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 25, 2008

ENTERGY NUCLEAR OPERATIONS, INC.'S MOTION TO STRIKE
IMPERMISSIBLE PORTIONS OF UWUA LOCALS' APRIL 15, 2008 REPLY

I. INTRODUCTION

In accordance with 10 CFR § 2.323(a), Entergy Nuclear Operations, Inc. ("ENO" or "Applicant"), hereby moves to strike portions of the "Reply of Locals 369 and 590, Utility Workers Union of America, AFL-CIO to Answer of Entergy Nuclear Operations, Inc. Opposing Petitions for Leave to Intervene, Request for Hearing, and Related Requests for Relief" ("Reply"), filed by Locals 369 and 590 ("UWUA Locals" or "Petitioners") on April 15, 2008. UWUA Locals' Reply

proffers numerous new arguments, including arguments based on four new affidavits and a new exhibit.[1] UWUA Locals seek impermissibly to expand the scope of their original February 5, 2008, Petition to Intervene,[2] as supplemented on March 18, 2008[3] (collectively, "Petition to Intervene"). Furthermore, because UWUA Locals have not requested leave to amend their contentions, either to expand their original scope or to submit new bases, they have failed to comply with the standards governing late-filed contentions set forth in 10 CFR § 2.309(c), (f)(2). Accordingly, ENO respectfully requests that the new arguments, new affidavits, and new documentary references—including all portions of UWUA Locals' Reply referring to or relying thereon—be stricken as contrary to controlling NRC procedural rules and legal precedent.

II. BACKGROUND

The procedural history associated with this indirect license transfer case[4] is detailed in ENO's April 8, 2008, Answer to UWUA Locals' February 5 Petition and March 18 Supplemental Petition.[5] In brief, 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

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1 In accordance with 10 CFR § 2.323(b), on April 24, 2008, counsel for ENO discussed this Motion with counsel for UWUA Locals in an attempt to resolve this issue. The parties were unable to reach agreement on an acceptable means of resolving the matters raised in the Motion.

2 *See* Petition of [UWUA Locals] 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").

3 *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").

4 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"). 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.

5 *See* Answer of Entergy Nuclear Operations, Inc. Opposing Petition for Leave to Intervene and Request for Hearing Locals 369 and 590, Utility Workers Union of America, AFL-CIO" (Apr. 8, 2008) ("ENO Answer").

application (*i.e.*, one for each of the Facilities). The Commission offered an opportunity to any person, whose interest may be affected by the Commission's action on the proposed transfer, to request a hearing and file a petition for leave to intervene in the indirect transfer proceedings within 20 days from the date of publication of the notices.[6] The Commission stated that any such petitions should be filed in accordance with the pleading requirements set forth in 10 CFR § 2.309.

On February 5, 2008, UWUA Locals filed their Petition to Intervene. On March 18, 2008, in accordance with the Revised Filing Schedule approved by the Commission,[7] UWUA Locals filed their March 18 Supplemental Petition after reviewing the confidential proprietary information furnished by ENO under a February 26, 2008, Confidentiality and Non-Disclosure Agreement executed by ENO and UWUA Locals. ENO filed its Answer to the Petition to Intervene on April 8, 2008. UWUA Locals, in turn, filed their Reply on April 15, 2008.

As set forth below, the 33-page Reply seeks to expand substantially the scope of UWUA Locals' Petition to Intervene by belatedly introducing new arguments and documents in support of the proffered contentions. UWUA Locals, however, make no attempt to address, and do not meet, the late-filing criteria of 10 CFR § 2.309(c), (f)(2). Therefore, the Commission should strike the portions of UWUA Locals' Reply identified herein as contrary to its rules and precedent.

III. LEGAL STANDARDS

A. New Arguments and Supporting Information are Prohibited in Reply Briefs

UWUA Locals may not introduce additional information or make new arguments in its reply brief. "It is well established in NRC proceedings that a reply cannot expand the scope of the

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

[7] *See* Commission Order (unpublished) (Feb. 28, 2008) (granting 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, dated February 26, 2008).

arguments set forth in the original hearing request."[8] Because a reply is intended solely to provide a party an opportunity to address arguments raised in answers, it may not use its reply as a vehicle to introduce new arguments or support, may not expand the scope of arguments set forth in its original petition, and may not attempt to "rehabilitate" an otherwise deficient contention.[9] Rather, "[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it."[10]

The Commission's prohibition on new arguments in replies, found in 10 CFR Part 2 and in Commission precedent, is rooted in the Commission's interests in conducting adjudicatory hearings efficiently and in conformance with basic principles of fairness. The Commission has recognized that "[a]s we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount."[11] It has further stated that:

> NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners. But there would be no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements every time they "realize[d] . . . that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset."[12]

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8 *Nuclear Mgmt. Co.*, *LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

9 *See Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 198 (2006) (finding that petitioners impermissibly "expand[ed] their arguments" by filing a second declaration from their expert in a reply brief that provided additional detail regarding the proposed contentions). The Board in the same proceeding struck all portions of the petitioners' expert's second declaration relating to a steam dryer aging management contention, as well as the entire testimony of a state engineer before the state public service department, finding that these portions of the reply and its supporting documents "include[d] new arguments and factual information that were not included in the initial petition and do not directly address challenges in the answers, and that therefore exceed the permissible scope of a reply." *Id.* at 191; *see also Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 351 (2006) (striking references to various letters, NRC Staff presentations, and briefings from public meetings not included in the original petition to intervene "as of the sort that might have been included in the original basis for the contention").

10 *Palisades*, CLI-06-17, 63 NRC at 732.

11 *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004).

12 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (citation omitted).

Accordingly, a party must include all of its arguments and claims in its initial filing. Allowing a party to amend or supplement its pleadings in reply to the applicant's answers would run afoul of the Commission's clear directives:

> Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements . . . by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later. The Commission has made numerous efforts over the years to avoid unnecessary delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort.[13]

Because NRC regulations do not allow the applicant to respond to a petitioner's reply, principles of fairness mandate that the petitioner restrict its reply brief to addressing issues raised in the applicant's answer;[14] "[a]llowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."[15] Thus, "[i]n Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief."[16] Accordingly, "[a]ny reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer."[17] Any arguments that improperly expand upon that must be stricken.[18]

B. A Petitioner Attempting to Introduce New Information Must Satisfy the Commission's Late-Filed Contention Criteria

New arguments or support for a contention "cannot be introduced in a reply brief, or any other time after the date the original contentions are due, unless the petitioner meets the late-filing

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13 *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004) (internal citation and quotation marks omitted).

14 Under 10 CFR § 2.309(h)(3), an applicant/licensee is precluded from filing an answer to a petitioner's reply.

15 *Palisades*, CLI-06-17, 63 NRC at 732.

16 *LES*, CLI-04-25, 60 NRC at 225 (citing *Amgen Inc. v. Smith*, 357 F.3d 103, 117 (D.C.Cir. 2004).

17 Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

18 The presiding officer has the authority to strike individual arguments and exhibits. *See generally* 10 CFR § 2.319 (The presiding officer has all the powers necessary "to take appropriate action to control the prehearing . . . process," including the authority to "strike any portion of a written presentation").

criteria set forth in 10 CFR § 2.309(c), (f)(2)."[19] A petitioner seeking to submit late-filed contentions is under an affirmative burden to demonstrate that it satisfies the criteria of Section 2.309(f)(2): (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.[20] Section 2.309(c) further provides that nontimely filings may be entertained only following a determination by the presiding officer that a balancing of the eight factors enumerated in that regulation weighs in favor of admission.[21] Allowing a Petitioner to raise new issues and arguments in a reply brief without addressing and satisfying the late-filing criteria "would effectively bypass and eviscerate [NRC] rules governing timely filing, contention amendment, and submission of late-filed contentions."[22]

IV. DISCUSSION

UWUA Locals' Reply bears little resemblance to its Petition to Intervene and goes far beyond the arguments raised in the Applicant's Answer. UWUA Locals improperly present multifarious new arguments or bases to bolster their deficient proposed contentions,[23] based, in principal part, on three new standing-related affidavits, a new expert affidavit, and new

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19 *Palisades*, CLI-06-17, 63 NRC at 732.

20 10 CFR § 2.309(f)(2)(i)-(iii).

21 The Commission made this clear in its hearing notices for the six indirect license transfer matters associated with Entergy's proposed corporate restructuring: "Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission . . . that the petition and/or request should be granted and/or the contentions should be admitted based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)-(viii)." *See*, *e.g.*, Pilgrim Notice, 73 Fed. Reg. at 2953.

22 *LES*, CLI-04-35, 60 NRC at 623. *See also La. Energy Servs., L.P.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004) (ruling that reply filings containing new information constituted untimely attempts to amend the original petitions, without addressing the late-filing factors in 10 CFR § 2.309(c), (f)(2), and therefore could not be considered in determining the admissibility of the proposed contentions).

23 Notably, UWUA Locals have withdrawn Proposed Contention 2, *albeit* purportedly for reasons of "administrative convenience." Reply at 12.

documentary references, including an exhibit. Moreover, Petitioners introduce all of this new information without addressing the late-filing standards set forth in 10 CFR § 2.309(c), (f)(2). Accordingly, these new arguments and new documents must be stricken from their Reply.

