

January 9, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

Before the Atomic Safety and Licensing Board

January 10, 2006 (8:30am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of )  
 )  
Nuclear Management Company, *et al.* )  
 )  
(Palisades Nuclear Plant) )

Docket No. 50-255-LR  
ASLBP No. 05-842-03-LR

**NUCLEAR MANAGEMENT COMPANY'S REPLY TO PETITIONERS' RESPONSE TO BOARD DECEMBER 21, 2005 ORDER REGARDING EXPERT OPINION ALLEGEDLY SUPPORTING CONTENTION 1 - PALISADES REACTOR EMBRITTEMENT**

Nuclear Management Company ("NMC") hereby replies to Petitioners' response<sup>1</sup> to the December 21, 2005 Order of the Atomic Safety and Licensing Board ("Board"). In that Order, the Board requested that Petitioners respond to information provided by counsel for the NRC Staff concerning Demetrios Basdekas, upon whom Petitioners had relied as their expert in support of their contention concerning reactor pressure vessel embrittlement. By e-mail dated December 20, 2005 to the Board and the parties, counsel for the Staff reported on a telephone call that she had received from Demetrios Basdekas during which Mr. Basdekas informed her that, "although he was contacted by the petitioners regarding being their expert witness and had told them that he might be willing to help them after looking into the matter, he subsequently declined to serve as an expert witness in this matter." Further, Mr. Basdekas advised Staff counsel that, while he had "informed the petitioners that, as a generic matter, the longer a reactor operates, the more embrittled the vessel becomes," he had "made no statements regarding the state of the Palisades reactor as he had no site specific information on which to base an opinion."

---

<sup>1</sup> Petitioners' Response to Board Order on Matter of Expert Opinion (Jan. 3, 2006) ("Pet. Response").

The Board's Order provided Petitioners an opportunity to respond to "this very significant development in this proceeding." Order at 1. The Petitioners' response, however, inappropriately denigrates both the Board and the Staff and incorrectly suggests that the current status of their retention of expert assistance is "immaterial" and "irrelevant." Pet. Response at 1; see also id. at 3. Parties to NRC licensing proceedings have a duty to apprise the Board of significant developments affecting the proceeding.<sup>2</sup> Here, the opinion of Mr. Basdekas was the only purported support for the Petitioners' original contention, and the Board clearly considered the Petitioners' retention of Mr. Basedekas as an expert to be important in resolving the admissibility of the contention.

For example, at the pre-hearing conference on November 3, 2005, Judge Young inquired of counsel for Petitioners as follows:

Admin Law Judge Young: . . . What I am getting at is if we were to admit this contention –

Mr. Lodge: Right.

Admin Law Judge Young: You have an expert, the expert can talk about what happened at the Palisades Plant.

Mr. Lodge: Right.

Admin Law Judge Young: Okay. What's the impact of that? . . . .

Prehearing Tr. at 48. As now made clear by Petitioners' response, Mr. Basdekas had advised Petitioners as of August 22, 2005, that he would not serve as their expert on the contention. This was more than three weeks before Petitioners filed their reply and more than two months before the prehearing conference. In light of these circumstances, even assuming the lack of any legal duty to notify the Board, it clearly would have been appropriate for Petitioners to have apprised

---

<sup>2</sup> See, e.g., Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 N.R.C. 1387, 1394 (1982) ("parties to Commission proceedings [have an] absolute obligation to alert adjudicatory bodies directly regarding (i) new information that is relevant and material to the matters being adjudicated; (ii) modifications and rescissions of important evidentiary submissions; and (iii) [outdated or incorrect information on which the board may rely].")

the Board that Mr. Basdekas was no longer serving as their expert. Petitioners, however, chose to remain silent.

Moreover, the Petitioners' suggestion that Mr. Basdekas's decision not to serve as their expert is immaterial and irrelevant under the Commission's rules of practice is erroneous. The Commission's rules expressly provide that a contention 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 and on which the petitioner intends to rely at hearing. . . ." 10 C.F.R. § 2.309(f)(1)(v) (emphasis added). Here, Petitioners knew as of August 22, 2005 that they would not be relying on Mr. Basdekas's opinion at hearing by virtue of his having declined, as of that date, to be their expert, and they should have duly advised the Board. Mr. Basdekas's opinion was the only purported basis offered by Petitioners in their original contention for its admission. This is precisely the situation that the Commission sought to resolve with the 2004 amendments to its rules of practice, which sought to "support an early NRC determination whether there are issues that are appropriate for and susceptible to NRC resolution with respect to an NRC regulatory/licensing action" by requiring contentions supported by specific facts or expert opinions "in all hearings." Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004).

Petitioners rely upon 10 C.F.R. § 2.309(f)(2), whose introductory phrase provides that "[c]ontentions must be based on documents or other *information available at the time the petition is to be filed . . .*" Pet. Response at 3 (emphasis added by Petitioners). That subparagraph is specifically focused on the "standards for amending existing contentions, or submitting new contentions based upon documents or other information not available at the time that the original request for hearing/petition to intervene was required to be filed." 69 Fed. Reg. at 2,221 (emphasis added). Were this subparagraph to apply to Petitioners in this case, they would also have to establish that their submission satisfies the additional criteria in § 2.309 (f)(2)(i) – (iii). But they have attempted no such a showing and such a showing would clearly be irrelevant here, as this is

not a late-filed contention but rather a contention that was timely filed without the appropriate basis. Subparagraph 2 of 10 C.F.R. § 2.309(f) in no way suggests that a contention may be based on incorrect information or expert opinion that is subsequently withdrawn.

