubstantial and lacking in any reasonable basis . . . . Petitioner simply does not appear to have taken its responsibilities seriously . . . .").

[39] We have set forth in this decision our specific findings with respect to each contention and each basis, with one overall exception. For numerous contentions, PRESS presents, as one of its bases, a bare reference to its Appendices D and E. These appendices consist of direct excerpts from 10 C.F.R. §§ 70.22 and 70.23. In no instance does PRESS provide any discussion related to its reference to the regulations. As noted above, a mere reference to a regulation, without explaining its significance or establishing any connection to the proffered contention, does not serve as a basis for the admissibility of any contention. These references are, therefore, not discussed in the body of this Memorandum and Order.

1. PRESS Contention # 1: Criticality Monitoring Exemption

"Petitioners contend that USEC's request for an exemption from 10 CFR 70.25(e) is not justified."[40]

In support of this contention, PRESS first claims that USEC's request for exemption from criticality monitoring of the cylinder storage yards is not justified, and states that "[t]he ACP would handle a markedly increased number of cylinders compared with the GDP," and "GDP exemptions ought not to be automatically transferred to the ACP."[41] PRESS does not provide any foundation for its assumption that GDP exemptions will be "automatically transferred" to the ACP, but appears to rely on USEC's statement in its License Application (LA) that "[s]imilar to the exemption granted for the GDP regarding criticality monitoring of the UF_6 [uranium hexafluoride] cylinder storage yards the following exemption from the requirements of 10 C.F.R. [§] 70.24 addressing criticality monitoring is identified in Section 5.4.4 of [USEC's] License Application . . . ."[42] We fail to see, however, how USEC's use of the words "[s]imilar to the exemption granted for the GDP" translates into what PRESS appears to assume, which is that the GDP exemptions will be "automatically transferred to the ACP."

In its answer to PRESS' petition, USEC acknowledges that "the amount of uranium-235 in the cylinder storage yards would 'exceed the threshold' for maintenance of a CAAS [criticality accident alarm system] set forth in 10 C.F.R. § 70.24," and notes, "[t]hat is, of course, why it is seeking a specific exemption from the 10 C.F.R. § 70.24 CAAS requirements . . . ."[43] USEC further states that its application "specifically addresses the exemption criteria [and] PRESS has

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[40] We assume that PRESS intended to refer to Section 70.24, not Section 70.25.

[41] PRESS Petition to Intervene at 14. The GDP is the Gaseous Diffusion Plant, which operated at the Piketon site.

[42] Id. at 13.

[43] USEC Answer to PRESS Petition at 21.

made no effort to challenge USEC's compliance with those criteria . . . . [it] has failed to identify in any respect why the requested exemption is not 'authorized by law . . . will not endanger life or property or the common defense and security and [is] otherwise [not] in the public interest.'"[44]

For its part, the NRC Staff, at the outset, challenges the logic and content of the contention, stating, "[i]n light of the difference between the wording of the contention and the bases, it is unclear what issue PRESS wishes to litigate" and "[t]he contention should be rejected on this ground alone."[45] The Staff goes on to address the proposed basis of the contention, asserting, as did USEC, that "[n]owhere does PRESS challenge USEC's specific statements in support of its exemption request."[46] The Board concludes that PRESS fails to provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This proffered basis therefore, does not support the contention.

PRESS also takes issue with USEC's statement that it has been "deemed impractical" to label each container located in restricted areas within the ACP, claiming that "USEC has not indicated who has deemed it impractical to label each and every container, or their rationale."[47] Impracticability, however, is not the standard for approval or denial of the requested exemption, and PRESS has not challenged USEC's compliance with the exemption criteria. With respect to these assertions, PRESS has also failed to raise any genuine dispute of material fact or law, to provide sufficient specificity, or to proffer facts or expert opinions to support its allegations.

Additionally, as part of its second basis for Contention # 1, PRESS cites an NRC

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[44] Id. at 21-22 (citing 10 C.F.R. § 70.17).

[45] NRC Staff's Response to Petitions to Intervene Filed by [PRESS] and Geoffrey Sea (Mar. 25, 2005) at 29 [hereinafter NRC Staff Response].

[46] Id.

[47] PRESS Petition to Intervene at 14-15.

Violation Notice, Notice EA-98-012, which was issued to USEC in March 1998.[48] PRESS, however, fails to explain how this violation notice is related to its argument opposing the exemptions requested by USEC. The two alleged deficiencies cited in the notice of violation – one having to do with criticality safety posting and labeling requirements and the other addressing criticality safety training and qualification of personnel – have nothing to do with the exemption which is the subject of the contention. This basis does not provide support for PRESS Contention # 1.

In its final explanation of the basis for this contention, PRESS asserts that USEC's treatment of its criticality accident alarm system coverage "lacks detail" (apparently an alleged omission), but without any discussion of the purported effect or impact of such an omission, or of how the allegedly omitted material could (or should) affect our decision in this proceeding.[49] PRESS also cites what it characterizes as a "questionable" safety record on the part of USEC, stating that "NRC has issued eight safety violations notices to USEC."[50] PRESS, however, fails to explain how they relate to the ACP and this contention.

In support of this contention PRESS has merely stated that sufficient quantities of U_{235} are present to warrant maintenance of a CAAS absent the requested exemption. PRESS has neither directly controverted any aspect of the LA nor presented any genuine dispute of material fact or law. To receive a license, USEC must establish that it has met the requirements of the criticality monitoring and labeling regulations or, alternatively, that it has satisfied the relevant exemption requirements. As we noted above, supra pp. 7-9, however, an admissible contention

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[48] Id. at 15.

[49] See id. at 15-16. We also note here that no nexus whatsoever was made by PRESS between the management and procedures of the ACP and those previously used by USEC with respect to its ownership and operation of the GDP.

[50] Id. at 16.

must contain a concise allegation of supporting facts or expert opinion, and a contention is inadmissible if the petitioner has offered nothing more than "bare assertions and speculation."[51] Setting forth the existence of prior violations as a purported basis for a contention, without explaining their significance to the application, is inadequate to support the contention.[52]

PRESS merely describes the exemptions requested by USEC, and makes the bare assertion that they are "not justified," without addressing the exemption criteria or providing any expert opinion or summary of facts explaining why the exemptions are not justified. For this reason alone, this contention is inadmissible. Also, PRESS' citation to past USEC violations issued by the NRC, without indicating any connection between these violations and USEC's current LA, does not provide support for the proposed contention.[53] In summary, PRESS has not supported this contention with fact or expert opinion and it does not raise a genuine dispute with regard to any part of the LA. Accordingly, PRESS Contention # 1 is not admitted.

2. PRESS Contention # 2: Radiation Work Permits

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

PRESS alleges that USEC's LA is deficient because it does not specify the criteria that the Radiation Protection Manager would use to determine where, and whether, a radiation work

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[51] Louisiana Energy Services, L.P. (National Enrichment Facility), LBP-04-14, 60 NRC 40, 55 (2004).

[52] See Fansteel, CLI-03-13, 58 NRC at 205.

[53] See Millstone, CLI-02-22, 55 NRC at 228.

permit could be dispensed with. Basis 2.1 for this contention reads, in its entirety:

> In chapter 4 of the Application, page 4-4, section 4.4.2, Radiation Work Permits, USEC says, "The RPM may exempt the requirement for an RWP in certain RAs as specified in approved procedures." To paraphrase this by expanding the acronyms, this says that the Radiation Protection Manager may exempt the requirement for a Radiation Work Permit in certain Radiation Areas as specified in approved procedures.
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> In Violations Notice EA-97-267 ("Twenty Four Security Failures," see section B.1) USEC demonstrated a relaxed approach to keeping unused security badges in an insecure place. One may expect USEC to adopt a similar approach to Radiation Work Permits.[54]

The NRC Staff, in its response, points out that Section 4.4.3 of the Standard Review Plan for the Review of a License Application for a Fuel Cycle Facility (NUREG-1520) – a document which received public comment prior to its adoption by the Commission, and which was produced to provide guidance to the Staff in its review process – "indicates that an applicant need not submit the radiation protection procedures," but that "an applicant's commitment to prepare written radiation protection procedures and Radiation Work Permits can be acceptable if certain criteria are met."[55] The Staff further notes that "[a]lthough Staff guidance is not a regulation, PRESS offers no reason why [the allegedly missing] information would be necessary."[56]

As correctly pointed out by the Staff, there is no regulatory requirement that an applicant submit its proposed radiation protection procedures at this stage of the application process. Because PRESS has not proffered any rationale or facts to indicate that it is necessary at this point, there is no support for a proposition that the LA is deficient. PRESS has not provided

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[54] PRESS Petition to Intervene at 17.

[55] NRC Staff Response at 32.

[56] Id.

facts or expert opinion raising a material issue with regard to the adequacy of USEC's LA in this regard. Finally, PRESS' bald assertion that a previous, unrelated violation causes one to "expect USEC to adopt a similar approach to Radiation Work Permits" – presenting no nexus whatsoever between the cited violation and either USEC personnel or plans for ACP management and operations – adds nothing of substance to aid us in consideration of the admissibility of this contention.[57]

In summary, PRESS Contention # 2 is inadmissible due to PRESS' failure to present a valid challenge to the LA, its failure to provide facts or expert opinion explaining the significance of its assertion relating to USEC's previous violation, and its failure to establish a connection between a past violation notice and its assertions regarding radiation work permits.

