

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/28/07

COMMISSIONERS

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

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In the Matter of )  
)  
)  
CONSUMERS ENERGY COMPANY ) Docket Nos. 50-155-LT &  
) 72-043-LT  
(Big Rock Point ISFSI) )  
)  

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CLI-07-21

**MEMORANDUM AND ORDER**

On April 26, 2007, we issued a Memorandum and Order (CLI-07-19, 65 NRC \_\_\_) finding that the three petitioners to intervene (Mr. Victor McManemy, Nuclear Information and Resource Service, and Don't Waste Michigan, collectively "Petitioners") had failed to demonstrate individual or representative standing based on Mr. McManemy's proximity to the Big Rock Point Independent Spent Fuel Storage Installation ("ISFSI").<sup>1</sup> Based on that finding, we denied their joint Petition to Intervene and terminated this adjudicatory proceeding regarding an application to transfer the NRC license for the ISFSI. On May 7, 2007, Petitioners submitted a Petition for Reconsideration of CLI-07-19, rearguing (in greater detail) that they have standing based on Mr. McManemy's proximity to the ISFSI.<sup>2</sup>

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<sup>1</sup> Petitioners based their claims of standing solely on this ground. See Request for Hearing and Petition to Intervene at 1-2 (Feb. 20, 2007).

<sup>2</sup> In their Petition for Reconsideration, Petitioners also seek to explain their failure to file a Reply Brief earlier in this proceeding and complain of our silence on the merits of their contentions. Petition for Reconsideration at 2, 6-7. We base today's decision solely on

(continued...)

To succeed, a “petition for reconsideration must 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.”<sup>3</sup> The Petition for Reconsideration does not satisfy this rigorous standard. We therefore deny it.

## I. BACKGROUND

In CLI-07-19, we found insufficient Mr. McManemy’s claim of residence within 50 miles of the Big Rock Point ISFSI. We pointed out that “[w]e have required far closer proximity in . . . license transfer cases” for reactor operating licenses, and that “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.’”<sup>4</sup> We then explained that, because an ISFSI is essentially a passive structure, the radiological risk from the transfer of its license is even lower than that from the transfer of a nuclear power plant’s operating license.<sup>5</sup> From this, we concluded that Mr. McManemy’s 50-mile “proximity” assertion did not qualify him for standing.

In their Petition for Reconsideration, Petitioners argue that, in license renewal adjudications, our agency has regularly granted standing to individuals residing, working or

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<sup>2</sup>(...continued)

Petitioners’ failure to demonstrate standing and therefore need not reach these other unrelated matters.

<sup>3</sup> 10 C.F.R. § 2.345(b). See also *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 NRC 399, 400-01 (2006).

<sup>4</sup> CLI-07-19, 65 NRC at \_\_\_, slip op. at 3, quoting *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005).

<sup>5</sup> CLI-07-19, 65 NRC at \_\_\_, slip op. at 4.

engaging in recreation within 50 miles of the facility seeking license renewal,<sup>6</sup> and that in one license transfer proceeding, we granted standing to a petitioner living within 35 miles of the licensed facility.<sup>7</sup> Based on these precedents, they assert that we should have accorded standing to Mr. McManemy (and, through him, to Nuclear Information and Resource Service, and Don't Waste Michigan), because he lives "about 40 to 42 miles . . . from Big Rock [Point],"<sup>8</sup> sails within 15 miles of it "several times per year" and within one mile of it "every few years," and stops at a park within one mile of it several times a year to (among other things) collect water from an artesian well.<sup>9</sup> In support, Petitioners submit a Supplemental Declaration from Mr. McManemy, largely to the above effect.<sup>10</sup>

## II. DISCUSSION

Petitioners seeking reconsideration of a Commission order must satisfy a high standard: the Commission's alleged error must be "clear," petitioners' argument must be new, and petitioners must not previously have been able to make that argument.

Petitioners here originally claimed only that their member, Mr. McManemy, lived within 50 miles of the Big Rock Point site. In CLI-07-19, we explained why this bare allegation did not suffice for standing to challenge transferring the license for the Big Rock Point ISFSI – which as we explained in CLI-07-19 is a passive structure whose potential to harm Mr. McManemy 50

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<sup>6</sup> Petition for Reconsideration at 3.

<sup>7</sup> *Id.*, citing *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, LBP-93-5, 37 NRC 96, *aff'd*, CLI-93-16, 38 NRC 25 (1993).

<sup>8</sup> Petition for Reconsideration at 4. Petitioners also assert that any breach of the ISFSI's dry storage casks could release radioactive cesium which either wind or water could carry 42 miles. *Id.* at 5.

<sup>9</sup> *Id.* at 4; Supplemental Declaration of Victor McManemy (May 7, 2007), appended to Petition for Reconsideration.

