LeBoeuf, Lamb, Greene & MacRae LLP

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1875 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000
Facsimile: (202) 986-8102

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March 16, 2007

U.S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, D.C. 10555-0001

Re: Consumers Energy Company, Entergy Nuclear Palisades LLC and Entergy Nuclear Operations
Docket Nos. 50-255 and 72-043

Dear Sir or Madam:

Please find enclosed for filing an original and two (2) copies of the attached Response of Consumers Energy Company, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. in Opposition to Request for Hearing and Petition to Intervene of Nuclear Information and Resource Service, Don't Waste Michigan, and Victor McManemy.

Sincerely,

Ahren S. Tryon
Counsel for Consumers Energy Company

A001
NMSS01

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY ENTERGY NUCLEAR PALISADES, LLC ENTERGY NUCLEAR OPERATIONS, INC.	Docket Nos. 50-255 72-043

RESPONSE OF CONSUMERS ENERGY COMPANY, ENTERGY NUCLEAR PALISADES, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. IN OPPOSITION TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF NUCLEAR INFORMATION AND RESOURCE SERVICE, DON'T WASTE MICHIGAN, AND VICTOR McMANEMY

I. Background

On October 31, 2006, Consumers Energy Company ("Consumers"), Entergy Nuclear Palisades, LLC ("ENP"), and Entergy Nuclear Operations, Inc. ("ENO") (collectively, the "Applicants") filed an application seeking Nuclear Regulatory Commission ("NRC" or "Commission") approval to directly transfer the Big Rock Point Facility ("Big Rock") Operating License DPR-06 and the Big Rock Point Independent Spent Fuel Storage Installation ("Big Rock ISFSI") license SFGL-16 from Consumers to ENP, to possess and own, and ENO, to possess, use and operate, the Big Rock ISFSI.[1] The transfer of the Big Rock and Big Rock ISFSI licenses from

[1] The Big Rock ISFSI is the only remaining nuclear facility at the Big Rock Point site. The Big Rock reactor ceased operation in August 1997 and has since undergone decommissioning. In accordance with the Big Rock License Termination Plan ("LTP") approved by the Commission, Consumers submitted a letter on November 16, 2007 in Docket No. 72-043 stating that it had completed all decommissioning and final status surveys of the Big Rock facility. Consumers requested the unrestricted release of all Big Rock Point site land except for the 30 acres associated with the Big Rock ISFSI and an additional 75 acres (which will be transferred to ENP along with the Big Rock Operating License). By letter dated January 8, 2007, the NRC approved Consumers' land release request, stating that: "(i) Dismantlement and decontamination activities were performed in accordance with the approved LTP, and (ii) The [final status survey reports] and associated documentation demonstrate that the surveyed areas of

Consumers to ENP and ENO will occur pursuant to the execution of an Asset Sales Agreement ("ASA") executed by Consumers and ENP on July 11, 2006. Under the ASA, in addition to transferring the Big Rock ISFSI and associated licenses, Consumers will transfer the Palisades Nuclear Plant and associated licenses. The Palisades Nuclear Plant transfer is the subject of a separate proceeding.[2]

On February 20, 2007, the Nuclear Information and Resource Service ("NIRS") and Don't Waste Michigan ("DWM"), on behalf of themselves and Mr. Victor McManemy (collectively, the "Petitioners"), filed a Request for Hearing and Petition to Intervene ("Petition") in the above-captioned dockets. The Applicants hereby respond in opposition to the Petition and request that the Commission deny the Petitioners' request for a hearing and request to intervene as procedurally inadequate and lacking in merit.

II. Standing to Intervene

The Commission may grant the Petitioners' intervention and request for hearing if it determines that the Petitioners have standing under the provisions of 10 CFR 2.309(d) and have proposed at least one admissible contention meeting the requirements of 10 CFR 2.309(f). *See* 10 CFR 2.309(a). Under the Commission's regulations, the Petitioners must demonstrate, *inter alia*, the nature and extent of their property, financial or other interest in the proceeding and the possible effect of any decision or order that may be issued in the proceeding on that interest. 10 CFR 2.309(d)(1).

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the facility and site meet the criteria for decommissioning in 10 CFR Part 20, subpart E. Therefore, except for that area necessary to support the [ISFSI] ... the site is available for unrestricted use."

[2] Consumers, Nuclear Management Company, LLC ("NMC"), ENP, and ENO submitted an application on August 31, 2006 requesting Commission approval to transfer the Palisades Nuclear Plant Facilities Operating License DPR-20 from Consumers and NMC to ENP, to possess and own, and ENO, to possess, use and operate, the Palisades facilities.

Specifically, to satisfy the threshold 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 challenged action (here, the grant of a license transfer), (b) is likely to be redressed by a favorable decision, (c) arguably lies within the "zone of interests" protected by the governing statutes, and (d) specifying the facts pertaining to that interest. *See 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, 52 NRC 251 (2000). The Petitioners here fail to satisfy these basic standing requirements.

The Petitioners provide only minimal information to establish standing, falling far short of an adequate showing under the Commission's regulations and precedent. The Petitioners offer an organizational description of NIRS and DWM and provide the address of Mr. McManemy, who declares his affiliation to NIRS and DWM as a member-intervenor in these proceedings. Petition at 1-2. The Petitioners state that the "safety and security concerns" and "environmental issues" presented in the Petition must be resolved or the Big Rock ISFSI "may operate unsafely and insecurely and pose an unacceptable risk to public health and safety, the environment, and the common defense and security, thereby jeopardizing the health and welfare of the respective Petitioners'-Inteveners' members who live, own property, are ratepayers, and recreate within the vicinity" of the Big Rock Point site. Petition at 2-3. "In addition, the still-present radioactive contamination of the soil, groundwater, and Lake Michigan sediments at, and adjacent to, the Big Rock Point site, will continue to represent an unacceptable risk to public health and safety and the environment. . . " Petition at 3. The Petitioners offer little more to establish their standing.

Clearly, the statements offered by the Petitioners to establish standing do not allege a concrete and particularized injury. Nowhere do the Petitioners articulate how or why the approval of the *license transfer* would injure the Petitioners or any members of NIRS' and DWM's organizations. The Petitioner's state their belief that the *current* security measures (which they note are intended to remain the same after the transfer) are inadequate and the NRC's design criteria for waste transport criteria are "woefully inadequate," and make general arguments related to the potential for terrorist attacks, the Department of Energy's spent nuclear fuel disposal program, and underwater submersion of casks. Petition at 5, 6, 8, 10.

Assuming *arguendo* that any of these issues, as articulated by the Petitioners, establish a concrete and particularized injury, they are not traceable to the challenged action: the transfer of the Big Rock and Big Rock ISFSI licenses. In fact, the Petition is largely, if not wholly, premised on the idea that nothing will change as a result of the license transfer. Petition at 10 ("The admission that 'No physical change to the BRP facility or operational change are being proposed in the application' confirms that [ENP] and [ENO] have no plans whatsoever to adequately upgrade security protections at the BRP ISFSI, as contended through this petition."). While the security issues raised by the Petitioners might arguably be appropriately considered in the context of an original licensing proceeding, in this context they fail to satisfy the requirements for standing and amount to little more than a collateral attack on the NRC's past actions to approve the security/emergency measures in place at the Big Rock Point facilities. Those collateral attacks are clearly untimely.

Further, any injury associated with the issues raised in the Petition could not be redressed by a favorable decision in this proceeding. Any injury that may be associated with the security contention(s) raised in the Petition will not be a result of this license transfer proceeding because,

as the Petitioners recognize, the Applicants do not propose to alter the NRC-approved security and emergency plans in place at the Big Rock Point site. In any event, the issues raised by the Petitioners do not specify any real or potential injury that relates to the license transfer[3] and any injury that might be implicitly assumed from the arguments in the Petition could only be redressed in other proceedings before the NRC or other administrative bodies.

First, the Petitioners' concerns regarding terrorist attack scenarios (Petition at 3-5) are general in nature—they could apply to many, if not all, nuclear facilities—and should thus be addressed within a rulemaking proceeding, such as the Commission's pending rulemaking on threats to nuclear facility designs in the event of a terrorist attack. *See* Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). Even assuming that the Petitioners' terrorism concerns were specific to the Big Rock Point site, the Atomic Safety and Licensing Board has determined that "[w]here, as here, the Commission has initiated rulemaking proceedings that apply to the facility in question and that directly implicate a proposed contention, a Board ordinarily should refrain from admitting that contention." *Amergen Energy Co., LLC,* LBP-06-07, 63 NRC 188, 203 (2006) (citation omitted).

Second, the Petitioners' statements regarding transportation of casks and spent fuel (and related arguments regarding cask submersion and disposal at Yucca Mountain) concern matters that fall outside of the scope of this license transfer proceeding. The Applicants have not proposed to transport any spent nuclear fuel from the Big Rock ISFSI, nor is the transportation of spent fuel a matter for consideration within this license transfer proceeding. Transfer of spent fuel to the DOE for disposal at Yucca Mountain or another facility is controlled by the DOE under the Nuclear Waste Policy Act, and by the Department of Transportation under its

[3] The purported risk of injury associated with the action at issue must be "distinct and palpable." *Warth v. Seldin,* 422 U.S. 490, 501 (1975), cited in *In the Matter of Caroline Power & Light,* Docket No. 50-400, 1999 WL 146268 (1999).

regulations. Moreover, as the Petitioners state, "Michigan law forbids the transfer of Big Rock's waste to another site within the state...such as to the Palisades nuclear plant in southwest Michigan." Petition at 7. In sum, the Applicants have proposed no action—and are, as Petitioners state, forbidden from proposing an action—which could create a risk of injury to the Petitioners through the proposed license transfer with respect to these transportation issues.

Third, the Petitioners do not specify a redressable injury with respect to Consumers' intention to sell portions of restored land to the State of Michigan. *See* Petition at 9-10. The restored land has been removed from the Big Rock licenses through the approvals of the NRC, in accordance with the Commission-approved Big Rock LTP. Thus, any action Consumers may take with respect to the restored lands is separate and apart from the instant proceeding. The Petitioners had ample opportunity to comment on the development of the LTP and the Big Rock Point decommissioning and restoration processes and may not now seek to attack the Commission's decisions to release the restored lands from the license at issue in this proceeding.