3. PRESS Contention # 3: Cylinder Labeling

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

The arguments presented in support of this contention are substantially similar to the arguments presented in support of PRESS Contention # 1 and, accordingly, we believe that it is neither necessary or appropriate for us to fully repeat our analysis of those arguments here. As explained in our discussion of PRESS Contention # 1, the Petitioner has neither challenged any specific portion of the LA nor provided any facts or expert opinion raising a material issue with regard to the adequacy of USEC's exemption requests. Accordingly, we do not admit PRESS Contention # 3.

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[57] See Millstone, CLI-02-22, 55 NRC at 228.

4. PRESS Contention # 4: 10% Assay

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

PRESS contends that the LA should not be granted because USEC has not demonstrated that it has a market for 10% assay U_{235} or that the market for 5% assay U_{235} would not be as economically viable as the market for 10% assay.[58] In addition, as its basis for this contention PRESS cites three enforcement actions in which the NRC determined that USEC exceeded its possession limit for enriched uranium.[59]

We see no support for admission of this contention, given PRESS' failure to provide any connection between its challenge to USEC's rationale for 10% assay and the matters at issue in this proceeding. Additionally, regarding the portion of this contention alleging that USEC previously exceeded its possession limits for enriched uranium, PRESS has not provided anything which indicates that the previous enforcement action is in any way related (let alone material) to any finding which the NRC must make with regard to USEC's application for a license to build, own, and operate the ACP.[60]

This contention is not within the scope of this proceeding, is not material to any finding which the NRC must make, lacks support in the form of facts or expert opinion, and does not raise a genuine dispute regarding any portion of the LA. Therefore, PRESS Contention # 4 is inadmissible.

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[58] See PRESS Petition to Intervene at 18-20.

[59] See id. at 19-20.

[60] See Millstone, CLI-02-22, 55 NRC at 228.

5. PRESS Contention # 5: Domino Effect

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

PRESS contends that USEC has not attempted to model the "domino effect" scenario, which "proceeds from the failure of one centrifuge . . . [and] [s]hrapnel from the failed centrifuge destroys adjacent centrifuges."[61] PRESS asserts that the manufacture of 12,000 centrifuge machines, something USEC proposes to do in connection with its proposed action, "has to elevate the likelihood for a catastrophic event like the 'domino effect.'"[62] PRESS also refers to three violation notices previously received by USEC relating to failure of actuator valves, cites a fourth violation notice relating to failure to declare an alert during a fire, and goes on to state (impliedly concluding from the noted violations) that "[i]f there were a catastrophic event, it's not clear that USEC could be counted on to do the right thing . . . . Is it wise to allow a company to ramp up production to twenty new machines each day if they can't be trusted to fit actuator valves properly?"[63]

In its response, USEC points out that PRESS erroneously alleged an omission, because a "centrifuge machine crash scenario" was in fact evaluated in the Integrated Safety Analysis (ISA).[64] USEC explained that the centrifuge machines are designed to prevent the domino

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[61] PRESS Petition to Intervene at 20.

[62] Id. at 21.

[63] Id. at 21-22.

[64] USEC Answer to PRESS Petition at 30.

effect, because the design "ensure[s] the debris generated from a centrifuge failure during operation remains confined in the machine."[65] In this regard, USEC also calls our attention to Section 2.1.2.2 of its ER, which states that "the casing 'provides physical containment of components in the unlikely event of a catastrophic failure of the gas centrifuge machine.'"[66]

As pointed out by the NRC Staff, PRESS fails to support its assertions in this contention with any expert opinion or fact, providing only a website address that discusses the domino effect, without providing any discussion of the reference or its relevance to its assertions.[67] Additionally, PRESS fails to discuss or analyze USEC's ISA, wherein material safety issues have been analyzed, and in which USEC did in fact address the safety concern asserted to have been not addressed.

Furthermore, the section of the NRC regulations cited by PRESS in this contention, 10 C.F.R. 70.22(h)(2)(i)(1)(ii), requires that the applicant develop an emergency plan, and has nothing to do with PRESS' allegation that USEC has failed to adequately consider the impacts or likelihood of a 'domino effect' event. It therefore provides no basis for admitting this contention. Furthermore, in this contention PRESS ignores the fact that USEC has submitted a proposed Emergency Plan in conformity with applicable NRC requirements. (See LA § 8.0 and "Emergency Plan for the American Centrifuge Plant in Piketon, Ohio" submitted with the LA).

With respect to the violation notices cited by PRESS, mere reference to previous enforcement history, without establishing a link between the prior history and the contention at issue, is insufficient to support a contention and PRESS does not explain how these notices

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[65] Id.

[66] Id.

[67] See NRC Staff Response at 35.

relate to the assertion in this contention that USEC has failed to consider the "domino effect."[68] In this respect, PRESS has again merely presented unrelated facts, bare assertions, and no analysis or expert opinion to support its conclusions. Accordingly, this contention concerning USEC's alleged failure to model a potentially catastrophic scenario is inadmissible both because it erroneously alleges an omission, and because the proposition is unsupported by expert or factual evidence. In this contention PRESS does not raise a genuine issue with regard to any matter that must be decided by the Commission. PRESS Contention # 5 is inadmissible.

6. PRESS Contention # 6: Health Risks

"Petitioners contend that ER 3.11 "Public and Occupational Health" dangerously underestimates the health risks and damage already effecting worker and public health as a result of operations on the site."

PRESS provides seven purported bases in support of this contention. Basis 6.1 reads, in its entirety:

> In Chapter 3 of the Environmental Review, page 3-82, section 3.11, "Public and Occupational Health," USEC says the following.
>
> > Air releases of radionuclides from the operations at the site result in radiation exposures to people in the vicinity well within regulatory limits.
>
> Petitioners submit all of the testimonials and information at the website of National Nuclear Workers for Justice (NNWJ) as evidence to support this contention [citing http://www.nnwj.com].[69]

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[68] Id.

[69] PRESS Petition to Intervene at 22-23. The National Nuclear Workers for Justice website appears to be a project of PRESS, and its stated mission is to "actively seek[] to expose all human health effects caused by toxic exposure to environmental poisons that were 'hidden' from the workers and the public during and after the government officials implemented their national security goals." See http://www.nnwj.com.

Here PRESS has provided only brief, unexplained references to various documents, letters, "worker testimonials," and reports that it alleges support the contention. Basis 6.1 relies on the National Nuclear Workers for Justice website, which contains a vast amount of information, some of which relates to USEC and some of which concerns issues that are not germane to this proceeding, such as references to the Environmental Protection Agency and worker compensation issues. PRESS, neither indicates which information on the website it intends to rely upon as evidence to support this contention, nor how any of this information supports its contention.

Basis 6.2 refers to a letter which PRESS states was addressed to the National Institute for Occupational Safety and Health (NIOSH) and signed by Daniel J. Minter, the President of Paper Allied-Industrial, Chemical and Energy International Union, AFL-CIO (PACE) Local 5-689, which, according to PRESS, states: "There are an estimated 100 personal interviews that Dr. Michaels [we are not told anything about this individual] conducted on our Site assessment that NIOSH would have access to that would prove to be very helpful, as well as available congressional testimony available on the website."[70] PRESS provides no further information. The letter is neither provided nor explained. Likewise, PRESS does not discuss the nature of the interview information, or how it would be helpful to support its proposed contention.

We address these first two bases together, due to their similarity. As we mentioned above, supra p. 9, petitioner may not simply refer to voluminous documents, such as those on a website, without providing analysis demonstrating that those documents provide factual support for the proffered contention.[71] Without detail, bases 6.1 and 6.2 shed no light on PRESS' argument. The National Nuclear Workers for Justice website contains a variety of information

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[70] PRESS Petition to Intervene at 23.

[71] Seabrook, CLI-89-3, 29 NRC at 240-41.

related to numerous organizations and issues. Similarly, the quote from the letter in Basis 6.2 is proffered without further explanation, and without the full text of the letter, leaving us with a quote without context, and with no additional information explaining how the quote – or the letter – relates to PRESS' contention. Bases 6.1 and 6.2 thus do not provide factual or expert support for Contention # 6.

Basis 6.3 provides "quotes . . . excerpted from one of two statements about serious accidents and other problems at the Portsmouth Gaseous Diffusion Plant."[72] It appears that the statements were made by PRESS' President Vina Colley to the NRC at a public scoping meeting on January 18, 2005. These statements, however, refer to events that occurred before USEC was the certificate holder for the Gaseous Diffusion Plant. Furthermore, the section of the ER being challenged by PRESS involves the air release of radionuclides from operations at the site, not accidental releases. Finally, PRESS fails to provide the required explanation of how any of these past events bear on the issue in its contention, or any other statement in the ER or LA. These events occurred 13 or more years ago, and PRESS has not offered facts or expert opinions to provide the missing nexus between the personal remarks of its president and its argument in Contention # 6.[73] Basis 6.3 thus fails to support PRESS' contention.

