UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR PALISADES, LLC (Palisades Nuclear Plant)	Docket Nos. 50-255-LT and 72-7-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR FITZPATRICK, LLC (James A. Fitzpatrick Nuclear Power Plant)	Docket Nos. 50-333-LT and 72-12-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR GENERATION COMPANY (Pilgrim Nuclear Power Station)	Docket No. 50-293-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR VERMONT YANKEE, LLC (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-LT and 72-59-LT
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, 50-286-LT and 72-51-LT
ENTERGY NUCLEAR OPERATIONS, INC. and ENTERGY NUCLEAR PALISADES, LLC (Big Rock Point)	Docket Nos. 50-155-LT and 72-43-LT
	April 8, 2008

ANSWER OF ENTERGY NUCLEAR OPERATIONS, INC. OPPOSING PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING OF LOCALS 369 AND 590, UTILITY WORKERS UNION OF AMERICA, AFL-CIO

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I. INTRODUCTION

Pursuant to 10 CFR § 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 filed on February 5, 2008, by Locals 369 and 590, Utility Workers Union of America, AFL-CIO ("UWUA Locals" or "Petitioners"), and supplemented on March 18, 2008. The intervention petition and hearing request relate to ENO's pending application, submitted pursuant to 10 CFR § 50.80, for an order from the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") consenting to the proposed indirect transfer of control of the captioned operating licenses. As shown below, UWUA Locals have not satisfied the NRC's requirements to intervene in this matter. UWUA Locals have neither established standing to intervene nor proffered an admissible contention. Therefore, under 10 CFR § 2.309, their intervention petition and hearing request must be denied in their entirety. No hearing is warranted.

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, LLC (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 ("AEA") of 1954, as amended, and 10 CFR § 50.80, of the operating licenses for six NRC licensed nuclear power facilities—Palisades, Fitzpatrick, Pilgrim, Vermont Yankee, Indian Point, and Big Rock

(collectively, "the Facilities").[1] The indirect transfer of control would result from certain planned restructuring transactions of Entergy Corporation (Entergy) 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 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 CFR § 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 of the Facilities).[2] 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

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[1] *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.

[2] *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).

transfer proceeding within 20 days from the date of publication of the notices.[3] 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, UWUA Locals filed a timely petition to intervene through the NRC's Electronic Information Exchange ("EIE") system.[4] The Westchester Citizen's Awareness Network ("WestCAN") and several other joint petitioners also filed a petition to intervene on February 5, 2008.[5] Pursuant to a Commission Order dated March 19, 2008,[6] ENO responded to the WestCAN petition on March 31, 2008.[7]

In its February 5 Petition, 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.[8] Accordingly, upon reviewing the petitions, on February 12, 2008, counsel for ENO telephoned counsel of record for 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.

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[3] *See*, *e.g.*, Pilgrim Notice, 73 Fed. Reg. at 2952.

[4] *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 Petition").

[5] *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).

[6] Commission Order (unpublished) (Mar. 19, 2008).

[7] *See* Answer of [ENO] Opposing WestCAN, Et Al. Petition for Leave to Intervene and Request for Hearing Concerning Indirect Transfer of Control of Licenses (Mar. 31, 2008).

[8] *See* February 5 Petition at 2, 5, 15.

C. The Revised Filing Schedule

On February 26, 2008, ENO filed a motion (unopposed by UWUA Locals) seeking Commission approval of a Revised Filing Schedule that would accommodate any supplemental contentions that UWUA Locals might file 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 agreement. 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.[10]

On March 18, 2008, in accordance with the Revised Filing Schedule approved by the Commission, 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.[11] ENO responds herein to both the February 5 Petition and the March 18 Supplemental Petition. As demonstrated below, UWUA Locals have neither established standing to intervene nor proffered an admissible contention. Accordingly, the Petitions must be denied. No hearing is warranted.

III. UWUA LOCALS HAVE FAILED TO DEMONSTRATE STANDING TO INTERVENE UNDER 10 CFR § 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 CFR 2.309. Among other things, a petitioner must demonstrate that

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[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), *available at* ADAMS Accession No. ML080570686.

[10] Commission Order (unpublished) (Feb. 28, 2008).

[11] *See* Statement of New or Amended Contentions of [UWUA Locals] Supplementing Petitions for Leave to Intervene and Related Requests for Relief (Mar. 18, 2008) ("March 18 Supplemental Petition"). UWUA Locals filed both proprietary and public (*i.e.*, redacted) versions of the March 18 Supplemental Petition.

it has standing pursuant to 10 CFR § 2.309(d) by addressing: (1) the nature of its right under the AEA 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.[12] 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.[13] 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."[14] To 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.[15] 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:[16]

> [T]he asserted injury must be "distinct and palpable," and "particular [and] concrete," as opposed to being "'conjectural… [,]

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[12] 10 CFR § 2.309(d)(l).

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

[14] *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).

[15] *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)).

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

> hypothetical,'" or "abstract"… [W]hen future harm is asserted, it must be "threatened," "'certainly impending,'" and "'real and immediate.'"[17]

b. Zone of Interests

A petitioner also must demonstrate that its injury falls within the zone of interests of the statutes governing the proceeding[18]—either the AEA or the National Environmental Policy Act of 1969, as amended ("NEPA").[19] The injury in fact, therefore, must generally involve potential radiological or environmental harm.[20] To make this assessment, the Commission has observed that "it is necessary to 'first discern the interests' arguably . . . to be protected by 'the statutory provision at issue,' and 'then inquire whether the plaintiff's interests affected by the agency action are among them.'"[21]

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.[22] 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."[23] The relevant inquiry

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17 *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).

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

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

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

21 *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)).

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

23 *Id.*

is whether a cognizable interest of the petitioner might be adversely affected by one of the possible outcomes of the proceeding.[24]

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."[25] Furthermore, "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'"[26] 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.[27]

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.[28] "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.[29] The NRC has held that the proximity presumption may be sufficient to confer standing on an individual or group in proceedings

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

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

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

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

[28] *Peach Bottom*, CLI-05-26, 62 NRC at 580.

[29] *Id.* (citations omitted).

conducted pursuant to 10 CFR Part 50 for reactor construction permits, operating licenses, or significant license amendments.[30]

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."[31] 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.'"[32]

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."[33] Conversely, the NRC has denied proximity-based standing where contact has been limited to "mere occasional trips to areas located close to reactors."[34] Furthermore, to establish proximity standing, a petitioner must provide "*fact-specific standing*

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

[31] *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).

[32] *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).

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

[34] *Id.* (citation omitted).

allegations, not conclusory assertions," as the Commission "cannot find the requisite 'interest' based on . . . general assertions of proximity."[35]

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).[36] 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.[37] The Commission considers an organization, like an individual, as a "person" (as that term is defined in 10 CFR § 2.4, and as the Commission has used it in making standing determinations under 10 CFR § 2.309).[38] Accordingly, a petitioner must show a "risk of 'discrete institutional injury *to itself*, other than the general environmental and policy interests of the sort [NRC tribunals] repeatedly have found insufficient for organizational standing.'"[39]

b. Representational Standing

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

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

[36] *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)).

[37] *See Georgia Tech*, CLI-95-12, 42 NRC at 115.

[38] *Palisades*, CLI-07-18, 65 NRC at 411.

[39] *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).

protected interests, causation, and redressability), (2) identify that member by name and address, and (3) show—preferably by affidavit—that the organization is authorized by that member to request a hearing on behalf of the member.[40] Where the affidavit of the member is devoid of any statement that he or she wants and has authorized the organization to represent his or her interests, the presiding officer should not infer such authorization.[41]

4. Discretionary Intervention

Pursuant to 10 CFR § 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 CFR § 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.[42] The regulation specifies that in addition to addressing the factors in 10 CFR § 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 CFR § 2.309(e), which the presiding officer will consider and balance.[43] Of the six factors, primary consideration is given to the first factor—

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[40] *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).

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

[42] 10 CFR § 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.").

