

September 26, 2005

DOCKETED
USNRCUNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

September 26, 2005 (12:00pm)

Before the Atomic Safety and Licensing BoardOFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

Nuclear Management Company, *et al.*)

(Palisades Nuclear Plant))

Docket No. 50-255-LR

ASLBP No. 05-842-03-LR

NUCLEAR MANAGEMENT COMPANY'S MOTION TO STRIKE
PETITIONERS' SEPTEMBER 16, 2005 COMBINED REPLY TO NRC STAFF
AND NUCLEAR MANAGEMENT COMPANY ANSWERS

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(a), Nuclear Management Company ("NMC") hereby moves to strike "Petitioners' Combined Reply to NRC Staff and Nuclear Management Company Answers" ("Petitioners' Reply") dated September 16, 2005. Rather than addressing the NRC Staff's and NMC's answers to the Petitioners' original proposed contentions, the Petitioners' Reply impermissibly raises entirely new issues and claims not found in the Petitioners' original contentions. The Petitioners have provided no basis in their Reply for accepting such late-filed amendments to their contentions, as required by 10 C.F.R. §§ 2.309(c) and (f)(2), and accordingly, the Petitioners' Reply must be stricken.

II. BACKGROUND

On March 22, 2005, NMC submitted an application for renewal of Operating License DPR-20 for the Palisades Nuclear Plant (the "Application"). On June 8, 2005, the Nuclear Regulatory Commission ("NRC" or "Commission") published a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing ("Notice") regarding NMC's application. 70 Fed. Reg. 33,533 (June 8, 2005). The Notice permitted any person whose interest may

be affected to file a request for hearing and petition for leave to intervene within 60 days of the notice. Id. at 33,534.

The Notice directed that any petition set forth with particularity the interest of the petitioner and how that interest may be affected, as well as the specific contentions sought to be litigated. Id. The Notice provided that to properly support a contention

the requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

Id. (footnote omitted).

On August 8, 2005, Petitioners submitted their "Request for Hearing and Petition to Intervene" ("Petition" or "Pet.") seeking to raise twelve proposed contentions for consideration in this proceeding. On September 2, 2005, NMC and the NRC Staff filed answers to the Petition opposing the intervention on the grounds that the Petitioners had failed to plead an admissible contention.¹ As set forth in NMC's and the Staff's answers, the Petitioners (1) seek to raise issues beyond the scope of this relicensing proceeding unrelated to the management of aging or time-limited aging analyses; (2) set forth only conclusory claims unsupported by factual basis or expert opinion necessary to demonstrate the existence of a genuine, material issue; and (3) impermissibly seek to challenge Commission regulations. Id.

On September 16, 2005, Petitioners filed their Reply to NRC Staff and Nuclear Management Company answers. In their Reply, however, Petitioners do not seek to defend the adequacy

¹ Nuclear Management Company's Answer to the August 8, 2005 Request for Hearing and Petition to Intervene (Sept. 2, 2005); NRC Staff Answer Opposing Petition to Intervene and Request for Hearing, (Sept. 2, 2005).

of their contentions as originally pled in their Petition.² Rather, they supply a series of documents that were neither referenced in, nor supplied with, the Petition, and seek to raise a multitude of new issues and claims nowhere to be found in the Petition. As discussed in below, the Petitioners' attempt to provide new claims and arguments nowhere found within the four corners of the original petition is clearly impermissible under the Commission's well-established rules of practice.

III. ARGUMENT

Under the NRC's rules at 10 C.F.R. § 2.309(h)(2), a petitioner may file a reply to any answer within seven days after service of that answer. While the Commission's rules do not specify the content of such a reply, other provisions of Part 2, the Statement of Considerations published with the final rule, and Commission precedent make clear that this reply is to "be narrowly focused on the legal or logical arguments presented" in the answers of the applicant and NRC Staff. Final Rule: "Changes to Adjudicatory Process," 69 Fed. Reg. 2,182, 2,203 (Jan. 14, 2004). In this case, the Petitioners have gone far beyond any reasonable interpretation of an allowable reply by raising innumerable new facts, claims and arguments in their Reply. If the hearing procedures established in Part 2 are to have any meaning whatsoever, the reply must be stricken.

