

March 27, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
NUCLEAR MANAGEMENT COMPANY) Docket No. 50-255-LR
)
(Palisades Nuclear Generating Station))

NRC STAFF'S BRIEF IN OPPOSITION TO
APPEAL FROM LBP-06-10

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(c), the staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in opposition to the Petitioners' appeal¹ from the decision of the Atomic Safety and Licensing Board (Board) in LBP-06-10, denying a hearing request and petition to Intervene filed by Nuclear Information and Resource Service, West Michigan Environmental Action Council, Don't Waste Michigan, the Green Party of Van Buren County, the Michigan Land Trustees, and individuals belonging to these organizations (collectively, Petitioners).²

STATEMENT OF THE CASE

This case arises from the application by Nuclear Management Company (NMC) to renew the operating license for Palisades Nuclear Generating Station (Palisades) for an additional 20 years.³ On June 8, 2005, the NRC published a notice of acceptance for docketing

¹ Petitioners Notice of Appeal from ASLB Denial of Hearing, and Supporting Brief, (Mar. 17, 2006) (Appeal).

² Request for Hearing and Petition to Intervene, (Aug. 8, 2005) (Petition).

³ See Letter from Daniel J. Malone, Site Vice President, Palisades Nuclear Plant, [NMC], to U.S. NRC (Mar.22, 2005) (Agencywide Documents and Access Management System ("ADAMS") Accession No. ML050940434).

and opportunity for hearing regarding the license renewal application.⁴ On August 8, 2005, Petitioners filed their Petition.

After a Board was established to preside over the proceeding, the Staff and NMC filed their responses to the Petition.⁵ On September 16, 2005, Petitioners filed a combined reply, in which it withdrew Contentions 5, 6, 9, 10, 11, and one of the two contentions numbered 8.⁶ On September 26, 2005, the Staff and NMC both filed motions to strike the Petitioners' Reply.⁷ Petitioners responded on October 6, 2005.⁸

⁴ See [NMC], Palisades Nuclear Plant; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-20 for an Additional 20-Year Period, 70 Fed. Reg. 33,533 (June 8, 2005).

⁵ See NRC Staff Answer Opposing Petition to Intervene and Request for Hearing (Sept. 2, 2005) (Staff Answer); [NMC]'s Answer to the August 8, 2005 Request for Hearing and Petition to Intervene (Sept. 2, 2005) (NMC Answer).

⁶ See Combined Reply to NRC Staff and [NMC] Answers, (Sept. 16, 2005) (Combined Reply).

⁷ See NRC Staff Motion to Strike Petitioners' Combined Reply to NRC Staff and [NMC] Answers to Petitioner to Intervene and Request for Hearing, (Sept. 26, 2005); [NMC]'s Motion to Strike Petitioners' September 16, 2005 Combined Reply to NRC Staff and [NMC] Answers, (Sept. 26, 2005).

⁸ Petitioners' Combined Response In Opposition to NRC Staff and [NMC] Motions to Strike, (Oct. 6, 2005).

Oral argument on the contentions was held November 3-4, 2005.⁹ On March 7, 2006, the Board issued LBP-06-10, Memorandum and Order (Ruling on Standing, Contentions, and Other Pending Matters), in which it denied the Petitioners' motions and objections, held that the Petitioners had standing, but had not proffered an admissible contention, and terminated the proceeding. LBP-06-10, slip op. at 60. On March 17, 2006, the Petitioners filed their notice of appeal and supporting brief.

STATEMENT OF THE ISSUES

The Petitioners request that the Commission reverse the Board's decision denying admission of Contention 1, regarding failure to address embrittlement and pressurized thermal shock (PTS), and Contention 3, pertaining to lack of spent fuel storage and regulatory violations regarding the concrete pads used for dry cask storage of spent fuel.

⁹ Subsequent to oral argument, on December 20, 2005, Staff counsel received an unsolicited telephone call from Demerits Basdekas, who had been named by the Petitioners as an expert witness in support of Contention 1. The Board and the Parties were notified via e-mail regarding the call. See E-mail from Susan L. Uttal, Counsel for NRC Staff to Board Members and Parties, (Dec. 20, 2005). Mr. Basdekas advised that while he had assisted the Petitioners, he had declined to serve as their expert. In addition, because he did not have any data related specifically to Palisades, he had only advised Petitioners on matters of generic application. The Board issued an Order requesting that the Petitioners respond to the information provided by Staff counsel. Petitioners filed their response and the Staff and NMC replied. See Petitioners' Response to Board Order on Matter of Expert Opinion (Jan. 3, 2006) (Petitioners' Response); NRC Staff Reply to Petitioners' Response to Board Order (Jan. 9, 2006); [NMC]'s Reply to Petitioners' Response to Board December 21, 2005 Order Regarding Expert Opinion Allegedly Supporting Contention 1 – Palisades Reactor Embrittlement (Jan. 9, 2006). On January 27, 2006, Petitioners filed a motion to strike the Staff and NMC's January 9 replies, to stay the proceedings and to depose Staff counsel. See 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) (Motion to Stay). The Staff and NMC responded on February 3, 2006. See 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 (Feb. 3, 2006); [NMC]'s Answer to Petitioners' Motion to Strike, Stay Proceeding and Take Deposition (Feb. 3, 2006). The Board denied the Motion for Stay in LBP-06-10. See slip op. at 60.