A. The Three New Affidavits Submitted by UWUA Locals to Support Their Claim of Standing to Intervene Should Be Stricken

As stated in ENO's Answer, though asserting representational standing, UWUA Locals failed to identify any individual members of their organizations by name and address, or to demonstrate, by affidavit, that the organizations are authorized by any member to request a hearing on behalf of the member.[24] As the Commission stated in *Palisades*, "[t]he failure both to identify the member(s) [the petitioners] purport to represent and to provide proof of authorization therefore precludes [petitioners] from qualifying as intervenors."[25] UWUA Locals now attempt to cure this deficiency by submitting in Attachment 1 to the Reply affidavits from three UWUA Locals members: David Leonardi, Murray Williams, and Fred DiCristofaro.

The three affidavits should be stricken. As explained above, the NRC pleading requirements at 10 CFR § 2.309 "demand a level of discipline and preparedness on the part of petitioners."[26] Without doubt, this includes a petitioner's clear and affirmative obligation to provide—in its *original* petition to intervene—the information necessary to support its standing. Petitioners failed to meet that obligation. Now, they offer the *post hoc* rationalization that, "like all local unions, [they] are already the authorized representatives of their members," and the three affidavits provide "additional assurance" of this purported authorization.[27] This is unavailing. Presumably, UWUA Locals are authorized to represent their members in labor-related disputes and collective bargaining

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[24] ENO Answer at 12-13.

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

[26] *McGuire*, CLI-03-17, 58 NRC at 428.

[27] Reply at 2.

matters. However, there is no reason to believe, nor should the NRC presume, that the scope of a union's authorization encompasses *any* litigation in *any* forum, including administrative litigation before the NRC. Petitioners' unsupported claims of implicit authorization to represent its members in NRC-related litigation simply do not justify the belatedness of the three standing affidavits. Accordingly, those affidavits should be stricken. UWUA Locals have not demonstrated standing.

B. The New Affidavit of Whitfield A. Russell Filed by UWUA Locals Substantially Expands the Bases of their Proposed Contentions and Should be Summarily Stricken

In Attachment 2 to the Reply, UWUA Locals include—for the first time—an affidavit from an alleged expert, *i.e*., the April 15, 2008, Affidavit of Whitfield A. Russell ("Russell Affidavit"). The Russell Affidavit presents a slew of new arguments that are nowhere to be seen in UWUA Locals' Petition to Intervene. These arguments exceed the proper scope of a reply pleading; clearly, they are not "narrowly focused on the legal or logical arguments" presented by ENO in its answer.[28] Nor are they permissible "amplifications" of prior statements or arguments made by Petitioners. For example, the Russell Affidavit contains new arguments or information concerning, *inter alia*:

- the inability of the Securities and Exchange Commission ("SEC") to review the merits of NewCo's capital structure and debt arrangements (Russell Affidavit ¶¶ 6-8);
- the purported need for NRC review of Entergy's strategic business objectives (*id.* ¶ 10);
- alleged risks associated with purportedly undefined "hedging arrangements" (¶ 15)
- historical failures associated with the spin-off of generating assets to a separate company trading in the competitive marketplace (¶ 17); and

[28] 69 Fed. Reg. at 2203. UWUA Locals now purport, for the first time, "to challenge whether that 'reasonable assurance' has been demonstrated where the proposal calls for a shift from the conservative capital structure provided by Entergy, to a far riskier financial arrangement in which the six operating plants become guarantors of billions of dollars in new debt." Reply at 16 (citing Russell Affidavit ¶¶ 11, 13-14). Petitioners further state that the "increased financial instability" surmised by Mr. Russell "goes directly to the 'financial qualifications' issue, which is sufficiently tied to the safe operations of a nuclear plant that the Commission has specific requirements governing the financial qualifications of operators. 10 CFR §§ 50.33(f), 50.80(b)(1)(i)." *Id.* at 4. Notably, UWUA Locals' Petition to Intervene contained no discussion of 10 CFR §§ 50.33(f) and 50.80(b), Commission case law construing and applying those provisions, or the "reasonable assurance" standard. Nor did it address the financial Support Agreement that NewCo will execute with the Applicants, including each of the corporate entities licensed to own the facilities, in the total amount of $700 million, to provide a financial backstop for all six operating facilities, if called upon to do so. This is another glaring omission that Petitioners now seek to cure in their Reply.

- alleged disparities between Entergy's proposed debt-to-enterprise values and statements contained in Entergy's 2007 SEC Form 10-K report (*id.* ¶ 18).

The Russell Affidavit is, unmistakably, an impermissible attempt to cure deficiencies in UWUA Locals' original contentions and to provide new bases for those contentions.[29] In effect, Petitioners seek to amend their proposed contentions without complying with the Commission's late-filing standards. UWUA Locals provide no reasonable explanation as to why they failed to include an expert affidavit in their Petition to Intervene. Mr. Russell states in his affidavit that he "reviewed unredacted versions of the substantive filings made by the Applicants with the [NRC]."[30] Significantly, Mr. Russell was authorized to review copies of those filings as of March 7, 2008, the date on which he executed his Acknowledgment of the February 26, 2008, Confidentiality and Non-Disclosure Agreement. Given that Mr. Russell thus had access to those filings 11 days before Petitioners' March 18 filing deadline, UWUA Locals could have prepared an affidavit by Mr. Russell during that time and submitted it as part of their March 18 Supplemental Petition.[31]

Petitioners are required to "examine the publicly available material and set forth their claims *and the support for their claims at the outset*."[32] UWUA Locals failed to adequately support their claims at the outset and should not be permitted to supplement their Petition to Intervene now. Accordingly, the Russell Affidavit, and all portions of the Reply referring to or relying thereon, should be summarily stricken.[33] Petitioners' belated attempt to cure their defective contentions with

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[29] To borrow one of Petitioners' pithy colloquialisms: "You don't need a weatherman to know which way the wind blows." Reply at 9 n.7. The fact that the Russell Affidavit is non-timely and replete with supplemental arguments and information is similarly self-evident.

[30] Russell Affidavit ¶ 4.

[31] Given that Entergy filed its Answer on April 8, 2008, and UWUA Locals filed their Reply (including the Russell Affidavit) on April 15, 2008, it appears that Mr. Russell prepared his affidavit on a week's notice.

[32] *LES*, CLI-04-25, 60 NRC at 225 (emphasis supplied).

[33] The Reply incorporates extensively the new arguments set forth in the Russell Affidavit. By ENO's count, the Reply cites the Russell Affidavit over two dozen times.

new arguments and/or supplemental information is precisely what the Commission has prohibited in past adjudications, as the recent *LES* and *Palisades* proceedings attest.

For the reasons discussed above, Entergy respectfully submits that, in ruling on the admissibility of proposed contentions, the Commission should not consider the Russell Affidavit and any portions of the Reply referring to, or relying on, that affidavit. In addition, however, the Affidavit should be struck, because it misleads, misstates facts, and attempts to import filing standards applicable to economic regulators, *e.g.*, SEC and FERC, that neither are appropriate for the NRC, nor reflect any insight into NRC's requirements, guidance and/or practice for making its financial qualifications findings.[34] For example, Mr. Russell misleadingly asserts that the six operating plants will become "guarantors" of billions of dollars in new debt, an assertion that is unsupported by fact.[35] Rather, it is clear that either the stock of the owner-licensee companies or plant assets *may* be pledged as security for NewCo's debt. In other words, the owner-licensees are themselves the collateral. These companies are not "guarantors," and there is no plan for them to hold debt, as reflected in the balance sheets available to Mr. Russell. Moreover, the creation of such a pledge or security interest is expressly authorized by 10 CFR § 50.81 and could occur at any time, without regard to the proposed license transfers. Similarly, Mr. Russell's misstatements regarding the scope of the $700 million Support Agreement not only mischaracterize the nature of these arrangements, but misunderstand the fact that the arrangements in place currently, *i.e.*, the *status quo ante*, are similar in scope. The major difference is that the current arrangements total *only* $315 million, which is less than half of the $700 million provided under the new arrangements.

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[34] Mr. Russell's resume provides no clear indication that his particular expertise and experience are germane to the financial qualifications findings the NRC must make under 10 CFR § 50.33(f)(2). Indeed, while Mr. Russell has testified in numerous proceedings before numerous tribunals, the NRC does not appear to be one of them.

[35] Russell Affidavit, ¶¶ 11, 15.

C. UWUA Locals' New Documentary References, Including Attachment 3 to the Reply, Should be Stricken from the Reply

Both the Russell Affidavit and the Reply reference a new, yet previously available, document, *i.e.*, the Entergy Corporation and Subsidiaries 2007 Annual Report (including the Form 10-K) that was filed with the SEC on February 29, 2008 (Attachment 3 to Reply). UWUA Locals fail to explain why they did not identify this document in their Petition to Intervene (*i.e.*, the March 18 Supplemental Petition), and they have made no attempt to address the late-filing criteria of 10 CFR § 2.309(c), (f)(2). Such a showing is necessary to amend a previously submitted petition to include additional supporting documents. Accordingly, for the same reasons stated above with respect to the Russell Affidavit, this new documentary reference should be stricken.

D. UWUA Locals' New Argument Concerning Entergy's Proposed Dispute Resolution Mechanism for "Deadlock Matters" is Non-timely and Should be Stricken

In further support of Proposed Contention 3,[36] UWUA Locals proffer the following additional argument, albeit without reference to the Russell Affidavit:

> Entergy will have what amounts to a *potential veto power over decisions concerning the operation, maintenance and modification of these nonutility nuclear plants*, but with no apparent responsibility for the consequences of that control. Entergy's ability to deadlock the decision-making process and an equal say in what the operating subsidiary does, could lead it to, for example, *skew allocation of needed spare parts or plant personnel to those nuclear plants that serve Entergy's utilities*.[37]

Here again, it is unclear why UWUA Locals failed to proffer the foregoing "veto power" argument regarding the "Joint Venture" between Entergy and NewCo in their March 18 Supplemental Petition. Therefore, Entergy respectfully requests that the argument be stricken from the Reply.

