

February 3, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
NUCLEAR MANAGEMENT)	Docket No. 50-255-LR
COMPANY, LLC)	
)	ASLBP No. 05-842-03-LR
(Palisades Nuclear Plant))	

NRC STAFF ANSWER TO PETITIONERS' MOTION TO STRIKE
STAFF AND NMC RESPONSES TO BOARD ORDER, TO STAY PROCEEDINGS
AND TO TAKE DEPOSITION OF NRC STAFF COUNSEL

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's (Board's) January 30, 2006, "Order and Notice (Regarding Petitioners' Motion of January 27, 2006, and Expected Rulings on Motion, Standing, Contentions, and Other Pending Matters)" (January 30 Order), the U.S. Nuclear Regulatory Commission Staff (Staff) hereby answers the January 27, 2006, "Motion to Strike Staff and NMC Responses to Board Order on Expert Witness Matter, to Stay Proceedings and to Take Deposition of NRC Staff Counsel" (Motion to Stay), filed by the Nuclear Information and Resource Service, *et al.* (Petitioners), on January 27, 2006.

For the reasons discussed more fully below, the Staff opposes the relief requested in the Motion to Stay. In addition, in that the Motion is devoid of good cause for its untimeliness, the Staff urges the Board not to consider its merits.

BACKGROUND

On August 8, 2005, Petitioners filed a "Request for Hearing and Petition to Intervene" (Petition) on Nuclear Management Company's (NMC) license renewal application. This Petition included several proposed contentions, the first of which concerned embrittlement and the associated problem of Pressurized Thermal Shock (PTS). Mr. Demetrios Basdekas, an

individual, was cited as an expert witness for the Petitioners in support of the proposed embrittlement contention.¹ The embrittlement contention made several statements specifically about Palisades and cited Mr. Basdekas for support.²

A telephone conference was held on September 12, 2005. During the conference Petitioners' counsel, in response to a question by Judge Young concerning the existence of a written opinion by Mr. Basdekas, replied that nothing other than email correspondence was written. In fact, on August 22, 2005, subsequent to the filing of the Petition, Mr. Basdekas declined to serve as their expert,³ but Petitioners did not apprise either the Board or the other parties of this during the conference.⁴ Petitioners also failed to mention his status in either their "Combined Reply to NRC Staff and Nuclear Management Company Answers," (Combined Reply) filed September 16, 2005, or their "Combined Response in Opposition to NRC Staff

¹ Petition at 4.

² The contention in its entirety reads:

The license renewal application is untimely and incomplete for failure to address the continuing crisis of embrittlement.

The Petitioners allege that the Palisades license renewal application is fundamentally deficient because it does not adequately address technical and safety issues arising out of the embrittlement of the reactor pressure vessel and unresolved Pressure Thermal Shock ("PTS") concerns that might reasonably result in the failure of the reactor pressure vessel ("RPV"). The Palisades nuclear power station is identified as prone to early embrittlement of the reactor pressure vessel, which is a vital safety component. As noted in the opinion of Petitioners' expert on embrittlement, Mr. Demetrios Basdekas, retired from the Nuclear Regulatory Commission, the longer Palisades operates, the more embrittled its RPV becomes, with decreasing safety margins in the event of the initiation of emergency operation procedures. Therefore, a hearing on the public health and safety effects of a prospective additional twenty years of operation, given the present and prospective embrittlement trend of the RPV is imperative to protecting the interests of those members of the petitioning organization who are affected by this proceeding.

Petition at 4.

³ See "Petitioners' Response to Board Order on Matter of Expert Opinion," (Response) at 3 (January 3, 2006).

⁴ Teleconference Tr., (Sept. 12, 2005), p. 4.

and Nuclear Management Company Motions to Strike,” filed October 6, 2005.

Oral argument was conducted on November 3-4, 2005, in South Haven, Michigan. During oral argument, the opinion of Mr. Basdekas came up in several exchanges between Petitioners’ counsel and the Board. Petitioners’ counsel, again, however, did not mention that Mr. Basdekas was no longer their expert, even during a colloquy with Judge Young in which she said: “Now, you have identified an expert who is retired from the NRC, and presumably that expert would be able to say things other than just give us a lesson on the dangers of embrittlement.”⁵ Nor did he mention this fact when directly questioned by Judge Young.⁶

On December 20, 2005, Staff counsel, Ms. Susan Uttal, received a telephone call from Mr. Basdekas during which he advised her that he was not serving as an expert witness for the Petitioners and that the proposed contention contained information not supplied by him. Staff counsel informed the Board and parties of the conversation via email.

