

November 3, 2016

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)
)
Susquehanna Nuclear, LLC) Docket Nos. 50-387, 50-388, and 72-28
)
(Susquehanna Steam Electric Station,)
Units 1 and 2))

SUSQUEHANNA NUCLEAR’S MOTION FOR LEAVE TO RESPOND TO MR. SABATINI MONATESTI’S CHALLENGE TO THE NRC’S DENIAL OF HIS REQUEST FOR ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION

Pursuant to 10 C.F.R. § 2.323, Susquehanna Nuclear, LLC (“Susquehanna Nuclear”) respectfully moves for leave to file the attached response in opposition to Mr. Sabatini Monatesti’s October 24, 2016 challenge to the NRC Staff’s October 20, 2016 denial of his request to access sensitive unclassified non-safeguards information (“SUNSI”).¹ The SUNSI at issue consists of Susquehanna Nuclear’s projected income statement and capacity factor assumptions upon which the income statement was based, which were provided as proprietary attachments to Susquehanna Nuclear’s June 29, 2016 application requesting NRC consent for the indirect transfer of control of Susquehanna Nuclear’s interests in the operating licenses for

¹ According to the “General Target Schedule for Processing and Resolving Requests for Access to [SUNSI] Information in this Proceeding” that is part of the Order Imposing Procedures for Access to [SUNSI] for Contention Preparation included with the Notice of Opportunity for Hearing in this proceeding, the deadline for the NRC Staff to reply to motions to reverse NRC Staff determinations is 30 days after publication of the notice of hearing for this proceeding, or November 3, 2016. Application for Indirect License Transfer; Notice of Opportunity to Comment, Request a Hearing, and Petition for Leave to Intervene; Order Imposing Procedures, 81 Fed. Reg. 68,462, 68,466 (Oct. 4, 2016). Susquehanna Nuclear is filing this Motion for leave to file a response and its Response in accordance with this deadline.

Susquehanna Steam Electric Station Units 1 and 2 (“SSES”) and the general license for the SSES Independent Spent Fuel Storage Installation.²

This motion for leave to respond is supported by good cause. Granting the Motion will ensure that the adjudicatory record before the Atomic Safety and Licensing Board reflects the viewpoints of all parties interested in Mr. Monatesti’s request for the SUNSI, including Susquehanna Nuclear as the party owning and potentially injured by the release of its financial information.

Although the procedures in the Order Imposing Procedures for Access to [SUNSI] for Contention Preparation, included with the Notice of Opportunity for Hearing in this proceeding, refer only to an NRC Staff reply to challenges to NRC Staff SUNSI access determinations, *see* 81 Fed. Reg. 68,462, 68,466, nothing in those procedures prohibits an applicant from filing a statement in support of a Staff determination to deny a request for access to the applicant’s SUNSI. The Order includes provisions allowing an applicant to challenge a Staff determination granting access to the applicant’s SUNSI, or to challenge—to the Commission via interlocutory appeal—a determination by a Presiding Officer granting access to license applicant’s SUNSI. *Id.* The Commission established these opportunities so that “the relevant applicant or licensee should have an opportunity to have input concerning the propriety of providing SUNSI . . . to the requesting party.”³ It appears equally appropriate to allow the applicant to provide input on the propriety of providing SUNSI to the requesting party when the Atomic Safety and Licensing

² Application for Order Approving Indirect Transfer of Control of Facility Operating License Nos. NPF-14 and NPF-22 (June 29, 2016) (the “Application”) (ADAMS Accession Nos. ML16181A415, ML16181A417, ML16181A419, ML 16181A420).

³ Response to Public Comments on Proposed Procedures to Allow Potential Intervenors to Gain Access to Relevant Records that Contain Sensitive Unclassified Non-Safeguards Information or Safeguards Information at 8 (Feb. 29, 2008) (ADAMS Accession No. ML080380633).

Board is considering an access determination. Susquehanna Nuclear has a strong interest in ensuring that its confidential commercial information is properly protected, and has had no prior opportunity to express its views on Mr. Monatesti's request.

Permitting Susquehanna Nuclear an opportunity to respond to Mr. Monatesti's challenge also appears consistent with the Atomic Safety and Licensing Board's November 1, 2016 Order (On Communication Received and Providing Opportunity to Respond), which permits the parties to respond to the additional e-mail and attachment that Mr. Monatesti submitted earlier that day. Susquehanna Nuclear has included in the attached response its position on this additional submittal.

As required by 10 C.F.R. § 2.323(b), the undersigned counsel for Susquehanna Nuclear certifies that he has consulted with the NRC Staff and Mr. Monatesti in an effort to resolve the issues raised by this motion. The NRC Staff has no objection to this motion. Mr. Monatesti has indicated that it is difficult for him to concur based on the information available.

For the foregoing reasons, the Board should grant Susquehanna Nuclear's motion for leave to respond.

Respectfully submitted,

/Signed Electronically By David R. Lewis/

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Dated: November 3, 2016

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November 3, 2016

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**SUSQUEHANNA NUCLEAR’S RESPONSE OPPOSING MR. SABATINI
MONATESTI’S CHALLENGE TO THE NRC’S DENIAL OF HIS REQUEST FOR
ACCESS TO SENSITIVE UNCLASSIFIED NON-SAFEGUARDS INFORMATION**

Susquehanna Nuclear, LLC (“Susquehanna Nuclear”) hereby responds in opposition to Mr. Sabatini Monatesti’s October 24, 2016 challenge to the NRC Staff’s October 20, 2016 denial of his request to access sensitive unclassified non-safeguards information (“SUNSI”). The SUNSI at issue consists of Susquehanna Nuclear’s projected income statement and capacity factor assumptions upon which the income statement was based, which were provided as proprietary attachments to Susquehanna Nuclear’s June 29, 2016 application requesting NRC consent to the indirect transfer of control of Susquehanna Nuclear’s interests in the operating licenses for Susquehanna Steam Electric Station Units 1 and 2 (“SSES”) and the general license for the SSES Independent Spent Fuel Storage Installation.¹ The Atomic Safety and Licensing Board (the “Board”) should affirm the NRC Staff’s denial of Mr. Monatesti’s SUNSI access request for three independent reasons. The Board should reject Mr. Monatesti’s challenge in the first instance because Mr. Monatesti did not submit any proper hearing request by the deadline in