NIRS and DWM, each seeking 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), identify that member by name and address, and show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member." *Vermont Yankee*, 52 NRC at 163 (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 52 NRC 193, 202 (2000)). For the reasons set forth above, NIRS and DWM have failed to demonstrate how one of its members, Mr. McManemy, may be affected by the licensing action. In addition, the Petitioners have specified only that Mr. McManemy lives within the 50-mile Emergency Planning Zone of the former Big Rock plant. Neither the Petition nor Mr. McManemy's declaration provide any other information as to how Mr. McManemy may

be affected by the license transfer at issue in this proceeding. Thus, Mr. McManemy, NIRS, and DWM lack standing to intervene in this proceeding.

III. Admissibility of Contentions

To be found admissible, a contention must (i) provide a specific statement of the issue of law or fact to be raised or controverted; (ii) provide a brief explanation of the basis for the contention; (iii) *demonstrate that the issue raised in the contention is within the scope of the proceeding*; (iv) *demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding*; (v) provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 CFR 2.309(d). The Petitioners have failed to meet these burdens with respect to each of the discrete issues they raise in their Petition.

A. The Security Contentions Are Inadmissible

The transaction described in the ASA and the license transfers will not involve any changes to the design or operational criteria established under the licenses pertaining to the Big Rock ISFSI, will not have any adverse impact on the public health, safety, or the environment, and will not be inimical to the common defense or security. The Application does not request approval of, or involve any physical changes in, the facility or in the conduct of operations at the

Big Rock ISFSI. After the closing of the transaction described in the ASA, the Big Rock ISFSI will continue to be operated and maintained in accordance with its licenses and all relevant safety and security provisions of those licenses.

Upon closing of the transaction, ENP and ENO (as its authorized agent) will simply assume authority and responsibility for the functions necessary to fulfill the security planning requirements specified in 10 C.F.R. Part 73, and will assume responsibility, functions, and control under the existing NRC-approved physical security, guard training and qualification, and safeguards contingency plans developed and implemented by Consumers, as well as any commitments in response to the NRC's Security Orders. ENP anticipates that no changes will be made upon ENP's assumption of ownership and operation of Big Rock that will result in a decrease in the effectiveness of the plans, and that the plans will continue to meet existing regulatory standards. Moreover, any changes to the plans, operations, and safeguards will be made in accordance with the Commission's regulations designed to protect human health and safety and the environment, and only with the Commission's written approval.

To maintain continuity of operations, the Big Rock ISFSI supervisor employed by Consumers immediately prior to the closing of the transaction will be offered employment with ENO upon completion of the sale/purchase of the Big Rock assets. Following the closing of the transaction, ENP and ENO will maintain all nuclear property damage insurance for the Big Rock property transferred to ENP, to the full extent required by the NRC pursuant to 10 CFR 50.54(w), as well as any required nuclear energy liability insurance pursuant to Section 170 of the AEA and 10 CFR Part 140. ENP, ENO and, to the extent appropriate, Consumers, will cooperate to maintain the necessary limits and types of commercially available nuclear liability and property damage insurance which may be required by license and regulation.

Based on these undisputed facts, Petitioners have failed to demonstrate that a change in ownership, and a concomitant transfer of NRC licenses, is material to any issue before the NRC. NRC has already approved all safety and security aspects of the Big Rock ISFSI and its operations as protective of public health, safety, and security, and there is no legal or factual basis for Petitioner's untimely speculation to the contrary.

B. The Financial Contentions Are Inadmissible

Petitioners' contentions regarding ENP and ENO's financial qualifications fall into three categories:

(1) The Petitioners claim that ENP and ENO will not have the financial resources to "adequately safeguard and secure Big Rock's high level radioactive waste." Petition at 13. They question whether the $25 million line of credit to which ENP and ENO will have access is sufficient to "deal with a cask emergency at Big Rock...," and further claim that "a $25 million credit line is insufficient for unexpected but very possible problems with the ISFSI or individual dry casks at Big Rock." Petition at 11-12. They further contend that ENP and ENO "lack the financial wherewithal to adequately provide security for the Big Rock ISFSI." Petition at 10.

(2) The Petitioners assert that "Entergy Nuclear's holding company/limited liability company scheme walls off the financial resources of the Entergy Nuclear parent company from the financial needs of Entergy Nuclear Palisades, LLC at the Palisades nuclear power plant site, but most especially at the shutdown and dismantled (that is, generating no income) Big Rock Point site and ISFSI." Petition at 12.

(3) The Petitioners also contend that ENP and ENO lack the financial qualifications to provide adequate security and safeguards for Big Rock's high-level radioactive wastes due to Entergy Corporation's bond ratings, and the impact of Katrina on the company, including the bankruptcy of Entergy New Orleans, Inc.

The Petitioners' contentions on financial qualifications should not be admitted because they have failed to demonstrate that the issues raised in these contentions are within the scope of this proceeding, and they are not supported by sufficient facts or expert opinions.

a. The financial impact of the security and environmental issues should not be admitted as a contention. The Petitioners' financial qualifications contention(s) are based on security and/or environmental concerns which are not at issue in this proceeding and will not be affected by the proposed licensing action. (See Section III. A., C.). Thus, any discussion of ENP and ENO's financial resources or their ability to pay for increased security to deal with the threat of a terrorist attack or potential emergencies related to the integrity of the dry storage casks are issues extraneous to this licensing proceeding, and are not properly the subject of a contention in this proceeding. Since the underlying issues are not admissible as contentions, the need for additional financial resources to deal with those issues should not be admitted as a contention.

b. The financial qualifications contention(s) lack specificity and are not supported by expert opinion. The Petitioners' contentions regarding ENP and ENO's financial qualifications are not specific and are not supported by expert opinion. Rather, the Petitioners merely claim that a $25 million line of credit will be insufficient to pay the costs of "unexpected but very possible" problems with the ISFSI or a cask emergency at Big Rock. The Petitioners do not establish the likelihood of these problems or the costs of dealing with them. They simply state

that $25 million will not be enough. This assertion is not supported by expert opinion, or any other applicable evidence, and is too vague and nonspecific to be admitted as a contention.

This contention also misconstrues the Application. The Petitioners refer to "a $25 million credit line from Entergy for maintenance of the Big Rock ISFSI." Petition at 11. The application does not rely on a $25 million line of credit to fund the safe operations and maintenance of the Big Rock ISFSI. The Application states that the costs of operation and maintenance of the Big Rock ISFSI, which includes maintaining all the existing security and emergency planning requirements, will be paid from the sale of electricity generated by Palisades. The $25 million line of credit is available, if needed, for additional working capital.

c. ENO and ENP have met the financial qualifications requirements of 10 CFR 50.33. With regard to Entergy's corporate structure and its impact on ENP and ENO's access to additional financial resources from their parent companies, this contention amounts to an impermissible attack on the regulations applicable to this license transfer. Under those regulations, only the applicants are required to demonstrate that they have the financial qualifications to safely own and operate the plant. This is demonstrated through five years of projected revenues and costs. 10 CFR 50.33. ENP and ENO have demonstrated that they possess those financial qualifications as required by the Commission's regulations. No further financial resources, either through parent companies or any other source, are required by the regulations, and any contention based on such a concern is not appropriate for admission in a license transfer proceeding.

d. Entergy Corporation's financial performance has been strong. In addition, the Petitioners' alleged concerns about Entergy Corporation's overall financial well-being, especially in the aftermath of Hurricane Katrina, are misplaced. Entergy Corporation's stock

price is currently near its all-time high, and the price has increased approximately 40 percent over the past two years. The price has increased approximately 25 percent since the period immediately prior to Katrina.

Prior to Katrina, Entergy New Orleans, Inc. accounted for approximately six percent of Entergy Corporation's customers and load. It currently accounts for about three percent of Entergy Corporation's overall customers and load. Entergy New Orleans, Inc. was put into Chapter 11 reorganization within weeks after Katrina, and is progressing toward emerging from that bankruptcy.

Entergy Corporation's financial well-being, while not properly an issue for contention in this proceeding, should not be a concern to the Commission, especially in view of the company's performance since Katrina.

C. The Categorical Exclusion of Environmental Review for License Transfers Is Valid

The decisions to construct the Big Rock and the Big Rock ISFSI, and to subsequently decommission Big Rock and terminate its operating license, were made by Consumers, and approved by NRC, with full knowledge and awareness of the minimal impacts that the Big Rock ISFSI's continued operation would have on the environment. On March 21, 2005, the Commission determined that a license amendment allowing Consumers to implement its license termination plan would not result in significant environmental impacts, and therefore issued a Finding of No Significant Impact ("FONSI"). The Commission explicitly noted that Consumers had moved all Big Rock reactor fuel to its ISFSI, and that the ISFSI would be maintained and operated until at least 2012 (when the DOE repository for spent fuel at Yucca Mountain may

open). Notice of Availability of Environmental Assessment and Finding of No Significant Impact Approval of License Termination Plan for the Big Rock Point Reactor Facility, Charlevoix, Michigan, 70 Fed. Reg. 13545 (March 21, 2005). Therefore, the Commission has already addressed the impacts of the ISFSI and its operation in an environmental assessment ("EA") and made a FONSI. The Petitioners did not file a timely challenge to the Commission's actions supported by those NEPA determinations and may not belatedly distort the license transfer process by raising a contention now.

The ownership and operation of the Big Rock ISFSI will transfer from Consumers to Entergy as a result of the ASA and the requested NRC license action. The NRC has generically determined that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond life of operation...of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations its spent fuel storage." 10 CFR 51.23. The design basis for the facility, its Safety Analysis Reports, and Updated Final Hazards Summary Reports will all remain the same, except for technical amendments substituting ENP and ENO as the owner and operator, respectively, of the ISFSI. No changes need to be made in the identification of the types of effluents that may be released onsite or offsite, and there would be no increase in public or occupational exposure to radiological or other materials on or offsite. Therefore, there are no significant radiological or other environmental impacts associated with the proposed action.

In brief, the physical facility, its operation, and the radiological and environmental conditions, and the environmental impacts of the Big Rock ISFSI would remain the same as they were before the anticipated transfer of ownership and operation. By no stretch of the

imagination will the proposed action and license transfer increase the probability of terrorist attack or the consequences of accidents.

The Commission has rendered a generic determination that continued storage of spent fuel in an ISFSI for a minimum of thirty years after the cessation of reactor operations does not result in significant environmental impact, anticipating the exact situation at the Big Rock ISFSI: 10 C.F.R 51.23.

The Applicants requested action is a license transfer for purposes of the environmental review requirements contained in 10 CFR Part 51, and therefore falls within the categorical exclusion from environmental review for approvals of direct or indirect transfers of NRC licenses and any associated amendments. 10 CFR 51.22 (c)(21).