<sup>10</sup> Supplemental Declaration of Victor McManemy.

miles away is hardly self-evident.<sup>11</sup> On reconsideration, Petitioners have submitted a fresh declaration that, for the first time, specifies the distance from the ISFSI that Mr. McManemy resides (42 miles) and points to closer distances (1-15 miles) that he occasionally traverses. This information comes too late. A petitioner cannot satisfy our standing requirement by offering a vague claim of 50-mile “proximity” in an initial petition and later using a petition for reconsideration to fill in gaps with more specific information that was available all along.<sup>12</sup>

Even were we to entertain Petitioners’ belated effort to substantiate their standing, we would not find their new information persuasive. Petitioners cite our 1993 *Vogtle* license transfer decision, where we allowed petitioners living within 35 miles of a reactor to challenge a license transfer. But *Vogtle*, like the various license renewal decisions Petitioners cite, involved an operating reactor, not simply an ISFSI. The difference in potential risk between a reactor and an ISFSI justifies treating the present case differently.<sup>13</sup> We have, moreover, always treated *Vogtle* as an unusual, special case:

The petitioner in *Vogtle* alleged that he could suffer harm from the transfer of operating authority to a company that, according to him, lacked the “character, competence, and integrity to safely operate the *Vogtle* plant, and lacks the candor, truthfulness, and willingness to abide by the regulatory requirements

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<sup>11</sup> CLI-07-19, 65 NRC at \_\_\_, slip op. at 4. Cf. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 191 (1999) (citations omitted), *petition for review denied*, *Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir. 2000):

[G]iven the shutdown and defueled status of the units, the license amendments do not on their face present any “obvious” potential of offsite radiological consequences. . . . Because neither reactor will ever operate again, the scope of activities at the plant has been greatly reduced. . . . Accordingly the “spectrum of accidents and events that remain credible is significantly reduced.”

<sup>12</sup> See generally 10 C.F.R. § 2.345(b) (“A petition for reconsideration must 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” (emphasis added)).

<sup>13</sup> See *Private Fuel Storage, LLC*, CLI-01-22, 54 NRC 255, 265 (2001) (ISFSI “failure would not pose nearly the same radioactive consequences as a reactor failure”).

necessary to operate a nuclear facility.” CLI-93-16, 38 NRC at 33. The petitioner also alleged that management had submitted material false statements to the Commission in order to obstruct an NRC investigation. *Id.* *Those unusual circumstances are not present here.*<sup>14</sup>

The current case contains no allegations similar to those in *Vogtle*. Post-*Vogtle*, our grants of standing based on a facility’s proximity to a petitioner’s residence have not approached the 40-42 miles separating Mr. McManemy’s house from the Big Rock Point ISFSI. Indeed, the longest specific distance for which we have granted proximity-based standing in a post-*Vogtle* license transfer case is 6-6½ miles.<sup>15</sup> By contrast, we have denied proximity-based standing in license transfer proceedings to petitioners within 5-10 miles,<sup>16</sup> 12 miles,<sup>17</sup> and 40 miles from licensed facilities.<sup>18</sup> All these proceedings involved active, operating reactors. Thus, we deny the requested proximity-based standing claim in this case resting on a residence within 42 miles of an ISFSI or on occasional sailing trips within 15 miles.

This leaves only the question whether Mr. McManemy’s sporadic visits (sailing every few years and walking several times a year) to within about a mile of the ISFSI might qualify him for proximity-based standing. NRC licensing boards and the Commission itself have recognized proximity standing at such close distances where a petitioner “*frequently engages in substantial business and related activities in the vicinity of the facility,*”<sup>19</sup> engages in “normal, *everyday*

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<sup>14</sup> *Peach Bottom*, CLI-05-26, 62 NRC at 583 n.27 (emphasis added).

<sup>15</sup> *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163-64 (2000).

<sup>16</sup> *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132-33 (2000).

<sup>17</sup> *AmerGen Energy Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 576 (2005).

<sup>18</sup> *Peach Bottom*, CLI-05-26, 62 NRC at 582.

<sup>19</sup> *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-82-4, (continued...)

activities” in the vicinity,<sup>20</sup> has “*regular*”<sup>21</sup> and “*frequent* contacts”<sup>22</sup> in an area near a licensed facility, or otherwise has visits of a “length” and “nature” showing “an ongoing connection and presence.”<sup>23</sup> Conversely, the agency has denied proximity-based standing where contact has been limited to “*mere occasional trips* to areas located close to reactors.”<sup>24</sup> Mr. McManemy’s trips (sailing and walking) fall within this latter category of contacts.

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<sup>19</sup>(...continued)  
15 NRC 199, 204 n.7 (1982) (emphases added).

<sup>20</sup> *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-183, 7 AEC 222, 226 (1974) (emphasis added). See also *Maine Yankee*, LBP-82-4, 15 NRC at 204.

<sup>21</sup> *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 and 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 26 (2002) (emphasis added) (frequency must reflect “regular interaction” with the zone of harm, not merely “occasional contact”).

<sup>22</sup> *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 & n.22 (1994) (emphasis added). See also *Sequoyah Nuclear Plant*, LBP-02-14, 56 NRC at 26; *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, 148 (2001), *aff’d on other grounds*, CLI-01-17, 54 NRC 3 (2001).

<sup>23</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 32 (1998), *petition for review docketed*, No. 05-1419 (D.C. Cir. Nov. 7, 2005). See also *Private Fuel Storage*, CLI-99-10, 49 NRC 318, 324 (1999).

<sup>24</sup> *Sequoyah Nuclear Plant*, LBP-02-14, 56 NRC at 26 (emphasis added). See also *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 NRC 330, 338 (1979).

**III. CONCLUSION**

For the reasons above, we *deny* Petitioners' Petition for Reconsideration.

IT IS SO ORDERED.

For the Commission

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 28<sup>th</sup> day of June, 2007.