¹ Application for Order Approving Indirect Transfer of Control of Facility Operating License Nos. NPF-14 and NPF-22 (June 29, 2016) (the “Application”) (ADAMS Accession Nos. ML16181A415, ML16181A417, ML16181A419, ML 16181A420).

this proceeding. Having failed to do so, he cannot participate in the proceeding and thus has no need to access Susquehanna Nuclear's proprietary information. In addition, as the NRC Staff correctly determined in denying Mr. Monatesti's request for access to SUNSI, Mr. Monatesti failed to satisfy both prongs of the Commission's test for a potential party to gain access to SUNSI. Here, Mr. Monatesti failed (1) to demonstrate that he would likely have standing in this indirect license transfer proceeding, and (2) to show a need for the information in order to meaningfully participate in any adjudicatory proceeding on the indirect license transfer application (i.e., to formulate contentions). Each of these failures is sufficient grounds for the denial of Mr. Monatesti's access request, and Mr. Monatesti's challenge identifies no error in, or other basis for overturning, the Staff's determination.

Susquehanna Nuclear also responds to the additional e-mail and attachment that Mr. Monatesti submitted on November 1, 2016. This submittal appears unrelated to Mr. Monatesti's challenge to the NRC Staff's denial of his SUNSI access request. Instead, the November 1, 2016 submittal appears to be a request that the license transfer be tabled and a thorough investigation be conducted to determine whether there is a benefit to the citizens, coupled with an assertion that Mr. Monatesti needs several weeks to complete his review and analysis of "the Securities and Exchange Filings, the review of the 10K reports from Talen Energy and Riverstone Holdings, and the materials filed with the Federal Energy Regulatory Commission" and 90 days to submit a report to the Board. Susquehanna Nuclear respectfully submits that the requested actions exceed the authority of the Board, which has been established only to rule on Mr. Monatesti's challenge to the SUNSI access denial. Even if the November 1, 2016 submittal were related to the challenge before the Board (which does not appear to be the case), it is untimely.

I. PROCEDURAL BACKGROUND

Susquehanna Nuclear is licensed as the operator of, and owner of a 90% undivided interest in, SSES. On June 29, 2016, Susquehanna Nuclear, on behalf of itself and Riverstone Holdings, LLC (“Riverstone”), an energy- and power-focused private investment firm, requested NRC consent to the indirect transfer of control of Susquehanna Nuclear’s interests in the SSES operating licenses, as well as the general license for the SSES ISFSI. The indirect transfer of control would result from a transaction (the “Shareholder Transaction”) in which Talen Energy Corporation (“Talen”), Susquehanna Nuclear’s ultimate parent, will become wholly owned by the portfolio companies of Riverstone that currently hold 35% in the aggregate of the outstanding common stock of Talen. Application at 1. As a result, all of the common stock of Talen will become privately held by affiliates of Riverstone, and Susquehanna Nuclear will become indirectly controlled by Riverstone as described in the Application. *Id.* at 1-2.

In accordance with NRC requirements in 10 C.F.R. § 50.80, the Application explained the purpose of the transfers and nature of the Shareholder Transaction, and provided information showing that Susquehanna Nuclear would remain technically and financially qualified. This information included a projected income statement for the SSES Units (combined and individually) and six-month fixed costs for the five-year period from January 1, 2017 through December 31, 2021. Susquehanna Nuclear’s income statement included sensitivity studies, which adjust projected income estimates based on hypothetical reductions in capacity factor and energy prices. The financial information provided with the Application also included capacity factor assumptions on which Susquehanna Nuclear’s income statement was based. Because this financial information is confidential commercial information, Susquehanna Nuclear provided proprietary versions of the income and capacity factor assumptions as Attachments 3P and 4P to

the Application, and non-proprietary versions as Attachment 3NP and 4NP, which redacted the financial and capacity factor data. Susquehanna Nuclear requested that the proprietary Attachments 3P and 4P be withheld from public disclosure under 10 C.F.R. § 2.390, and provided a supporting affidavit as Attachment 6 to the Application.

In addition, the Application demonstrated that Susquehanna Nuclear is currently providing decommissioning assurance in excess of the amount required by the NRC rules through the prepayment method. *See* Application at 15–16 & Attachment 5. Attachment 5 of the Application provided the calculation of the minimum decommissioning funding amount required by the NRC rules. The Application also identified the site-specific estimate of the cost of decommissioning the SSES ISFSI. Application at 15–16. The Application then demonstrated that, when earnings are credited as permitted by the NRC rules, the credited value of the SSES decommissioning trust funds for Units 1 and 2 (\$815,141,316 and \$939,899,446, respectively) exceeds Susquehanna Nuclear’s 90% ownership share of the NRC minimum requirement of \$620,379,000 for each unit plus the estimated ISFSI decommissioning cost. *Id.* None of the information pertaining to decommissioning funding assurance was redacted. It is all publicly available.

By letter dated August 26, 2016,² the Staff determined that the income statement and capacity factor assumptions contained in proprietary Attachments 3P and 4P were confidential commercial information and should be withheld from public disclosure. The Staff made publicly available the non-proprietary Attachments 3NP and 4NP to the Application along with the rest of the Application.

² Letter from NRC to Timothy Rausch, President and Chief Nuclear Officer, Susquehanna Nuclear, Request for Withholding Information from Public Disclosure for Susquehanna Steam Electric Station, Units 1 and 2 (CAC Nos. MF8056 and MF8057) (Aug. 26, 2016) (ADAMS Accession No. ML16215A008).