PRESS' fourth basis for Contention # 6 begins by stating: "Typical testimonials by workers who were employed at the plant pre-USEC but presented as evidence here as to how bad conditions were and how important 'outside' monitoring is" [again citing the National Nuclear Workers for Justice website].[74] Several of these testimonials, some of which criticize the Department of Energy's (DOE) activities with respect to the plant, were given by workers

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[72] PRESS Petition to Intervene at 23.

[73] See Millstone, CLI-02-22, 55 NRC at 228.

[74] PRESS Petition to Intervene at 24.

employed at the plant pre-USEC. These testimonials are from workers not associated with USEC, which make them irrelevant absent a clear nexus to the ACP. Likewise, Basis 6.4 does not indicate – and PRESS does not explain – how the statements relate in any way to the proffered contention, which deals with the treatment of releases of radionuclides in the ER.[75]

Basis 6.5, which apparently relates to fluoride incident regulations, references two reports by name and date.[76] Basis 6.6, relating to an Argonne National Laboratory (ANL) cylinder accidents report, references one document, an accident report dated February 21, 2005, without anything more.[77] PRESS does not provide these reports, nor does it provide any analysis of them. As discussed above in connection with Bases 6.1 and 6.2, referencing documents without providing the documents or even an explanation of their significance to the contention at hand is insufficient to support admissibility of a contention. Thus, Bases 6.3 through 6.6 fail for the same reasons as Bases 6.1 and 6.2; they do not provide factual or expert support for this contention.

Basis 6.7 relates to budget and funding, and discusses money allocated to "the Lexington Office." PRESS states:

> How much of that . . . was actually paid to Piketon workers? Petitioner asked this of DOE in a printed list of questions over two months ago at the last DOE public hearing and has not to date received an answer to that or several other pertinent questions. . . . DOE must account to the public for how this tax money is being spent and it should be fully made public in USEC's filing papers.[78]

These vague allegations against DOE, regarding how it spends (or has spent) allocated

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[75] Id. at 25.

[76] Id. at 26.

[77] See id.

[78] Id.

funds, have no apparent relationship to PRESS' contention on the health effects of ongoing site operations, are beyond the scope of this proceeding, and fail to raise any genuine dispute of material fact or law. PRESS has simply failed to provide any link between this proffered basis and proposed Contention 6, which deals with USEC's treatment in its ER of the release of radionuclides.

In summary, the bases proposed by PRESS to support Contention 6 are insufficient to support the admissibility of this contention because they are factually unsupported, are unrelated to the assertions in the contention, are outside the scope of this proceeding, and refer to websites and documents whose full text has not been provided and whose connection to the proffered contention has not been established. Therefore, PRESS Contention # 6 is inadmissable.

7. PRESS Contention # 7: 3.9% Feedstock

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

In support of this contention, PRESS provides (1) a calculation of its estimate for the uranium concentration of the feedstock (Basis 7.1); (2) an estimate of the number of cylinders of feedstock, product, and tails used in the process and the daily traffic needed to handle the estimate of feedstock (Basis 7.2); (3) a reference to the USEC LA which PRESS claims supports its allegation that Low Enriched Uranium (LEU) will be used as feedstock (Basis 7.3); and (4) vague concerns over the Highly Enriched Uranium (HEU) program mentioned in

USEC's ER (Basis 7.4).[79]

With respect to Basis 7.1, USEC and the NRC Staff both assert that PRESS' calculation is in error, and further, that the calculation is based on erroneous assumptions. For our part, even if PRESS' calculations were valid, we do not see how they support PRESS' contention that USEC was not forthright in its LA. With respect to Basis 7.2, PRESS does not explain the significance of its estimate of the number of cylinders to be used at the ACP, nor does PRESS allege an omission or error in USEC's LA. With respect to Bases 7.3 and 7.4, USEC represents that the LA states that LEU material may be used at the facility (ER § 1.1), and that part of this enriched uranium may be derived from LEU obtained by the Federal Government from the Russian Government.[80] PRESS does not explain the significance of these claims or how they support this contention.

PRESS does not provide any support for the propositions that (1) the application deceptively implies that the feedstock would only be natural assay, or (2) the number of containers of feedstock or tails would be anything different than that presented in the license application. As such, this contention does not allege a deficiency in the LA or a failure to comply with NRC regulations. Even if PRESS' suppositions were correct, they do not raise a genuine dispute of material fact within the scope of this proceeding. Accordingly, PRESS Contention # 7 is inadmissable.

8. PRESS Contention # 8: Scioto Survey

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

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[79] See id. at 27-30.

[80] See USEC Answer to PRESS Petition at 36-37; NRC Staff Response at 39-40.

In its basis for this contention, titled "Misuse of average," PRESS provides an excerpt from Chapter 1 of USEC's license application outlining the discharge of uranium into the Scioto River.[81] PRESS, however, fails to explain why or how the use of an average concentration level is misleading or inadequate. In addition, PRESS fails to explain what a "full survey" is or what it would contain, or to indicate how it could answer questions relevant to its challenge to the pending license application. This contention is not supported by fact or expert opinion and does not raise any genuine issue of material fact or law. Accordingly, it is inadmissable.

9. PRESS Contention # 9: LLMW Exemption

"Petitioners contend that LLMW Exemption doesn't apply to material that was generated offsite. (See OAC 3745-226.)"

In support of this contention, PRESS cites to an Ohio regulation stating that low-level radioactive mixed waste (LLMW) is eligible for a conditional exemption from Resource Conservation and Recovery Act (RCRA) storage and treatment permit requirements "if it is generated and managed . . . under a single . . . license. (Mixed waste generated at a facility with a different license number and shipped to your facility for storage or treatment requires a permit and is ineligible for this exemption . . . .)."[82] We agree with USEC that it is not apparent why PRESS believes that LLMW will be generated at another facility (i.e., "offsite") and shipped to the ACP. USEC states that it has no plans to do so, and the portion of the ER quoted by PRESS makes no such statement.[83]

PRESS has not provided factual support for the implication in this contention that LLMW generated offsite will be shipped to the ACP, or for the proposition that RCRA matters are

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[81] See PRESS Petition to Intervene at 31.

[82] Id. at 32.

[83] See USEC Answer to PRESS Petition at 38-39.

within the scope of this proceeding. In this contention PRESS has failed to raise a genuine issue with regard to any matter within the scope of this proceeding. Accordingly, PRESS Contention # 9 is inadmissible.

10. PRESS Contention # 10: Independent Environmental Reporting

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

PRESS asserts that any assessment for the Environmental Impact Statement (EIS) should be performed by a third party because USEC "cannot be relied upon to do that impartially," and because USEC "has a documented history of misleading the NRC."[84] PRESS then cites six enforcement actions taken against USEC for various events, including a failure to initiate an assessment and tracking report, and a failure to classify a fire incident as an alert. PRESS argues that "USEC should not be entrusted with the responsibility for assessing the environmental state of the site."[85]

Because the Staff bears the obligation under the National Environmental Policy Act (NEPA)[86] to prepare a full environmental impact statement (EIS) for any major federal action, including the granting or denial of a Part 70 license to USEC, the "independent assessment'" sought by Petitioners will be performed, and no genuine issue of material fact or law has been raised. In addition, as the NRC Staff correctly notes, to rely on past enforcement history as a basis for a contention, there must be a direct and obvious relationship between the character issues raised and the licensing action in dispute.[87] PRESS has failed to establish a direct and

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[84] PRESS Petition to Intervene at 33.

[85] Id.

[86] See 42 U.S.C. § 4332(2)(C).

[87] See NRC Staff Response at 43.

obvious relationship between these enforcement actions and the licensing action in dispute. PRESS has failed to dispute any portion of the LA, has not supported the contention with material facts, and has not presented a genuine dispute with regard to any issue to be decided by the NRC. Therefore, PRESS Contention # 10 is not admissible.

11. PRESS Contention # 11: Ground and Surface Water

"Petitioner contends that the Environmental Report (ER) 3-18 through 3-23 contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 CFR 51.45."

PRESS states that USEC in its ER (ER 3.4 Water Resources, 3.4.1 Groundwater, and 3.4.2 Surface Water) fails to address certain concerns relating to potential impacts on ground and surface water. PRESS then offers five bases for its contention, which reference three separate reports, a quote from a letter from the Ohio EPA Southeast District Office (without supplying the letter itself), and a section of its own petition.[88] PRESS did not provide the three reports it cites, asserting as its reason the possibility that the reports contain "'security' information," and stating that it "awaits NRC's directions" regarding the documents.[89] PRESS, however, fails to explain the significance of any of these reports, or how they relate to USEC's LA. PRESS also fails to point to any specific deficiency in the ER, and, with regard to other portions of this contention, raises issues outside the scope of this proceeding, such as DOE compliance with RCRA.

In response to PRESS' determination not to provide these reports because they contain "security information," the NRC Staff states that "[a]lthough the Staff appreciates

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[88] See PRESS Petition to Intervene at 34-36.

