

RAS 12854

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY, NUCLEAR
MANAGEMENT COMPANY, LLC and
ENTERGY NUCLEAR PALISADES LLC and
ENTERGY NUCLEAR OPERATIONS

Docket No. 50-255

(Palisades Nuclear Plant, License No. DPR-20)

RESPONSE OF CONSUMERS ENERGY COMPANY, NUCLEAR MANAGEMENT COMPANY, LLC AND ENTERGY NUCLEAR PALISADES LLC AND ENTERGY NUCLEAR OPERATIONS IN OPPOSITION TO PETITIONS BY VAN BUREN COUNTY, COVERT TOWNSHIP, COVERT PUBLIC SCHOOLS, VAN BUREN COUNTY INTERMEDIATE SCHOOL DISTRICT, VAN BUREN COUNTY DISTRICT LIBRARY, LAKE MICHIGAN COLLEGE AND SOUTH HAVEN HOSPITAL (COLLECTIVELY REFERRED TO AS "LOCAL UNITS"), THE MICHIGAN ENVIRONMENTAL COUNCIL, AND THE PUBLIC RESEARCH GROUP IN MICHIGAN FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING, REQUEST FOR EXTENSION OF TIME AND REQUEST FOR DISCOVERY

INTRODUCTION

On August 31, 2006, Consumers Energy Company ("Consumers"), Nuclear Management Company, LLC ("NMC"), Entergy Nuclear Palisades, LLC ("Entergy Nuclear Palisades"), and Entergy Nuclear Operations, Inc. ("ENO") requested the Nuclear Regulatory Commission ("NRC" or the "Commission") to transfer the Palisades Nuclear Plant ("Palisades") Facilities Operating License DPR-20 from Consumers and NMC to Entergy Nuclear Palisades to possess and own, and ENO, to possess, use, and operate Palisades pursuant to 10 CFR §50.80. Palisades is a 2565.4 megawatt thermal pressurized water reactor located near South Haven, Michigan. Palisades was issued an NRC operating license on March 24, 1971. The license transfer was requested as a result of the Asset Sale Agreement ("ASA")

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signed by Consumers and Entergy Nuclear Palisades on July 11, 2006, pursuant to which Entergy Nuclear Palisades agreed to purchase, and Consumers agreed to sell, Palisades and related assets. The ASA was previously provided to the Commission as part of the Application for license transfer. The Commission published a notice of the proposed license transfer in the Federal Register on November 16, 2006. 71 Fed. Reg. 66805-06 (Nov. 16, 2006).¹

On December 5, 2006, Van Buren County, Covert Township, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District, Lake Michigan College and South Haven Hospital (collectively referred to as "Local Units") filed a Petition with the NRC requesting leave to intervene in the proposed Palisades license transfer, a request for hearing, a request for an extension of time, and a request for discovery. In a separate action, on December 6, 2006, the Michigan Environmental Council ("MEC") and the Public Interest Research Group in Michigan ("PIRGIM") in Michigan (collectively referred to as "MEC/PIRGIM") filed with the NRC a request for hearing, a request for extension of time, and a request for discovery regarding the proposed Palisades license transfer.

The following is the consolidated response in opposition to the above-stated petitions of the Local Units and MEC/PIRGIM which we are filing today on behalf of Consumers, Entergy Nuclear Palisades, ENO, and NMC (collectively "Applicants").

¹ On October 31, 2006, Consumers, Entergy Nuclear Palisades, and ENO also requested an order from the Commission approving the transfer of the entire interest in NRC Facility Operating License No. DPR-6, and of the entire interest in Interim Spent Fuel Site Installation ("ISFSI") License No. SFGL-16, as required to consummate the transaction described in the ASA. Licenses No. DPR-6 and SFGL-16 pertain to the land and facilities known as Big Rock Point ("Big Rock").

ARGUMENT

I. LOCAL UNITS PETITIONERS AND MEC/PIRGIM LACK STANDING TO INTERVENE IN THIS PROCEEDING.

A. Local Units, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College and South Haven Hospital, Lack Standing

Local Units claim that they are Palisades “host communities and stakeholders in a range of issues incident to the proposed sale of Palisades, including, but not limited to, distribution of Palisades Decommissioning funds; the inadequacy of emergency preparedness related to the site; the likely continued operation until 2031 of Palisades (if the license is renewed); and the ultimate decommissioning of Palisades by a private party purchaser.” (Local Units Petition, p. 4). 10 CFR 2.309(d) confers standing on a state or “local governmental body” for license transfer proceedings involving “a facility located within its boundaries....” The Petition alleges that Palisades is located within portions of Petitioners Van Buren County and Covert Township and is approximately 4.5 miles from the City of South Haven, Michigan. The Petitioners concede (Local Units Petition, p. 7) that only Van Buren County and Covert Township are exempt from the requirement that Petitioners must satisfy certain standing factors before they may participate in this proceeding.

To establish standing, a Petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision in the proceeding. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 112. The alleged injury

must be one that will be (1) affected by the license transfer (2) is likely to be redressed by a favorable decision, and (3) that lies arguably within the “zone of interests” protected by the governing statute. *Power Authority of the State of New York*, (James A. FitzPatrick Nuclear Power Plant and Indian Plant Nuclear Generating Unit No. 3), CLI-00-22; 52 NRC 266 (2000); 2000 WL 1803178 (WL at p. 4). The Petitioners other than Van Buren County and Covert Township have failed to satisfy the requirements for standing.

1. Local Units' “range of issues” do not confer standing because they are not within the zone of interests affected by license transfers.

Local Units have described their interests in support of their standing as “a range of issues”, including “distribution of Palisades decommissioning funds; the inadequacy of emergency preparedness relating to the site; the likely continued operation until 2031 of Palisades (if the license is renewed); and the ultimate decommissioning of Palisades by a private party purchaser.” None of these “interests” are sufficient to confer standing to the Petitioners other than Van Buren County and Covert Township.

a. Distribution of Palisades decommissioning funds. The Petitioners’ interest in the “distribution of Palisades decommissioning funds” and “ultimate decommissioning of Palisades by a private party purchaser” are not interests that will be addressed by the license transfer. Petitioners don’t describe their interest in the distribution of Palisades decommissioning funds, and Mr. Sansoucy’s report does not shed any light on the Petitioners' concern with this issue. However, even if this interest were adequately described by the Petitioner, the Commission has previously ruled that “the Commission does not have statutory authority to determine the recipient of any excess decommissioning funds...”, and has refused to admit contentions on this issue. *Power Authority of the State of New York*, 52 NRC 266; 2000 WL 1803178 (WL at p. 28).

Thus, the distribution of Palisades Decommissioning funds cannot serve as a basis for standing because it is not an issue that will be decided by a favorable ruling in this matter, nor is it within the “zone of interests” protected by regulations regarding license transfers.

b. Continued operation of Palisades until 2031 if license is renewed and ultimate decommissioning by private party purchaser. Similarly, the Commission has also decided that issues dealing with license renewal, including operations and decommissioning upon renewal, “do not fall within the scope of ... license transfer proceeding[s].” *Power Authority of the State of New York*, 52 NRC 266; 2000 WL 1803178 (WL at p. 27). In deciding that this issue is not within the scope of a license transfer proceeding, the Commission noted that the Petitioner “overlooks its right to seek intervenor status in any application for license renewal or license extension.... These grounds for rejection apply equally to Petitioner’s concerns regarding delayed decommissioning of the three units, the resulting need to store both additional spent fuel on site during the plant’s extended life and the resulting need to continue the storage of current spent fuel for a longer time than [Petitioner] had anticipated.” *Id.* Local Units’ vague and unparticularized interest in this issue does not confer standing.