On December 21, 2005, the Board issued the “Order and Revised Notice (Setting Deadlines to Respond to Staff Notification of December 20, 2005)” (December 21 Order), which described portions of the conversation between Mr. Basdekas and Ms. Uttal, as follows:

According to Ms. Uttal, 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 informed Ms. Uttal, “he had sent an email to the petitioners advising them that he was declining to be their expert.” He indicated that he had “informed the petitioners that, as a generic matter, the longer a reactor operates, the more embrittled the vessel becomes,” but 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.”

Board Order at 1. The Order asked the Petitioners to respond to the above information supplied by Staff counsel, and set a reply deadline for NMC and Staff.

⁵ Oral Argument Tr., (Nov. 3, 2005), p. 47.

⁶ *Id.* at 48.

Petitioners filed their Response on January 3, 2006. Pursuant to the December 21 Order, both Nuclear Management Company (NMC) and the Staff filed their Replies on January 9, 2006.⁷

According to the Petitioners' Response, Mr. Basdekas had agreed to consult for Petitioners on the issue of PTS sometime in July 2005,⁸ but on August 22, 2005, he declined to participate as their expert witness.⁹ According to Petitioners, they have been seeking a replacement for Mr. Basdekas, but have yet to hire one.¹⁰

On January 27, 2006, Petitioners filed their Motion to Stay, asking the Board to strike from the record the Replies from Staff and NMC and the email sent to the Board by Staff counsel. Additionally and alternatively, Petitioners moved to stay the proceedings in order to depose Staff attorney Susan Uttal and reply to the NMC and Staff Replies.

ARGUMENT

In their Motion to Stay, Petitioners parade a variety of baseless allegations and irrelevant arguments, supported neither in fact nor in law.¹¹ The Staff's argument will first

⁷ See "Reply to Petitioners' Response to Board December 21, 2005 Order Regarding Expert Opinion Allegedly Supporting Contention 1 - Palisades Reactor Embrittlement"; and "Reply to Petitioners' Response to Board Order" (Staff Reply).

⁸ Response at 3.

⁹ Response at 3.

¹⁰ Motion to Stay at 2 n.1

¹¹ Petitioners' baseless and frivolous attacks on Staff counsel should not be permitted by the Board. As the Commission recently noted: [T]he use of intemperate and disrespectful rhetoric . . . has no place in filings before the Commission or its Boards. . . . *Ad hominem* attacks do nothing to advance the petitioner's interests or the orderly administration of the Commission's adjudicatory processes, and will not be tolerated." *Nuclear Management Co, LLC* (Monticello Nuclear Generating Plant), CLI-06-06, sl. op. at 4, n. 18 (Feb. 2, 2006).

respond to the grounds cited by Petitioners, and then respond to their requested relief.¹²

As a preliminary matter, the motion was untimely,¹³ and Petitioners' failed to show good cause, or to state any reason whatsoever, for the untimeliness of their motion. As the Commission very recently made clear, untimely motions for which no good cause for delay is shown are "inexcusably late" are not to be considered.¹⁴

A. Staff Counsel's Communication With Demetrios Basdekas and Her Subsequent Notification to the Board Were Proper

1. Staff Counsel's Communication with Mr. Basdekas Was Proper

Petitioners' counsel unreasonably attacks Staff counsel for talking to Mr. Basdekas in a call initiated by Mr. Basdekas. Staff counsel did nothing wrong by talking to Petitioners' former expert.¹⁵ Petitioners' counsel cites to Rule 4.2 of the American Bar Association's (ABA's) Model Rules of Professional Conduct (Model Rules), which prohibits attorneys from communicating "about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter." Mr. Basdekas, however, was not a represented person and Petitioners never showed that he was; he was just an expert consulted by Petitioners who

¹² Petitioners also renew mention of claims of privilege regarding Attorney-Client Communications and Work-Product, but ineffectively pursue them by failing either to state the elements for these doctrines, or show which communications fall under which doctrines and how they so fit. Because Petitioners have added nothing substantive to their claims on these matters, Staff will not respond to them in the body of the argument.

¹³ As the Board noted in its January 30 Order, Petitioners had until January 19, 2006, to file this motion. However, some of the relief sought by Petitioners relates to an email sent by Ms. Uttal on December 20, 2005, which means that Petitioners had only until December 30, 2005, to file a motion to strike that communication. See 10 C.F.R. 2.323(a).

¹⁴ See *FirstEnergy Nuclear Operating Company* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-02, *11 n.36 (January 31, 2006) (declining to rule on the merits of an untimely motion for which no good cause was shown).