[89] Id. at 34.

PRESS' concerns for security, PRESS offers no reasons why it could not provide some discussion of these reports and how the reports have any significance to the ER."[90] We agree.

The bases offered by PRESS do not contain an explanation of the significance of the information cited therein. Bases 11.1, 11.2, and 11.3 cite reports without explaining how these reports support the contention. Basis 11.4 provides a quotation without any explanation. As we have repeatedly stated above, offering bare conclusions, without explaining the rationale behind those conclusions, and without even providing the documents on which they are purportedly based, provides no basis for admission of a contention.[91] This vague presentation by PRESS does not constitute an adequate statement of facts or expert opinion within the meaning of 10 C.F.R. § 2.309(f)(1)(v). Finally, DOE compliance with RCRA is outside the scope of this proceeding. Accordingly, PRESS Contention # 11 is inadmissible.

12. PRESS Contention # 12: Radiological Impacts

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

Basis 12.1 again refers to various reports without providing copies of the reports or presenting analysis of their content from which the Board could evaluate their relevance. PRESS states that it "will withhold public release of the location of these reports awaiting 'security' instructions from NRC."[92] Basis 12.2 proffers quotations from correspondence PRESS received from Sergei Pashenko (again without providing the correspondence itself), in which Pashenko (described as a Russian scientist who has been researching aerosols and their dispersion in the atmosphere since 1975) makes bare conclusory remarks with respect to which

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[90] NRC Staff Response at 44.

[91] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1988); see also Seabrook, CLI-89-3, 29 NRC at 240-41.

[92] PRESS Petition to Intervene at 36.

PRESS offers no explanation or analysis.[93]

PRESS does not discuss either the content or the significance of the reports it cites. Likewise, it does not identify any error or omission in the ER. USEC describes the quotations from the Pashenko correspondence as "so unintelligible that even PRESS makes no 'attempt to interpret the language,'" and argues that the basis thus "fails to provide the requisite level of clarity and specificity to support this contention."[94] The NRC Staff's arguments echo those of USEC.[95] We do not see that anything presented by PRESS originating from Pashenko supports PRESS' contention. PRESS' reference to the Pashenko correspondence without explanation or analysis does not provide an adequate basis to support the admissibility of a contention.[96] PRESS Contention # 12 is, therefore, inadmissable.

13. PRESS Contention # 13: D & D Plans Inadequate

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

PRESS asserts that USEC's application is deficient because "[d]isposal facilities must be identified and accompanied by statements from the facilities that they will receive them and

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[93] See id. at 36-37. Sergei Pashenko's resumé is included as Attachment C to PRESS' petition. We do not reach the issue of whether Sergei Pashenko qualifies as an expert because his conclusions are of no assistance to this Board, due to PRESS' failure to provide any accompanying explanation or analysis.

[94] USEC Answer to PRESS Petition at 44.

[95] See NRC Staff Response at 45-47.

[96] See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2) LBP-85-20, 21 NRC 1732, 1741 (1986); Private Fuel Storage, LBP-98-7, 47 NRC at 181.

the cost."[97] It offers no support for this proposition.

PRESS' challenges to the ER in this Contention are impermissible under several NRC regulations. As to the portion of this contention addressing decontamination and decommissioning plans, (1) the ER is not required to include a decommissioning plan (DP) or a decommissioning funding plan (DFP), 10 C.F.R. Part 51; (2) the DP is not required to be submitted until the license expires or the licensee has ceased principal operations, 10 C.F.R. § 70.38(d); and (3) the DFP submitted with the application is not required to include statements from disposal facilities indicating that they will accept ACP wastes, 10 C.F.R. § 70.25(e).

Although 10 C.F.R. § 70.25 requires the submission of a decommissioning funding plan, this plan must contain only a cost estimate for decommissioning and a description of the method for assuring funds for decommissioning. 10 C.F.R. § 70.25(e). As noted by the NRC Staff in its response to PRESS' Petition, "[t]he purpose of this plan is to determine whether the applicant has considered what decommissioning activities may be needed in the future, has performed a credible site-specific cost estimate for those activities and has submitted sufficient financial assurance to cover the cost of those activities in the future."[98] USEC has addressed these requirements in its LA at Chapter 10, and PRESS has not offered any specific challenge to any portion of the LA.

With regard to PRESS' assertion that "ER 4.13.2.4 . . . does not contain . . . adequate information about radioactive and hazardous materials," we note that the ER section to which PRESS is probably referring is Section 4.13.3.4 (Section 4.13.2.4, to which PRESS did refer, does not exist). But that section is not intended to address radioactive or hazardous materials. Other sections of the ER do, however, provide extensive discussions and analyses of such

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[97] PRESS Petition to Intervene at 38.

[98] NRC Staff Response at 48 (citing NUREG-1520 at 10-1).

materials (see, e.g., ER §§ 3.12 and 4.13).

PRESS has not offered a discussion or criticism of the cost information provided by USEC, has failed to challenge any portion of the application with specificity, and has failed to explain why, under the Commission's regulations, it believes the information provided is insufficient. For these reasons, PRESS has not raised any genuine issue of material fact in this contention and, accordingly, PRESS Contention # 13 is inadmissible.

14. PRESS Contention # 14: Application Inadequate

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

As its sole basis for this contention, PRESS quotes a portion of Chapter 1 of USEC's LA in which USEC requests an exemption from portions of 10 C.F.R. § 74.13(a).[99] However, as both USEC and the NRC Staff note in their responses, PRESS neither addresses the criteria for granting such an exemption nor provides any discussion of why USEC's requested exemption should not be granted.[100] PRESS failed to provide any basis for the contention and has not raised any genuine dispute with regard to any issue of material fact or law. PRESS Contention # 14 is inadmissable.

15. PRESS Contention # 15: National Security

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

In Basis 15.1, PRESS quotes former Secretary of Energy Spencer Abraham as referring to nuclear energy as "clean, affordable and reliable," and stating that "USEC, and its partners in

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[99] See PRESS Petition to Intervene at 38.

[100] See USEC Answer to PRESS Petition at 45-46; NRC Staff Response at 49-50.

the nuclear industry, continue to take important steps enhancing national energy security with private sector development of advanced American technology."[101] We fail to see how this statement supports PRESS' contention – the statement clearly indicates support for USEC and its efforts.

Basis 15.2 quotes the ER, in which USEC states that "[t]he ACP is a crucial step toward advancing the national energy security goal of maintaining a reliable and economical domestic source of enriched uranium."[102] PRESS then cites a 2005 Washington Times editorial written by Congressman David Hobson, in which Hobson states that the United States "send[s] the wrong signal to the rest of the world" when it "embark[s] on new weapons and testing initiatives."[103] PRESS further states, without reference to the Hobson article or any other source, that "[m]uch of the pressure on Iran and N. Korea stems from their pursuit of centrifuge uranium enrichment" and then argues that "the ACP would risk our national security."[104] Basis 15.3 urges the Commission to "determine that the issuance of a license for the ACP would be inimical to the common defense and security of the United States, and deny the license."[105]

PRESS' policy preference for a ban on uranium enrichment does not raise a litigable issue in this proceeding.[106] Likewise, PRESS' reliance on the Hobson editorial is misplaced. The statements quoted from the editorial, which was attached by PRESS as Appendix A to its Petition to Intervene, focus on nuclear weapons initiatives, not enrichment technology. PRESS has not

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[101] PRESS Petition to Intervene at 39.

[102] Id.

[103] Id. at 40.

[104] Id.

[105] Id.

[106] Philadelphia Electric Co. et al., (Peach Bottom Atomic Power Station, Units 2 and 3) ALAB-226, 8 AEC 13, 21 at n.33, aff'd on other grounds, CLI-74-32, 8 AEC 217 (1974).

offered any facts or expert opinion to support its contention that the proposed ACP would be inimical to the common defense and security. Thus, PRESS has not raised a genuine dispute with regard to any issue of material fact or law with this contention and, therefore, PRESS Contention # 15 is not admitted.

16. PRESS Contention # 16: Alternative Site Use

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

Basis 16.1 states that the no-action alternative should be considered relative to other potential uses of the site, rather than in connection with USEC's proposed use of the site. PRESS, however, offers no response to, or criticism of, USEC's discussion of the no-action alternative in its ER. Similarly, Basis 16.2 argues that Atomic Vapor Laser Isotopic Separation (AVLIS) is a reasonable alternative, again without any response to, or criticism of, the analysis of AVLIS contained in the ER.[107]

Contrary to PRESS' allegation, USEC did examine and comment on the impacts of the no-action alternative on the site in Section 4 of its ER and PRESS has failed to identify any error or omission in the application in that regard. In addition, as USEC notes, "the purpose and need for the ACP is to provide enriched uranium,"[108] and thus, aside from the no action alternative, USEC was only required to discuss alternatives that produce enriched uranium. Finally, USEC did consider AVLIS as an alternative, eliminated it, and adequately stated its reasons for doing so

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[107] See PRESS Petition to Intervene at 41.