[43] 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 CFR § 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 CFR § 2.309(e)(2)(i)-(iii).

assistance in developing a sound record.[44] The petitioner has the burden to establish that the factors in favor of intervention outweigh those against intervention.[45]

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

1. The Pilgrim Proceeding

UWUA Locals assert that they have standing to intervene as of right in the Pilgrim indirect license transfer proceeding because they "have a substantial interest in the safe operation and good financial standing of PNPS [Pilgrim Nuclear Power Station]."[46] UWUA Locals claim to have both organizational and representational standing:

> As the unions representing many of the employees at PNPS, UWUA Locals have an organizational interest in protecting their members' safety. Moreover, each individual member employed at PNPS has an interest in the safe operation of PNPS; UWUA Locals thus have representational standing through their members' standing, which falls within the organizational purposes of UWUA Locals.[47]

UWUA Locals aver that "a decision by the NRC to approve the Applicants' proposed transfer *may* have a negative impact on the safe operation of PNPS, which would have a corresponding and adverse impact upon the surrounding community."[48] Aside from citing some NRC cases discussing the agency's standing requirements, UWUA Locals offer no further support for their claims of organizational and representational standing.[49]

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[44] *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).

[45] *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").

[46] February 5 Petition at 7.

[47] *Id.* at 8.

[48] *Id.* at 7 (emphasis supplied).

[49] The March 18 Supplemental Petition does not address the issue of UWUA Locals' standing to intervene.

UWUA Locals' vague and unsubstantiated assertions of *potential* "negative" or "adverse" impacts on the safe operation of PNPS and the adjacent community do not pass muster for standing in an NRC proceeding. As noted above, organizational petitioners, like individual petitioners, must show the existence of a "concrete and particularized" injury involving radiological or environmental harm that flows directly from the proposed action, and which could be cured by some action of the NRC. The harm alleged by UWUA Locals is entirely hypothetical—it is not "threatened," it is not "certainly impending," and it is not "real and immediate."[50] Petitioners provide no factual support for their assertion that the proposed indirect transfer of control of the Pilgrim operating license may adversely affect the safe operation of PNPS.[51] The Commission has made clear that general allegations of "potential injury" are insufficient for standing; a petitioner must "show a *real* potential for injury."[52] In short, UWUA Locals have failed to show a "risk of discrete institutional injury" to the organizations themselves.[53]

UWUA Locals also fail to demonstrate representational standing. They do not identify any individual members of their organizations by name and address, or demonstrate, by affidavit or other means, that the organizations are authorized by any member to request a hearing on behalf of the member. UWUA Locals thus fail 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

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[50] *Perry*, LBP-92-4, 35 NRC at 121 (citations omitted).

[51] As both the Application and the Commission's Hearing Notice indicate, there will be no significant genealogical change involving the PNPS owner-licensees. ENO will continue to operate PNPS, and Entergy Pilgrim will continue will continue to own the facility. Importantly, the proposed indirect transfer of the operating license involves no physical or operational changes to PNPS. Therefore, as in *Millstone* and *Peach Bottom* cases discussed *infra*, the proposed corporate restructuring will involve no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel.

[52] *See FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 and 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 2006 WL 1704519, at *4 (N.R.C. Jan. 31, 2006) (emphasis supplied).

[53] *Palisades*, CLI-07-18, 65 NRC at 411-12.

failure both to identify the member(s) [petitioners] purport to represent and to provide proof of authorization therefore precludes [petitioners] from qualifying as intervenors."[54]

UWUA Locals' failure to identify any specific members of their organizations alone is fatal to their claim of representational standing. In any event, Petitioners' suggestion that unnamed members of the unions may have standing by virtue of their employment at, or residence near, the Pilgrim plant (*i.e.*, standing based on "proximity") is insufficient to establish proximity standing. As the Commission explained in the *Peach Bottom* proceeding:

> 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 standing analysis of whether the petitioner has made a specific showing of injury, causation, and redressability.[55]

In rejecting the *Peach Bottom* petitioner's claim of proximity standing, the Commission emphasized that the proposed license transfer—like the proposed transfer at issue here—would result in "no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel."[56] Accordingly, the Commission found that the risks

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[54] *Palisades*, CLI-07-18, 65 NRC at 410.

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

[56] *Id.* at 581-82. *Compare Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 NRC 129, 132-33 (2000) (stating that because the transfer application at issue proposed no change in the licensees, no change in the facility, no change in facility operation, and no change in facility personnel, "[i]t [was] far from obvious how [the Applicant's] corporate restructuring would affect Petitioners' interests").

associated with the transfer were "*de minimis* and therefore justif[ied] no 'proximity standing' at all."[57] Likewise, UWUA Locals have not discharged their burden to show *how* the pending indirect license transfer presents an obvious potential for offsite (or onsite) consequences. Therefore, even if Petitioners had identified specific members, they have provided no justification for any claim of proximity standing.

2. The Palisades, Fitzpatrick, Vermont Yankee, Indian Point, and Big Rock Proceedings

In their February 5 Petition, UWUA Locals, though associated specifically with the Pilgrim plant, "seek leave to intervene on behalf of themselves and their members in each of the captioned proceedings" stemming from Entergy's proposed corporate restructuring.[58] UWUA Locals state as follows:

> While UWUA Locals represent only employees at the Pilgrim Nuclear Power Station, the proposed restructuring appears to involve global, across-the-board changes to the organizational structure of all of the Entergy Nuclear plants. The NRC has issued separate Notices with respect to each of the potentially affected nuclear facility. Out of an abundance of caution, and because UWUA Locals do not know how the Commission's review processes will proceed, we are requesting leave to intervene in each of the captioned proceedings.[59]

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[57] *Id.* at 581. T]he longest specific distance for which the Commission has granted proximity-based standing in a post-*Vogtle* license transfer case is 6-6½ miles. By contrast, it has denied proximity-based standing in license transfer proceeding to petitioners within 5-10 miles, 12 miles, and 40 miles from licensed facilities. *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); *AmerGen Energy Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-05-25, 62 NRC 572, 576 (2005) (radius of 12 miles); and *Peach Bottom*, CLI-05-26, 62 NRC at 582 (radius of 40 miles)). As the Commission explained in *Peach Bottom*, in the few instances in which the Commission has granted standing in a license transfer proceeding based on the petitioners' proximity to the facilities at issue, "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 transfer implicating more significant safety issues than are present here." *Peach Bottom*, CLI-05-26, 62 NRC at 583 (emphasis in original).

[58] February 5 Petition at 4.

[59] *Id.* n.5.

Neither the February 5 Petition nor the March 18 Supplemental Petition contains any discussion of the basis for UWUA Locals implicit claim of standing to intervene in the Palisades, Fitzpatrick, Vermont Yankee, Indian Point, and Big Rock matters.

UWUA Locals lack standing to intervene in the other five indirect transfer proceedings for the same reasons discussed above with respect to Pilgrim. Indeed, the considerations militating against UWUA Locals' standing in the Pilgrim matter apply *a fortiori* to the other five proceedings. Clearly, UWUA Locals have not alleged, let alone demonstrated, that the indirect transfer of control of the Palisades, Fitzpatrick, Vermont Yankee, Indian Point, and Big Rock licenses will cause a "distinct and palpable" radiological or environmental harm to UWUA Locals or their members (all of whom are employed at PNPS). There simply is no apparent basis—and none is offered—for any claim of organizational or representational standing with respect to the other five proceedings.

Indeed, the Commission recently addressed an analogous situation in an indirect license transfer proceeding arising from the proposed merger of FPL Group, Inc. and Constellation Energy Group, Inc.[60] In that proceeding, FPL and Constellation filed applications seeking Commission approval of the indirect transfers of the operating licenses for the Turkey Point, St. Lucie, Seabrook, and Duane Arnold faculties. The parent corporations also requested a "threshold determination" by the Commission that the proposed transaction involved no indirect transfer of control of the operating licenses for three other Constellation facilities (Calvert Cliffs, Nine Mile Point, and R.E. Ginna). A labor union representing employees at the Nine Mile Point

[60] *See Fla. Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert Cliffs Independent Spent Fuel Storage Installation; Nine Mile Point Nuclear Station, Units 1 and 2; R.E. Ginna Nuclear Power Plant; Turkey Point Nuclear Generating Plant, Units 3 and 4; St. Lucie Nuclear Power Plant, Units 1 and 2; Seabrook Station; Duane Arnold Energy Center), CLI-06-21, 64 NRC 30 (2006).

facility, the International Brotherhood of Electrical Workers, Local 97, petitioned to intervene and requested a hearing to challenge the applications.