Contrary to Petitioners' contentions, the use of the categorical exclusion for license transfer is legally sound. The Petitioners assert that "the requested NRC action does not fall within the categorical exclusion from environmental review for approvals of transfers of NRC licenses and any associated amendments established by 10 C.F.R. § 51.22(c)(21)," and then misconstrue a recent 9th Circuit decision regarding NEPA analysis of terrorism impacts in an attempt to override this clearly applicable categorical exclusion. Petition at 13-14; *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, __ U.S. __, No. 03-74628 (Jan. 16, 2007) ("*San Luis Obispo*").

The *San Luis Obispo* case, however, involved an application for a license to *construct a new ISFSI* facility, not a *license transfer* for an ISFSI that already exists, where any environmental impacts of the construction have long since occurred. The Ninth Circuit determined that an EIS is required for *construction of a new ISFSI.* Therefore, on its face *San Luis Obispo* is inapplicable to the Big Rock license transfer. The Petitioners' inappropriate

invocation of *San Luis Obispo* is no more than a transparent attempt to circumvent the well-established rule that once a facility requiring a federal permit or license is fully constructed, challenges based upon NEPA are moot.[4]

The Petitioners also assert that the *San Luis Obispo* NEPA decision requires consideration of terrorist impacts during the review of license transfers, "negating the categorical exclusion." Petition at 14. The Petitioners' assertion amounts to a collateral attack on the NRC's interpretation of NEPA and its own rules, and is thus outside of the scope of this license transfer proceeding.

The Petitioners' assertions are also at odds with recent Supreme Court interpretations of NEPA, as well as the NRC's interpretation of its NEPA obligations during license transfers. *See, e.g., DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (applying "proximate cause" concept to NEPA analyses and holding that NEPA requires a "reasonably close causal relationship" between the alleged environmental effect and the alleged cause). There simply is no change in the probability of a terrorist attack, or its consequences to the environment, as a result of license transfer. Indeed, the NRC has determined that "there simply is no 'proximate cause' link between an NRC licensing action ... and any altered risk of terrorist attack." *In the Matter of Amergen Energy Co., LLC*, CLI-07-08, ___ NRC ___ (Feb. 26, 2007) ("*Amergen*"). Further, in *Amergen*,

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[4] *See, e.g., Fund for Animals*, 428 F.3d at 1065; *Knaust v. Kingston*, 157 F.3d 86 (2d Cir. 1998) (NEPA action to stop construction of business park moot where related funds had all been disbursed and park was complete); *Or. Natural Res. Council, Inc. v. Wood*, 49 F.3d 1441 (9th Cir.1995) (where government had completed challenged dredging activity and had no plans to repeat dredging, no effective relief could be granted and NEPA-based action was moot); *Neighborhood Transp. Network v. Pena*, 42 F.3d 1169 (8th Cir. 1994) (NEPA-based suit challenging highway construction moot where project was complete); *Neighbors Org. To Insure a Sound Env't v. McArtor*, 878 F.2d 174 (6th Cir. 1989) (NEPA suit filed after construction, but before opening, of new airport terminal moot because terminal was finished); *Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d at 549 (affirming denial on mootness grounds of motion for permanent injunction under NEPA of an almost-complete highway); *Bayou Liberty Assoc., Inc.*, 217 F.3d 393 (5th Cir. 2000) (completion of construction project mooted NEPA claim); *Friends of the Earth v. Bergland*, 576 F.2d 1377 (NEPA action moot where mining company had already engaged in challenged exploratory mining in national forest).

the NRC refused to extend the holding in *San Luis Obispo* to apply to proceedings beyond the underlying proceeding in that case:

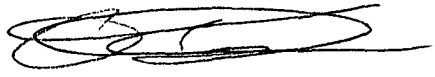
> Respectfully, however, we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the Diablo Canyon proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question. Such an obligation would defeat any possibility of a conflict between the Circuits on important issues. For the reasons we gave in our prior decisions, and for the reasons the Solicitor General gave in his recent Supreme Court brief in the Diablo Canyon case, we continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.
> *Id.* at ___.

Consistent with the Supreme Court decision in *Public Citizen* and the Commission's own determination in *Amergen*, the NRC should not expand the *San Luis Obispo* holding to include license transfers. Nor should it obviate its own validly promulgated regulation on categorical exclusions. Even if the NRC were to apply *San Luis Obispo* in all proceedings, that case does not state or even imply that all, or even any, of the NRC's categorical exclusions, as set forth in Part 51 of its regulations, are no longer valid. Thus, in accordance with Part 51 of its regulations and the NRC's interpretations of NEPA, the NRC need not perform an environmental review of this license transfer action. To the extent that the Petitioners' assertion regarding *San Luis Obispo* may form the basis of a contention, that contention or portion thereof is inadmissible for the reasons stated above.

IV. Conclusion

For all of the foregoing reasons, the Applicants respectfully request that the Commission (a) find that the Petitioners have not set forth an admissible contention, (b) deny the Petitioners' request to intervene in these proceedings, and (c) deny the Petitioners' request for a hearing.

Respectfully submitted,



Douglas E. Levanway
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, Mississippi 39205
(601) 968-5500
del@wisecarter.com

Counsel For Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc.

Sam Behrends, IV
Robert M. Andersen
Ahren S. Tryon
LeBoeuf, Lamb, Greene & MacRae LLP
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 986-8000
sbehrend@llgm.com
randersen@llgm.com
atryon@llgm.com

Counsel for Consumers Energy Company

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY ENTERGY NUCLEAR PALISADES, LLC ENTERGY NUCLEAR OPERATIONS, INC.	Docket Nos. 50-255 72-043

CERTIFICATE OF SERVICE

I hereby certify that I have on this date filed the foregoing 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
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

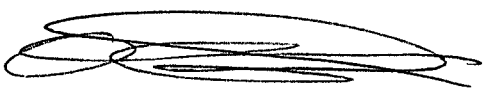
Victor McManemy
7786 Peninsula Drive
Traverse City, Michigan 49686

Kevin Kamps
Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, Maryland 20912

Susan Devon
Division Director, Regulated Energy
Michigan Public Service Commission
P.O. Box 30221
Lansing, Michigan 48909

Terry Lodge, Esq.
On behalf of Michael Keegan and
Don't Waste Michigan
316 North Michigan Street, Suite 520
Toledo, Ohio 43604

Dated at Washington, D.C. this 16th day of March, 2007.



Ahren S. Tryon
Counsel for Consumers Energy Company

LeBoeuf, Lamb, Greene & MacRae LLP

NEW YORK
WASHINGTON, D.C.
ALBANY
BOSTON
CHICAGO
HARTFORD
HOUSTON
JACKSONVILLE
LOS ANGELES
SAN FRANCISCO

1875 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000
Facsimile: (202) 986-8102

LONDON
A MULTINATIONAL PARTNERSHIP
PARIS
BRUSSELS
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March 16, 2007

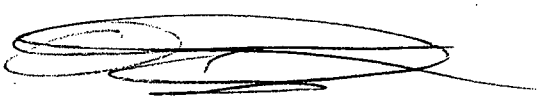
U.S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, D.C. 10555-0001

Re: Consumers Energy Company, Entergy Nuclear Palisades LLC and Entergy Nuclear Operations
Docket Nos. 50-255 and 72-043

Dear Sir or Madam:

Please find enclosed for filing an original and two (2) copies of the attached Response of Consumers Energy Company, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. in Opposition to Request for Hearing and Petition to Intervene of Nuclear Information and Resource Service, Don't Waste Michigan, and Victor McManemy.

Sincerely,



Ahren S. Tryon
Counsel for Consumers Energy Company

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY ENTERGY NUCLEAR PALISADES, LLC ENTERGY NUCLEAR OPERATIONS, INC.	Docket Nos. 50-255 72-043

RESPONSE OF CONSUMERS ENERGY COMPANY, ENTERGY NUCLEAR PALISADES, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. IN OPPOSITION TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF NUCLEAR INFORMATION AND RESOURCE SERVICE, DON'T WASTE MICHIGAN, AND VICTOR McMANEMY

I. Background

On October 31, 2006, Consumers Energy Company ("Consumers"), Entergy Nuclear Palisades, LLC ("ENP"), and Entergy Nuclear Operations, Inc. ("ENO") (collectively, the "Applicants") filed an application seeking Nuclear Regulatory Commission ("NRC" or "Commission") approval to directly transfer the Big Rock Point Facility ("Big Rock") Operating License DPR-06 and the Big Rock Point Independent Spent Fuel Storage Installation ("Big Rock ISFSI") license SFGL-16 from Consumers to ENP, to possess and own, and ENO, to possess, use and operate, the Big Rock ISFSI.[1] The transfer of the Big Rock and Big Rock ISFSI licenses from

[1] The Big Rock ISFSI is the only remaining nuclear facility at the Big Rock Point site. The Big Rock reactor ceased operation in August 1997 and has since undergone decommissioning. In accordance with the Big Rock License Termination Plan ("LTP") approved by the Commission, Consumers submitted a letter on November 16, 2007 in Docket No. 72-043 stating that it had completed all decommissioning and final status surveys of the Big Rock facility. Consumers requested the unrestricted release of all Big Rock Point site land except for the 30 acres associated with the Big Rock ISFSI and an additional 75 acres (which will be transferred to ENP along with the Big Rock Operating License). By letter dated January 8, 2007, the NRC approved Consumers' land release request, stating that: "(i) Dismantlement and decontamination activities were performed in accordance with the approved LTP, and (ii) The [final status survey reports] and associated documentation demonstrate that the surveyed areas of

Consumers to ENP and ENO will occur pursuant to the execution of an Asset Sales Agreement ("ASA") executed by Consumers and ENP on July 11, 2006. Under the ASA, in addition to transferring the Big Rock ISFSI and associated licenses, Consumers will transfer the Palisades Nuclear Plant and associated licenses. The Palisades Nuclear Plant transfer is the subject of a separate proceeding.[2]

On February 20, 2007, the Nuclear Information and Resource Service ("NIRS") and Don't Waste Michigan ("DWM"), on behalf of themselves and Mr. Victor McManemy (collectively, the "Petitioners"), filed a Request for Hearing and Petition to Intervene ("Petition") in the above-captioned dockets. The Applicants hereby respond in opposition to the Petition and request that the Commission deny the Petitioners' request for a hearing and request to intervene as procedurally inadequate and lacking in merit.