[108] USEC Answer to PRESS Petition at 48.

in the ER.[109]

Although PRESS has quite clearly expressed its preference for an alternative use for this site, it has failed to offer any specific criticism of the application or any legal or factual basis to support its contention. PRESS has failed to raise any genuine dispute of material fact or law that is within the scope of this proceeding. Accordingly, PRESS Contention # 16 is inadmissible.

17. PRESS Contention # 17: ACP Project Failure

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

PRESS states that "USEC doesn't provide any assurance that its centrifuge plans won't go the way of its AVLIS plans," and describes a past event in which USEC's stock price dropped after it abandoned its pursuit of AVLIS, implying that this indicates that USEC is not financially qualified to build, own, and operate the ACP.[110] Further, PRESS asks "[w]hat effect would [decontamination and decommissioning] at Paducah have on USEC's ability to pay for ACP development and operation?"[111]

USEC, in its response, expresses confusion over PRESS' reference to "incremental payment," stating that it is not sure if it refers to "USEC's plans to incrementally build the ACP, incrementally fund tails disposition costs, or something else."[112] USEC accurately asserts that the basis for concluding that it has the financial qualifications to construct and operate the ACP is set out in the application.[113] The NRC Staff states that "PRESS' assertion lacks any basis or

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[109] See USEC ER at Section 2.2.

[110] PRESS Petition to Intervene at 42.

[111] Id.

[112] USEC Answer to PRESS Petition at 48-49.

[113] See id. at 49.

explanation."[114] The NRC Staff also describes as irrelevant PRESS' concerns about the impact of decommissioning the Paducah facility on USEC's financial capacity to build and operate the ACP because USEC was required, specifically and separately, with regard to the Paducah GDP, to set aside funds for its decommissioning.[115]

PRESS has not presented any criticism of USEC's submission (which includes a section devoted to its financial qualifications) or any fact or expert opinion which support the proposition that USEC is not financially qualified to build, own, and operate the ACP. Accordingly, there is no genuine dispute with regard to any issue of material fact or law proffered by this contention and, therefore, PRESS Contention # 17 is not admitted.

18. PRESS Contention # 18: USEC Incompetence

"Petitioner contends that as the leading violator of the NRC materials licensees, USEC is incompetent to hold a license to operate a centrifuge plant."

In support of this contention Petitioners cite various NRC enforcement actions taken against USEC between 5 and 7 years ago.[116] Based on this record, PRESS concludes that "USEC has a documented culture of reluctance to comply with . . . regulations regarding nuclear criticality safety."[117] PRESS further asserts that because USEC has a documented record of utilizing untrained workers, discriminating against employees for engaging in protected activities, and repeatedly committing safety violations, it should not be trusted with the operation of a facility as complex and potentially dangerous as the ACP.[118]

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[114] NRC Staff Response at 54.

[115] See id.

[116] See PRESS Petition to Intervene at 42-44.

[117] Id. at 44.

[118] See id. at 44-47.

As noted above, and as specifically noted by the NRC Staff in response to this contention, "In order for management integrity issues to be admissible, a contention must assert (and demonstrate) that the management personnel alleged to have acted improperly in the past are also going to be involved with the activity that is the subject of the current proceeding."[119] PRESS has not alleged that any of the enforcement actions involved managers or individuals who would be working at the ACP. Further, PRESS has provided no reason for us to reach that conclusion, because the violations cited by PRESS occurred over 5 years ago and at different facilities operating under different regulations. As such, PRESS has failed to provide a nexus between the violations and the ACP.

As explained above, for this Board to consider "management 'character' [as] an appropriate basis for adjudication in a licensing proceeding, 'there must be some direct and obvious relationship between the character issues and the licensing action in dispute.'"[120] Allegations of management improprieties must be of more than historical interest.[121] The Commission has expressly stated that "[w]e cannot allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind."[122] Integrity issues must be directly germane to the challenged licensing action to serve as the basis for an admissible contention.

It is proper, in determining whether to grant USEC the license it seeks, to evaluate whether the company, as presently organized and staffed, can provide reasonable assurance of

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[119] NRC Staff Response at 55 (citing Georgia Tech, CLI-95-12, 42 NRC at 120; Vogtle, CLI-93-16, 38 NRC at 36).

[120] Millstone, CLI-02-24, 54 NRC at 365 (quoting Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999)).

[121] Georgia Tech, CLI-95-12, 42 NRC at 120.

[122] Millstone, CLI-02-24, 54 NRC at 366.

candor, willingness, and ability to follow NRC regulations. If USEC's current management is unfit, it would be a cause to deny the license.[123] Here, however, PRESS has not presented any information indicating that any person or procedure associated with past violations will be employed at, or involved with, the ACP. Therefore PRESS has not raised a genuine dispute with regard to a material issue of fact or law.[124] Accordingly, PRESS Contention # 18 is inadmissible.

19. PRESS Contention # 19: Enrichment Freeze

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

PRESS cites to a Carnegie Report (again, without providing the document) for the proposition that there may be an international freeze on the enrichment of uranium and that, if such an event were to occur, USEC would not be economically viable.[125] PRESS' assertions, even if accurate, would be insufficient to support its contention.[126]

PRESS does not provide any facts or expert opinion to support this contention, only speculation about USEC's future financial capabilities. Accordingly, PRESS has not raised a genuine issue of material fact or law with regard to this contention. To the extent that this contention can be construed as aimed at USEC's financial qualifications, it provides no nexus to that concern or any specific criticism of the financial qualifications of USEC that are set out in the LA. Moreover, this contention raises issues of international policy that are unrelated to the

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[123] Georgia Tech, CLI-95-12, 42 NRC at 120-21.

[124] See Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1) CLI-85-9, 21 NRC 1118, 1128 (1985) (personnel changes diminished significance of violations alleged to have occurred 6 years before).

[125] See PRESS Petition to Intervene at 47-48.

[126] We note that USEC has represented that the Carnegie Endowment for International Peace has now issued its final report, in which it abandoned its original recommendation. See USEC Answer to PRESS Petition at 51. Regrettably, USEC failed to supply a copy of the final Carnegie report.

licensing criteria of the NRC and so are beyond the scope of this proceeding. For these reasons, PRESS Contention # 19 is inadmissible.

20. PRESS Contention # 20: Need for Proposed Action

"Petitioners contend that there is no need for the proposed action. The future of power generated by enriched uranium is very uncertain. There is a growing understanding among decision makers that nuclear power is not only unsafe and generating huge amounts of dangerous wastes but is also expensive and unnecessary."

PRESS presents eight bases to support Contention # 20.[127] Basis 20.1 references a report by the Energy Information Administration[128] which, PRESS asserts, indicates that nuclear power will become more expensive over the next twenty years. Basis 20.2 quotes (without providing the article) a 2004 Wall Street Journal article stating that "the move to adopt renewable energy resources is gaining momentum."[129] Basis 20.3 references a 2005 article (also not provided) from Business Week which, PRESS says, contains information about certain companies making a move toward renewable sources of energy, such as solar panels. Basis 20.4 cites "leading authorities" (without naming these authorities, providing their statements, or providing the documents in which the statements may be found) as "calling for a 'production pause' in nuclear enrichment facilities," and PRESS states that "NRC must consider that by the

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[127] See PRESS Petition to Intervene at 48-51. PRESS lists a basis 20.8 that simply states "see also section D.1.2." See note 39, above, in which we explain that a mere reference to a regulation, without explaining its significance or establishing any connection to the proffered contention, does not serve as a basis for the admissibility of any contention. Accordingly, in ruling on the admissibility of this contention we only discuss PRESS' Bases 20.1 through 20.7.

[128] This report was not provided with PRESS' Petition to Intervene.

[129] PRESS Petition to Intervene at 49.

time ACP is ready for operation such a pause might be in effect."[130] Basis 20.5 references a draft Carnegie Report and a United Nations report (without providing either), both dealing with concerns about nuclear security. PRESS cites these reports without additional explanation. Basis 20.6 references a national Sierra Club advertisement campaign stating that "[w]e can free ourselves from dangerous nuclear power and the polluting industries of the past by investing now in 21st Century solutions."[131] Basis 20.7 states: "If the Megatons to megawatts program were accelerated and expanded to accommodate the megatons, perhaps that would obviate the necessity for a centrifuge plant. This should be considered as an alternative to licensing the ACP."[132]

Although PRESS labels this contention "Need for Proposed Action," it does not offer any analysis of USEC's discussion of need. This contention is based wholly on speculation, it makes references to statements and documents without providing them, fails to present facts or expert opinion to support the contention, fails to challenge any specific portion of the application, makes vague and general assertions without nexus to the pending application, raises policy questions outside the scope of this proceeding, and raises no genuine issue of fact or law. Therefore, PRESS Contention # 20 is inadmissable.

21. PRESS Contention # 21: Unnecessary Censorship

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

USEC states that most of the documents that PRESS contends have been improperly

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[130] Id.

[131] Id. at 51.

[132] Id.