The Commission ruled that the Union did not show standing to intervene in any of the proceedings, including the Nine Mile Point matter.[61] The Commission found that the Union "failed to establish a link between the Nine Mile Point license transfers and *safety concerns* sufficient to show standing to challenge the indirect transfers."[62] Like UWUA Locals here, Local 97 provided no factual support (*i.e.*, affidavits) and "instead reste[d] its assertions on speculation."[63] The Commission further concluded that the Union described "no causal nexus at all between the asserted potential injury to its members' 'employment and financial well-being' and the indirect transfer of licenses for the Turkey Point, St. Lucie, Seabrook, Duane Arnold, Calvert Cliffs, and R.E. Ginna facilities."[64] In holding that the Union lacked standing to standing to intervene insofar as the applications concerned those six facilities, the Commission emphasized that "the Union does not even claim to represent employees at those facilities."[65] Likewise, UWUA Locals here do not claim to represent employees at Palisades, Fitzpatrick, Vermont Yankee, Indian Point, and Big Rock—the other facilities identified in ENO's Application. Therefore, UWUA Locals lack standing to intervene in the associated proceedings.

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61 *Id.* at 34-35.

62 *Id.* at 35 (emphasis supplied).

63 *Id.*

64 *Id.* at 34. The Commission reiterated that it is "disinclined to 'step into the middle of a labor dispute' or 'involve [itself] in the personnel decisions of licensees.'" *Id.* (quoting *Power Auth. of N.Y.* (James A. Fitzpatrick Nuclear Power Plant and Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 314, 316 (2000)). The Commission noted that, to have any prospect of admission, an employment-related contention must be "closely tied to specific health-and-safety concerns or to potential violations of NRC rules." *Id.* (quoting *Fitzpatrick*, CLI-00-22, 52 NRC at 315).

65 *Id.* at 34.

C. UWUA Locals Have Not Demonstrated that a Balancing of the Factors in 10 CFR § 2.309(e) Support an Exceptional Grant of Discretionary Intervention

UWUA Locals "alternative" request for discretionary intervention under 10 CFR § 2.309(e) also misses the mark. Petitioners merely pay lip service to the applicable criteria, offering no specific and compelling reasons as to why an exceptional grant of discretionary intervention would be warranted in any of the indirect transfer proceedings, particularly those involving facilities other than Pilgrim. The statements made by UWUA Locals are vague and unparticularized—they could be made by any similarly situated petitioner.

The burden of convincing the Commission that a petitioner can make a valuable contribution to the agency's decision-making process lies with the petitioner.[66] UWUA Locals' Petition addresses none of the considerations that prior NRC tribunals have considered as potential indicia of a petitioner's ability to contribute to development of a sound record. Such considerations include a petitioner's showing of significant ability to contribute on substantial issues of law or fact that will not be otherwise properly raised or presented; the specificity of such ability to contribute on those substantial issues of law or fact; justification of time spent on considering the substantial issues of law or fact; the ability to provide additional testimony, particular expertise, or expert assistance; and specialized education or pertinent experience.[67] In short, vague and conclusory assertions of the type proffered by UWUA Locals are not sufficient to discharge a petitioner's burden under 10 CFR § 2.309(e).[68]

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[66] *Nuclear Eng'g Co.*, ALAB-473, 7 NRC at 745 (1978).

[67] *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-81-1, 13 NRC 27, 33 (1981) (and cases cited therein); *see also Fla. Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-24, 32 NRC 12, 16-17 (1990), *aff'd*, ALAB-952, 33 NRC 521, 532 (1991).

[68] As noted above, discretionary intervention may be granted only when at least one petitioner has established standing and at least one contention has been admitted in the proceeding so that a hearing will be held. *See* 10 CFR § 2.309(e). Here, the only other petitioners are WestCAN, et al., who filed a joint petition to intervene and hearing request with respect to the Indian Point indirect license transfer proceeding.

IV. UWUA LOCALS HAVE FAILED TO PROFFER AN ADMISSIBLE CONTENTION UNDER 10 CFR § 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 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.[69]

Failure to comply with any one of the six admissibility criteria is grounds for the dismissal of a contention.[70] The Commission's contention admissibility rule is "strict by design,"[71] because its purpose is to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[72] 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."[73] In indirect license transfer proceedings such

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69 *See* 10 CFR § 2.309(f)(1)(i)-(vi).

70 *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).

71 *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).

72 69 Fed. Reg. at 2202.

73 *Id.*

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."[74]

B. UWUA Locals' Petition, Even as Supplemented, Does Not Meet the Requirements of 10 CFR § 2.309 for Admissible Contentions

1. Proposed Contention 1 Concerning Alleged Contradictory Statements in the Application is Inadmissible Because it Lacks Adequate Support and Fails to Establish a Genuine Dispute on a Material Issue of Law or Fact

UWUA Locals' first contention alleges as follows:

> [T]he Application should not be approved because it contains contradictory statements concerning whether implementation of the proposed restructuring will be accompanied by operational changes at Pilgrim.[75]

The sole basis for the proposed contention is Petitioners' juxtaposition of two statements from ENO's Application. Specifically, the July 30 Application states that the proposed restructuring will allow the Applicants "to own and operate the company's nuclear plants with more clarity and enhance their ability to attract capital."[76] It subsequently states that "[t]here will be no physical changes to the Facilities and no changes in the officers, personnel, or day-to-day operations of the Facilities in connection with the indirect transfer of control."[77] From these two statements, UWUA Locals wrongly infer a "contradiction" relative to the stated effect of the indirect transfer on Pilgrim operations. Specifically, they claim that it is unclear what current "operational confusion" at the plant requires clarification, how that clarification will be achieved, and whether the "clarity" sought by the Applicants will involve a change to Pilgrim operations.[78]

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[74] *Millstone*, CLI-00-18, 52 NRC at 133.

[75] February 5 Petition at 9; March 18 Supplemental Petition at 5.

[76] Application at 2.

[77] *Id.* at 5.

[78] February 5 Petition at 10.

ENO opposes Proposed Contention 1 because it lacks adequate support and fails to raise a genuine dispute with the Applicants on a material issue of law or fact, contrary to 10 CFR § 2.309(f)(1)(v)-(vi). In short, UWUA Locals' contention rests on a patent misreading of the Application; indeed, it founders on the very text upon which it is based. UWUA Locals, in short, conflate two very disparate matters: the broader Entergy organization's business and financing structure on the one hand, and Pilgrim's plant-specific operations on the other.

The Application involves modification of only the former, and the impetus for that change—"to simplify the Applicants' and Entergy's corporate structure to the benefit of customers, regulators, capital markets, and shareholders"—is clearly stated in the Application.[79] As the Application further explains:

> For historic reasons the Applicants are currently part of a dispersed structure within the Entergy Corporation system. Financing is provided internally in a top down fashion, with debt attributable to the wholesale nuclear business residing primarily with Entergy Corporation. This structure has resulted in complex financing and operating relationships. The Applicants believe that by aggregating their ownership and financing activities under [NewCo] within a discrete business segment structure, and aggregating their nuclear services businesses under Entergy Nuclear, Inc., they will own and operate the company's nuclear plants with more clarity and enhance their ability to attract capital.[80]

The Application seeks to effect changes that are *business-related*, such as segregation of operating revenues and net income from Entergy's nuclear services business and its wholesale, non-utility nuclear generation business; creation of discrete operating history and focused operating results for those different business segments; and enhanced capital formation.

Thus, contrary to UWUA Locals' contention, ENO is not seeking to remedy alleged "operational confusion" at Pilgrim or any of the other Facilities. Also contrary to Petitioners'

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[79] Application at 2.

[80] *Id.*

assertion, the Application addresses the impact of the proposed action on the operation of the Facilities. It states in no uncertain terms that there will be no physical changes to the Facilities, and no changes to officers, personnel, or day-to-day operations.[81] UWUA Locals cite no legal or regulatory basis for their assertion that this representation must be reduced to a formal "commitment."[82] Regardless, the Application has been submitted under oath and affirmation and in accordance with the NRC's completeness and accuracy requirements.

Accordingly, Proposed Contention 1 is inadmissible. UWUA Locals' imprecise and self-serving reading of the Application itself cannot provide the basis for a litigable contention.[83] UWUA Locals have not identified any *bona fide* omission or deficiency in the Application that would serve to establish a genuine dispute. A contention that does not directly controvert a position taken by an applicant in its application is subject to dismissal.[84] Furthermore, Petitioners adduce no facts, documents, or expert opinion to show that the alleged defects in the Application—even if they existed—call into question the Applicants' technical and financial qualifications or pose a threat to the public health and safety.

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[81] *See id.* at 5.