LEGAL STANDARDS

A. Legal Standards for the Admission of Contentions

To gain admission to a proceeding as a party, a petitioner, in addition to establishing standing, must proffer at least one contention that satisfies the admissibility requirements of 10 C.F.R. § 2.309(f). See 10 C.F.R. § 2.309(a). See also, e.g., *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 and 3), CLI-99-11, 49 NRC 328, 333 (1999). For a contention to be admissible, the petitioner must satisfy the following six requirements:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the . . . petitioner's position on the issue and on which the petitioner intends to rely at the hearing, together with references to the specific sources and documents on which the . . . petitioner intends to rely to support its position on the issue; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the . . . licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

10 C.F.R. § 2.309(f)(1)(i)-(vi). These contention requirements are "strict by design." *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001). A contention that fails to comply with any of these requirements will not be admitted for litigation. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage

Installation), CLI-99-10, 49 NRC 318, 325 (1999); Changes to Adjudicatory Process [Final Rule], 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004). The petitioner must do more than submit bald or conclusory allegations of a dispute with the applicant. *Millstone*, CLI-01-24, 54 NRC at 358. There must be a specific factual and legal basis supporting the contention. *Id.* at 359. A contention will not be admitted if it is based only on unsupported assertions and speculation. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner fails to provide the requisite support for its contentions, then a Licensing Board may neither make factual assumptions that favor the petitioner, nor supply information that is lacking. *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 56 (2004) (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)).

In addition, a reply filed by a petitioner cannot expand the scope of the arguments set forth in the original petition or rely on bases and documents that could have been submitted in the original petition. See *LES*, LBP-04-14, 60 NRC 40 (2004), *aff'd* CLI-04-25, 60 NRC 223, *reconsideration den'd* CLI-04-35, 60 NRC 619. “Any reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or the NRC staff answer. . . .” Statement of Consideration, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (January 14, 2004). Reply filings that “essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in [10 C.F.R.] section 2.309(c), (f)(2), cannot be considered in determining the admissibility of their contentions.” *LES*, LBP-04-14, 60 NRC at 58. As the Commission stated in affirming *LES*:

[T]he reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs. . . . As the Commission has stressed, our contention admissibility and timeliness requirements “demand a

level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset. . . . As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount.

LES, CLI-04-25, 60 NRC at 224-25 (internal footnotes omitted).

B. License Renewal

The scope of a license renewal proceeding with respect to technical issues is limited by 10 C.F.R. Part 54. See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-10 (2001); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC ___, slip op. at 25-28 (March 7, 2006); [Final Rule], Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995). The focus of Part 54 safety review is on “the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation.” 60 Fed. Reg. at 22,464. As the Commission has explained, license renewal review focuses on “plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation.” *Turkey Point*, CLI-01-17, 54 NRC at 10 (citing 60 Fed. Reg. at 22,469) (alteration in CLI-01-17).

In contrast, issues relating to a plant’s “current licensing basis” are ordinarily beyond the scope of a license renewal review, because “those issues already [are] monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.” *Id.* at 8. The current licensing basis as defined in the regulations includes the various Commission requirements and licensee’s written commitments applicable to a particular plant that are docketed and in effect. See 10 C.F.R. § 54.3. Therefore, a contention that does not raise a genuine dispute of fact or law with respect to the “detrimental effects of aging” during the period of extended operation

has not demonstrated that it is within the scope of license renewal and therefore, necessarily, has not raised an issue material to license renewal.

DISCUSSION

A. The Licensing Board was Correct in Holding Contention 1 Inadmissible

The Petitioners make one argument in support of their appeal of the dismissal of Contention 1: They assert that the Board should not have limited itself to consideration of the information contained in the Petition, but should also have considered the information in the Petitioners' Combined Reply. Appeal at 3. Commission regulations and case law require otherwise.