On October 4, 2016, the NRC published in the Federal Register a Notice of Opportunity for Hearing on the proposed indirect license transfer,³ setting October 24, 2016 as the deadline for hearing requests on the Application. In addition, because the Application contained SUNSI (the confidential commercial information withheld from public disclosure in proprietary Attachments 3P and 4P), the Federal Register notice included an Order Imposing Procedures for Access to [SUNSI] for Contention Preparation (the “Order”). 81 Fed. Reg. at 68,465. The Order allows potential intervenors to gain access to SUNSI-portions of a license application, subject to an opportunity for hearing, that have been withheld from public disclosure. The Order explained that “any potential party who believes access to SUNSI is necessary to respond to this notice may request such access” “[w]ithin 10 days after publication of this notice of hearing” 81 Fed. Reg. at 68,465.

In order to gain access to the SUNSI portion of the Application, the Order stated that a potential party must request permission for such access and include in its request (1) a description of the licensing action at issue; (2) the identity of the potential party and a description of the potential party’s particularized interest that could be harmed by the licensing action (in other words, the individual’s basis for standing in this proceeding); and (3) the requestor’s basis for the need for the information in order to meaningfully participate in this adjudicatory proceeding. *Id.* at 68,465. “In particular, the request must explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention.” *Id.* The Order also explained that that the NRC Staff would evaluate the request as to whether “(1) There is a reasonable basis to believe the petitioner is

³ Application for Indirect License Transfer; Notice of Opportunity to Comment, Request a Hearing, and Petition for Leave to Intervene; Order Imposing Procedures, 81 Fed. Reg. 68,462 (Oct. 4, 2016).

likely to establish standing to participate in this NRC proceeding; and (2) The requestor has established a legitimate need for access to SUNSI.” *Id.* The Order further provided that if the NRC Staff denied the individual’s request for access, the requestor may challenge that adverse determination within five days of receipt of that determination. *Id.* at 68,466. Likewise, the Order provided that any person whose interests would be harmed if the request for SUNSI was granted may challenge such grant of access within five days of the NRC Staff’s notification that such access would be granted. *Id.*

By e-mail dated October 11, 2016, Mr. Sabatini Monatesti transmitted to the Office of the Secretary a letter stating that “I wish to receive access to sensitive business documents filed by Talen Energy to discern whether Riverstone Holdings includes provisions and capital available for decommissioning of the Salem Township nuclear plant (aka. Susquehanna), and I require information regarding their continued support of Salem Township property and recreational facilities.”⁴ By e-mail dated October 12, 2016, the Office of the Secretary acknowledged receipt of Mr. Monatesti’s message and letter, informed Mr. Monatesti that his SUNSI request was under review, provided instructions on how to obtain a digital certificate, and informed Mr. Sabatini that an electronic docket was being established in anticipation of his filing a request for hearing. Because Mr. Monatesti did not take steps to obtain a digital certificate, the Office of the Secretary e-mailed him again on October 17, 2016, “to be certain that you understand any request for hearing you may wish to make in the subject proceeding must be submitted via the Electronic Information Exchange (EIE) prior to the filing deadline stated in the Federal Register Notice, which calculates to October 24, 2016.” Mr. Monatesti responded the same day,

⁴ This letter (hereinafter referred to as the “Access Request”) is Attachment 1 to the Letter from NRC Staff to Sabatini Monatesti, Request for Access to Sensitive Unclassified Non-Safeguards Information Related to the Application for Indirect Transfer of the Susquehanna Steam Electric Station (Oct. 20, 2016) (the “Staff Denial”).

explaining that he “plan[ned] to submit request for CERT tomorrow.”⁵ Responding to an inquiry made by Susquehanna Nuclear’s counsel to the Office of the Secretary,⁶ Mr. Monatesti also indicated that he had no objection to speaking with Susquehanna Nuclear’s Counsel and shared a “few areas of investigation.”⁷

By letter dated October 20, 2016, the NRC Staff denied Mr. Monatesti’s Access Request, explaining that “there is not a reasonable basis to believe that you are likely to establish standing to participate in the NRC proceeding and you have not established a legitimate need for access to the SUNSI.” Staff Denial at 1. The NRC Staff did not consider the areas of investigation in Mr. Monatesti’s October 17, 2016 e-mail (which in context appeared to be a response to the inquiry from Susquehanna Nuclear counsel to the Office of the Secretary⁸) to be part of Mr. Monatesti’s access request because it was not accompanied by any showing of good cause for a late filing as required by the SUNSI Order, but added that “even if the Staff had considered this additional information, it would not have changed the fact that your Access Request cannot be granted because it does not demonstrate that you are likely to establish standing and that you have a legitimate need for access to Attachment 3P and Attachment 4P.” Staff Denial at 4 n.27.

⁵ Mr. Monatesti’s October 17, 2016 message is included as Attachment 2 to the Staff Denial.

⁶ In connection with setting up the electronic docket, the Office of the Secretary informed Susquehanna Nuclear’s counsel on October 13, 2016, that it had received notification that a party intended to request a hearing on the license transfers. On October 17, 2016, Susquehanna Nuclear’s counsel learned that a SUNSI request had been received but would not be served through the e-filing system. Susquehanna Nuclear’s counsel therefore asked the Office of the Secretary to determine whether the SUNSI request could be disclosed or the person making the request could be identified.

⁷ The Office of the Secretary forwarded Mr. Monatesti’s October 17 response to Susquehanna Nuclear’s counsel the same day. Susquehanna Nuclear did not obtain Mr. Monatesti’s October 11 Access Request until it was provided as an attachment to the Staff Denial.

⁸ See *supra* note 6.

