

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

ENTERGY NUCLEAR OPERATIONS, INC.;)
ENTERGY NUCLEAR INDIAN POINT 2, LLC;)
and ENTERGY NUCLEAR INDIAN POINT 3, LLC)
(Indian Point Nuclear Generating Unit Nos. 1, 2, and 3))

Docket Nos. 50-003-LT,
50-247-LT, and 50-286-LT

March 31, 2008

**ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING
WESTCAN, ET AL. PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR
HEARING CONCERNING INDIRECT TRANSFER OF CONTROL OF LICENSES**

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Entergy Nuclear Operations, Inc. (“ENO”), acting on its own behalf and as agent for the other captioned applicants (collectively, “Applicants”), submits this Answer to the petition for leave to intervene and request for hearing jointly filed by Westchester Citizen’s Area Network (“WestCAN”), Rockland County Conservation Association (“RCCA”), Public Health and Sustainable Energy (“PHASE”), Sierra Club-North East Chapter, and New York State Assemblyman Richard Brodsky (collectively, “WestCAN” or “Petitioners”) on February 5, 2008.¹ The Petition relates to ENO’s pending request, submitted pursuant to 10 C.F.R. § 50.80, for an NRC order consenting to the proposed indirect transfer of control of the captioned operating licenses. As shown below, WestCAN has not satisfied the NRC’s requirements to intervene in this matter. WestCAN has neither established standing to intervene nor proffered an admissible contention. Therefore, under 10 C.F.R. § 2.309, the Petition must be denied in its entirety. No hearing is warranted on the issues raised by Petitioners.

II. BACKGROUND

A. The Indirect License Transfer Application

By letter dated July 30, 2007, ENO, acting on behalf of itself and (i) Entergy Nuclear Generation Company, (ii) Entergy Nuclear Fitzpatrick, LLC, (iii) Entergy Nuclear Vermont Yankee, LLC, (iv) Entergy Nuclear Indian Point 2, LLC, (v) Entergy Nuclear Indian Point 3, LLC, and (vi) Entergy Nuclear Palisades, LLC, requested that the Commission consent via order to the indirect transfer of control, pursuant to Section 184 of the Atomic Energy Act of 1954, as amended, and 10 C.F.R. § 50.80, of the operating licenses for six NRC licensed nuclear power

¹ See Petition of Westchester Citizen’s Awareness Network (WestCAN), Rockland County Conservation Association (RCCA), Promoting Health and Sustainable Energy (PHASE), Sierra Club – North East Chapter (Sierra Club), and Richard Brodsky (Feb. 5, 2008) (“Petition”).

facilities (Palisades, Fitzpatrick, Pilgrim, Vermont Yankee, Indian Point, and Big Rock).² The indirect transfer of control would result from certain planned restructuring transactions involving the creation of a new holding company, creation of new intermediary holding companies and/or changes in the intermediary holding companies for the ownership structure for the corporate entities (ENO and the other entities listed above) that hold the NRC issued operating licenses for the six facilities. To the extent the application contains information that is proprietary to ENO or other Entergy companies, ENO requested that such information be withheld from public disclosure pursuant to 10 C.F.R. § 2.390.

B. The Commission’s Hearing Notices and Resulting Petitions to Intervene

On January 16, 2008, the NRC published six separate notices in the *Federal Register* regarding ENO’s application for Commission approval of the indirect license transfer application (*i.e.*, one for each plant subject to the indirect transfer).³ In each of those notices, the Commission offered an opportunity to any person, whose interest may be affected by the Commission’s action on the proposed transfer, to request a hearing and file a petition for leave to intervene in the indirect transfer proceeding within 20 days from the date of publication of the

² See Application for Order Approving Indirect Transfer of Control of Licenses, ENOC-07-0026 (July 30, 2007) (“Application”). ENO has since submitted four supplements to the July 30, 2007 Application. See ENOC-07-00036 (Oct. 31, 2007), ENOC-07-00042 (Dec. 5, 2007), ENOC-08-00003 (Jan. 24, 2008), and ENOC-08-00012 (Mar. 17, 2008). The July 30, 2007, Application is available at NRC ADAMS Accession Number ML072220219. The four supplements are available at NRC ADAMS Accession Numbers ML073100216, ML073440039, ML080670222, and ML080810285, respectively.

³ See Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2948 (Jan. 16, 2008) (Palisades Nuclear Plant); Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2950 (Jan. 16, 2008) (James A. Fitzpatrick Nuclear Power Plant); Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2951 (Jan. 16, 2008) (Pilgrim Nuclear Power Station); Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2953 (Jan. 16, 2008) (Vermont Yankee Nuclear Power Station); Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2954 (Jan. 16, 2008) (Indian Point Nuclear Generating Unit Nos. 1, 2, and 3) (“Indian Point Notice”); and Notice of Consideration of Approval of Application Regarding Proposed Corporate Restructuring and Opportunity for a Hearing, 73 Fed. Reg. 2956 (Jan. 16, 2008) (Big Rock Point).

notices.⁴ The Commission stated that any such petitions should be filed in accordance with the pleading requirements set forth in Subpart C of the NRC's Rules of Practice.

On February 5, 2008, two timely petitions to intervene were filed and served through the NRC's Electronic Information Exchange ("EIE") system. One petition, to which ENO responds herein, was submitted by WestCAN and the other joint petitioners identified above. A second petition was submitted by Locals 369 and 590, Utility Workers Union of America, AFL-CIO ("UWUA Locals").⁵ ENO will file a separate response to the UWUA Locals' petition no later than April 8, 2008, in accordance with the Commission's Order of February 28, 2008.⁶

WestCAN apparently seeks to intervene and request a hearing with respect to the proposed indirect transfer of control of the Indian Point operating licenses. The caption of the WestCAN Petition lists only Indian Point Nuclear Generating Units 1, 2, and 3. Furthermore, in discussing the standing of the various joint petitioners, the Petition refers only to the Indian Point facility. The second paragraph of the Petition, however, could be read to suggest that WestCAN does not wish to limit its participation solely to the Indian Point proceeding.⁷ As shown below,

⁴ See, e.g., Indian Point Notice, 73 Fed. Reg. at 2955.

⁵ See Petition of Locals 369 and 590, Utility Workers Union of America, AFL-CIO for Leave to Intervene; Request for Initiation of Hearing Procedures, Preliminary Statement of Contentions, Request for Issuance of Protective Order(s) and Related Production of Data (Feb. 5, 2008) ("February 5 UWUA Locals Petition").

⁶ See Commission Order (unpublished) (Feb. 28, 2008).

⁷ Far from the paragon of clarity, the second paragraph of the Petition confusingly states:

"In addition, Stakeholders motion for intervention and participation in what may be multiple hearings of corporate restructuring as was formally noticed in four other federal register announcements that in effect consolidate or modify the proposed new corporate structure as it affects not only the aforementioned licensees, and the Indian Point Nuclear Power Plants, but as it affects the James A. Fitzpatrick Plant, the Vermont Yankee Nuclear Plant, and the Palisades Plant in the same restructure and license transfer. For the reasons set forth below, Stakeholders have standing and raise at least one admissible contention."

whether the Petition is construed to encompass all six proceedings or only the Indian Point matter, WestCAN has neither established standing to intervene nor proffered an admissible contention. Therefore, under either scenario, the Petition must be denied.

C. Procedural History Associated with Petitioners' Request for Access to Confidential Proprietary Information and Related Commission Orders

In their respective petitions, both WestCAN and UWUA Locals sought the opportunity to review the confidential proprietary information submitted by ENO as part of the Application, and to proffer new or amended contentions based upon their review of that information.

Accordingly, upon reviewing the petitions, on February 12, 2008, counsel for ENO telephoned counsel of record for WestCAN and UWUA Locals to discuss a confidentiality and non-disclosure agreement, pursuant to which ENO would produce the relevant confidential commercial information to each petitioner. During the following two weeks, and through a good faith exchange of drafts, counsel for ENO and UWUA Locals successfully negotiated a confidentiality and non-disclosure agreement, which was fully executed on February 26, 2008. Notwithstanding diligent efforts by ENO counsel, WestCAN, however, flatly refused to enter into such an agreement with ENO.⁸

Consequently, on February 26, 2008, ENO filed two motions with the Commission. One motion (unopposed by UWUA Locals) sought Commission approval of a Revised Filing Schedule that would accommodate any supplemental contentions that UWUA Locals might file

Petition at 1-2. As noted above, the proposed corporate restructuring affects six Entergy facilities, for which the Commission issued a total of six *Federal Register* notices (not five, as WestCAN suggests in the above-quoted statement).

