

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/26/07

COMMISSIONERS

SERVED 04/26/07

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of)
)

CONSUMERS ENERGY COMPANY)

(Big Rock Point ISFSI))
_____)

Docket Nos. 50-155-LT &
72-043-LT

CLI-07-19

MEMORANDUM AND ORDER

On July 11, 2006, Consumers Power Company (“Consumers”) entered into an “Asset Sales Agreement” with Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc. regarding the Big Rock Point Independent Spent Fuel Storage Installation (“ISFSI”). As one step towards effectuating this agreement, Consumers filed an application for authorization to transfer and amend the NRC licenses associated with the Big Rock Point ISFSI.¹ (The Big Rock Point reactor was permanently shut down in 1997 and has now been decommissioned.²) Three petitioners have filed a joint petition to intervene and request for a hearing to challenge Consumers’ application. We deny the petition and terminate this adjudication.

¹ The Asset Sales Agreement also involved a transfer of the license for the Palisades Nuclear Power Plant and its associated ISFSI. The Palisades transfer is the subject of a separate adjudicatory proceeding in Docket No. 50-255-LT.

² See NUREG-1350, Vol. 18, *2006-2007 Information Digest* at 95.

BACKGROUND

Consumers submitted its Big Rock Point license transfer application pursuant to Section 184 of the Atomic Energy Act of 1954³ and sections 50.80 and 72.50 of the Commission's regulations.⁴ On January 30, 2007, the Commission published a notice in the *Federal Register* announcing our consideration of Consumers' application and offering the opportunity for a hearing on it.⁵ The notice informed the public that petitions to intervene must meet the standards set forth in section 2.309 of our procedural regulations.⁶ That regulation requires a petitioner to proffer at least one admissible contention⁷ and to demonstrate standing.⁸

Responding to the *Federal Register* notice, the Nuclear Information and Resource Service, Don't Waste Michigan, and Mr. Victor McManemy (collectively "petitioners") filed a joint Request for Hearing and Petition to Intervene on February 20, 2007. The first two petitioners seek representational standing and the third seeks standing as an individual.⁹ Mr. McManemy states that he authorizes both organizations to represent his interests, lists himself as a "Member-Intervenor"¹⁰ and, as an individual, claims standing based on the fact that he lives

³ 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing).

⁴ 10 C.F.R. §§ 50.80, 72.50.

⁵ 72 Fed. Reg. 4302.

⁶ *Id.* at 4303.

⁷ 10 C.F.R. § 2.309(f).

⁸ 10 C.F.R. § 2.309(d).

⁹ Request for Hearing and Petition to Intervene at 1-2 ("Petition to Intervene").

¹⁰ *Id.* at 1 & appended Declaration.

within 50 miles of the Big Rock Point site.¹¹ Neither Mr. McManemy nor the two petitioning organizations have attempted to make a specific showing of harm from the ISFSI license transfer. Petitioners jointly proffer one “contention about the vulnerability of Big Rock Point’s ISFSI to terrorism.”¹²

Consumers filed an Answer opposing the hearing request. The petitioners submitted no Reply to that Answer. The NRC Staff, which is not required to be a party, has submitted no pleadings.¹³

DISCUSSION

Although Mr. McManemy’s claim of residence within 50 miles of the Big Rock Point ISFSI might entitle him to a presumption of standing based on his proximity if this were a reactor construction permit or operating license proceeding,¹⁴ we have required far closer proximity in other licensing proceedings, including license transfer cases. We determine on a case-by-case basis whether the proximity presumption should apply, considering the “obvious potential for offsite [radiological] consequences,” or lack thereof, from the application at issue, and specifically “taking into account the nature of the proposed action and the significance of the radioactive source.”¹⁵

¹¹ *Id.* at 2 & appended Declaration.

¹² *Id.* at 5.

¹³ In this proceeding, the NRC Staff completed its review of the license transfer application and approved it on April 6, 2007. 72 Fed. Reg. 19,055 (April 16, 2007). The Staff’s approval was subject to the Commission’s action on the instant petition. This order concludes the entire license transfer proceeding.

¹⁴ See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

¹⁵ *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005).

License transfers even for *operating* nuclear power plants typically involve little if any radiological risk, as there are generally no changes to the physical plant, its operating procedures, or its design basis accident analysis. The potential radiological risks associated with an ISFSI license transfer are even lower, because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.

Mr. McManemy has not demonstrated that the mere transfer of the ISFSI somehow increases his risk of radiological harm. There is simply no "obvious potential for offsite consequences" from this ISFSI transfer sufficient to justify applying a presumption of standing based on proximity.¹⁶ He therefore fails to qualify for standing. And because the two petitioning organizations base their own claims of standing solely on Mr. McManemy's proximity, they too lack standing.

We also observe that, as a matter of procedure, Mr. McManemy should not have requested to intervene in his own right and simultaneously authorized each of the two other petitioners to represent his interests. Such multiple representation might lead to confusion as to which of the three petitioners was speaking for Mr. McManemy; such confusion would be detrimental to the process of adjudication.¹⁷ But given the failure of Mr. McManemy and the

¹⁶ See generally *id.* at 580-83; *AmerGen Energy Co., LLC* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 574-76 (2005); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132 (2000).

¹⁷ *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-89-30, 30 NRC 311, 316 (1989) ("Catherine Hunt can have her interest protected by participating as an individual or by having South Dakota Resources Coalition represent her interest. It would be detrimental to the process to have a person appear in the proceeding individually and to be represented by an organization.... [S]he should elect whether to appear individually or to be represented by the organization"). By contrast, nothing precludes an individual from seeking to intervene both on his/her own behalf and as a representative of others. See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 530, *aff'd* CLI-91-13, 34 NRC 185 (1991); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, (continued...)

organizations to allege any injury beyond the assertion of Mr. McManemy's residence "within 50 miles," we need not sort out how to differentiate between him and the organizations.

Petitioners' lack of standing also means that we need not address their contentions or their request to review proprietary information.

For the reasons set forth above, we *deny* the petitioners' Petition to Intervene and *dismiss* this adjudicatory proceeding.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of April, 2007.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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CONSUMERS ENERGY COMPANY)
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(Big Rock Point Plant))

Docket Nos. 50-155-LT
72-043-LT

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-19) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, or through NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of April 2007