[82] *See* February 5 Petition at 9. An open-ended commitment not to make changes to the Facilities, personnel, or day-to-day operations clearly is not tenable. To the extent that such changes may prove necessary in the future *for reasons other than the proposed restructuring*, they would be subject to continuing NRC oversight, inspection, and enforcement authority.

[83] *See Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995).

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

2. Proposed Contention 2 Concerning the Commercial Benefits of the Proposed Restructuring is Inadmissible Because it Does Not Raise a Material Issue Within the Scope of this Proceeding, Lacks Adequate Support, and Fails to Establish a Genuine Dispute on a Material Issue of Law or Fact

UWUA Locals' second contention alleges that "the Application should not be approved because Applicants' claims as to benefits are neither supported nor self-evident."[85] Petitioners "question whether approval of the proposed transaction will in fact have benefits to Pilgrim operations or, at a minimum, benefits that outweigh potential detriments."[86] In so asserting, they claim that ENO must demonstrate why the proposed restructuring is "superior to the status quo."[87] UWUA Locals go so far as to suggest that the Applicants must submit "testimony" or "internal analyses or studies" by Entergy officials or expert analysts to verify that Entergy will, in fact, reap the intended commercial benefits of the corporate restructuring.[88]

ENO opposes the admission of Proposed Contention 2 given its clear failure to meet the admissibility criteria set forth in 10 CFR § 2.309(f)(1)(iii)-(vi). First, a contention alleging an error or omission in an application must establish some significant link between the claimed deficiency and *protection of the health and safety of the public or the environment*.[89] The AEA requires the Commission to determine whether the proposed corporate restructuring will affect the technical and financial *qualifications* of the licensees to hold the licenses affected by the indirect transfer of control. It does not charge the Commission with the task of verifying whether the proposed corporate restructuring will fulfill each of Entergy's specific commercial

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85 February 5 Petition at 10; March 18 Supplemental Petition at 5.

86 February 5 Petition at 11.

87 *Id.* at 10; March 18 Supplemental Petition at 5.

88 February 5 Petition at 11. As discussed in response to Proposed Contention 4, *infra,* Entergy prepared the Application in accordance with NRC guidance, particularly NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," Rev. 1 (1999).

89 *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).

objectives. Such an inquiry would be inconsistent with the Commission' statutory charter and likely beyond the scope of its institutional expertise. The Commission has emphasized that it "is not in the business of regulating the market strategies of licensees," and that it leaves to licensees "intricate ongoing business decisions" such as those relating to "cost and profit."[90]

To the extent the Application discusses business objectives, it does so to provide the *raison d'être* or context of the proposed indirect license transfers. NRC's rules require a statement of the purpose for requesting NRC's consent to a transfer, but there is no regulation that requires ENO to make the affirmative showing sought by Petitioners. There is no regulatory dictate that ENO show that the proposed reorganization will achieve the "stated objectives."[91] By positing new requirements beyond those contained in 10 CFR Part 50, Proposed Contention 2 impermissibly exceeds the scope of this proceeding, contrary to 10 CFR § 2.309(f)(1)(iii).[92]

UWUA Locals do not explicitly challenge the technical or financial qualifications of the Applicants to maintain safe operation of the Facilities.[93] UWUA Locals do not even suggest that the failure to attain the "promised benefits" of the restructuring will adversely impact those qualifications or otherwise undermine safe operation of the Facilities. As such, Proposed Contention 2 raises no issues material to the findings that the NRC must make in this proceeding, contrary to 10 CFR § 2.309(f)(1)(iv).

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[90] *Hydro Res., Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001).

[91] February 5 Petition at 11.

[92] *See*, *e.g.*, *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159, *aff'd*, CLI-01-17, 54 NRC 3 (2001).

[93] Petitioners make reference to expenses listed as "Other" and "Administrative Expense" and appear to be suggesting that there is some affirmative need to inquire into the details of these expenses. March 18 Supplemental Petition at 6. However, Petitioners misunderstand the required NRC finding, which is that there is reasonable assurance of adequate revenues to fund expenses. In the absence of evidence that the projected costs are understated in some material way or that revenues are overstated in some material way, there is no need for a detailed inquiry into each line item.

UWUA Locals' attempt in their March 18 Supplemental Petition to bolster Proposed Contention 2 is unavailing. Petitioners again focus on issues that simply are not material to the Commission' statutory charge in this case: to determine whether the proposed shift in ultimate corporate control will affect the financial and technical qualifications of the NRC licensees. Instead, Petitioners assert that the proprietary financial data produced by ENO "do not demonstrate that the December 2007 proposal is beneficial to the Pilgrim plant, its employees, or the public as compared with the *status quo*."[94]

As discussed above, the AEA directs the Commission to ensure that its licensees conduct operations safely. It does not direct or authorize the NRC to act as an arbiter of commercial disputes (whether of a labor-related or contractual nature) or to pass judgment on the commercial practicability or fairness of private business ventures.[95] In suggesting that the Commission must determine whether the proposed restructuring is in the "public interest,"[96] UWUA Locals stray far beyond the proper scope of this proceeding. The Commission has held that "[t]he public interest is not a suitable standard for an NRC hearing"[97] because:

> This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest—other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility.[98]

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[94] March 18 Supplemental Petition at 5.

[95] *See*, *e.g.*, *CBS Corp.* (Waltz Mill Facility), CLI-07-15, 65 NRC 221, 234 (2007) ("The Commission will not be drawn into [commercial] disputes, absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders, and regulations.")

[96] March 18 Supplemental Petition at 7.

[97] *Diablo Canyon*, CLI-02-16, 55 NRC at 342.

[98] *Id.* (quoting *Consol. Edison Co. of N.Y.* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 149 (2001)).

The Vermont Public Service Board ("VPSB"), which is presiding over the pending Vermont Yankee proceeding often cited by Petitioners, is one example of an agency that that will examine whether the transaction promotes the public good of Vermont. The bottom line is that UWUA Locals seek relief not available in this forum.

Tellingly, Petitioners' discomfiture with the proposed restructuring derives largely from certain statements contained in the January 28, 2008, prefiled testimony of ENO's Chief Financial Officer, Wanda C. Curry. That testimony was submitted in support of a petition filed in the aforementioned Vermont Yankee proceeding, in which ENO and Entergy Nuclear Vermont Yankee, LLC ("ENVY") are seeking VPSB approvals of various aspects of the proposed transaction (as it pertains to Vermont Yankee).[99] In particular, UWUA Locals take issue with the potential issuance of certain guarantees, secured by the pledging of plant assets, in connection with four types of debt arrangements sought by NewCo. UWUA Locals contend that such guarantees and pledges would impose on the Facilities "backstop financial responsibility for NewCo's highly leveraged borrowings."[100] Quoting extensively from Ms. Curry's testimony, Petitioners assert: "Entergy has not demonstrated that the assumption of these obligations by Vermont Yankee, Pilgrim, and other plants is *an improvement*, or that the transaction is *otherwise in the public interest*."[101]

This argument, like others before it, must fail for its lack of materiality to this NRC proceeding. Whether the proposed restructuring will constitute an "improvement" or serve the "public interest" are not matters for the NRC. UWUA Locals do not establish any nexus

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[99] *See* Appendix to March 18 Supplemental Petition (Petition, Other Initial Pleadings and Prefiled Testimony of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., filed on January 28, 2008, with the State of Vermont Public Service Board and including the January 28, 2008, "Prefiled Testimony of Wanda C. Curry (hereinafter "Curry Testimony")).

[100] March 18 Supplemental Petition at 2; *see also id.* at 11-12.

[101] *Id.* at 7 (emphasis supplied).

between their concerns and the findings that the Commission must make in this proceeding. Also, UWUA Locals fail to recognize that the NRC's "creditor regulations" at 10 CFR § 50.81 expressly permit, without individual application, the creation of mortgages, pledges, or other liens in NRC-licensed facilities, including nuclear power plants.[102] Section 50.81, however, subjects creditors seeking to exercise their secured interests in NRC-licensed facilities to the "same requirements and restrictions" that apply to licensees, and precludes creditors from taking possession of a facility without prior NRC approval. In short, the mere creation of such secured interests in nuclear power plants does not give rise to a cognizable dispute. Moreover, to the extent Petitioners seek to object to the creation of security interests in or liens upon the commercial reactors at issue here, such an objection is an impermissible challenge to the NRC's creditor regulations, which already provide a general consent.