⁸ ENO's efforts to negotiate a confidentiality and non-disclosure agreement with WestCAN are detailed in ENO's Motion of [ENO] for Expedited Approval of Protective Order and Request for Extension of Time to File Answer to WestCAN Et Al. Petition to Intervene (Feb. 26, 2008), discussed *infra*.

based upon their review of the confidential proprietary information.⁹ As noted above, UWUA Locals obtained access to such information pursuant to the above-referenced confidentiality and nondisclosure agreement. The second motion sought a Protective Order to govern any possession and use by WestCAN of the confidential proprietary information contained in ENO's indirect license transfer application relating to NewCo and Indian Point Nuclear Generating Units 1, 2, and 3, in the event WestCAN were to seek access to such information to formulate new or amended contentions.¹⁰

On February 28, 2008, the Commission issued an Order granting ENO's consent motion for a Revised Filing Schedule relative to the UWUA Locals' petition and any supplement thereto.¹¹ In the same Order, the Commission also opted to "postpone Entergy's deadline to answer WestCAN's petition to intervene, pending further order of the Commission." Significantly, WestCAN never submitted an answer to ENO's motion, as permitted by 10 C.F.R. § 2.323(c). On March 19, 2008, the Commission issued another Order, directing ENO to file its answer to the WestCAN Petition within 10 days of the date of the Order.¹² The Commission did not issue a Protective Order or otherwise address the issue of WestCAN's potential access to ENO confidential proprietary information. Accordingly, pursuant to the Commission's March 19 Order, ENO submits this answer to the February 5, 2008 WestCAN

⁹ See Consent Motion of [ENO] for Commission Approval of Revised Filing Schedule and Applicant's Conforming Request for an Extension of Time to File Answer to UWUA Locals Petition to Intervene (Feb. 26, 2008).

¹⁰ See February 26, 2008 Motion for a Protective Order.

¹¹ In accordance with the Revised Filing Schedule approved by the Commission, on March 18, 2008, UWUA Locals filed a supplement to their February 5, 2008 petition based upon the confidential proprietary information furnished by ENO under the February 26, 2008 confidentiality and non-disclosure Agreement. See Statement of New Or Amended Contentions of Locals 369 and 590, Utility Workers Union of America, AFL-CIO Supplementing Petitions For Leave to Intervene and Related Requests for Relief (Mar. 19, 2008). Under the Revised Filing Schedule, ENO's answer to the February 5 UWUA Locals Petition, as supplemented on March 18, 2008, is due to be filed no later than April 8, 2008.

¹² Commission Order (unpublished) (Mar. 19, 2008).

Petition.¹³

III. PETITIONERS HAVE FAILED TO DEMONSTRATE STANDING UNDER 10 C.F.R. § 2.309(d)(1)

A. Applicable NRC Legal Standards and Precedent

Each of the Commission’s Hearing Notices states that a petitioner “must comply with the requirements set forth in 10 C.F.R. 2.309.” Among other things, a petitioner must demonstrate that it has standing in accordance with 10 C.F.R. § 2.309(d) by addressing: (1) the nature of its right under the Atomic Energy Act (“AEA”) of 1954, as amended, to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest.¹⁴ Thus, a petitioner must demonstrate either that it satisfies the traditional elements of standing, or that it has presumptive standing based on geographic proximity to the proposed facility.¹⁵ These concepts, as well as organizational standing, representational standing, and discretionary intervention, are discussed below.

1. Traditional Standing

To determine whether a petitioner’s interest provides a sufficient basis for intervention, “the Commission has long looked for guidance to current judicial concepts of standing.”¹⁶ To

¹³ Because March 29, 2008 (*i.e.*, 10 days after the Commission’s March 19, 2008 Order) fell on a Saturday, ENO filed its answer to WestCAN’s Petition on Monday, March 31, 2008, in accordance with 10 C.F.R. § 2.306 (“Computation of time”). Section 2.306 states, in pertinent part: “The last day of [any prescribed period of time] is included unless it is a Saturday, Sunday, or Federal legal holiday at the place where the action or event is to occur, . . . in which event the period runs until the end of the next day that is not a Saturday, Sunday, Federal legal holiday, or emergency closure.”

¹⁴ 10 C.F.R. § 2.309(d)(1).

¹⁵ See *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 579-83 (2005).

¹⁶ *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, N.M.), CLI-98-11, 48 NRC 1, 5-6 (1998), *aff’d sub nom. Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999)(citations omitted).

demonstrate standing, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision.¹⁷ These criteria are commonly referred to as injury-in-fact, causality, and redressability, respectively.

a. Injury In Fact

A petitioner must first show that NRC approval of the Application will cause it to suffer a distinct and palpable injury.¹⁸

[T]he asserted injury must be “distinct and palpable,” and “particular [and] concrete,” as opposed to being “conjectural... [,] hypothetical,” or “abstract”... [W]hen future harm is asserted, it must be “threatened,” “certainly impending,” and “real and immediate.”¹⁹

b. Zone of Interests

A petitioner also must demonstrate that its injury falls within the zone of interests of the statutes governing the proceeding²⁰—either the AEA or the National Environmental Policy Act of 1969, as amended (“NEPA”).²¹ The injury in fact, therefore, must generally involve potential radiological or environmental harm.²² To make this assessment, the Commission has observed that “it is necessary to ‘first discern the interests’ arguably . . . to be protected by ‘the statutory

¹⁷ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1998)).

¹⁸ *Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

¹⁹ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-92-4, 35 NRC 114, 121 (1992) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)), *rev'd and remand. on other grounds*, CLI-93-21, 38 NRC 87 (1993).

²⁰ *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001).

²¹ *Quivira Mining*, CLI-98-11, 48 NRC at 5.

²² See *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002).

provision at issue,’ and ‘then inquire whether the plaintiff’s interests affected by the agency action are among them.’”²³

c. Causation

A petitioner also must establish that the injury alleged is fairly traceable to the proposed activity—in this case, the NRC’s approval of an indirect license transfer application.²⁴ Although a petitioner is not required to demonstrate that the injury flows directly from the challenged action, it must nonetheless show that the “chain of causation is plausible.”²⁵ The relevant inquiry is whether a cognizable interest of the petitioner might be adversely affected by one of the possible outcomes of the proceeding.²⁶

d. Redressability

Finally, the Commission has observed that a petitioner is required to show that “its actual or threatened injuries can be cured by some action of the tribunal.”²⁷ Furthermore, “it must be ‘likely,’ as opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.’”²⁸ If the NRC cannot take action that would redress the injury being claimed by a petitioner, the petitioner lacks an essential element of the requisite standing to request a hearing.²⁹

²³ USEC, CLI-01-23, 54 NRC at 272-73 (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank*, 522 U.S. 479, 492 (1998)).

²⁴ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71, 75 (1994).

²⁵ *Id.*

²⁶ *Nuclear Eng’g Co. Inc.* (Sheffield, Ill. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

²⁷ *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

²⁸ *SFC*, CLI-94-12, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

²⁹ *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 332 (1994).

2. Standing Based on Geographic Proximity

Under NRC case law, a petitioner may, in some instances, be presumed to have fulfilled the judicial standards for standing based on his or her geographic proximity to a facility or source of radioactivity.³⁰ “Proximity” standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility.³¹ The NRC has held that the proximity presumption may be sufficient to confer standing on an individual or group in proceedings conducted pursuant to 10 C.F.R. Part 50 for reactor construction permits, operating licenses, or significant license amendments.³²

Although the NRC has applied a presumption of standing in initial reactor operating license proceedings for individuals who live within 50 miles of a plant, it has held that a more stringent standard applies to proceedings involving approvals lacking a “clear potential for offsite consequences.”³³ Such proceedings include license transfer cases, where the Commission “determine[s] 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.’”³⁴

³⁰ *Peach Bottom*, CLI-05-26, 62 NRC at 580.