The Commission has squarely ruled that a reply to an answer may not be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention. Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004) ("LES"); Louisiana Energy Services, L.P. (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 623 (2004). In that case in rejecting four contentions filed by the State of New Mexico Environment Department ("Environment Department") and the New Mexico Attorney General ("Attorney General"), the licensing board "declined to

² In fact, Petitioners withdraw contentions 5, 6, 8, 9, 10 and 11. See Petitioners' Reply at 55. Also, although it is not on the list of withdrawn contentions, Petitioners also appear to be withdrawing contention 4 as well. See Petitioners' Reply at 38 n. 27.

consider new 'purportedly material' information in support of the contentions that was first submitted as part of a reply pleading." LES, CLI-04-25, 60 N.R.C. at 224. On appeal of the board's decision, the Commission agreed that "the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs." Id. The Commission went on to state that such a course of action was clearly impermissible under its rules of practice:

[O]ur contention admissibility and timeliness requirements "demand a level of discipline and preparedness on part of petitioners," who must examine the publicly available material and set forth their claims and the support for their claims at the outset. The Petitioners' reply brief should be "narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer," a point the Board itself emphasized in this proceeding. As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply could be "no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset."

Id. at 224-25 (footnotes omitted) (emphasis added).

In CLI-04-35, the Commission rejected requests for reconsideration from the Attorney General and the Environment Department and reaffirmed its holding in CLI-04-25. In its reconsideration decision, the Commission noted that the "contentions at issue contained conclusory and unsupported allegations and thus no adequate basis." LES, CLI-04-35, 60 N.R.C. at 622 (emphasis added). The Commission cited, for example, the Attorney General's and the Environment Department's contention concerning the storage of depleted uranium at the LES facility. The Attorney General had claimed that "such onsite storage 'poses a distinct environmental risk to New Mexico.'" Id. Similarly, the Environment Department had claimed that "onsite storage 'may pose a threat' to health and property and that the LES's proposed storage plan was insufficiently detailed." Id. The Commission went on describe the inadequacy of this contention by the Attorney General and the Environment Department as follows:

Neither petition alleged facts or expert opinion in support of these broad and conclusory allegations. LES's application outlines potential environmental, health, and safety impacts of storing depleted uranium in uranium byproduct cylinders (UBCs) on an open-air storage pad. But neither the Attorney General nor the Environment Department addressed with any particularity or support how LES's proposed plan for onsite storage of depleted uranium lacks sufficient information, provides an inaccurate environmental impacts assessment, or otherwise falls short.

Id.

The Commission then reiterated the reasons set forth in CLI-04-25 explaining why allowing a reply to raise new arguments or claims not found in the original contention would eviscerate its requirements for the pleading of contentions:

"Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements" . . . "by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later." The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is "more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions." Under our contention rule, Intervenors are not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. We agree with the Licensing Board that on these four particular contentions, the Attorney General and the Environment Department failed to do so.

Id. at 622-23 (footnotes omitted).

Finally, the Commission went on to strongly reaffirm its holding in CLI-04-25 that a reply to an answer may not, under its rules of practice, be used as a vehicle to raise new arguments or claims not found in the original contention or be used to cure an otherwise deficient contention:

What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.

Id. at 623 (emphasis added).

Thus, the Commission has squarely ruled that a reply to an answer may not be used to cure an otherwise deficient contention. As made clear by the Commission, a contrary ruling would eviscerate the rules of practice governing timely filing of properly pled contentions, contention amendments, and submission of late-filed contentions. Under 10 C.F.R. § 2.309(f), a petitioner must “set forth with particularity the contention sought to be raised.” The rule goes on to make clear that to do so a petitioner must “provide a concise statement of the alleged facts or expert opinions which support” the alleged contention and must further “provide sufficient information to show that a genuine dispute exists...on a material issue of law or fact,” which showing must include “references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute” *Id.* To develop sufficient information to support a properly pled contention, “an intervention petitioner has an ironclad obligation,” *inter alia*, “to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention.” Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 N.R.C. 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 N.R.C. 1041 (1983) (emphasis added).

Thus, contentions must be based on information available to petitioners at the time a petition is filed. 10 C.F.R. 2.309(f)(2). Here, the Notice of Opportunity for Hearing – quoted above – clearly provided notice to the Petitioners of these well-established Commission pleading requirements. Further, the rules clearly provide that “amended or new contentions filed after the initial filing” may be done “only with leave of the presiding officer upon a showing that –

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.”