On October 24, 2016, Mr. Monatesti sent two e-mails to the NRC Chief Administrative Law Judge purporting to challenge the NRC Staff's denial of his Access Request.⁹ Among other things, his first e-mail stated that he "raised concerns regarding Susquehanna" and that he "believe[d] these concerns are still valid." Attached to this e-mail was a document entitled "Health and Safety review – Susquehanna Site," which concerns the planned "extension of the nuclear waste dry storage facility" at the SSES site. Later that same day, Mr. Monatesti sent a second e-mail to the NRC, which referenced a newspaper (the Morning Call) article and documents submitted to the Securities and Exchange Commission. Mr. Monatesti's e-mail stated that he "plan[ned] to review Talen Energy and Riverstone 10K Reports" and associated financial data, and stated that "this license transfer should be scrutinized in detail and tabled until citizen review is completed." On October 25, 2016, the NRC Secretary referred Mr. Monatesti's challenge to the NRC Staff's denial of his Access Request to the Atomic Safety and Licensing Board.¹⁰

While this matter was pending, Mr. Monatesti transmitted another document by e-mail dated November 1, 2016, entitled "Talen Energy Corp. – Riverstone Holdings, LLC – Transfer Order 10 CFR 50.80." In essence, the document "request[s] s action on the pending transfer of license to Riverstone Holdings LLC, indirect license transfer for Susquehanna Nuclear, LLC be tabled pending detailed review of the issues and concerns raised by me and others," "request[s] that a thorough investigation of the document presentations by Talen Energy and Riverside [sic]

⁹ Mr. Monatesti first emailed the NRC Staff on October 23, 2016. In response, the NRC Staff reminded Mr. Monatesti of the correct process for challenging such denial. This e-mail exchange is attached to the Office of the Secretary's referral to the Atomic Safety and Licensing Board. See *infra* note 10.

¹⁰ Memorandum from the Secretary to the ASLBP Chief Administrative Judge, Appeal from a Determination of the NRC Staff to Deny a Request for Access to [SUNSI] from an Individual Who Has Indicated an Intent to Request A Hearing Regarding Susquehanna Nuclear, LLC's Application for Indirect License Transfer (Docket Nos. 50-387, 50-388, and 72-28) (Oct. 25, 2016). The e-mail correspondence between Mr. Monatesti and the NRC Staff concerning his Access Request referenced herein was attached to this Memorandum.

Holdings be undertaken,” and stated that Mr. Monatesti would “need a minimum of ninety (90) days” to complete additional review of documents related to the transaction and “report [his] findings back to the” Board. Again, Mr. Monatesti identifies a number of issues potentially of interest to him, and cites a variety of documents he has identified in the public domain related to Riverstone, Talen, and SSES. For example, Mr. Monatesti cites risk factors routinely identified in Talen’s filings with the Securities and Exchange Commission (SEC) and alludes vaguely to “inconsistencies” and his view of additional information needed in order for him to assess the implications of the proposed transfer. He also alludes to other articles or information he uncovered, most from several years ago, and none with any clear connection to the proposed transfer. The filing does not demonstrate grounds for its untimeliness, identify an error in the NRC Staff’s denial of his access to SUNSI, provide any information pertaining to his standing, identify how the SUNSI at issue relates to any proposed contention, or request a hearing. Mr. Monatesti merely seeks more time to complete his evaluations.

In sum, as of today’s date, Mr. Monatesti has not filed any request for hearing on the Application through the NRC’s adjudicatory E-filing system.

II. THE BOARD SHOULD UPHOLD THE STAFF’S DENIAL OF MR. MONATESTI’S SUNSI ACCESS REQUEST

A. Mr. Monatesti’s SUNSI Access Request is Moot Because He Failed to File a Request for Hearing

The Board should reject out of hand Mr. Monatesti’s challenge to the NRC Staff’s denial of his Access Request because Mr. Monatesti has failed to file a request for hearing on the Application. His failure to file a request for hearing has obviated any need for access to Susquehanna Nuclear’s SUNSI.

The Commission's SUNSI Order makes clear that the only reason a potential party to an adjudicatory proceeding may be permitted access to the SUNSI is for "Contention Preparation." 81 Fed. Reg. 68,465. Accordingly, the Order explicitly required Mr. Monatesti to establish the "basis for the need for the [SUNSI] information *in order to meaningfully participate in this adjudicatory proceeding.*" *Id.* (emphasis added). The NRC Staff, in turn, was required to determine if there "is a reasonable basis to believe [Mr. Monatesti] is likely to establish standing to participate in this proceeding," and if he "has established a legitimate need for access to SUNSI." *Id.* If a potential party requests access to SUNSI but fails to request a hearing, the potential party cannot participate in the adjudicatory proceeding, and thus no longer has any legitimate need for access to the SUNSI.

Those are the circumstances here. While Mr. Monatesti has corresponded with the NRC concerning access to Susquehanna Nuclear's SUNSI, Mr. Monatesti filed nothing that can be characterized as a proper hearing request in this proceeding. Mr. Monatesti's general interest in issues related to SSES, Talen, or Riverstone does not constitute a basis for access to the confidential commercial information.

In this regard, the NRC Notice of Opportunity for Hearing in this proceeding explicitly states that requests for hearing and petitions for leave to intervene must be filed within 20 days of the Notice, *i.e.* by October 24 (*see* 81 Fed. Reg. at 68,463) and further provides that all documents filed in the adjudicatory proceeding, including a request for hearing and petition for leave to intervene, must be filed in accordance with the NRC's E-filing rule (*id.* at 68,464). As explained in the Notice of Opportunity for Hearing, the E-filing rule requires proceeding participants to obtain a digital identification certificate in order to be able to electronically submit documents through the NRC E-filing system, and then to submit and serve on all parties all

adjudicatory documents through the E-filing system, unless an exemption is obtained. *Id.* Mr. Monatesti did not submit and serve any hearing request through the E-filing system by the October 24 deadline, nor did he request an exemption from the requirement to do so.

Mr. Monatesti was put on notice at least three times that e-mails to the NRC Staff requesting access to Susquehanna Nuclear's SUNSI were separate and distinct from any request for hearing. First, the Order included with the Notice of Opportunity for Hearing states:

While a request for hearing or petition to intervene in this proceeding must comply with the filing requirements of the NRC's "E-Filing Rule," the initial request to access SUNSI under these procedures should be submitted as described in this paragraph.

