

January 10, 2007 (5:00 pm)

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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)

**LOCAL UNITS' REPLY TO RESPONSE OF CONSUMERS ENERGY COMPANY,
NUCLEAR MANAGEMENT COMPANY, LLC AND ENTERGY NUCLEAR PALISADES
LLC AND ENTERGY NUCLEAR OPERATIONS
IN OPPOSITION TO LOCAL UNITS' PETITION FOR LEAVE TO INTERVENE
AND REQUEST FOR HEARING, REQUEST FOR EXTENSION OF TIME
AND REQUEST FOR DISCOVERY**

I. INTRODUCTION AND RELIEF SOUGHT

Petitioners 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 "Local Units"), filed their Petition for Leave to Intervene, Request for Hearing, Request for Discovery, and Request for Extension of Time ("Local Units' Petition") on December 5, 2006. Consumers Energy Company, Nuclear Management Company, LLC, Entergy Nuclear Palisades LLC and Entergy Nuclear Operations (collectively "Applicants") filed their Response in Opposition to Local Units Petition on January 3, 2007 ("Applicants' Response").

Pursuant to 10 CFR 2.309(h), Local Units file this their Reply to Applicants' Response, and respectfully ask that this Commission reject the assertions by

Applicants in their Response and grant Local Units' Petition and related relief requested.

II. ARGUMENT

- A. Petitioners have satisfied NRC regulations and precedent on standing and all Local Units should be found to have standing to participate as parties in this proceeding.

Applicants selectively cite NRC cases and ignore specific details provided by Local Units which clearly show their interests in this proceeding and how those interests will be affected. (See pages 4-7, Local Units' Petition). Local Units - not just Van Buren County and Covert Township - are similar to those petitioners whose rights and interests the Commission found satisfied 10 CFR 2.309(d) standing requirements in Power Authority of the State of New York (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22; 52 NRC 266 (2000); 2000 WL 1803178. Local Units certainly have articulated a higher level of interests which will be affected by the license transfer, are likely to be redressed by a favorable decision, and that lie well within the "zone of interests" protected by the governing statute. Power Authority of the State of New York, supra, 2000 WL 1803178, WL p 5.

Local Units' "range of issues", then, clearly meet or exceed the Commission's required findings for standing and Local Units' "range of issues" were specifically detailed, based upon facts, documents, and information available to them at the time of filing their Petition.¹ The Commission has acknowledged the reality that that is all a

¹ Applicants also ignore Commission direction in Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), 60 NRC 548, 553; ASLBP No. 04-832-02-OLA (2004) that: "In determining whether a petitioner has met the requirements for establishing standing, the Commission has directed us to 'construe the petition in favor of the petitioner.' Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115

petitioner can do: certainly a Petitioner cannot be faulted - or denied access to participate in a proceeding - for failing to have access to information which Applicants have done their utmost to keep from petitioners.²

Likewise, Local Units have far exceeded the showings of standing in Georgia Institute of Technology (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12; 42 NCR 111 (1995). In that case, the organization GANE was granted standing on the basis of one man who lived ½ mile from the reactor and one woman who drove past the reactor several times per day. *Id.* Local Units are all within miles of the Palisades facility and well within the Emergency Planning Zone of 10 miles.³ In Power Authority of the State of New York, *supra*, 2000 WL 1803178, at WL p 7, the Commission stated that it has previously found that people “living or active within a few miles of a nuclear plant have shown standing in license transfer cases. . .”

Applicants seem dismissive of Local Units’ references to their contractual obligations on behalf of emergency preparedness, but this Commission has acknowledged in 69 Fed Reg 2182 that such units or entities which bear responsibilities

(1995).” (Cited page 5, Local Units’ Petition).

