

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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DOCKETED 06/23/06

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In the Matter of)

NUCLEAR MANAGEMENT COMPANY, LLC)

(Palisades Nuclear Plant))
_____)

Docket No. 50-255-LR

CLI-06-17

MEMORANDUM AND ORDER

Petitioners Nuclear Information and Resource Service, West Michigan Environmental Action Council, Don't Waste Michigan, the Green Party of Van Buren County, the Michigan Land Trustees, and individual members of these organizations (collectively, "Petitioners"), have appealed an Atomic Safety and Licensing Board ruling denying their petition to intervene and request for hearing in this license renewal proceeding.¹ Specifically, Petitioners claim that the Board erred in finding inadmissible two proposed contentions, relating to reactor pressure vessel embrittlement and spent fuel storage. Finding no indication that the Board erred, we affirm the Board's ruling.

I. Background

Nuclear Management Company, LLC ("NMC") has applied to renew its license to operate the Palisades Nuclear Plant ("Palisades") for a twenty-year period starting in 2011.

¹LBP-06-10, 63 NRC __ (Mar. 7, 2006).

Petitioners jointly filed a petition to intervene and request for hearing, and NMC and the NRC Staff each filed answers to the petition.² Petitioners then filed a “Combined Reply” to the NRC Staff’s and NMC’s answers.³ The NRC Staff and NMC immediately objected to the Combined Reply as an improper attempt to supplement Petitioners’ original pleading without the Board’s approval.⁴ The Board agreed. It refused to consider new claims in the Combined Reply, and found Petitioners’ original contentions inadmissible under NRC’s contention pleading rules.⁵

Just as the burden was on the Petitioners to raise an admissible contention on which a hearing can be held, it is the Petitioners’ burden to raise an issue on appeal that would justify reversing the Board’s ruling and remanding the issue for further proceedings. We find that Petitioners have failed in their attempt on appeal, and affirm the Board’s rulings.⁶

II. Discussion

Our customary practice is to affirm Board rulings on contention admissibility absent an

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

³ Petitioners’ Combined Reply to NRC Staff and Nuclear Management Company Answers (Sept. 16, 2005) (“Combined Reply”).

⁴ NRC Staff Motion to Strike Petitioners’ Combined Reply to NRC Staff and NMC Answers to Petition to Intervene and Request for Hearing (Sept. 26, 2005), Nuclear Management Company’s Motion to Strike Petitioners’ September 16, 2005 Combined Reply to NRC Staff and Nuclear Management Company Answers (Sept. 26, 2005).

⁵ See LBP-06-10, 63 NRC ___, slip op. at 18-25.

⁶ Although Petitioners state in their notice of appeal and brief that they are appealing the Board’s ruling on Contention 5 (no permanent spent fuel repository), there is no argument on that contention, nor even is there any further mention of it. See Petitioners’ Notice of Appeal from ASLB Denial of Hearing, and Supporting Brief (Mar. 17, 2006), at 2 (“Appeal”). Petitioners withdrew the proposed contention in their Combined Reply. See Combined Reply at 55. We conclude that the reference to Contention 5 in the appeal was a typographical error.

abuse of discretion or error of law.⁷ Here, we see no basis for disturbing the Board's well-reasoned rejection of Petitioners' contentions. We affirm, for the reasons discussed below and for the reasons articulated by the Board.

A. The Board Properly Rejected Contention 1

1. Contention 1, As Submitted, Was Vague, Unsupported, And Failed to Address Information in the License Renewal Application

Petitioners' proposed Contention 1 failed to satisfy our contention pleading requirements that contentions be specific, material and within the scope of the license application, and supported by factual evidence.⁸ This proposed contention argued that the application was "incomplete for failure to address the continuing crisis of embrittlement." The entire basis given for the proposed contention was as follows:

The Petitioners allege that the Palisades license renewal application is fundamentally deficient because it does not adequately address technical and safety issues arising out of the embrittlement of the reactor pressure vessel and unresolved Pressure [sic] Thermal Shock ("PTS") concerns that might reasonably result in the failure of the reactor pressure vessel ("RPV"). The Palisades nuclear power station is identified as prone to early embrittlement of the reactor pressure vessel, which is a vital safety component. As noted in the opinion of Petitioners' expert ... the longer Palisades operates, the more embrittled its RPV becomes, with decreasing safety margins in the event of the initiation of emergency operation procedures. Therefore, a hearing on the public health and safety effects of a prospective additional twenty years of operation, given the present and prospective embrittlement trend of the RPV is imperative to protecting the interests of [Petitioners].⁹

We agree with the Board's assessment that this statement consists of only general allegations and obvious truisms (*i.e.*, that the longer the reactor pressure vessel is in service, the more vulnerable to embrittlement it becomes). No documentary support was provided for the only

⁷ See, e.g., *USEC Inc. (American Centrifuge Plant)*, CLI-06-9, 63 NRC ___, slip op. at 7 (Apr. 3, 2006).

⁸ See 10 C.F.R. § 2.309(f).

⁹ Request for Hearing and Petition to Intervene (Aug. 8, 2005), at 4 .

argument specific to Palisades: that it is peculiarly vulnerable to embrittlement. As the Board put it, when reading this proposed contention, “[i]t cannot be ascertained whether the drafters . . . actually even read the Application.”¹⁰

On appeal, Petitioners do not argue that the above statement, standing alone, constitutes a sufficient contention. Instead, they argue that material in their Combined Reply raises an admissible contention. We agree with the Board that the Combined Reply constituted an untimely attempt to supplement Petitioners’ contention, and find that the Board was correct not to consider it. We turn now to that issue.

2. The Board Properly Declined to Consider New Claims Raised in Petitioners’ Combined Reply

In stark contrast to the brief contention and basis described above, Petitioners’ Combined Reply devoted 22 pages of material relating to their contention that Palisades is already or soon will be too embrittled to safely tolerate a thermal shock event.¹¹ Unlike their proposed Contention 1, Petitioners’ Combined Reply included citations to documents and disputed portions of the application.

NRC regulations provide a method for assuring that the reactor vessel of a pressurized water reactor will not become too embrittled to protect against pressurized thermal shock events.¹² Section 50.61, which applies to all pressurized water reactors throughout their operating life, requires the licensee to calculate the effects of neutron flux on the reactor vessel materials, and to project the time at which embrittlement of the reactor vessel will exceed a conservative screening criterion. If the vessel is projected to exceed the screening criterion, the

¹⁰ LBP-06-10, 63 NRC ___, slip op. at 39.

¹¹ See Combined Reply at 2-23.

¹² A pressurized thermal shock event is “an event or transient in pressurized water reactors (PWRs) causing severe overcooling (thermal shock) concurrent with or followed by significant pressure in the reactor vessel.” 10 C.F.R. § 50.61(a)(2).

burden is on the licensee to demonstrate that it is safe for the plant to continue to operate.¹³ Specifically, the regulations require the licensee to implement a neutron flux reduction program to avoid exceeding the screening criterion.¹⁴ If no practicable flux reduction can prevent the reactor vessel from exceeding the criterion, the licensee must conduct an analysis to identify how it must modify equipment, systems and operations to prevent failure of the reactor vessel in a thermal shock event.¹⁵ An additional option is for the licensee to anneal the reactor pressure vessel to restore ductility.¹⁶

NMC's license renewal application described the ongoing flux reduction procedures at Palisades, and acknowledged that it was unlikely that any additional "cost-effective" flux reduction methods would suffice to extend the reactor vessel life.¹⁷ The application states that, within the time frame prescribed by the regulations, it will choose one of the prescribed methods to demonstrate that its reactor vessel is safe in a pressurized thermal shock event.¹⁸

The essence of Petitioners' Combined Reply was that NMC's calculation of the date that its reactor pressure vessel will exceed the screening criteria is unreliable,¹⁹ and that the method NMC will use to handle embrittlement should be subject to a hearing to select the safest option, not merely the least expensive option.²⁰ These arguments, however, are not even suggested

¹³ 10 C.F.R. §§ 50.61(b)(4)-(6).

¹⁴ 10 C.F.R. § 50.61(b)(3).

¹⁵ 10 C.F.R. § 50.61(b)(4).