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[36] Proposed Contention 3 alleges 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." February 5 Petition at 12; March 18 Supplemental Petition at 7.

[37] Reply at 13 (emphasis supplied).

Notwithstanding its belatedness, the argument does not support the admission of Proposed Contention 3. It is misleading and based on spurious suppositions, *i.e.*, that the Joint Venture would be an entity that might contribute capital for the "operation, maintenance and modification" of the six Facilities, allocate "spare parts," or make plant personnel decisions. As Entergy's Application and supplemental filings (and its Answer) make clear, these decisions would be governed by the Operating Agreements between the operating licensee and owner-licensees, which are responsible for providing capital or ongoing funding pursuant to the budgets set for plant operating and maintenance expenses or capital improvements.[38] Petitioner's reference to the limitation of an Arbitrator's power under the "Deadlock Mechanism" regarding a "Capital Contribution" being made by Members in the Joint Venture arrangement is simply misleading.[39] This is not a "veto power" over capital improvements to the plants, which are funded by the owner-licensees under the Operating Agreements,[40] but rather it is veto relating to future investments that might be made by the Joint Venture, *e.g.*, if the Joint Venture wanted capital to purchase another company such as a nuclear services business. In short, the dispute over "capital" feared by Petitioners is simply irrelevant to the operation of the commercial nuclear power plants at issue in this proceeding.

V. CONCLUSION AND RELIEF REQUESTED

The Commission's rules of practice and precedent preclude Petitioners from using their Reply to ENO's Answer as a vehicle for presenting new arguments not contained in the original Petition to Intervene or extensive supplemental information to bolster or cure otherwise deficient contentions. Allowing otherwise would render the Commission's contention pleading requirements (both the substantive admissibility and the timeliness criteria) meaningless. Petitioners have not

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[38] See, *e.g.*, July 30 Application at 6-9; ENO Answer at 29-30

[39] Reply at 13.

[40] Notably, this true under the current structure, as well as the post-transfer structure.

explained why the Russell Affidavit, the other new documentary references identified above, and Petitioners' "veto power" argument were not timely submitted as part of their Petition to Intervene.

Accordingly, ENO respectfully requests that the new arguments, new affidavits, and new documentary references identified above—including all portions of UWUA Locals' Reply referring to or relying thereon—be stricken from the April 15 Reply. Given the extensive nature of the new and non-timely information presented by UWUA Locals in their Reply, ENO has attached to this Motion a marked-up copy of the text of the Reply that indicates (via "cross-out" or "strikethrough") specifically which portions of the Reply should be stricken.[41] *See* Attachment 1 to Motion.

Respectfully submitted,

Signed (electronically) by

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Dated at Washington, District of Columbia
this 25th day of April, 2008

1-WA/2963755.3

[41] Thus, Attachments 1, 2, and 3 to UWUA Locals' Reply should be stricken, along with the specific text of that Reply identified in Attachment 1 to this Motion.

ATTACHMENT 1

SPECIFIC PORTIONS OF TEXT OF UWUA LOCALS' REPLY TO BE STRICKEN

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NUCLEAR REGULATORY COMMISSION

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	)	April 15, 2008

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

Pursuant to 10 C.F.R. § 2.309(h)(2), and the Secretary's February 28, 2008, Order in the captioned proceedings, Locals 369 and 590, Utility Workers Union of America, AFL-CIO ("UWUA Locals") reply to the April 8, 2008, "Answer of Entergy Nuclear Operations, Inc." ("Opposition"). For the reasons stated here, as well as in pleadings filed by UWUA Locals in

these proceedings on February 5 and March 18, 2008, UWUA Locals urge the Commission to reject Entergy's Opposition, and to issue an order finding that UWUA Locals: (1) have standing to intervene in these proceedings; and (2) have raised admissible contentions that will be considered in a hearing before the Commission.

In support of our positions, UWUA Locals state:

I. UWUA LOCALS HAVE STANDING TO APPEAR AS PARTIES TO EACH OF THE CAPTIONED PROCEEDINGS

Entergy questions the standing of UWUA Locals to intervene in all of the captioned proceedings, including Docket No. 50-293-LT, notwithstanding that UWUA Locals represent the Pilgrim Nuclear Power Station workforce. As explained in UWUA Locals' earlier pleadings in this proceeding and amplified *infra*, UWUA Locals and their members have an interest in the outcome of each of the captioned proceedings, and therefore meet the requirements of injury-in-fact, causation, and redressability, both on their own behalf and through their representation of their members.[1] As discussed *infra*, while these standards have been met, the "proximity standing" presumption makes it unnecessary for the Commission to examine these factors separately in each case.[2]

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[1] ~~While UWUA Locals, like all local unions, are already the authorized representatives of their members, Attachment 1 to this pleading contains affidavits from Local members David Leonardi, Murray Williams, and Fred DiCristofaro, as an additional assurance that UWUA Locals are in fact authorized to represent specific individuals with standing to intervene in this proceeding. These affidavits explain approximately how much time the affiants spend at or near the plant, and provide their addresses and their authorization of UWUA Locals to represent their interests in this proceeding.~~

[2] We note that UWUA Locals' interests in this proceeding do not fit the category of "labor dispute" described in *Florida Power & Light Co.* UWUA Locals are concerned not about staffing reductions *per se*, but rather about the effect of NewCo's perilous financial situation on the safe operations of each of the plants, whose financial health is directly linked under the proposed restructuring, and thus on the health and safety of the Locals' members. Even if this were a "labor dispute," however, Entergy acknowledges (Opposition at 16 n.64) that "there may be cases where employment-related contentions which are closely tied to specific health-and-safety concerns, or to potential violations of NRC rules can be admitted for a hearing" (*Florida Power & Light Co.*, CLI-06-21, 64 N.R.C. 30, 34 (2006) (citations and quotations omitted)). Moreover, unlike the would-be intervenors in *Florida Power & Light Co.*, UWUA Locals have shown a "causal link" between the proposed transfer and the alleged harm. *See id.* at 35. In *Florida Power & Light*, the would-be intervenors also admitted that the harm they alleged had begun "at least a

A. UWUA Locals have Standing under the Traditional 3-Prong Test

Contrary to Entergy's assertions (Opposition at 12), UWUA Locals have provided ample factual support — drawn from Entergy's own NRC application and its testimony before the Vermont Public Service Board — showing that approval of the proposed reorganization will significantly increase the risk of accidents at Pilgrim and at the five other plants implicated by the restructuring, thereby threatening substantial harm to the UWUA Locals and their members. As discussed *infra* at II.D, the causal chain between the proposed reorganization and the threatened harm is short and clear. Commission approval of the proposed reorganization would (1) cause (2) a non-speculative risk of serious harm to the physical safety and health of members of UWUA Locals, and Commission denial of the reorganization would (3) redress this harm (by preventing it).

The fact that the alleged injury has not yet occurred does not preclude a finding that UWUA Locals have standing, just as it did not bar a similar finding in the *Power Authority of the State of New York* case. The situation in the instant case is analogous to that presented in the transfer of the Indian Point and Fitzpatrick plants to Entergy in 2000. In that proceeding, the Commission found that an association of nuclear plant workers had standing, stating:

> The Association… argues that its members' health and safety may suffer as a direct result of the license transfer if an insufficient amount of revenue were to preclude the Entergy companies from adequately funding both occupational radiation protection and safe decommissioning activities…. Given that we have found that people… living or active within a few miles of a nuclear plant have shown standing in license transfer cases, it follows that employees who work inside a plant should ordinarily be accorded standing as well, as long as the alleged injury is fairly traceable to the license transfer.

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year before" the license transfer applications were filed. *Id.*

Power Auth. of N.Y., CLI-00-22, 52 N.R.C. 266, 294 (2000) (citations omitted). As the Commission has held, "Injury may be actual or threatened." *Cleveland Elec. Illuminating Co.*, CLI-93-21, 38 N.R.C. 87, 92 (1993) (citations and quotations omitted). Thus, for the same reasons that the Association was found to have standing in the Indian Point transfer, UWUA Locals should be found to have standing to participate in the captioned proceedings.

More specifically, and as explained in UWUA Locals' earlier pleadings and *infra* at Part II.A, the materials presented by Entergy suggest that approval of the proposed restructuring could lead to significant financial pressures on each of the six nuclear plants at issue, and these pressures could have a negative impact on the members of the UWUA Locals, and deleterious impacts on the operation of the nuclear plants involved in the restructuring. In the case of the proposed financial changes, the causal nexus is, as explained more fully *infra* in Part II.D, that the proposed reorganization will put the six nuclear plants in a far more risky financial situation, significantly increasing the risk that maintenance, staffing and other safety-related functions at all of the plants will receive inadequate funding and attention. Indeed, increased financial instability is a direct, foreseeable and unavoidable effect of the reorganization as proposed, as explained in UWUA Locals' prior pleadings in this proceeding, *infra* at Part II, ~~and in the attached affidavit of Mr. Whitfield Russell, which is Attachment 2 to this pleading ("Russell Affidavit").~~ ~~This instability goes directly to the "financial qualifications" issue, which is sufficiently tied to the safe operations of a nuclear plant that the Commission has specific requirements governing the financial qualifications of operators.~~ ~~10 C.F.R. §§ 50.33(f), 50.80(b)(1)(i).~~

For the reasons stated here, and those presented in prior pleadings, UWUA Locals have alleged and demonstrated that, if the proposed reorganization is approved, they and their

members will face a significant, non-conjectural risk of future injury. As such, UWUA Locals have satisfied the traditional, three-prong standing test.

