

February 3, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

Before the Atomic Safety and Licensing Board

February 3, 2006 (10:18am)

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

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

NUCLEAR MANAGEMENT COMPANY'S ANSWER TO PETITIONERS' MOTION TO STRIKE, STAY PROCEEDING AND TAKE DEPOSITION

Nuclear Management Company ("NMC") hereby answers and opposes Petitioners' 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 (Jan. 27, 2006) (hereinafter referred to as "Petitioners' Motion"). Petitioners' Motion is baseless and should be denied.

Petitioners make unfounded assertions that NMC has "smeared" Petitioners (Petitioners' Motion at 2) and that NMC is arguing for a standard of conduct which has no basis in the NRC rules (*id.* at 3). To the contrary, NMC cited precedent requiring parties to an NRC proceeding to alert adjudicatory bodies to new information that is relevant and material to matters being adjudicated. Nuclear Management Company's Reply to Petitioners' Response to Board December 21, 2005 Order Regarding Expert Opinion Allegedly Supporting Contention 1 – Palisades Reactor Embrittlement (Jan. 9, 2006) ("NMC Reply") at 2, citing Tennessee Valley Authority (Browns Ferry Nuclear Plant, Units 1, 2 and 3), ALAB-677, 15 N.R.C. 1387, 1394 (1982). In light of this obligation, NMC stated that "it clearly would have been appropriate for Petitioners to have apprised the Board that Mr. Basdekas was no longer serving as their expert." *Id.* at 2-3. It is remarkable that Petitioners take offense at such a mild and reasonable admonishment.

Rather than acknowledging this obligation, Petitioners attempt to deflect criticism of their inaction by wrongfully accusing NRC Staff counsel of violating an ethical rule preventing communication with a party represented by counsel (Petitioners' Motion at 5). Mr. Basdekas was not and is not a party to this proceeding. Moreover, he does not appear to have ever been represented by Petitioners or their counsel as a client, so the restrictions on communicating with parties represented by counsel is not even applicable. Further, Mr. Basdekas was not even Petitioners' expert. When Mr. Basdekas initiated the call to NRC Staff counsel, he informed NRC Staff counsel that he had declined to serve as Petitioners' expert. Consequently, NRC Staff counsel violated no ethical rule in receiving this call and properly communicated what she had learned to the Board and parties.

Petitioners also fault the NRC Staff with procedural improprieties for not communicating this information in a motion. Petitioners' Motion at 3-4. Because the NRC Staff was not requesting the Board to take any action, a motion was unnecessary.

Finally, Petitioners suggest that the NRC Staff may have intimidated Mr. Basdekas by expressing concern at the Pre-hearing Conference (see Tr. at 29-30) that the provision of expert opinion of another former NRC employee, Dr. Landsman, would violate 18 U.S.C. § 207. Petitioners' Motion at 3. There is nothing inappropriate with the NRC Staff raising such an objection. The NRC has a right to prevent ethical violations by its former employees. Further, because this objection was not directed to Mr. Basdekas and not even raised until the prehearing conference – more than 2 months after Mr. Basdekas had declined to serve as Petitioners' expert – there is no basis for Petitioners to characterize this objection as either a "threat" or an attempt to intimidate Mr. Basdekas.

In light of these facts, Petitioners' attack on NRC Staff counsel is frivolous and provides no basis for their request to depose NRC Staff counsel. Petitioners have admitted that "[o]n August 22, 2005, Mr. Basdekas indicated that he could not serve further as Petitioners' expert on

embrittlement for personal reasons.” Petitioners’ Response to Board Order on Matter of Expert Opinion (Jan. 3, 2006) at 3.¹ Therefore, there is no dispute concerning the accuracy of NRC Staff counsel’s report, and certainly Petitioners are not precluded from speaking to Mr. Basdekas if they want further information on his conversation with Staff counsel. In any event, discovery is generally limited to disclosure of relevant documents subsequent to the admission of contentions (10 C.F.R. § 2.337), and depositions of NRC employees are not permitted (10 C.F.R. § 2.709(a)(1)).

Likewise, there is no basis to strike the responses of NMC and the NRC Staff to the Board’s December 2005 Order, or to stay this proceeding. Petitioners offer no authority or justification supporting these requests and have certainly made no showing on the factors governing the issuance of stays. Sequoyah Fuels Corporation and General Atomics (Gore, OK, Site), CLI-94-9, 40 NRC 1, 6 (1994) (*stating* “The stringent four-part standard set forth in [2 C.F.R. § 2.342(e)] makes it difficult for a party to obtain a stay of any aspect of a Licensing Board proceeding.”) (emphasis added)²

Petitioners suggest that “the ASLB may be losing control of these proceedings by allowing procedural and ethical irregularities” (Petitioners’ Motion at 2) and assert that “this license extension proceeding has been hijacked by what Petitioners submit is baseless consideration of an issue not properly before the Board” (*id.* at 8). Clearly, whether Petitioners’ contention is supported by any expert opinion is a matter properly considered by the Board (see 10 C.F.R. § 2.309(f)(v)), and the only irregularity in this proceeding has been Petitioners’ failure to inform the Board that Mr. Basdekas had declined to serve as Petitioners’ expert. It is unfortunate that, rather than recognizing they should have informed the Board of this

¹ See also Declaration of Alice Hirt (Jan. 27, 2006) at ¶5 (“[a]lthough Mr. Basdekas had long since resigned as an expert witness for the Petitioners-Intervenors by November 2005...”) (emphasis added).

² See also Dominion Nuclear Connecticut, Inc., (Millstone Nuclear Power Station, Units 2 and 3) LBP-04-15, 60 N.R.C. 81, 87 n.15 (2004); Pacific Gas & Electric Co., (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation) LBP-02-15, 56 N.R.C. 42, 47-48 (2002).

information, Petitioners instead make silly claims and requests that would only disrupt this proceeding further. Rather than brooking such disruption, the Board should deny Petitioners' Motion and, in the interest of maintaining a fair and orderly proceeding, proceed with the prompt issuance of its decision ruling on Petitioners' proposed contentions.

For all of the foregoing reasons, Petitioners' Motion should be denied.

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: February 3, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Nuclear Management Company's Answer to Petitioners' Motion to Strike, Stay Proceeding, and Take Deposition," dated February 3, 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 3rd day of February, 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

*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

*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

*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

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.
Michael A. Spencer
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
slu@nrc.gov; mas8@nrc.gov

*Kary Love, Esq.
Executive Business Center
348 Waverly Road, Suite 2
Holland, MI 49423
kary_love@yahoo.com

*Mr. Michael Keegan
Don't Waste Michigan
2213 Riverside Drive, NE
Grand Rapids, MI 49505
mkeeganj@comcast.net

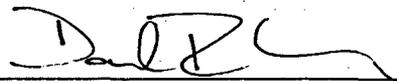
*Mr. Chuck Jordan
Green Party of Van Buren County
50521 34th Avenue
Bangor, MI 49013
jordanc@btc-bci.com

*Terry Lodge, Esq.
316 N. Michigan St., Suite 520
Toledo, OH 43624-1627
tjlodge50@yahoo.com

*Mr. Paul Gunter
Nuclear Information and Resource Service
1424 16th Street, N.W.
Suite 404
Washington, D.C. 20036
pgunter@nirs.org

*Ms. Alice Hirt
Western Michigan Environmental Action
Council
1415 Wealthy St., SE
Suite 280
Grand Rapids, MI 49506
alicehirt@charter.net

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


David R. Lewis