c. Participation in Emergency Preparation Agreements. The Local Units Petitioners other than Van Buren County and Covert Township assert that they have standing because they are parties to agreements or contracts relating to Palisades emergency preparations. The Commission has previously ruled that issues involving emergency evacuation and preparation plans, including the impact of proposed license transfers on changes to emergency plans, are not proper subjects for inquiry in license transfer proceedings. As stated in *Power Authority of the State of New York*: “The new

licensees will have to meet all the requirements of 10 CFR §50.47 and Appendix E to 10 CFR Part 50 concerning emergency planning and preparedness.... Under these circumstances, we see no basis for further pursuit of this issue.” *Power Authority of the State of New York*, 2000 WL 1083178 (WL at p. 36). A similar contention was rejected by the Commission in *Consolidated Edison Company of New York* (Indian Point Units 1 and 2), CLI-01-19 (2001) 54 NRC 109, 146 (2001) 2001 WL 34050840. In rejecting contentions by the Town of Cortlandt that the radiological emergency response plan was deficient because it failed to take into account the expansion of local communities and that it did not take into account the probability that a new evacuation plan would have to be devised, the Commission stated: “In Indian Point 3, we rejected two similar issues. . . . We noted in the earlier case that the new licensees would have to meet all of our regulatory requirements concerning emergency planning and preparedness.... The same reasoning applies in the instant case. As with some of Cortlandt’s other issues, its emergency response claims relate to the every day running of the plant, not to license transfer.” *Id.*

The Local Units Petitioners other than Van Buren County and Covert Township have not established standing through their participation in emergency preparation agreements because those Agreements are not interests that may be affected by the license transfer, or that lie within the “zone of interests” protected by the regulations affecting license transfers.

2. Participation in an Intergovernmental Agreement does not Satisfy Standing Requirements. In further support of their standing, Local Units state (Petition, p. 6) that they have “formed an Inter-governmental Agreement in a joint effort to ensure that the health, welfare and safety of their citizens is protected by the terms of

the proposed sale and purchase, and thereafter, during the anticipated additional 20 years of Palisades operation and eventual decommissioning.” This statement also fails to establish standing because it fails to allege a “concrete and particularized injury (actual or threatened)” that will be affected by the license transfer, or to “specify the facts pertaining to that interest.” *Power Authority of the State of New York*, 52 NRC 266 (2000); 2000 WL 1803178 (WL at p. 20). Local Units' statement regarding the Inter-governmental Agreement does not allege any particularized injury, real or threatened, that will be addressed by the license transfer and fails to meet the requirements for standing.

None of the “range of issues” described in the Petition in support of the Local Units' claim of standing are interests likely to be affected by the license transfer proceeding and are not within the zone of interest protected by the regulations at issue. For these reasons, Petitioners other than Van Buren County and Covert Township lack standing to intervene in this proceeding.²

B. Petitioners MEC and PIRGIM lack standing to intervene in this proceeding.

To satisfy the standing requirements in a license transfer proceeding, a Petitioner must identify an interest in the proceeding by (1) alleging a concrete and particularized injury (actual or threatened) that (a) is fairly traceable to, and may be affected by, the

² Local Units also make a reference on page 7 to their “organizational standing.” The Petitioners other than Van Buren County and Covert Township have made no allegations or showing sufficient to entitle them to organizational standing. An organization which seeks representational standing must demonstrate how at least one of its members may be affected by the licensing action, must identify that member by name and address, and must show “preferably by affidavit” that the organization is authorized to request the hearing on behalf of that member. *Power Authority of the State of New York, (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3)*, CLI-00-22 (2000), 52 NRC 266 (2000), 2000 WL 1803178 (WL at p. 20) (citing *Vermont Yankee*, CLI-00-20, 52 NRC at p. 151, 163 (2000), 2000 WL 1591144.

challenged action (the grant of an application), (b) is likely to be redressed by a favorable decision, and (c) arguably lies within the “zone of interests” protected by the governing statutes, and (2) specifying the facts pertaining to that interest. *Niagara Mohawk Power Corp.* (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 (1999); *Vermont Yankee Nuclear Power Corp* (Vermont Yankee Nuclear Power Station), CLI-00-20 (2000), 52 NRC 251, 163, 2000 WL 159144.

In addition, intervenors such as MEC and PIRGIM who seek standing as an organization “must also demonstrate how at least one of its members may be affected by the licensing action (as a result of the member’s activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member. *See, GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station)*, CLI-00-6, 52 NRC 193, 202 (May 3, 2000).” *Vermont Yankee*, 52 NRC at 163. (emphasis added).

1. MEC and PIRGIM have failed to allege facts sufficient for “organizational standing.”

Petitioners MEC and PIRGIM have failed to make the requisite showing of organizational standing that would allow them to intervene in this proceeding. MEC and PIRGIM assert that they have standing for intervention as organizations because they are “concerned with Michigan’s environment, and in promoting the decommissioning of nuclear plants and SNF storage sites in Michigan, and in assuring adequate financial assurances to accomplish these objectives.” (MEC/PIRGIM Petition, p. 5). They claim to represent thousands of Michigan rate payers “who have a vital interest in preserving and protecting the financial resources they have prepaid for the decommissioning of CEC’s nuclear plants and SNF sites, and also for the disposal of SNF through fees paid to CEC’s

under the provisions of the Nuclear Waste Policy Act of 1982....” (MEC/PIRGIM Petition, p. 5). MEC states that it is an “organization consisting of 71 public health and environmental organizations ...” and PIRGIM is a “statewide nonprofit consumer protection and public interest organization made up of approximately 10,000 Michigan citizen members located within and throughout the state of Michigan.” (MEC/PIRGIM Petition, p. 5, fn.1).

These assertions failed to satisfy the Commission’s organizational standing requirements. The Petitioners have failed to (1) identify by name and address the individuals they represent, (2) to demonstrate how at least one of its members may be affected by the license transfer, and (3) to establish that they are authorized by those individuals to represent them in this proceeding and to request a hearing on their behalf. These are required elements to establish organizational standing (“must” is the language used by the Commission) and are not merely guidance. Absent these prerequisites, MEC and PIRGIM have not established their organizational standing and should not be allowed to intervene in this proceeding.

2. MEC and PIRGIM have failed to allege interests that entitle them to standing.

MEC and PIRGIM also fail to assert interests that will be affected by the license transfer proceeding and that fall within the zone of interests protected by the statute and regulations applicable to this proceeding. For example, MEC and PIRGIM claim to represent “thousands of citizens who obtain their electric energy from CECO, and thus are directly affected by and interested in the rates, terms and conditions, and policies governing the provision of electric energy to its members and the general public.” (MEC/PIRGIM Petition, p. 7). They claim that their members “have a vital interest in

ensuring that utility rates are just and reasonable....” (MEC/PIRGIM Petition, p. 7). They also assert a “strong interest in preserving MPSC [Michigan Public Service Commission] jurisdiction over rate matters, and in supporting the cooperative exercise and jurisdiction by the MPSC and this Commission....” (MEC/PIRGIM Petition, p. 8). MEC and PIRGRIM also claim “direct interests under their organizational mission statements, and purpose, to promote the economic use of energy, including nuclear energy, and to promote the public interest, environmental protection, and consumer protection.” (MEC/PIRGIM Petition, p. 9).

None of the interests described in the preceding paragraph are interests that will be affected by this proceeding nor are they within the zone of interests protected by the applicable regulations and statute. The MPSC’s jurisdiction over rate matters, the rates, terms and conditions, and policies governing the provision of electric energy to their members, their interest in “ensuring that utility rates are just and reasonable...”, the economic use of energy, environmental protection, and consumer protection are all interests that will not be the subject of, or affected by this license transfer proceeding.³ These interests therefore fail to confer standing on Petitioners MEC and PIRGIM.