Id. (emphasis added). As held by the Commission in LES, allowing a reply to introduce new or amended contentions would clearly eviscerate these provisions of the rule for they would become meaningless.

The Petitioners' Reply clearly runs afoul of the Commission's rules of practice and its decisions in LES. Rather than responding to legal or logical arguments raised in NMC's or the NRC Staff's answers, the Reply raises entirely new arguments and claims nowhere to be found within the four corners of the original Petition which are based on a host of new documents and other information, neither referenced in, nor supplied with, the original Petition. Permitting introduction of these new claims, and asserted supporting information, at this late date would completely "bypass and eviscerate" the NRC's hearing rules. LES, CLI-04-35, 60 N.R.C. at 623.

For example, Contention 1 as pled in the Petition consisted of a single paragraph raising a conclusory, unsupported claim that the Application does not adequately address reactor vessel embrittlement and Pressurized Thermal Shock ("PTS"). This is directly analogous to the conclusory, unsupported contentions discussed by the Commission in LES. LES, CLI-04-35, 60 N.R.C. at 622. As in LES – and directly contrary to the express requirements of the rule to include "references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute," 10 C.F.R. § 2.309(f)(1)(vi) – Contention 1 failed to address "with any particularity or support" any asserted deficiency with the Application. LES, CLI-04-35, 60 N.R.C. at 622. No specific reference to the Application was made, nor was any specific claimed deficiency with respect to the Application identified. Moreover, directly contrary to their ironclad obligation to examine the publicly available documentary to identify any information that could serve as the foundation for the contention, Catawba, ALAB-687, 16 N.R.C. at 468, the Petitioners' Contention made no reference to any documents. The only support provided was a single, oblique reference to a statement by an asserted expert stating a truism, that "the longer Palisades operates, the more embrittled its RPV becomes." Petition at 4.

In their Reply, Petitioners make no reference to or defense of the adequacy of Contention 1 as originally pled. Rather, they raise for the first time a host of claimed deficiencies and disputes with the Application, none of which appear in the contention as originally pled, and reference and supply numerous documents nowhere found within the bounds of the original contention. See, e.g., Petitioners' Reply at 10-23. Such a course of action clearly exceeds the bounds of an acceptable reply and must be rejected. LES, CLI-04-35, 60 N.R.C. at 622-23.

Petitioners' so-called "reply" regarding Contention 2 is equally fatally flawed. As in the case of Contention 1, this contention consisted of a single conclusory paragraph lacking any support. Applicant answered this contention by observing that the accusations made by Petitioners regarding excessive emissions from the Palisades facility were (i) outside the scope of the proceeding, and (ii) vague and unsupported by any factual basis. Rather than attempting to explain why the contention was not outside of the scope or was factually supported, Petitioners simply say in their Reply that of course "the amounts of toxic chemicals and radioactivity released into the Lake Michigan ecosystem over time" will increase. Reply at 24. Furthermore, rather than arguing why their original contention was sufficiently detailed and supported, the Petitioners' for the first time provide almost five pages of "emissions from the Palisades Nuclear Power Plant" (albeit, with absolutely no context as to the relevance of the numbers offered), Reply at 25-29, and for the first time introduce us to four new asserted experts. Reply at 30-35. Clearly, Petitioners' Reply is not "narrowly focused on the legal or logical arguments presented" in NMC's and the NRC Staff's answers as required under the Commission's rules of practice, LES, CLI-04-25, 60 N.R.C. at 223, 225 (see also CLI-04-35, 60 N.R.C. at 624), and must therefore be stricken.

Likewise, the Petitioners' impermissibly seek to transform their other conclusory, unsupported contentions into properly pled contentions. They now provide for the first time a declaration to assertedly support their Contention 3, Reply at 37, which clearly exceeds the Commis-

sion's directive for replies to be "narrowly focused on the legal or logical arguments presented" in the answers of the applicant/licensee and the NRC Staff. LES, CLI-04-25, 60 N.R.C. at 223, 225. Likewise, for example, the Petitioners' Reply makes no defense of their environmental justice contention as originally pled, but seeks belatedly to raise for the first time specific claims challenging the adequacy of the discussion of historic and archeological resources in the Application. Reply at 47. Again such a reply is not "narrowly focused on the legal or logical arguments presented" in NMC's and the NRC Staff's answers as required under the Commission's rules of practice (see LES, CLI-04-25, 60 N.R.C. at 223, 225) and must be stricken.