81 Fed. Reg. 68,465 n.1. Second, in its October 12, 2016 e-mail acknowledging receipt of Mr. Monatesti's October 11, 2016 Access Request, the Office of the Secretary stated that it would "begin the process of establishing an electronic docket *in anticipation of your filing of a request for a hearing*" (emphasis added). In its e-mail five days later on October 17, the Office of the Secretary again instructed Mr. Monatesti that "any request for hearing you may wish to make in the subject proceeding *must be submitted via the Electronic Information Exchange (EIE)* prior to the filing deadline stated in the Federal Register Notice, which calculates to October 24, 2016" (emphasis added). Mr. Monatesti simply ignored these instructions.

Further, nothing in the Order relieved Mr. Monatesti of the obligation to file a hearing request by October 24. To the contrary, the target schedule provided at the end of the Order made it clear that 20 days after the Notice of Opportunity for Hearing was the "[d]eadline for submitting petition for intervention containing (i) Demonstration of standing, and (ii) all contentions whose formulation does not require access to SUNSI. . . ." 81 Fed. Reg. at 68,466. Thus, even if one assumed that Mr. Monatesti was contemplating filing contentions that required

access to applicant's SUNSI (an assumption completely inconsistent with Mr. Monatesti's expressed concerns regarding decommissioning assurance, the expansion of the ISFSI, and continued support of Salem Township property and recreational facilities), Mr. Monatesti was still obligated to submit a hearing request that was properly filed and served through the E-filing system demonstrating his standing. Having failed to request a hearing through submission of a proper request that included, at a minimum, a demonstration of standing, Mr. Monatesti's Access Request is moot.

B. Mr. Monatesti Failed to Demonstrate That He Would Likely Have Standing in This Proceeding

The Board should uphold the NRC's Staff's denial of Mr. Monatesti's Access Request because the Staff correctly determined that he was not likely to establish standing in this proceeding. Mr. Monatesti did not describe any "particularized interest that could be harmed by the potential licensing . . . action" as required by the Order. As discussed below, the proximity of his residence to SSES is an insufficient basis for standing on a license transfer matter.

The NRC Staff correctly determined that Mr. Monatesti's statement that he lives within two miles of SSES is not sufficient to demonstrate standing. Staff Denial at 5. To establish standing based on proximity, a petitioner has the burden of demonstrating that "the kind of action at issue, when considered in light of the radioactive sources at the plant, justifies a presumption that the licensing action 'could plausibly lead to the offsite release of radioactive fission products from . . . the . . . reactors.'" *Exelon Generation Co. (Peach Bottom Atomic Power Station, Units 2 and 3)*, CLI-05-26, 62 N.R.C. 577, 581 (2005) (quoting *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 and 2)*, LBP-98-27, 48 N.R.C. 271, 277 (1998), *aff'd* CLI-99-4, 49 N.R.C. 185 (1999), *petition for review denied*, *Dienethal v. NRC*, 203 F.3d 52 (D.C. Cir.

2000)). Here, Mr. Monatesti provided no demonstration that the indirect transfer of the SSES licenses could have offsite consequences nor provided any traditional standing analysis.

Further, proximity standing has been repeatedly rejected in cases such as this where only an *indirect transfer of control* will occur. In the *Palisades* case, involving an application for indirect transfer of control resulting from a proposed spinoff of nuclear units, the Commission held that proximity alone does not establish standing. *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 N.R.C. 251, 258 (2008). As the Commission explained,

[The licensee's] proposed license transfer is an *indirect* one in that it does not involve transfer of either ownership or operating rights to the subject facilities. Nor does it entail any changes in the facilities themselves or in their operation. Given these facts, we can see no 'obvious potential for offsite consequences' stemming from this *indirect* license transfer. And without such potential consequences, proximity-based standing cannot be demonstrated. Indeed, to date, *we have never granted proximity-based standing to a petitioner in an indirect license transfer* Petitioners' Group offers no reason for us to depart from this line of adjudicatory precedent. Nor can we think of any.

Id. at 269 (emphasis added). Similarly, in the *Millstone* indirect transfer case, involving the merger of a corporate parent, the Commission rejected proximity standing. *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 1, 2, and 3), CLI-00-18, 52 N.R.C. 129 (2000).

The transfer application at issue here proposes no change in the Millstone licensees, no change in the Millstone facility, no change in its operation, no change in its personnel, and no change in its financing. It is far from obvious how [the] corporate restructuring would affect petitioners' interests.”

Id. at 132–133.¹¹

¹¹ See also *Peach Bottom*, CLI-05-26, 62 N.R.C. at 581–82 (rejecting “proximity standing” in a proceeding involving a corporate merger and the consequent transfers of 50 percent non-operating interests in nuclear units,

Here, the NRC Staff correctly concluded that Mr. Monatesti's "assertion of proximity to the site, on its own, is not sufficient to demonstrate standing" because there "is no obvious potential for offsite radiological consequences from the proposed SSES indirect license transfer." Staff Denial at 5. Just as the Commission found in the *Peach Bottom* license transfer proceeding, the risks associated by the indirect transfer of control of SSES are "de minimis" and justify no proximity presumption. *Peach Bottom*, CLI-05-26, 62 N.R.C. at 581. As explained in the SSES indirect license transfer application, Susquehanna Nuclear will continue to be the plant operator. Application at 11. The Shareholder Transaction that will result in the indirect transfer of control of the SSES licenses will not affect the technical qualifications of Susquehanna Nuclear, nor will it require any change in the management or staffing of the nuclear organization, or any change in its procedures. *Id.* Because the Shareholder Transaction "will result in no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel," there is no "obvious potential for offsite consequences" resulting from the indirect transfer of control. *Peach Bottom*, CLI-05-26, 62 N.R.C. at 582. Consequently, there is no basis to use proximity to SSES as a basis for establishing standing.