B. UWUA Locals have Demonstrated that they Have Standing to Intervene in Each of the Captioned Proceedings

Entergy's protestations aside, the financial well-being of each of the six plants will be linked under the proposed restructuring. ~~Russell Affidavit ¶¶ 11-14.~~ As such, UWUA Locals are concerned both about the license transfer at issue in the Pilgrim proceeding, as well as the transfers to be addressed in the remaining separate dockets opened for each of the other plants. Pilgrim's financial stability will now be directly subject to and affected by events at the other five plants. As such, UWUA Locals have an interest justifying intervention in those proceedings as well as in the Pilgrim proceeding.

Given the significant financial linkages created by Entergy's proposal, the Commission should consider consolidating these proceedings for purposes of hearing and decision. Consolidation will promote administrative efficiency, as it will, *inter alia*, facilitate the Commission's review of the direct financial linkage among the six plants impacted by the proposed license transfers and restructuring.

C. UWUA Locals have Demonstrated that they have "Proximity Standing"

It is not necessary for the Commission to determine that UWUA Locals meet the traditional three-prong standing test, because UWUA Locals qualify for the "proximity presumption" standing criterion recognized by the Commission:

> In determining whether a petitioner has met the requirements for establishing standing, the Commission has directed us to construe the petition in favor of the petitioner. To this end, in proceedings involving nuclear power reactors, the Commission has recognized a proximity presumption, whereby a petitioner is presumed to have standing to intervene without the need to specifically plead injury,

> causation, and redressability if the petitioner lives within fifty miles of the nuclear power reactor.

In re Entergy Nuclear Vt. Yankee, LLC, 50-271-LR, 64 N.R.C. 131, 144 (2006) (citations and quotations omitted), *reversed in irrelevant part*, CLI-07-16, 65 N.R.C. 371 (2007).

While the Commission has stated elsewhere that it sets the "proximity" radius on a case-by-case basis (*see, e.g.*, *Tenn. Valley Auth.*, LBP-02-14, 56 N.R.C. 15, 24 (2002)), no matter what radius the Commission finds appropriate in this case, UWUA Locals' members are within it, because — at least with respect to Pilgrim — they work at the plant itself. ~~See Attachment 1.~~ In applying the proximity presumption, the Commission has held that "the appropriate focus is upon the nature of the proposed action and the significance of the radioactive source." *Id.* at 25 (citations and quotations omitted). The significance of the radioactive source — the cores of operating nuclear plants and associated spent fuel pools — is obvious. The "nature of the proposed action," a reorganization that weakens the owner's and operators' financial qualifications at each of the six plants, is also significant.[3] *See supra* at Part I.A. UWUA Locals should therefore be granted standing based on the "proximity presumption."

II. UWUA LOCALS HAVE RAISED ADMISSIBLE CONTENTIONS THAT SHOULD BE SET FOR HEARING IN THIS PROCEEDING

In their March 18 Filing, and in accordance with Commission regulations, UWUA Locals specified certain contentions, explained the basis for these contentions, and asked that the Commission set these contentions for hearing. Entergy has opposed each such contention. We here reply to Entergy's claims, and reiterate the bases for each proposed contention.

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[3] Unlike the *Millstone* license transfer case cited by Entergy, Opposition at 13 n.56, the transfer of control proposed in these proceedings would involve a change in financing (a significant change, as discussed *infra*), which is indisputably relevant to the safe operation of the plants. *See Ne. Nuclear Energy Co.* ("*Millstone*"), CLI-00-18, 52 N.R.C. 129, 132 (2000).

At the outset, UWUA Locals note that the Commission's regulations, 10 C.F.R. § 2.309(f)(1)(i)-(vi), state that each 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. Each of the contentions raised by the UWUA Locals complies with the NRC's regulations, Entergy's objections notwithstanding.

At the outset, we note that while these requirements have been characterized as "strict by design," the Commission has also made clear that they do not obligate an intervenor, at this early stage, to mount its entire case on any specific issue.[4] As explained by the Commission:

> Determining whether a contention is adequately supported by a concise allegation of the facts or expert opinion, however, "does not call upon the intervenor to make its case at [the contention admissibility] stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention." 54 Fed. Reg. at 33,170. A petitioner does not have to provide an exhaustive list of its experts or evidence or prove the merits of its contention at the admissibility stage. As with a

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[4] *Dominion Nuclear Conn., Inc.* (*Millstone Nuclear Power Station, Units 2 and 3*), CLI-01-24, 54 N.R.C. 349, 358 (2001), *recons. denied*, CLI-02-1, 55 N.R.C. 1 (2002). In making this observation, the Commission expressed concern that it had become involved in litigating "contentions that appeared to be little more than speculation." *Id.* (citations and quotations omitted). Through this and our earlier pleadings, UWUA Locals seek to assure the Commission that the contentions presented here are well-founded and not purely "speculation." However, as noted *infra* and as the Commission has itself recognized, in matters involving projections of financial and technical qualifications, some "speculation" is "unavoidable." *N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1)*, CLI-99-6, 49 N.R.C. 201, 219-220, *dismissed due to settlement*, CLI-99-16, 49 N.R.C. 370 (1999).

> summary disposition motion, the support for a contention may be viewed in a light that is favorable to the petitioner and inferences that can be drawn from evidence may be construed in favor of the petitioner. *See Palo Verde*, CLI 91-12, 34 NRC at 155; 10 C.F.R. § 2.710(c).

In re Entergy Nuclear Vt. Yankee, LLC, 50-271-LR, 64 N.R.C. 131, 150 (2006) (footnote omitted), *reversed in irrelevant part*, CLI-07-16, 65 N.R.C. 371 (2007).[5] The Commission reached much the same conclusion in its earlier decision in *GPU Nuclear, Inc.* (*Oyster Creek Nuclear Generating Station*), CLI-00-6, 51 N.R.C. 193 (2000). While stating that it will not accept filings that are "unsupported by alleged fact or expert opinion and documentary support," the Commission went on to make clear that:

> This is not to say that our threshold admissibility requirements should be turned into a ''fortress to deny intervention.'' *Cf. Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999), quoting *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). The Commission regularly continues to admit for litigation and hearing issues that are material and are adequately supported. *See, e.g., Seabrook, supra.*

51 N.R.C. 193, 203 (2000).

Moreover, while there is much in Entergy's Opposition concerning the need for intervenors to provide "expert" and "affidavit" testimony in support of their contentions, we trust that the Commission will consider Entergy's objections in accordance with the adage that "what

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[5] The Commission has elsewhere made clear that an intervenor is not required to prove its case at the contention filing stage: "'the factual support necessary to show that a genuine dispute exists need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion.'" Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 22 n.1 (1998), citing Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, Final Rule, to be codified at 10 C.F.R. pt. 2, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). Rather, petitioner must make "a minimal showing that the material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." *In re Gulf States Utils. Co.*, CLI-94-10, 40 N.R.C. 43, 51 (1994), citing Rules of Practice for Domestic Licensing Proceedings - Procedural Changes in the Hearing Process, Final Rule, to be codified at 10 C.F.R. pt. 2, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). *See also In re AmerGen Energy Co.*, LBP-06-07, 63 N.R.C. 188, 220 (2006) (citing Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 N.R.C. 18, 22 n.1 (1998)) (the contention requirement "does not require the submission of an expert opinion").

is good for goose is good for the gander." During the relatively brief duration of this proceeding, Entergy has made three filings containing versions of and support for its proposed indirect license transfer and related corporate restructuring. Although this proceeding involves the fate of six nuclear plants and billions of dollars in proposed transactions, none of those filings has been accompanied by any expert affidavit or other testimony.[6] As Mr. Russell observes:

> the lack of supporting data for the financial projections submitted by Entergy to the Commission is perhaps the most striking feature of its submissions in this proceeding. Entergy's submittals represent an unusually sparse amount of support for such a large transaction. In my experience, such a substantial transaction would ordinarily involve considerable internal Entergy review and interaction with outside advisors (including accounting, legal and investment bankers). While I have every reason to believe that such interactions have occurred, no data concerning them have been provided.

Russell Affidavit ¶ 5.[7]

A. UWUA Locals contend that the 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.

Entergy contends that its application "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." Opposition at 21. UWUA Locals do not agree, and have already explained the

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[6] Entergy finds it "telling" that UWUA Locals focus attention on the Curry testimony. Opposition at 43. It is "telling" only in that our focus on Ms. Curry is a result of the lack of information provided by Entergy in its NRC filings. UWUA Locals do, however, reject Entergy's contention that we have ignored their financial forecasts. As the March 18 Filing shows, that is not the case. However, the ability to analyze these data would be enhanced by the inclusion of backup or other supporting data, as well as testimony concerning the specifics and overall focus of the transaction.