It is the Petitioners' burden to demonstrate the admissibility of their contention. *LES*, LBP-04-14, 60 NRC at 56 (citing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)). Petitioners have failed to do so. Petitioners must show compliance with the requirements of 10 C.F.R. § 2.309(f)(1) in their initial pleading. See *LES*, CLI-04-25, 60 NRC at 224-5. The Petitioners have not done so. Petitioners are not permitted to provide additional support and bases for the contentions in their reply pleadings. Petitioners have attempted to do just that in their Combined Reply. But the replies are designed to answer arguments raised in the responses of other parties. See Statement of Consideration, Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,203 (January 14, 2004). New evidence that could not have been provided before is the only exception to this rule. See 10 C.F.R. § 2.309(f)(2). Here, there was no attempt to demonstrate that the information provided in the Combined Reply could not have been provided in the Petition. In fact, all of the information was available at the time the Petition was filed and should have been contained therein. Thus, the Board was correct in limiting its consideration to the

bases and support provided in the Petition and to any replies to the “legal or logical arguments presented in the applicant/licensee or the NRC staff answer.” *Id.*

It is clear that Contention 1, whether or not the Combined Reply is considered, does not meet the criteria in 10 C.F.R. § 2.309(f)(1). The contention is unsupported by facts or expert opinion.¹⁰ As the Board noted, it does not explain “with specificity, particular safety or legal reasons requiring rejection of the contested [Application].” Order, slip op. at 37, *citing Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 359-60 (2001). In addition, as stated by the Board, the Contention provides no expert or documentary support for any of the claims specific to Palisades. Order, slip op. at 38. The contention is generic and non-specific. *Id.* Nor does the contention provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of fact or law. *Id.* at 38-39. Thus, the contention does not meet the criteria of 10 C.F.R. § 2.309(f)(1)(ii), (v) and (vi).

The Board was correct in refusing to consider the additional information regarding Mr. Basdekas that could have been submitted in the Petition, but was not. But, even if the Board had considered the information in the subsequent pleadings regarding Mr. Basdekas’s input, the information does not add support for Contention 1. Whether or not Mr. Basdekas is an expert witness for the Petitioners, Contention 1 does not meet the criteria for admission under 10 C.F.R. § 2.309(f), in that it does not provide a concise statement of the alleged facts or

¹⁰ Petitioners assert that Demetrios Basdekas was their expert when Contention 1 was drafted and point to “extensive evidence” of his involvement in drafting the contention. Appeal at 2. But the “extensive evidence” alluded to is not in the Petition. Nor, for that matter, is it in the Combined Reply. Ignoring the Commission’s clear holding in *LES*, the Petitioners assert that the Board should have considered the information regarding Mr. Basdekas submitted in the Combined Reply. *Id.* at 2-3. See *also*, discussion of *LES*, *supra.*, at 5-6. The Commission has made it abundantly clear that a petitioner must abide by the regulations, file at least one contention that meets all the requirements of 10 C.F.R. § 2.309 in a timely manner, and cannot wait until its reply filing to raise new issues and provide support that could have and should have been submitted in its initial filing. See *LES*, CLI-04-25, 60 NRC at 224-25.

expert opinions in support of the petitioners' position or any references to specific sources and documents on which the petitioners intend to rely. Nor does it demonstrate that a genuine dispute exists with the licensee on a material issue of law or fact, with references to specific portions of the application disputed. As discussed below, it is constructed of unsupported, largely generic statements. It is, therefore, inadmissible and the Board was correct in rejecting the contention.

B. The Board was Correct in Holding Contention 3 Inadmissible

Contention 3 is inadmissible because it fails to raise a genuine dispute of fact that would be material to and within the scope of license renewal. See 10 C.F.R. § 2.309(f)(1)(iii), (vi). To be admissible, contentions in a license renewal proceeding must concern the "detrimental effects of aging." *Turkey Point*, CLI-01-17, 54 NRC at 7. Contention 3 concerns the lack of space to store spent fuel and asserts that the dry cask storage pads used at the independent spent fuel storage installation (ISFSI) at Palisades do not meet the regulations. Order, slip op. at 45-46. To produce an admissible contention within the scope of this proceeding, the Petitioners needed to explain their contention how their concerns regarding the concrete pads are indeed aging-related. See 10 C.F.R. § 2.309(f)(1)(iii); see also Order, slip op. at 40. Petitioners have failed to do so. As the Board held, Contention 3 is outside the scope of license renewal. *Id.* at 48-49. Consequently, the contention was properly found to be inadmissible.

CONCLUSION

The Board was correct in denying admission of Contentions 1 and 3. Therefore, Petitioners' appeal of LBP-06-10 should be denied.

Respectfully submitted,

/RA/

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 27th day of March, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S BRIEF IN OPPOSITION TO APPEAL FROM LBP-06-10" 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 27TH day of March, 2006:

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