II. Standing to Intervene

The Commission may grant the Petitioners' intervention and request for hearing if it determines that the Petitioners have standing under the provisions of 10 CFR 2.309(d) and have proposed at least one admissible contention meeting the requirements of 10 CFR 2.309(f). *See* 10 CFR 2.309(a). Under the Commission's regulations, the Petitioners must demonstrate, *inter alia*, the nature and extent of their property, financial or other interest in the proceeding and the possible effect of any decision or order that may be issued in the proceeding on that interest. 10 CFR 2.309(d)(1).

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the facility and site meet the criteria for decommissioning in 10 CFR Part 20, subpart E. Therefore, except for that area necessary to support the [ISFSI] ... the site is available for unrestricted use."

[2] Consumers, Nuclear Management Company, LLC ("NMC"), ENP, and ENO submitted an application on August 31, 2006 requesting Commission approval to transfer the Palisades Nuclear Plant Facilities Operating License DPR-20 from Consumers and NMC to ENP, to possess and own, and ENO, to possess, use and operate, the Palisades facilities.

Specifically, to satisfy the threshold 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 challenged action (here, the grant of a license transfer), (b) is likely to be redressed by a favorable decision, (c) arguably lies within the "zone of interests" protected by the governing statutes, and (d) specifying the facts pertaining to that interest. *See 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, 52 NRC 251 (2000). The Petitioners here fail to satisfy these basic standing requirements.

The Petitioners provide only minimal information to establish standing, falling far short of an adequate showing under the Commission's regulations and precedent. The Petitioners offer an organizational description of NIRS and DWM and provide the address of Mr. McManemy, who declares his affiliation to NIRS and DWM as a member-intervenor in these proceedings. Petition at 1-2. The Petitioners state that the "safety and security concerns" and "environmental issues" presented in the Petition must be resolved or the Big Rock ISFSI "may operate unsafely and insecurely and pose an unacceptable risk to public health and safety, the environment, and the common defense and security, thereby jeopardizing the health and welfare of the respective Petitioners'-Inteveners' members who live, own property, are ratepayers, and recreate within the vicinity" of the Big Rock Point site. Petition at 2-3. "In addition, the still-present radioactive contamination of the soil, groundwater, and Lake Michigan sediments at, and adjacent to, the Big Rock Point site, will continue to represent an unacceptable risk to public health and safety and the environment. . . " Petition at 3. The Petitioners offer little more to establish their standing.

Clearly, the statements offered by the Petitioners to establish standing do not allege a concrete and particularized injury. Nowhere do the Petitioners articulate how or why the approval of the *license transfer* would injure the Petitioners or any members of NIRS' and DWM's organizations. The Petitioner's state their belief that the *current* security measures (which they note are intended to remain the same after the transfer) are inadequate and the NRC's design criteria for waste transport criteria are "woefully inadequate," and make general arguments related to the potential for terrorist attacks, the Department of Energy's spent nuclear fuel disposal program, and underwater submersion of casks. Petition at 5, 6, 8, 10.

Assuming *arguendo* that any of these issues, as articulated by the Petitioners, establish a concrete and particularized injury, they are not traceable to the challenged action: the transfer of the Big Rock and Big Rock ISFSI licenses. In fact, the Petition is largely, if not wholly, premised on the idea that nothing will change as a result of the license transfer. Petition at 10 ("The admission that 'No physical change to the BRP facility or operational change are being proposed in the application' confirms that [ENP] and [ENO] have no plans whatsoever to adequately upgrade security protections at the BRP ISFSI, as contended through this petition."). While the security issues raised by the Petitioners might arguably be appropriately considered in the context of an original licensing proceeding, in this context they fail to satisfy the requirements for standing and amount to little more than a collateral attack on the NRC's past actions to approve the security/emergency measures in place at the Big Rock Point facilities. Those collateral attacks are clearly untimely.

Further, any injury associated with the issues raised in the Petition could not be redressed by a favorable decision in this proceeding. Any injury that may be associated with the security contention(s) raised in the Petition will not be a result of this license transfer proceeding because,

as the Petitioners recognize, the Applicants do not propose to alter the NRC-approved security and emergency plans in place at the Big Rock Point site. In any event, the issues raised by the Petitioners do not specify any real or potential injury that relates to the license transfer[3] and any injury that might be implicitly assumed from the arguments in the Petition could only be redressed in other proceedings before the NRC or other administrative bodies.

First, the Petitioners' concerns regarding terrorist attack scenarios (Petition at 3-5) are general in nature—they could apply to many, if not all, nuclear facilities—and should thus be addressed within a rulemaking proceeding, such as the Commission's pending rulemaking on threats to nuclear facility designs in the event of a terrorist attack. *See* Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). Even assuming that the Petitioners' terrorism concerns were specific to the Big Rock Point site, the Atomic Safety and Licensing Board has determined that "[w]here, as here, the Commission has initiated rulemaking proceedings that apply to the facility in question and that directly implicate a proposed contention, a Board ordinarily should refrain from admitting that contention." *Amergen Energy Co., LLC,* LBP-06-07, 63 NRC 188, 203 (2006) (citation omitted).

Second, the Petitioners' statements regarding transportation of casks and spent fuel (and related arguments regarding cask submersion and disposal at Yucca Mountain) concern matters that fall outside of the scope of this license transfer proceeding. The Applicants have not proposed to transport any spent nuclear fuel from the Big Rock ISFSI, nor is the transportation of spent fuel a matter for consideration within this license transfer proceeding. Transfer of spent fuel to the DOE for disposal at Yucca Mountain or another facility is controlled by the DOE under the Nuclear Waste Policy Act, and by the Department of Transportation under its

[3] The purported risk of injury associated with the action at issue must be "distinct and palpable." *Warth v. Seldin,* 422 U.S. 490, 501 (1975), cited in *In the Matter of Caroline Power & Light,* Docket No. 50-400, 1999 WL 146268 (1999).

regulations. Moreover, as the Petitioners state, "Michigan law forbids the transfer of Big Rock's waste to another site within the state...such as to the Palisades nuclear plant in southwest Michigan." Petition at 7. In sum, the Applicants have proposed no action—and are, as Petitioners state, forbidden from proposing an action—which could create a risk of injury to the Petitioners through the proposed license transfer with respect to these transportation issues.

Third, the Petitioners do not specify a redressable injury with respect to Consumers' intention to sell portions of restored land to the State of Michigan. *See* Petition at 9-10. The restored land has been removed from the Big Rock licenses through the approvals of the NRC, in accordance with the Commission-approved Big Rock LTP. Thus, any action Consumers may take with respect to the restored lands is separate and apart from the instant proceeding. The Petitioners had ample opportunity to comment on the development of the LTP and the Big Rock Point decommissioning and restoration processes and may not now seek to attack the Commission's decisions to release the restored lands from the license at issue in this proceeding.

NIRS and DWM, each seeking 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), identify that member by name and address, and show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member." *Vermont Yankee*, 52 NRC at 163 (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 52 NRC 193, 202 (2000)). For the reasons set forth above, NIRS and DWM have failed to demonstrate how one of its members, Mr. McManemy, may be affected by the licensing action. In addition, the Petitioners have specified only that Mr. McManemy lives within the 50-mile Emergency Planning Zone of the former Big Rock plant. Neither the Petition nor Mr. McManemy's declaration provide any other information as to how Mr. McManemy may

be affected by the license transfer at issue in this proceeding. Thus, Mr. McManemy, NIRS, and DWM lack standing to intervene in this proceeding.

III. Admissibility of Contentions

To be found admissible, a contention must (i) provide a specific statement of the issue of law or fact to be raised or controverted; (ii) provide a brief explanation of the basis for the contention; (iii) *demonstrate that the issue raised in the contention is within the scope of the proceeding*; (iv) *demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding*; (v) provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 CFR 2.309(d). The Petitioners have failed to meet these burdens with respect to each of the discrete issues they raise in their Petition.

A. The Security Contentions Are Inadmissible

The transaction described in the ASA and the license transfers will not involve any changes to the design or operational criteria established under the licenses pertaining to the Big Rock ISFSI, will not have any adverse impact on the public health, safety, or the environment, and will not be inimical to the common defense or security. The Application does not request approval of, or involve any physical changes in, the facility or in the conduct of operations at the

Big Rock ISFSI. After the closing of the transaction described in the ASA, the Big Rock ISFSI will continue to be operated and maintained in accordance with its licenses and all relevant safety and security provisions of those licenses.

Upon closing of the transaction, ENP and ENO (as its authorized agent) will simply assume authority and responsibility for the functions necessary to fulfill the security planning requirements specified in 10 C.F.R. Part 73, and will assume responsibility, functions, and control under the existing NRC-approved physical security, guard training and qualification, and safeguards contingency plans developed and implemented by Consumers, as well as any commitments in response to the NRC's Security Orders. ENP anticipates that no changes will be made upon ENP's assumption of ownership and operation of Big Rock that will result in a decrease in the effectiveness of the plans, and that the plans will continue to meet existing regulatory standards. Moreover, any changes to the plans, operations, and safeguards will be made in accordance with the Commission's regulations designed to protect human health and safety and the environment, and only with the Commission's written approval.

To maintain continuity of operations, the Big Rock ISFSI supervisor employed by Consumers immediately prior to the closing of the transaction will be offered employment with ENO upon completion of the sale/purchase of the Big Rock assets. Following the closing of the transaction, ENP and ENO will maintain all nuclear property damage insurance for the Big Rock property transferred to ENP, to the full extent required by the NRC pursuant to 10 CFR 50.54(w), as well as any required nuclear energy liability insurance pursuant to Section 170 of the AEA and 10 CFR Part 140. ENP, ENO and, to the extent appropriate, Consumers, will cooperate to maintain the necessary limits and types of commercially available nuclear liability and property damage insurance which may be required by license and regulation.

Based on these undisputed facts, Petitioners have failed to demonstrate that a change in ownership, and a concomitant transfer of NRC licenses, is material to any issue before the NRC. NRC has already approved all safety and security aspects of the Big Rock ISFSI and its operations as protective of public health, safety, and security, and there is no legal or factual basis for Petitioner's untimely speculation to the contrary.