3. MEC and PIRGIM have failed to allege a concrete and particularized injury.

MEC and PIRGIM also claim an interest in the “financial qualifications” of the Applicants and the adequacy of Applicant’s financial assurances to “successfully carry out their responsibilities under the requested license-responsibilities that should include

³ The NRC has no jurisdiction over the reasonableness of rates, their terms and conditions, or similar MPSC’s matters. Environmental Impact Statements and environmental reviews are categorically excluded from license transfer proceedings. 10 CFR 52.22(c) (21).

decommissioning of plant sites and ISFSIs and disposing of SNF.” (MEC/PIRGIM Petition p. 8). To the extent the Petitioners have stated an interest in the financial qualifications of the Applicants and the adequacy of decommissioning funding, they have stated an interest that will be affected by the license transfer. However, they have failed to allege a particularized or concrete injury traceable to the license transfer. They claim that the license transfer may “undercut efforts in Michigan to protect ratepayer funds paid for decommissioning and SNF disposal, to reduce the financial assurance that may result from said efforts, to work at cross-purposes with state jurisdiction over CECo and said trust funds, in contravention of this Commission’s stated positions and rules, and to increase the risks assigned to Michigan’s ratepayers and Michigan’s environment that proper decommissioning and SNF disposal will not be accomplished (despite ratepayers’ substantial payments for such programs.” (MEC/PIRGIM Petition, p. 10). These are vague and unparticularized injuries that will not be addressed by the license transfer. These are issues that may be appropriate for the MPSC, but will not be addressed as part of this license transfer.⁴

II. PETITIONERS’ CONTENTIONS ARE NOT ADMISSIBLE.

A. Local Units’ contention D-1 is erroneous, speculative and not sufficiently supported by specific facts or opinions to be admissible as a contention.

1. The Application meets the requirements of 10 CFR 50-33(f).

Local Units contend that information submitted by the Applicant is insufficient to meet the criteria in 10 CFR 50.33(f) regarding financial qualifications of the Applicant.

(Local Units Petition, pps. 10-11). Petitioners further contend that (1) the Applicants

⁴ As explained below, the Petitioners MEC and PIRGIM have failed to state admissible contentions on these issues.

only provide details about Entergy Corporation, but not about ENP and ENO, and (2) that the Applicants make only “bare assertions” that ENP and ENO will have the funds necessary to cover the estimated costs to operate Palisades. The Petitioners acknowledge that they have not examined the Applicant’s five year projected revenues and costs for ENP contained in the Application. Despite not having examined the Applicant’s five year financial projections, the Petitioners contend that ENP’s reliance upon revenue streams only generated from Palisades are “facially insufficient”. (Local Units Petition, p. 12).

The Applicants have complied with the requirements of 10 CFR 50.33(f) in every respect. The Applicants have submitted projected financial statements for the first five full years of operation which contain projected revenues, source of revenues, capacity factors, operation and maintenance costs, capital costs, and net income. Contrary to the Petitioners’ contention that “Applicants have provided details about Entergy Corporation but not about ENP and ENO...” a projected five year financial statement for Entergy Nuclear Palisades was included as part of the application. (Application, Enclosure 7). An Applicant satisfies the Commission’s financial qualification rule if it provides a cost and revenue projection for the first five years of operation that predicts sufficient revenue to cover operating cost. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20 (2000); 52 NRC 151, 160; 2000 WL 1591144 (citing *Oyster Creek*, CLI-00-6, 51 NRC at 206-208).

Local Units’ assertion that reliance on revenue streams is “facially insufficient” is, in essence, a challenge to the Commission’s regulations at 10 CFR 50.33(f)(2), which

specifically allow for reliance on revenue projections. *Oyster Creek*, CLI-00-6, 51 NRC 193,207. A contention challenging NRC rules is not admissible. 10 CFR 2.335.

2. The contention that reliance on revenue generated only from Palisades is “facially insufficient” is speculative.

Local Units' contention that the application is “facially insufficient” because it relies on revenue from Palisades only and those revenues are based on an “inflated and unrealistic capacity factor” (Local Units Petition, p. 12) is wholly speculative, and should not be admitted as a contention in this proceeding. This contention lacks the specificity required for an admissible contention, and is not supported by specific facts or expert opinions. While Petitioners assert that the Applications’s capacity factor is inflated and unrealistic, (Local Units Petition, p. 12), they provide no indication what capacity factor should have been used and why, and no showing that such other capacity factor would have affected the analysis. Thus, Petitioners have failed to meet their burden of demonstrating that a genuine, material dispute exists. Moreover, the only support offered by Petitioners for this contention is the assertion that average capacity factor over the last several years represents better performance than in the past, but they provide no basis whatsoever to suggest that the current level of performance will not be sustained or is not representative. As stated in *Power Authority of the State of New York*, the Commission “will not accept the ‘filing of a vague, unparticularized’ issue, unsupported by alleged fact or expert opinion and documentary support. . . . General assertions or conclusions will not suffice.” *Power Authority of the State of New York*, 2000 WL 1803178 (WL at p. 22).

3. The \$25 million line of credit is not the proper subject for a contention.

Petitioners raised several issues with regard to the \$25 million line of credit to which ENO and ENP will have access. The Petitioners mischaracterize the Application when they state that “the credit line at issue here is not in addition to the minimum financial requirements, but rather, as part of the minimum.” (Petition, p.12, fn. 6). Nowhere in the Application is it stated that the \$25 million line of credit is needed or required in order to meet the financial qualifications requirements of 10 CFR 50.33(f). To the contrary, the Application states that revenue from the Power Purchase Agreement will provide sufficient funds for the operation and maintenance of Palisades. (Application, p. 8). The Application then states that the line of credit would be available “if necessary” to provide working capital. Id. The Petitioners concede that the Commission has previously held that additional lines of credit are not required by its regulations, and are not appropriate subjects for contentions in a license transfer proceeding. (Petition, p. 12, fn. 6); *See, Vermont Yankee Nuclear Power Corp.*, CLI-22-20 (2000); 52 NRC 151, 175; 2000 WL 1591144; *Power Authority of the State of New York*, 2000 WL 1803178 (WL page 25). The Applicant does not rely on the line of credit to meet the financial qualifications of 10 CFR 50.33 (f), and any contentions regarding the line of credit should not be admitted in this proceeding.

B. Issue D-1(a) regarding costs is speculative and not supported by reliable facts or opinions.

1. Sansoucy’s opinion regarding Applicant’s costs of operation is based on speculation.

Local Units also raise as a contention whether the actual cost of safely maintaining and operating Palisades will be in excess of those projected by the Applicant.

In support of this contention, the Petitioners rely on the report of George E. Sansoucy. Sansoucy's report and the opinions contained therein regarding the reasonableness of Applicants projected costs are speculative and not supported by facts. On page 3 of his report, Sansoucy states: "The Application has been redacted of certain financial and other information that ENP and ENO are relying upon to demonstrate the collective qualifications to assume responsibility for operating and decommissioning the Palisades plant. A review of this information is impossible and therefore our ability to comment upon the reasonableness of the ENP and ENO's claims are equally as impossible."

((Local Units Petition, Enclosure 1, p. 3, Sansoucy report (emphasis added)). Mr. Sansoucy further concedes on page 5 of his report that "ENP and ENO may anticipate different costs of operation ...", and that "it is impossible to explore the difference as the information in the Application before the NRC is redacted." Any opinion regarding the Applicants' projected costs are therefore speculative and should not be admitted as a contention. The Commission has held that "the Commission will not accept 'the filing of a vague and unparticularized' issue, unsupported by alleged fact or expert opinion and documentary support. General assertions or conclusions will not suffice." *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 164 (2000); 2000 WL 159, 1144.

