

May 17, 2007 (4:12pm)

UNITED STATES OF AMERICA
BEFORE THE
NUCLEAR REGULATORY COMMISSIONOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of

CONSUMERS ENERGY COMPANY

Docket Nos. 50-155-LT
72-043-LT(Big Rock Point ISFSI)

**ANSWER IN OPPOSITION
TO PETITION FOR RECONSIDERATION**

On May 7, 2007, Victor McManemy, Nuclear Information and Resource Service, and Don't Waste Michigan (collectively, the "Petitioners") filed a Petition for Reconsideration ("Petition") of the Commission's April 26, 2007 Memorandum and Order, CLI-07-18 ("Order"). The Commission's Order approved the transfer of the license for the Big Rock Independent Spent Fuel Storage Installation ("ISFSI") from Consumers Energy Company to Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC (collectively, the "Applicants"). In their Petition, the Petitioners address their failure to submit a timely reply to the Applicants' previous answer prior to the issuance of the Order, discuss their standing in this proceeding, reiterate arguments raised in their original petition to intervene, and raise new arguments. Pursuant to 10 C.F.R. § 2.345, the Applicants file this Answer in Opposition to the Petition and respectfully request that the Commission dismiss the Petition based on the Petitioners' lack of standing and failure to satisfy the Commission's standards for petitions for reconsideration.

A. Petitioners Continue to Lack Standing

The Petitioners present no new facts or arguments that would alter the Commission's prior determination that the Petitioners lacked standing in this proceeding.¹ The Petitioners state that the "Commission's denial of standing to Victor McNamery, who indisputably lives within 40 to 42 miles of Big Rock Point, reflects a shallow analysis of the facts alleged by Petitioners...." Petition at 2. Although the Petitioners accuse the Commission of performing a "shallow analysis," they argue that they should have standing based on a "rule of thumb" which "presumes a petitioner has standing to intervene without the need specifically to plead injury, causation or redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity." Petition at 3 (quoting *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4)*, LBP-01-06, 53 NRC 138, 146 (2001)). The Petitioners thus simultaneously argue that the Commission should have performed some deeper analysis to find that they had standing *and* that the Commission should have granted them standing without any analysis beyond Mr. McManemy's proximity to the ISFSI based on this presumption. These arguments are clearly incongruous.

Moreover, the Petitioners appear to ignore the fact that the presumption upon which they

¹ "Petitions for reconsideration should not be used merely to 're-argue matters that the Commission already [has] considered' but rejected." *Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3)*, CLI-02-1, 55 NRC 1, 2 (2002), quoting *Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041)*, CLI-93-24, 38 NRC 187, 188 (1993).

rely—as all of the cases the Petitioners cite for support demonstrate—applies specifically in the context of issuance of an operating nuclear reactor license. Indeed, the Commission stated at the outset of its Order that:

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, 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.... CLI-07-19 (slip op. at 3).

As the Commission's Order made clear, the proximity presumption that applies to reactor construction permit and operating licensing proceedings is inapplicable in this context, where the transaction at issue involves only the *transfer* of a storage facility license.

In their original petition to intervene, the Petitioners failed to show how the *license transfer* would threaten to injure Mr. McNanemy, and they again fail to offer any additional facts in that respect. Here, the Petitioners appear to ignore the Commission's discussion in the Order of risks posed by an ISFSI license transfer,² and thus offer no additional facts to support their standing. Accordingly, the Petitioners lack standing for the aforementioned reasons and on the same basis as the Commission held in its Order.

² “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.” CLI-07-19 (slip op. at 4).

B. Petitioners Failure to File a Timely Reply Does Not Provide any Grounds for Granting Reconsideration of the License Transfer Approval

The Petitioners state that their counsel “omitted to prepare and submit a response in reply to Consumers’ Answer and to oppose dismissal of the original petition.” Petition at 2. This omission should have no effect on the Petitioners’ rights or responsibilities with respect to the Petition at issue. The Petitioners should not be prevented from filing a petition for reconsideration because of their failure to file an reply to Consumers’ previous answer. However, their failure to file a reply to Consumers’ previous answer provides no basis for consideration of arguments that the Petitioners’ advance in their most recent Petition; those arguments must stand or fall in accordance with the Commission’s requirements for petitions for reconsideration under 10 C.F.R. § 2.345. The failure of one of the joint Petitioners’ representative to receive notice of Consumers’ previous answer did not prejudice the Petitioners because counsel for the Petitioners and their other representatives all received timely notice. Petitioners admit that their counsel was served but “simply overlooked” the copy of Consumers’ previous answer that was provided to him. Petition at 2. The Petitioners never submitted a motion to file an untimely reply for good cause, as they could have done under 10 C.F.R. § 2.309. Thus, the Petitioners have no entitlement to recourse for their previous failure to file a reply.

