

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

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In the Matter of)
)
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CONSUMERS ENERGY COMPANY,)
NUCLEAR MANAGEMENT COMPANY, LLC,)
ENERGY NUCLEAR PALISADES, LLC, AND)
ENERGY NUCLEAR OPERATIONS, INC.)

(Palisades Nuclear Power Plant))
_____)

Docket No. 50-255-LT

CLI-07-18

MEMORANDUM AND ORDER

I. INTRODUCTION

The four captioned Applicants have entered into an "Asset Sale Agreement" dated July 11, 2006, regarding the Palisades Nuclear Power Plant ("Palisades") and Independent Spent Fuel Storage Installation ("ISFSI"), both near South Haven, Michigan. As one step towards effectuating this agreement, the Applicants on August 31, 2006, filed with us an application for authorization to transfer and amend the NRC operating license associated with the Palisades

plant and ISFSI.¹ (Although the agreement also encompassed the sale of the Big Rock Point ISFSI, the transfer of the NRC license for that property is not at issue here.)

These facilities are currently owned by Consumers Energy Company (“Consumers”) and operated by Nuclear Management Company, LLC. These two Applicants seek authorization to transfer the license associated with the Palisades Plant and ISFSI to the remaining two Applicants, Entergy Nuclear Palisades, LLC (“Entergy Nuclear Palisades”) and Entergy Nuclear Operations, Inc. (“Entergy Nuclear Operations”) (collectively “Entergy”). Entergy would thereafter own and operate those facilities.

The Applicants submitted the Palisades Application to the Commission pursuant to Section 184 of the Atomic Energy Act of 1954 (“AEA”)² and sections 50.80 and 50.90 of the Commission’s regulations.³ On November 16, 2006, the Commission published in the *Federal Register* a notice on the Application.⁴

¹ The license at issue is DPR-20 (Palisades Facilities Operating License) issued under 10 C.F.R. Part 50. The ISFSI is subject to a general license under 10 C.F.R. § 72.210. The requested “conforming amendments” to the license are administrative, not substantive, and are intended merely to reflect the proposed transfer. The Application proposes no physical or operational changes to the Palisades facility. See “Notice of Consideration of Approval of Transfer of Facility Operating License and Conforming Amendment and Opportunity for Hearing, 71 Fed. Reg. 66,805 (Nov. 16, 2006). The public version of the Application can be found on the Commission’s website at ADAMS Accession No. ML062500352. (ADAMS is the acronym for the NRC’s Agencywide Documents Access and Management System -- a computerized storage and retrieval system for NRC documents, publicly accessible at <http://www.nrc.gov>.)

² 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).

³ 10 C.F.R. §§ 50.80, 50.90. Section 50.80 reiterates the requirements of AEA § 184, *supra*, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations and Commission orders. Section 50.90 authorizes applications to amend existing operating licenses or construction permits for production or utilization facilities.

⁴ 71 Fed. Reg. 66,805, *supra* note 1.

Responding to that Notice, two groups opposing the license transfer have filed timely Petitions to Intervene and Requests for Hearing. The first group comprises two public interest organizations -- the Michigan Environmental Council and the Public Interest Research Group in Michigan (collectively "Environmental Petitioners").⁵ And in the second group are Van Buren County ("the County"), Covert Township ("the Township"), Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College, and South Haven Hospital (collectively "Local Units").⁶ The petitioners' concerns center around two general questions (or "issues"⁷): does Entergy have the necessary financial qualifications to own and operate the facilities safely, and are the decommissioning funds which are to be transferred adequate to provide for the safe decommissioning of the licensed facilities? Both groups include within the scope of their concerns not only the Palisades facility but also the Big Rock Point ISFSI (see Section III, *infra*).

⁵ Petition for Leave to Intervene of the Michigan Environmental Council and Public Interest Research Group in Michigan and Request for Hearing, Request for Extension of Time, and Request for Discovery" (Dec. 6, 2006) ("Environmental Petitioners' Petition").

⁶ Petition by Van Buren County, Covert Township, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College and South Haven Hospital (Collectively Referred to as "Local Units") for Leave to Intervene and Request for Hearing, Request for Extension of Time and Request for Discovery (Dec. 6, 2006) ("Local Units' Petition").

⁷ Both groups of petitioners use the term "issues" to describe their general arguments on these two questions. This terminology stems from a now-superseded 1998 procedural regulation that governed the arguments of petitioners to intervene in license transfer cases. See former 10 C.F.R. §§ 2.1306(b)(2) (rescinded in 2004) (a person seeking to intervene must "[s]et forth the issues sought to be raised"). In 2004, we rescinded section 2.1306(b)(2) and, in its place, incorporated 10 C.F.R. § 2.309(f) by reference. See 10 C.F.R. § 2.1300. Section 2.309(f) sets forth the standards for admissibility of "contentions." But despite this regulatory change, petitioners, applicants and the Commission have continued to use the term "issues." We clarify today that the "issues" in license transfer proceedings constitute "contentions" under section 2.309(f) and must therefore meet the standards for admissibility set forth in that regulation.