2. Sansoucy's Report fails to raise a disputed issue on financial qualifications.

While Mr. Sansoucy recognizes that ENO and ENP's costs of operations are likely to be different from Consumers, and concedes that he has no basis on which to judge the reasonableness of the difference in the costs of operation, he nevertheless states

his opinion that ENP and ENO will experience a revenue “shortfall” that could affect ENP’s and ENO’s financial qualifications to safely own and operate Palisades. Mr. Sansoucy’s opinion is not sufficiently supported by his own facts and this contention should not be admitted.

To demonstrate that an issue is admissible under sub-part M, a Petitioner must also show that a “genuine dispute” exists with the Applicant regarding the issue. 10 CFR §2.1308; *Nine Mile Point*, CLI-99-30, 50 NRC at 342; *Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*; CLI-00-20, 52 NRC, 151,164 (2000) 2000 WL 1591144. The Petitioners’ contention in issue D-1(a), that the Applicants costs for safely operating and maintaining Palisades will be in excess of projected revenue, fails to meet this criteria for admissibility. In support of this contention, the Petitioners rely upon the Sansoucy Report, who in turn relies upon testimony from Applicant Consumers before the Michigan Public Service Commission, Case No. U-14992. In particular, Mr. Sansoucy relies on the “Revenue Minus Cost” (also labeled “Margin”) shown in Column 7 of Table 1 of his report. (Sansoucy Report, page 6-7). Mr. Sansoucy’s reliance on Consumers’ projected costs is entirely misplaced, as Consumers’ costs, as a single unit operator, are irrelevant to ENO/ENP’s costs, as part of a fleet of nuclear power operators, and provide no basis for challenging ENO/ENP’s costs.

Even if Consumers’ projected costs of operation were relevant, they fail to show a genuine material issue for adjudication. Contrary to Sansoucy’s contention, Table 1 clearly shows that in the first five years of operation, revenues will exceed Consumers’ (not ENO and ENP’s) projected costs of operation by over \$90 million. Table 1 of Sansoucy’s Report actually supports that the Applicants will have sufficient revenue over

the first five years of operation of the facility to adequately cover operating costs and expenses, even when using Consumer's projected costs. In addition, in none of the first five years of operation is the projected "revenue shortfall" greater than the excess revenue from the prior years. (See Table 1 to Sansoucy report.) Petitioners have therefore failed to support this contention by demonstrating with facts or opinions that there is a disputed issue of fact for adjudication in this proceeding on this issue, because even Sansoucy's Table 1 Report satisfies the Commission's requirements with regard to financial qualification. *Vermont Yankee*, at p. 176.

3. An expert report does not ensure admissibility of a contention.

The fact that this contention is supported by Mr. Sansoucy's report does not ensure its admissibility. The Commission has previously declined to admit a contention on financial qualifications even when that contention was supported by expert affidavit. In rejecting a contention on the Applicant's financial qualifications that was supported by an expert affidavit, the Commission stated: "Finally, even using [the expert's] own estimates based on a 10 percent fall in market price, Vermont Yankee's estimated revenue would still be sufficient to cover its costs for the first five years. . . . [The expert's] key assertions, in short, fail to show that a genuine dispute exists with the Applicants." *Vermont Yankee Nuclear Power Corp.*, 52 NRC 151, 177, 2000 WL 1591144. Similarly, Mr. Sansoucy's Table 1 fails to show that the Applicants will not have sufficient revenue for the first five years of operation to safely operate Palisades.

C. Petitioners have failed to state an admissible issue in D-1(b) regarding capacity factor.

1. Consumers' projected performance for Palisades is not a reliable indicator of ENO's performance.

Local Units rely on the testimony of Steven T. Wawro and other Consumers' witnesses, as well as the Sansoucy Report as support for this contention. None of those references creates a disputed issue of fact with regard to the Applicant's projected capacity factor for Palisades. First, Mr. Wawro's testimony reflects his view of the capacity factor Palisades could achieve under Consumer Energy's continued ownership, not ENP and ENO's. (Local Units Petition, p. 15). The testimony of Consumers' witnesses attached to the Petition establishes that projections of Palisades performance if Consumers had continued to operate Palisades without NMC is not an accurate predictor of Palisades performance with ENO as its operator.

The testimony from Consumers' witnesses before the MPSC establish that Palisades benefited greatly from the operation of the plant by NMC. See Sansoucy report, p. 8, (quoting testimony of John Reed: "Much of Palisades performance improvement can be attributed to Consumers' decision to hire NMC to operate the plant..."); Sansoucy Report, Attachment 6 (John Reed Testimony); Local Units Petition, Enclosure 10, (Joos Testimony) ("The likelihood of continuing to realize the benefits associated with continued NMC management of Palisades as part of a fleet of units is in considerable doubt.") Thus, any projection of future performance of Palisades that did not include operation by NMC is not a relevant predictor of future performance under ENO.

In addition, testimony attached to the Petition supports the notion that a plant's performance is benefited by being part of a fleet of nuclear operators, such as ENO. *See*, Local Units Petition, Enclosure 4, (Wawro testimony) ("As described by Mr. Reed, one reason why industry performance has outpaced that of Palisades is the superior performance of fleet owned generating units."); Local Units Petition, Enclosure 10 (Joos Testimony) ("There is considerable industry evidence supporting the conclusion that fleet owned and operated nuclear units have better overall performance than do single site units.") Thus, comparing Consumers projected costs, without the benefit of operation by NMC, to the cost of operation by ENO, which is part of fleet of nuclear operators, is speculative at best, and unsupported by the testimony of witnesses cited in support of the Petition. Those witnesses establish that Consumers' performance was improved by NMC's operation, and performance would further be expected to be improved by a fleet operator such as ENO. The projected performance of the plant by Consumers is thus not a relevant measure for performance under ENO. The contention should not be admitted because it is not supported by valid facts or opinions.

2. Contention D-1(b) does not raise a disputed issue with the Applicants.

This contention also fails to meet the standards for admissibility because the Local Units have failed to establish a disputed issue of fact with this contention. The testimony of witnesses cited in support of the Petition indicated that a projected capacity factor of 86.42 was "reasonable". *See*, Local Units Petition, p. 15 (Wawro testimony); Local Units Petition, Enclosure 1, Attachment 6 (Reed testimony). While the witnesses stated that 86.42 was "optimistic" or the "upper end" of reasonable, there are no facts or opinions on how high a capacity factor would have to be in order to be "unreasonable."

Further, Enclosure 7 to the Petition establishes that Palisades capacity factor over the past four years was 92.2 percent in 2002, 89.2 percent in 2003, 77.2 percent in 2004 (included reactor vessel head repair), and 95.6 percent in 2005. The Petitioners point to prior years when the capacity factors were not as good as recent performance indicates. The Commission has previously found that recent capacity factors carry “great” weight when compared to older more historical capacity factors. *Power Authority of the State of New York, (James A. Fitzpatrick and Indian Point 3)*, CLI-01-14 (2001), at page 21.

None of the testimony or exhibits in support of the Petition raised significant doubts about the achievability of the projected capacity factors for Palisades. The testimony of the witnesses offered in support of this contention all establish that a projected capacity factor of 86.42 percent for operation of Palisades by Consumers was reasonable, and that operation by a fleet operator, as opposed to a single unit operator such as Consumers, would likely lead to greater performance by Palisades. There is no testimony, facts or opinions in support of the Petition that ENO would not be able to achieve the projected performance level. For these reasons, Petitioners have failed to establish a disputed issue with this contention for adjudication in this proceeding.

D. Issue D-1(c) is not supported by the Petition and is not an issue within the zone of interests protected by the regulations.

Local Units’ Issue D-1(c) questions whether the Applicants will be able to pay projected fixed operating expenses from retained earnings and a line of credit in the event of an extended outage. Local Units also claim that ENP will “incur additional significant expenses possibly within the next five years, as a result of the need to address (1) the problem of future offsite storage for low level waste from Palisades, once South Carolina

is no longer an option (2008); (2) the problem of continued storage, maintenance and safety of SNF currently on site at Palisades (Application, p. 17), and at Big Rock ISFSI; and (3) the required non-routine expenditures that will be required in the next ten years at Palisades....” (emphasis added).