² See Power Authority of the State of New York, *supra*, 2000 WL 1803178, at WL p 9, “Subpart M calls for ‘specificity’ in pleadings. . . However, in the unusual setting here, where critical information has been submitted to the NRC under a claim of confidentiality and was not available to Petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue.” And similarly: “the Commission believes that Petitioners’ explanation regarding the unavailability of relevant data entitles it to gain access to the data through a protective order before being held to the NRC’s usual specificity requirements.” *Id.*

³ “Geographic proximity”, however, was not the only basis for Local Units’ assertions of having met standing requirements. (See Local Units’ Petition, pp 4-7).

of emergency preparedness “would ordinarily be accorded standing.” 69 Fed Reg 2182, at 2221.⁴

A final reason to decide that Local Units have satisfied standing is that if they are not admitted as a party, Local Units will seek - and be entitled to - “interested party” status to participate in this proceeding. 10 CFR 2.315(c)⁵; Power Authority of the State of New York, supra, 2000 WL 1803178, at WL p 8 (“the Commission has long recognized the benefits of participation in our proceedings by representatives of interested states, counties, municipalities, etc.”)

B. Local Units’ Contentions are Admissible

Petitioners’ contentions satisfy the standards of 10 CFR 2.309(f) and are similar to contentions previously ruled admissible by this Commission. (See pages 7-26, Local Units’ Petition). All of their contentions should, therefore, be admitted.

1. Contention D-1.

NRC precedent supports the admission of this contention. The NRC ruled in North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201 (1999), that it is not enough for Applicants to simply assert compliance with 10 CFR

⁴ The NRC case of North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, involved a petition to intervene by a co-licensee/co-owner in the Seabrook facility. Though that is a different factual scenario, the NRC’s reasoning in allowing the petition to intervene by New England Power Company, could be viewed as supporting Local Units’ petition, in that the proposed transfer to a “new and financially incapable” licensee could have the potential of “increasing the Petitioner’s risk of radiological harm to its property and its risk of being forced to assume a greater-than-expected share of the nuclear facility’s . . .” The NRC found that “this kind of situation justifies standing based on ‘real-world consequences that conceivably could harm petitioners and entitle them to a hearing.’” Id.

⁵ 10 CFR 2.315(c) provides that “The presiding officer will afford an interested State, local governmental body (county, municipality or other subdivision), . . . which has not been admitted as a party under Section 2.309, a reasonable opportunity to participate in a hearing.”

50.33(f) regarding financial qualifications. In that case, the Commission aptly noted that Transferee's "collateral attack" argument conflated two portions of section 50.33(f)(2) - just as Applicants argument in the Response does.⁶ The NRC pointed out the defect of their argument: it assumes that "[a]pplicants have met their burden of proof merely by complying with the filing requirements." North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), p 207. Though "such satisfaction [of filing requirements is essential, it] cannot be deemed always sufficient to satisfy the Applicants' burden of proof, else the NRC be irrevocably bound by Applicants' own estimates and left without authority to look behind them. Always in question under section 50.33(f)(2) is whether the Applicants' cost and revenue estimates are reasonable. The adequacy of those estimates is challengeable (as here) by a petition for intervention . . ." Id.

Local Units' claim on this contention can be analogized to that of the petitioner in Seabrook, about which the Commission wrote: "Petitioner's claim that the license transferee will lack sufficient financial resources to fulfill its obligations for operating expenses is relevant and material. Indeed, it goes to the very heart of the question whether Applicants' financial qualifications are adequate to pass statutory and regulatory muster." North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), p 206.

2. Contentions D-1(a) - D-1(d).

⁶ The Commission explained the difference - which applies to Local Units' contention on this issue: "If a petitioner claimed that 5-year cost-and-revenue projections are per se inadequate to meet financial requirements, such a claim would be precluded as a collateral attack on NRC rules. . . . Petitioner simply contends that, as NRC rules themselves contemplate, the circumstances of this particular transfer call for more detailed or extensive financial protection." North Atlantic Energy Service Corporation (Seabrook Station, Unit 1), p 208).

Each of these matters (Contentions D-1(a) - D-1(d)) relate to or are issues which the Commission has previously admitted. Consolidated Edison Company of New York (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 116 (2001).