Each group has also submitted a Request for Discovery and a Request for Extension of Time within which to submit revised contentions. These requests are grounded in the two groups' current lack of access to the redacted portions of three documents: Section II.F ("Financial Qualifications") of the Application for Transfer of Facility Operating License, Entergy's proposed Operating Agreement, and Entergy Nuclear Palisades' projected financial statement.

The Applicants filed Answers to these hearing requests, and the two petitioner groups then submitted Replies to those Answers. The NRC Staff, which is not required to be a party, has submitted no pleadings.⁸ We consider the pleadings under Subpart M of our procedural rules.⁹

For the reasons set forth below, we find that the Environmental Petitioners, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College, and South Haven Hospital have not demonstrated standing to participate in this adjudication, but that the County and the Township have standing. We also define the proceeding's scope, conditionally grant the County's and the Township's request for access to the redacted portions of the license transfer Application, grant their request for an extension of time, deny their request for discovery, require the appointment of a presiding officer, and address several minor administrative matters.¹⁰

⁸ The Staff ordinarily does not participate as a party in the adjudicatory portion of license transfer proceedings. See *generally* 10 C.F.R. § 2.1316(b), (c).

⁹ 10 C.F.R. §§ 2.1301 - 2.1331.

¹⁰ The purpose of this adjudication is to resolve whether, for the reasons presented by the petitioners, the Commission should itself disapprove the Palisades license transfer application – regardless of the NRC Staff's action. On April 6, 2007, the NRC Staff completed its review and approved the license transfer. 72 Fed. Reg. 19,057 (April 16, 2007). The staff approval is, of course, subject to the outcome of this adjudication.

II. THE LICENSE TRANSFER APPLICATION

The Application explains that, if we approve the license transfer, Entergy Nuclear Palisades will assume title to the Palisades facilities as well as to all used and spent nuclear fuel and other licensed nuclear materials at Palisades. Entergy Nuclear Operations will have the authority for the plant's operation and maintenance. As part of the sales transaction, Consumers also entered into a Power Purchase Agreement with Entergy Nuclear Palisades under which Consumers has agreed to purchase energy and capacity at pre-established rates and schedules for fifteen years from the closing date of the sale of Palisades.

On that closing date, Consumers will transfer the assets of its Qualified Decommissioning Trust Fund to a trust fund that Entergy Nuclear Palisades will establish. Applicants state that the amount of the new trust fund will be sufficient to satisfy the NRC funding requirements if the license for Palisades is renewed as requested in Consumers' and Nuclear Management Company's "Application for License Renewal" (March 22, 2005). (The Commission approved the Palisades license renewal Application on January 17, 2007.¹¹) Applicants also state that, once the sale has closed, the responsibility for decommissioning the plant will transfer to Entergy.¹²

Before turning to the issue of petitioners' standing, we first address a threshold matter dealing with the scope and nature of this adjudicatory proceeding.

¹¹ See *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-07-09, 65 NRC ____, ____, n.2, slip op. at 2 n.2 (Feb. 26, 2007); "Nuclear Management Company, LLC; Palisades Nuclear Plant; Notice of Issuance of Renewed Facility Operating License No. DPR-20 for an Additional 20-Year Period; Record of Decision," 72 Fed. Reg. 3168 (Jan. 24, 2007); "Consumers Energy Company, Nuclear Management Company, LLC, Docket No. 50-255, Palisades Nuclear Plant, Renewed Facility Operating License, Renewed License No. DPR-20" (Jan. 17, 2007), ADAMS Accession No. ML070100469.

¹² Application at 2-3.

III. PRELIMINARY PROCEDURAL ISSUES

By a *separate* license transfer application submitted under 10 C.F.R. §§ 50.80 and 72.50, Consumers and Nuclear Management Company also seek our authorization to transfer to Entergy the Part 50 license for the Big Rock Point Nuclear Plant and the license for the ISFSI, located near Charlevoix, Michigan.¹³ The sales of the Palisades and Big Rock Point properties are part of a single transaction effectuated in the Asset Sales Agreement. As with the Palisades property, Entergy Nuclear Palisades would own and Entergy Nuclear Operations would maintain the Big Rock ISFSI. The Applicants in the instant proceeding have indicated that, under the Asset Sales Agreement, “the sale of each facility [the Palisades Plant and ISFSI, and the Big Rock Point ISFSI] is conditioned upon the sale of the other, and . . . that both will be treated together as a single transaction consummated on the same day.”¹⁴

The petitioners have apparently taken this to mean that the scope of the Asset Sales Agreement defines the scope of this proceeding, for their petitions address not only the transfer of the Palisades facilities’ license but also the transfer of licenses for Big Rock Point and the ISFSI.¹⁵

The petitioners are mistaken. Although both the Palisades and Big Rock Point license transfer Applications stem from the same document (the Asset Sales Agreement), they nonetheless seek different licensing actions and are the subject of two *separate Federal*

¹³ See “Application for Approval of Transfer of Facility Operating License No. DPR-6 and ISFSI License No. SFGL-16” (Oct. 31, 2006), ADAMS Accession No. ML063100429.

¹⁴ Application at 2.

¹⁵ See, e.g., Local Units’ Petition at 27; Environmental Petitioners’ Petition at 3.