1. The Petition fails to support the contention that “additional significant expenses” will be incurred and is speculative.

Enclosure 8, cited in support of the “problem of future off-site storage for low level waste from Palisades” does not support that contention. Rather, Enclosure 8 explains how room will be made to store Class B and Class C waste in existing vaults, leaving a small quantity, less than 200 cubic feet, of greater than Class C waste that will not be able to be shipped to Barnwell. It also indicates that Palisades plans to continue shipping waste offsite for processing and eventual burial to reduce the backlog of stored waste. There are no facts offered by Local Units as to the amount of waste that will need to be stored off-site, the cost of that storage, or whether that cost has been taken into account in cost estimates submitted with the Application.

Likewise, Enclosure 9, cited in support of “the problem of continued storage, maintenance and safety of SNF stored currently on site at Palisades” and the Big Rock ISFSI, is nothing more than an explanation that there is adequate storage capacity in the spent fuel pool through 2012, and that additional storage is provided through dry cask storage systems. Nothing in Enclosure 9 supports the Contention that there is a “problem with storage of SNF,” or that the cost of storage of SNF at Palisades and Big Rock has not been taken into account in the five year projected expenses contained in the

Application. As such, this contention is purely speculative, and is not supported by facts or opinions, and should not be accepted as a contention.

Enclosure 10 (Joos Testimony) is referenced as support for the contention that “non-routine capital expenditures” will be required over the next ten years. Joos’ testimony merely states that over the next ten years investments necessary for reactor vessel head replacement, steam generator replacement, and the Combined Pressurizer/Alloy 600 program, and various life extension projects may be necessary. Again, there are no facts or opinions that these expenses have not been accounted for, when they would be incurred, or the effect of these expenditures on the Applicant’s five year projections.

A contention very similar to Petitioners D-1(c) has been previously rejected by the Commission. In *Vermont Yankee*, the Petitioners argued that the Applicant was underfunded, that the Vermont Yankee plant was in an advance stage of deterioration and faced problems such as a lack of fuel storage capacity that would cause operating expenses to increase over current levels, as well as other problems, such as structural cracks on the ground floor of a building where spent fuel was housed. In rejecting this contention, the Commission stated that the Petitioner “has not given us any reason to believe that [the Applicant’s] cost and revenue projections failed to take into account such maintenance issues.” *Vermont Yankee*, 52 NRC 151, 171.

2. The contention that Applicants could not pay operating expenses in the event of an outage is vague, non-specific and unsupported.

Local Units’ contention that the Applicants would be unable in the event of an extended outage to pay projected fixed operating expenses from retained earnings and a

line of credit is simply speculative, with no supporting facts or opinions. The Petitioners state that “[i]f any period of outage at Palisades is experienced, the financial condition if ENP/ENO will be even worse”. (Local Units Petition, p. 17) (emphasis added) There is no opinion on how long the outage would need to be, or what the affect would be on ENP/ENO’s financial condition. Contentions must be specific, and not vague, and must be supported by facts or opinions. This Contention lacks the specificity required for admission as a contention in a proceeding of this type.

The Petitioners’ assertions on this contention are, at this point, pure conjecture. This contention is not adequately supported by facts or opinions and should not be admitted.

E. The Application is not patently deficient as alleged in D-1(d).

The Applicants have demonstrated through the five year projection of income and expenses that they have the financial qualifications to safely operate and maintain Palisades. The Petitioner’s inability to see this confidential and proprietary information because it was redacted in the Application pursuant to the Commission’s rules and regulations does not render the Application “patently deficient.” The Petitioners have provided no facts or opinions, and have no basis for, disputing the financial projections of the Applicants. For these reasons, the contentions in Part D should not be admitted for adjudication. Absent a more particularized showing that the Applicants are not financially qualified pursuant to 10 CFR 50.33(f), the contentions as stated in the Petition regarding financial qualifications should not be admitted for consideration in this proceeding.

F. Local Units Issue D-3 involves an issue that has twice been rejected as an admissible contention by the Commission.

In D-3, the Petitioners question whether the Application is deficient because ENP/ENO's "inadequate financial qualifications" create doubt as their ability to adequately revise and fund the radiological and emergency response plan required by 10 CFR 50.33(g). Petitioners and their expert state that they "reasonably believe that ENP/ENO will be unable to adequately revise and fund the SEP." (Local Units Petition, p. 25.). They further state that they believe there will be a "stepped up" level of ENP/ENO and governmental participation that will require additional financial resources. (Local Units Petition, p. 25.) Mr. Sansoucy states that this stepped up involvement by ENP and ENO is "expected to place additional financial pressures on Palisades annual operating costs for emergency planning." Mr. Sansoucy then further speculates that a review of the SEP will be necessary, and that such a review will likely see a need to revise the SEP, given the population diversity and increase in the affected regions, as well as other demographic complexities of the three affected counties. Mr. Sansoucy does not describe the cost, nor the chance or likelihood that these costs will be incurred.

The Commission has previously rejected an almost identical contention, also supported by an expert report from Mr. Sansoucy, in *Consolidated Edison Company of New York* (Indian Point, Units 1 and 2), 54 NRC 109, 146-147 (2001); WL194050840. In the *Consolidated Edison* proceeding, the Petitioners also asserted that the application was "deficient because it fails to provide a radiological emergency response plan ...to account for the increased population and development of the immediate vicinity of the Indian Point plant." The Petitioners argued that because of the expansion in the

surrounding communities, the evacuation of the population would be more difficult than in the past, and the Application was deficient because it didn't consider the probability of a "new evacuation plan" that will have to be designed and may require significant additional expenses, possibly including the construction of new and improved highways.

Id. The Commission rejected the issue for adjudication. The Commission noted that they had previously rejected two similar issues in *Indian Point 3*; specifically, the request that the Commission "consider the impact of the proposed transfers on the need for changes to the Emergency Evacuations Plans...." The Commission stated: "We noted in the earlier case that the new licensees will have to meet all of our regulatory requirements for any emergency planning and preparedness.... We also concluded that IP3's proximity to metropolitan areas and to locations for sporting and cultural events was not relevant to the question whether to approve the license transfer.... The same reasoning applies in the instant case. As with some of [Petitioners] other issues, its emergency response claims relate to the every day running of the plant, not to license transfer. Moreover, [Petitioner] provides nothing more than speculation that Entergy's compliance with our emergency response plan regulations will necessitate large unanticipated expenditures, rendering Entergy's five-year costs and revenue projections unreliable." *Id.*

The Commission has twice rejected contentions almost identical to Petitioners' D-3. Local Units' contention in D-3 should be rejected for precisely the same reasons, as they have made no showing that the revisions would be necessary, that they have not been taken into account in the five year projections, or that they would be affected by the license transfer.

G. Petitioner's Contentions Regarding Adequacy of Funding for Decommissioning the Facility and Site are Inadmissible.

The Petitioners seek admission of their decommissioning funding contentions on the basis that Applicants have not satisfied the requirements of 10 C.F.R. §§ 50.33(k)(1) and 50.75. Local Units Petition at 21; MEC/PIRGIRM Petition at 17. However, on these issues as well, Petitioners have failed to put forth admissible contentions that satisfy the requirements of 10 C.F.R. § 2.306(b)(2). Specifically, Local Units' and MEC/PIRGIM's proposed decommissioning funding contentions do not demonstrate (1) that the decommissioning funding issues they raise are within the scope of the proceeding, (2) that the issues they raise are relevant to the findings the NRC must make to grant the license transfer application, or (3) that a genuine dispute exists on a *material* issue of law or fact. 10 C.F.R. §§ 2.306(b)(2)(i), (ii), and (iv).