¹⁵ Attached to the Motion to Stay was a copy of an August 2, 2005 email from Mr. Basdekas to certain Petitioners and their attorney in which he said: "Let me reiterate that, even though I have been helping you with some technical aspects of PTS, I have not made a final decision as to whether I will participate as an expert witness in the Palisades proceedings."

contacted Staff counsel to correct the misimpressions given to the Board and the parties by Petitioners' counsel.

The ABA Standing Committee on Ethics and Professional Responsibility has declared that Rule 4.2 does not apply to expert witnesses. In a formal opinion, the Committee said that Model Rule 4.2 applies only to parties represented by counsel: "No Model Rule extends this protection to witnesses or explicitly treats expert witnesses differently from fact witnesses."¹⁶ More broadly, the Committee said that of the universe of ABA ethical rules implicated by *ex parte* contacts with opposing parties' experts, "[n]one of these Model Rules, or their predecessors in the Model Code, establishes an automatic bar to lawyers initiating contact with the opposing parties' experts."¹⁷

Formal Opinion 93-378 of the ABA also considers other possible ethical problems arising from *ex parte* contacts with expert witnesses for opposing parties, but none of these apply to the current situation. Mr. Basdekas had read the transcript and knew he was speaking to an attorney representing the NRC in the Palisades proceeding, so no deception about Staff counsel's position was involved. Staff counsel never told Mr. Basdekas that he must discuss the case with her, and in fact, the communication to Ms. Uttal was initiated by Mr. Basdekas on his own initiative.

Staff counsel also did not contact Mr. Basdekas to inquire about confidences of the opposing party or the work product of that party's lawyer, or to engage in discovery barred by the rules. Mr. Basdekas contact with Ms. Uttal on his own initiative revealed the true nature of his work for Petitioners, without prodding from counsel.

¹⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-378 (1993) (discussing the ethics consequences of *ex parte* contacts with expert witnesses for other parties).

¹⁷ *Id.*

Furthermore, the status of Mr. Basdekas' employment with Petitioners was not confidential; the NRC regulations require with the filing of the proposed contention an identification of experts and their opinions that support the Petitioners' position on the issue and upon which the Petitioner intends to rely at hearing.¹⁸ Statements concerning the meaning of the opinions attributed to Mr. Basdekas were also not confidential; these opinions had, presumably, already been revealed in Petitioners pleadings and are the subject of the decision the Board is going to make.¹⁹

2. Staff Counsel Properly Notified the Board and the Parties of the Statements made by Mr. Basdekas

Petitioners' counsel also attacks Staff counsel for notifying the Board of the communications made to her by Mr. Basdekas, ignoring the fact that by so doing, she only performed her duty as an officer of the Court. The short answer is that Petitioners' counsel neglected his obligation to use one of the many opportunities he had to correct the record on a matter material to the proceeding. The status of Mr. Basdekas as expert witness is material to determining the admissibility of contentions under 10 C.F.R. 2.309 because contentions require an adequate basis in fact and the identification of expert opinions upon which petitioners base their position and intend to rely at hearing.²⁰ Furthermore, the work of Mr. Basdekas came up several times during the course of oral argument, and Judge Young directly asked Petitioners' counsel whether Petitioners had an expert who could testify about Palisades.²¹ Petitioners' counsel was clearly aware of the materiality of Mr. Basdekas' role, and the fact that he had

¹⁸ 10 C.F.R. 2.309(f)(1)(v)

¹⁹ Even assuming any of these statements could be considered confidential, confidentiality would be subordinate to the need to inform the tribunal of the misrepresentation of facts

²⁰ See 10 C.F.R. 2.309(f)(1)(v).

²¹ Oral Argument Tr., (Nov. 3, 2005), p. 48.

declined to be their expert witness more than two months prior, and chose not to disclose these facts.