³¹ *Id.* (citations omitted).

³² *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (citations omitted).

³³ *Id.* at 329-30; *see also Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff’d on other grounds*, ALAB-816, 22 NRC 461 (1985) (residence 43 miles from the plant is inadequate for standing with respect to a spent fuel pool expansion).

³⁴ *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Peach Bottom*, CLI-05-26, 62 NRC at 580-81).

NRC tribunals 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, engages in normal everyday activities in the vicinity, has regular and frequent contacts in an area near a license facility, or otherwise has visits of a length and nature showing an ongoing connection and presence.”³⁵ Conversely, the NRC has denied proximity-based standing where contact has been limited to “mere occasional trips to areas located close to reactors.”³⁶ Furthermore, to establish proximity standing, a petitioner must provide “*fact-specific standing allegations*, not conclusory assertions,” as the Commission “cannot find the requisite ‘interest’ based on . . . general assertions of proximity.”³⁷

3. Standing of Organizations

a. *Standing of an Organization in its Own Right*

An organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representative capacity (by demonstrating harm to the interests of its members).³⁸ To intervene in a proceeding in its own right, an organization must allege, just as an individual petitioner must allege, that it will suffer an immediate or threatened injury to its organizational interests that can be fairly traced to the proposed action and be redressed by a favorable decision.³⁹ The Commission considers an

³⁵ *Consumers Energy Co.* (Big Rock Point), CLI-07-21, 65 NRC 519, 523-524 (2007) (internal quotation marks and citations omitted) (emphasis in original).

³⁶ *Id.* (citation omitted).

³⁷ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 410 (2007) (emphasis supplied).

³⁸ *Yankee*, CLI-98-21, 48 NRC at 195 (citing *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

³⁹ *See Georgia Tech*, CLI-95-12, 42 NRC at 115.

organization, like an individual, as a “person” (as that term is defined in 10 C.F.R. § 2.4, and as the Commission has used it in making standing determinations under 10 C.F.R. § 2.309).⁴⁰

Accordingly, a petitioner must show a “risk of ‘discrete institutional injury *to itself*, other than the general environmental and policy interests of the sort the [NRC tribunals] repeatedly have found insufficient for organizational standing.’”⁴¹

b. Representational Standing

Where an organization is to be represented in an NRC proceeding by one of its members, the member must demonstrate authorization by that organization to represent it.⁴² A partnership, corporation or unincorporated association may be represented by a duly authorized member or officer, or by an attorney-at-law.⁴³ Any person appearing in a representative capacity must file with the Commission a written notice of appearance.⁴⁴ The notice of appearance must state the representative’s name, address, telephone number, facsimile number, and e-mail address, if any; the name and address of the person or entity on whose behalf the representative appears, and the basis of his or her authority to act on behalf of the party.⁴⁵

To invoke representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right (*i.e.*, by demonstrating geographic proximity in cases where the presumption applies, or by demonstrating injury-in-fact within the zone of protected interests, causation, and redressability), (2) identify that member by name and address,

⁴⁰ *Palisades*, CLI-07-18, 65 NRC at 411.

⁴¹ *Id.* at 411-12 (quoting *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)) (emphasis in original).

⁴² *See, e.g., Georgia Tech*, CLI-95-12, 42 NRC at 115 (1995)(citation omitted).

⁴³ *See* 10 C.F.R. § 2.314(b).

⁴⁴ *Id.*

⁴⁵ *Id.*

and (3) show—preferably by affidavit—that the organization is authorized by that member to request a hearing on behalf of the member.⁴⁶ Where the affidavit of the member is devoid of any statement that he or she wants and has authorized the organization to represent his interests, the presiding officer should not infer such authorization.⁴⁷

4. Discretionary Intervention

Pursuant to 10 C.F.R. § 2.309(e), a presiding officer may consider a request for discretionary intervention where a party lacks standing to intervene as a matter of right under 10 CF. § 2.309(d)(1). Discretionary intervention may only be granted, however, when at least one petitioner has established standing and at least one contention has been admitted in the proceeding.⁴⁸ The regulation specifies that in addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), a petitioner who seeks intervention as a matter of discretion (if it is determined that standing as a matter of right is not demonstrated), must specifically address in its initial petition the six factors set forth in 10 C.F.R. § 2.309(e), which the presiding officer will consider and balance.⁴⁹ Of the six factors, primary consideration is given to the first factor—

⁴⁶ See, e.g., *N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Independent Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

⁴⁷ *Duquesne Light Co.* (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

⁴⁸ 10 C.F.R. § 2.309(e). See also *PPL Susquehanna LLC*, (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 21 n.14 (2007) (“[D]iscretionary standing [is] only appropriate when one petitioner has been shown to have standing as of right and an admissible contention so that a hearing will be conducted.”).

⁴⁹ Factors weighing in *favor* of allowing intervention include (i) the extent to which its participation would assist in developing a sound record; (ii) the nature of petitioner’s property, financial or other interests in the proceeding; and (iii) the possible effect of any decision or order that may be issued in the proceeding. See 10 C.F.R. § 2.309(e)(1)(i)-(iii). Conversely, factors weighing *against* allowing intervention include (i) the availability of other means whereby the petitioner’s interest might be protected; (ii) the extent to which petitioner’s interest will be represented by existing parties; and (iii) the extent to which petitioner’s participation will inappropriately broaden the issues or delay the proceeding. See 10 C.F.R. § 2.309(e)(2)(i)-(iii).

assistance in developing a sound record.⁵⁰ The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.⁵¹

B. Petitioners Have Failed to Demonstrate Standing to Intervene in Any of the Indirect License Transfer Proceedings

1. The Palisades, Fitzpatrick, Pilgrim, Vermont Yankee, and Big Rock Proceedings

None of the organizations or persons (*i.e.*, Mr. Brodsky) seeking to intervene in this proceeding has articulated a sufficient basis for standing to intervene under 10 C.F.R. § 2.309(d)(1), nor identified any specific interest with respect to the Palisades, Fitzpatrick, Pilgrim, Vermont Yankee, or Big Rock indirect license transfers. In fact, the Petition does not expressly allege *any* connection between the various petitioners and any facility other than Indian Point. As such, there is not even a *putative* basis for the Commission to grant standing to any of the petitioners with respect to the license transfers for plants other than Indian Point. Even assuming, *arguendo*, that Petitioners have standing to intervene in the Indian Point license transfer proceeding—which, as shown below, they do not—the Petition must, on its face, be denied to the extent Petitioners arguably seek to intervene in the other five proceedings. Petitioners simply have made no attempt to make the requisite showing of standing.

2. The Indian Point Proceeding

Although Petitioners attempt to establish standing with respect to Indian Point, they fall far short of meeting the requirements of 10 C.F.R. § 2.309(d). As discussed below, none of the organizational petitioners has demonstrated standing in its own right, representational standing, or standing based on proximity to the Indian Point facility. Mr. Brodsky has similarly failed to

⁵⁰ See *Portland Gen. Elec. Co.* (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976); see also *Pub. Utils. Nuclear Corp.* (Oyster Creek Nuclear Generating Station), LBP-96-23, 44 NRC 143, 160 (1996).

⁵¹ See *Nuclear Eng'g*, ALAB-473, 7 NRC at 745 (requiring potential discretionary intervenor to show “that it is both willing and able to make a valuable contribution to the full airing of the issues . . . in this proceeding”).

establish standing in his own right or standing based on proximity to the plant. Indeed, while the Petition lists Mr. Brodsky as one of the joint petitioners, it proffers no basis whatsoever for his standing to intervene in any of the indirect license transfer proceedings, including the Indian Point matter. Finally, Petitioners proffer no basis for their request that the Commission permit them to intervene as a matter of discretion.