[7] In any event, to the extent the Commission concludes that the factual contentions raised by UWUA Locals in their earlier filings fail to meet the necessary standards absent support through an expert affidavit, we have included Mr. Russell's affidavit as an Attachment to this pleading. Mr. Russell reiterates and, in response to Entergy's claims, amplifies the concerns expressed in our earlier filings and described here. That said, UWUA Locals assert that their prior factual assertions, and the concerns which flow from them, are generally self-evident, even (if not especially) when considered in light of the paucity of information provided by Entergy. *See Subterranean Homesick Blues,* B. Dylan (1965) ("You don't need a weatherman to know which way the wind blows").

bases for that disagreement in their February 5 Filing (at 9-10). Given their assertions, Licensees will presumably agree to the conditioning of any approval of the transaction on the assumption of their stated commitment that there will be neither physical nor personnel changes as a result of the proposed restructuring. However, we note that these commitments do not resolve the concerns raised by our remaining Contentions, addressed *infra.* Approval of the proposed transaction will create severe financial pressures on the operating nuclear plants, and calls into question whether the proposed transaction satisfies applicable NRC regulatory requirements. If the transaction is nonetheless approved, UWUA Locals are concerned that there will be deleterious impacts on Unit safety and performance, and continue to urge the Commission to address these concerns at hearing.

B. UWUA Locals contend that the Application should not be approved because Applicants' claims as to benefits are neither supported nor self-evident.

UWUA Locals stated in their February 5 Filing in the *Pilgrim* proceeding (at 10) that "Applicants nowhere explain why this structure is superior to the proposed structure set forth in their July 30 Application, let alone why either arrangement is superior to the *status quo*." In response, Entergy argues that while the Commission's regulations require "a statement of the purpose for requesting the NRC's consent to a [license] transfer," the applicant's response can essentially be ignored as outside the scope of any Commission review. Opposition at 23.

UWUA Locals assert that the information presented in support of Contention 2, including matters of market or business "strategy," is directly relevant to the Commission's review of the proposed transaction, as these concerns go to the likelihood that post-transaction, the licensees will be able to meet the requisite financial (if not the technical) qualifications. ~~Russell Affidavit ¶ 10.~~ Entergy responds that UWUA Locals have failed to "even suggest" that the failure of the

promised transaction benefits "will adversely impact those qualifications or otherwise undermine safe operation of the Facilities." Opposition at 23. Given UWUA Locals' arguments in both their earlier pleadings and the instant filing, Entergy's claim is simply not credible.

In the same vein, Entergy asserts that while UWUA Locals "express strong reservations" about the proposed guarantees and pledges associated with the transaction, "they do not contend that such transactions would adversely affect nuclear safety at the Facilities." Opposition at 26. The statement is incorrect. In their March 18 Filing, UWUA Locals assert (at 9-10):

> Once the spin-off is implemented, it appears from the data provided by Entergy that NewCo will be saddled with massive debt obligations for which it will be 100% responsible. 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. In such instances, NewCo will be forced to deal with whatever problems it may face with much reduced free cash flow (because so much of its cash flow has been committed to paying debt), fewer sources of equity capital (mainly the public and new owners), and as part of a considerably smaller enterprise with a much reduced pool of generating resources, revenue sources and borrowing power. 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.* The probability that this detrimental cycle will develop is virtually certain to be increased by implementation of Entergy's proposal because lenders, recognizing the higher risk of NewCo, can be expected to demand higher interest rates and more restrictive loan covenants from NewCo than they would demand from Entergy.

Footnotes omitted and emphasis added. The express reference to the link between the proposed guarantees and "financial strains," "layoffs," "reductions in the provision of needed maintenance

and plant security," "poor operational performance" and "other such deleterious impacts" should be sufficient to demonstrate that there is a material safety issue posed by the Application.[8]

All of this notwithstanding, it appears to UWUA Locals that the information presented with respect to Contention 2 is likewise relevant to Contention 4, which addresses expressly the financial impacts of the proposed restructuring. UWUA Locals address Contention 4 *infra.* For administrative convenience, UWUA Locals are willing to withdraw Contention 2, assuming that the same information presented in support of this Contention 2 can be addressed in connection with Contention 4, both at this stage of the proceeding and at any hearing that is ordered.

C. UWUA Locals contend 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.

UWUA Locals' third contention goes to the potential for "managerial conflict" in that post-restructuring, the licensed operator will be owned equally by Entergy and NewCo. In its Opposition, Entergy objects to UWUA Locals' purported failure to evaluate thoroughly new information provided by Entergy after business hours the evening before UWUA Locals' supplemental contentions were due. Opposition at 31. As promised in their March 18 Filing (at 8), UWUA Locals here expand on the bases for this contention.

Entergy suggests that matters such as "incurring significant indebtedness" and "variation or termination of material contracts," Opposition at 29-30, would not affect the safe operations of

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[8] For the same reasons, and for those expressed here (and elsewhere in the March 18 Filing), the Commission should likewise reject Entergy's claim that we have failed to "meaningfully engage the specifics" of Entergy's financial projections. Notwithstanding that the utility of these data are limited by the absence of testimony or meaningful supporting or backup information, the March 18 Filing addresses Entergy's presentation in reasonable detail. Indeed, the "public version" of the March 18 Filing shows redactions at pages 2-10 and 12-14 (the pleading is 16 pages in length), in each instance because these pages contain information from (or based upon) Entergy's financial projections. Entergy's apparent refusal to address these contentions (its filing contains no protected data) does not entitle it to claim that UWUA Locals have failed to present an assessment of these data.

the plants. As explained *supra* and *infra*, "incurring significant indebtedness" can certainly increase the level of financial risk assumed by each of the plant-guarantors, and thereby impact safe plant operations. There is also no question that termination of a material contract, depending on the nature of the contract, may go directly to plant safety and performance.

Entergy complains that, in the event of a dispute, "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." Opposition at 31. An expedited decision could be necessary if, for example, a costly accident at one of the plants made it necessary for NewCo to raise funds quickly ("incurring significant indebtedness," to use Entergy's phrase). ~~The "limitations" on the arbitrator's authority are clear on the face of Entergy's March 17, 2008 Supplement:~~

> ~~[T]he arbitrator is not empowered to amend the provisions of Articles IV [Capital] or VII [Management] of this Agreement or otherwise amend this Agreement where such amendment would, in any way whatsoever, change or be likely to change the effect of the provisions set forth in Article VII of this Agreement, any other fundamental governance provisions of this Agreement specified by the Members in writing, or *require a Member to make a Capital Contribution to which it has not given its prior consent*.~~

~~March 17 Supplement at 4 (emphasis added). The emphasized text is particularly important, as unforeseen needs for capital may arise, and this provision would prevent an arbitrator from ordering the "Members" to make a contribution even if necessary for the safe plant operations.~~

~~Thus, Entergy will retain influence over the plants equal to NewCo's, subject only to mediation and arbitration provisions if NewCo concludes that Entergy is acting contrary to the good of the spun-off facilities. February 5 Filing at 12. Entergy's proposal is to retain an exactly even one-half interest in the Entergy subsidiary that will operate Entergy's merchant nuclear~~

~~plants, while retaining full control over Entergy's nuclear plants embedded in Entergy's traditional vertically integrated electric utilities. Entergy will have what amounts to a potential veto power over decisions concerning the operation, maintenance and modification of these non-utility nuclear plants, but with no apparent responsibility for the consequences of that control. Entergy's ability to deadlock the decision-making process and an equal say in what the operating subsidiary does, could lead it to, for example, skew allocation of needed spare parts or plant personnel to those nuclear plants that serve Entergy's utilities. Entergy's ability to influence decisions to favor its regulated utility nuclear fleet at the expense of Entergy's non-utility nuclear plants at issue here is a serious concern and goes directly to the extent to which the proposed restructuring will result in safe and financially secure nuclear units. Thus, this contention is relevant to the matters at issue, there is a sound basis for concern, and there is a genuine dispute between the parties. This matter should be set for hearing.~~

D. UWUA Locals contend that the Application should not be approved because the financial impacts of the NewCo proposal are unknown, and call into question whether the new entity can provide the requisite "reasonable assurance" as to financial and, ultimately, technical qualifications.

UWUA Locals asserted in the March 18 Filing that the financial impacts of Entergy's NewCo proposal are "unknown" and that no approval of the proposed indirect license transfer should be granted without an evidentiary hearing. Entergy spends much of its Opposition attacking this important contention, which goes to the heart of the matters at issue in this proceeding. Entergy's opposition should be rejected and the matter set for hearing.

1. The issue UWUA Locals seek to raise concerns the financial impacts of the proposed transaction, which is material to, and well within the scope of, this proceeding (10 C.F.R. § 2.309(f)(1)(i), (iii) and (iv))

The Commission has stated that the "question in indirect transfer cases …is whether the proposed shift in ultimate corporate control will 'affect' a licensee's existing financial and technical qualifications." *Millstone*, *supra*, 52 N.R.C. at 133, quoting 65 Fed. Reg. at 18,381. UWUA Locals have proposed as a contention their concern that the proposed transaction will impact adversely the ability of the plant licensees to meet their ongoing financial obligations. As such, there should be no question that this contention falls well within the scope of the matters at issue. 10 C.F.R. § 2.309(f)(1)(i) and (iii). Indeed, even Entergy is constrained to admit (Opposition at 36) that UWUA Locals' contention can be viewed as "an ostensible health-and-safety-related challenge to the Applicants' financial qualifications."

Nonetheless, Entergy claims (Opposition at 33) that we seek relief that is beyond the scope of this proceeding, arguing that UWUA Locals have wrongly suggested that the Commission consider conditioning approval in ways that protect "the public interest." Entergy's claim that UWUA Locals are basing their contention on the wrong standard proves nothing. The concerns UWUA Locals raise go to whether approval will adversely impact the ability of the affected plant licensees to meet their financial and, ultimately, safety-based obligations. The Commission clearly has the authority and responsibility to address our concerns and, in that fashion, to protect the "public interest," whether or not this express standard is applied. While mindful that the Commission has stated that its mission is "solely to protect health and safety," and "not to make general judgments about what is or is not otherwise in the public interest,"[9] the

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[9] *Pac. Gas & Elec. Co.* (*Diablo Canyon Nuclear Power Plant, Units 1 & 2*), CLI-02-16, 55 N.R.C. 317, 342 (2002), quoting *Consol. Edison Co. of N.Y.* (*Indian Point, Units 1 and 2*), CLI-01-19, 54 N.R.C. 109, 149 (2001).

arguments raised and the relief sought by UWUA Locals fall well within the scope of the Commission's "mission."