Finally, in an endeavor to now backfill the loss of their expert, Petitioners seek to bring before the Board a host of historical statements made by Mr. Basdekas concerning the generic subject of reactor embrittlement and related information. None of this information was referenced or provided as support for the contention when filed. For the reasons set forth in NMC's Motion to Strike Petitioners' Reply<sup>3</sup> and as recognized by the Board,<sup>4</sup> it is simply too late for the Petitioners to bring forward new information to support the admission of its embrittlement contention.<sup>5</sup> Accordingly, the Board must ignore this new information, as it must ignore supporting information that was first made available in Petitioners' Reply.

In summary, for the reasons set forth in NMC's Answer, Petitioners' embrittlement contention even with the support of the generalization originally attributed to Mr. Basdekas's opinion does not constitute an admissible contention.<sup>6</sup> Now lacking even that minimal support, the contention is clearly inadmissible and must be rejected by the Board.

Respectfully Submitted,



David R. Lewis

Paul A. Gaukler

PILLSBURY WINTHROP SHAW PITTMAN LLP

2300 N Street, N.W.

Washington, DC 20037-1128

Tel. (202) 663-8474

Counsel for Nuclear Management Company

Dated: January 9, 2005

---

<sup>3</sup> NMC's Motion to Strike Petitioners' September 16, 2005 Combined Reply to NRC Staff and NMC Answers (Sept. 26, 2005).

<sup>4</sup> Prehearing Tr. At 25, 32-33, 37 (Nov. 3, 2005).

<sup>5</sup> NMC also notes that all the information referenced by the Petitioners is from the 1980s and is therefore dated.

<sup>6</sup> NMC's Answer to the August 8, 2005 Request for Hearing and Petition to Intervene (Sept. 2, 2005) at 10-14.

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
Nuclear Management Company, <i>et al.</i>	)	Docket No. 50-255-LR
	)	ASLBP No. 05-842-03-LR
(Palisades Nuclear Plant)	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of "Nuclear Management Company's Reply to Petitioners' Response to Board December 21, 2005 Order Regarding Expert Opinion Allegedly Supporting Contention 1 – Palisades Reactor Embrittlement," dated January 9, 2006, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 9th day of January 2006.

\*Administrative Judge  
Ann Marshall Young, Esq., Chair  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[AMY@nrc.gov](mailto:AMY@nrc.gov)

\*Administrative Judge  
Dr. Anthony J. Baratta  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[AJB5@nrc.gov](mailto:AJB5@nrc.gov)

\*Administrative Judge  
Dr. Nicholas T. Trikouros  
Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[N.TRIKOUROS@att.net](mailto:N.TRIKOUROS@att.net)

\*Secretary  
Att'n: Rulemakings and Adjudications Staff  
Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[hearingdocket@nrc.gov](mailto:hearingdocket@nrc.gov)

Office of Commission Appellate Adjudication  
Mail Stop O-16 C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

Atomic Safety and Licensing Board  
Mail Stop T-3 F23  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

\*Susan L. Uttal, Esq.  
Office of the General Counsel  
Mail Stop O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
[slu@nrc.gov](mailto:slu@nrc.gov); [dmr1@nrc.gov](mailto:dmr1@nrc.gov)

\*Kary Love, Esq.  
Executive Business Center  
348 Waverly Road, Suite 2  
Holland, MI 49423  
[kary\\_love@yahoo.com](mailto:kary_love@yahoo.com)

\*Mr. Michael Keegan  
Don't Waste Michigan  
2213 Riverside Drive, NE  
Grand Rapids, MI 49505  
[mkeeganj@comcast.net](mailto:mkeeganj@comcast.net)


\*Mr. Chuck Jordan  
Green Party of Van Buren County  
50521 34<sup>th</sup> Avenue  
Bangor, MI 49013  
[jordanc@btc-bci.com](mailto:jordanc@btc-bci.com)

\*Terry Lodge, Esq.  
316 N. Michigan St., Suite 520  
Toledo, OH 43624-1627  
[tjlodge50@yahoo.com](mailto:tjlodge50@yahoo.com)

\*Mr. Paul Gunter  
Nuclear Information and Resource Service  
1424 16<sup>th</sup> Street, N.W.  
Suite 404  
Washington, D.C. 20036  
[pgunter@nirs.org](mailto:pgunter@nirs.org)

\*Ms. Alice Hirt  
Western Michigan Environmental Action  
Council  
1415 Wealthy St., SE  
Suite 280  
Grand Rapids, MI 49506  
[alicehirt@charter.net](mailto:alicehirt@charter.net)

Mr. Maynard Kaufman  
Michigan Land Trustees  
25485 County Road 681  
Bangor, MI 49013

  
Paul A. Gaukler