Register notices.¹⁶ Moreover, the *Palisades* petitioners have not sought intervention in the *Big Rock Point* proceeding.¹⁷

IV. DISCUSSION

To intervene as of right in any Commission licensing proceeding, a petitioner must demonstrate that its "interest may be affected by the proceeding," *i.e.*, it must demonstrate "standing."¹⁸ (A petitioner must also raise at least one admissible contention,¹⁹ but we do not reach the admissibility question in today's decision.) As already noted, we conclude that the Environmental Petitioners, Covert Public Schools, Van Buren County Intermediate School District, Van Buren County District Library, Lake Michigan College, and South Haven Hospital have failed to demonstrate standing, but that the County and the Township have standing.

A. Standing

To demonstrate standing in a license transfer proceeding, the petitioner must

- (1) identify an interest in the proceeding by
 - (a) alleging a concrete and particularized injury (actual or threatened) that
 - (b) is fairly traceable to, and may be affected by, the challenged action (*e.g.*, the grant of an application to approve a license transfer), and
 - (c) is likely to be redressed by a favorable decision, and
 - (d) lies arguably within the "zone of interests" protected by the governing statute(s).

¹⁶ We published the *Federal Register* notice for the Big Rock Point transfer Application on January 30, 2007. 72 Fed. Reg. 4302.

¹⁷ Two other organizations and one individual filed a joint petition to intervene and request for hearing in the *Big Rock Point* proceeding. We address that petition in a separate order, also issued today.

¹⁸ See AEA, § 189a, 42 U.S.C. § 2239(a).

¹⁹ See 10 C.F.R. § 2.309(a); *Port Authority of the State of NY* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 292 (2000).

- (2) specify the facts pertaining to that interest.²⁰

Moreover, any organization seeking “representational standing” (*i.e.*, permission to represent the interests of its members) must also show that at least one of its members may be affected by the Commission’s approval of the transfer (such as by the member’s activities on or near the site), must identify that member, and must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or her behalf.²¹ The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its own purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action.²²

1. **Environmental Petitioners**

- a. *Representational Standing*

The two Environmental Petitioners seek representational standing. Yet neither petitioner provides a supporting affidavit or other evidence that any of its members has authorized it to represent his or her interests in this proceeding. Our case law on representational standing is both longstanding and clear regarding the need to demonstrate

²⁰ See *FitzPatrick*, CLI-00-22, 52 NRC at 293; *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 340-41 and n.5 (1999) (and cited authority).

²¹ See *FitzPatrick*, CLI-00-22, 52 NRC at 293; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000), and cited authority.

²² See, *e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999), & CLI-98-13, 48 NRC 26, 30-31 (1998), *petition for review filed sub nom. Ohngo Gaudadeh Devia v. NRC*, No. 05-1419 (D.C. Cir. Nov. 7, 2005).

authorization.²³ Our reasoning is simple. If an organization does not identify the members it purportedly represents, we cannot “determine whether the organization actually does represent members who consider that they will be affected by [the licensing action] . . . or rather, [i]s simply seeking the vindication of its own value preference.”²⁴ And without written authorization for such representation, we would have no “concrete indication that, in fact, the member wishes to have [the organization represent its interests] in th[is] proceeding.”²⁵ The failure both to identify the member(s) they purport to represent and to provide proof of authorization therefore precludes Environmental Petitioners from qualifying as intervenors.

But even were we to ignore the Environmental Petitioners’ failure to follow the established requirements for invoking representational standing, we would still conclude that they have not demonstrated the required “interest” in this proceeding, using the standards for standing set out in *FitzPatrick* and *Nine Mile Point*, *supra*. The Environmental Petitioners attempt to demonstrate this interest by relying on their (unnamed) members’ proximity to the facilities. Petitioners assert that many of their members (or, in the case of the Michigan Environmental Council, many of its member organizations’ members) “live, work, or engage in recreation, *adjacent and near* the [Palisades and Big Rock] facilities.”²⁶ But to demonstrate an interest based on proximity, a petitioner must provide greater specificity than this regarding the

²³ See, e.g., *Oyster Creek*, CLI-00-6, 51 NRC at 202, and cited authority.

²⁴ *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 389-90, *reconsideration denied*, ALAB-539, 9 NRC 422 (1979), and ALAB-544, 9 NRC 630 (1979). See also *Sierra Club v. Morton*, 405 U.S. 727, 739-40 (1972).

²⁵ *Allens Creek*, ALAB-535, 9 NRC at 396.