Entergy next asserts that the "relevant inquiry" in this case is whether the Company has demonstrated that it "possesses or has reasonable assurance of obtaining funds necessary to cover estimated operation costs for the period of the license." Opposition at 34, quoting 10 C.F.R. § 50.33(f)(2) (emphasis removed from Opposition). To the extent this is correct, that is precisely the focus of UWUA Locals' presentation. ~~Based on analysis of the (albeit limited) information provided by Entergy, we have sought to challenge whether that "reasonable assurance" has been demonstrated where the proposal calls for a shift from the conservative capital structure provided by Entergy, to a far riskier financial arrangement in which the six operating plants become guarantors of billions of dollars in new debt, and where there has been no showing that the payment of operating costs will have priority over debt service obligations. Russell Affidavit ¶¶ 11, 13-14.~~ The issue raised is therefore well within the scope of the NRC regulatory standards that Entergy contends must be met in order to obtain relief. As UWUA Locals' challenge goes directly to whether the "reasonable assurance" standard has been met, Entergy cannot credibly contend (Opposition at 36) that we have failed to specify a "particular … legal reason[]" why the application should not be granted. UWUA Locals have likewise raised "particular safety … reasons," in support of this contention, as addressed further below.

In addition, Entergy responds (Opposition at 37) to concerns over the structure of this arrangement by claiming that its "business" and "market strategies" are outside the scope of the Commission's purview, relying upon the NRC's statement that it "is not in the business of regulating the market strategies of licensees." *Id.* at 23, quoting *Hydro Res., Inc.* (*P.O. Box 15910, Rio Rancho, NM 87174*), CLI-01-4, 53 N.R.C. 31, 48 (2001). Entergy's claim is not

well-founded. In *Hydro Res., Inc.*, the Commission stated that "business decisions that relate to costs and profit" are not the Agency's concern, but that the Commission "looks to whether [the regulated entity] can conduct operations safely." 53 N.R.C. at 49. The Commission never stated that where business strategies bear directly on financial qualifications or operational safety concerns, they are nonetheless off limits from NRC scrutiny.[10] ~~Moreover, as the issues here include financial stability, it would seem to be fairly obvious that the Commission must examine an applicant's proposed market or business strategies. Phrased differently, the issue here is whether Entergy's chosen business or market strategy — the proposed indirect license transfer and the related corporate restructuring — provides the requisite "reasonable assurance" to satisfy the Commission's regulation-based financial and technical standards. In order to answer that question, it is appropriate (if not essential) to evaluate Entergy's strategic objectives. Russell Affidavit ¶ 10.~~

~~Moreover, the question of whether the terms of a proposed license transfer provide the requisite "reasonable assurance" is fundamentally a forward-looking analysis. *Id.*~~ In challenging whether that showing has been made, intervenors must have the latitude to engage in some degree of "speculation" as to what might or might not happen if an applicant's strategy and related forecast of the future turn out to be wrong. Considerations about the future are not off-limits. As the Commission itself has recognized, "'[s]peculation' of some sort is unavoidable when the issue at stake concerns predictive judgments about an applicant's future financial capabilities." *N. Atl. Energy Serv. Corp.*, *supra*, 49 N.R.C. at 219-220.

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[10] In fact, the Commission explained as much in a case cited by Entergy. In *CBS Corp.* (*Waltz Mill Facility*), CLI-07-15, 65 N.R.C. 221, 234 (2007), the Commission stated that it "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." Opposition at 24 n.95. UWUA Locals have expressed concern about Entergy's business strategy because it goes directly to related public health and safety concerns.

2. UWUA Locals have provided an explanation for this contention, a statement of alleged facts or opinions relevant to the contention, and sufficient information concerning the existence of a genuine dispute (10 C.F.R. § 2.309(f)(1)(ii), (v) and (vi))

UWUA Locals contend that the proposed new structure poses unacceptable financial risks, that "reasonable assurance" has not been provided, and that approval may call into question the ability of the licensees, post-restructuring, to meet their technical, financial and safety-related obligations. ~~As explained in the March 18 Filing, and addressed further below and in the Russell Affidavit, the specific alleged facts or statements of opinion that form the premises for this contention include:~~

- ~~Entergy intends through the proposal to eliminate its liability for the six nuclear plants, meaning that a far smaller pool of assets — the six non-utility nuclear plants — will be responsible for guaranteeing a new and enormous set of debt obligations. Russell Affidavit ¶ 11.~~
- ~~Entergy's proposed Support Agreement is of limited value, in that guaranteed coverage of a certain level of fixed O&M charges hardly constitutes satisfying the entire universe of financial risks associated with a nuclear plant. The Support Agreement does not demonstrate that under the new structure, the licensees will be able to weather extended outages at any one plant, or support normal needs for capital improvements and betterments, new capital investment obligations normally associated with refurbishing and extending the useful lives of aging facilities, and any debt service obligations that could not be met from plant revenues in the event of extended outages, whether for refurbishments or extended forced outages. The new structure means that the six plants will have~~

significant financial vulnerability in the event of an extended outage, incident or other event at any of them. Russell Affidavit ¶ 13.

- The application does not provide a clear picture of NewCo's capitalization. While the application, and data provided elsewhere, seem to indicate borrowings of up to $4.5 billion in "Senior Notes" and an additional $2 billion for a "Senior Revolving Credit Facility," a large portion of these funds will apparently be flowing back to Entergy, which has elsewhere explained that it expects through the spin-off to receive $4 billion as compensation, including $1.5 billion that it expects to employ in reducing its debt and in carrying out a $2.5 billion share repurchase program. Moreover, some portion of the $2 billion left with NewCo will be used for undefined "Hedging Arrangements." The extent to which these arrangements will involve additional risk and, if so, the nature of any such risk, is unclear. It is not clear where NewCo will be, from the perspective of financial resources, once Entergy has received a substantial portion of the proceeds generated by the transaction in order to meet other Entergy corporate objectives. It is clear, however, that all of the plant licensees will be guarantors of whatever arrangements NewCo chooses to undertake. Russell Affidavit ¶ 15.
- Over the next few years, the proposed new arrangement involves movement away from fixed price contracts and toward heavy reliance upon the competitive marketplace, even as Entergy has elsewhere stated a preference not to move in that direction. While significant reliance on the deregulated marketplace is not, by itself, a show-stopper, moving in that direction clearly entails substantially more risk, and offers (in this case) the added concern of NewCo facing those risks

with much reduced financial reserves. At a minimum, this structure heightens the need for Entergy to supply backup and supporting data that have not been provided. Russell Affidavit ¶ 16.

- Entergy asserts that it plans to have a debt-to-enterprise value of 30 to 45%. If that is the case, then the overall enterprise value would be at or above $10 billion. Entergy has not reconciled this debt-to-enterprise value objective with statements in Entergy's 2007 SEC 10-K report to the effect that the six nuclear assets carry a valuation of $7 billion. Russell Affidavit ¶ 18.
- The NRC should be mindful that the regulatory structure associated with this transaction has undergone recent and substantial change, and that the United States Securities and Exchange Commission can no longer be relied upon to review the merits of NewCo's capital structure and of the debt that is projected to be taken on in connection with this proposal. Russell Affidavit ¶¶ 6-8.
- UWUA Locals are concerned that as financial risk is increased by the proposed restructuring, there will be pressure on the operating companies to cut costs, and (especially if there is an extended outage at one or more of the plants) this pressure will result in unhealthy incentives to defer maintenance, cut staff and otherwise undermine the ability of the new entity to meet its technical, financial and, ultimately, safety-related obligations. Russell Affidavit ¶ 21.

We review each of these assertions below and in the Russell Affidavit.

a) The proposal involves heightened financial risk because Entergy's generation portfolio will no longer be available as a financial backstop

There should be little doubt that the proposed transfer involves an arrangement which, when compared with the *status quo*, presents substantially more financial risk for the licensees, the workforces at each plant, and the consuming public. As explained in UWUA Locals' March 18 Filing (*e.g.,* at 8-9), and reviewed further below, Entergy seeks to move to a far riskier structure as compared with the current arrangement As of now, the six non-utility nuclear plants are part of an enterprise with a large and diversified generation portfolio (including nuclear, coal, oil, gas, renewables, etc.), and a balance sheet that includes substantial amounts of equity, meaning relative financial security and relatively low leverage. Once the spin-off is implemented, NewCo will be saddled with substantially increased debt obligations for which it will be 100% responsible. 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 capital expenditures and operating costs rise and revenues fall as a result of an extended outage, a catastrophic failure, or any unexpected event.

~~The heightened risk is demonstrated by financial data submitted by Entergy to the United States Securities and Exchange Commission as part of its 2007 Form 10-K Report. Entergy states in this filing that the asset value of its non-utility nuclear units (*i.e.,* the six plants involved in this proceeding) is roughly $7.0 billion. By contrast, the overall value of Entergy's resources is stated to be roughly $33.6 billion.[11] If the $7.0 billion figure is a rough approximation of the value of the NewCo resources, then Entergy plans to cut-off NewCo's access to roughly 80% of~~

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[11] Form 10-K Report at 156, *available at* http://www.sec.gov/Archives/edgar/data/7323/000006598408000052/a10k.htm.

