

October 27, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S BRIEF IN OPPOSITION TO PORTSMOUTH/PIKETON RESIDENTS FOR
ENVIRONMENTAL SAFETY AND SECURITY (PRESS) APPEAL OF LBP-05-28

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in opposition to the Appeal and Motion for Leave to Augment Appeal filed by the Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS).¹ This Appeal concerns the Atomic Safety and Licensing Board's (Board) denial of the petition for leave to intervene filed by PRESS in this proceeding on the basis that although PRESS demonstrated standing, it failed to proffer at least one admissible contention. *USEC, Inc.* (American Centrifuge Plant), LPB-05-28, slip op., 61 NRC __ (Oct. 7, 2005). As discussed below, the Board correctly denied PRESS's request for intervention in the instant proceeding and the Order denying its request should be affirmed.

BACKGROUND

On August 23, 2004, USEC, Inc. filed an application for a license to construct and operate a uranium enrichment plant, to be known as the American Centrifuge Plant, in Piketon, Ohio. On October 7, 2004, the NRC published a "Notice of Receipt of Application for License;

¹In this brief the Staff addresses only the appeal filed by PRESS. The Staff addresses PRESS's Motion for Leave to Augment Appeal separately.

Notice of Availability of Applicant's Environmental Report; Notice of Consideration of Issuance of License, and Notice of Hearing and Commission Order" related to the foregoing application. See *USEC, Inc.* (ACP), CLI-04-30, 60 NRC 426. On February 28, 2005, PRESS filed a petition to intervene in the instant hearing.² On May 12, 2005, the Commission determined that PRESS had standing and referred its petition to the Board for a determination of whether it had presented one or more admissible contentions. See *USEC, Inc.* (ACP) CLI-05-11, 61 NRC 309, 310 (2005). The October 7, 2005, decision which is the subject of this appeal rejected PRESS's request to intervene in the instant hearing in light of its failure to proffer admissible contentions. LBP-05-28, *supra*. On October 18, 2005, PRESS filed the instant appeal challenging the denial of contentions 21, 20, 19, and 18.³ The NRC Staff will address each of these issues in turn.⁴

DISCUSSION

I. Legal Standards for the Admission of Contentions

In addition to satisfying the standing requirements, a petitioner must also provide at least one admissible contention in order to be admitted to an NRC proceeding. 10 C.F.R. §2.309(a). It is well established that contentions may only be admitted in an NRC proceeding if

²Petition to Intervene by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) (PRESS Petition for Intervention).

³Notice of Appeal and Brief and Motion for Leave to Augment Appeal by Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS). (PRESS Appeal)

⁴The first fourteen pages of the PRESS appeal appear to be background material or objections to NRC practices and requirements. Because PRESS does not identify any grounds for error in the Board's decision except to identify so-called "classes of objection" which correlate to the Commission's contention standards, the Staff will not address those arguments further in this brief. As the Commission has said, any arguments not clearly articulated in the petition for review are deemed waived. See, e.g., *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 46 (2001); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001); *Commonwealth Edison Co.*, (Zion Nuclear Power Station, Units 1 &2), CLI-99-4, 49 NRC 185, 194 (1999).

they fall within the scope of the proceeding and comply with the requirements of 10 C.F.R. §2.309(f). Each contention must be accompanied by: (1) a specific statement of the issue of law or fact to be raised or controverted, (2) a brief explanation of the basis for the contention, (3) a demonstration that the issue is within the scope of the proceeding, (4) a demonstration that the issue is material to the findings the NRC must make regarding the action subject to the proceeding, (5) a concise statement of the alleged facts or expert opinions which support the contention and on which the petitioner intends to rely at hearing, including references to the specific sources and documents, and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

Failure to comply with any of these requirements is grounds for dismissal of a contention. See, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Since the PRESS contentions did not meet the 2.309 standards, the Board properly refused to admit the contentions.

II. The Board Properly Denied Admission of PRESS's Contentions

A. The Board Properly Denied Admission of Contention 21 Regarding Unnecessary Censorship.

In Contention 21, PRESS asserts that some of USEC's application documents contained unnecessary redactions. PRESS Petition for Intervention at 51. The Board properly held Contention 21 inadmissible, finding that PRESS' general assertion that material was unnecessarily redacted, failed "to raise a genuine dispute with regard to any issue of material law or fact." *USEC*, LBP-05-28, slip op. at 42. Specifically, the Board reasoned that PRESS had failed to suggest any issue related to USEC's License Application or Environmental Report that might be implicated by the censorship. *Id.*

On appeal, PRESS argues that the Board erred because Contention 21 did, in fact, identify several specific examples of material that was improperly redacted from the

Environmental Report (“ER”) and the Licensing Application (“LA”). However, PRESS misconstrues the Board’s ruling. The Board did not hold that Contention 21 was inadmissible because PRESS failed to identify examples of material that was improperly redacted from the ER and LA. Instead, the Board effectively held that, regardless of the availability of the redacted information, PRESS failed to suggest how the alleged “censorship,” whether proper or improper, implicated a genuine dispute with USEC over an issue of law or fact relevant to the validity of its application, as required by 10 C.F.R. § 2.309(f)(1)(vi). *USEC*, LBP-05-28, slip op. at 42. PRESS simply failed to address this issue on appeal. Having failed to identify any error in the Board’s holding that Contention 21 is inadmissible the PRESS appeal of this ruling should be denied.