Petitioner's counsel, however, went further than failing to alert the Board to relevant new information. When Judge Young, at oral argument, asked whether Petitioners had an expert able to testify about Palisades, Petitioners' counsel replied affirmatively.²² While discussing the embrittlement contention during oral argument on November 3, 2005, the following **exchange** occurred:

ADMIN. LAW JUDGE YOUNG: No, no. What I'm 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? What difference does that make considering the standard that, if we look at, for example, 10 C.F.R. 2.309(f) Subsection 4, "You must demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that's involved in the proceeding."²³

This affirmation was, it turns out, inaccurate even at that time. It is hardly credible to assume that Petitioners' counsel was uninformed as to the status of his own expert. Tellingly, Petitioners' Motion to Stay entirely ignores this misrepresentation, which was pointed out by both NMC and Staff in their January 9 Replies. This misrepresentation to the Board violates ABA Model Rule 3.3, which forbids lawyers from "knowingly mak[ing] a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the

²² *Id.*

²³ *Id.* at 48 (emphasis added).

tribunal by the lawyer.”²⁴

The communication Mr. Basdekas made to Staff counsel called into question the Petitioners’ forthrightness and was relevant to the disposition of matters before the Board. Staff counsel had both an ethical obligation to notify the Board of such conduct related to the proceeding and an “absolute obligation to alert adjudicatory bodies directly regarding ... new information that is relevant and material to the matters begin adjudicated.”²⁵ Unlike Petitioners’ counsel, Ms. Uttal performed her obligations in both respects.

Petitioners also object to Staff counsel’s decision to notify the Board by email rather than through a motion. Petitioners cite no authority, however, that requires all communications to the Board be made by motion. Such authority, of course, does not exist because motions are proper only when relief is sought.²⁶ Staff did not desire or seek any relief; Staff desired only to inform the Board and the parties of important new information and let the Board choose what action, if any, to take.

B. The Staff Made Proper Use of Mr. Basdekas’ Statements to Staff Counsel in its Reply

Petitioners object to the Staff’s use of Mr. Basdekas’ statements to Staff counsel, but this objection, likewise, has no merit. It is the Petitioners, not the Staff, who have the burden of proving the worthiness of their contentions. Their characterization of Mr. Basdekas’ opinions regarding embrittlement at Palisades and of his employment with them have come under attack from Mr. Basdekas himself, as communicated to the Board by Staff counsel. Furthermore, the substance of Mr. Basdekas’ statements has been either confirmed by Petitioners’ own submissions or has been ineffectively contradicted by them.

²⁴ *Model Rules of Prof’l Conduct* R. 3.3(a)(1).

²⁵ *Browns Ferry*, 15 N.R.C. at 1394.

²⁶ See 10 C.F.R. 2.323(b) (requiring that motions “state with particularity the grounds and the relief sought.”)

Petitioners' Motion to Stay itself includes an example of a failed attempt to contradict Mr. Basdekas.²⁷ Petitioners included with their motion an email from Mr. Basdekas containing suggested changes to the embrittlement contention. Petitioners' counsel claims that "Petitioners used Basdekas' version of the embrittlement contention – which adds a specific reference to Palisades – precisely as Mr. Basdekas had written it."²⁸ This is apparently yet another misrepresentation to the Board by Petitioners' counsel. Comparing Mr. Basdekas' suggested changes with the embrittlement contention as filed reveals that the final version was not "precisely as Mr. Basdekas had written it." Based on the Staff's comparison of the two documents, except for two minor changes, the final version contains *none* of the changes Mr. Basdekas suggested. *Compare* Petition at 4, *with* Motion to Stay (enclosed email from Demetrios Basdekas).

Furthermore, contrary to the representation by Petitioners' in their Motion to Stay, the version of the proposed contention sent by Mr. Basdekas did not add a specific reference to Palisades. The version sent to Mr. Basdekas *already* contained a reference to Palisades.²⁹ Mr. Basdekas' suggested change regarding the Palisades reference clarified that embrittlement increases for all nuclear plants, but this change was not incorporated in the contention as filed.³⁰ In an effort to contradict the statements Mr. Basdekas made to Staff counsel, Petitioners only confirm their truth.³¹

²⁷ The Staff Reply of January 9 contains further arguments on this score in addition to those made here.

²⁸ Motion to Stay at 5.

²⁹ See Motion to Stay (enclosed email from Demetrios Basdekas).

³⁰ *Compare* Petition at 4, *with* Motion to Stay (enclosed email from Demetrios Basdekas).

³¹ Staff also points out that in the email sent to Petitioners, Mr. Basdekas characterizes his work for them as "helping [them] with some technical aspects of PTS," rather than as performing any analysis specific to Palisades.

Finally, the Staff made proper use of Mr. Basdekas' revelations because the Staff's earlier responses to the Board were based on circumstances that no longer applied and on the misrepresentations of Petitioners' counsel. The new understanding of the facts required a new application of those facts to the contention requirements in 10 C.F.R. 2.309.