~~the resources currently available to support its operations, or to replace plant output if one or more of the nuclear units is taken out of service. Russell Affidavit ¶ 12. This change raises significant concerns.~~[12]

b) The proposed "Support Agreement" is inadequate to alleviate concerns about the financial risk posed by the proposal

Entergy touts its "financial Support Agreement with the Applicants," noting that it will execute this arrangement with "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." Opposition at 35. The Company goes on to state that:

> 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. 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 facility, for a period significantly exceeding the 6-month period specified in the SRP).

Id. at 35-36, footnotes omitted. While this sounds significant, in the context of the proposal on the table it does not appear to be adequate. If there is a substantial outage at one (or more) of the units, $700 million may well be insufficient.[13] ~~Moreover, in the event of an outage, NewCo or~~

~~[12] As explained by Mr. Russell (Affidavit ¶ 17):~~

> ~~Concerns about the possible failure of a spin-off of generating assets to a separate company that will trade in the competitive marketplace and assume enormous financial obligations are not financial fantasy. In April 2001, the Southern Company spun-off its wholly-owned subsidiary, Mirant Corporation, which was created to build unregulated power plants and to sell their output into deregulated and competitive markets. By July 2003, Mirant had filed for bankruptcy protection, after slumping power prices left it unable to refinance a $4.9 billion debt. Mirant emerged from bankruptcy nearly three years later, in January 2006.~~

[13] For example, in 1987, the Nine Mile 1 unit began a 34-month outage, which the unit's owner, Niagara Mohawk, estimated cost at least $375 million *in 1990 dollars*. *Niagara Mohawk Power Corp.*, 31 N.Y. P.S.C. 1745, 1765 (1991).

some subset of the plants may well need to be in the market to obtain replacement power. To the extent fixed price contracts associated with these plants do not sufficiently limit NewCo's liability for replacement power costs or obligations, the dollar impact of these undertakings can become substantial. Russell Affidavit ¶ 14. In addition, UWUA Locals are uncertain where the obligation to pay debt service costs associated with the borrowings proposed as part of the license transfer will be included in the payment priority structure. Russell Affidavit ¶ 11. Assuming these obligations are ahead of most other (if not all other) obligations, then an outage may exert financial pressures well in excess of whatever is covered under the Support Agreement. In any event, guaranteed coverage of a certain level of fixed O&M charges hardly constitutes satisfying the entire universe of fixed financial obligations associated with a nuclear plant. The Support Agreement does not demonstrate that under the new structure, the licensees will be able to weather extended outages at any one plant, new capital investment obligations in aging facilities, and whatever debt service obligations are not being met because of the outages. Russell Affidavit ¶ 9.

c) Much of NewCo's borrowings will flow back to Entergy, or be used in undefined "Hedging Arrangements"

Entergy's NRC application does not provide a clear picture of NewCo's capitalization. In testimony filed with the Vermont Public Service Board, Entergy states that while none of its proposed debt arrangements have yet been placed, the plan is for NewCo to enter into several debt arrangements with independent financial institutions. Entergy Witness Curry testifies:

> First, NewCo is expecting to issue up to $4,500,000,000 in aggregate principal amount of Senior Notes. Some of these Senior Notes will be exchanged with Entergy Corporation for outstanding equity interests as part of the proposed transaction. Entergy Corporation will use the Senior Notes to pay down Entergy Corporation's Credit Facilities, exchange and retire existing Entergy Corporation senior notes and possibly conduct an

> exchange offer to repurchase existing Entergy Corporation common stock. NewCo will also enter into a Senior Revolving Credit Facility to establish lines of credit up to $2,000,000,000, a portion of which will be available for letters of credit; a Term LC Facility to post letters of credit; and Hedging Arrangements to provide credit support for hedging by NewCo, its marketing affiliate and its Units. Hedging Arrangements include but are not limited to a Commodity Collateral Revolver (or "CCR"). The aggregate amount of the Senior Revolving Credit Facility and the Term LC Facility will not exceed $2,000,000,000. The Senior Revolving Credit Facility, the Term LC Facility and the CCR Facility (to which I refer collectively, as the "Credit Facilities") may each be secured, *pari passu,* in all respects with respect to the other facilities and will be used for working-capital purposes and to support NewCo's commodity-collateral requirements. The Senior Notes may also be secured.

Testimony of Wanda C. Curry at page 17 of 44, line 9 through page 18, line 3.

~~It is clear from other sources that a substantial portions of the funds raised through these borrowings will flow back to Entergy rather than, it appears, to NewCo. In its 2007 Annual Report to shareholders (entitled, "Unlocking Value"), Entergy states:~~

> ~~As part of the spin-off, Entergy Corporation expects to receive $4 billion, $1.5 billion of which is targeted to reduce debt. The remaining $2.5 billion is targeted for a share repurchase program, $0.5 billion of which has already been authorized by the Entergy Board of Directors, with the balance to be authorized and to commence following completion of the spin-off. Post-spin, Entergy Classic's dividend payout ratio aspiration ranges from 70 to 75 percent.~~

~~An excerpt from this document is Attachment 3 to this pleading, and is addressed by Mr. Russell. Russell Affidavit ¶ 15.~~

~~Thus, it appears that the majority of the funds to be raised by NewCo ($4 billion of the $6.5 billion, or 61.5 percent), will be going back to Entergy. The remaining $2.5 billion will apparently be used, *inter alia*, for "Hedging Arrangements," the scope of which is neither defined nor explained. The extent to which these arrangements will involve additional risk and,~~

~~if so, the nature of any such risk, is not stated. Russell Affidavit ¶ 15. Absent an opportunity to probe further, it is not known what risks, if any, are involved in the use of NewCo funds to "hedge" other obligations, or how the assumption of these additional risks bears on the overall "reasonable assurance" required by the Commission.~~

d) Entergy itself acknowledges that its proposal to rely increasingly on market revenues creates considerable financial risk

Entergy contends that UWUA Locals have failed to establish a "genuine dispute" with respect to its estimates of market revenues, and have misunderstood the role those revenues play in establishing "reasonable assurance." The Company is wrong, and the matter should be set for hearing.

Entergy claims that the marked shift in reliance upon market rather than contract revenues over the 5-year period at issue "merely reflects the NewCo business model" and cannot "defeat a finding of reasonable assurance." Opposition at 41. This statement makes no sense. If Entergy's business model fails to provide the requisite "assurance," then the proposed restructuring should not be approved. In any event, Entergy has explained elsewhere that it would prefer not to engage in the contract-to-market revenue shift that apparently forms the basis for the proposed restructuring.

~~Entergy's 2007 SEC Form 10-K Report states, under the general heading, "Significant Factors and Known Trends," the Company's general concern about the sale of non-utility nuclear plant output through the market rather than via contract, stating:~~

> ~~The sale of electricity from the power generation plants owned by Entergy's Non-Utility Nuclear business, unless otherwise contracted, is subject to the fluctuation of market power prices. Entergy's Non-Utility Nuclear business has entered into PPAs and other contracts to sell the power produced by its power plants at prices established in the PPAs. Entergy continues to pursue~~

> opportunities to extend the existing PPAs and to enter into new PPAs with other parties.

SEC Form 10-K Report at 42. In other words, Entergy is concerned about the "fluctuation of market power prices," and intends to "continue[] to pursue" power purchase agreements. *Id.* The preference for fixed price contracts is hardly startling. However, Entergy's stated preference for contract payments is hard to reconcile with NewCo's apparent plan to pursue market revenues, which are of course potentially more volatile.[14] The difference in preference and perspective highlights the need for a further examination of the bases for Entergy's market revenue projections. As Mr. Russell explains:

> Moving in the direction of more substantial reliance on the deregulated marketplace clearly entails substantially more financial risk, and offers (in this case) the added concern of NewCo facing those risks while having much reduced financial reserves. At a minimum, this structure heightens the need for Entergy to supply backup and supporting data that have not been provided.

Russell Affidavit ¶ 16.[15]

In response to concerns about its forecasts, Entergy makes much of its having provided all required information, suggesting that the NRC Staff can assess the projections based on what has been produced. (Opposition at 39). However, this claim is hard to understand when Entergy has provided no backup or other supporting data for its projections. Moreover, the suggestion in its SEC 2007 Form 10-K Report that substantially lower contract revenues are preferable to the risk of payments through the markets suggests that the "uncertainties" are "'significantly greater

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[14] Opposition at 41 (confirming the observation that NewCo's "business model" includes shifting the source of nuclear plant revenues "from contracts to the markets over the 5-year forecast period"). The specifics of Entergy's average market price forecasts, which are addressed in the March 18 Filing, have been designated as "confidential" by Entergy and are not being repeated here.

[15] In its SEC 2007 Form 10-K Report, Entergy states (at 42) that its average contract price per MWh as of 2012 will be $51 ($55 in 2011). Entergy's forecasts in this proceeding of average per MWh market prices are reviewed by UWUA Locals in the March 18 Filing (at 13).

than those that usually cloud business outlooks.'" Opposition at 39, quoting *N. Atl. Energy Serv. Corp.*, 49 N.R.C. at 222. As for the data requirements set forth in the Commission's regulations, the NRC has previously made clear that compliance with the obligation to provide five years' worth of data may be necessary, but is not *per se* sufficient to meet its requirements. As explained in *North Atlantic Energy Service Corporation*, five year projections may not "prove adequate in any and all cases." 49 N.R.C. at 220:

> Although satisfaction of those requirements is *necessary* to the grant of a license transfer application, such satisfaction cannot be deemed always *sufficient* to satisfy the Applicant's burden of proof, else the NRC be irrevocably bound by Applicants' own estimates and left without authority to look behind them.