Local Units assert that the decommissioning funds to be acquired by Entergy Nuclear Palisades at closing will be inadequate to fund decommissioning of Palisades, based on their affiant's review of site-specific decommissioning cost estimates prepared for Consumers.⁵ Local Units Petition, p. 22. Local Units ask the Commission to consider the site-specific cost estimates contained in the study performed by TLG, Inc. for Consumers. Local Units Petition, p. 23. Local Units further state through their affiant's analysis that the "proposed division of the decommissioning funds is outside of the market norm," that there is conflicting information regarding minimum funding requirements, and that there are "significant concerns" about Entergy Nuclear Palisades' ability to safely and timely decommission Palisades. Local Units Petition, p. 22. Local

⁵ Local Units also request that the Commission reject the Application due to deficiencies with respect to decommissioning funding assurance. LU Petition at 24. Local Units' request should be denied for the same reasons that Local Units' proposed contention should not be admitted, as set forth herein.

Units contend that the "Applicants' adherence to the 'NRC minimum' ignores the reality of known risks inherent in the decommissioning process." Local Units Petition, p. 23.

MEC/PIRGIM offer similar arguments and specify the methods by which they believe Applicants should be required to assure decommissioning funding under 10 C.F.R. Part 50. *See* MEC/PIRGIM Petition, p. 17-20. MEC/PIRGIM state that the NRC should require "maximum financial assurances and remedies" as a condition to any license transfer. MEC/PIRGIM Petition, p. 18. Those complaints are nothing but an attack on the Commission's rules, and should be denied as a matter of law.

The Petitioners' do not support their proposed contentions that Applicants have failed to satisfy the requirements of 10 C.F.R. § 50.33(k)(1) and 10 C.F.R. § 50.75. 10 C.F.R. § 50.33(k)(1) requires Applicants to submit information as described in 10 C.F.R. § 50.75, indicating the manner in which reasonable assurance will be provided that funds will be available to decommission Palisades.

Applicants have, in fact, provided this information in Section K of their Application. Section 50.75 requires Applicants to provide assurance of decommissioning funds of a minimal level, calculated by formula specified in 10 C.F.R. § 50.75(c), and identifies several available methods for providing assurance of decommissioning funding. Applicants provide in their Application that funds will be available to meet the minimum decommissioning funding assurance requirements through two methods. First, Applicants provide that Consumers will transfer no less than \$250 million from the Qualified Funds to a trust established by Entergy Nuclear Palisades. Application at 10. This "prepayment" method of assurance is explicitly permitted under 10 C.F.R. §

50.75(e)(1)(i) and (vi).⁶ That prepayment fully complies with the Commission's rules regarding the NRC minimum, assuming decommissioning in 2031. Second, in the event that relicensing is denied or that decommissioning funds transferred at closing otherwise do not meet the minimum funding requirement, Entergy Nuclear Palisades will assure adequacy of the funds through a parent or affiliate guarantee. Application at 10. This method of funding is permitted under 10 C.F.R. § 50.75(e)(1)(iii). The information provided by Applicants thus fully explains and establishes, as a matter of law, that Entergy Nuclear Palisades will provide assurance of decommissioning funds that meet the minimum fund requirements in satisfaction of 10 C.F.R. § 50.75.

Local Units' and MEC/PIRGIM's arguments that the Applicants fail to satisfy the requirements of 10 C.F.R. § 50.75 (and § 50.33(k)(1), directing compliance with § 50.75) amount to a collateral attack on the NRC's regulations. As demonstrated above, the Applicants have shown how they will comply with the requirements in 10 C.F.R. § 50.75. The NRC has repeatedly held, in similar license transfer proceedings, that "a showing of compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding." *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-0-19, 54 NRC 109, 142 (2001) ("*Indian Point 2*"), citing *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999) ("*Seabrook*").

Local Units' Petition suggests a site-specific decommissioning funding requirement, while MEC/PIRGIM's Petition urges the Commission to adopt a "maximum

⁶ 10 CFR §50.75(e)(1)(vi) allows licensees to demonstrate decommissioning funding assurance through "any other mechanism, or combination of mechanisms, that provides... assurance of decommissioning funding equivalent to that provided by the mechanisms specified in paragraphs (e)(1)(iv) through (v) of this section."

funding" requirement. Local Units Petition, p. 23; MEC/PIRGIM Petition, p. 18. Both of these suggestions are contrary to the NRC's regulations and its past decisions. The NRC requires the Applicants to demonstrate assurance of minimum decommissioning funds in order to "minimize the administrative effort of licensees and the Commission" and to "provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner which protects public health and safety." Final Rule: General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). Use of the "generic formulas" set forth in 50 C.F.R. § 50.75 "fulfill[s] the dual purposes of the rule." *Indian Point 2*, 49 NRC at 144. In a similar license transfer proceeding, the NRC held that admission of a petitioner's proposed contention, which urged reliance on an applicant's existing site-specific decommissioning funding analysis to refute the showing of adequate decommissioning funding, "would defeat the specific purpose of minimizing inefficient administrative effort." *Indian Point 2*, 49 NRC at 144. Requiring "maximum funding" would entail a site-specific inquiry that would similarly defeat the purpose of the decommissioning funding assurance rule. More importantly, suddenly requiring "maximum funding" would eviscerate the Commission's current rule, which specifies a "[t]able of minimum amounts ... required to demonstrate reasonable assurance of funds for decommissioning." 10 C.F.R. §50.75 (c) (the "NRC Minimum Rule"). The Commission should not reverse the NRC Minimum Rule. At any rate, the Commission cannot do so without engaging in a new rulemaking, subject to full notice and comment, and changing the text of the rule.

For these reasons, the NRC must therefore deny Local Units' request for "site-specific", and deny MEC/PIRGM'S request for "maximum" decommissioning funding

assurance. Both requests are contrary to the NRC regulations and are thus outside the scope of this proceeding.

Local Units also express concern that "there is conflicting information as to the NRC minimum funding requirement." *See* Local Units Petition at 22. This concern is based on Mr. Sancoucy's observation that the estimates of the amount needed to fund the decommissioning trust to the NRC minimum level in the application are "substantially less than those estimated by Consumers for Palisades as of December 31, 2005 in the MPSC proceeding." (Petition, Enclosure 1, page 12). These concerns are misplaced. The estimates contained in the application are based on the formula found at NUREG-1307, rev. 11. Revision 11 to NUREG-1307 substantially reduced the burial costs factor in the formula. The earlier estimates by Consumers were based on Revision 10 of NUREG-1307, and accounts for the "discrepancy" in the estimates in the application for funding as of March 1, 2007 and the earlier estimates made by Consumers to the MPSC for funding requirements as of December 31, 2005. Thus, there is no genuine dispute on this issue and it should not serve as a basis for allowing this contention in this proceeding.

The Applicants have provided more than adequate information regarding their calculation of minimum decommissioning funds. The NRC has previously found inadmissible a proposed contention challenging the adequacy of decommissioning funding assurance where the applicant had not explained the derivation of its minimum funding figure in its license transfer application and assumed an estimated 2% real growth rate of funds. *See Indian Point 2*, 49 NRC at 143. The NRC there found that the issues raised in the petitioner's proposed contention "amount[ed] to an impermissible

challenge to a generic decision made by the Commission in its decommissioning rulemaking." *Id.*, citing *Seabrook*, 49 NRC at 217 n.8. The same is true here.