C. The Staff's Objection to the Landsman Affidavit Was Proper and Did Not Constitute Intimidation

Petitioners baselessly accuse Staff of "intimidating" witnesses by objecting to those portions of the affidavit by another prospective witness, Mr. Ross Landsman, containing his opinions.³² To begin with, the Landsman affidavit is irrelevant to the embrittlement contention, and the Staff's objection to portions of that affidavit is irrelevant to Mr. Basdekas' work for Petitioners. The Staff never objected to the testimony of Mr. Basdekas for the reasons given in objecting to certain opinions of Mr. Landsman. The Staff did not so object because Mr. Basdekas' testimony does not fall under the restrictions on certain testimony by former federal employees on the particular matters they worked on during their employment. See 18 U.S.C. § 207.

Petitioners make much of the fact that the Staff did not in its Reply, mention its objection to portions of the Landsman affidavit. The Staff's decision in this regard reflected its choice to focus its Reply on the substance of the contention at issue rather than on red herrings thrown about by Petitioners. Furthermore, Staff fails to see how its effort to ensure compliance with the provisions of the United States Code, which Petitioners' counsel apparently believes constitutes "intimidation" and a "threat,"³³ could possibly have frightened Mr. Basdekas into contacting Staff

³² Petitioners inaccurately characterize the Staff's objection as seeking to bar Mr. Landsman from testifying. Staff's objection was limited to Mr. Landsman's opinions on matters he had worked on while employed by the NRC. The Staff never asked that Mr. Landsman be barred from testifying. See Motion to Stay (enclosed email from Demetrios Basdekas).

³³ See Motion to Stay at 3.

counsel; Mr. Basdekas had declined to be Petitioners' expert *four months* prior to calling Staff counsel and over *two months* prior to the objection Staff made at oral argument in November, 2005.

D. Petitioners' Requested Relief is Improper and Should Not Be Granted in Whole or in Part

In their Motion to Stay, Petitioners ask for the following relief: (1) Staff counsel's email communication to the Board and the Replies of Staff and NMC should be stricken, and (2) "additionally and alternatively," the proceedings should be stayed to allow Petitioners to depose Staff counsel and respond to the Staff and NMC Replies. As the arguments raised previously make clear, Petitioners have no grounds for relief of any kind, much less relief of the extreme nature they request. Their request is also "inexcusably late," without good cause shown for untimely filing. Any and all requested relief should be denied.

Petitioners' request to strike certain pleadings and communications is improper. Motions to strike have already been filed in this proceeding, and the Board at oral argument stated that under modern practice, pleadings and evidence should not be stricken from the record because the record needs to be preserved for possible appeals.³⁴ The Board indicated its willingness to take such motions as requests not to consider any improper thing contained in the subject pleadings or documents.³⁵ But, as shown above, there is nothing improper in either the email from Staff counsel or its Reply. Therefore, the request to strike, in whatever form it is considered, should be denied.

Petitioners' request to stay the proceedings and depose Ms. Uttal is also improper. If Petitioners wish to determine more about the communications Mr. Basdekas made to Ms. Uttal, they should ask Mr. Basdekas; he is *their* former expert and, significantly, he is the individual

³⁴ Oral Argument Tr., (Nov. 3, 2005), pp. 29-30.

³⁵ *Id.* at 24.

who initiated the contact. Deposing the attorney for a party is a drastic measure that should not be undertaken lightly, and certainly not in this instance involving irrelevant collateral matters.

Finally, Petitioners should not be allowed to respond to the Staff Reply. The December 21 Order directed all parties to file one pleading concerning the recent revelations regarding Mr. Basdekas, and each party had its bite at the apple. Petitioners are already using this untimely filed motion as a second chance to argue their case and are asking for a third. This, and all other requested relief, should be denied.

CONCLUSION

In their Motion to Stay, Petitioners baselessly accuse NRC Staff of procedural and ethical irregularities. For the reasons discussed above, Petitioners' motion is inexcusably late, is without ground in fact or law, and seeks improper remedies. Petitioners' motion should be denied.

Respectfully submitted,

/RA/

Michael A. Spencer
Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of February, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMPANY, LLC)	
)	ASLBP No. 05-842-03-LR
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF ANSWER TO PETITIONERS' MOTION TO STRIKE STAFF AND NMC RESPONSES TO BOARD ORDER, TO STAY PROCEEDINGS AND TO TAKE DEPOSITION OF NRC STAFF COUNSEL" in the above-captioned proceeding have been served on the following through deposit in the NRC's internal mail system, with copies by electronic mail, as indicated by an asterisk, by U.S. mail, first class, as indicated by double asterisk, with copies by electronic mail, or by U.S. mail, first class, as indicated by triple asterisk, this 3rd day of February, 2006:

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