- a. *WestCAN, RCCA, PHASE and Sierra Club lack organizational standing given their failure to allege any discrete institutional injury and to show any obvious potential for offsite consequences that might provide the basis for proximity-based standing to intervene*

With respect to the four organizations seeking to intervene—WestCAN, RCCA, PHASE, and Sierra Club—the Petition first describes, in the most cursory of terms, the charter or mission of each organization⁵² The Petition then provides some limited information about the membership of each organization and lists the physical address of each organization’s principal office. At no point, however, does the Petition actually allege a “discrete institutional injury” to any of the four organizations—a *sine qua non* for any showing of organizational standing. Petitioners’ failure to allege a “distinct and palpable injury” renders the issues of causality and redressability moot. In short, none of the joint petitioners has alleged a concrete and particularized injury, involving radiological or environmental harm, that flows directly from the challenged action (approval of the indirect transfer of control) and which could be cured by some action of the Commission. As the Commission has noted, “promotion of ‘the public interest,

⁵² WestCAN states that it is a “grassroots coalition that has advocated for a nuclear free northeast and has consistently followed the events at Indian Point in order to keep the public informed through its listserve.” Petition at 3. RCCA states that it “is dedicated to the conservation of our natural resources, and promotes sound land use, advocate’s (sic) clean air and water quality, develops proper drainage, and supports energy conservation and preservation of natural beauty.” *Id.* at 4. PHASE states that it “is a grassroots think tank that advocates for the development and use of sustainable energy, in an effort to protect public health and safety, and the protection of the environment.” *Id.* Sierra Club states that it “promotes conservation of the natural environment through public education, lobbying and grassroots advocacy.” *Id.* at 5.

environmental protection, and consumer protection’ are broad interests shared with many others and too general to constitute a protected interest under [the AEA and NEPA].”⁵³

Indeed, Petitioners’ claims of standing to intervene rest solely and precariously upon the “proximity” presumption discussed above. Petitioners aver that proximity to a facility “has *always* been deemed to be enough to establish the requisite interest to confer standing,” and that the Commission’s “rule of thumb” in reactor licensing proceedings is that persons who reside or frequent the area within a 50-mile radius of the facility are presumed to have standing.⁵⁴

Petitioners, however, are patently incorrect. As noted above, in license transfer proceedings, the Commission assesses claims of proximity standing on a “case-by-case” basis, considering any “obvious potential for off-site [radiological] consequences.”⁵⁵ Thus, contrary to Petitioners’ assertion, such claims are *not* “always” found sufficient to confer standing.

Several recent Commission rulings make clear that Petitioners are not only incorrect, but that they have failed to meet *their* burden. In *Peach Bottom*, for example, the Commission held:

In ruling on claims of proximity standing, we decide the appropriate radius on a case-by-case basis. We determine the radius beyond which we believe there is no longer an obvious potential for offsite consequences by taking into account the nature of the proposed action and significance of the radioactive source.

The initial question we need to address is whether the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action could plausibly lead to the offsite release of radioactive fission products from . . . the . . . reactors. *The burden falls on the petitioner to demonstrate this.* If the petitioner fails to show that a particular licensing action raises an obvious potential for offsite consequences, then our standing inquiry reverts to a traditional

⁵³ *Palisades*, CLI-07-18, 65 NRC at 411.

⁵⁴ Petition at 6 (emphasis supplied).

⁵⁵ *See, e.g., Big Rock Point*, CLI-07-19, 65 NRC at 426.

standing analysis of whether the petitioner has made a specific showing of injury, causation, and redressability.⁵⁶

In *Peach Bottom*, the Commission rejected the petitioner's claim of proximity standing, finding that the underlying factual circumstances resembled those of the 2000 Millstone license transfer proceeding.⁵⁷ At issue there, like here, was "an indirect license transfer involving no change in the facility, its operation, licensees, personnel, or financing."⁵⁸ In *Millstone*, the Commission denied "proximity standing" to organizations that claimed to have members living within 5-10 miles of the plant.⁵⁹ The Commission concluded that it was "far from obvious how [the] corporate restructuring would affect Petitioners' interests," particularly given that the company operating the plant would continue to do so after completion of the restructuring.

In rejecting the *Peach Bottom* petitioner's claim of proximity standing, the Commission applied the same logic that it applied in *Millstone*: "And we likewise conclude here that [the petitioner] has failed to show how the pending license transfers present an obvious potential for offsite consequences."⁶⁰ The Commission emphasized that, as in *Millstone*, the proposed license transfer "will result in no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel."⁶¹ Accordingly, the Commission found that

⁵⁶ *Peach Bottom*, CLI-05-26, 62 NRC at 581 (internal quotation marks and citations omitted; emphasis supplied).

⁵⁷ *Id.* at 581-82.

⁵⁸ *Id.* at 581; see *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129 (2000).

⁵⁹ *Peach Bottom*, CLI-05-26, 62 NRC at 581, see *Millstone*, CLI-00-18, 52 NRC at 132.

⁶⁰ *Peach Bottom*, CLI-05-26, 62 NRC at 581.

⁶¹ *Id.* at 581-82.

the risks associated with the transfer were “*de minimis* and therefore justif[ied] no ‘proximity standing’ *at all*.”⁶²

And so it is here. Petitioners have not discharged their burden to show *how* the pending license transfers present an obvious potential for offsite consequences. As both the Application and the Commission’s Hearing Notice indicate, there will be no significant “genealogical change” for ENO and its limited liability companies that are the owner-licensees.⁶³ ENO will continue to operate the facilities, and Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC will continue to own the facilities. Importantly, the proposed indirect transfer of the licenses involves no physical or operational changes to Indian Point Units 1, 2, or 3. As in *Millstone* and *Peach Bottom*, therefore, the proposed corporate restructuring will involve no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel. Thus, the risks associated with the indirect transfer of the Indian Point operating licenses likewise are “*de minimis*” and provide no basis “at all” for proximity standing.

In view of the above, none of the joint petitioners has established proximity standing. Given the clear lack of any obvious potential for offsite consequences, and Petitioners’ failure to demonstrate otherwise, the various distances or radii from the Indian Point plant cited by the Petitioners are meaningless. Moreover, with one exception, those distances are beyond the longest specific distance for which the Commission typically has granted proximity standing in license transfer cases. As the Commission recently observed:

[T]he longest specific distance for which we have granted proximity-based standing in a post-*Vogtle* license transfer case is

⁶² *Id.* at 581 (emphasis supplied).

⁶³ *See AmerGen Energy Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 575 (2005).

6-6½ miles. By contrast, we have denied proximity-based standing in license transfer proceedings to petitioners within 5-10 miles, 12 miles, and 40 miles from licensed facilities. All these proceedings involved active, operating reactors.⁶⁴

Here, WestCAN, RCCA, and PHASE state that their central offices are located within 3 miles, 9 miles, and 11 miles of the Indian Point plant, respectively.⁶⁵ The Sierra Club states only that it has a central office in Albany, New York and a regional office in New York City.⁶⁶ Clearly, the 9 and 11-mile radii “fall comfortably within the distance parameters of other rulings” in license transfer proceedings in which the NRC has declined to grant proximity standing.⁶⁷ The 3-mile radius cited by WestCAN is not by itself sufficient to establish proximity standing in the absence—as here—of any obvious potential for offsite consequences. Although the Commission has previously granted proximity standing where the petitioners lived within 6-6½ miles,⁶⁸ 5½ miles,⁶⁹ and 1-2 miles⁷⁰ from the facility at issue, the underlying factual circumstances were different—and dispositively so—from those present here. As the Commission explained in *Peach Bottom*, “each of those cases involved the transfer of both a 100% ownership interest in the plant and the *operating authority* for the plant—a kind of

⁶⁴ *Big Rock Point*, CLI-07-21, 65 NRC at 523 (citing *Millstone*, CLI-00-18, 52 NRC at 132-33 (radius of 5-10 miles); *Three Mile Island*, CLI-05-25, 62 NRC at 576 (radius of 12 miles); and *Peach Bottom*, CLI-05-26, 62 NRC at 582 (radius of 40 miles) (internal footnotes omitted from quote). In *Big Rock Point*, the Commission denied the petitioner’s request for proximity standing based on a residence within 42 miles of the facility and occasional trips within 15 miles of the facility.

⁶⁵ Petition at 3-4.

⁶⁶ *Id.* at 5.

⁶⁷ *Three Mile Island*, CLI-05-25, 62 NRC at 576; *see also Peach Bottom*, CLI-05-26, 62 NRC at 582.

⁶⁸ *Vt. Yankee*, CLI-00-20, 52 NRC at 163.