Where a petitioner fails to justify a presumption of standing based on proximity by demonstrating an obvious potential for offsite consequences, the Commission's standing inquiry reverts to a "traditional standing" analysis of whether the petitioner has made a specific showing of injury, causation, and redressability. *Peach Bottom*, CLI-05-26, 62 N.R.C. at 581.¹² Mr.

because the proposed license transfer "will result in no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel" and as a result, the risks associated with the transfer were "*de minimis* and therefore justifi[ed] no 'proximity standing' at all.')

¹² Under the traditional analysis, a petitioner must show: (1) an actual or threatened, concrete and particularized injury that is (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable decision. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 N.R.C. 185, 195 (1998) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th

Monatesti's Access Request did not contain any information indicating that he would incur an injury causally related to the indirect license transfer or redressable in this proceeding. Indeed, the Staff examined each of the concerns that Mr. Monatesti expressed in his Access Request and correctly found that none of them implicated a harm traceable to the proposed license transfer, or that otherwise falls within the interests protected by the Atomic Energy Act (the "AEA"). These assertions included:

- A claim regarding an increase in nuclear waste storage at SSES and alleged outstanding health and safety issues at the site, which the Staff found would exist "independent of the proposed license transfer," Staff Denial at 5;
- Concerns regarding SSES's continued support of local property and recreational facilities, which the Staff found are not "among the general interests protected by the AEA," *id.*;
- A concern regarding the availability of a sufficient and trained workforce to ensure a successful transfer of responsibilities, which the Staff found not fairly traceable to the proposed licensing action because the proposed indirect transfer would not require any change in the management or staffing of the plant, and which Mr. Monatesti failed to refute, *id.*; and

Cir.), *cert. denied*, 515 U.S. 1159 (1995). For a facility with ongoing operations, a petitioner's challenge must show that the approval will cause a "distinct new harm or threat apart from the activities already licensed." *See Int'l Uranium (USA) Corp.* (Source Material Amendment License No. SUA-1358), CLI-01-18, 54 N.R.C. 27, 31 (2001), citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 N.R.C. 185, 192 (1999). The petitioner must show that the alleged injury is fairly traceable to the proposed activity. *Alaska Dep't of Transp. and Pub. Facilities* (Confirmatory Order Modifying License), CLI-04-26, 60 N.R.C. 399,405, *reconsideration denied*, CLI-04-38, 60 N.R.C. 652 (2004); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 71, 75 (1994). And the petitioner is required to show that "its actual or threatened injuries can be cured by some action of the tribunal." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 N.R.C. 9, 14 (2001).

- A concern regarding the sufficiency of decommissioning funding, which the Staff found not traceable to the proposed license transfer, as decommissioning funding assurance has been provided by prepayment and is therefore unaffected by the proposed indirect transfer of control.¹³ *Id.* at 5–6.

In sum, the Staff correctly found that Mr. Monatesti failed to demonstrate standing because none of Mr. Monatesti’s assertions suggested any harm that is fairly traceable to the indirect license transfer.

None of Mr. Monatesti’s challenges to the Staff’s denial of his Access Request provides any basis to reverse the Staff’s determination. In fact, the two messages constituting his challenge do not contain any discussion of the Staff’s determination or identification of any error in the NRC Staff’s analysis. As Mr. Monatesti’s challenge is in the nature of an appeal, it should clearly identify any error and provide meaningful argument as to why the Staff’s determination should be reversed. *See, e.g.*, 10 C.F.R. 2.341(b)(2)(iii) (requiring that a petition for review contain a “concise statement why in the petitioner’s view the decision or action is erroneous”). *See also Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-03, 35 N.R.C. 63, 67 (1992)* (“Mere recitation of [intervenor’s] prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below”).

¹³ In expressing a concern regarding who would be responsible for decommissioning if the license holder goes bankrupt, Mr. Monatesti referred to Talen’s \$341 million net loss in 2015 and a downturn in energy prices. Talen’s performance in 2015 has no bearing on the adequacy of the Susquehanna Nuclear decommissioning trust, nor does it raise any concern traceable to the Shareholder Transaction. Further, the 2015 net loss was largely the result of non-cash goodwill and other asset impairment charges, and a one-time charge for the retirement of certain debt securities. *See Talen Energy Reports 2015 Results*, TALEN ENERGY CORPORATION (Feb. 25, 2016), <http://talenergy.investorroom.com/2016-02-25-Talen-Energy-Reports-2015-Results-Announces-2016-Guidance>. Talen’s adjusted EBITDA (as defined on page 14 of the Application) in 2015 was in excess of \$1 billion. *Id.*

Rather than identifying any error in the Staff's determination, Mr. Monatesti repeats and in some respects expands on his concerns. To the extent that Mr. Monatesti simply repeats the concerns in his original Access Request, his challenge provides no basis to disturb the Staff's determination. To the extent that his challenges include new assertions, they appear improper. The SUNSI Order requires any late request for access to SUNSI to be supported by a showing of good cause. 81 Fed. Reg. at 68,465. Accepting new assertions as a basis for overturning the Staff's determination without a showing of good cause would be inconsistent with this aspect of the Order and would render the Staff's SUNSI review essentially meaningless. Further, as a general matter, it is improper to raise issues for the first time on an appeal. *See, e.g., USEC Inc. (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 468 n.104 (2006)* ("This is new evidence submitted improperly for the first time on appeal (in a reply brief, no less)" and "This is, yet again, an improper new argument on appeal that we will not address").

