UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
INTERNATIONAL URANIUM (USA) CORPORATION	)	Docket No. 40-8681-MLA-6
	)	
	)	
(Receipt of Material from St. Louis, Missouri)	)	
	)	

NRC STAFF OPPOSITION TO ENVIROCARE OF UTAH, INC.'S APPEAL OF THE PRESIDING OFFICER'S MEMORANDUM AND ORDER DATED MAY 21, 1999

Henry J. McGurren
Counsel for NRC Staff

June 10, 1999

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INTRODUCTION

On April 26, 1999, Petitioner, Envirocare of Utah, Inc. (Envirocare) filed a request for hearing challenging a proposed amendment which would authorize the International Uranium (USA) Corporation (IUSA) to receive and process uranium-bearing material from various sites in the St. Louis, Missouri area that are currently being remediated by the U.S. Army Corps of Engineers in accordance with its responsibilities under the Formerly Utilized Sites Remedial Action program (FUSRAP).[1] In LBP-99-20, 49 NRC _____ (May 21, 1999), the Presiding Officer dismissed Envirocare's hearing petition, finding that Envirocare's continued reliance on economic-competitor injuries unconnected to any environmental harm associated with the proposed licensing action are not cognizable under the National Environmental Policy Act (NEPA) or the Atomic Energy Act (AEA), and, therefore, are not sufficient to establish standing under Commission precedent.

[1]Request for Hearing of Envirocare of Utah, Inc., dated April 26, 1999, (Petition).

Envirocare has now filed an appeal of that decision stating that it continues to disagree with two prior Commission decisions finding that it lacks standing to intervene and seeks to preserve its rights to participate in this proceeding during the pendency of its appeal of those prior Commission decisions in Federal court. As grounds for the instant appeal, Envirocare appends a copy of the appeal brief it filed in the IUSA MLA-4 proceeding. *See* Envirocare of Utah's August 31, 1998, Appeal of the Presiding Officer's Memorandum and Order Dated 8/19/98 (Appeal).[2]

Pursuant to 10 C.F.R. § 2.1205, the Staff submits this opposition to Envirocare's appeal. The appeal should be denied because the appellant fails to show that the Presiding Officer committed any reversible error.

BACKGROUND

The contested application for amendment which was received by the U.S. Nuclear Regulatory Commission, (NRC) by letter dated March 2, 1999, would allow IUSA to receive and process alternate feed material--material other than natural uranium ore--at its White Mesa Mill near Blanding, Utah.[3] The Presiding Officer was designated on May 19, 1999, first to rule on a hearing petition filed by Envirocare, a corporation licensed by the NRC to receive and dispose of uranium and thorium byproduct material (as defined in section 11e.(2) of the Atomic Energy Act (AEA), as

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[2]In a Memorandum and Order (Dismissal of Envirocare), dated August 19, 1998, (unpublished) (August 19 Order), the Presiding Officer dismissed the intervention petition filed by Envirocare of Utah, Inc. (Envirocare), in the IUSA MLA-4 proceeding. That dismissal was upheld by the Commission in *IUSA*, CLI-98-23, 48 NRC 259 (1998).

[3]*See* Notice of Consideration of a License Amendment for International Uranium (USA) Corporation's White Mesa Uranium Mill and and Opportunity for a Hearing. 64. Fed. Reg. 23876 (May 4, 1999).

amended, 42 U.S.C. § 2011 *et seq.*), and then, if warranted, to conduct an informal adjudicatory proceeding pursuant to 10 C.F.R. Part 2, Subpart L.[4] 64 Fed. Reg. 28218 (May 25, 1999).

The Presiding Officer rejected Envirocare's petition based on the Commission's rulings in *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1 (1998), and *IUSA*, 49 NRC 259 (1998). LBP-99-20, at 1-2.

ARGUMENT

In its Appeal, Envirocare claims that the Presiding Officer erred because he relied on *Quivira*, which "failed to recognize the significance of the United States Supreme Court's decision in *National Credit Union Administration v. First National Bank & Trust Co., 522* U.S. 479, 118 S. Ct. 927 (1998) (NCUA), and thus the conclusion that Envirocare's interests do not fall within the zone of interests of either NEPA or the AEA was erroneous. *See* Appeal at 2. Envirocare asserts that, "instead of simply asking whether Envirocare's interests arguably fell within the zone of interests of the AEA or NEPA" as directed by *NCUA*, "the Commission searched for some 'indication' in the relevant statutes of an intent to protect Envirocare's competitor interests." Appeal at 9, *citing, Quivira* (slip. op. At 12-13, 17-19). Envirocare argues that the Commission should have simply asked whether Envirocare's interests "arguably fall within the 'zone of interests' protected or regulated by the AEA." Appeal at 10.