⁶⁹ *Power Auth. of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

⁷⁰ *Oyster Creek*, CLI-00-6, 51 NRC at 194.

transfer implicating more significant safety issues than are present here.”⁷¹ Hence, WestCAN similarly lacks any basis for its claim of proximity standing.

b. WestCAN, RCCA, PHASE and Sierra Club lack representational standing because they have failed to address any of the relevant criteria or factors

In the Petition, each of the organizational joint petitioners claims to have “standing on its own behalf and on behalf of its members.”⁷² As demonstrated above, none of the Petitioners has shown organizational standing. The Petitioners also have failed to establish representational standing. Petitioners do not identify any individual members of their organizations by name and address, or demonstrate, by affidavit or other means, that the organization is authorized by that member to request a hearing on behalf of the member.⁷³ Prescinding from the obvious, Petitioners have failed to show that at least one of their respective members has standing in his or her own right. As the Commission stated in *Palisades*, “[t]he failure both to identify the member(s) [petitioners] purport to represent and to provide proof of authorization therefore precludes [petitioners] from qualifying as intervenors.”⁷⁴ Moreover, to demonstrate their members’ interests based on proximity, Petitioners must provide fact-specific allegations, not vague assertions that their members live, work, or engage in recreation within the vicinity of the plant.⁷⁵ Petitioners have failed to do so here and thus have proffered no basis to establish representational standing.

⁷¹ *Peach Bottom*, CLI-05-26, 62 NRC at 583 (emphasis in original).

⁷² Petition at 3-4.

⁷³ Although the Petition makes reference to “attached declarations” (Petition at 6), no declaration was attached to the Petition filed and served by Petitioners through the Commission’s EIE system. Furthermore, it appears that Mr. Brodsky, a New York State Assemblyman, seeks to intervene in his own right. In any case, the Petition provides no indication that he is a member of any of the organizational petitioners. Indeed, the Petition contains no discussion whatsoever of the basis for his standing.

⁷⁴ *Palisades*, CLI-07-18, 65 NRC at 410.

⁷⁵ *See id.*

- c. *Petitioners are not entitled to discretionary intervention because they have failed to show that a balancing of the factors in 10 C.F.R. § 2.309(e) supports intervention on that basis*

The petitioner has the burden to establish that a balancing of the factors set forth in 10 C.F.R. § 2.309(e) weigh in favor of the petitioner's participation as a matter of Commission discretion. Petitioners here have made no *bona fide* attempt to address the six factors, including their ability to contribute to the development of a sound record. They state only that they "are interested parties since their property, financial, and other interests will be affected by this proceeding."⁷⁶ Such a vague and conclusory assertion cannot form the basis for a grant of discretionary intervention, a form of relief that the NRC has granted only on rare occasions.

- d. *Individual Petitioner Richard Brodsky has failed to provide any basis to establish standing to intervene in the license transfer proceedings*

The burden to show standing to intervene in an NRC license transfer proceeding rests unequivocally with the petitioner. Mr. Brodsky, one of the named petitioners, provides no putative basis for his standing to intervene. The Petition is silent with respect to the nature of his interest in any of the indirect license transfer proceedings, including the Indian Point matter. The Commission cannot infer such an interest on his behalf. Accordingly, Mr. Brodsky, like the joint organizational petitioners, has not shown standing to intervene.

IV. PETITIONERS HAVE FAILED TO PROFFER AN ADMISSIBLE CONTENTION UNDER 10 C.F.R. § 2.309(f)(1)

A. Applicable Legal Standards

Section 2.309(f)(1) requires a petitioner to "set forth with particularity the contentions sought to be raised," and with respect to each contention proffered, satisfy six specific criteria. To be admissible, a proposed contention must: (1) provide a specific statement of the legal or

⁷⁶ Petition at 6.

factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and (6) provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.⁷⁷

Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a contention.⁷⁸ The Commission's contention admissibility rule is "strict by design,"⁷⁹ because its purpose is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."⁸⁰ The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."⁸¹ In indirect license transfer proceedings such as this one, the only question "is whether the proposed shift in ultimate corporate control will 'affect' a licensee's existing financial and technical qualifications."⁸²

⁷⁷ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁷⁸ See Final Rule, "Changes to Adjudicatory Process; Final Rule," 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁷⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *recons. denied*, CLI-02-1, 55 NRC 1 (2002).

⁸⁰ 69 Fed. Reg. at 2202.

⁸¹ *Id.*

⁸² *Millstone*, CLI-00-18, 52 NRC at 133.

B. The Petition Does Not Address or Meet the Requirements of 10 C.F.R. § 2.309 for Admissible Contentions

The WestCAN Petition does not specifically address the contention standards set forth in 10 C.F.R. § 2.309(f)(1), as required. In fact, the Petition fails even to designate specific contentions. Instead, it presents a series of proposed issues that are either immaterial to license transfer or too vague and insufficiently supported to define a genuine dispute with the Applicant. As far as ENO can discern, those issues relate to the following: (1) ENO’s compliance with 10 C.F.R. Part 54 (*i.e.*, license renewal) regulations, (2) the permissibility and effectiveness of the proposed corporate restructuring, (3) the potential for foreign ownership of Indian Point, (4) ENO’s corporate “responsibility” or integrity, (5) ENO’s financial qualifications, (6) the adequacy of decommissioning funding for Indian Point, (7) the alleged need for an antitrust review, and (8) the adequacy of the NRC Staff’s license transfer review process. As demonstrated below, none of Petitioners’ proposed issues constitutes an admissible contention.

1. Compliance with 10 C.F.R. Part 54 Requirements

Petitioners claim that ENO’s Application should be denied, in part, because the proposed indirect transfer of control “violates 10 C.F.R. 54.35 and 54.37.”⁸³ Petitioners later make a vague reference to “decommissioning funds specifically relevant to Unit 2 and Unit 3 license renewal.”⁸⁴ These statements constitute the full extent of Petitioners’ claim.

Petitioners’ nebulous and unexplained references to Part 54 regulations or license renewal in general cannot provide the basis for an admissible contention. Indeed, Petitioners fail to meet any of the Section 2.309 admissibility criteria. Petitioners’ statements are devoid of specificity, basis, factual or legal support, and any explicit reference to the Application.

⁸³ Petition at 7.

⁸⁴ *Id.* at 11.

Moreover, ENO's compliance with Part 54 license renewal requirements is neither within the scope of, nor material to, this indirect license transfer proceeding.⁸⁵ For these reasons, Petitioners have failed to proffer an admissible contention.

2. Purpose and Effectiveness of the Proposed Corporate Restructuring

Petitioners oppose the proposed restructuring on the ground that it is too “complicated” as well as “unnecessary.”⁸⁶ They assert that “Entergy fails to explain how the proposed corporate restructuring would enhance the ability of analysts, regulators, capital markets and shareholders.”⁸⁷ Petitioners also question the propriety of Entergy's use of holding companies and limited liability companies.⁸⁸ They conclude that the proposed reorganization would neither simplify the corporate structure nor protect the public.⁸⁹ Finally, Petitioners' complain that “each intervening corporate layer can act as a barrier to extending liability to the parent corporation that contains most of the assets, such that “an injured party would have to commence complex litigation and would be required to pierce the corporate veil of each corporation.”⁹⁰

Petitioners' arguments fail to give rise to an admissible contention. The claims made by Petitioners “are either immaterial to license transfer, too conclusory, or both.”⁹¹ First, a contention alleging an error or omission in an application must establish some significant link

⁸⁵ The renewal of the operating licenses for Indian Point Units 2 and 3 is the subject of a separate pending license renewal application. Notably, Petitioners have filed a separate intervention petition/hearing request in the Indian Point license renewal proceeding.

⁸⁶ Petition at 9.

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.* at 9.

⁹¹ *Oyster Creek*, CLI-00-6, 51 NRC at 203.

between the claimed deficiency and *protection of the health and safety of the public or the environment*.⁹² Whether or not the proposed corporate restructuring is “complicated” or fulfills Entergy’s specific commercial objectives is immaterial to any required finding of the Commission. The Commission must determine whether the proposed corporate restructuring will affect the *qualifications* of the licensees to hold the licenses affected by the indirect transfer of control. Petitioners’ arguments concerning the purpose, complexity, or effectiveness of the restructuring, however, do not challenge the technical or financial qualifications of the Indian Point Unit 1, 2, and 3 licensees. Thus, no litigable issue has been raised.