In any event, none of the assertions in Mr. Monatesti's two October 24 e-mails demonstrates that Mr. Monatesti will suffer a concrete injury that is fairly traceable to the indirect transfer of control, distinct from activities already licensed, and redressable in this proceeding.¹⁴ Mr. Monatesti's first message attaches a May 18, 2016 letter which sets forth concerns that predate the Application and relate entirely to his unhappiness that storage of spent fuel in an independent spent fuel storage facility can be expanded under the general license in 10 C.F.R. § 72.210 without citizen input – a topic that predates the indirect transfer of control and will be unaffected by the transfer. In the body of his first October 24 e-mail, Mr. Monatesti asserts that the revenue stream for nuclear is under strain and repeats his assertions concerning his two mile proximity to the plant, the ongoing plans to increase nuclear waste storage at SSES,

¹⁴ *See supra* note 12.

alleged outstanding health and safety issues, and the sufficiency of decommissioning funding. All of these concerns appear to relate to the status quo. Nowhere does Mr. Monatesti explain how he would suffer any harm fairly traceable to indirect license transfer in these areas. In that same e-mail, Mr. Monatesti asserts that the “difficulty [he has] with the transfer of license process” is the purported lack of a public hearing. But this claim does not implicate any potential for increased radiological harm from the proposed transfer, and clearly a petitioner cannot bootstrap standing on a claim that he will be injured if there is no hearing. Mr. Monatesti also claims that, without the “Riverstone operating plan, investment NPV calculation, and clear recognition and resolution of the issues raised above, along with known dollar values for continued operation, the citizen is left with a lack of understanding, information, and lack of trust as to the veracity of the proposed transfer.” But Mr. Monatesti’s lack of understanding and trust does not constitute a particularized and concrete injury, or one within the zone of interests protected by the Atomic Energy Act—i.e., radiological risk.

Mr. Monatesti’s second October 24 e-mail refers to an article by a local reporter discussing Riverstone’s post-merger strategy, and states that he will review (and needs additional time to review) the Talen and Riverstone 10K reports to understand how operating and capital expenditures may be cut to address the \$340 million “shortfall” reported by Talen in 2015. But Mr. Monatesti’s desire for more information concerning Riverstone’s post-merger strategy hardly amounts to a showing of a particularized injury, such as any increased risk of radiological harm or other harm traceable to the proposed indirect license transfer.

For all of these reasons, the Board should uphold the Staff’s determination that Mr. Monatesti has failed to show he would likely have standing to participate in this license transfer proceeding.

C. Mr. Monatesti Failed to Demonstrate a Need for the SUNSI

The Board should uphold the NRC's Staff's denial of Mr. Monatesti's SUNSI access request because the Staff correctly determined that Mr. Monatesti failed to demonstrate a legitimate need for the SUNSI at issue. To gain access to SUNSI, the potential intervenor must identify its "need for the information in order to meaningfully participate in an adjudicatory proceeding" and "explain why publicly available versions of the information requested would not be sufficient to provide the basis and specificity for a proffered contention." Order, 81 Fed. Reg. at 68,465. To demonstrate how the requested SUNSI is necessary for meaningful participation in the proceeding, the requester must provide "(1) an explanation of the importance of the requested information to the proceeding, i.e., how the information relates to the license application . . . and how it will assist the requester in seeking intervention; and (2) an explanation of why existing publicly available versions of the application would not be sufficient." *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 & 4), CLI-10-24, 72 N.R.C. 451, 465 (2010) (footnotes omitted). In other words, a "request for SUNSI must demonstrate how the information would assist in meeting the Commission requirements for intervention petitions, including formulation of a proposed contention." *Id.* at 467. Mr. Monatesti never addressed or met these standards.

In particular, Mr. Monatesti's Access Request made no attempt to explain why Mr. Monatesti needed Susquehanna Nuclear's income statement or how that information was needed to formulate an admissible contention, as required by the Order. As the NRC Staff correctly determined, Mr. Monatesti's SUNSI request "does not challenge Susquehanna Nuclear's financial qualifications or make any arguments that are related to the redacted financial information." Staff Denial at 6. Indeed, the only explicit statement that Mr. Monatesti provided

for needing the SUNSI was “to discern whether Riverstone Holdings includes provisions and capital available for decommissioning of the Salem Township nuclear plant (aka. Susquehanna).” Access Request at 1. Mr. Monatesti’s Access Request failed to explain how the redacted financial information was needed to formulate a contention challenging decommissioning funding. Nor could he given that the decommissioning funds for SSES Units are pre-paid, and all of the information pertaining to decommissioning funding in the indirect license transfer application is publicly available. Application at 15–16 & Attachment 5. Nor did Mr. Monatesti explain how the income statement was necessary to support the formulation of any other contention.

Mr. Monatesti’s present challenge provides no basis to overturn the Staff’s determination that Mr. Monatesti failed to establish a legitimate need for the SUNSI. Mr. Monatesti does not identify any error in the Staff’s determination. He makes no attempt to address the applicable standards and provides no argument that they were met.

As previously discussed, Mr. Monatesti’s attempt to expand upon his prior concerns is untimely and therefore should be disregarded. But even if his new assertions were considered, they would still not meet the Commission’s standard for access to SUNSI. Neither of Mr. Monatesti’s October 24 e-mails explains why the SUNSI information is needed to formulate a proposed contention, and why the publicly available information is not sufficient.

His first October 24 e-mail states that his concerns regarding decommissioning funding, spent fuel storage, and health and safety issues were “still valid,” but nowhere shows that access to the non-public financial information is needed to formulate contentions on these issues. He also asks “who is left with the cost of cleaning up what is left” if Riverstone goes bankrupt, but again ignores the publicly available information supporting SSES decommissioning funding

assurance, which projects that both Units' decommissioning trust funds will far exceed NRC minimum requirements for Susquehanna Nuclear's 90% ownership share.¹⁵ Mr. Monatesti has full access to the information on decommissioning funding in the Application, SSES decommissioning funding reports available in ADAMS, and NRC requirements with respect to decommissioning funding assurance.