²⁶ Environmental Petitioners’ Petition at 6 (emphasis added). See also *id.* at 9 (“[M]embers of [the Michigan Environmental Council] / [the Public Interest Research Group in Michigan] also represent Michigan citizens who live locally *near* both the Big Rock . . . site and the Palisades . . . site” (emphasis added)).

distance from a plant.²⁷ We require fact-specific standing allegations, not conclusory assertions. The closest that the Public Interest Research Group in Michigan came to providing the required specificity was to submit a 3½ year old affidavit from a state regulatory proceeding, asserting that some of its members live in Van Buren County.²⁸ Likewise, the Michigan Environmental Council submitted an equally old affidavit (signed by its Policy Director) from the same state regulatory proceeding, asserting that its member groups included individuals living within Consumers' service territory.²⁹ We cannot find the requisite "interest" based on such general assertions of proximity.

b. *Organizational standing in their own right.*

Environmental Petitioners also seek to intervene in their own right, based on their organizational purposes. They claim to "have direct interests under their organizational mission statements, and purpose, to promote the economic use of energy, including nuclear energy, and to promote the public interest, environmental protection, and consumer protection."³⁰

²⁷ See, e.g., *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994) (assertion that members live "close" to transportation routes at issue insufficient for standing); *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (descriptions of activities as being "near," in "close proximity," or "in the vicinity" of facility in question insufficient to establish standing), *aff'd*, CLI-97-8, 46 NRC 21 (1997).

²⁸ See Affidavit of Brian Imus at 2 (July 10, 2003), submitted in Michigan Public Utilities Commission Case No. U-13771, appended to Environmental Petitioners' Reply.

²⁹ See Affidavit of James P. Clift at 2 (July 10, 2003), appended to Environmental Petitioners' Reply.

³⁰ Environmental Petitioners' Petition at 9. See also *id.* at 7. Along similar lines, they point to their "concern[] with Michigan's environment," their "promot[ion of] the decommissioning of nuclear plants and [spent nuclear fuel] storage sites in Michigan," and their interest in gaining "adequate financial assurances to accomplish these objectives." Environmental Petitioners' Petition at 5. However, our review of the Environmental Petitioners' mission statements (appended to their Reply) reveals no references to nuclear plants, SNF storage sites, or financial assurance.

Organizations seeking to intervene in their own right must satisfy the same “standing” requirements as individuals seeking to intervene.³¹ This is because an organization, like an individual, is considered a “person” as we have defined that word in 10 C.F.R. § 2.4 and as we have used it in 10 C.F.R. § 2.309 regarding standing.

The Environmental Petitioners’ interest in the promotion of “economic use of energy” falls outside the zone of interests protected by either the Atomic Energy Act or the National Environmental Policy Act.³² Also, their promotion of “the public interest, environmental protection, and consumer protection” are broad interests shared with many others³³ and too general to constitute a protected interest under these two statutes.³⁴ In essence, the Environmental Petitioners seek to play the role of a “private attorney general” -- a role that AEA Section 189 -- which grants a hearing right to those with an “interest” in the proceeding -- does not contemplate.³⁵ Neither Environmental Petitioner has shown any risk of “discrete institutional

³¹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), ALAB-952, 33 NRC 521, 528, *aff'd in relevant part*, CLI-91-13, 34 NRC 185, 187-88 (1991).

³² *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983) (denying standing to an organization with similar general interests in the “development of economical energy resources”). *See generally Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

³³ *See generally Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972); *Three Mile Island*, CLI-83-25, 18 NRC at 332.

³⁴ *Three Mile Island*, CLI-83-25, 18 NRC at 332.

³⁵ *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, NRC at & n.4 (2005), citing *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), ALAB-333, 3 NRC 804, 806 n.6 (1976). *See also Curators of the University of Missouri*, LBP-90-30, 32 NRC 95, 103 (1990) (“intervenors may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly”).

injury *to itself*, other than the general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing.”³⁶

2. Local Units

Van Buren County and Covert Township are local governmental bodies. The Palisades facility is located within the boundaries of both these entities. Thus, pursuant to 10 C.F.R. § 2.309(d)(2), they do not need to make any further demonstration of standing. Petitioners Covert Public Schools, Van Buren County Intermediate School District, Lake Michigan College, South Haven Hospital and Van Buren County District Library have not alleged that they are a county, municipality, or other subdivision, nor have they alleged that Palisades is located within their boundaries. Thus, we must analyze standing pursuant to 10 C.F.R. 2.309(d)(1).³⁷

It is not sufficient to rely on the standing of one petitioner because Commission practice requires each party to separately establish standing.³⁸ In the instant case, the Local Units collectively have made broad statements regarding a range of issues “including, but not limited to, distribution of Palisades’ decommissioning funds; the inadequacy of emergency

³⁶ *International Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, 252 (2001) (emphasis added).

³⁷ Section 2.309(d)(2) was promulgated in 2004 as part of our revisions to our adjudicatory procedures, and is an acknowledgment that the State or local governmental body has an inherent interest in licensing actions within its boundaries sufficient to grant standing. Thus, no further demonstration of such interest is necessary. Not all organizations with governmental ties are entitled to participate in our proceedings as a “local governmental body (county, municipality, or other subdivision)” under section 2.309(d)(2), in much the same way not all organizations with governmental ties were entitled to participate in our proceedings as governmental agencies under our former regulation, 10 C.F.R. § 2.715(c), regarding participation by non-parties. Under that former section, an advisory body that lacked executive or legislative responsibilities was determined by the Commission to be “so far removed from having the representative authority to speak and act for the public that [it did] not qualify” as a governmental entity for the purpose of section 2.715(c). See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-98-21, 48 NRC 185, 202-203 (1998).