Second, Petitioners’ criticisms of Entergy’s use of holding companies and limited liability companies are vague, conclusory, and unfounded. The existing ownership structure already involves multiple holding companies and limited liability companies, and the new ownership structure is different only in so much as the specific companies involved and the use of fewer intermediate companies. Moreover, the use of such companies to limit shareholder liability is a well established corporate business and legal practice. Petitioners, in effect, seek impermissibly to challenge a bedrock principle of U.S. corporate law within this license transfer proceeding. As the U.S. Supreme Court has held:

It is a general principle of corporate law “deeply ingrained in our economic and legal systems” that a parent corporation (so-called because of control through ownership of another corporation’s stock) is not liable for the acts of its subsidiaries.⁹³

The Commission, for its part, “has consistently held that limited liability companies are not

⁹² *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 89, *aff’d*, CLI-04-36, 60 NRC 631 (2004).

⁹³ *U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998) (citations omitted).

precluded from owning and operating nuclear power plants.”⁹⁴ As the Commission explained in *Vermont Yankee*, “limited liability companies are no different than corporations in that both are legally structured to limit the liability of their shareholders, and that the Commission has issued reactor licenses to such limited liability organizations for decades.”⁹⁵ Petitioners, in any case, do not allege, with the requisite specificity and support, that the proposed restructuring and attendant indirect transfer of control will pose a threat to the public health and safety. Accordingly, Petitioners’ second “contention” fails to establish a litigable dispute with the Applicants.

3. Alleged Potential for Foreign Ownership of Indian Point

Petitioners state that the NRC must assess whether a proposed license transfer involves foreign ownership, control or domination of an NRC licensee. Sections 103(d) and 104(d) of the AEA, 42 U.S.C. §§ 2133(d) and 2134(d), expressly prohibit the issuance or transfer of a license to an alien or “any corporation or other entity” that is “owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.”⁹⁶ Additionally, the same sections prohibit the NRC from issuing a license to any person or entity if, in the opinion of the NRC, doing so would be “inimical to the common defense and security.” Petitioners posit that “[b]ecause NewCo will be a publicly owned company, foreign ownership is possible.”⁹⁷

Petitioners’ foreign ownership claim is a “textbook” example of a contention that lacks adequate specificity and foundation, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(i), (ii), and (v). Petitioners’ arguments are footed in neither facts nor expert opinion, but rather, are

⁹⁴ *Diablo Canyon*, CLI-02-16, 55 NRC at 344-45 (citing *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173 (2000); *Oyster Creek*, CLI-00-6, 51 NRC at 208).

⁹⁵ *Vt. Yankee*, CLI-00-20, 52 NRC at 173 (citing *Oyster Creek*, CLI-00-6, 51 NRC at 208; *Monticello*, CLI-00-14, 52 NRC at 57).

⁹⁶ See also 10 C.F.R. § 50.38.

⁹⁷ Petition at 11.

based on rank speculation. The Commission has stated “predictions about future acquisitions [in this case by a foreign entity] are purely speculative,” and thus insufficient to trigger an adjudicatory hearing.⁹⁸ Moreover, the existing ultimate parent company here, Entergy Corporation, is a publicly owned company, and, as such, is susceptible to the same exact risk posited by Petitioners. The NRC addresses this risk through ongoing monitoring of foreign ownership issues. For example, Regulatory Information Summary (“RIS”) 2000-01 reminds licensees of their obligation to monitor filings with the Securities Exchange Commission and notify the NRC of any foreign ownership issues.⁹⁹

Petitioners also ignore the relevant portion of the Application—submitted under oath and affirmation—for NRC approval of the indirect transfer. It states:

The current and proposed directors and executive officers of Entergy Corporation and the Entergy subsidiaries that directly or indirectly own the Applicants are United States citizens. There is no reason to believe that the Applicants are owned, controlled, or dominated by any alien, foreign corporation, or foreign government. Thus, the indirect transfer of control of the licensed entities and their corporate parents will not result in any foreign ownership, domination or control of these entities within the meaning of the Atomic Energy Act of 1954, as amended.¹⁰⁰

Petitioners have furnished no facts, documents, or expert opinion to support a contrary conclusion. Accordingly, Petitioners have failed to establish a genuine dispute with ENO on a material issue of law or fact. A contention that does not *directly controvert* a position taken by the applicant in the application is subject to dismissal.¹⁰¹ Therefore, Petitioners also fail to satisfy

⁹⁸ *Vt. Yankee*, CLI-00-20, 52 NRC at 172.

⁹⁹ RIS 2000-01, “Changes Concerning Foreign Ownership, Control, or Domination of Nuclear Reactor Licensees” (Feb. 1, 2000).

¹⁰⁰ Application at 4-5.

¹⁰¹ *See Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi).

4. Allegations Regarding Corporate “Responsibility” or Integrity

Petitioners also suggest that the Commission should not approve the proposed indirect transfer of control given the Entergy organization’s ostensible lack of “corporate responsibility.”¹⁰² Petitioners allege acts of corporate malfeasance by Entergy Corporation “in the aftermath of Hurricane Katrina.”¹⁰³ In particular, they accuse Entergy of engaging in “corporate hide and seek” at the expense of New Orleans ratepayers, citing a May 10, 2006, news article entitled “Entergy Holds New Orleans for Ransom.”¹⁰⁴

Putting aside the veracity of Petitioners’ allegations—which, in fact, are baseless—such allegations do not amount to an admissible contention. Petitioners make no effort to show how historical events involving Hurricane Katrina and Entergy New Orleans are germane to the indirect transfer of control now before the NRC. The Commission has “placed strict limits on ‘management’ and ‘character’ contentions” in its proceedings.¹⁰⁵ Specifically, “[a]llegations of management improprieties or poor ‘integrity’ . . . must be of more than historical interest: they must relate directly to the proposed licensing action.”¹⁰⁶ An NRC proceeding is not a forum for litigating “historical allegations or past events with no direct bearing on the challenged licensing action.”¹⁰⁷ Because Petitioners have failed to establish any nexus between the cited historical events and this indirect license transfer proceeding, they have failed to meet their burden to

¹⁰² Petition at 9-10.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 9-10; *see also* WestCAN Exh. B.

¹⁰⁵ *Millstone*, CLI-01-24, 54 NRC at 366.

¹⁰⁶ *Id.* (quoting *Georgia Tech*, CLI-95-12, 42 NRC at 120).

¹⁰⁷ *Id.* (internal quotation marks and citation omitted).

proffer an admissible contention under 10 C.F.R. § 2.309(f)(1).

5. Financial Qualifications

Petitioners also purport to challenge the adequacy of the Applicants' financial qualifications. Petitioners "question whether Entergy's parent company will have the necessary level of financial qualifications to run the nuclear plants," and claim that Entergy's application does not provide reasonable assurance that Entergy has sufficient funds to operate the plants safely.¹⁰⁸ Petitioners also purport to "challenge Entergy's cost and revenue projections."¹⁰⁹ Finally, Petitioners claim that Entergy Corporation's allegedly negative credit rating outlook reflects concerns about the proposed corporate restructuring.¹¹⁰

Petitioners' conclusory allegations again fail to pass muster under the Commission's strict contention pleading standings. Petitioners offer no alleged facts, documents, or expert opinion to support their contention. Furthermore, Petitioners fail to address, let alone controvert, the financial information presented in the Application.

The Application makes clear that ENO will receive the necessary revenue to operate and maintain the plants, including decommissioning funds to pay for such expenses, from the corporate entities licensed to own the facilities, pursuant to operating agreements or other intra-corporate arrangements that have been previously described to the NRC.¹¹¹ The Projected Income Statements for the licensed owners show that anticipated revenues sales of capacity and energy from the facilities, including Indian Point, provide reasonable assurance of an adequate source of funds to meet on going operating and maintenance ("O&M") expenses for the facilities.

¹⁰⁸ Petition at 10.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 12-13.

¹¹¹ *See* Application at 5-9.