"censored" are now publicly available on ADAMS.[133] With regard to the remaining documents, USEC alleges that they were properly withheld pursuant to 10 C.F.R. § 2.390.[134] Whether or not the censored material is or was available, PRESS has not suggested any issue with regard to the LA or the ER which might have been implicated by this "censorship" and thus fails to raise a genuine dispute with regard to any issue of material fact or law in this contention. Accordingly, PRESS Contention # 21 is not admitted.

22. PRESS Contention # 22: Gender Discrimination

This contention regarding gender discrimination was withdrawn by PRESS.[135]

D. Rulings on Geoffrey Sea's Contentions

We begin by noting that on August 17, 2005, petitioner Geoffrey Sea electronically submitted what he captioned "Motion for Leave to Supplement Replies to USEC and the NRC Staff by Geoffrey Sea." This document was accompanied by Amended Contentions, which purported to amend the bases for Mr. Sea's existing contentions because of newly acquired information.[136] The petition referred to various exhibits, only some of which were submitted electronically. Mr. Sea represented that the exhibits not submitted electronically would be submitted with the mailed version of the petition.[137] According to the Certificate of Service

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[133] See USEC Answer to PRESS Petition at 54. ADAMS is an acronym for the NRC's Agencywide Documents Access and Management System.

[134] See id.

[135] See PRESS Reply at 4, 7.

[136] Amended Contentions of Geoffrey Sea (Aug. 17, 2005) at 1 [hereinafter Sea Amended Contentions].

[137] These documents included Exhibit BB (Photograph of the part of the entrance to the Southwest Access Road . . . .); Exhibit CC (Excerpts from the lease agreement between DOE and USEC); Exhibit DD (USEC promotional brochure for the ACP); copies of curriculum vitae for John Hancock, Frank Cowan and Cathryn Long, which are referred to in Exhibit AA; and a DOE OIG Audit report which is referred to as Exhibit A to Petitioner's Exhibit FF (Declaration of Geoffrey Sea).

submitted by Petitioner, these documents were sent via the United States Postal Service on August 17, 2005, to Administrative Judges McDade, Abramson, and Wardwell (as well as several others); however, they were not received by the Board until August 31, 2005. Despite the delay, the Board considered all information submitted by Mr. Sea in reaching the following conclusions.[138]

1. Assessment of Cultural Resources

Sea Contention # 1.1:

"USEC has failed to identify cultural resources potentially impacted by the American Centrifuge Plant."

In this contention, Mr. Sea claims that USEC failed to identify historic and cultural resources that might be impacted by the project. In particular, the Petitioner identifies two prehistoric sites that are listed on the National Register of Historic Places: Piketon Works and the Scioto Township Works. Mr. Sea alleges an error of omission in that these sites were not identified by USEC in its ER.[139]

NRC regulations require that an ER provide a "description of the environment affected" by a proposed project.[140] 10 C.F.R. § 51.45(b).[141] The obvious purpose of this regulation is to

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[138] The possibility of filing an Amended Petition was raised by Mr. Sea during our prehearing conference on July 19, 2005. See Prehearing Conference Tr. at 65. At the conference the Board expressly advised Mr. Sea to submit any additional materials "as quickly as you reasonably can." Id. at 66. However, we went on to state that the idea is not to have things submitted "in dribbles and drabs." Id. In light of this Board's instruction to Mr. Sea, we find that he did submit his additional materials in a timely fashion and, accordingly, they were fully considered by the Board.

[139] Petition to Intervene by Geoffrey Sea (Feb. 28, 2005) at 14 [hereinafter Sea Petition to Intervene]. Mr. Sea also identifies the Barnes, Sargents, and Rittenours homes as threatened cultural resources that he contends are eligible for inclusion on the National Register. Id. at 22.

[140] We construe the phrase ''description of the environment affected" in 10 C.F.R .§ 51.45(b) to mean an inventory of resources in the general area surrounding a project that can

identify resources for the NRC Staff, including cultural and historic resources, that could be reasonably expected to be adversely affected so the NRC can meet its obligations under NEPA, 42 U.S.C. § 4331(b)(2)(4), the National Historical Preservation Act (NHPA), 16 U.S.C. § 470f, and other relevant environmental statutes. This description (and subsequent discussion of impacts of the proposed action) is required so the Agency can assess the significance of the impact on the environment as part of its Draft Environmental Impact Statement (DEIS) and ultimately as part of the Final Environmental Impact Statement (FEIS). Thus, in our view, this description should include an inventory of historic, cultural, and natural aspects of national heritage in the area which could reasonably be expected to be affected by the Agency's action.

The NRC Staff does not oppose the admission of this contention "to the extent that it is based on the claim that the Applicant's ER does not adequately take into account the cultural and historical impacts within the appropriate area of potential impacts."[142] The Staff further stated that the contention presents a genuine dispute to the extent it asserts "that the ER considered an incorrect 'area of potential effects' [because it] improperly omitt[ed] two sites listed on the National Register."[143] The Staff does assert, however, that Sea's request to consider issues involving past DOE compliance with the NHPA exceeds the scope of this proceeding, and should be excluded.[144]

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reasonably be expected to be affected by the project. Once the environment is described/inventoried, the applicant must then discuss, among other things, the potential impact on these sites.

[141] See also NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (Aug. 2003), which advises an Applicant of the information that the NRC believes should be included in the ER, including a discussion of the impact of the proposed action on historic and cultural resources in the surrounding area.

[142] NRC Staff Response at 11.

[143] Id. at 12.

[144] Id. at 12-13.

As his basis for this contention, Petitioner cites USEC's statement in its ER that "[t]here are no . . . cultural, historical or visual resources that will be adversely affected by the refurbishment, construction or operation of the ACP at the DOE reservation in Piketon, Ohio," and asserts that USEC failed to consider the two National Register sites that are "in immediate proximity to the proposed ACP."[145] The portion of USEC's ER cited by Mr. Sea, however, does not expressly state that the Applicant did not consider those off-site properties but only that no such resources would be adversely affected. Therefore, without more, we cannot construe the quoted sentence from the ER to demonstrate a failure by the Applicant to "consider" those resources in its ER.

We do not believe that the mere presence of historic or cultural resources in close proximity to the proposed activity, standing alone, requires a description in the ER. Rather, the governing regulation, 10 C.F.R. § 51.45(b), requires that the ER identify the "environment affected," and we find no basis for construing the regulation to require identification of every portion of the environment which might, even in the remotest of possibilities, be affected. There must be some demonstration of potential effect upon those resources before the failure to list the resources would constitute a deficiency in the ER. We believe that the appropriate interpretation of Section 51.45(b) is that the ER must identify only sites that can reasonably be expected to be "affected" by the proposed federal action, thereby alerting the Agency to the need to examine the potential impacts upon those sites.

With his proposed Amended Contentions submitted electronically on August 17, 2005, Mr.

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[145] Sea Petition to Intervene at 14. In support of the contention Petitioner also submitted, inter alia, letters from Professors Kennedy and Hancock, and a letter from Karen Kaniatobe, the Tribal Historic Preservation Officer for the Shawnee Tribe, attesting to the historic and cultural significance of ancient earthworks located near the proposed ACP site. Petitioner also submitted a letter from Mr. Charles Beegle regarding the historic significance of the Scioto Trail Farm which is also located near the proposed ACP site. Id.

Sea provided additional evidence to establish that there may be cultural and historic resources in close proximity to the proposed ACP. What he did not do, however, is provide facts or expert opinion supporting the proposition that the construction or operation of the ACP could reasonably be expected to adversely impact those cultural and historic resources. Instead, Mr. Sea offers the opinion of an archaeologist that "Whether pumping of water from beneath the structure damages the structure is a question that should be evaluated by hydrology experts" and then offers his personal opinion that the "[p]otential impacts are obvious . . . ."[146] The impacts of such an activity are not obvious to this Board.

Petitioner has not supported this contention by offering facts or expert opinion which indicate that the construction or operation of the proposed ACP can reasonably be expected to affect the historic and cultural resources he has identified. Instead, Mr. Sea presents speculation which, as we have repeatedly discussed above, does not serve as the basis for the admission of a contention.[147]

Furthermore, Petitioner has not pointed to any specific NRC requirement that USEC failed to meet in its LA or ER, and the Board cannot assume that there are facts somewhere that might support the proposition that these resources can reasonably be expected to be affected by the ACP.[148] Accordingly, because this contention is not adequately supported by facts or expert opinion, and does not raise a genuine dispute of material fact or law, Sea Contention # 1.1 is not admitted.

Moreover, the underlying regulation which prescribes content of the ER, 10 C.F.R. § 51.45(b), has a primary purpose of alerting the NRC to the need to examine these identified sites

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[146] See Sea Amended Contentions at 4.

[147] See Louisiana Energy Services, LBP-04-14, 60 NRC at 55.