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[4]Envirocare argued that the amendment application failed to satisfy (1) NRC guidance concerning disposal of alternate feed material, (2) 10 C.F.R. Part 40 requirements and (3) the standards established by the National Environmental Policy Act, 42 U.S.C. § 4322 (NEPA), the NRC's regulations for the implementation of NEPA and application of NEPA regulations to similarly situated licensees. *See* Petition at 2.

I. The Presiding Officer Did Not Err In Finding Envirocare Lacked Standing To Intervene

The Commission has long held that contemporaneous judicial concepts of standing will be applied in determining whether a petitioner for leave to intervene has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189a of the Act. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613 (1976); *Georgia Institute of Technology,* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). The "irreducible constitutional minimum" requirements for standing are that the plaintiff suffer an "injury-in-fact" which is "concrete or particularized and ... actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action at issue, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1997). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991). A petitioner must also meet the "prudential" standing requirement that the petitioner's interest must arguably fall "within the 'zone of interests' protected or regulated by the governing statutes–here, the AEA and NEPA."[5]

Envirocare, a private facility licensed by the NRC to accept 11e.(2) material from outside generators for disposal, alleges that it has standing to intervene because its petition (1) "described its economic interest in ensuring that all licensees proposing to accept 11e.(2) byproduct material comply with applicable NRC standards," (2) "described its interest, as a member of an

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[5]*Quivira*, 48 NRC at 6, *citing Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); *Bennett v. Spear*, 117 S. Ct. at 1167; *Reytblatt v. NRC,* 105 F.3d 715, 721 (D.C. Cir 1997).

environmentally sensitive industry, in ensuring that environmental laws are uniformly applied and enforced by the NRC"[6] and (3) argued that these economic interests fall within the zone of interests protected by NEPA and the AEA. Appeal at 4-5; *see* Petition at 10-13. Envirocare's generalized grievance concerning enforcement of regulatory requirements is not sufficient for particularizing a harm to support standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983), *citing, Transnuclear, Inc.*, CLI-77-24, 6 NRC 525, 531 (1977) (a "generalized grievance" shared in substantially equal measure by all or a large class of citizens will not result in distinct and palpable harm to support standing). Such interests would be indistinguishable from those of general concerns about the integrity of NRC actions.

Envirocare further argues that the zone-of-interests test requires that a determination of whether a plaintiff's interests arguably fall within the zone of interest "'should not inquire whether there has been a congressional intent to benefit the would-be-plaintiff,'" but discern the interests arguably to be protected by the statutory provision at issue and then "'inquire whether the plaintiff's interests affected by the agency action in question are among them.'" Appeal at 7-8 (emphasis in original), *quoting NCUA*, 118 S. Ct. at 933,935. Envirocare maintains that since the Supreme Court, in NCUA, found standing where (1) the statute, in effect, protected the banks' competitive interests and (2) the agency's interpretation of the statutory provision at issue affected those interests, the

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[6]Envirocare noted that in connection with its facility, it incurred great expense in complying with "stringent siting regulations set forth in 10 C.F.R. Part 40" and "preparation of an Environmental Impact Statement based upon an Environmental Report prepared by [Envirocare]." Appeal at 4. Envirocare also claimed that the IUSA amendment allowing alternate feed material to be "reprocessed" at IUSA's mill rather than at a facility specifically designated and licensed for the disposal of such radioactive material, resulted in a "lost opportunity to compete for a public contract and derive profits therefrom." Petition at 11.

Commission (and the Presiding Officer) should similarly recognize that NRC's licensing requirements for disposal of 11e.(2) byproduct material, implemented pursuant to section 84 of the AEA, 42 U.S.C. § 2114, "constitute a classic example of a regulatory scheme for limiting entry into a market and, thus, that Envirocare's interests arguably fall within the AEA or NEPA. *See* Appeal at 8-9, 10,12.