B. The Board Properly Denied Admission of Contention 20 Regarding the Need for the Proposed Action

In Contention 20, PRESS asserts that there is no need for the proposed action because the future of power generated by enriched uranium is very uncertain. Petition to Intervene by PRESS at 48. The Board properly held Contention 20 inadmissible, finding that it “[was] based wholly on speculation, . . . 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 questions outside the scope of this proceeding, and raises no genuine issue of fact or law.” *USEC*, LBP-05-28, slip op. at 41.

On appeal PRESS merely reasserts that, despite the Board’s ruling to the contrary, it has presented sufficient facts or expert opinion supporting their assertion that “there is no need for the proposed action.” PRESS Appeal at 18. As stated in the Staff response to PRESS’ petition to intervene, PRESS’ sources merely indicate that governments and industry may be pursuing greater use of renewable energy sources. NRC Staff’s Response to Petitions to

Intervene at 57. However, these sources offer no support for the conclusion that this possible increased use of renewable energy would result in there being no need for the ACP. *Id.* The fundamental flaw in PRESS's logic, attempting to use pure speculation to bridge the gap between the pursuit of greater use of renewable energy at one end and the uranium enrichment process being rendered unnecessary at the other, cannot support the admission of a contention. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). Therefore, with regard to contention 20, PRESS failed to meet 10 C.F.R. § 2.309(f)(1)(v).

In addition, PRESS concedes that it failed to comply with 10 C.F.R. § 2.309(f)(1)(vi) stating, “[w]e acknowledge that the Petition did fail to discuss ER §1.1 or provide the nexus [between the contention and the license application], but we have checked our notes, and that is indeed where the contention came from.” PRESS Appeal at 21. Citing the idea that the Board may view the Petitioners' support for contentions in a light favorable to the Petitioner, PRESS attempts to cure their admitted noncompliance by appealing for such “favorable light.” Press Appeal at 21-22. However, PRESS has the burden of providing the basic support for contentions that meet the pleading requirements in 10 C.F.R. § 2.309. The Board may not supply missing information or draw inferences on PRESS' behalf. See *Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328 at 334, 338 (1999). No amount of “favorable light” would allow the Board to overcome PRESS's admitted failure to provide enough information in Contention 20 to demonstrate that a genuine dispute exists with USEC on a material issue of fact or law. See 10 C.F.R. § 2.309(f)(1)(vi). For these reasons, the appeal of the Board's finding that Contention 20 is inadmissible should be denied.

C. The Board Properly Denied Admission of Contention 19 Regarding a Potential Enrichment Freeze

In Contention 19, PRESS asserts that an international freeze on uranium enrichment is

possible and that if such freeze took place “USEC would not be able to survive.” Petition to Intervene at 47. The Board properly held Contention 19 inadmissible, finding that PRESS (1) failed to provide any facts or expert opinion to support the contention, (2) failed to raise a genuine issue of material fact or law regarding this contention, and (3) the contention raised issues of international law that are outside the scope of this proceeding.

After responding to the Board’s criticism for not providing a copy of the Carnegie Report,⁵ making the unsupported assertion that the Board failed to examine the information provided by PRESS, PRESS attempts to cure the deficiencies of Contention 19 by introducing new factual support for the contention on appeal. PRESS Appeal at 22-24. Specifically, after acknowledging that the Carnegie Endowment seems to have withdrawn its recommendation for an enrichment moratorium, PRESS states “[n]ote however, that the [possibility of an enrichment moratorium] is not moot. . . The definitive resources are a report by the UN High-Level Panel on Threats, Challenges and Change . . . and the 22 February 2005 IAEA Expert Group Report.” PRESS Appeal at 23-24.

When ruling on intervention petitions, the Board’s holdings are “necessarily based on the record before it.” *Houston Lighting and Power Company* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980). Here, PRESS states for the first time that the definitive references supporting Contention 19 are UN and IAEA reports included in the quote above, neither of which were cited as a basis for Contention 19 in PRESS’s Petition to Intervene. See Petition to Intervene by PRESS at 47-48. In addition, both of these reports were available when the PRESS’s Petition to Intervene was filed.⁶ Therefore, the Commission

⁵The Carnegie Report was the only document on which PRESS relied for its assertion that an international freeze on uranium enrichment was possible. See Petition to Intervene by PRESS, at 47-48 (February 28, 2005).