[148] See Georgia Tech, LBP-95-6, 41 NRC at 305.

for environmental impact. In this instance, what is alleged here are certain specific omissions from the ER (the National Register sites identified by petitioner), and the Staff has already expressly stated to the Board that, because the issue has been raised by Mr. Sea, it is considering effects upon these resources.[149] This Board, as well, has been made aware of them. Thus, there are no remaining effects on the licensing review from the asserted omission and it does not therefore constitute an admissible contention. Under these circumstances, admitting this contention would undoubtedly lead to a curing amendment indicating that these resources had been considered (whether or not they were "affected"), which thereupon would be appropriate for summary disposition. The net result of such a process would add no additional information, but would simply create unnecessary additional work for the parties and unnecessary delay – both of which the Commission has continuously encouraged licensing boards to avoid.[150]

Here, the petitioner did not support his contention that historic or cultural resources would be affected by the proposed ACP. Further, even if the mere failure to identify these resources, without demonstrating any potential impact on them can serve as the basis for a contention, in this case any effects of such an omission have already been cured. The Staff is aware of these cultural and historic resources and is in the process of consideration and consultation specified by the NHPA. Accordingly, Sea Contention # 1.1 would be rejected for any or all of these reasons.

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[149] During the July 19, 2005 prehearing conference, the Staff articulated its understanding that it had an obligation to consider cultural and historic resources that were located off the DOE reservation and indicated that it was in the process of meeting that obligation. The Staff stated that it had already submitted a request for additional information to the Applicant to address the area of potential effects to include these off-reservation sites, and that the Staff intends to pursue an examination of those sites whether or not this contention is admitted. Tr. at 106-08.

[150] See 63 Fed. Reg. 41,872, 41,873 (Aug. 5, 1998) ("The Commission's regulations . . . provide licensing boards all powers necessary to regulate the course of proceedings, including the authority to set schedules, resolve discovery disputes, and take other action appropriate to avoid delay.").

Sea Contention # 1.2:

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

As his basis for this contention Mr. Sea presents a list of potential adverse impacts on historic and prehistoric sites from construction and operation of the ACP, but again does not offer any expert testimony or factual support (as required by 10 C.F.R. §§ 2.309(f)(v) and (vi)) indicating any adverse effect whatsoever.[151] Both USEC and the NRC Staff emphasize Mr. Sea's failure to provide facts or expert opinion to support this contention.[152]

In his Amended Contentions submitted electronically on August 17, 2005, Mr. Sea represents that in the early spring of 2005, the Southwest Access Road "was . . . reopened, and its entrance was festooned with new security barriers, adorned with fluorescent orange decals, new gateposts painted fluorescent yellow, and new road markers in fluorescent orange."[153] He further references a photograph that depicts the road as of August 14, 2005. First, we find that the photograph[154] is not as dramatic as Mr. Sea's description of the scene. Further, when Mr. Sea raised this issue during the Prehearing Conference on July 19, 2005,[155] he was repeatedly asked how the modifications to the road were related to the NRC's licensing of the proposed ACP. He did not offer a viable explanation to these queries during the Prehearing Conference, and did not answer these questions in his Amended Contentions. Further, at the Prehearing Conference, counsel for USEC explained that the changes to the recent Southwest Access Road

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[151] See Sea Petition to Intervene at 22-23.

[152] USEC Answer to Sea Petition at 23-26; NRC Staff Response at 13-15.

[153] Sea Amended Contentions at 5.

[154] This photograph was submitted as Exhibit BB to Mr. Sea's Amended Contentions.

[155] Tr. at 72-73.

were unrelated to the proposed ACP, and that, under USEC's proposal, the road would be closed.[156] Mr. Sea offered nothing to rebut USEC Counsel and offered nothing to indicate that the changes to the road are related to the proposed ACP. No portion of this contention is adequately supported by facts or expert opinion, and it does not raise a genuine dispute of material fact or law.

This contention is also inadmissible because it no longer presents a dispute which can affect the outcome of this proceeding.[157] Sea Contention # 1.2 is not admitted.

2. Compliance With Federal Historic Preservation Laws

Sea Contention # 2.1:

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

As USEC and the Staff accurately point out in their responses, the issue presented in this contention is beyond the scope of this proceeding, is premature, is not supported by material facts or expert opinion, and does not raise a genuine dispute with regard to the license application.[158]

The NHPA is a procedural statute designed to ensure consideration by federal agencies of the potential impact of their undertakings, including licensing decisions, upon historic properties. The NHPA requires agencies to inform interested persons and entities of the possible governmental action, and to consult with them to identify historic properties, assess the potential effects of the proposed action on these properties, and seek ways to avoid, minimize,

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[156] Id. at 89-90.

[157] The Staff has advised that it will examine these particular resources, and, additionally, this Board has been made aware of them and may examine them in the context of the mandatory hearing on this application.

[158] USEC Answer to Sea Petition at 26-29; Staff Response at 15-18.

or mitigate any adverse impact on the properties. Activities potentially covered by the NHPA include undertakings carried out by, or on behalf of, a federal agency and those activities, such as are presented here, requiring a federal license. 36 C.F.R. § 800.16(y).[159]

USEC has no obligations directly imposed upon it by NHPA. That statute is directed to federal agencies such as the NRC, not to license applicants. Thus, the requirement to identify cultural and historic resources are imposed upon license applicants, such as USEC, by 10 C.F.R. § 51.45(b), not by the NHPA. Section 51.45(b) requires that an applicant for a license to be issued by the NRC must describe the environment affected by its proposed action and must discuss the impact of the proposed action on that environment. Historic and cultural resources must be considered in this description of the environment affected.[160] Accordingly, a contention which focuses on deficiencies with regard to cultural and historic resources should include a discussion of Section 51.45(b), as well as any perceived lack of compliance by the applicant with those obligations. In this contention, Mr. Sea neither discusses, nor even mentions, this provision.

The NRC is required to complete the NHPA process of consideration and consultation prior to the issuance of any license. 16 U.S.C. § 470f, 36 C.F.R. § 800.1(c). Once the NRC completes the DEIS, potential intervenors will have a basis to evaluate whether historic and

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[159] The NHPA requires that before a federal agency such as the NRC issues any license, it shall "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. In addition, the NHPA requires that "[t]he head of any such Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment . . . ." Id. The regulations promulgated pursuant to the NHPA require even more. See 36 C.F.R. Part 800. See also Atglen-Susquehanna Trail v. Surface Transp. Bd., 252 F.3d 246, 252-54 (3d Cir. 2001) for a clear, concise summary of the steps that a federal agency must take in order to comply with the NHPA.

[160] See 42 U.S.C. § 4331(b)(4). As noted above, in NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (Aug. 2003), the NRC gives further guidance to license applicants regarding what they must include in the ER with regard to historic and cultural resources.

cultural resources have been adequately considered.

Upon review of the DEIS for the ACP, if an interested person concludes that the NRC has failed to meet its obligations, he may have a basis to submit a late-filed contention. At this time, however, this contention is not supported by any material fact or expert opinion and does not raise a genuine dispute with regard to USEC's LA. Accordingly, Sea Contention # 2.1 is not admitted.

Sea Contention # 2.2:

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

This contention is outside the scope of this proceeding, is not supported by fact or expert opinion, and does not identify any genuine dispute on any material issue of fact or law within the scope of this proceeding. In this contention Mr. Sea presents no material facts, instead making only bare allegations and presenting unsupported hypotheses. Petitioner opines that DOE's compliance status with NHPA "will likely be determined by the Advisory Council on Historic Preservation [ACHP]" but that the "NRC should anticipate that outcome and either deny a license or send the applicant back into the process of negotiating its lease agreement with DOE . . . ."[161]

If the ACHP renders an opinion in this matter, the NRC will be required to react. At that time, if that activity occurs, as part of the mandatory hearing in this proceeding, the Board will consider whether the Agency's reaction complies with the law. However, there is nothing in Mr. Sea's discussion of this issue in his petition, or in any of his subsequent filings, that supports the admission of this contention.

In his Amended Contentions, Mr. Sea represents that the federally-owned GCEP Water

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[161] See Sea Petition to Intervene at 27.

Field site may contain significant earthworks, and that the site has been leased from DOE by USEC.[162] Mr. Sea also represents that the lease agreement, which he identifies as Exhibit CC, incorporates a "Regulatory Oversight Agreement (ROA) between DOE and USEC," which passes responsibility for NHPA compliance from DOE to USEC.[163] Mr. Sea then alleges that the DOE/USEC team have not met their NHPA obligations and, accordingly, that the NRC should deny USEC's license application.[164] DOE's activities, however, are entirely outside the purview of this Board, and Mr. Sea provides no legal analysis for the proposition that USEC somehow has assumed, or as a matter of law could assume, DOE's NHPA obligations, or that the activities of DOE are within our jurisdiction.

As noted above, before the NRC can grant the license requested by USEC, it must comply with the NHPA, and in the context of the mandatory hearing this Board is empowered to review the NRC's compliance with all of its obligations, including NHPA compliance. But this Board is not empowered to review DOE activity. Accordingly, even if the allegations made against DOE were true, it would be outside the scope of this proceeding. Sea Contention # 2.2 is thus not admissible.

***3. Consideration of Action Alternatives*.**

Sea Contention # 3.1:

"USEC has failed to consider a broad range of alternatives to the proposed action."

Petitioner notes that USEC only considers alternatives for USEC, and a "no action"

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[162] See Sea Amended Contentions at 6-7.

[163] Id. at 8.