B. The Financial Contentions Are Inadmissible

Petitioners' contentions regarding ENP and ENO's financial qualifications fall into three categories:

(1) The Petitioners claim that ENP and ENO will not have the financial resources to "adequately safeguard and secure Big Rock's high level radioactive waste." Petition at 13. They question whether the $25 million line of credit to which ENP and ENO will have access is sufficient to "deal with a cask emergency at Big Rock...," and further claim that "a $25 million credit line is insufficient for unexpected but very possible problems with the ISFSI or individual dry casks at Big Rock." Petition at 11-12. They further contend that ENP and ENO "lack the financial wherewithal to adequately provide security for the Big Rock ISFSI." Petition at 10.

(2) The Petitioners assert that "Entergy Nuclear's holding company/limited liability company scheme walls off the financial resources of the Entergy Nuclear parent company from the financial needs of Entergy Nuclear Palisades, LLC at the Palisades nuclear power plant site, but most especially at the shutdown and dismantled (that is, generating no income) Big Rock Point site and ISFSI." Petition at 12.

(3) The Petitioners also contend that ENP and ENO lack the financial qualifications to provide adequate security and safeguards for Big Rock's high-level radioactive wastes due to Entergy Corporation's bond ratings, and the impact of Katrina on the company, including the bankruptcy of Entergy New Orleans, Inc.

The Petitioners' contentions on financial qualifications should not be admitted because they have failed to demonstrate that the issues raised in these contentions are within the scope of this proceeding, and they are not supported by sufficient facts or expert opinions.

a. The financial impact of the security and environmental issues should not be admitted as a contention. The Petitioners' financial qualifications contention(s) are based on security and/or environmental concerns which are not at issue in this proceeding and will not be affected by the proposed licensing action. (See Section III. A., C.). Thus, any discussion of ENP and ENO's financial resources or their ability to pay for increased security to deal with the threat of a terrorist attack or potential emergencies related to the integrity of the dry storage casks are issues extraneous to this licensing proceeding, and are not properly the subject of a contention in this proceeding. Since the underlying issues are not admissible as contentions, the need for additional financial resources to deal with those issues should not be admitted as a contention.

b. The financial qualifications contention(s) lack specificity and are not supported by expert opinion. The Petitioners' contentions regarding ENP and ENO's financial qualifications are not specific and are not supported by expert opinion. Rather, the Petitioners merely claim that a $25 million line of credit will be insufficient to pay the costs of "unexpected but very possible" problems with the ISFSI or a cask emergency at Big Rock. The Petitioners do not establish the likelihood of these problems or the costs of dealing with them. They simply state

that $25 million will not be enough. This assertion is not supported by expert opinion, or any other applicable evidence, and is too vague and nonspecific to be admitted as a contention.

This contention also misconstrues the Application. The Petitioners refer to "a $25 million credit line from Entergy for maintenance of the Big Rock ISFSI." Petition at 11. The application does not rely on a $25 million line of credit to fund the safe operations and maintenance of the Big Rock ISFSI. The Application states that the costs of operation and maintenance of the Big Rock ISFSI, which includes maintaining all the existing security and emergency planning requirements, will be paid from the sale of electricity generated by Palisades. The $25 million line of credit is available, if needed, for additional working capital.

c. ENO and ENP have met the financial qualifications requirements of 10 CFR 50.33. With regard to Entergy's corporate structure and its impact on ENP and ENO's access to additional financial resources from their parent companies, this contention amounts to an impermissible attack on the regulations applicable to this license transfer. Under those regulations, only the applicants are required to demonstrate that they have the financial qualifications to safely own and operate the plant. This is demonstrated through five years of projected revenues and costs. 10 CFR 50.33. ENP and ENO have demonstrated that they possess those financial qualifications as required by the Commission's regulations. No further financial resources, either through parent companies or any other source, are required by the regulations, and any contention based on such a concern is not appropriate for admission in a license transfer proceeding.

d. Entergy Corporation's financial performance has been strong. In addition, the Petitioners' alleged concerns about Entergy Corporation's overall financial well-being, especially in the aftermath of Hurricane Katrina, are misplaced. Entergy Corporation's stock

price is currently near its all-time high, and the price has increased approximately 40 percent over the past two years. The price has increased approximately 25 percent since the period immediately prior to Katrina.

Prior to Katrina, Entergy New Orleans, Inc. accounted for approximately six percent of Entergy Corporation's customers and load. It currently accounts for about three percent of Entergy Corporation's overall customers and load. Entergy New Orleans, Inc. was put into Chapter 11 reorganization within weeks after Katrina, and is progressing toward emerging from that bankruptcy.

Entergy Corporation's financial well-being, while not properly an issue for contention in this proceeding, should not be a concern to the Commission, especially in view of the company's performance since Katrina.

C. The Categorical Exclusion of Environmental Review for License Transfers Is Valid

The decisions to construct the Big Rock and the Big Rock ISFSI, and to subsequently decommission Big Rock and terminate its operating license, were made by Consumers, and approved by NRC, with full knowledge and awareness of the minimal impacts that the Big Rock ISFSI's continued operation would have on the environment. On March 21, 2005, the Commission determined that a license amendment allowing Consumers to implement its license termination plan would not result in significant environmental impacts, and therefore issued a Finding of No Significant Impact ("FONSI"). The Commission explicitly noted that Consumers had moved all Big Rock reactor fuel to its ISFSI, and that the ISFSI would be maintained and operated until at least 2012 (when the DOE repository for spent fuel at Yucca Mountain may

open). Notice of Availability of Environmental Assessment and Finding of No Significant Impact Approval of License Termination Plan for the Big Rock Point Reactor Facility, Charlevoix, Michigan, 70 Fed. Reg. 13545 (March 21, 2005). Therefore, the Commission has already addressed the impacts of the ISFSI and its operation in an environmental assessment ("EA") and made a FONSI. The Petitioners did not file a timely challenge to the Commission's actions supported by those NEPA determinations and may not belatedly distort the license transfer process by raising a contention now.

The ownership and operation of the Big Rock ISFSI will transfer from Consumers to Entergy as a result of the ASA and the requested NRC license action. The NRC has generically determined that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond life of operation...of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations its spent fuel storage." 10 CFR 51.23. The design basis for the facility, its Safety Analysis Reports, and Updated Final Hazards Summary Reports will all remain the same, except for technical amendments substituting ENP and ENO as the owner and operator, respectively, of the ISFSI. No changes need to be made in the identification of the types of effluents that may be released onsite or offsite, and there would be no increase in public or occupational exposure to radiological or other materials on or offsite. Therefore, there are no significant radiological or other environmental impacts associated with the proposed action.

In brief, the physical facility, its operation, and the radiological and environmental conditions, and the environmental impacts of the Big Rock ISFSI would remain the same as they were before the anticipated transfer of ownership and operation. By no stretch of the

imagination will the proposed action and license transfer increase the probability of terrorist attack or the consequences of accidents.

The Commission has rendered a generic determination that continued storage of spent fuel in an ISFSI for a minimum of thirty years after the cessation of reactor operations does not result in significant environmental impact, anticipating the exact situation at the Big Rock ISFSI: 10 C.F.R 51.23.

The Applicants requested action is a license transfer for purposes of the environmental review requirements contained in 10 CFR Part 51, and therefore falls within the categorical exclusion from environmental review for approvals of direct or indirect transfers of NRC licenses and any associated amendments. 10 CFR 51.22 (c)(21).

Contrary to Petitioners' contentions, the use of the categorical exclusion for license transfer is legally sound. The Petitioners assert that "the requested NRC action does not fall within the categorical exclusion from environmental review for approvals of transfers of NRC licenses and any associated amendments established by 10 C.F.R. § 51.22(c)(21)," and then misconstrue a recent 9th Circuit decision regarding NEPA analysis of terrorism impacts in an attempt to override this clearly applicable categorical exclusion. Petition at 13-14; *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, __ U.S. __, No. 03-74628 (Jan. 16, 2007) ("*San Luis Obispo*").

The *San Luis Obispo* case, however, involved an application for a license to *construct a new ISFSI* facility, not a *license transfer* for an ISFSI that already exists, where any environmental impacts of the construction have long since occurred. The Ninth Circuit determined that an EIS is required for *construction of a new ISFSI.* Therefore, on its face *San Luis Obispo* is inapplicable to the Big Rock license transfer. The Petitioners' inappropriate

invocation of *San Luis Obispo* is no more than a transparent attempt to circumvent the well-established rule that once a facility requiring a federal permit or license is fully constructed, challenges based upon NEPA are moot.[4]

The Petitioners also assert that the *San Luis Obispo* NEPA decision requires consideration of terrorist impacts during the review of license transfers, "negating the categorical exclusion." Petition at 14. The Petitioners' assertion amounts to a collateral attack on the NRC's interpretation of NEPA and its own rules, and is thus outside of the scope of this license transfer proceeding.

The Petitioners' assertions are also at odds with recent Supreme Court interpretations of NEPA, as well as the NRC's interpretation of its NEPA obligations during license transfers. *See, e.g., DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (applying "proximate cause" concept to NEPA analyses and holding that NEPA requires a "reasonably close causal relationship" between the alleged environmental effect and the alleged cause). There simply is no change in the probability of a terrorist attack, or its consequences to the environment, as a result of license transfer. Indeed, the NRC has determined that "there simply is no 'proximate cause' link between an NRC licensing action ... and any altered risk of terrorist attack." *In the Matter of Amergen Energy Co., LLC*, CLI-07-08, ___ NRC ___ (Feb. 26, 2007) ("*Amergen*"). Further, in *Amergen*,

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[4] *See, e.g., Fund for Animals*, 428 F.3d at 1065; *Knaust v. Kingston*, 157 F.3d 86 (2d Cir. 1998) (NEPA action to stop construction of business park moot where related funds had all been disbursed and park was complete); *Or. Natural Res. Council, Inc. v. Wood*, 49 F.3d 1441 (9th Cir.1995) (where government had completed challenged dredging activity and had no plans to repeat dredging, no effective relief could be granted and NEPA-based action was moot); *Neighborhood Transp. Network v. Pena*, 42 F.3d 1169 (8th Cir. 1994) (NEPA-based suit challenging highway construction moot where project was complete); *Neighbors Org. To Insure a Sound Env't v. McArtor*, 878 F.2d 174 (6th Cir. 1989) (NEPA suit filed after construction, but before opening, of new airport terminal moot because terminal was finished); *Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d at 549 (affirming denial on mootness grounds of motion for permanent injunction under NEPA of an almost-complete highway); *Bayou Liberty Assoc., Inc.*, 217 F.3d 393 (5th Cir. 2000) (completion of construction project mooted NEPA claim); *Friends of the Earth v. Bergland*, 576 F.2d 1377 (NEPA action moot where mining company had already engaged in challenged exploratory mining in national forest).

the NRC refused to extend the holding in *San Luis Obispo* to apply to proceedings beyond the underlying proceeding in that case:

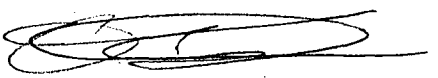
> Respectfully, however, we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the Diablo Canyon proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question. Such an obligation would defeat any possibility of a conflict between the Circuits on important issues. For the reasons we gave in our prior decisions, and for the reasons the Solicitor General gave in his recent Supreme Court brief in the Diablo Canyon case, we continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.
> *Id.* at ___.