³⁸ See *Commonwealth Edison Co. (Dresden Nuclear Power Station, Unit 1)* CLI-81-25, 14 NRC 616, 623 (1981).

preparedness relating to the site; the likely continued operation until 2031 of Palisades (if the license is renewed); and the ultimate decommissioning of Palisades by a private party purchaser.³⁹ They have not, however, clearly explained their individual interests or how they will be harmed. Although they make brief reference to a showing of organizational standing,⁴⁰ they have said little about their individual organizational interests apart from bare references to Covert Public Schools', Van Buren County Intermediate School District's, Lake Michigan College's, and South Haven Hospital's connection to emergency preparedness for Palisades.⁴¹ Although they suggest geographic proximity as a basis for a presumption of harm in support of standing,⁴² they fail to provide any individual addresses as required by 10 C.F.R. § 2.309(d)(1) and do not specify their respective distances to the Palisades facility.⁴³

In summary, we find that Covert Public Schools, Van Buren County Intermediate School District, Lake Michigan College, South Haven Hospital and Van Buren County District Library

³⁹ See Local Units' Petition at 4.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 6.

⁴² *Id.* at 7 n.4; Local Units' Reply to Response of Consumers Energy Company, Nuclear Management Company, LLC and Entergy Nuclear Palisades LLC and Entergy Nuclear Operations in Opposition to Local Units' Petition for Leave to Intervene and Request for Hearing, Request for Extension of Time and Request for Discovery at 3 n. 3 (Jan. 10, 2007) ("Local Units' Reply Brief").

⁴³ In their Reply Brief, the Local Units make the general statement that they are "within miles of the Palisades facility and well within the Emergency Planning Zone of 10 miles." Local Units' Reply Brief at 3. This is unlike, for example, the Declaration in support of petitioner's standing, including the specific statement of distance from the licensed facility, that was submitted and accepted in *Vermont Yankee*, CLI-00-20, 52 NRC at 163.

have failed to set forth a clear and coherent argument for standing.⁴⁴ Since they have failed to sufficiently demonstrate their interests and injury, their petition to intervene is denied.⁴⁵

B. Admissibility of Contentions

We are deferring ruling on the admissibility of the contentions of the County and Township at this stage since we find that the arguments concerning at least one of their contentions (*viz.* Contention D-1(a)) and the need for access to redacted information are sufficient to warrant our approval of the requested access.⁴⁶ The County and the Township may amend or withdraw their current financial contentions after reviewing the redacted information in the Palisades license transfer Application under appropriate conditions (see Section IV.C, *infra*). We therefore defer our consideration of the admissibility question until after the County and the Township have had the opportunity to renew or amend their

⁴⁴ *Commonwealth Edison Co.* (Zion Nuclear Power Stations, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999). See also *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 336-37 (2002) (denying standing to the California Public Utilities Commission).

⁴⁵ Since by all indications these petitioners, acting through single counsel, have concerns shared with the County and the Township, as a practical matter the latter two will be able to carry forward the concerns of the other petitioners notwithstanding that the other petitioners in this proceeding will not have formal status as parties.

⁴⁶ *FitzPatrick*, CLI-00-22, 52 NRC at 300 n.23 (“where critical information has been submitted to the NRC under a claim of confidentiality and was not available to Petitioners when framing their issues, it is appropriate to defer ruling on the admissibility of an issue until the petitioner has had an opportunity to review this information and submit a properly documented issue”). Petitioners are obligated to put forward and support contentions when seeking intervention, based on the application and information available. See, *e.g.*, *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 429 (2003) (“petitioners have an obligation to examine the application and publicly available information, and to set forth their claims at the earliest possible moment”). See generally 10 C.F.R. § 2.309(c) and (f)(2) (providing for admission of late-filed contentions if based on previously-unavailable information). The Commission may decide the admissibility of such contentions or defer ruling on them, considering the need for access to redacted information and other relevant factors. See *FitzPatrick*, CLI-00-22, 52 NRC at 296-319.

contentions and the Applicants have had the opportunity to challenge them as revised. We will rule promptly on the admissibility issues once they are ripe for decision.

The County and the Township should bear in mind the following admissibility standards:

To demonstrate that contentions are admissible under Subpart M, a petitioner must

- (1) set forth the [contentions] (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those [contentions] fall within the scope of the proceeding,
- (3) demonstrate that those [contentions] are relevant and material to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the [contentions], and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such [contentions], together with references to the sources and documents on which petitioner intends to rely.⁴⁷

As we observed in *FitzPatrick*, “[t]hese standards do not allow mere notice pleading; the Commission will not accept the filing of a vague, unparticularized [contention], unsupported by alleged fact or expert opinion and documentary support.”⁴⁸ In short, “[g]eneral assertions or conclusions will not suffice.”⁴⁹

The County and the Township must also show that their new or revised contentions could not have been submitted without the requested access to the redacted information in the license transfer Application. If they cannot make this showing, then they will have to meet not

⁴⁷ See *FitzPatrick*, CLI-00-22, 52 NRC at 295; *Nine Mile Point*, CLI-99-30, 50 NRC at 342 (and cited authority). See 10 C.F.R. § 2.309(f).

⁴⁸ *FitzPatrick*, CLI-00-22, 52 NRC at 295 (internal quotation marks omitted).