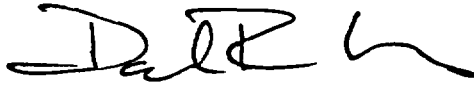
Petitioners' Reply is over five times as long as their original petition to intervene. Such a dramatic increase in the length of the reply might be understandable if the Applicant or NRC Staff had raised a variety of novel or complicated arguments regarding the admissibility of the proposed contentions. However, the arguments raised against the Petitioners' contentions were straightforward: (1) the contentions were not within the scope of the proceeding, (2) the contentions impermissibly challenged NRC rules, and (3) the contentions were not specific nor supported by a basis demonstrating a genuine, material dispute. Rather than addressing these arguments in their Reply, Petitioners have attempted to introduce entirely new information and raise entirely new arguments, hoping that the sheer volume of their response will somehow convince the Board that their issues deserve to be "decide[d]...on their merits, not . . . avoid[ed] . . . on technicalities." Reply at 53. Mere "technicalities" are not, however, the issue, as made clear by the Commission's decisions in LES. Rather, Petitioners' Reply completely ignores the Commission's well-established rules of practice put in place to ensure judicious, efficient administration of the Commission licensing proceedings. The Petitioners' disregard of the Commission's rules of practice mandates the Board's striking of their Reply.

In accordance with 10 C.F.R. § 2.323(b), counsel for NMC has contacted and discussed this motion with Petitioners' counsel and counsel for the NRC Staff, but has not been successful in resolving this motion.

CONCLUSION

For the reasons stated above, the Board should strike Petitioners' Reply.

Respectfully Submitted,



David R. Lewis
Paul A. Gaukler
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037-1128
Tel. (202) 663-8474

Counsel for Nuclear Management Company

Dated: September 26, 2005

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Nuclear Management Company, <i>et al.</i>)	Docket No. 50-255-LR
)	ASLBP No. 05-842-03-LR
(Palisades Nuclear Plant))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Nuclear Management Company's Motion to Strike Petitioners' September 16, 2005 Combined Reply to NRC Staff and Nuclear Management Company Answers," dated September 26, 2005, were served on the persons listed below by deposit in the U.S. Mail, first class, postage prepaid, and where indicated by an asterisk by electronic mail, this 26th day of September, 2005.

*Administrative Judge
Ann Marshall Young, Esq., Chair
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
AMY@nrc.gov

*Administrative Judge
Dr. Anthony J. Baratta
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
AJB5@nrc.gov

*Administrative Judge
Dr. Nicholas G. Trikouros
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
N.TRIKOUROS@att.net

*Secretary
Att'n: Rulemakings and Adjudications Staff
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
secy@nrc.gov, hearingdocket@nrc.gov

Office of Commission Appellate Adjudication
Mail Stop O-16 C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

*Susan L. Uttal, Esq.
Office of the General Counsel
Mail Stop O-15 D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
slu@nrc.gov

*Kary Love, Esq.
17344 Wood Drift Dr.
West Olive, MI 49460
kary_love@yahoo.com

*Mr. Michael Keegan
Don't Waste Michigan
2213 Riverside Drive, NE
Grand Rapids, MI 49505
mkeegan@comcast.net

*Mr. Chuck Jordan
Green Party of Van Buren County
50521 34th Avenue
Bangor, MI 49013
jordanc@btc-bci.com

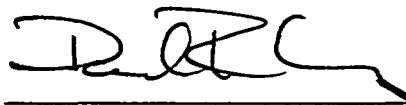
*Jonathan Rund, Esq.
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
JMR3@nrc.gov

*Terry Lodge, Esq.
316 N. Michigan St., Suite 520
Toledo, OH 43624-1627
tjlodge50@yahoo.com

*Mr. Paul Gunter
Nuclear Information and Resource Service
1424 16th Street, N.W.
Suite 404
Washington, D.C. 20036
pgunter@nirs.org

*Ms. Alice Hirt
Western Michigan Environmental Action
Council
1415 Wealthy St., SE
Suite 280
Grand Rapids, MI 49506
alicehirt@charter.net

Mr. Maynard Kaufman
Michigan Land Trustees
25485 County Road 681
Bangor, MI 49013



David R. Lewis