Consistent with the Supreme Court decision in *Public Citizen* and the Commission's own determination in *Amergen*, the NRC should not expand the *San Luis Obispo* holding to include license transfers. Nor should it obviate its own validly promulgated regulation on categorical exclusions. Even if the NRC were to apply *San Luis Obispo* in all proceedings, that case does not state or even imply that all, or even any, of the NRC's categorical exclusions, as set forth in Part 51 of its regulations, are no longer valid. Thus, in accordance with Part 51 of its regulations and the NRC's interpretations of NEPA, the NRC need not perform an environmental review of this license transfer action. To the extent that the Petitioners' assertion regarding *San Luis Obispo* may form the basis of a contention, that contention or portion thereof is inadmissible for the reasons stated above.

IV. Conclusion

For all of the foregoing reasons, the Applicants respectfully request that the Commission (a) find that the Petitioners have not set forth an admissible contention, (b) deny the Petitioners' request to intervene in these proceedings, and (c) deny the Petitioners' request for a hearing.

Respectfully submitted,



Douglas E. Levanway
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, Mississippi 39205
(601) 968-5500
del@wisecarter.com

Counsel For Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc.

Sam Behrends, IV
Robert M. Andersen
Ahren S. Tryon
LeBoeuf, Lamb, Greene & MacRae LLP
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 986-8000
sbehrend@llgm.com
randersen@llgm.com
atryon@llgm.com

Counsel for Consumers Energy Company

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY	Docket Nos. 50-255
ENTERGY NUCLEAR PALISADES, LLC	72-043
ENTERGY NUCLEAR OPERATIONS, INC.	

CERTIFICATE OF SERVICE

I hereby certify that I have on this date filed the foregoing 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
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

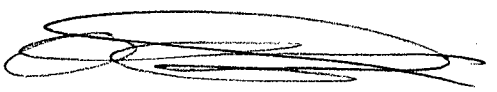
Victor McManemy
7786 Peninsula Drive
Traverse City, Michigan 49686

Kevin Kamps
Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, Maryland 20912

Susan Devon
Division Director, Regulated Energy
Michigan Public Service Commission
P.O. Box 30221
Lansing, Michigan 48909

Terry Lodge, Esq.
On behalf of Michael Keegan and
Don't Waste Michigan
316 North Michigan Street, Suite 520
Toledo, Ohio 43604

Dated at Washington, D.C. this 16th day of March, 2007.



Ahren S. Tryon
Counsel for Consumers Energy Company

LeBoeuf, Lamb, Greene & MacRae LLP

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SAN FRANCISCO

1875 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20009-5728
(202) 986-8000
Facsimile: (202) 986-8102

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March 16, 2007

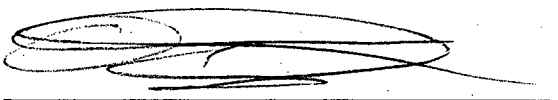
U.S. Nuclear Regulatory Commission
Attention: Document Control Desk
Washington, D.C. 10555-0001

Re: Consumers Energy Company, Entergy Nuclear Palisades LLC and Entergy Nuclear Operations
Docket Nos. 50-255 and 72-043

Dear Sir or Madam:

Please find enclosed for filing an original and two (2) copies of the attached Response of Consumers Energy Company, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc. in Opposition to Request for Hearing and Petition to Intervene of Nuclear Information and Resource Service, Don't Waste Michigan, and Victor McManemy.

Sincerely,



Ahren S. Tryon
Counsel for Consumers Energy Company

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY ENTERGY NUCLEAR PALISADES, LLC ENTERGY NUCLEAR OPERATIONS, INC.	Docket Nos. 50-255 72-043

RESPONSE OF CONSUMERS ENERGY COMPANY, ENTERGY NUCLEAR PALISADES, LLC, AND ENTERGY NUCLEAR OPERATIONS, INC. IN OPPOSITION TO REQUEST FOR HEARING AND PETITION TO INTERVENE OF NUCLEAR INFORMATION AND RESOURCE SERVICE, DON'T WASTE MICHIGAN, AND VICTOR McMANEMY

I. Background

On October 31, 2006, Consumers Energy Company ("Consumers"), Entergy Nuclear Palisades, LLC ("ENP"), and Entergy Nuclear Operations, Inc. ("ENO") (collectively, the "Applicants") filed an application seeking Nuclear Regulatory Commission ("NRC" or "Commission") approval to directly transfer the Big Rock Point Facility ("Big Rock") Operating License DPR-06 and the Big Rock Point Independent Spent Fuel Storage Installation ("Big Rock ISFSI") license SFGL-16 from Consumers to ENP, to possess and own, and ENO, to possess, use and operate, the Big Rock ISFSI.[1] The transfer of the Big Rock and Big Rock ISFSI licenses from

[1] The Big Rock ISFSI is the only remaining nuclear facility at the Big Rock Point site. The Big Rock reactor ceased operation in August 1997 and has since undergone decommissioning. In accordance with the Big Rock License Termination Plan ("LTP") approved by the Commission, Consumers submitted a letter on November 16, 2007 in Docket No. 72-043 stating that it had completed all decommissioning and final status surveys of the Big Rock facility. Consumers requested the unrestricted release of all Big Rock Point site land except for the 30 acres associated with the Big Rock ISFSI and an additional 75 acres (which will be transferred to ENP along with the Big Rock Operating License). By letter dated January 8, 2007, the NRC approved Consumers' land release request, stating that: "(i) Dismantlement and decontamination activities were performed in accordance with the approved LTP, and (ii) The [final status survey reports] and associated documentation demonstrate that the surveyed areas of

Consumers to ENP and ENO will occur pursuant to the execution of an Asset Sales Agreement ("ASA") executed by Consumers and ENP on July 11, 2006. Under the ASA, in addition to transferring the Big Rock ISFSI and associated licenses, Consumers will transfer the Palisades Nuclear Plant and associated licenses. The Palisades Nuclear Plant transfer is the subject of a separate proceeding.[2]

On February 20, 2007, the Nuclear Information and Resource Service ("NIRS") and Don't Waste Michigan ("DWM"), on behalf of themselves and Mr. Victor McManemy (collectively, the "Petitioners"), filed a Request for Hearing and Petition to Intervene ("Petition") in the above-captioned dockets. The Applicants hereby respond in opposition to the Petition and request that the Commission deny the Petitioners' request for a hearing and request to intervene as procedurally inadequate and lacking in merit.

II. Standing to Intervene

The Commission may grant the Petitioners' intervention and request for hearing if it determines that the Petitioners have standing under the provisions of 10 CFR 2.309(d) and have proposed at least one admissible contention meeting the requirements of 10 CFR 2.309(f). *See* 10 CFR 2.309(a). Under the Commission's regulations, the Petitioners must demonstrate, *inter alia*, the nature and extent of their property, financial or other interest in the proceeding and the possible effect of any decision or order that may be issued in the proceeding on that interest. 10 CFR 2.309(d)(1).

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the facility and site meet the criteria for decommissioning in 10 CFR Part 20, subpart E. Therefore, except for that area necessary to support the [ISFSI] ... the site is available for unrestricted use."

[2] Consumers, Nuclear Management Company, LLC ("NMC"), ENP, and ENO submitted an application on August 31, 2006 requesting Commission approval to transfer the Palisades Nuclear Plant Facilities Operating License DPR-20 from Consumers and NMC to ENP, to possess and own, and ENO, to possess, use and operate, the Palisades facilities.

Specifically, to satisfy the threshold 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 challenged action (here, the grant of a license transfer), (b) is likely to be redressed by a favorable decision, (c) arguably lies within the "zone of interests" protected by the governing statutes, and (d) specifying the facts pertaining to that interest. *See 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, 52 NRC 251 (2000). The Petitioners here fail to satisfy these basic standing requirements.

The Petitioners provide only minimal information to establish standing, falling far short of an adequate showing under the Commission's regulations and precedent. The Petitioners offer an organizational description of NIRS and DWM and provide the address of Mr. McManemy, who declares his affiliation to NIRS and DWM as a member-intervenor in these proceedings. Petition at 1-2. The Petitioners state that the "safety and security concerns" and "environmental issues" presented in the Petition must be resolved or the Big Rock ISFSI "may operate unsafely and insecurely and pose an unacceptable risk to public health and safety, the environment, and the common defense and security, thereby jeopardizing the health and welfare of the respective Petitioners'-Inteveners' members who live, own property, are ratepayers, and recreate within the vicinity" of the Big Rock Point site. Petition at 2-3. "In addition, the still-present radioactive contamination of the soil, groundwater, and Lake Michigan sediments at, and adjacent to, the Big Rock Point site, will continue to represent an unacceptable risk to public health and safety and the environment. . . " Petition at 3. The Petitioners offer little more to establish their standing.

Clearly, the statements offered by the Petitioners to establish standing do not allege a concrete and particularized injury. Nowhere do the Petitioners articulate how or why the approval of the *license transfer* would injure the Petitioners or any members of NIRS' and DWM's organizations. The Petitioner's state their belief that the *current* security measures (which they note are intended to remain the same after the transfer) are inadequate and the NRC's design criteria for waste transport criteria are "woefully inadequate," and make general arguments related to the potential for terrorist attacks, the Department of Energy's spent nuclear fuel disposal program, and underwater submersion of casks. Petition at 5, 6, 8, 10.

Assuming *arguendo* that any of these issues, as articulated by the Petitioners, establish a concrete and particularized injury, they are not traceable to the challenged action: the transfer of the Big Rock and Big Rock ISFSI licenses. In fact, the Petition is largely, if not wholly, premised on the idea that nothing will change as a result of the license transfer. Petition at 10 ("The admission that 'No physical change to the BRP facility or operational change are being proposed in the application' confirms that [ENP] and [ENO] have no plans whatsoever to adequately upgrade security protections at the BRP ISFSI, as contended through this petition."). While the security issues raised by the Petitioners might arguably be appropriately considered in the context of an original licensing proceeding, in this context they fail to satisfy the requirements for standing and amount to little more than a collateral attack on the NRC's past actions to approve the security/emergency measures in place at the Big Rock Point facilities. Those collateral attacks are clearly untimely.