⁴⁹ *FitzPatrick*, CLI-00-22, 52 NRC at 295. “This is not to say, however, that our threshold admissibility requirements should be turned into a ‘fortress to deny intervention.’” *Id.*, citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), and quoting *Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), *rev’d in part*, CLI-74-32, 8 AEC 217 (1974), *rev’d in part*, *York Comm. for a Safe Env’t v. NRC*, 527 F.2d 812 (D.C. Cir. 1975).

only the contention requirements set forth above, but also the late-filing requirements set forth in 10 C.F.R. § 2.309(c).

We also recommend that the County and the Township consider the arguments that the Applicants have already submitted in opposition to the admissibility of their various contentions. To the extent the County and the Township find the Applicants' arguments persuasive regarding a particular contention, then they should refrain from resubmitting that contention. To the extent they disagree with the Applicants' arguments, then the County and the Township may address them when proffering revised contentions. These measures, if taken by the County and the Township, should narrow and focus the contentions, expedite the proceeding, and reduce their own, the Applicants' and this agency's adjudicatory costs.

C. Local Units' Request for Access to Unredacted Versions of Financial Information, Request for an Extension of Time, and Request for Discovery

The prospective new owner and the new operator of the facilities at issue in this proceeding are not "electric utilities" under our rules, and must therefore demonstrate financial qualifications to own and/or operate the plant.⁵⁰ As our rules require, the Entergy companies have submitted five-year cost and revenue projections and other business-related financial data and discussion,⁵¹ but much of this material was submitted as confidential financial information and has been redacted from the Application (*i.e.*, withheld from public disclosure).⁵²

The County and the Township assert that their lack of access to the redacted financial information precludes them from fully presenting their contentions. As explained above, we agree. We therefore direct the Applicants to provide the County and the Township access to the unredacted version of the license transfer Application within 5 business days, pursuant to a

⁵⁰ See 10 C.F.R. § 50.33(f).

⁵¹ See 10 C.F.R. §§ 50.33(k)(1), 50.75.

⁵² See 10 C.F.R. § 2.390(b).

confidentiality agreement identical or similar to the attached “Model Confidentiality and Non-Disclosure Agreement.”⁵³

If the Applicants, the County and the Township cannot agree on the terms of a confidentiality and non-disclosure agreement, then they shall inform the Presiding Officer (see section V.A of this order, *infra*) of this fact, and shall indicate specifically the areas where they disagree. At that time, the Applicants, the County and Township, or all three may move the Presiding Officer for issuance of a protective order.⁵⁴ The motion must explain with specificity the objections to any terms of the Model Confidentiality and Non-Disclosure Agreement. The motion must also provide a draft protective order that contains the terms on which the Applicants, the County and the Township agree and the terms that the movant believes will resolve any issues of accessibility still in dispute. Any answer to a motion for a protective order must be filed within five business days of the date of the motion. The Presiding Officer shall entertain no Reply Briefs.

Assuming confidentiality matters are resolved, and once the Applicants have released the sensitive information to the County and the Township, the latter two entities should file revised contentions within 20 days.⁵⁵ (To that extent, we are granting the County’s and Township’s request for extensions of time.) If such contentions are submitted, the Applicants

⁵³ Participants have entered into confidentiality and non-disclosure agreements in at least two prior license transfer proceedings. See *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 228, 230-31 (2001); *FitzPatrick*, CLI-00-22, 52 NRC at 292.

⁵⁴ See, e.g., *Oyster Creek*, CLI-00-6, 51 NRC at 211; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 268 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 225 (1999).

⁵⁵ See *Indian Point*, CLI-01-8, 53 NRC at 228, 231; *FitzPatrick*, CLI-00-22, 52 NRC at 300. Cf. 10 C.F.R. § 2.309(b)(1).

may file answers within 25 days thereafter, and the County and the Township may file replies thereto within 7 days.⁵⁶

The Applicants, the County and the Township should note that we are *not* allowing extra time for service of *any* of the documents referenced in this section (IV.C) of today's order. Thus, to be timely, those documents must be *received* by the Commission's Office of the Secretary no later than 4:45 p.m. (if filing is by hard copy) or 11:59 p.m. (if filing is electronic) on the final day of the filing period.

We deny the County and the Township' instant discovery motion. We have long precluded petitioners from using discovery as a device to uncover additional information supporting the admissibility of contentions.⁵⁷ Contentions should rest on defects or omissions *in the application*, not on underlying "discovery" material.

V. OTHER PROCEDURAL MATTERS

A. Designation of Presiding Officer

The Commission directs the Chief Administrative Judge to appoint a Presiding Officer for this proceeding within the next 5 days. The Presiding Officer's initial responsibilities shall be limited to resolving any disputes regarding the County's and Township's access to proprietary information in the Application. By subsequent order, the Commission may direct the Presiding Officer to conduct a hearing on any contentions we have admitted for litigation and to address procedural matters that arise between the issuance of our "admissibility" order and the close of

⁵⁶ Cf. 10 C.F.R. § 2.309(h)(1), (2).

⁵⁷ See, e.g., *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-10, 42 NRC 1, 3 (1995); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1263 (1982).

the hearing record.⁵⁸ Until the appointment of a Presiding Officer, the parties should address any written submissions directly to the Commission.