Finally, while UWUA Locals express strong reservations about the issuance of guarantees and related pledges of assets, they do not contend that such transactions would adversely affect nuclear safety at the Facilities. Nor do they seek directly to controvert the Application. NRC rules require a petitioner to read the pertinent portions of an application, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant.[103] A petitioner, in other words, must explain with particularity why the application is allegedly deficient in some material respect.[104] Here, while Petitioners cite extensively to testimony from a non-NRC proceeding, they never meaningfully engage the specifics of the

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[102] In fact, 10 CFR § 50.81, which is derived from AEA Section 184, states that it does not "affect the means of acquiring, or the priority of, any tax lien or other lien provided by law."

[103] Final Rule, "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process," 54 Fed. Reg. at 33,170; *Millstone*, CLI-01-24, 54 NRC at 358.

[104] *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991).

Applicants' technical or financial qualifications presentations, including the financial projections provided by ENO under the Confidentiality and Non-Disclosure Agreement.

In summary, Proposed Contention 2 is inadmissible. It raises issues that are neither within the scope of, nor material to, this proceeding, contrary to 10 CFR § 2.309(f)(1)(iii)-(iv). Moreover, the proposed contention lacks adequate support and does not establish a genuine dispute on a material issue of law or fact, contrary to 10 CFR § 2.309(f)(1)(v)-(vi).

3. Proposed Contention 3 Concerning Resolution of Managerial Conflicts is Inadmissible Because it Lacks Adequate Support, and Fails to Establish a Genuine Dispute on a Material Issue of Law or Fact

UWUA Locals' third contention states that "the Application should not be approved because the proposed 'NewCo' structure admits the possibility of managerial conflict, yet does not explain how any disputes will be resolved."[105] Specifically, after the restructuring, ENO,[106] the licensed operator of the Facilities, will be wholly owned and "single member managed" by ENOI Holdings, LLC.[107] That company, in turn, will be owned in equal part (*i.e.*, 50-50) by its two "members," which will be wholly owned subsidiaries of Entergy Corporation and NewCo.[108] UWUA Locals contend that "[i]t is not clear where or how [the] lines of authority are to be established."[109] They further assert that "[t]he Commission should require the submission and

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105 February 5 Petition at 12; March 18 Supplemental Petition at 7.

106 ENO will be converted to become a limited liability company, tentatively named "ENOI, LLC."

107 *See* Letter from Michael R. Kansler, President and Chief Executive Officer, Entergy, to NRC Document Control Desk, Subject: Supplemental Information #4 in Support of Application for Order Approving Indirect Transfer of Control of Licenses (Mar. 17, 2008) (ENOC-08-00012) ("March 2008 Supplement to Application") at 2 & Figure 4 (Simplified Organization Chart—Post Reorganization), *available at* ADAMS Accession No. ML080810285.

108 *Id.* The two subsidiaries are ETR ENOI Holdings, Inc. and NewCo ENOI Holdings, LLC. The March 2008 Supplement to the Application also refers to these two subsidiaries as "Members."

109 February 5 Petition at 12.

review of any such dispute resolution mechanisms before permitting the proposed transaction to go forward."[110]

Although the Application recognizes the *possibility* of an impasse in certain high-level management decisions involving ENOI Holdings, LLC (and thus, indirectly, ENO), it makes clear that such an impasse, even if unresolved, would not pose any risk to the public health and safety. As the December 2007 Supplement to the Application explains:

> Under the existing and any amended operating agreements with the individual plant owners, ENO will operate and make capital improvements at the plants in accordance with the operating licenses and applicable laws and regulatory requirements; ENO also shall have the *sole authority* as the operator of the plants to protect the public health and safety and comply with NRC orders and requirements. ENO will establish clear lines of authority to carry out its duties as an operator, and dispute resolution mechanisms will be established in the event of any disagreement among the two 50% owners of ENOI Holdings, LLC. Notwithstanding any such disagreement among the owners of ENO, *the Chief Nuclear Officer of ENO shall have the authority at all times to take any actions necessary to carry out ENO's responsibilities as the operator under the NRC Operating Licenses*, including any actions and/or expenditure of funds necessary to protect the public health and safety, to maintain safe operating or shutdown conditions at each plant, and to comply with NRC orders and requirements.[111]

The March 2008 Supplement to the Application reaffirms the post-reorganization authority of the ENO Chief Nuclear Officer to take any actions necessary to protect the public health and safety and to comply with NRC orders and requirements. In fact, it states that such authority will be explicitly provided for in "the terms of the governance provisions for ENOI

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[110] *Id.*

[111] *See* Letter from Michael R. Kansler, President and Chief Executive Officer, Entergy, to NRC Document Control Desk, Subject: Supplemental Information #2 in Support of Application for Order Approving Indirect Transfer of Control of Licenses (Dec. 5, 2007) (ENOC-07-00042) ("December 2007 Supplement to Application") at 3, *available at* ADAMS Accession No. ML073440039.

Holdings, LLC and/or contractual arrangements of ENO."[112] Therefore, after the reorganization, ENO will retain decisionmaking authority on nuclear safety and NRC regulatory compliance matters.[113]

This fact is dispositive with respect to UWUA Locals' proffered contention on "managerial conflict," to the extent that contention *arguably* can be construed to raise concerns related to nuclear safety. UWUA Locals never actually allege, or seek to demonstrate, that a disagreement between the two 50-percent owners of ENOI Holdings, LLC would pose a threat to the public health and safety. The Commission and ENO are left to infer such a concern.

The Application indicates, however, that decisions made by ENOI Holdings, LLC would relate to "high-level" corporate matters such as securities issuances or variation of securities rights, major tax matters, mergers, and acquisitions—not to nuclear safety matters.[114] After the restructuring, decisionmaking authority on nuclear safety matters would reside with the ENO Chief Nuclear Officer.[115] Any potential managerial "deadlocks" occurring at the holding company level and requiring dispute resolution "would include matters such as approval of the business plan or annual budget, variation or termination of material contracts, significant

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[112] March 2008 Supplement to Application at 4.

[113] NRC Regulatory Information Summary ("RIS") 2001-06 provides some insight into the nature of the decisionmaking authority of concern to the NRC in the context of proposed license transfers and their potential impacts on the technical qualifications of licensees. Among other things, the NRC considers an entity's authority to: continue operation or shut down the plant for repairs, start up the plant, make operability determinations for safety-related equipment, change staffing levels for licensed personnel, make organizational changes for Technical Specification required positions, defer repairs on safety-related equipment, make quality-assurance-related decisions, control the terms of employment of licensed staff, manage design control of the facility, determine whether NRC approval is needed under 10 CFR § 50.59, perform maintenance on safety-related equipment, decide whether to make a 10 CFR § 50.72 report, provide various program services (*e.g.*, health physics, fire protection), perform engineering work in safety-related systems, and maintain design basis documentation. *See* RIS 2001-06, "Criteria for Triggering a Review Under 10 CFR 50.80 for Non-Owner Operator Service Companies" (Feb. 15, 2001) at 3-4. After the restructuring, authority to take these types of actions will remain vested exclusively in the Chief Nuclear Officer of ENO.

[114] March 2008 Supplement to Application at 3.

[115] *Id.* at 4.

expenditures, incurring significant indebtedness, commencement of litigation, major regulatory filings, distributions, redemptions, selection of accountants and auditors, etc."[116] While such decisions are important, the Application provides no reason (nor do Petitioners) to believe that any related managerial disputes would adversely affect safe operation of the Facilities.

The fact is that nothing in the proposed restructuring—or, more importantly, in the proposed transfer of certain non-operating ownership interests in the Facilities—involves changes to plant design, programs, procedures, conduct of operations, organizational infrastructure, or staffing levels. Stated differently, there is no reason to suspect a material adverse change in the Applicants' qualifications. Because UWUA Locals have proffered no alleged facts or expert opinion to support a different conclusion, they have failed to raise a genuine dispute.

In as much as Proposed Contention 3 raises concerns about the lack of clarity regarding the precise terms of the dispute resolution mechanism, the contention has been rendered moot by subsequent developments. As UWUA Locals acknowledge in their March 18 Supplemental Petition, ENO has supplemented the Application to squarely address the issue of "deadlocks" on corporate matters to be decided by ENOI Holdings, LLC. Specifically, Entergy has committed to include in the Joint Venture Agreement for ENOI Holdings, LLC, to be executed by NewCo, a "Deadlock Matters" provision in substantially the same form and effect as the provisions included in the March 2008 Supplement to the Application.[117] Those provisions include procedures for identification, notification, and resolution of "deadlock matters" (including initial meetings, mediation, and arbitration). The March 2008 Supplement further states that those

[116] *Id.* at 3.