Further, any injury associated with the issues raised in the Petition could not be redressed by a favorable decision in this proceeding. Any injury that may be associated with the security contention(s) raised in the Petition will not be a result of this license transfer proceeding because,

as the Petitioners recognize, the Applicants do not propose to alter the NRC-approved security and emergency plans in place at the Big Rock Point site. In any event, the issues raised by the Petitioners do not specify any real or potential injury that relates to the license transfer[3] and any injury that might be implicitly assumed from the arguments in the Petition could only be redressed in other proceedings before the NRC or other administrative bodies.

First, the Petitioners' concerns regarding terrorist attack scenarios (Petition at 3-5) are general in nature—they could apply to many, if not all, nuclear facilities—and should thus be addressed within a rulemaking proceeding, such as the Commission's pending rulemaking on threats to nuclear facility designs in the event of a terrorist attack. *See* Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). Even assuming that the Petitioners' terrorism concerns were specific to the Big Rock Point site, the Atomic Safety and Licensing Board has determined that "[w]here, as here, the Commission has initiated rulemaking proceedings that apply to the facility in question and that directly implicate a proposed contention, a Board ordinarily should refrain from admitting that contention." *Amergen Energy Co., LLC,* LBP-06-07, 63 NRC 188, 203 (2006) (citation omitted).

Second, the Petitioners' statements regarding transportation of casks and spent fuel (and related arguments regarding cask submersion and disposal at Yucca Mountain) concern matters that fall outside of the scope of this license transfer proceeding. The Applicants have not proposed to transport any spent nuclear fuel from the Big Rock ISFSI, nor is the transportation of spent fuel a matter for consideration within this license transfer proceeding. Transfer of spent fuel to the DOE for disposal at Yucca Mountain or another facility is controlled by the DOE under the Nuclear Waste Policy Act, and by the Department of Transportation under its

[3] The purported risk of injury associated with the action at issue must be "distinct and palpable." *Warth v. Seldin,* 422 U.S. 490, 501 (1975), cited in *In the Matter of Caroline Power & Light,* Docket No. 50-400, 1999 WL 146268 (1999).

regulations. Moreover, as the Petitioners state, "Michigan law forbids the transfer of Big Rock's waste to another site within the state...such as to the Palisades nuclear plant in southwest Michigan." Petition at 7. In sum, the Applicants have proposed no action—and are, as Petitioners state, forbidden from proposing an action—which could create a risk of injury to the Petitioners through the proposed license transfer with respect to these transportation issues.

Third, the Petitioners do not specify a redressable injury with respect to Consumers' intention to sell portions of restored land to the State of Michigan. *See* Petition at 9-10. The restored land has been removed from the Big Rock licenses through the approvals of the NRC, in accordance with the Commission-approved Big Rock LTP. Thus, any action Consumers may take with respect to the restored lands is separate and apart from the instant proceeding. The Petitioners had ample opportunity to comment on the development of the LTP and the Big Rock Point decommissioning and restoration processes and may not now seek to attack the Commission's decisions to release the restored lands from the license at issue in this proceeding.

NIRS and DWM, each seeking 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), identify that member by name and address, and show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member." *Vermont Yankee*, 52 NRC at 163 (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 52 NRC 193, 202 (2000)). For the reasons set forth above, NIRS and DWM have failed to demonstrate how one of its members, Mr. McManemy, may be affected by the licensing action. In addition, the Petitioners have specified only that Mr. McManemy lives within the 50-mile Emergency Planning Zone of the former Big Rock plant. Neither the Petition nor Mr. McManemy's declaration provide any other information as to how Mr. McManemy may

be affected by the license transfer at issue in this proceeding. Thus, Mr. McManemy, NIRS, and DWM lack standing to intervene in this proceeding.

III. Admissibility of Contentions

To be found admissible, a contention must (i) provide a specific statement of the issue of law or fact to be raised or controverted; (ii) provide a brief explanation of the basis for the contention; (iii) *demonstrate that the issue raised in the contention is within the scope of the proceeding*; (iv) *demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding*; (v) provide a concise statement of the alleged facts or expert opinions which support the petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and (vi) provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. 10 CFR 2.309(d). The Petitioners have failed to meet these burdens with respect to each of the discrete issues they raise in their Petition.

A. The Security Contentions Are Inadmissible

The transaction described in the ASA and the license transfers will not involve any changes to the design or operational criteria established under the licenses pertaining to the Big Rock ISFSI, will not have any adverse impact on the public health, safety, or the environment, and will not be inimical to the common defense or security. The Application does not request approval of, or involve any physical changes in, the facility or in the conduct of operations at the

Big Rock ISFSI. After the closing of the transaction described in the ASA, the Big Rock ISFSI will continue to be operated and maintained in accordance with its licenses and all relevant safety and security provisions of those licenses.

Upon closing of the transaction, ENP and ENO (as its authorized agent) will simply assume authority and responsibility for the functions necessary to fulfill the security planning requirements specified in 10 C.F.R. Part 73, and will assume responsibility, functions, and control under the existing NRC-approved physical security, guard training and qualification, and safeguards contingency plans developed and implemented by Consumers, as well as any commitments in response to the NRC's Security Orders. ENP anticipates that no changes will be made upon ENP's assumption of ownership and operation of Big Rock that will result in a decrease in the effectiveness of the plans, and that the plans will continue to meet existing regulatory standards. Moreover, any changes to the plans, operations, and safeguards will be made in accordance with the Commission's regulations designed to protect human health and safety and the environment, and only with the Commission's written approval.

To maintain continuity of operations, the Big Rock ISFSI supervisor employed by Consumers immediately prior to the closing of the transaction will be offered employment with ENO upon completion of the sale/purchase of the Big Rock assets. Following the closing of the transaction, ENP and ENO will maintain all nuclear property damage insurance for the Big Rock property transferred to ENP, to the full extent required by the NRC pursuant to 10 CFR 50.54(w), as well as any required nuclear energy liability insurance pursuant to Section 170 of the AEA and 10 CFR Part 140. ENP, ENO and, to the extent appropriate, Consumers, will cooperate to maintain the necessary limits and types of commercially available nuclear liability and property damage insurance which may be required by license and regulation.

Based on these undisputed facts, Petitioners have failed to demonstrate that a change in ownership, and a concomitant transfer of NRC licenses, is material to any issue before the NRC. NRC has already approved all safety and security aspects of the Big Rock ISFSI and its operations as protective of public health, safety, and security, and there is no legal or factual basis for Petitioner's untimely speculation to the contrary.

B. The Financial Contentions Are Inadmissible

Petitioners' contentions regarding ENP and ENO's financial qualifications fall into three categories:

(1) The Petitioners claim that ENP and ENO will not have the financial resources to "adequately safeguard and secure Big Rock's high level radioactive waste." Petition at 13. They question whether the $25 million line of credit to which ENP and ENO will have access is sufficient to "deal with a cask emergency at Big Rock...," and further claim that "a $25 million credit line is insufficient for unexpected but very possible problems with the ISFSI or individual dry casks at Big Rock." Petition at 11-12. They further contend that ENP and ENO "lack the financial wherewithal to adequately provide security for the Big Rock ISFSI." Petition at 10.

(2) The Petitioners assert that "Entergy Nuclear's holding company/limited liability company scheme walls off the financial resources of the Entergy Nuclear parent company from the financial needs of Entergy Nuclear Palisades, LLC at the Palisades nuclear power plant site, but most especially at the shutdown and dismantled (that is, generating no income) Big Rock Point site and ISFSI." Petition at 12.

(3) The Petitioners also contend that ENP and ENO lack the financial qualifications to provide adequate security and safeguards for Big Rock's high-level radioactive wastes due to Entergy Corporation's bond ratings, and the impact of Katrina on the company, including the bankruptcy of Entergy New Orleans, Inc.

The Petitioners' contentions on financial qualifications should not be admitted because they have failed to demonstrate that the issues raised in these contentions are within the scope of this proceeding, and they are not supported by sufficient facts or expert opinions.

a. The financial impact of the security and environmental issues should not be admitted as a contention. The Petitioners' financial qualifications contention(s) are based on security and/or environmental concerns which are not at issue in this proceeding and will not be affected by the proposed licensing action. (See Section III. A., C.). Thus, any discussion of ENP and ENO's financial resources or their ability to pay for increased security to deal with the threat of a terrorist attack or potential emergencies related to the integrity of the dry storage casks are issues extraneous to this licensing proceeding, and are not properly the subject of a contention in this proceeding. Since the underlying issues are not admissible as contentions, the need for additional financial resources to deal with those issues should not be admitted as a contention.

b. The financial qualifications contention(s) lack specificity and are not supported by expert opinion. The Petitioners' contentions regarding ENP and ENO's financial qualifications are not specific and are not supported by expert opinion. Rather, the Petitioners merely claim that a $25 million line of credit will be insufficient to pay the costs of "unexpected but very possible" problems with the ISFSI or a cask emergency at Big Rock. The Petitioners do not establish the likelihood of these problems or the costs of dealing with them. They simply state

that $25 million will not be enough. This assertion is not supported by expert opinion, or any other applicable evidence, and is too vague and nonspecific to be admitted as a contention.

This contention also misconstrues the Application. The Petitioners refer to "a $25 million credit line from Entergy for maintenance of the Big Rock ISFSI." Petition at 11. The application does not rely on a $25 million line of credit to fund the safe operations and maintenance of the Big Rock ISFSI. The Application states that the costs of operation and maintenance of the Big Rock ISFSI, which includes maintaining all the existing security and emergency planning requirements, will be paid from the sale of electricity generated by Palisades. The $25 million line of credit is available, if needed, for additional working capital.

c. ENO and ENP have met the financial qualifications requirements of 10 CFR 50.33. With regard to Entergy's corporate structure and its impact on ENP and ENO's access to additional financial resources from their parent companies, this contention amounts to an impermissible attack on the regulations applicable to this license transfer. Under those regulations, only the applicants are required to demonstrate that they have the financial qualifications to safely own and operate the plant. This is demonstrated through five years of projected revenues and costs. 10 CFR 50.33. ENP and ENO have demonstrated that they possess those financial qualifications as required by the Commission's regulations. No further financial resources, either through parent companies or any other source, are required by the regulations, and any contention based on such a concern is not appropriate for admission in a license transfer proceeding.

d. Entergy Corporation's financial performance has been strong. In addition, the Petitioners' alleged concerns about Entergy Corporation's overall financial well-being, especially in the aftermath of Hurricane Katrina, are misplaced. Entergy Corporation's stock

price is currently near its all-time high, and the price has increased approximately 40 percent over the past two years. The price has increased approximately 25 percent since the period immediately prior to Katrina.