A. Purely Economic Interests Are Not Cognizable Under NEPA Or The AEA

Envirocare has failed to provide any basis to conclude that the holding in *NCUA* reverses a long line of NEPA cases holding that economic injury, standing alone, is not sufficient to support standing. *See generally Quivira*, 48 NRC at 8-10; *Churchill Truck Lines, Inc. v United States*, 533 F.2nd 411, 416 (8th Cir. 1976) (NEPA not designed to prevent loss of profits); *Sabine River Authority v. U.S. Department of Interior,* 951 F.2d 669, 674 (5th Cir.), *cert. denied.* 506 U.S. 823 (1992) (geographic nexus to the project required). Similarly, the Commission should not abandon the wisdom of previous decisions that find harm to economic interests cognizable under NEPA only if such harm directly results from environmental damage. *See Port of Astoria v. Hodel,* 595 F.2d 467, 474 (9th Cir. 1979); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *See also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2, ALAB-789, 20 NRC 1443, 1447 (1984); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB 413, 5 NRC 1418, 1421 (1977). *See generally Long Island Co.* (Jamesport Nuclear Power Station), ALAB-292, 2 NRC 631, 638-643 (1975) (economic competitor of nuclear power plants does not have interests protected or regulated by NEPA).

Further, to the extent that Envirocare suggests that *NCUA* alters the way in which standing is determined under the AEA, the Commission specifically addressed *NCUA* in rejecting

Envirocare's assertion that its competitor injuries were protected by the AEA in holding that such a claim must be linked to asserted radiological injury. *See Quivira* at 10-17. The Commission examined whether Envirocare's competitor interest was "arguably" protected by the AEA and found no indication in the AEA of an intent to protect" the competitor interests claimed by Envirocare, noting that each "Supreme Court decision to date...involving "zone of interests" and competitor standing...found some form of statutory interest in or provision for restricting competition--typically a restriction on market activities or a limitation on the available customer base." *Id.* At 11.[7] Thus, the Commission's approach in *Quivira* (to determine whether the applicable statute contained a provision "whose clear intent or effect is to restrict competition," *Id.* at 12), was consistent with the Supreme Court's examination of the purposes implicit in the governing statute in *NCUA*. *See* NCUA, 118 S. Ct. at 933-936.

NCUA involved a statute that, although not specifically protective of banks, had the effect of limiting credit union markets, which thus affected the interests of the competitor banks. *NCUA* at 935-36. Finding that the AEA (with the exception of antitrust review requirements for power reactors not at issue in a materials license proceeding) is devoid of provisions (expressly or implicitly) limiting competition and focuses instead on public health and safety and the common defense and security, the Commission properly concluded that Envirocare lacked standing. *See*

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[7]The Commission found no basis to conclude that Envirocare's competitor interests were encompassed by the AEA due to the absence of an AEA provision "effectively cordoning off a portion of the market from competition," and the absence of an "intent to limit competition, either as an end in itself or as a means to another statutory purpose." *Quivira,* 48 NRC at 14 (citations omitted).

Quivira at 11-15; *IUSA*, 48 NRC at 14-16.[8] Thus, the Presiding Officer's reliance on the rejection of Envirocare's competitor interests in *Quivira* and *IUSA* was not in error.

B. *NCUA* Does Not Require A Finding That Purely Economic Interests Are Cognizable Under The AEA And NEPA

Envirocare's arguments do not demonstrate that the Presiding Officer erroneously concluded that Envirocare lacks standing to intervene in the instant proceeding. Contrary to Envirocare's claims, the Commission did not limit its inquiry to whether Congress specifically intended that the "zone of interests" circumscribed by applicable statutes encompass competitor interests. *See* Appeal at 9-10. Rather, the Commission, cognizant of *NCUA*'s admonition that there need be no indication of "a congressional purpose to benefit the would-be plaintiff," 118 S. Ct. at 935, concluded that it could not discern protection of competitor interests as among the interests protected by the AEA or NEPA. *See Quivira*, 48 NRC at 9-10, 14-17; *IUSA*, 48 NRC at 264-65.