Entergy Nuclear Palisades is further contractually committed to ensuring adequate decommissioning funding. Pursuant to the ASA, Entergy Nuclear Palisades "shall take all reasonable steps necessary to satisfy any requirements imposed by the NRC regarding [Entergy Nuclear Palisades'] Qualified Decommissioning Fund, in a manner sufficient to obtain NRC approval of the transfer of Qualified Decommissioning Fund assets from [Consumers] to [Entergy Nuclear Palisades]." ASA, Section 6.12(b); *See also* ASA, Section 6.27. Entergy Nuclear Palisades' decommissioning funding commitments in the ASA are reflected in the Application, whereby Entergy Nuclear Palisades will assure adequate decommissioning funds are available through the "prepayment" method permitted under 10 C.F.R. § 50.75(e)(1)(i). In the event that the funds held in trust pursuant to § 50.75(e)(1)(i) are insufficient to meet the minimum funding requirement, the NRC's regulations permit Entergy Nuclear Palisades to utilize any combination of approved mechanisms to meet the minimum requirement. 10 C.F.R. § 50.75(e)(1)(vi). In that event, Entergy Nuclear Palisades would supplement its "prepayment" method with a parent or affiliate company guarantee, as permitted under 10 C.F.R. §§ 50.75(e)(1)(iii) and (vi).

The ability of licensees to provide for combinations or variations of funding methods reflects the potential for change in funding levels that the NRC may require over the life of the plant. Local Units concerns regarding Entergy Nuclear Palisades' ability to "safely and timely" decommission Palisades are addressed by the NRC's multi-step process for decommissioning funding assurance, which provides for adjustments to decommissioning funding levels as

necessary. The use of the minimum funding formula is "only the first step in ensuring adequate funds for decommissioning, and [the NRC's] rules take into account the possibility of changes over time." *Indian Point 2*, 49 NRC at 144. A licensee must update its minimum decommissioning costs yearly and provide reports to the NRC on its decommissioning funds every two years. 10 C.F.R. §§ 50.75(b) and (d). In promulgating its decommissioning funding regulations, the NRC ultimately determined that the "combination of these steps . . . will provide reasonable assurance that . . . sufficient funds are available to decommission the facility in a manner which protects public health and safety. More detailed consideration by NRC early in life . . . is not considered necessary. . . ." 53 Fed. Reg. at 24,030-31. The decommissioning funding contentions proposed by Local Units and MEC/PIRGIM are therefore inadmissible because they ask the Commission to prematurely determine decommissioning funding matters beyond this first step and outside the scope of this proceeding.

In sum, the Applicants have fully prepared for either eventuality regarding license renewal and decommissioning. If the Palisades License is not renewed, then Buyer and its parent and affiliates are obligated to provide a guarantee, if necessary, for any additional amount needed to meet the NRC's minimum funding requirements. If the Palisades license is renewed, then the decommissioning funds transferred to ENP's decommissioning trust will meet the NRC minimum, in full compliance with Rule 50.75, and are thus adequate under the Commission's rules as a matter of law. There are no admissible issues regarding decommissioning funding.⁷

⁷ Local Units also raise a contention that the decommissioning funds to be transferred at the closing are outside of "Market Norm." (Local Units Petition, p. 22). This contention has no basis in the Commission's regulations or prior rulings. It is clearly an attack on the Commission's regulations and should not be considered in this proceeding.

H. Those Portions of Petitioners' Contentions 2 and 3 Regarding the Michigan Public Service Commission Are Outside the Scope of this Proceeding, Are Fully Justiciable in the MPSC Proceeding, and Thus Raise No Admissible Issue in this Docket.

MEC/PIRGIM argue in their proposed Contentions 2 and 3 that the NRC should impose requirements on Applicants to ensure MPSC regulation of Palisades SNF and decommissioning funds. MEC/PIRGIM Petition, pp. 19, 21-22. These arguments are outside of the scope of this proceeding and are mooted by the statute and regulation.

Section 50.75 of the NRC's regulations states upfront that "[f]unding for the decommissioning of power reactors may also be subject to the regulation of Federal or State Government agencies (e.g., Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions) that have jurisdiction over rate regulation." 10 C.F.R. § 50.75(a). The NRC's decommissioning funding rule further requires that, in choosing from the various allowed methods of decommissioning funding assurance, licensees must adhere to applicable state or federal standards. *See* 10 C.F.R. § 50.75(e). Accordingly, to the extent that Michigan law confers authority upon the MPSC to regulate any decommissioning funds for the Palisades facility, NRC regulations allow for MPSC oversight as specified by applicable federal or state standards. Those issues are properly justiciable by the MPSC, however, and are outside the scope of this proceeding.

Further, the NRC's decommissioning rule does not confer any authority upon the State of Michigan or the MPSC to determine the outcome of this NRC proceeding with respect to decommissioning funding assurance or funding for the disposition of SNF. As recognized in the NRC's rules, the authority conferred upon the State of Michigan and/or the MPSC is set by statute. To the extent MEC/PIRGIM urge the NRC to confer any greater authority on the MPSC to regulate SNF funds, their request is beyond the NRC's

discretion. In sum, MEC/PIRGIM ask the Commission to ensure state control over decommissioning and SNF funds, which is outside of the scope of this proceeding, predetermined and preempted by federal and state law, and beyond the NRC's discretion. As explained above, the NRC has continuing authority over the funds for decommissioning Palisades over the life of the plant, will continue to monitor decommissioning plans and activities, and may require adjustments to funding amounts as necessary to ensure protection of the public health and safety. The NRC cannot delegate that authority to the states, and this issue should therefore be resolved as a matter of law.

I. **MEC/PIRGIM's Contention Regarding Spent Nuclear Fuel Is Contrary to the Nuclear Waste Policy Act of 1982 and Not Admissible Because It Raises No Material Issue Of Fact.**

MEC/PIRGIM also argue in their proposed Contention 2 that, after the close of the transaction, Consumers and its parent company, CMS Energy, should share with Entergy Nuclear Palisades the responsibility for spent nuclear fuel ("SNF") generated at Palisades and the Big Rock Point Nuclear Plant **until DOE fulfills its obligation to take and dispose of the SNF**. MEC/PIRGIM Petition, p. 18 (emphasis added). As a protection against the hypothesis that the federal government will permanently default on its obligation to take custody of the SNF, MEC/PIRGIM believe that Consumers should deposit in an external trust overseen by MPSC any amounts Consumers has collected from ratepayers to satisfy the Pre-1983 Fee. *Id.* at 19. Furthermore, MEC/PIRGIM request that the Commission require Consumers and CMS, and Entergy Nuclear Palisades and Entergy, to file corporate bonds and letters of credit as a condition of the license transfer. *Id.* at 18, 19. MEC/PIRGIM cite no relevant authority for this novel

request, because no such authority exists. The allocation of responsibility for spent nuclear fuel will not be adjudicated as part of this license transfer proceeding, and is outside the zone of interests protected by the regulation. This contention simply has no place in a license transfer proceeding.

No provision of the NWPA, applicable NRC regulations, or DOE regulations requires nuclear licensees to provide bonds, letters of credit, or other guarantees in the event the federal government fails to provide a final repository for SNF in accordance with its statutory and contractual duties. The courts have clearly held that, in the event of a continuing or permanent default by the federal government, DOE will be responsible for resulting damages and costs associated with the default, so that past or present licensees will *not* be financially impacted by such default. *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336 (Fed. Cir. 2000). Therefore, the United States Court of Federal Claims has consistently enforced agreements that allocate responsibility for both pre-1983 and post-1983 SNF fees between sellers and buyers, and has allowed assignment, or partial assignment, of the DOE Standard Contracts for SNF disposal. *See, e.g., Boston Edison Company v. United States*, 67 Fed Cl. 63, 2005 U.S. Claims LEXIS 227 (2005); *Entergy Nuclear Generation Co. v. United States*, 64 Fed Cl. 336, 2005 U.S. Claims LEXIS 56 (2005). Therefore, because this MEC/PIRGIM contention has no basis in law, and raises no material issue of fact, it is not admissible.