B. Notices of Appearance

To the extent that they have not already done so, each counsel for or representative of either the Applicants or the County and Township shall, within 5 days, file a notice of appearance complying with the requirements of 10 C.F.R. § 2.314. Any counsel or representative who has already entered an appearance but who has not provided one or more of the pieces of information required under that regulation shall do so within 5 days.

C. Participants in the Hearing and the Proceeding; Service List

The participants in the next (contention admissibility) stage of this proceeding will be the Applicants, the County and the Township. The recipients on the service list will be:⁵⁹

Richard D. Reed
Lewis, Reed & Allen, P.C.
136 East Michigan Ave., Suite 800
Kalamazoo, MI 49007
phone: (269) 388-7600
fax: (269) 349-3831
e-mail: rreed@lewisreedallan.com

Douglas E. Levanway
Wise, Carter, Child & Caraway
P.O. Box 651
Jackson, MS 39205
phone:
fax:
e-mail: DEL@wisecarter.com

Samuel Behrends, IV
LeBoeuf, Lamb, Greene & MacRae
1875 Connecticut Ave., NW
Suite 1200
Washington, DC 20009
Phone: (202) 986-8000
Fax: (202) 986-8102
e-mail: Sbehrend@llgm.com

Office of the General Counsel
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
phone: (301) 415-1354
fax: (301) 415-3725
e-mail: OGCLT@nrc.gov
& SLU@nrc.gov

⁵⁸ Our rules say that “ordinarily” the Commission itself will preside at license transfer hearings. See 10 C.F.R. 2.1319(a). But our rules also allow us to designate “one or more Commissioners” or “any other person permitted by law” to preside. *Id.* Although we are requiring the appointment of a *presiding* officer, we need not decide on a *hearing* officer until after we decide whether any contention is admissible.

⁵⁹ We observe that the Michigan Public Service Commission is listed on some service lists. We have no objection to such service, but we do not require it.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory
Commission
Washington, DC 20555-0001
fax: (301) 415-3200
e-mail: rmf@nrc.gov

Office of the Secretary
U.S. Nuclear Regulatory
Commission
Attn: Rulemakings and
Adjudications Branch
Room O-16-H15
Washington, DC 20555-0001
phone: (301) 415-1966/1675
fax: (301) 415-1101
e-mail: secy@nrc.gov

We direct the individuals or entities on this service list immediately to supplement or correct the above information to the extent that it is incomplete or inaccurate, and to notify all others on this service list immediately as to any changes.

D. Service Requirements

The preferred method of filing in this proceeding is electronic (*i.e.*, by e-mail). Electronic copies should be in a current WordPerfect format (preferably WordPerfect 10.0 or XP). Service will be considered timely if sent electronically not later than 11:59 p.m. of the due date, or *received* by the Commission's Office of the Secretary no later than 4:45 p.m. of the due date (if filing is by hard copy), under Subparts C and M of our rules of practice and procedure (10 C.F.R. Part 2). These procedures will apply for the duration of this adjudicatory proceeding.

We also require the Applicants, the County and the Township to submit a single signed hard copy of any such filings to the Office of the Secretary's Rulemakings and Adjudications Branch, *supra*. If either the Applicants or the County and Township wish to submit documents by courier or expedited delivery, those should be delivered to the Commission's street address -- 11555 Rockville Pike, Rockville, MD 20852.

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.

Commissioner Gregory B. Jaczko, Respectfully Dissenting:

I join with my colleagues in the majority of this decision, but respectfully dissent regarding the decision to deny standing to Covert Public Schools, Van Buren County Intermediate School District, Lake Michigan College, South Haven Hospital and Van Buren County District Library. I believe there is ample evidence in the record to demonstrate the standing of these entities and that excluding them from participation based upon a lack of standing is contrary to the spirit of the Atomic Energy Act. Moreover, a demonstration of standing would not have assured their participation in the hearing because it would not have relieved them of the obligation to present an admissible contention. With the additional contention hurdles required for admission into NRC proceedings, I do not support such a restrictive application of the standing analysis.

Model Confidentiality and Non-Disclosure Agreement

I. INTRODUCTION

On [DATE], the [NAME OF APPLICANT] submitted to the U.S. Nuclear Regulatory Commission (NRC) an application for [TYPE OF LICENSE TRANSFER APPLICATION]. The application included the submission of documents containing financial information deemed by the applicant to be sensitive and proprietary (sensitive financial information). On [DATE], the NRC published a notice of consideration of approval of the transfer in the Federal Register [CITATION TO FEDERAL REGISTER].

II. CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT

1. This Confidentiality and Non-Disclosure Agreement applies to and governs [NAME OF APPLICANT] (Applicant) and [NAME OF INTERVENER/PARTICIPANT], and their agents and representatives (including those described in Paragraph 3 below), with respect to these entities' provision, use, return and destruction of sensitive financial information contained in the application.