C. Petitioners Do Not Satisfy the NRC’s Standards for Reconsideration

The Petitioners allege that Commission’s Order suffered from a “clear and material error” under 10 C.F.R. § 2.345 due to the Commission’s “trivialization of Entergy’s financial

problems and denial of an inquiry into the company's current management culture....” Petition at

8. The Petitioners also allege that:

When it denied the present petition, the Commission failed to analyze the adversities of earthquake, terrorism and plane wrecks together with certain Big Rock-specific troubles: (1) the security vulnerability of the casks (i.e., much of the former Big Rock reactor installation site has been released for public use, likely as a public park, with greatly altered security requirements from those which formerly pertained when the reactor existed nearby); (2) Entergy's poor security management track record; and (3) the ongoing bankruptcy of the parent Entergy electric utility company as a result of Hurricane Katrina's devastation of Entergy's Gulf Coast rate base, which has left New Orleans subject to frequent blackouts and unreliable service. Entergy's corporate focus is distracted, and careful monitoring of the casks at Big Rock is a costly afterthought in its otherwise lucrative purchase deal. Petition at 8.

The Commission did not reach these issues in its Order because the Petitioners did not satisfy the Commission's threshold requirements for standing. Insofar as the Commission did not reach these issues due to the Petitioners' lack of standing, the Commission did not commit "clear and material error," and these issues would only be appropriately addressed if the Commission would now find that the Petitioners do have standing (which it should not, for the reasons stated *supra*). See *In the Matter of State of Alaska Department of Transportation and Public Facilities*, 60 NRC 652 (2004) ("The Commission's alleged factual error, even if it were true, is not a ground for reconsideration, where the alleged error was not "material" to the Commission's decision."). However, even if the Commission were to find that the Petitioners have standing, the allegations in the Petition either fail to satisfy the criteria for petitions for reconsideration under 10 C.F.R. § 2.345 or are otherwise inadmissible as contentions at this stage in the proceeding.

10 C.F.R. § 2.345 requires a petitioner to "demonstrate a compelling circumstance, such

as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid.” The Commission will “apply this standard strictly, and [will] not grant motions for reconsideration lightly.” *In the Matter of Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, Memorandum and Order, Docket No. 72-26-ISFSI, Nuclear Reg. Rep. P 31,520 (Nov. 9, 2006). Petitions for reconsideration will be granted only where a petitioner brings “decisive new information to [the Commission’s] attention or demonstrates a fundamental Commission misunderstanding of a key point.” *In the Matter of Louisiana Energy Services, L.P. (National Enrichment Facility)*, 60 NRC 619, 622 (2004). Further, in petitions for reconsideration, “[n]ew arguments are improper.” *Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility)*, CLI-02-2, 55 NRC 5, 7 (2002), quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-00-21, 52 NRC 261, 264 (2000).

None of the arguments in the Petition provide “decisive new information” upon which reconsideration of the Commission’s Order could be granted. The Petitioners simply reiterate in short-form (as opposed to refining) previous arguments such as those regarding terrorist attacks,³ the unrelated bankruptcy of Entergy’s New Orleans subsidiary, and the extra-jurisdictional lands that have been released from the licenses at issue. The Petitioners also briefly assert several new arguments that run afoul of the Commission’s prohibition against raising new arguments in a

³ The Applicants note the NRC’s determination that it need not consider terrorism-related impacts as part of its NEPA review process, limiting the application of the Ninth Circuit decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Jan. 16, 2007). *In the Matter of Amergen Energy Company, LLC (License Renewal for Oyster Creek Nuclear Generating Station)*, CLI-07-08, 65 NRC __ (slip op.) (Feb. 26, 2007).

petition for reconsideration. *See* 55 NRC at 7. The Petitioners for the first time raise issues regarding earthquakes, non-terrorism-related plane crashes, and potential impacts on the Michigan tourism economy in the event of a terrorist attack. None of these issues are appropriate for consideration at this time because, by failing to raise them in their petition to intervene or through an amendment to that petition, the Petitioners have waived their right to do so now. Thus, the Commission should dismiss the instant Petition because it does not satisfy the criteria for petitions for reconsideration under 10 C.F.R. § 2.345.

D. Conclusion

WHEREFORE, for the reasons stated above, the Applicants respectfully request that the Commission deny the Petitioners' Petition for Reconsideration.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of May, 2007, served the foregoing document upon each person designated on the service list compiled by the Secretary in this proceeding.

/S/

Ahren S. Tryon

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May 17, 2007

VIA HAND DELIVERY

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Re: In the Matter of Consumers Energy Company
(Big Rock Point ISFSI)
Docket Numbers 50-155-LT and 72-043-LT

Dear Sir/Madam:

Enclosed for filing please find the Answer in Opposition to the Petition for Reconsideration filed by Victor McManemy, Nuclear Information and Resource Service, and Don't Waste Michigan in the above-referenced dockets.

Very truly yours,

/S/

Ahren S. Tryon

Enclosure

cc: Service List for Docket Nos. 50-155-LT and 72-043-LT
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