[117] *See id.* at 3-4.

provisions "are designed to ensure that a resolution is reached on any significant matter with respect to which the Members cannot agree."[118]

In their March 18 Supplemental Petition, UWUA Locals state in passing that Entergy's proposed dispute resolution mechanism "does not appear to include provision for accelerated procedures, should circumstances require a more expedited decision."[119] They also assert that it is not "clear that the limitations on the arbitrator's authority would be appropriate or beneficial in all cases."[120] Such nebulous statements do not constitute a particularized challenge to the Application. UWUA Locals do not explain what "circumstances" might require "a more expedited decision," or how much more "expedited" such a decision would need to be. With respect to the arbitration provisions, it is unclear what "limitations" UWUA Locals are alluding to, and why such limitations are of concern to UWUA Locals. Petitioners have not come remotely close to the meeting the Commission's "strict" pleading standards, the hallmark of which is specificity.

More fundamentally, UWUA Locals never explain how their stated concerns about dispute resolution mechanisms for "deadlock matters" give rise to a *genuine* dispute on a *material* issue of law or fact.[121] As set forth above, the restructuring and attendant indirect transfer of control will not effect any material change to the *qualifications* of the Applicants. The Application states unequivocally that the ENO Chief Nuclear Officer will have the authority "at all times" to take "any actions" necessary to carry out ENO's responsibilities as the operator under the NRC Operating Licenses, including any actions or expenditure of funds necessary to

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[118] *Id.* at 4.

[119] March 18 Supplemental Petition at 7.

[120] *Id.*

[121] The Commission has observed that "[t]he dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'" *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999); *see also* 54 Fed. Reg. at 33,172.

protect public health and safety. In other words, if expedition is required, the ENO Chief Nuclear Officer will have the authority to act, even if a "deadlock" among the owners exists. UWUA Locals' present no information to suggest the contrary. As such, they have failed to sustain their burden to show, with the requisite basis and specificity, that the Application is deficient in some material respect.

4. Proposed Contention 4 Concerning Unknown Financial Impacts is Inadmissible Because it Seeks Relief Not Available in this Forum, Lacks Adequate Support, and Does Not Establish a Genuine Dispute on a Material Issue of Law or Fact

UWUA Locals' final proposed contention states that "the Application should not be approved because the financial impacts of the NewCo proposal are unknown."[122] The gist of Proposed Contention 4 is that the creation of NewCo and related structural changes may result in an increase in corporate overheads and the allocation of those overheads to the Pilgrim plant. Petitioners provide the following synopsis of their concerns:

> . . . Entergy's proposed "NewCo" or "SpinCo" corporate restructuring poses potentially enormous financial risks for Pilgrim and, it appears, for the five other Entergy nuclear facilities that would likewise be involved in the restructuring. The transaction is structured such that the six Entergy nuclear plants will have backstop financial responsibility for NewCo's highly leveraged borrowings. Immediately prior to the transaction, the nuclear plants were funded in part by Entergy Corporation capital, and supported from a financial risk perspective by Entergy Corporation's immense and diversified generation portfolio. . . . Once the NewCo transaction is approved, the protections of investors, consumers and the public that have long flowed from Entergy's legacy as a PUHCA registered system will be removed, NewCo will be saddled with massive debt, and the public, investors and consumers can look only to the much-diminished cash flow from the six nuclear plants in the event of a financial downturn. What little we know of NewCo's structure provides cold comfort to the public and the employee workforce at the plants, which will be dependent upon NewCo to operate a nuclear

[122] February 5 Petition at 12.

> fleet in a safe manner, free from operating neglect and excessive outages.[123]

Proposed Contention 4 is inadmissible for the reasons set forth below. In brief, the contention raises issues that go well beyond the purview of the NRC's authority and required findings in this proceeding. In addition, it relies heavily on speculation (rather than facts or expert opinion) and fails to directly controvert the Application on a material issue of law or fact.

a. Petitioners seek relief that is not available in this forum

As a threshold matter, Proposed Contention 4 is inadmissible because it seeks relief not available this forum. Reprising an earlier request, UWUA Locals ask the Commission to evaluate whether the proposed restructuring will inure to the benefit of the Pilgrim plant and serve the "public interest." Petitioners state, for example, that an NRC hearing is warranted because they "have no way of knowing how substantial an impact [the restructuring] will have on Pilgrim staffing or operations, or whether (and, if so, when and how) there will be offsetting financial benefits."[124] They urge the Commission to undertake "[a] full examination of the proposal, including thorough hearings," so that "the Commission can identify risks, fashion remedies and, if warranted, condition its approval in ways that *protect the public interest*."[125] As explained above, this proceeding centers on whether the proposed indirect transfer of control could affect the Applicants' qualifications in a way that might pose a risk to public health and safety. It is not a surrogate public service commission proceeding—the matters raised by UWUA Locals are not susceptible to resolution here. Petitioners have come to the wrong forum for the relief sought.

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[123] March 18 Supplemental Petition at 2-3.

[124] February 5 Petition at 13.

[125] March 18 Supplemental Petition at 8 (emphasis supplied).

b. The Application contains the information required by 10 CFR § 50.33(f)(2) and specified in NRC guidance

The relevant inquiry in *this* proceeding is whether the Application demonstrates compliance with the requirements in 10 CFR § 50.33(f)(2). That regulation states:

> The Applicant shall submit information that demonstrates the applicant possesses or has *reasonable assurance* of obtaining funds necessary to cover estimated operation costs for the period of the license. The applicant shall submit estimates for annual operating costs for each of the first five years of operation of the facility. The applicant shall also indicate the source(s) of funds to cover these costs.[126]

The NRC has published a Standard Review Plan ("SRP") on financial qualifications and decommissioning funding assurance for power reactor licensees to facilitate compliance with 10 CFR § 50.33(f)(2).[127] ENO prepared its Application in accordance with that guidance.

Accordingly, ENO has submitted to the NRC balance sheets (for the period 2008-2012) and Projected Income Statements (for the period 2008-2012) for Entergy Pilgrim and the other licensed owners of the Facilities, as well as a projected consolidated balance sheet and Projected Income Statement for NewCo (which, as a holding company, will indirectly own all of the corporate entities licensed to own the Facilities). In accordance with NRC guidance and the Staff's request, ENO has submitted two sets of sensitivity analyses of the Projected Income Statements that respectively reflect: (i) an assumed 10% reduction in the average contract/market *price* of energy projected to be generated, and (ii) an assumed 10% reduction in the *amount* of energy projected to be generated.[128] The Projected Income Statements for the

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[126] 10 CFR § 50.33(f)(2) (emphasis supplied).

[127] NUREG-1577, "Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance," Rev. 1 (1999).

[128] *See* Letter from Michael R. Kansler, President and Chief Executive Officer, Entergy, to NRC Document Control Desk, Subject: Supplemental Information in Support of Application for Order Approving Indirect Transfer of Control of Licenses (Oct. 31, 2007) (ENOC-07-00036) ("October 2007 Supplement to Application") at 2 (and attached "Sensitivity Analysis"), *available at* ADAMS Accession No. ML073100216.

licensed owners show that anticipated revenues from sales of capacity and energy from the Facilities provide reasonable assurance of an adequate source of funds to meet the ongoing O&M expenses for the Facilities.

In further compliance with 10 CFR § 50.33(f)(2), the Application demonstrates that ENO, the licensed operator of the Facilities, 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 identical to, or consistent with, those previously described to the NRC.[129] 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.[130] 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 multiple-plant outages, should the circumstances necessitate access to such funds.[131] Thus, the total amount available would fund approximately six-month's worth of fixed O&M expenses for *all* six Facilities (or, for any one

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In their February 5 Petition, UWUA Locals state that they "do not know the basis for the potential for a '10% reduction in projected revenue.'" February 5 Petition at 14. As noted above, the assumed 10% reduction is consistent with NRC expectations concerning the conduct of sensitivity analyses of Projected Income Statements. In fact, ENO filed its October 2007 Sensitivity Analysis specifically in response to an October 18, 2008, NRC Staff Request for Additional Information (available at ADAMS Accession No. ML072890337). The assumption is used to test whether adequate funds will be available if actual revenues are lower than projected. It in no way suggests a deficiency in Entergy's statements or financial qualifications demonstration.