Additionally, NewCo will execute a financial Support Agreement with the Applicants, including each of the corporate entities licensed to own the facilities, in the total amount of \$700 million, to pay for O&M costs for all six operating facilities.¹¹² Finally, if necessary, the Applicants would have access to funds from capital contributions, loans, credit lines, or other sources that provide adequate funding to support safe operation of all six facilities.¹¹³

Petitioners fail to challenge or even address any of this information, or explain how purportedly “negative” credit ratings call into questions the financial qualifications of the Applicants to continue to operate Indian Point safely. Also, as discussed above, due to their recalcitrant refusal to enter into a confidentiality and non-disclosure agreement with ENO, Petitioners have not reviewed ENO’s confidential proprietary financial projections. Therefore, they have no basis for asserting that those projections are in any way deficient.

In short, a petitioner bears the burden to present the factual information or expert opinions necessary to support its contention adequately, and a failure to do so requires that the contention be rejected.¹¹⁴ Moreover, a petitioner must read the pertinent portions of the license application. An allegation that some aspect of an application is “inadequate” or “unacceptable” does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.¹¹⁵ Petitioners have failed to meet these contention pleading requirements. Indeed, Petitioners’ allegations are so vague and

¹¹² Under the Support Agreement, each of the licensed entities will have access to up to a total of \$700 million, to the extent not previously utilized, for any single plant outage or for a multiple-plant outage should the circumstances necessitate access to such funds. Application at 8.

¹¹³ For example, the Application indicates that parent company NewCo will have access to a line of credit of at least \$1 billion. Application at 8.

¹¹⁴ See 10 C.F.R. § 2.309(f)(1)(v); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 262 (1996).

¹¹⁵ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 & n.12 (1990); 10 C.F.R. § 2.309(f)(1)(vi).

unsubstantiated that they fail even to meet the basic specificity and foundation requirements of 10 C.F.R. 2.309(f)(1)(i) and (ii). Petitioners again have failed to proffer an admissible contention.

6. Decommissioning Funding for Indian Point

Petitioners also claim that the Application does not address the “increased costs of decommissioning,” including those associated with an alleged “significant change in the contamination streams.”¹¹⁶ In this regard, Petitioners assert that the decommissioning trust funds have not been adjusted as required by NRC regulations. As support, Petitioners aver as follows:

The decommissioning reports for Indian Point 2 from 2002 to 2006 indicate that the Urban Inflation rate has been 2.9% (two and nine-tenth percent) per year, yet the adjustment of the decommissioning funds for Indian Point 2 has only been 1% (one percent) per year. However, the decommissioning reports falsely state the escalation rate is 3.0% (three percent). The decommissioning funds for Indian Point have a substantial shortfall because they do not even keep up with the rate of inflation as evidenced in the March 29, 2005 Report BVY-05-033/NL-05-039/JNP-05-005/Entergy Nuclear Operations Ltr. 2.05.023 and the March 29, 2007 Report Entergy Nuclear Operations C-07-00007.¹¹⁷

As explained below, because ENO and the Indian Point licensees (Entergy Nuclear Indian Point 2, LLC and Entergy Nuclear Indian Point 3, LLC) have met the NRC’s minimum requirements for decommissioning financial assurance, this proposed issue does not present a genuine dispute on a material issue of law or fact, and should be rejected.¹¹⁸

NRC regulations set forth a minimum amount, determined by formula, required to demonstrate reasonable assurance of funds for decommissioning by reactor type and power

¹¹⁶ Petition at 12.

¹¹⁷ *Id.*

¹¹⁸ *See* 10 C.F.R. § 2.309(f)(1)(vi).

level.¹¹⁹ Pursuant to 10 C.F.R. § 50.75(b), the licensee is required to provide decommissioning funding assurance by one or more of the methods described in 10 C.F.R. § 50.75(e). ENO and the Indian Point licensees have satisfied this requirement for Indian Point Units 1, 2, and 3, by using the prepayment method described in 10 C.F.R. § 50.75(e)(1)(i). The prepayment option requires the licensee to deposit into the trust an amount sufficient to meet the NRC-mandated formula amount for decommissioning costs. In determining the prepayment amount, the licensee may take credit for projected earnings on the prepaid funds using *up to a 2 percent annual real rate of return* up to the time of permanent termination of operations.¹²⁰ The Commission has held that a showing of compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding.¹²¹

ENO has made the requisite showing in the Application. As explained therein, the financial qualifications of the Applicants to continue to own the Indian Point units are “demonstrated by the decommissioning funding assurance provided in accordance with 10 C.F.R. 50.75 (e)(1).”¹²² The details regarding the status of the decommissioning funding assurance for all three Indian Point units (among other Entergy plants) are provided in the March 29, 2007, biennial decommissioning funding status report submitted by ENO in accordance with 10 C.F.R. § 50.75(f) and cited in the Application.¹²³ The funding amounts reflected in the report were calculated using amount was calculated using the generic formulas codified at

¹¹⁹ See 10 C.F.R. § 50.75(c).

¹²⁰ See 10 C.F.R. § 50.75(e)(1)(i); see also *Vt. Yankee*, CLI-00-20, 52 NRC at 165.

¹²¹ *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

¹²² Application at 9.

¹²³ See Status of Decommissioning Funding for Plants Operated by Entergy Nuclear Operations, Inc. for Year Ending December 31, 2006 – 10 C.F.R. 50.75(f)(1), ENOC-07-00007 (Mar. 29, 2007), available at ADAMS Accession No. ML070950209.

10 C.F.R. § 50.75(c) and NRC guidance contained in NUREG-1307 and RIS 2001-07.¹²⁴ As the Application states, the report “demonstrates that there is reasonable assurance of adequate decommissioning funding that is provided by pre-paid amounts maintained as assets in external sinking funds segregated from licensee assets and outside licensee administrative control in accordance with the requirements of 10 C.F.R. 50.75(e)(1)(i).”¹²⁵

Petitioners have not provided any information that would support a contrary conclusion or establish a genuine dispute relative to the Application. Petitioners provide no credible explanation or support for their claim that ENO has not adequately accounted for inflation or other potential increases in decommissioning costs. Moreover, the March 29, 2007, status report makes clear that, as permitted by NRC regulations, ENO assumed a 2 percent annual real rate of return (*i.e.*, an escalation rate of 3.0% and a rate of earnings of 5.0%). As noted above, 10 C.F.R. 50.75(e)(1)(i) allow licensees to take a credit of up to a 2-percent annual real rate of return on decommissioning trust funds on deposit when using the prepayment method of decommissioning funding assurance. This credit may be applied toward the current estimate of decommissioning funds needed for decommissioning at the time of permanent cessation of operations. In short, because the Applicants have met the NRC’s requirements, there is no genuine dispute of material fact or law on which to base a contention.

To the extent Petitioners’ proposed contention challenges ENO’s reliance on the generic formula or the 2-percent annual real rate of return assumption contained in 10 C.F.R. § 50.75, it

¹²⁴ See NUREG-1307, “Report on Waste Burial Charges,” Rev. 12 (Feb. 2007); RIS 2001-07, “10 C.F.R. 50.75(f)(1) Reports on the Status of Decommissioning Funds (Due March 31, 2001)” (Feb. 15, 2001).

¹²⁵ Application at 9. This is consistent with the conclusion reached by the NRC Staff in SECY-07-0200, “2007 Summary of Decommissioning Funding Status Reports for Nuclear Power Reactors” (Nov. 14, 2007). SECY-07-0200 states that the NRC staff evaluated the information in the current biennial decommissioning funding status reports for *all* 104 operating nuclear power reactors. It concludes that “[t]he staff identified no concerns with the decommissioning funding assurance levels for the 104 operating nuclear power reactors,” and that “[n]o action needs to be taken by the NRC at this time.”

constitutes an impermissible collateral attack in NRC regulations.¹²⁶ Such “general attacks on the agency’s regulations . . . do not raise an admissible issue in this license transfer proceeding.”¹²⁷ Petitioners have neither requested nor demonstrated any basis for a waiver of the provisions contained in 10 C.F.R. § 50.75.