Also in his first October 24 e-mail, Mr. Monatesti asserts that Talen (not Susquehanna Nuclear) posted a loss of \$341 million in 2015, and claims that "energy prices are going down." In his second October 24 e-mail, he states he needs to review Talen and Riverstone 10K reports, which are publicly available. Nowhere does he explain why he needs to review Susquehanna Nuclear's income statement, what he thinks such a review might show, and how this information would support a contention. He provides no connection between the loss posted in 2015 by Talen (which owns approximately 16,000 MWe of generating capacity) and the profitability of *Susquehanna Nuclear*.¹⁶ Indeed, there is no relevance between Susquehanna Nuclear's projected income, projected operating costs, and projected capacity factor in the years 2017-2021, and the "loss" accrued in 2015 by Talen.

¹⁵ Mr. Monatesti's email includes a cost calculation purportedly showing decommissioning costs for SSES over the next twenty years. The calculation is not clear, but appears to refer to the initial cost of transitioning a nuclear facility from an operational status into decommissioning, based on a Fact Sheet from the Nuclear Energy Institute referenced at the bottom of his e-mail (available at <http://www.nei.org/Master-Document-Folder/Backgrounders/Fact-Sheets/Decommissioning-Nuclear-Energy-Facilities>). The costs referenced in that Fact Sheet pertain to obtaining NRC exemptions and approvals for reduced staffing when a nuclear plant permanently ceases operation and transitions from an operational status into decommissioning – a process which can take 12-18 month to complete. It appears that Mr. Monatesti takes the mid-point (\$15 million) of this transitional cost, multiplies it by 100 (the number of operating reactors), and then multiplies it by 1.03¹⁹ (apparently representing 3 percent escalation for 20 years). This is a meaningless calculation that has no bearing on the expected total decommissioning costs for SSES. In any event, the amount of required decommissioning funding assurance is established by the NRC rules at 10 CFR 50.75, which is not subject to challenge, and the SUNSI at issue in this proceeding has no bearing on the decommissioning funding assurance that Susquehanna Nuclear has provided.

¹⁶ As previously noted, Talen's 2015 net loss was largely the result of non-cash goodwill and other asset impairment charges and a one-time charge for the retirement of certain debt securities. *See supra* note 13. More information on these accounting charges is available in Talen's Form 10-K for the year ending December 31, 2015.

It appears in these e-mails that Mr. Monatesti's true interest is not with any potential harm resulting from the proposed indirect license transfer, but with potential risks associated with the expansion of the SSES ISFSI. Attached to his first October 24 e-mail is the paper entitled "Health and Safety Review – Susquehanna Site,"¹⁷ which consists of a discussion of nuclear waste-related issues, including the proposed expansion of the SSES ISFSI, potential impacts to the health and safety of the surrounding area, the Nuclear Waste Policy Act, and a request that the proposed expansion be halted absent "review and acceptance by Salem Township citizen." All of these issues are outside the scope of this indirect license transfer proceeding. Moreover, none of this information explains why the proprietary Susquehanna Nuclear financial information in question is needed, nor how it relates to a proposed contention.

D. Mr. Monatesti's November 1 Submittal Is Improper and Irrelevant

The e-mail and attached document that Mr. Monatesti submitted on November 1 are improper and untimely. The deadline for filing a challenge to the Staff's determination rejecting his Access Request expired on October 25. Mr. Monatesti has shown no good cause for a late submission.

Further, Mr. Monatesti's November 1 submittal appears unrelated to his challenge to the NRC Staff denial of his SUNSI access request. It makes no attempt to address the NRC Staff's denial of his Access Request –i.e., whether Mr. Monatesti demonstrated standing or his need for the SUNSI to formulate a proposed contention. The November 1 submittal, vaguely raising various historical issues or disconnected facts, still fails to demonstrate any injury caused by the proposed transfer. Under the NRC's rules, a petitioner must address standing by making a

¹⁷ If Mr. Monatesti intended this document to supplement his initial Access Request, the Board should not consider it because it was untimely filed. The Order states that such untimely filings are not to be considered absent good cause, and Mr. Monatesti has not provided any. 81 Fed. Reg. 68,465.

showing of injury, independent from a request for access to information. Mr. Monatesti has failed to do this. In addition, it still fails to explain why the SUNSI is needed to formulate a proposed contention. Indeed, the submittal only asserts a need to review the “Securities and Exchange Filings, the review of the 10K reports from Talen Energy and Riverstone Holdings, and the materials filed with the Federal Energy Regulatory Commission” in order to conduct an investigation of whether the Shareholder Transaction is “a positive one for the citizen.” Thus, rather than showing any need to review the SUNSI to formulate an admissible contention, the November 1 submittal reflects Mr. Monatesti’s desire to review documents that are already publicly available to conduct a public interest review of the transaction.

Instead of addressing the NRC Staff denial of the SUNSI access request, the November 1 submission seeks to have the Application “tabled” and calls for an investigation and more time. These requests exceed the Board’s authority. The Board was empaneled to consider Mr. Monatesti’s appeal from the NRC Staff’s denial of a request for access to SUNSI information. The Board does not have the authority to stay the indirect transfer of control, or to order an investigation.

In sum, the November 1 submittal is untimely, improper, and irrelevant.

III. CONCLUSION

For the foregoing reasons, the Board should affirm the NRC Staff's denial of Mr. Monatesti's Access Request.

Respectfully submitted,

/Signed Electronically By Timothy J. V. Walsh/

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Dated: November 3, 2016

Counsel for Susquehanna Nuclear, LLC

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of)	
)	
Susquehanna Nuclear, LLC)	Docket Nos. 50-387, 50-388, and 72-28
)	
(Susquehanna Steam Electric Station,)	
Units 1 and 2))	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing “Susquehanna Nuclear’s Motion for Leave to Respond to Mr. Sabatini Monatesti’s Challenge to the NRC’s Denial of His Request for Access to Sensitive Unclassified Non-Safeguards Information”, and “Susquehanna Nuclear’s Response Opposing Mr. Sabatini Monatesti’s Challenge to the NRC’s Denial of His Request for Access to Sensitive Unclassified Non-Safeguards Information,” both dated November 3, 2016, have been served through the E-Filing system on the participants in the above-captioned proceeding, this 3rd day of November, 2016.

/Signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh