

July 3, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

Before the Commission

July 3, 2006 (11:37am)

In the Matter of )  
 )  
Nuclear Management Company, LLC ) Docket No. 50-255-LR  
 )  
(Palisades Nuclear Plant) )

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**NUCLEAR MANAGEMENT COMPANY'S RESPONSE TO  
PETITIONERS' NOTICE OF PERTINENT NEW CASE LAW**

Nuclear Management Company ("NMC") hereby responds to the "Notice of Pertinent New Case Law Affecting Proceeding; Request for Redraft of EIS, Additional Comment Period, and for New Period for Receipt of Contentions on Terrorism" ("Notice"), which a number of organizations<sup>1</sup> filed on June 22, 2006 in the Palisades license renewal proceeding. Relying on the recent decision of the U.S. Court of Appeals for the Ninth Circuit in San Luis Obispo Mothers for Peace v. NRC, No. 03-74628, slip op. (9th Cir. June 2, 2006), the Notice requests that the Commission complete a NEPA analysis of the effects of various terrorist attacks on Palisades, expose this analysis to public comment in an extended or re-opened public comment period, and establish a new deadline for contentions concerning terrorism to allow resubmittal of a previously withdrawn contention on terrorism. As discussed below, none of these requests has merit.

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<sup>1</sup> Several of the organizations – 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 – had petitioned to intervene and requested a hearing in the Palisades license renewal proceeding. The Commission recently affirmed the denial of that request. Nuclear Management Co. LLC (Palisades Nuclear Plant), CLI-06-17, 63 N.R.C. \_\_, slip op. (June 23, 2006). The Notice states that the other submitting organizations participated in the submittal of comments on the draft environmental impact statement for the Palisades license renewal.

The Notice's request for the Commission to consider the effects of various terrorist attacks on Palisades is inconsistent with the NRC rules and case law governing license renewal proceedings. The Commission has ruled repeatedly that terrorism is beyond the scope of a license renewal proceeding. Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 638 (2004); Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2), CLI-02-26, 56 N.R.C. 358, 363 (2002). As stated by the Commission in Millstone, "[s]ecurity issues at nuclear power plants, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding." Millstone, CLI-04-36, 60 N.R.C. at 638. Issues of terrorism "are, by their very nature, directly related to security and are, therefore, under our rules, unrelated to 'the detrimental effects of aging.'" McGuire, CLI-02-26, 56 N.R.C. at 364. Thus, these issues "are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding." Id.

Terrorism is similarly not within the scope of any of the NEPA issues that must be addressed in this proceeding pursuant to 10 C.F.R. § 51.53(c). In this regard, the Commission has explicitly ruled "that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts, such as the [September 11, 2001, attacks], on a case-by-case basis in conjunction with commercial power reactor license renewal applications." Id. at 365. More generally, the Commission has held that terrorism is not cognizable under NEPA. Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 357 (2002); Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3), CLI-02-27, 56 N.R.C. 367 (2002).

In effect, the Notice asks the NRC to overturn this precedent by "consider[ing] *San Luis Obispo Mothers* as controlling precedent" (Notice at 3), but the Ninth Circuit's decision is

nothing of the sort. The Court has not yet issued its mandate,<sup>2</sup> so this decision currently has no effect. Furthermore, the claim that the Ninth Circuit is “the only court to have scrutinized the NRC’s policy” of not considering acts of terrorism under NEPA (Notice at 3) is wrong. The Ninth Circuit’s decision is inconsistent with preexisting judicial precedent – Limerick Ecology Action v. NRC, 869 F.2d 719, 741-44 (3d Cir. 1989) – which upheld the NRC’s determination that the risk of sabotage could not be assessed meaningfully and therefore was unlitigable. Therefore, even if the Ninth Circuit’s decision were to become effective, there would be a split in the circuits. In short, contrary to the claims made by the Notice, San Luis Obispo is not controlling precedent.

Moreover, even if the Ninth Circuit’s decision were controlling, it would not impact license renewal proceedings, because the Commission has expressly held:

Even if we were required by law to consider terrorism under NEPA, the NRC has already issued a Generic Environmental Impact Statement (“GEIS”) that considers sabotage in connection with license renewal. . . . The GEIS concluded that, if such an event were to occur, the resultant core damage and radiological releases would be no worse than those expected from internally initiated events.

McGuire, CLI-02-26, 56 N.R.C. at 365 n.24 (emphasis added) (citations omitted). Based on the determination that the resultant core damage and radiological release from sabotage events “would be no worse” than those expected from internally initiated events, the GEIS expressly concludes that “the risk from sabotage . . . at existing nuclear power plants is small.” NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (1996) at

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<sup>2</sup> Nor has the time expired within which the NRC or the utility involved may seek rehearing, rehearing *en banc*, or Supreme Court review.

5-18 (emphasis added).<sup>3</sup> The Notice ignores this discussion in the GEIS, and provides no reason why it does not satisfy NEPA, as indeed it does.

It is well established that a NEPA analysis need not consider a particular scenario where the risk for that scenario has been bounded by the NEPA analysis performed by the agency, as done for terrorism in the GEIS. See, e.g., Hirt v. Richardson, 127 F. Supp. 2d 833, 839 (W.D. Mich. 1999) (a Department of Energy analysis of the risks associated with the shipping of plutonium was not arbitrary and capricious for failing to consider the possibilities of terrorism and sabotage because “the consequences of any such criminal act would not exceed those discussed in the [Environmental Assessment] for accidental destruction of the container.”) (emphasis added); South Carolina ex rel. Beasley v. O’Leary, 953 F. Supp. 699, 708 (E.D.S.C. 1996) (finding that the Department of Energy considered all “reasonably possible vulnerabilities” of a spent fuel rod storage basin by employing a “bounding’ analysis” that evaluated risks under a “worst case” scenario that “looked at the possible hazards as if the worst would occur”) (emphasis added); Sierra Club v. Watkins, 808 F. Supp. 852, 866-67 (D.D.C. 1991) (finding that analysis of risk based on a “generic port” that used “bounding values” to “conservatively” estimate risk of shipping spent nuclear fuel into the U.S. satisfied NEPA, such that analysis of risk of shipments into specific ports would not be required) (emphasis added).

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<sup>3</sup> The GEIS analyzed the potential radiological consequences resulting from severe accidents at nuclear plants, including the potential dose and adverse health effects from atmospheric radiological releases, fallout onto open bodies of water, and possible radiological releases to groundwater. GEIS at 5-12 – 5-95. In addition, the GEIS relied on a previous NRC study that examined the potential consequences resulting from internally and externally initiated severe accidents at five U.S. nuclear plants. GEIS at 5-13; NUREG-1150, Severe Accident Risks: and Assessment for Five U.S. Nuclear Power Plants (Dec. 1990). NUREG-1150 concluded that the severity and timing of containment failure or bypass was key in determining the consequences of a severe accident. NUREG-1150 at 9-1 (“If the containment function is maintained in a severe accident, the radiological consequences will be minor.”). In this respect, the NUREG-1150 analysis encompassed the range of “Important Mechanisms That Defeat Containment Function During Severe Accidents.” Id. at § 9.4.2. The NUREG-1150 analysis included risk estimates for early fatalities, latent cancer fatalities, average individual early fatalities, and average individual latent cancer fatalities and also included estimates of the frequency of a “large [radioactive] release” defined as a release that results “in one or more early fatalities.” Id. at 12-1, 12-6 (emphasis added).

Thus, the GEIS's determination that no separate NEPA analysis is required to evaluate the potential environmental impacts of a terrorist attack because the GEIS's analysis of severe accident consequences bounds the potential consequences that might result from a large scale radiological release, regardless of the initiating cause, is fully supported by the NEPA case law. Accordingly, even if the Ninth Circuit's San Luis Obispo decision were controlling, there is no need to redo the Palisades license renewal EIS to analyze the effects of a terrorist attack because the Commission has properly considered the "the risk from sabotage" and has found that the risk "is small." GEIS at 5-18 (emphasis added). See also Texas Utilities Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-260, 1 N.R.C. 51, 54 (1975) (it would be "wholly unreasonable" under NEPA's rule of reason to require an "elaborate analysis" for a proposed action that would "have little environmental impact").

Additionally, the Notice's request to redraft the Palisades license renewal EIS to consider severe accident risks stemming from terrorist attacks impermissibly challenges the Commission's regulations that embody the GEIS's generic determination that severe accident risks, regardless of initiating cause, are small and need not be considered in individual plant license renewal proceedings. In 10 C.F.R. § 51.53(c), the Commission "does not require [an applicant] broadly to consider severe accident risks" but rather has "left consideration of [severe accident mitigation alternatives] as the only Category 2 issue" concerning severe accidents. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-06, 53 N.R.C. 138, 160 (2001) (emphasis added). Accordingly, the Notice's request that the Commission redo the Palisades license renewal EIS to analyze severe accidents risks originating from various terrorist attacks impermissibly challenges the Commission's license renewal regulations on this ground as well. Id. at 160-61.

The Notice should also be denied because it is procedurally defective. Because the Commission's generic determination is beyond the scope of this proceeding, it may not be raised in this proceeding absent a petition for waiver meeting the requirements in 10 C.F.R. § 2.335. Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 N.R.C. 3, 12 (2001) ("In the hearing process, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. See 10 C.F.R. § [2.355].") (emphasis added). The Notice includes no such petition. Moreover, as reflected in Turkey Point, even if the Notice had alleged some significant, new information affecting this generic finding – which it did not – the appropriate course would be a petition for rulemaking. Id. ("Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking"). Indeed, given the significant policy considerations and the national nature of the terrorist threat, the individual discussion and adjudication sought by the Notice in the Palisades license renewal proceeding would appear highly undesirable.

In short, the Notice's request for a NEPA analysis of the effects of various terrorist attacks on Palisades must be denied on both substantive and procedural grounds. Furthermore, overturning the Commission's long-standing precedent that terrorism is not cognizable under NEPA, as requested by the Notice, would involve serious policy issues, not the least of which would be the national security implications of disclosing "various attack scenarios" in a public forum. Unlike the San Luis Obispo decision, in which the Court suggested that an analysis of the impacts of terrorism could be one that would not be publicized or adjudicated, here the Notice seeks both publication and adjudication of terrorist scenarios. Accordingly, the precipitous actions requested in the Notice are both unwarranted and inadvisable.

Finally, the Notice's request for a new contention filing deadline to allow resubmittal of a previously withdrawn contention on terrorism wholly lacks merit. The Commission's rules provide standards that must be met before new or amended contentions may be admitted, and these standards should not be circumvented by simply requesting a new schedule. If someone wishes to advance a new or amended contention after the initial filing deadline, that person must, under well-established Commission rules and precedent, both proffer the proposed contention to allow a determination of admissibility<sup>4</sup> and demonstrate compliance with the late-filing criteria in 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f). Where a petitioner fails to demonstrate compliance with these late-filing requirements, its request may be dismissed without further consideration. Baltimore Gas & Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 347 (1998); Boston Edison Co. (Pilgrim Nuclear Power Station), ALAB-816, 22 N.R.C. 461, 465-66 (1985).

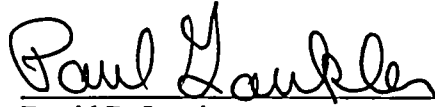
In sum, the Notice requests precipitous actions in response to a decision that is not yet law and ignores the generic finding of "small" impact for terrorist events that is already provided in the GEIS. It raises no significant new information that would alter the generic finding in the GEIS, and fails to demonstrate compliance with any of the standards that must be met to allow new or amended contentions after the initial filing deadline in a proceeding.

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<sup>4</sup> The Notice refers to Contention 11, which the petitioners for hearing withdrew after receiving answers from NMC and the NRC Staff. Both answers pointed out that, in addition to being beyond the scope of the proceeding, this contention was also inadmissible because it lacked any basis. Nuclear Management Company's Answer to the August 8, 2005 Request for Hearing and Petition to Intervene (Sept. 2, 2005) at 35-36; NRC Staff Answer Opposing Petition to Intervene and Request for Hearing (Sept. 2, 2005) at 35-36.

For all of the reasons discussed above, the Commission should deny all of the requests.

Respectfully submitted,

A handwritten signature in cursive script that reads "Paul Gaukler". The signature is written in black ink and is positioned above a horizontal line.

David R. Lewis

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Dated: July 3, 2006



**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Commission

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 Response to Petitioners' Notice of Pertinent New Case Law," dated July 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 3<sup>rd</sup> day of July, 2006.

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