Finally, Petitioners’ cryptic references to “significant change[s] in the contamination streams” and “the increased costs of decommissioning” are too vague and ill-defined to trigger an adjudicatory hearing.¹²⁸ They lack the require specificity and support required by 10 C.F.R. § 2.309(f)(1). In addition, Petitioners simply ignore the fact that the NRC’s decommissioning funding rules “take into account the possibility of changes over time.”¹²⁹ For example, the Commission’s regulations, at 10 C.F.R. § 50.75(f)(2), require that the licensee, five years prior to the expected end of operations, submit both a cost estimate for decommissioning based on an up-to-date assessment of the actions necessary for decommissioning, and plans for adjusting levels of funds for decommissioning, if necessary.¹³⁰

7. Alleged Need for Antitrust Review

Petitioners also contend that, because the proposed reorganization purportedly “involves the transfer of 11 licenses into one holding company,” an antitrust review is necessary.¹³¹ Notably, Petitioners expressly acknowledge the Commission’s *Wolf Creek* decision,¹³² in which

¹²⁶ See 10 C.F.R. 2.335(a).

¹²⁷ *Vt. Yankee*, CLI-00-20, 52 NRC at 165.

¹²⁸ Petition at 12.

¹²⁹ *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 144 (2001).

¹³⁰ See Final Rule, “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030 (June 27, 1988).

¹³¹ Petition at 13.

¹³² *Kan. Gas and Elec. Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999).

the Commission held that the AEA does not require or even authorize NRC antitrust reviews of post-operating license transfer applications.¹³³ Nonetheless, Petitioners assert that the antitrust laws “are Congressional legislation that cannot be trumped or ignored by the Commission.”¹³⁴

Petitioners’ proposed contention lacks any basis in law or fact and accordingly is inadmissible. As noted above, in *Wolf Creek* the Commission concluded that the structure, language, and history of the AEA do not call for Commission antitrust reviews of post-operating license transfer applications. The Commission thoroughly explained its rationale:

It now seems clear to us that Congress never contemplated such reviews. On the contrary, Congress carefully set out exactly when and how the Commission should exercise its antitrust authority, and limited the Commission’s review responsibilities to the anticipatory, prelicensing stage, prior to the commitment of substantial licensee resources and at a time when the Commission’s opportunity to fashion effective antitrust relief was at its maximum. The Act’s antitrust provisions nowhere even mention post-operating license transfers.

The statutory scheme is best understood, in our view, as an implied prohibition against additional Commission antitrust reviews beyond those Congress specified. At the least, the statute cannot be viewed as a requirement of such reviews. In these circumstances, and given what we view as strong policy reasons against a continued expansive view of our antitrust authority, we have decided to abandon our prior practice of conducting antitrust reviews of post-operating license transfers¹³⁵

As the Commission explained in a subsequent rulemaking, “[its] decision in *Wolf Creek* was based on a thorough consideration of the documented purpose of Congress’s grant of limited antitrust authority to the NRC’s predecessor, the Atomic Energy Commission, the statutory framework of that authority, the carefully-crafted statutory language, and the legislative history

¹³³ Petition at 13.

¹³⁴ *Id.*

¹³⁵ *Wolf Creek*, CLI-99-19, 49 NRC at 446.

of the antitrust amendments to the Atomic Energy Act.”¹³⁶

As such, this license transfer proceeding is not a forum for revisiting the Commission’s well-reasoned decision in *Wolf Creek* or its 2000 rulemaking. Indeed, the Commission has reaffirmed its holding in *Wolf Creek* in subsequent license transfer proceedings.¹³⁷ Petitioners offer no compelling reason to suggest that the Commission reached an incorrect conclusion with respect to the nature and extent of its antitrust review authority. Furthermore, Petitioners fail to explain how the proposed corporate restructuring at issue in this proceeding involves any potential anti-competitive practices or effects that could engender antitrust concerns. The notion that the mere creation of a new holding company gives rise to antitrust concerns is plainly without merit. Accordingly, the proposed contention should be rejected. It raises issues that are beyond the scope of this proceeding and immaterial to the Commission’s license transfer approval, lacks a factual or legal foundation, and fails to establish a genuine dispute with the Applicant on a material issue of law or of fact.¹³⁸

8. Adequacy of NRC Staff’s Review of the Application

Intertwined with Petitioners’ inadmissible foreign ownership, financial qualifications, and decommissioning funding claims is the suggestion that the NRC Staff may not perform an adequate review of the proposed indirect transfer of control.¹³⁹ As support, Petitioners cite a December 2001 report issued by the General Accounting Office (“GAO”).¹⁴⁰ According to

¹³⁶ Final Rule. “Antitrust Review Authority: Clarification,” 65 Fed. Reg. 44,649, 44,649-50 (July 19, 2000).

¹³⁷ See, e.g., *Vt. Yankee*, CLI-00-20, 52 NRC at 168.

¹³⁸ See 10 C.F.R. § 2.309(f)(1)(iii)-(vi).

¹³⁹ Petition at 11-12.

¹⁴⁰ GAO-02-48, Report to the Honorable Edward J. Markey, House of Representatives, “Nuclear Regulation: NRC’s Assurances of Decommissioning Funding During Utility Restructuring Could be Improved” (Dec. 2001). Although WestCAN identifies this GAO report as Exhibit C to their Petition, a copy of the report was

Petitioners, the GAO found that previous NRC license transfer reviews have been deficient in certain respects. As shown below, the proposed contention is inadmissible. Like previous contentions discussed above, it raises issues that are beyond the scope of this proceeding and immaterial to the Commission’s license transfer approval, lacks a factual or legal foundation, and fails to establish a genuine dispute with the Applicant on a material issue of law or fact.

First and foremost, it is well established that contentions concerning the adequacy of the NRC Staff’s review of a license application (as opposed to the application itself) are inadmissible in licensing hearings.¹⁴¹ License transfer proceedings are no exception. For example, in the 2000 *Vermont Yankee* license transfer proceeding, a petitioner similarly pointed to a GAO report that generally concluded that many nuclear facilities lacked sufficient funds to cover future decommissioning costs as estimated under the Commission’s then-current regulations. The Commission found that the alleged deficiencies in the agency’s oversight of financial assurances for decommissioning nuclear power plants were insufficient to trigger an adjudicatory hearing. The Commission stated unequivocally that “general attacks on the agency’s regulations and *competence* do not raise an admissible issue in [a] license transfer proceeding.”¹⁴² Petitioners’ analogous claims here must be rejected for the same reason.

In addition, Petitioners fail to explain how the GAO Report—issued over six years ago—is relevant to this proceeding. Petitioners provide no specific page citations to the report.

not provided as part of WestCAN’s February 5, 2008, filing. A copy of GAO-02-48 is available on the GAO website at <http://www.gao.gov/new.items/d0248.pdf>.

¹⁴¹ Final Rule “Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (“With the exception of NEPA issues, the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.”); *see also Curators of the Univ. of Mo.*, CLI-95-8, 41 NRC 386, 395-96 (1995) (“[I]n adjudications, the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns.”); *see also Curators of the Univ. of Mo.*, CLI-95-1, 41 NRC 71, 121-22, 121 n.67 (1995) (citing reactor cases in which this principle has been applied).

¹⁴² *Vt. Yankee*, CLI-00-20, 52 NRC at 165 (emphasis supplied).

Nor do Petitioners attempt to explain how the report has any bearing (and indeed none exists) on the technical and financial qualifications of the Applicants in this proceeding. Vague references to documents do not suffice—the petitioner must identify specific portions of the documents on which it relies.¹⁴³ To the extent the GAO report contains suggested enhancements to the NRC’s license transfer application review process, the adequacy of the Staff’s review is beyond the scope of this proceeding, as discussed above.¹⁴⁴

V. **CONCLUSION**

For the foregoing reasons, the Petition should be denied in its entirety. Petitioners have not established standing in the indirect license transfer proceeding. Furthermore, Petitioners have failed to articulate an admissible contention. Accordingly, no hearing is warranted.

Respectfully submitted,

Signed (electronically) by

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Dated at Washington, DC
this 31st day of March, 2008

¹⁴³ *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

¹⁴⁴ Notably, Petitioners ignore the 2001 GAO report’s conclusion that “[i]n most of the requests to transfer licenses to own or operate nuclear power plants that NRC has approved, the financial arrangements have either maintained or enhanced the assurance that adequate funds will be available to decommission those plants.” GAO-02-48, at 4; WestCAN Exh. C.