[129] *See id.* at 5-9.

[130] *See* Application at 7-9; December 2007 Supplement to Application at 3-4 and Attachment 5 (Revised). The Support Agreement is intended to support the NRC's finding of reasonable assurance. As the Application notes, the Applicants do not expect to need to request funding under this formal agreement, because they expect that, as the need for funding arises during day-to-day operations or otherwise, they will have access to funds from capital contributions, loans, credit lines, or other sources in amounts adequate to support safe operation of the Facilities. Application at 9.

[131] Application at 8-9.

facility, for a period significantly exceeding the 6-month period specified in the SRP).[132] The Application notes that this approach is superior to the current disparate support arrangements.[133]

c. Petitioners have not identified any particular safety or legal issue requiring rejection of the Application or otherwise precluding a finding of reasonable assurance by the Commission

Even when viewed in a light most favorable to Petitioners—*i.e.*, as an ostensible health-and-safety-related challenge to the Applicants' financial qualifications—Proposed Contention 4 still fails to meet the NRC's strict contention admissibility criteria. An admissible contention "must explain, with specificity, *particular safety or legal reasons* requiring rejection of the contested [application]."[134] In the context of this proceeding, UWUA Locals, therefore, must raise issues that are material to the Commission's finding that the Applicants possess, or have reasonable assurance of obtaining, the funds necessary to cover estimated operating costs. For present purposes, this devolves into two relevant inquiries: (1) whether Entergy Nuclear Generation Company, LLC (Entergy Pilgrim) is financially qualified as the licensed owner of the Pilgrim plant and (2) whether ENO is financially qualified as the licensed operator of the Pilgrim plant. Given that ENO's financial qualifications are based upon its contractual rights vis-à-vis Entergy Pilgrim, the second inquiry is dependent upon the first. The financial *bona fides* of NewCo are only relevant to the extent they impact Entergy Pilgrim, and this focuses almost entirely on the question of whether or not NewCo is likely have the resources to meet its obligations under the financial Support Agreement being provided. UWUA Locals have not directly controverted the Application with respect to these issues.[135]

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[132] *Id.*

[133] *Id.* at 9.

[134] *Millstone*, CLI-01-24, 54 NRC at 359-60 (emphasis supplied).

[135] *See* 10 CFR § 2.309(f)(1)(vi).

(1) Petitioners' asserted preference for the current Entergy corporate structure does not establish a cognizable dispute

Proposed Contention 4 focuses largely on the relative merits (at least as UWUA Locals see them) of the current and post-restructuring Entergy organizations. Specifically, Petitioners seek to contrast the "relative financial security and relatively low leverage" of Entergy Corporation with the "highly leveraged borrowings" and "extraordinary debt service obligations" of NewCo.[136] Petitioners observe that "Entergy Corporation will be in a very different financial position following implementation of NewCo."[137] Such a discussion, however, by itself does not provide the basis for an admissible contention. The mere fact that there will be a shift in financial responsibilities, or that Petitioners prefer the current corporate structure, is not sufficient to trigger an adjudicatory hearing.

As noted above, the Commission does not regulate the "market strategies" of licensees or otherwise intervene in their commercial prerogatives. Rather, the issue here is whether or not the post-transfer organization satisfies NRC's requirements. If so, the Applicants are entitled to an approval, even if it could be demonstrated that the prior ownership structure was somehow superior. NRC's authority is not centered on what corporate entity or entities "ought" to own NRC-licensed facilities or what corporate structures might be optimal, but rather, NRC's authority is directed to whether or not a proposed corporate entity is qualified to own and operate an NRC-licensed facility under a proposed corporate structure. It is simply not enough for the UWUA Locals to prefer having Entergy Corporation as the ultimate corporate parent of Entergy Pilgrim.

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[136] March 18 Supplemental Petition at 2-3, 8-10.

[137] As the very testimony quoted by UWUA Locals illustrates, that is precisely the point of the proposed restructuring. The Entergy organization is seeking to modify the current financing paradigm in order to reduce Entergy Corporation's debt and return value to its shareholders, among other things. *See* March 18 Supplemental Petition at 11 (quoting Curry Testimony at 18, 22).

(2) Petitioners do not challenge the financial projections for the Pilgrim owner-licensee or NewCo with requisite specificity and support to establish a cognizable dispute

As noted above, pursuant to the Confidentiality and Non-Disclosure Agreement executed on February 26, 2008, ENO provided UWUA Locals with a copy of the confidential proprietary financial projections and associated sensitivity analyses for Entergy Pilgrim and NewCo. UWUA Locals' March 18 Supplemental Petition contains some limited discussion of those projections.[138] Even as amended, Proposed Contention 4 fails to establish a genuine dispute on the matter of financial qualifications.

Before turning to Petitioners' specific claims, it warrants emphasis that the Commission does not require absolute certainty in an applicant's financial projections. As the Commission explained in the *Seabrook* license transfer proceeding:

> To be sure, safe operation of a nuclear plant requires adequate funding, but the potential safety impacts from a shortfall in funding are not so direct or immediate as the safety impacts of significant technical deficiencies. Generally speaking, then, the level of assurance the Commission finds it reasonable to require regarding a licensee's ability to meet financial obligations is less than the extremely high assurance the Commission requires regarding the safety of reactor design, construction, and operation. The Commission will accept financial assurances based on *plausible assumptions and forecasts*, even though the possibility is not insignificant that things will turn out less favorably than expected. *Thus, the casting of doubt on some aspects of proposed funding plans is not by itself sufficient to defeat a finding of reasonable assurance*.[139]

To be admissible, therefore, a contention must demonstrate the existence of a genuine dispute with respect to whether the applicant's financial projections meet this standard. The Commission has rejected proposed financial qualifications contentions where the petitioner

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[138] *See* March 18 Supplemental Petition at 10-15.

[139] *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 221-22 (1999).

failed to proffer "plausible and fact-based claims that a new reactor owner or operator lacks sufficient financing to run the reactor safely."[140]

UWUA Locals have not met their burden in this regard. First, Petitioners assert that ENO has not explained or documented the basis for the forecast average contract or average market prices used therein.[141] UWUA Locals assert that, absent such data, it is not possible to assess the validity of these projections.[142] To be admissible, however, a contention must do more than allege that an application is deficient or inadequate. Here, ENO has provided projections that comply with NRC's requirements, and the information provided includes sufficient detail for the NRC to assess the reasonableness of the projections, including various key assumptions regarding capacity and sales of energy. For example, the NRC Staff can be expected to assess capacity and revenue projections in the context of each relevant plant and each relevant regional market. UWUA Locals have supplied no information—no factual affidavits, no documents, no expert opinion—to suggest that there are "relevant uncertainties significantly greater than those that usually cloud business outlooks."[143]

Second, UWUA Locals complain that the average annual contract price in the financial projections for NewCo do not match the average annual contract prices in the financial projections for Entergy Pilgrim.[144] Specifically, Petitioners note that Entergy Pilgrim's contract prices are lower than the NewCo contract prices for years 2008, 2009 and 2010, but are higher

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[140] *Oyster Creek*, CLI-00-6, 51 NRC at 205-08 (rejecting proposed contention because the petitioner "offered no tangible information, no experts, no substantive affidavits," but instead "provided bare assertions and speculation"). *Compare Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 180 (1998), *aff'd*, CLI-98-13, 48 NRC 26 (1998) (stating that a petitioner must "provide documents or other factual information or expert opinion that set forth the necessary technical analysis to show why the proffered bases support its contention").

[141] *See* March 18 Supplemental Petition at 13.

[142] *See id.*

[143] *Seabrook*, CLI-99-6, 49 NRC at 222.