In sum, none of the issues raised by the Petitioners are admissible under the Commission's rule, in that those contentions amount to a collateral attack on the

Commission's existing rules, fail to create any disputed issue of material fact, and/or concern matters entirely within the jurisdiction of the MPSC.

III. RESPONSE TO REQUEST FOR HEARING.

Applicants incorporate by reference for all purposes their responses to the issues previously raised herein.

A. Type of Hearing. 10 CFR subpart M governs the proceedings in this matter.

B. Petitioner's Issues for Hearing.

With one possible exception, the Petitioners have previously raised all the issues described in this section and the Applicants have responded to those issues and incorporate those responses herein. Petitioners appear to raise with greater emphasis in this section the "unique problems" that the transfer of Palisades' license presents because "the pool for spent fuel only has sufficient capacity to accommodate additional spent fuel assemblies until 2012. (Enclosure 9)." (Local Units Petition, p. 27) Petitioners state that they recognize that this issue will arise regardless of whether the facility changes ownership. Petitioners nevertheless request that ENP "describe the measures that it intends to use to address the storage adequacy issue, and to demonstrate that it has the financial and technical capability to do so." (Local Units Petition, pp. 27-28).

The Commission has previously rejected a similar request. In *Vermont Yankee*, the Petitioner asserted that the Vermont Yankee plant faced such problems as a "lack of fuel storage capacity that will cause the operating expenses to increase over current levels." *Vermont Yankee*, 52 NRC 151, 171, 2000 WL 1591144. The Commission rejected this contention because the Petitioner failed to support its position with expert opinion, documentation or specific facts. *Id.* The contention was also rejected because

the Petitioner did not give the Commission “any reason to believe that AmerGen’s costs-and-revenue projections failed to take into account such maintenance issues.” *Id.*

The Commission did admit a contention regarding whether the costs of accommodating spent fuel had adequately been taken into account by applicants in *Consolidated Edison Company of New York (Indian Point, Units 1 and 2)* 54 NRC 109 (2001) 2001 WL 340508480. However, in that case, the Petitioner relied on a study that addressed the costs of the problem of spent nuclear waste with specific estimates of between \$147 million and \$362 million to resolve the problem. In addition, the potential issue fell within the five year projected costs-and-revenue projection and the Applicants had not demonstrated to the Commission that the projected cost estimates accounted for “the undefined expense of solving their admitted short-term problem of interim spent fuel storage.” *Id.* at 147.

In this proceeding, the Petitioners have done nothing more than raise the issue, with no supporting documents or facts as to the severity of the problem or the potential cost of resolving the issue, and have failed to show that the potential expenses have not been taken into account in the five year cost-and-revenue projections. As the court stated in *Consolidated Edison*, the Commission “cannot admit an issue for adjudication based on mere conjecture. ‘Unsupported hypothetical theories or projections ... will not support invocation of the hearing process.’ *Indian Point 3*, CLI-00-22, 53 NRC at 315.” *Consolidated Edison*, 54 NRC 109, 140-141.

Moreover, the Commission has ruled that concerns about storage of spent fuel after license renewal are more properly dealt with in license renewal proceedings and not

license transfer proceedings. *Power Authority of New York*, 52 NRC 266, (2000), 2000 WL 1803178 (WL at p. 27).

10 CFR 50.54(bb) requires licensee within two years after permanent shutdown or five years before expiration of the operating license (whichever is earlier) to submit to the NRC a program for managing and funding the management of all spent fuel from permanent shutdown until the spent fuel is taken by the Department of Energy. To the extent the Petitioners seek to have the Applicants do more than is required by 10 CFR 51.54(b), this contention amounts to a challenge to the Commission's regulations, and therefore outside the scope of this license transfer hearing. In addition, a contention regarding the adequacy of spent nuclear fuel storage is contrary to 10 CFR 51.23 which exempts the issue of storage of spent fuel after cessation of operation from any "analysis prepared in connection with the issuance or amendment of an operating license for a nuclear reactor...."

IV. REQUEST FOR EXTENSION OF TIME

Applicants believe that no extension of time should be granted to the Petitioners to review confidential and proprietary information that was redacted from the Application pursuant to the Commission's regulations. The Petitioners' requests for an extension of time in which to file amended contentions are governed by 10 CFR 2.309(f), which provides the requirements for amending or filing new contentions. The Petitioners have not satisfied the requirements of this rule, and it would be premature for the Commission to allow new contentions or amended contentions, or an extension of time in which to frame those contentions, absent the required showing.

Petitioners MEC/PIRGIM also request that they be allowed to incorporate the contentions made by other Petitioners in this case. This request is governed by the provisions of 10 CFR 2.309(f)(3). This request is premature as no contentions have been admitted yet in this proceeding. Further, the requirements of 10 CFR 2.309(f)(3) have not been satisfied by the Petitioner.

V. OBJECTIONS AND RESPONSES TO REQUEST FOR DISCOVERY.

Applicants object to the Petitioners' Request for Discovery. The regulations applicable to this proceedings specifically provide for mandatory discovery within thirty days of the issuance of an order granting a request for hearing or petition to intervene. 10 CFR 2.336(a). That regulation also provides that the mandatory disclosure required by that section "constitutes the sole discovery permitted for NRC proceedings under this part unless there is further provision for discovery under the specific sub-part under which the hearing will be conducted or unless the Commission provides otherwise in a specific proceeding." 10 CFR §2.336(f).

The Petitioners have made no showing that they are entitled to this discovery outside of the mandatory disclosures provided by the regulation, or that this proceeding presents unique issues with regard to discovery that warrant an exception to those regulations. Petitioners are not entitled to discovery in order to frame admissible contentions. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB – 107, 6 AEC 188, 192, reconsider. den. ALAB-110, 6 AEC 247 aff'd CLI-73-12, 6 AEC 241 (1973).

VI. CONCLUSION.

1. The Petitioners other than Van Buren County and Covert Township should be denied standing as intervenors for the reasons stated in this response.

2. The contentions offered by the Petitioners should not be admitted for adjudication for the reasons stated herein.

3. The Petitioners should not be granted additional time to amend their Petition or bring new contentions because they have failed to comply with 10 CFR 2.309(f)(2) and the request is premature.

4. Petitioners should not be allowed discovery outside of the discovery mandated by the regulations that govern this proceeding.

Respectfully Submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

**CONSUMERS ENERGY COMPANY, NUCLEAR
MANAGEMENT COMPANY, LLC and
ENERGY NUCLEAR PALISADES, LLC AND
ENERGY NUCLEAR OPERATIONS**

Docket No. 50-255

(Palisades Nuclear Plant, License No. DPR-20)

CERTIFICATE OF SERVICE

I hereby certify that I have on this date filed the above-captioned response by hand delivery and by mail with the Secretary of the Commission, and have served the foregoing document upon each of the following parties by placing copies in the U.S. Mail:

Secretary of the Commission
Attn: Rulemakings and Adjudications Staff
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Washington DC 20555-0001

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Dated at Washington, D.C. this 3rd day of January 2007.



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Counsel for Consumers Energy Company

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January 3, 2007

January 4, 2007 (3:35pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

U.S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, D.C. 20555-0001

Re: Consumers Energy Company, Nuclear Management Company, LLC and Entergy
Nuclear Palisades LLC and Entergy Nuclear Operations
Docket No. 50-255

Dear Sir or Madam:

Please find enclosed for filing an original and two (2) copies of the attached Response of Consumers Energy Company, Nuclear Management Company, LLC and Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations in Opposition to Petitions by Van Buren County, Covert Township, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College and South Haven Hospital (collectively referred to as "Local Units"), the Michigan Environmental Council, and the Public Research Group in Michigan for Leave to Intervene and Request for Hearing, Request for Extension of Time and Request for Discovery.

Sincerely yours,



Robert Andersen
Counsel for Consumers Energy Company