[164] See id. at 11.

alternative.[165] He argues that the ER is deficient because it does not consider a full range of alternatives for the Piketon site, such as the building of a "national monument – a pyramid – as a memorial to the passenger pigeon, which went extinct on this land" or moving a "part of Oak Ridge National Laboratory . . . to Piketon."[166]

In response, USEC argues that this contention should be rejected because the Petitioner fails to identify any additional alternatives – beyond those already discussed in the ER – which are required to be addressed by NEPA.[167] The Staff echoes this argument, and asserts that this contention fails to raise a genuine dispute with regard to a material issue of law or fact.[168]

In its ER, an applicant is required to provide a discussion of alternatives to the proposed action that is sufficiently complete to aid the Commission in developing and exploring appropriate alternatives to the recommended course of action. 10 C.F.R. § 51.45(b)(3). However, in addition to a no action alternative, only alternatives reasonably related to the goals of the proposed action, and the no action alternative, need be considered.[169] The applicant is only required to consider feasible, non-speculative alternatives,[170] and the range of alternatives need not extend beyond those reasonably related to the purposes or goals of the proposed project.[171] The ER need not evaluate the effects of alternatives that are only remote or

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[165] See Sea Petition to Intervene at 28.

[166] Id. at 30.

[167] USEC Answer to Sea Petition at 31.

[168] NRC Staff Response at 20.

[169] See Sacramento Mun. Util. Dist., CLI-93-3, 37 NRC at 144-45.

[170] See City of Carmel-by-the-Sea v. Dept. of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-9-02, 33 NRC 61, 65 (1991).

[171] See Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195 (D.C. Cir. 1991); Process Gas Consumers Group v. Dept. of Agriculture, 694 F.2d 728, 769 (D.C. Cir. 1981).

speculative possibilities.[172]

Petitioner Sea contends that there is a need to examine alternatives that are not in any way related to the purpose of the proposed project. Petitioner does not present any material facts or expert opinion in support of this contention. He offers no evidence that any of his speculative uses for the Piketon site might occur or that they are predictable consequences of a "no action" alternative.[173] He does not demonstrate that there is a genuine dispute on any issue within the scope of this proceeding. Accordingly, Sea Contention # 3.1 is not admitted.

Sea Contention # 3.2:

"USEC stated action alternatives should be seriously evaluated."[174]

In this contention, Mr. Sea argues that USEC should be required to move the ACP to Paducah, Kentucky, because the cultural impacts there would be less severe than the impact in Piketon, Ohio.[175] USEC argues that this contention fails to identify a genuine issue of material fact or law because it provides no meaningful support for Sea's proposition that the ACP would have more impact at Piketon than at Paducah.[176] USEC additionally points out that the ER does consider Paducah as an alternative site, and Mr. Sea acknowledges this in his petition.[177] The

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[172] See NRDC v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

[173] In his amended contention, Mr. Sea notes that Colorado's senators have proposed to transfer Rocky Flats, which was formerly used as a manufacturing site for nuclear weapons, from DOE to the Department of the Interior. Mr. Sea then argues that if it can happen at Rocky Flats, it can happen at Piketon. See Sea Amended Contentions at 12. This wholly speculative possibility does not support the admission of this contention, and does not alter our analysis.

[174] This Contention did not appear in the electronically filed version of Mr. Sea's Petition to Intervene, and thus is not properly before this Board. See infra pp. 2-4. Nevertheless, for the reasons discussed above, we considered the admissibility of this contention.

[175] See Sea Petition to Intervene at 31.

[176] See USEC Answer to Sea Petition at 33-34.

[177] Id. at 34.

NRC Staff opposes admission of this contention because, it asserts, the contention is not supported by an adequate factual or legal basis.[178]

We agree that this contention fails to identify any defect or deficiency in USEC's LA or the ER, is not supported by any relevant factual basis or expert opinion, and does not raise a genuine dispute on a material issue of fact or law. Sea Contention # 3.2 is not admissible.

4. Impacts on Surrounding Area

Sea Contention # 4.1:

"USEC neglects many potential impacts of ACP on the local community."

We interpret this contention to be an allegation that the ER submitted by USEC is deficient in that its discussion of the socio-economic impact of the ACP on the local community is inadequate.[179] To the extent that this contention goes beyond that interpretation, it is beyond the scope of this proceeding. As for the possibility that this contention relates to such a deficiency, it does not point out any specific deficiency in the extensive discussion of the socio-economic impact of the ACP that is set out at Section 4.10 of the ER, and is wholly unsupported by fact or expert opinion. Accordingly, Sea Contention # 4.1 is not admitted.

5. Impacts on site cleanup and community reuse

Sea Contention # 5.1:

"USEC fails to consider that ACP has resulted and will result in the relaxation of DOE cleanup standards at the site and reduce possibilities for community reuse of facilities."

Petitioner suggests that "[t]here is a sense in Piketon that DOE supports the USEC vision not just because it was congressionally mandated, but because new nuclear development will

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[178] NRC Staff Response at 21.

[179] See Sea Petition to Intervene at 32.

relieve DOE of its cleanup obligation . . . ."[180] Petitioner presents no facts or expert opinion in support of this contention, only bare allegations and speculation. In addition, as we stated above, this Board has no jurisdiction over DOE activities, which are not within the scope of this proceeding. Accordingly, Sea Contention # 5.1 is not admitted.

6. Nuclear Proliferation Considerations

Sea Contention # 6.1:

"USEC has not accounted for the proliferation risks associated with centrifuge technology."

In support of this contention Mr. Sea notes that "[i]t certainly is an odd time to be pursuing an 'American Centrifuge' project" because "when '[t]he American Centrifuge' is announced . . . to the world, there will be a backlash . . . . Countries on the edge of reconsidering their compliance with the fraying Nonproliferation Treaty will teeter over the edge."[181]

USEC and the NRC Staff both oppose the admission of this contention, on the grounds that non-proliferation issues exceed the scope of this proceeding.[182] The NRC Staff further notes that an attempt to impose broader requirements on an Applicant than are required under the Commission's regulations is considered an indirect challenge to those regulations.[183]

This contention raises an issue that is beyond the scope of this proceeding and, accordingly, Sea Contention # 6.1 is not admitted.

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[180] Id. at 33.

[181] Id. at 34.

[182] See USEC Answer to Sea Petition at 37; NRC Staff Response at 26.

[183] NRC Staff Response at 26.

7. Structure and Viability of USEC and of the USEC-DOE Relationship

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."

Mr. Sea asserts that "USEC is an odd thing. It was created, not for the purpose of enriching uranium, but for the purpose of closing the old diffusion plants down, without liability attaching to any politician."[184]

USEC asserts that the bases provided by Mr. Sea for this contention are irrelevant, and further, that the Petitioner neither provides supporting facts or expert opinion, nor identifies a material issue of law or fact.[185] The NRC Staff notes that the conduct of DOE and its relationship to USEC's operations are beyond the scope of this proceeding.[186]

We fail to see the relevance of the matters presented in this contention to the instant proceeding. The bases present neither material fact nor expert opinion and do not support the admissibility of the contention.[187] In addition, the DOE/USEC relationship is beyond the scope of this proceeding. Sea Contention # 7.1 is not admitted.

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[184] Sea Petition to Intervene at 36.

[185] USEC Answer to Sea Petition at 38-39.

[186] NRC Staff Response at 27.

[187] In his Amended Contentions, Mr. Sea cites various sources to suggest that USEC's financial future is less than certain. See Sea Amended Contentions at 14. This information, however, does not support Sea Contention # 7.1, and does not provide any basis for the Board to alter its analysis of the admissibility of this contention.

ADDITIONAL MATTERS

Mr. Sea requested that Exhibits T and U to his original Petition be kept under seal because they contain the names and personal information of individuals not involved in this proceeding.[188] Although the Board sees no reason why these documents should be kept confidential, we likewise see no harm to the other litigants in this proceeding, or to the public interest, that would be caused by granting Mr. Sea's request. Although we note that, absent a strong showing of good cause, it is the normal practice for documents filed as attachments to pleadings to be placed in the public record, in this instance we grant Mr. Sea's request to the following extent. We direct that Exhibits T and U be kept under seal. However, if he so desires, Mr. Sea may delete the names and personal information of individuals from copies of these exhibits, and enter them into the record as substitutes for Exhibits T-1 and U-1 to his original Petition to Intervene that would be placed in the public record.

CONCLUSION

For the reasons set forth above, we find that neither PRESS nor Geoffrey Sea has submitted an admissible contention under 10 C.F.R. § 2.309(f). Accordingly, their petitions to intervene are denied. In accordance with the provisions of 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be filed within ten (10) days after it is served.

It is so ORDERED.

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[188] See Request for Privacy Protection by Geoffrey Sea (Mar. 30, 2005).

THE ATOMIC SAFETY
AND LICENSING BOARD[189]

/RA/

Lawrence G. McDade, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA by L.G. McDade for/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland

October 7, 2005

[189] Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) applicant USEC, Inc.; (2) intervenors Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) and Geoffrey Sea; and (4) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON THE ADMISSIBILITY OF CONTENTIONS) (LBP-05-28) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2005