In addition, the Commission distinguished cases (including one cited by Envirocare) dealing with competitor interests as primarily involving statutory provisions which by intent, or effect, limit competition rather than being cases that address safety and environmental interests. *See Quivira* at 14-16.[9] The other cases cited by Envirocare, *see* Appeal at 11, can be distinguished as involving

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[8]The Commission also rejected Envirocare's argument that its economic injury in *Quivira* was protected by section 84 of the AEA, 42. U.S.C. § 2014, which directs that 11e.(2) byproduct material is to be managed, taking into account not only public health, safety and environmental rish, but also economic costs. *Quivira* at 16. Envirocare does not make that argument in the instant appeal.

[9]Among the cases cited by Envirocare is *MOVA Pharmaceutical Corp. v. Shalala,* 140 F.3d 1060, 1076 (D.C. Cir. 1998) (standing of a drug company to challenge agency approval of an abbreviated application to market a generic drug). *See* Appeal at 11. In *Quivira,* the Commission correctly distinguished the decision as involving a statutory provision intended to prohibit or limit competition. *See Quivira* at 15 and n.4. The D.C. Circuit had ruled that the drug company's interest (continued...)

statutory provisions that generally encompass pecuniary interests. *See American Bankers Ins. Group v. Board of Governors*, 3 F. Supp. 2d 37 (D.D.C. 1998) (standing of competitor to contest relaxation of restrictions on disclosure of credit transactions); Graham v. *FEMA*, 149 F.3d 997, 1001-1002 (9th Cir. 1998) (standing of state-approved applicants for payment of FEMA disaster relief funds since payment to victims within the general policy of the underlying statute); *Motor & Equipment Mfrs. Ass'n. v. Nichols,* 142 F.3d 449, 453, 453-458 (D.C. Cir. 1998) (standing of manufactures of replacement car parts to challenge Clean Air Act regulation stemming from a statutory provision that provided unrestricted access to emission control diagnostic systems).[10]

The bald assertion that NRC regulation of disposal of byproduct material constitutes "a classic example of a regulatory scheme for limiting entry into the market" does not suffice to establish a sufficient nexus between the AEA and protection of competitor interests.[11] Inasmuch as

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[9](...continued)
in limiting competition for its product was "'by its very nature,' NCUA, ___ U.S. at ___ n.6, 118 S. Ct 935 n.6, linked to the statute's goal of limiting competition between generic manufacturers." *MOVA*, 140 F. 3d at 1075-76.

[10]Such economic interests have been rejected even where a court acknowledged that any party whose interests, "while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests" are within the zone of interests. *See Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989) (trade association of hazardous waste treatment companies denied standing to challenge a rule under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* (RCRA)). Interests of competitors can make them unsuitable challengers since their challenge may frustrate, rather than further, statutory objectives. *See Clarke v. Securities Industry Assn.*, 479 U.S. 388, 397 n.12, 399 (1987) (discount banking services).

[11]In *NCUA,* the majority responded to the dissenter's assertion that *NCUA* eviscerates the zone of interest requirement by simply requiring that a "plaintiff must merely have an interest in enforcing the statute in question." *NCUA*, 118 S. Ct. at 936 n.7. The Supreme Court emphasized that the majority's two-prong test for prudential standing (discerning interests arguably to be protected by the statutory provision and inquiring whether the plaintiff's interests affected by the
(continued...)

Envirocare's competitor interests lack sufficient congruence with those protected by the AEA or NEPA, dismissal of its petition should be upheld.

CONCLUSION

In sum, the Envirocare appeal of LBP-99-11should be denied because Envirocare has not shown that its dismissal was erroneous.

Respectfully submitted,

Henry J. McGurren
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of June 1999

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[11](...continued)
agency action are among them) "differs only as a matter of semantics from the formulation" urged by the dissent (that a plaintiff must establish that "'the injury he complains of . . . falls within the zone of interests to be protected by the statutory provision whose violation forms the legal basis for his complaint).'" 118 S. Ct. at 927 n.7, *citing,* 118 S. Ct. at 941 (internal quotations and citations omitted).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF OPPOSITION TO ENVIROCARE OF UTAH, INC.'S APPEAL OF THE PRESIDING OFFICER'S MEMORANDUM AND ORDER DATED MAY 21, 1999" for the undersigned counsel in the above-captioned proceeding have been served on the following by deposit into the United States mail as indicated by an asterisk, or through deposit in the Nuclear Regulatory Commission's internal mail system on this10th day of June 1999.

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