Prior to Katrina, Entergy New Orleans, Inc. accounted for approximately six percent of Entergy Corporation's customers and load. It currently accounts for about three percent of Entergy Corporation's overall customers and load. Entergy New Orleans, Inc. was put into Chapter 11 reorganization within weeks after Katrina, and is progressing toward emerging from that bankruptcy.

Entergy Corporation's financial well-being, while not properly an issue for contention in this proceeding, should not be a concern to the Commission, especially in view of the company's performance since Katrina.

C. The Categorical Exclusion of Environmental Review for License Transfers Is Valid

The decisions to construct the Big Rock and the Big Rock ISFSI, and to subsequently decommission Big Rock and terminate its operating license, were made by Consumers, and approved by NRC, with full knowledge and awareness of the minimal impacts that the Big Rock ISFSI's continued operation would have on the environment. On March 21, 2005, the Commission determined that a license amendment allowing Consumers to implement its license termination plan would not result in significant environmental impacts, and therefore issued a Finding of No Significant Impact ("FONSI"). The Commission explicitly noted that Consumers had moved all Big Rock reactor fuel to its ISFSI, and that the ISFSI would be maintained and operated until at least 2012 (when the DOE repository for spent fuel at Yucca Mountain may

open). Notice of Availability of Environmental Assessment and Finding of No Significant Impact Approval of License Termination Plan for the Big Rock Point Reactor Facility, Charlevoix, Michigan, 70 Fed. Reg. 13545 (March 21, 2005). Therefore, the Commission has already addressed the impacts of the ISFSI and its operation in an environmental assessment ("EA") and made a FONSI. The Petitioners did not file a timely challenge to the Commission's actions supported by those NEPA determinations and may not belatedly distort the license transfer process by raising a contention now.

The ownership and operation of the Big Rock ISFSI will transfer from Consumers to Entergy as a result of the ASA and the requested NRC license action. The NRC has generically determined that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond life of operation...of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations its spent fuel storage." 10 CFR 51.23. The design basis for the facility, its Safety Analysis Reports, and Updated Final Hazards Summary Reports will all remain the same, except for technical amendments substituting ENP and ENO as the owner and operator, respectively, of the ISFSI. No changes need to be made in the identification of the types of effluents that may be released onsite or offsite, and there would be no increase in public or occupational exposure to radiological or other materials on or offsite. Therefore, there are no significant radiological or other environmental impacts associated with the proposed action.

In brief, the physical facility, its operation, and the radiological and environmental conditions, and the environmental impacts of the Big Rock ISFSI would remain the same as they were before the anticipated transfer of ownership and operation. By no stretch of the

imagination will the proposed action and license transfer increase the probability of terrorist attack or the consequences of accidents.

The Commission has rendered a generic determination that continued storage of spent fuel in an ISFSI for a minimum of thirty years after the cessation of reactor operations does not result in significant environmental impact, anticipating the exact situation at the Big Rock ISFSI: 10 C.F.R 51.23.

The Applicants requested action is a license transfer for purposes of the environmental review requirements contained in 10 CFR Part 51, and therefore falls within the categorical exclusion from environmental review for approvals of direct or indirect transfers of NRC licenses and any associated amendments. 10 CFR 51.22 (c)(21).

Contrary to Petitioners' contentions, the use of the categorical exclusion for license transfer is legally sound. The Petitioners assert that "the requested NRC action does not fall within the categorical exclusion from environmental review for approvals of transfers of NRC licenses and any associated amendments established by 10 C.F.R. § 51.22(c)(21)," and then misconstrue a recent 9th Circuit decision regarding NEPA analysis of terrorism impacts in an attempt to override this clearly applicable categorical exclusion. Petition at 13-14; *See San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, __ U.S. __, No. 03-74628 (Jan. 16, 2007) ("*San Luis Obispo*").

The *San Luis Obispo* case, however, involved an application for a license to *construct a new ISFSI* facility, not a *license transfer* for an ISFSI that already exists, where any environmental impacts of the construction have long since occurred. The Ninth Circuit determined that an EIS is required for *construction of a new ISFSI.* Therefore, on its face *San Luis Obispo* is inapplicable to the Big Rock license transfer. The Petitioners' inappropriate

invocation of *San Luis Obispo* is no more than a transparent attempt to circumvent the well-established rule that once a facility requiring a federal permit or license is fully constructed, challenges based upon NEPA are moot.[4]

The Petitioners also assert that the *San Luis Obispo* NEPA decision requires consideration of terrorist impacts during the review of license transfers, "negating the categorical exclusion." Petition at 14. The Petitioners' assertion amounts to a collateral attack on the NRC's interpretation of NEPA and its own rules, and is thus outside of the scope of this license transfer proceeding.

The Petitioners' assertions are also at odds with recent Supreme Court interpretations of NEPA, as well as the NRC's interpretation of its NEPA obligations during license transfers. *See, e.g., DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (applying "proximate cause" concept to NEPA analyses and holding that NEPA requires a "reasonably close causal relationship" between the alleged environmental effect and the alleged cause). There simply is no change in the probability of a terrorist attack, or its consequences to the environment, as a result of license transfer. Indeed, the NRC has determined that "there simply is no 'proximate cause' link between an NRC licensing action ... and any altered risk of terrorist attack." *In the Matter of Amergen Energy Co., LLC*, CLI-07-08, ___ NRC ___ (Feb. 26, 2007) ("*Amergen*"). Further, in *Amergen*,

[4] *See, e.g., Fund for Animals*, 428 F.3d at 1065; *Knaust v. Kingston*, 157 F.3d 86 (2d Cir. 1998) (NEPA action to stop construction of business park moot where related funds had all been disbursed and park was complete); *Or. Natural Res. Council, Inc. v. Wood*, 49 F.3d 1441 (9th Cir.1995) (where government had completed challenged dredging activity and had no plans to repeat dredging, no effective relief could be granted and NEPA-based action was moot); *Neighborhood Transp. Network v. Pena*, 42 F.3d 1169 (8th Cir. 1994) (NEPA-based suit challenging highway construction moot where project was complete); *Neighbors Org. To Insure a Sound Env't v. McArtor*, 878 F.2d 174 (6th Cir. 1989) (NEPA suit filed after construction, but before opening, of new airport terminal moot because terminal was finished); *Fla. Wildlife Fed'n v. Goldschmidt*, 611 F.2d at 549 (affirming denial on mootness grounds of motion for permanent injunction under NEPA of an almost-complete highway); *Bayou Liberty Assoc., Inc.*, 217 F.3d 393 (5th Cir. 2000) (completion of construction project mooted NEPA claim); *Friends of the Earth v. Bergland*, 576 F.2d 1377 (NEPA action moot where mining company had already engaged in challenged exploratory mining in national forest).

the NRC refused to extend the holding in *San Luis Obispo* to apply to proceedings beyond the underlying proceeding in that case:

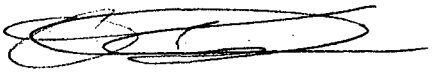
> Respectfully, however, we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the Diablo Canyon proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question. Such an obligation would defeat any possibility of a conflict between the Circuits on important issues. For the reasons we gave in our prior decisions, and for the reasons the Solicitor General gave in his recent Supreme Court brief in the Diablo Canyon case, we continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.
> *Id.* at ___.

Consistent with the Supreme Court decision in *Public Citizen* and the Commission's own determination in *Amergen*, the NRC should not expand the *San Luis Obispo* holding to include license transfers. Nor should it obviate its own validly promulgated regulation on categorical exclusions. Even if the NRC were to apply *San Luis Obispo* in all proceedings, that case does not state or even imply that all, or even any, of the NRC's categorical exclusions, as set forth in Part 51 of its regulations, are no longer valid. Thus, in accordance with Part 51 of its regulations and the NRC's interpretations of NEPA, the NRC need not perform an environmental review of this license transfer action. To the extent that the Petitioners' assertion regarding *San Luis Obispo* may form the basis of a contention, that contention or portion thereof is inadmissible for the reasons stated above.

IV. Conclusion

For all of the foregoing reasons, the Applicants respectfully request that the Commission (a) find that the Petitioners have not set forth an admissible contention, (b) deny the Petitioners' request to intervene in these proceedings, and (c) deny the Petitioners' request for a hearing.

Respectfully submitted,



Douglas E. Levanway
Wise Carter Child & Caraway, P.A.
P.O. Box 651
Jackson, Mississippi 39205
(601) 968-5500
del@wisecarter.com

Counsel For Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc.

Sam Behrends, IV
Robert M. Andersen
Ahren S. Tryon
LeBoeuf, Lamb, Greene & MacRae LLP
1875 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 986-8000
sbehrend@llgm.com
randersen@llgm.com
atryon@llgm.com

Counsel for Consumers Energy Company

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSION

In the Matter of

CONSUMERS ENERGY COMPANY ENTERGY NUCLEAR PALISADES, LLC ENTERGY NUCLEAR OPERATIONS, INC.	Docket Nos. 50-255 72-043

CERTIFICATE OF SERVICE

I hereby certify that I have on this date filed the foregoing 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
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

General Counsel
U.S. Nuclear Regulatory Commission
Washington DC 20555-0001

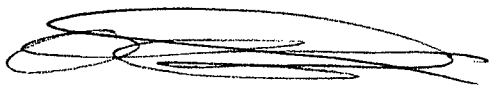
Victor McManemy
7786 Peninsula Drive
Traverse City, Michigan 49686

Kevin Kamps
Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, Maryland 20912

Susan Devon
Division Director, Regulated Energy
Michigan Public Service Commission
P.O. Box 30221
Lansing, Michigan 48909

Terry Lodge, Esq.
On behalf of Michael Keegan and
Don't Waste Michigan
316 North Michigan Street, Suite 520
Toledo, Ohio 43604

Dated at Washington, D.C. this 16th day of March, 2007.



Ahren S. Tryon
Counsel for Consumers Energy Company