⁶The PRESS Petition to Intervene is dated February 28, 2005. The UN Report cited in the PRESS Notice of Appeal and Brief is dated 2004, and the IAEA Report is dated February

should not consider these new factual bases for Contention 19 and the Board's ruling that PRESS failed to provide any facts or expert opinions to support Contention 19 should not be disturbed.

However, even if the Commission were to overlook PRESS's attempt to cure the deficient factual basis for Contention 19 by introducing new facts on appeal, the appeal should be denied because PRESS has failed to raise a material issue of fact or law that connects this contention to the financial qualifications set forth in USEC's License Application. See *USEC*, LBP-05-28, slip op. at 39 (2005). PRESS admits as much in their appeal when they concede that the Board's finding that "PRESS' assertions, even if accurate, would be insufficient to support its contention" may have been literally correct. PRESS Appeal at 24. PRESS has the burden of asserting contentions that meet the pleading requirements in 10 CFR § 2.309 and the Board was correct in not supplying missing information or drawing inferences on PRESS' behalf. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001). For these reasons, the appeal of the Board's finding that Contention 19 is inadmissible should be denied.

D. The Board Properly Denied Admission of Contention 18 Regarding USEC's Incompetence

In Contention 18, PRESS asserts that USEC is incompetent to hold a license to operate a centrifuge plant and cites USEC's enforcement history as support for this argument. See Petition to Intervene by PRESS at 42-47. The Board properly held Contention 18 inadmissible, finding that Press had "not presented any information indicating that any person or procedure associated with past violations will be employed at, or involved with, the ACP." *USEC*, LBP-05-28, slip op. at 39 (2005). As noted in the Board's decision dismissing this contention, in order

22, 2005. See PRESS Appeal at 23-24, n.11, n.12.

for issues of management integrity to be admissible the contention must assert and demonstrate that those management personnel who allegedly acted improperly in the past will also be involved in the activity currently before the Board. *Id.* slip op. at 38. More generally, a contention alleging a lack of management integrity based on past violations must provide a nexus between those violations and the proposed action. *Id.* As the Board points out, the Commission has stated that general fear that a licensee cannot be trusted to comply with regulations of any kind is not sufficient grounds for admission of contentions. *Id.* slip op. at 38 (*citing Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-02-24, 54 NRC 349, 366 (2001)).

In its appeal, PRESS concedes that it is “unable to present any information indicating that any individual person associated with past violations will be employed at, or involved with, the ACP.” PRESS Appeal at 26. Therefore, its contention that USEC is incompetent to operate the ACP based on lack of management integrity was properly dismissed by the Board for the reasons explained above.

However, on appeal PRESS also argues that the Board erred because it failed to consider “that in oral testimony we presented information indicating that procedures associated with past violations would be employed at, or involved with, the ACP.” *Id.* at 28. To support its argument for this alleged “procedural nexus,” PRESS directs the Commission to the transcript of the pre-hearing teleconference, which took place on July 19, 2005. *Id.* at 26-28. Specifically, PRESS seems to rely on three points made in the transcript⁷ to support an argument for a procedural nexus: (1) although PRESS was not “able to find an organizational structure for the gaseous diffusion plant,” they suggested that the organizational structure of the ACP is

⁷The remainder of the quoted portion of the transcript seems to be focused on using USEC’s enforcement history to extrapolate the number of enforcement actions that USEC would receive over the course of the next 30-years. PRESS Appeal at 28. The NRC staff fails to see how this is relevant to establishing the existence of a “procedural nexus.”

“remarkably similar” to that of the gaseous diffusion plant; (2) the fact that USEC’s environmental report stated that they considered such things as the existing skilled workforce, environmental data, regulatory programs and relevant infrastructure already in place at existing DOE sites when selecting a location for the ACP, suggested that USEC “intends to draw from the same population of people and to apply the same techniques that were utilized at those plants;” and (3) that because United States Enrichment Corporation is a wholly-owned subsidiary of USEC “there isn’t so much difference between the GDP operators and the ACP operators.” PRESS Appeal at 27-28.

In addition to being pure speculation, in the case of points (1) and (3), these assertions do not get PRESS any closer to making the required showing that, despite the Board’s ruling to the contrary, they have presented information indicating that a procedure that led to past violations will be employed at, or involved with, the ACP. See *USEC*, LBP-05-28, slip op. at 39. Even if there were some facts provided supporting the existence of procedural similarities between procedures employed by USEC in the past and the procedures to be employed at ACP, PRESS has failed to point to any specific procedure which was the cause of past violations which would be used by ACP. Therefore, the Board properly dismissed Contention 18.

CONCLUSION

For the reasons stated above, the Staff requests that the Commission affirm the Board's decision denying PRESS's request for intervention.

Respectfully submitted,

/RA/
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dated this 27th day of October, 2005
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC Staff's Brief in Opposition to Portsmouth/Piketon Residents for Environmental Safety and Security (PRESS) Appeal of LBP-05-28" in the above-captioned proceeding has been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), or by electronic mail as indicated by a double asterisk (**) on this 27th day of October, 2005.

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