2. The Applicant agrees to provide to [NAME OF INTERVENER/PARTICIPANT] either one paper copy of [DESCRIBE OR LIST, AS APPROPRIATE, RELEVANT DOCUMENT(S)], or an electronic text file of each document. Each page of each document provided by the Applicant to [NAME OF INTERVENER/PARTICIPANT] will be prominently marked: "**Sensitive Financial Information Subject to Confidentiality and Non-Disclosure Agreement.**" The Applicant will provide paper copies of the document(s) and/or the storage medium containing the electronic file(s) (e.g., a CD-ROM or diskette) in a sealed envelope bearing prominent markings indicating the envelope contains "**Sensitive Financial Information Subject to Confidentiality and Non-Disclosure Agreement.**"

3. [NAME OF INTERVENER/PARTICIPANT] agrees to limit the possession and use of all sensitive financial information and the documents provided by the Applicant which contain this information to [NAMES OF ATTORNEYS REPRESENTING INTERVENER/PARTICIPANT], [NAMES OF INTERVENER/PARTICIPANT], [NAMES OF INTERVENER/PARTICIPANT ORGANIZATION/ENTITY WHO HAVE DIRECT AUTHORITY TO MAKE DECISIONS WITH RESPECT TO THE PARTICIPATION OF THE ORGANIZATION/ENTITY IN THE PROCEEDING], individuals employed or retained by [NAME OF INTERVENER/PARTICIPANT] to testify as expert witnesses in this proceeding, and to persons assisting the designated expert or witness in the preparation of such testimony (and then only on a “need-to-know” basis to the minimum extent necessary for the effective performance by that person of his or her duties in connection with the resolution of issues related to this NRC proceeding. [NAME OF INTERVENER/PARTICIPANT] agrees that before first disclosing or transmitting sensitive financial information to these individuals, each individual has executed a copy of this Confidentiality and Non-Disclosure Agreement. [NAME OF INTERVENER/PARTICIPANT] agrees that copies of the executed Confidentiality and

Non-Disclosure Agreement will be sent to the Applicant and filed with the Commission within five days of the date of execution.

4. [NAME OF INTERVENER/PARTICIPANT] agrees to use the sensitive financial information provided by the applicant only for the preparation of written submissions and testimony in this proceeding, and appeals to the Commission. If [NAME OF INTERVENER/PARTICIPANT] is required to disclose any part of the sensitive financial information in any legal or regulatory proceeding other than this NRC proceeding, then prior to such disclosure [NAME OF INTERVENER/PARTICIPANT] agrees to advise the Applicant in a timely fashion so that the Applicant can either consent to the disclosure or obtain a protective

order from the relevant tribunal. In any event, [NAME OF INTERVENER/PARTICIPANT] agrees to use all reasonable and available efforts to protect the confidential nature of the sensitive financial information provided to [NAME OF INTERVENER/PARTICIPANT] by the Applicant.

5. [NAME OF INTERVENER/PARTICIPANT] agrees to treat sensitive financial information provided to it by the Applicant as confidential, and take all reasonable and practical steps necessary to protect the confidentiality of the sensitive financial information and to prevent its dissemination beyond those expressly authorized and who have executed protective agreements. [NAME OF INTERVENER/PARTICIPANT] agrees to store the information and documents in a secure fashion. Any documents containing sensitive financial information, or a storage medium containing electronic file(s) containing Sensitive financial information (e.g., a CD-ROM or diskette) filed by [NAME OF INTERVENER/PARTICIPANT] with either the Commission or the presiding officer [AND THE NRC STAFF, IF A PARTY IN THE PROCEEDING] will be filed and served in a sealed envelope bearing prominent markings indicating the envelope contains “**Sensitive Financial Information Subject to Confidentiality and Non-Disclosure Agreement.**” Each page of each document filed by [NAME OF INTERVENER/PARTICIPANT] which contains sensitive financial information (including electronic files of documents containing such information) will be prominently marked: “**Sensitive Financial Information Subject to Confidentiality and Non-Disclosure Agreement.**” [NAME OF INTERVENER/PARTICIPANT] shall take appropriate steps to ensure that any electronic submission of files containing sensitive financial information are transmitted only to persons and entities authorized to receive the sensitive financial information. [NAME OF INTERVENER/PARTICIPANT] agrees to delete and overwrite any file containing sensitive

financial information before discarding or reusing any diskettes or other media on which such files are stored.

6. [NAME OF INTERVENER/PARTICIPANT], and its agents and representatives (including the persons described in Paragraph 3 above) agrees not to copy or reproduce the documents and electronic files containing sensitive financial information provided to it by the Applicant except as permitted by, and in accordance with the requirements set forth in, this Confidentiality and Non-Disclosure Agreement.

7. Within ten days after the date on which a NRC decision or order terminating this proceeding becomes no longer subject to judicial review, [NAME OF INTERVENER/PARTICIPANT] agrees to: (i) return to [NAME OF APPLICANT] all documents containing sensitive financial information which were provided by [NAME OF APPLICANT] to [NAME OF INTERVENER/PARTICIPANT] pursuant to this Confidentiality and Non-Disclosure Agreement, (ii) destroy any other documents in its possession containing such sensitive financial information, and (iii) delete and overwrite any file containing sensitive financial information on any diskettes or other media on which such files are stored.

Person seeking access to sensitive financial information _____ Date

Applicant representative _____ Date