[144] *See* March 18 Supplemental Petition at 13.

for years 2011 and 2012. Obviously, the NewCo financial projections reflect contract prices for revenue from six operating units that are located in four different states. It therefore should be no surprise that NewCo's average contract prices across its fleet are not identical to the contract prices expected to be received by Entergy Pilgrim. As such, the UWUA Locals' observation fails to raise any genuine dispute or issue for consideration in a hearing.[145]

Third, Petitioners assert that "Entergy's December average market price projections are significantly higher than the projections provided to the NRC barely a month earlier, on October 31, 2007."[146] At the outset, the misleading suggestion that Entergy's projections changed significantly over the course of just a few weeks is disingenuous. The October submission is a sensitivity analysis of the projections submitted in July 2007, and each page of the October sensitivity projections has a label stating "Forecasts as of April 2007."[147] It should be no surprise that Entergy's view of future market prices might vary over the course of the many months that separate the projections. Moreover, Entergy's market price projections are largely irrelevant, because they do not have any material impact on Entergy Pilgrim's financial qualifications. Entergy Pilgrim itself receives contract prices for its energy production, and it is not subject to market price fluctuations feared by Petitioners. To the extent NewCo's revenues from market sales are marginally relevant to the NRC's findings regarding Entergy Pilgrim, the sensitivity analyses accompanying the December projections demonstrate that, even if market prices are lower than projected, NewCo will still have more than adequate resources to stand behind the $700 million financial Support Agreement being provided by NewCo. Regardless,

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[145] *See* 10 CFR § 2.309(f)(1)(iv), (vi).

[146] March 18 Supplemental Petition at 13.

[147] *See* October 2007 Supplement to Application.

Petitioners have provided no tangible information, no experts, or no substantive affidavits to suggest that ENO's projections are not based on plausible assumptions.

Fourth, Petitioners state that Entergy's financial forecasts for NewCo indicate that the source of nuclear plant revenues will shift dramatically from contracts to the markets over the 5-year forecast period.[148] This observation, however, merely reflects the NewCo business model. UWUA Locals again fail to explain how this observation by itself is sufficient to defeat a finding of reasonable assurance. Once again, Entergy Pilgrim will receive payments pursuant to its existing contracts at pre-established contract prices, which eliminates the purported concern about "potentially volatile market sales."[149] The financial projections demonstrate that there is reasonable assurance that Entergy Pilgrim will have an adequate source of funds to pay its operating expenses, and as such Entergy Pilgrim is financially qualified to hold the license for the Pilgrim plant.[150] Petitioners present no information to suggest otherwise.

Finally, UWUA Locals note "a significant change in the level of Accrued Pension Liability and Other" from July 2007 Application to the December 2007 supplement thereto.[151] Petitioners, however, make no effort to explain how this observation gives rise to a litigable dispute. The financial projections show that NewCo will have sufficient resources to meet its obligations (including pension liabilities), and Petitioners present no information or analysis which suggests that NewCo is likely to be unable to meet its obligations under the proposed Support Agreement with the owner licensees—the only inquiry of relevance here.

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148 *See* March 18 Supplemental Petition at 13-14.

149 *Id.* at 14.

150 *See* 10 CFR § 50.33(f)(2); *Vt. Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, Units 1 and 2), CLI-00-20, 52 NRC 151, 176 (2000) (stating that "a license transfer applicant satisfies our financial qualifications rule if it provides a cost-and-revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs") (citing *Oyster Creek*, CLI-00-6, 51 NRC at 206-08).

151 *See* March 18 Supplemental Petition at 14-15.

(3) Petitioners' assertions concerning highly leveraged borrowings by NewCo and the creation of secured interests in the assets of Pilgrim or other Facilities do not establish a cognizable dispute

Rather than focusing on the adequacy of the financial forecasts for Entergy Pilgrim, Petitioners allege concerns regarding "massive" and "extraordinary" debt service obligations to be assumed by NewCo.[152] Resorting to speculation, they postulate a chain of hypothetical events which they claim *could* portend financial debacle for the post-reorganization Entergy:

> NewCo sales and revenues *may* end up being below forecasted levels if, for example, its market price projections prove to overly optimistic, or if unit operating costs skyrocket and revenues plummet as a result of an extended outage, a catastrophic failure, or any unexpected event. . . . The reduced free cash flow, amounts of equity sources, and borrowing capacity *could* lead to strains at the nuclear plants, which under the proposed arrangements would serve as guarantors for NewCo's enormous borrowings. If unanticipated (or even anticipated) events occur, it would not be hard to see how these financial strains *could* lead to layoffs, reductions in the provision of needed maintenance and plant security, poor operational performance, failure to fund pensions and reserves, and other such deleterious impacts.[153]

Petitioners further assert that the transaction is structured such that the six Entergy nuclear plants will have "backstop financial responsibility" for NewCo's highly leveraged borrowings.[154] Specifically, they allege that, because NewCo will be "saddled with massive debt, [] the public, investors and consumers can look only to the much-diminished cash flow from the six nuclear plants in the event of a financial downturn."[155]

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[152] March 18 Supplemental Petition at 10.

[153] *Id.* at 9-10 (internal footnote omitted) (emphasis supplied).

[154] *Id.* at 2, 11-12. To the extent Petitioners are contesting the potential creation of secured credit interests in Pilgrim or other plant assets, they are impermissibly collaterally attacking an NRC regulation. See 10 CFR § 2.335(a). As noted above, in 10 CFR § 50.81, the Commission has, on a generic basis, expressly consented to the formation of such interests, subject to certain conditions set forth in that regulation.

[155] March 18 Supplemental Petition at 3.

Petitioners' conjectural and pessimistic prognostications, like those of the petitioner in *Oyster Creek*, are insufficient to trigger an adjudicatory hearing.[156] UWUA Locals provide no tangible information, documents, or expert opinion to support their allegations that the proposed restructuring *could* impose "financial strains" and have "deleterious impacts" on Pilgrim or any of the other Facilities. As discussed above, the financial projections—which Petitioners have not challenged with the necessary specificity and support—demonstrate the financial qualifications of Entergy Pilgrim as the owner licensee. The Application makes clear that ENO will receive the necessary revenues to operate and maintain the plants, pursuant to operating agreements or other intra-corporate arrangements. Moreover, NewCo will provide adequate resources to backstop its subsidiaries, if needed, and this is assured by its commitment to execute a financial Support Agreement with the Applicants in the total amount of $700 million. Petitioners ignore this information. As shown above, UWUA Locals provide no reason to believe that NewCo would be unable to meet its obligations under the Support Agreement with Entergy Pilgrim or the other owner licensees.

It is telling that Petitioners focus more on the testimony of Entergy's Chief Financial Officer—proffered in a separate public service board proceeding—than on the financial projections and other information submitted by ENO in its Application. In any case, none of the testimony cited by UWUA Locals in the basis statements for their contention defeats a finding of reasonable assurance by the Commission in this proceeding. Moreover, it warrants mention that Petitioners ignore portions of that testimony that contradict or undermine their proposed contentions. For example, Ms. Curry proffered testimony that undermines any suggestion that

[156] *Oyster Creek*, CLI-00-6, 51 NRC at 208.

NewCo will assume a precarious financial condition or be incapable of meeting its obligations under the Support Agreement, and instead, her testimony supports the contrary proposition:

> If NewCo places $4,500,000,000 of notes and enters into the Credit Facilities, its capitalization strategy will be similar to those of other EWGs [exempt wholesale generators]. EWGs are typically rated below investment grade, with total debt normally comprising anywhere from approximately 45% to 55% of total enterprise value and an average S&P rating of approximately single B.
>
> NewCo is expected to take on a slightly more conservative capital structure, with an anticipated S&P rating in the BB range and an expected debt-to-total-enterprise value of 30% to 45% (ultimately debt-to-total-enterprise value will depend on how the market values NewCo's common stock after closing). NewCo will be placing the debt with sophisticated lenders, and they will not lend to NewCo any more capital than they believe is supported by NewCo's balance sheet and the underlying value of and cash flow from its wholesale fleet.[157]

Ms. Curry also testified at length about the business rationale for the proposed restructuring (including its anticipated benefits), ENO's operating authority under the post-restructuring Operating Agreement, and the process for resolving decisionmaking disputes stemming from Entergy Corporation's and NewCo's equal (50-50) ownership of ENOI Holdings, LLC.[158] UWUA Locals ignore that testimony, which further underscores the inadmissibility of their proposed contentions.

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[157] Curry Testimony at 22-23 (Answer 25), attached as Appendix to March 18 Supplemental Petition.

[158] *See id.* at 5-17, 27-33.

V. CONCLUSION

For the foregoing reasons, UWUA Locals' February 5 Petition and March 18 Supplemental Petition should be denied in their entirety. Petitioners have not established standing in the indirect license transfer proceeding. Nor have they proffered an admissible contention. Accordingly, no hearing is warranted.

Respectfully submitted,

Signed (electronically) by

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