In addition to Local Units' position with respect to these issues in its Petition (pp 13-21), the Commission should note that Applicants are trying to shift the burden with regard to capacity factor. It is for ENP to establish, because of the burden borne by Applicants in this proceeding, how it will achieve a standard of operations at Palisades which have not been achieved before. ENP has not specified how Entergy Corporation has allegedly achieved high plant performance standard at other facilities it owns. The only "evidence" on this point is in the nature of testimony by Consumers' witnesses (no Entergy witnesses) in the MPSC proceeding that vaguely and generally refer to the allegedly superior plant performance under Entergy's direction. Applicants in this case cannot rely on generalized assertions like that (especially more so since they were made in a separate proceeding not before this Commission). What is more, there will undoubtedly be years when ENP's capacity factors are lower than that projected and, by extension, its revenue will be less than the projections. In those lower capacity years, ENP will have to rely upon other sources to fund its operations and ENP has failed to establish (or even suggest) how it will do so.⁷

3. Contention D-2.

⁷ Applicants' Response seems to denigrate Local Units' assertions as having been formulated or stated without the "five-year projections" of Entergy Nuclear Palisades, LLC. Local Units feel compelled to reiterate here that that is precisely part of the problem. As made clear in the Petition, Local Units' contentions are based upon documents or other information available at the time the Petition to Intervene was filed. 10 CFR 2.309(f)(2). Likewise, the report of Petitioners' expert witness, George E. Sansoucy, P.E. ("Sansoucy Report") was also based upon documents and information available at the time of filing.

To be clear, Local Units are not “collaterally attacking” an NRC Regulation. Rather, Local Units are contending that Local Units are contending that the proposed “raid” of the decommissioning trust funds established for Palisades is virtually unprecedented and given the specifics of the Palisades site, the site-specific studies performed at Consumers’ behest by TLG Studies, Inc., and the detailed doubts articulated by Local Units about ENP’s abilities to meet its expenses with revenues (given an unrealistic capacity factor, no other assets, no parent guarantee, etc, see Petition, pp 10-21), the NRC should admit this contention to ensure that Palisades is not consigned by this proposed transfer to be a nuclear waste dump.⁸

The Commission itself has observed that “ordinarily, a transferee would receive the decommissioning fund along with the nuclear plant with which it was associated.” Power Authority of the State of New York, CLI-01-14, 53 NRC 488, 2001 WL 871672 (2001), WL p 14. Though in that case, the issue was that the fund was to be retained by the transferor, Local Units suggest that the same “case-by-case basis” review and focus by the Commission is warranted in the instant proceeding. Power Authority of the State of New York, supra, WL p 13.

4. Contention D-3.

This contention raises concerns about radiological and emergency response issues similar in a certain respect to those held relevant to a license transfer proceeding in Power Authority of New York, WL p 24 (*8). In that case, the petitioner Association

⁸ And this is not a matter of use of “excess decommissioning funds” as Applicants suggest, but rather, a concern that the raid of the fund, transferring only a portion to ENP, is not “prudent” given the site-specific conditions outlined in a site-specific studies performed by TLG, Inc. (See North Atlantic Energy Service Corporation, at 204, where this Commission noted that “sometimes, in response to site-specific circumstances, utilities prudently set aside more funds than the NRC requires.”).

expressed concern “that the proposed transfer will directly and materially affect. . . its members’ morale and economic interests. . . The Association also argues that its members’ health and safety may suffer as a direct result of the license transfer if an insufficient amount of revenue were to preclude the Entergy companies from adequately funding both occupational radiation protection and safe decommissioning activities.” (Power Authority of the State of New York, supra WL p 24). Local Units, too, are concerned that “an insufficient amount of revenue” will preclude Entergy from adequately funding (and upgrading) the equipment, personnel, training, and technical needs under the Van Buren County Emergency Operations Plan. (Local Units’ Petition, pp 24-26).

As such, Local Units’ contention about radiological and emergency planning/funding is distinguishable from the emergency planning contention raised by petitioners in Con Ed (that the application is deficient for failure to provide a radiological emergency response plan. In the Matter of Consolidated Edison Company of New York and Entergy Nuclear Indian Point 2, LLC, (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109 (2001), pp 124-125). Here, by contrast, Local Units have asked that the Commission direct and ensure that adequate funds are assigned to address the immediate and presently-existing inadequacies in the Emergency Operations Plan of Van Buren County. For too long, the local host communities have borne the expense and burden of providing emergency planning, operations and management support, to ensure that operations at Palisades could continue given that Consumers seeks to divest itself entirely from the risks that its ownership and operation of Palisades have

created, and seek to transfer those risks (and the attendant costs) to a newly-formed, unfunded, asset-less limited liability company. (Local Units' Petition, pp 24-26).

