

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

USEC Inc.
(American Centrifuge Plant)

November 10, 2005

Docket No. 70-7004

ASLBP No. 05-838-01-ML

USEC INC. ANSWER TO "GEOFFREY SEA'S
MOTION FOR LEAVE TO ANSWER THE BRIEFS OF
USEC AND NRC STAFF ON PETITIONER'S APPEAL OF LBP-05-28"

I. INTRODUCTION

Mr. Geoffrey Sea, a petitioner for intervention in the above-captioned proceeding, has filed with the Commission a motion seeking leave to respond to USEC Inc. (USEC) and the NRC Staff's briefs in response to his appeal of LBP-05-28, the Atomic Safety and Licensing Board's (ASLB) decision denying admission of his contentions.¹ For the reasons discussed below, Mr. Sea has failed to provide adequate justification for his request and his Motion should be denied.

II. DISCUSSION

The Commission's regulations provide for the filing of a notice of appeal and brief by a petitioner for intervention who is seeking interlocutory review of an ASLB decision denying his petition.² Briefs in opposition are also permitted, but no further pleadings to the Commission are

¹ Geoffrey Sea's Motion for Leave to Answer the Briefs of USEC and NRC Staff on Petitioner's Appeal of LBP-05-28 (November 8, 2005) (Motion).

² 10 CFR § 2.311(a).

TEMPLATE = SECY-037

SECY-02

authorized by the regulations.³ Mr. Sea argues, however, that in this case leave to file a reply is warranted because, in their respective responses, USEC and the NRC Staff “raise[d] certain new issues, introduce[d] new facts, and commit[ted] errors of fact and law.”⁴

Characterizing the arguments of other parties as “errors of fact and law” does not provide justification for additional briefs. Mr. Sea had the opportunity to address such matters in the brief in support of his appeal. Neither dissatisfaction with his appeal brief nor a desire to get in the last word justifies a reply.

Mr. Sea cites the following two asserted examples of new issues or facts: “reference to the Draft Environmental Impact Statement (DEIS), and to the ongoing process of Section 106 consultation under the National Historic Preservation Act (NHPA).”⁵ Neither identifies a new issue or fact. In its decision denying the admissibility of Mr. Sea’s contentions, the ASLB specifically discussed both: the implications of the NRC Staff’s review in the DEIS on the admissibility of Mr. Sea’s contentions about alleged omissions from USEC’s Environmental Report (ER); and the ongoing NHPA Section 106 consultation process.⁶ Mr. Sea thus had ample notice of those bases for the ASLB’s decision, and the opportunity to address them in his original appeal brief. It should have been no surprise that USEC and the Staff addressed those aspects of

³ *Id.*

⁴ Motion at 1.

⁵ *Id.* Mr. Sea also states that “USEC takes issue with the Petitioner’s claim of being in the direction of maximum windborne contamination, for the first time in these proceedings.” *Id.* at 2. If this also is intended as an example of a new fact, it is also lacks merit. The facts are clearly stated in the ER, and are not new. Mr. Sea’s Appeal Brief (at 5) asserted that “the Barnes Home is in the direction of prevailing winds.” Certainly, Mr. Sea should not have been surprised by USEC’s pointing out that this assertion is false. Even Mr. Sea, in his proffered Reply Brief (at 4), acknowledges that Petitioner “erroneously referred to ‘direction of prevailing winds’” in his original petition. Yet he again repeats this “error” in his Appeal Brief, and when USEC points out the “error,” claims that this is new information.

⁶ LBP-05-028, __ NRC __, slip op. at 46-47, 49 n.157.

the ASLB's decision. Despite Mr. Sea's assertion that he was not able to comment on these specific references in his appeal brief, the DEIS was equally available to him.⁷

Moreover, Mr. Sea has specifically raised the issue of compliance with the NHPA Section 106 consultation process in his appeal.⁸ Again, it should come as no surprise that USEC and the Staff would address the very issue he raised in his appeal.

In addition, the fundamental point being made by USEC and the NRC Staff, in referencing the DEIS, was that the DEIS addressed the alleged omissions in USEC's ER. Those references were necessary and appropriate in light of the Commission's well-established precedent regarding the "curing" effect of a DEIS on alleged omissions in an ER.⁹ If Mr. Sea had any disagreement with the substance of the Staff's analyses, as they may be relevant to USEC's license application, Commission regulations afforded him the opportunity to submit proposed amended or new contentions based on the DEIS.¹⁰ The ASLB specifically pointed out this opportunity to Mr. Sea,¹¹ but he has not availed himself of this opportunity.

⁷ The DEIS was provided to the ASLB and the parties to this proceeding by the NRC Staff on September 13, 2005. *See* Board Notification Memorandum, Scott C. Flanders to Administrative Judges McDade, Abramson and Wardwell (Sept. 13, 2005). The DEIS contains a discussion of the NRC Staff's NHPA 106 consultation process and includes in Appendix B numerous letters that were sent to potential consulting parties.

⁸ *See e.g.*, Brief of Geoffrey Sea on Appeal of LBP-05-28, at 11. "New petitioners . . . who never were notified by USEC or anyone else, now have a mountain to climb in terms of getting their concerns heard. NRC Staff now considers its Section 106 process to be closed, or nearing closure."

⁹ *See* USEC Inc. Brief in Response to Brief of Geoffrey Sea on Appeal of LBP-05-28 (Nov. 2, 2005) at 10-11.

¹⁰ 10 CFR § 2.309(f)(2).

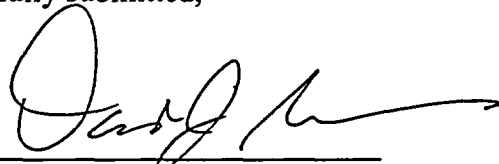
¹¹ *See e.g.*, LBP-05-28, __ NRC __, slip op. at 51.

Finally, contrary to Commission regulations,¹² Mr. Sea did not certify that he made a “sincere effort to contact other parties . . . and resolve the issue(s) raised in the motion,” and that such efforts were unsuccessful. Counsel for USEC has not been contacted.

III. CONCLUSION

For the reasons stated above, Mr. Sea has not provided an adequate justification to submit an additional appeal brief to the Commission and his Motion should therefore be denied.

Respectfully submitted,



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Dated November 10, 2005

Counsel for USEC Inc.

¹² 10 CFR § 2.323(b).

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_____)

CERTIFICATE OF SERVICE

I hereby certify that copies of the "USEC Inc. Answer to "Geoffrey Sea's Motion for Leave to Answer the Briefs of USEC and NRC Staff on Petitioner's Appeal of LBP-05-28" were served upon the persons listed below by U.S. mail, first-class, postage prepaid, and by electronic mail (except where noted with an asterisk), on this 10th day of November, 2005.

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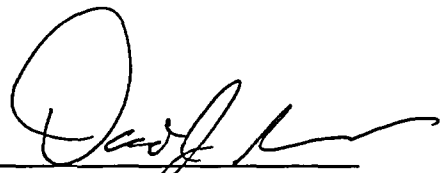
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Dated: November 10, 2005