¹⁶ See 10 C.F.R. § 50.61(b)(7).

¹⁷ See Palisades Nuclear Plant, Application for Renewed Operating License, ADAMS accession number ML050940446, at 4-10, 4-13 to 4-15 (Mar. 22, 2005).

¹⁸ *Id.* at 4-10.

¹⁹ See, e.g., Combined Reply at 3-4, 10-15.

²⁰ See, e.g., Combined Reply at 5-9.

by Petitioners' proposed Contention 1 as initially pled.

It is well established in NRC proceedings that a reply cannot expand the scope of the arguments set forth in the original hearing request.²¹ Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it. New bases for a contention cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing criteria set forth in 10 C.F.R. §§ 2.309(c), (f)(2). While a petitioner need not introduce at the contention phase every document on which it will rely in a hearing, if the contention as originally pled did not cite adequate documentary support, a petitioner cannot remediate the deficiency by introducing in the reply documents that were available to it at during the timeframe for initially filing contentions. Allowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants an opportunity to rebut the new claims.

Here, Petitioners never addressed the late-filing criteria before the Board, and do not assert in their appeal that the claims in their Combined Reply meet these criteria. In fact, the Board examined the material and noted that, because the supporting documentation was all available prior to the contention deadline, Petitioners would likely not be able to meet the late-filing test.²² We agree with the Board.

By stressing untimeliness, we by no means suggest that the new information in Petitioners' Combined Reply amounts to an admissible contention. On the contrary, the NRC Staff and NMC have pointed to other possible shortcomings in that pleading. For example, the Combined Reply appears to ignore vital information in the application, such as the fact that

²¹ See, e.g., *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223 (2004), *reconsideration denied*, CLI-04-35, 60 NRC 619 (2004). Accord *USEC*, CLI-06-9, 63 NRC ___, slip op. at 6.

²² See LBP-06-10, 63 NRC ___, slip op. at 37.

NMC has already implemented neutron flux reduction procedures at Palisades. In addition, to the extent that Petitioners suggest that NMC must *immediately* commit to a course of action (neutron flux reduction, modifying equipment and systems under § 50.61(b)(4), or annealing) to address neutron flux-induced embrittlement, the contention constitutes an impermissible attack on Commission regulations. But because Petitioners' original contention was inadequate on its face, and the Combined Reply unjustifiably late, we need not rule on the extent to which § 50.61 narrows embrittlement challenges that may properly be raised in a license renewal proceeding.

3. Petitioners' Claims Concerning Their Expert Witness Are Irrelevant

Petitioners also object to the Board's decision on the basis that it erroneously discounted the contribution of their proffered expert. In drafting their contentions, Petitioners consulted with a former NRC employee, Demetrios Basdekas, about conditions at Palisades and issues of embrittlement. Mr. Basdekas is the expert to whom their contention and supporting basis refers.

In December 2005, the NRC attorney representing the Staff in this matter received a call from Mr. Basdekas saying that he would not testify for Petitioners at a hearing. This led to charges among the litigants that Petitioners had misrepresented Mr. Basdekas as their expert, and accusations of attorney misconduct.²³

Petitioners' appeal claims that the Board "denigrated" the value of Mr. Basdekas by stating in its ruling that Mr. Basdekas assisted Petitioners only in drafting the contention and would not be available to testify at a hearing. This claim provides no basis for appeal because it is now irrelevant whether Mr. Basdekas was or was not the Petitioners' expert, whether he

²³ See LBP-06-10, 63 NRC ___, slip op. at 9-17, see *also id.* at ___, slip op. at 61 (Additional Statement of Judge Young).

withdrew as their expert, or why he did so. The Board found, correctly, that the statements attributed to him in Contention 1 were too general to support a contention.²⁴ The Board's ruling did not rest on a determination of Mr. Basdekas' status as Petitioners' expert. Furthermore, even if the Board misjudged the situation (and we see no evidence that it did), the error is harmless and immaterial.