Id. at 220-221. *See* 10 C.F.R. § 50.33(f)(4). In this case, UWUA Locals urge the Commission to require Entergy to provide the data needed to "look behind" the projections that have been provided.

Entergy contends that the market price forecasts offered in support of the proposal are "largely irrelevant" in that they "do not have any material impact on Entergy Pilgrim's financial qualifications" because Pilgrim's power purchase contracts apparently insulate it from market fluctuations. Opposition at 40. This is cold comfort. If, perhaps because of an event at one of the other five nuclear plants, NewCo is unable to raise sufficient funds to cover its obligations, then Pilgrim is a guarantor of the related debt service (or, perhaps, hedging arrangement) costs. Entergy has not proposed, nor do we understand it to be the case, that Pilgrim's contracts permit the plant to opt-out from the financial impact of the linked guarantees inherent in the proposed restructuring arrangements. While Entergy claims that UWUA Locals have failed to "present … information to suggest otherwise," Opposition at 41, it seems clear that the very structure of the Entergy proposal calls into question Pilgrim's financial qualifications.

c) Entergy's proposed debt-to-total enterprise figures do not add up

Entergy cites testimony provided in the Vermont Public Service Board proceeding stating that NewCo will have a comparatively more conservative capital structure, with an "expected debt-to-total-enterprise value of 30 to 45%." Opposition at 44, quoting Curry Testimony at 22-23. If that is the case, and given that Entergy proposes anywhere from $4.5 billion to $6.5 billion in debt offerings in connection with NewCo, then it appears that the enterprise value is planned to be in excess of $10 billion. Mr. Russell explains that these data are "hard to understand" given that the nuclear assets are stated (in Entergy's Form 10-K Report) to have a value of roughly $7 billion on Entergy's books. Russell Affidavit ¶ 18. He goes on to explain that the $6.5 billion in debt in a company now valued at $7 billion will represents a debt-to-enterprise value much higher than 30% to 45%. *Id.* Nonetheless, under this scenario, Entergy apparently expects that equity in NewCo that will be distributed to Entergy's shareholders will carry a market valuation on the order of at least $6 billion. Mr. Russell observes (*id.*):

> In order to sustain Entergy's assertion, the market must agree with … [Ms.] Curry's [valuation]…. While this valuation is critical to Entergy's representation that NewCo will be conservatively capitalized, Entergy has provided no assurance that the market will give NewCo shares such a high valuation.

However, assuming Entergy decides to keep investing and supports the high price of NewCo stock, Mr. Russell notes that the overall leverage of Entergy and NewCo viewed together can be expected to increase as a result of incremental upstream borrowings undertaken by Entergy in order to make equity investments in NewCo. Russell Affidavit ¶ 19. He observes that Entergy will not be inclined to issue new equity to invest in NewCo equity because doing so would lessen Entergy's "double" leverage. *Id.* Mr. Russell concludes:

> Lenders to NewCo (and to Entergy) can be expected to take this "double" leverage into account when pricing debt to NewCo. In other words, no matter what Entergy does, the market will eventually assign its own objective enterprise value to the NewCo. Ms. Curry's assertions about NewCo's enterprise value will not be tested until the newly issued NewCo stock starts trading in the secondary market.

Id.

If Entergy does not elect to increase its equity investments in NewCo so as to avoid diluting its control over the future, new equity will have to come from new investors who may not be as sanguine as Entergy about the risks of investing in NewCo, and who may demand high yields on their equity investments in order to reflect the higher risk. Russell Affidavit ¶ 20. High equity yields mean low prices and dilution of the original equity holders. If this were to occur, Mr. Russell notes that this plausible scenario undermines Ms. Curry's assertions about NewCo having a conservative capital structure. *Id.*

f) In evaluating Entergy's proposal, the Commission should take into account major changes in the regulatory landscape

Mr. Russell observes that in conducting its analysis of the "reasonable assurance" issue, the Commission should be mindful that the regulatory context within which the instant proposal is presented has undergone recent and substantial change. Russell Affidavit ¶ 6. He goes on to explain that Entergy is a conservatively capitalized corporate entity whose status as a registered holding company system under the now-repealed Public Utility Holding Company Act of 1935 ("PUHCA") meant that for decades its securities, capital structure and bond indentures were reviewed by the United States Securities and Exchange Commission. *Id.* ¶ 7.[16] Mr. Russell notes:

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[16] In reviewing his qualifications, Mr. Russell notes in his affidavit that from 1972-1976, he served as

> In registered PUHCA systems, certain limitations were generally imposed on debt issuances, common equity ratios and the payments of dividends, and upstream and downstream transactions within the holding company were closely scrutinized. The value and importance of adhering to those conservative financial traditions has been demonstrated time and again by the collapse of entities who abandoned these practices, including energy traders and highly leveraged funds secured by mortgages, bonds and other volatile cash flows that figure in today's headlines. The importance of these conservative traditions notwithstanding, Entergy has provided virtually nothing in the way of corporate charters, bond indentures, loan agreements or fundamental data upon which the Commission can test whether NewCo will adhere to this needed tradition of financial conservatism.

Id. ¶ 8. Mr. Russell goes on to point out that under the post-PUHCA structure, the SEC will no longer be regulating the financial offerings of NewCo (or other holding company entities). In this context, and as Mr. Russell explains, the Commission should not

> accept at face value predictions as to the financial stability of that the proposed restructuring. It will involve at least $6.5 billion in debt offerings in an enterprise now valued at $7 billion on Entergy's books, and guarantees for those obligations that will be assumed by six nuclear plants, some of which are older and undoubtedly facing the need for substantial upcoming capital expenditures for refurbishment and life extension.

Id. ¶ 9. In a footnote to this passage, Mr. Russell states that the commercial operation dates for the six plants at issue in this proceeding are: (1) Fitzpatrick (1975); (2) Indian Point 2 (1974); (3) Indian Point 3 (1976); (4) Palisades (1971); (5) Pilgrim (1972); and (6) Vermont Yankee (1972). *Id.* at n.1.

> Engineer and eventually Chief Engineer for the United States Securities and Exchange Commission's Division of Corporate Regulation. That Division, in administering the Public Utility Holding Company Act of 1935, regulated registered public utility holding company systems representing approximately 20% of the gas and electric industries in the United States. Entergy and its predecessor company, Middle South Utilities, was one of those registered public utility holding company systems.

Russell Affidavit ¶ 2.

g) UWUA Locals have understandably expressed concern that mounting financial pressures may result in negative impacts on employees and the public

Based on the concerns expressed here (and in the earlier filings), UWUA Locals asserted that it was plainly foreseeable that under an arrangement of this nature, there could be mounting pressure on the licensees to cut costs, and (especially if there is a lengthy outage at one or more of the plants) this will result in unhealthy pressures to defer maintenance, cut staff and otherwise call into question the ability of the new entity to meet its technical, financial and, ultimately, safety-related obligations. Entergy dismisses these concerns as "conjectural and pessimistic prognostications," and claiming that UWUA Locals have ignored the evidence demonstrating "financial qualifications." Opposition at 43.

For all of the reasons stated here, in prior pleadings, ~~and in Mr. Russell's Affidavit,~~ we do not believe that any such evidence has been presented. Given the financial pressures that these plants will be under, there is every reason for concern that may not be sufficient financial resources to cover outstanding obligations. To the extent this turns out to be the case, there is a legitimate basis for concern that there will be layoffs, deferred maintenance, poor performance, and heightened safety risk. We would add that, as Entergy notes, there is a significant change in the level of Accrued Pension liability. While Entergy states that this statistic is irrelevant (Opposition at 41), UWUA Locals assert that its relevance depends upon what the change is intended to convey. If the increase is, for example, the result of employee terminations, that could be directly relevant to ongoing plant operational performance and safety. As the basis for the change is, at the moment, unknown, Entergy should not be able to dismiss this concern as irrelevant.

Entergy makes much (Opposition at 42) of UWUA Locals' having framed these concerns as possibilities. Given the lack of data provided by Entergy, it is hard to imagine how much more of a showing UWUA Locals could have made on these issues.

h) There should be no question that a "genuine dispute" exists with respect to the financial qualifications of the licensees under the proposed restructuring

Entergy spends thirteen pages of its pleading (Opposition at 32-44) attempting to explain that there is no "genuine dispute" with respect to the issue of the licensees' financial qualifications under the proposed restructuring. In fact, given the showing here and in the earlier pleadings, UWUA Locals urge the Commission to find that such a dispute exists, and to set it for hearing. *See N. Atl. Energy Serv. Corp.*, *supra*, 49 N.R.C. at 219, in which the Commission notes with respect to a dispute about financial qualifications that the intervenor's "pleadings[] and the Applicants' own vigorous responses[] demonstrate that a genuine dispute exists regarding this issue." The same observation could certainly be made here.

CONCLUSION

WHEREFORE, for the foregoing reasons, and those stated in the February 5 and March 18 filings, UWUA Locals continue to respectfully request that the Commission: (a) grant Locals 369 and 590 leave to intervene in each of the captioned proceedings; (b) initiate hearing procedures with respect to the contentions as addressed herein; and (c) take any other actions consistent with the requests contained herein.

Respectfully submitted,

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