The Commission should admit this contention, holding (as it did in North Atlantic Energy Service Corporation, supra, at p 208-209) that: "As in other cases. . . , the Commission cannot brush aside such economically based safety concerns without giving the Intervenor a chance to substantiate its concerns at a hearing. . ."

III. CONCLUSION.

Local Units have satisfied standing and contention requirements of 10 CFR 2.309(d) and (f). Even if they had not, however, all of the NRC precedent cited in Local Units' Petition and this Reply bespeak of fairness to a petitioner to be allowed to amend both standing and contention portions of a petition, to access confidential/privileged documents and information, and/or to articulate new contentions. See for example, the following:

1. The NRC's "threshold admissibility requirements" should not "be turned into a 'fortress to deny intervention.' Cf. Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)." Power Authority of the State of New York, (2000), supra, WL p 25).

2. "[A]n intervenor need not, . . . prove its case at the contention stage. The factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form, or be of the quality necessary to withstand a summary disposition motion. What is required is a 'minimal showing' that material facts are in dispute, indicating that a further inquiry is appropriate." (Georgia Institute of Technology, supra, p 118).

3. The Georgia Institute of Technology case also makes clear that the Commission need not deny intervention if it determines that standing or contention requirements have not been met. The Commission may permit a petitioner to amend

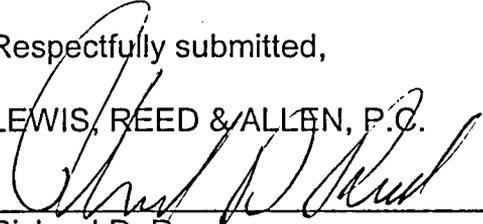
his/her pleading;⁹ the Commission may also rule that withheld/redacted documents and information are essential to the petitioner's ability to satisfy pleading requirements and order disclosure of such information/ documents pursuant to a protective order. Georgia Institute of Technology, passim; and Power Authority of State of New York, (2000), WL p 4, citing other NRC authority for this proposition.

For all the reasons cited herein and in Local Units' Petition, Local Units respectfully ask that this Commission grant its Petition to Intervene, Request for Hearing, Request for Extension of Time, and Request for Discovery.

Respectfully submitted,

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⁹ In the matter of Consolidated Edison Company of New York, supra, at 111.

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Docket No. 50-255

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

PROOF OF SERVICE

I, JULIE A. COSGROVE, hereby certify that I am employed by the law firm of LEWIS, REED & ALLEN, P.C., and that on January 10, 2007 I served, by electronic mail and by first class mail, postage fully prepaid, the Reply of Local Units to Response of Consumers Energy Company, Nuclear Management Company, LLC and Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations in Opposition to Local Units' Petition for Leave to Intervene and Request for Hearing, Request for Extension of Time and Request for Discovery on the following persons, addressed as indicated:

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Dated: January 10, 2007



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Re: In the Matter of Consumers Energy Company, Nuclear Management Company, LLC, and Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations (Palisades Nuclear Plant, License No. DPR-20) Docket No. 50-255

Dear Sir/Madam:

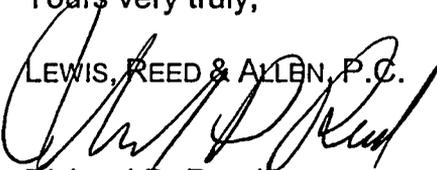
Enclosed find an original and two copies of the following:

1. Local Units' Reply to Response of Consumers Energy Company, Nuclear Management Company, LLC and Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations in Opposition to Local Units' Petition for Leave to Intervene and Request for Hearing, Request for Extension of Time and Request for Discovery.
2. Proof of Service.

Please direct any questions you may have to the undersigned. Thank you for your assistance.

Yours very truly,

LEWIS, REED & ALLEN, P.C.


Richard D. Reed

RDR/jac
Enclosures

cc: Mr. Douglas E. Levanway (w/Response)
Mr. Sam Behrends (w/Response)
General Counsel, U.S. Nuclear Regulatory Commission (w/Response)