B. The Board Correctly Found Contention 3 (Spent Fuel Storage Capacity) To Be Outside the Scope of the Proceeding

The Board properly rejected proposed Contention 3 because it sought to raise an issue outside the scope of a license renewal proceeding. Contention 3 charged that NMC has no place to store the spent fuel that will accumulate over the license renewal period because, Petitioners claim, the two dry cask storage pads currently in use at Palisades do not comply with the NRC's regulations. In their appeal, Petitioners argue that this constitutes an ongoing violation. The Board was correct in finding this claim to be outside the scope of this proceeding. First, the dry cask storage facility, or independent spent fuel storage installation ("ISFSI"), is licensed separately from the reactor.²⁵ The current proceeding concerns the renewal of the reactor operating license pursuant to 10 C.F.R. Parts 51 and 54, and not the ISFSI, which is licensed pursuant to 10 C.F.R. Part 72. Issues involving the ISFSI are, quite simply, separate licensing matters.²⁶

Second, the focus of a license renewal proceeding is on the detrimental effects of aging on reactor and auxiliary systems resulting from operation beyond the initial license term. "Accordingly, Part 54 requires renewal applicants to demonstrate how their programs will be

²⁴ See LBP-06-10, 63 NRC ___, slip op. at 17, 37-38.

²⁵ See LBP-06-10, slip op. at 17, 37-38.

²⁶ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 344 n.4 (1999).

effective in managing the effects of aging during the proposed period of extended operation.”²⁷ Petitioners argue on appeal that the putative storage pad defects cannot be disconnected from the proposed license renewal because additional spent fuel will accumulate over the license renewal period.²⁸ Although Petitioners attempt to recast their argument as a license renewal issue, it falls beyond the limited scope of this proceeding.²⁹

For these reasons, as well as those articulated by the Board, Contention 3 falls outside the scope of this proceeding, and Petitioners have not shown that the Board erred in so holding.³⁰

²⁷ See, e.g., *Turkey Point*, CLI-01-17, 54 NRC at 8.

²⁸ See Appeal at 11.

²⁹ The radiological impacts of onsite spent fuel during the renewal period are not subject to litigation in license renewal adjudicatory proceedings under the National Environmental Policy Act of 1969. As discussed by the Board below, this issue constitutes a “Category 1” issue. See LBP-06-10, slip op. at 30. Category 1 issues are those issues that the Commission has categorized and assessed generically because the environmental effects of those issues are essentially similar for all plants. These findings are codified in NRC regulations. See 10 C.F.R. Part 51, Subpart A, App. B. As such, a license renewal applicant may, in its environmental report, “refer to and adopt the generic environmental impact findings found in Table 1, Appendix B, for all Category 1 issues.” These generic determinations, including the determination regarding onsite waste storage, “preclude the Petitioners from attempting to introduce such waste issues into this adjudication.” *Oconee*, CLI-99-11, 49 NRC at 343.

³⁰ Petitioners have asked that, in the alternative to litigating their claim relating to the dry storage pads as part of this license renewal proceeding, the NRC consider their claim a request for enforcement action pursuant to 10 C.F.R. ss 2.202 and 2.206. We note that this matter is, in fact, currently under consideration by the NRC staff as a possible Section 2.206 petition. See “May 2006 Report on the Status of Public Petitions Under Title 10 of the Code of Federal Regulations, Section 2.206,” June 8, 2006 (ADAMS accession number ML061560109).

III. Conclusion

For the foregoing reasons, the Board's decision in LBP-06-10 is *affirmed*.³¹

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 23rd day of June, 2006

³¹ Yesterday (June 22, 2006) Petitioners, as well as other organizations, filed a pleading entitled "Notice of Pertinent New Case Law Affecting Proceeding; Request for Redraft of EIS, Additional Comment Period, and for New Period for Receipt of Contentions on Terrorism." Petitioners' "Notice" points to a recent decision from the United States Court of Appeals for the Ninth Circuit, *San Luis Obispo Mothers for Peace v. NRC*, No. 03-74628 (9th Cir., June 2, 2006). The Ninth Circuit decision deals with the question whether the NRC must consider the environmental effects of potential terrorist attacks. As neither of the contentions we discuss in today's decision concerns terrorism issues, we do not consider Petitioners' "Notice." We will address Petitioners' Notice at a later time.