UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket Nos. 50-286 and 50-333
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Unit No. 3 and James A. FitzPatrick Nuclear Power Plant)	)	November 28, 2016

ENTERGY'S ANSWER OPPOSING REQUEST FOR HEARING

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I. INTRODUCTION

Pursuant to 10 CFR § 2.309(i), Entergy Nuclear Operations, Inc. ("Entergy") submits this Answer opposing the request for hearing filed on November 1, 2016 ("Hearing Request")[1] by Indian Point Safe Energy Coalition; Hudson River Sloop Clearwater; Sierra Club, Lower Hudson Group; Council on Intelligent Energy & Conservation Policy; Nuclear Information and Resource Service; Alliance for Green Economy; and Public Health and Radiation Project (collectively, "Petitioners").[2] Together, Petitioners challenge Entergy's August 16, 2016 application ("Application")[3] to the U.S. Nuclear Regulatory Commission ("NRC") seeking various actions

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1 Letter from S. Shapiro to NRC Document Control Desk and Office of the Secretary (Sept. 15, 2016) ("Hearing Request") (ML16306A258). Despite the date inscribed on the Hearing Request, ADAMS indicates the document was "received" and "docketed" on November 1, 2016. The Hearing Request appears to be a resubmission of Ms. Shapiro's letter emailed to the NRC on September 15, 2016. That letter was rejected by the Office of the Secretary. *See* SECY Order (Dismissing Petition) at 1-2 (Oct. 3, 2016) (ML16277A605) ("Initial Hearing Request Dismissal Order").

2 The Hearing Request purports to be submitted on behalf of several organizations, including "Alliance for Green Economy" and "Public Health and Radiation Project." *See* Hearing Request at 2-3. The document may be referring to organizations named "Alliance for a Green Economy" and "Radiation and Public Health Project," respectively. However, as no address or contact information is provided, it is unclear for which legal entities the Hearing Request was submitted.

3 Letter from B. Sullivan, Entergy, to NRC Document Control Desk, Application for Order to Transfer Master Decommissioning Trust From PASNY to ENO, Consenting to Amendments to Trust Agreement,

related to a proposed transfer of the beneficial interest of the decommissioning trust for Indian Point Nuclear Generating Unit No. 3 ("IP3") and James A. FitzPatrick Nuclear Power Plant ("FitzPatrick") (collectively, the "Units").[4]

The Hearing Request is deficient in several respects and fails to fulfill the NRC's requirements for a hearing. First, the Hearing Request must be rejected because it fails to comply with several procedural requirements in 10 CFR Part 2. While the nonconformances are technical in nature, the Commission has declared that—due to her behavior in previous NRC adjudicatory proceedings—pleadings submitted by Ms. Shapiro *must* be summarily rejected unless they fulfill "all" procedural regulations.[5] Moreover, the Hearing Request fails to provide even the most basic information about the purported Petitioners, much less does it plead facts sufficient to establish standing. Finally, the assertions made in the Hearing Request are factually inaccurate, and fail to establish an admissible contention.

For all of these reasons, the Hearing Request should be summarily denied.

II. REGULATORY AND PROCEDURAL BACKGROUND

The discussion below provides background regarding the Units and the decommissioning trust fund at issue in this proceeding, as well as further details regarding the purpose of the Application and Petitioners' Hearing Request.

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and Approving Proposed License Amendments to Modify and Delete Decommissioning Trust License Conditions Upon the Transfer of Trust Funds (Aug. 16, 2016) (ML16230A308).

[4] The top of the Hearing Request identifies the document as a "Request for Public Hearing on Indian Point 2 License Amendment: Docket ID NRC-2015-0038." This heading appears to be a remnant of a different document.

[5] *See Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), CLI-08-29, 68 NRC 899, 900-03 (2008) ("Shapiro Sanctions Order").

A. Licensee and Trust Fund History

IP3 is a single-unit pressurized water reactor constructed by the Consolidated Edison Company of New York and completed in 1976.[6] On March 10, 1978, the Power Authority of the State of New York, a municipal instrumentality and political subdivision of the State of New York ("PASNY," which does business as the New York Power Authority) became the owner and operator of IP3.[7] FitzPatrick is a single-unit boiling water reactor; its operating license was granted in 1974 and commercial operation began in July 1975.[8] FitzPatrick also was owned and operated by PASNY.[9] In order to create an external source of funding for decommissioning of the Units, PASNY established the "Power Authority of the State of New York Master Decommissioning Trust" ("PASNY Trust"), pursuant to the Master Decommissioning Trust Agreement between PASNY and The Bank of New York, as trustee, dated July 25, 1990 (the "PASNY Trust Agreement").[10]

On November 9, 2000, pursuant to license transfer orders issued by the NRC ("License Transfer Orders"),[11] ownership of Fitzpatrick was transferred to Entergy Nuclear FitzPatrick,

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6 *See* Letter from G. Wunder, NRC, to J. Knubel, PASNY, and M. Kansler, Entergy, Indian Point Nuclear Generating Unit No. 3 - Order Approving Transfer of License from the Power Authority of the State of New York to Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc. and Approving Conforming Amendment (TAC No. MA8948), Attach. 3 at 1 (Nov. 9, 2000) ("IP3 License Transfer Order") (ML003767953).

7 *Id*.

8 *See* Letter from G. Vissing, NRC, to J. Knubel, PASNY, and M. Kansler, Entergy, James A. FitzPatrick Nuclear Power Plant - Order Approving Transfer of License from the Power Authority of the State of New York to Entergy Nuclear FitzPatrick, LLC, and Entergy Nuclear Operations, Inc. and Approving Conforming Amendment (TAC No. MA8949), Attach. 3 at 2 (Nov. 9, 2000) ("FitzPatrick License Transfer Order") (ML003768011).

9 *Id*.

10 *See* Conformed Copy of the Master Decommissioning Trust Agreement for Indian Point 3 Nuclear Power Plant and James A. FitzPatrick Nuclear Power Plant (July 25, 1990) (ML100500726).

11 *See* IP3 License Transfer Order; FitzPatrick License Transfer Order.

LLC ("ENF"), ownership of IP3 was transferred to Entergy Nuclear Indian Point 3, LLC ("ENIP3"), and Entergy became the licensed operator of the Units. Under the License Transfer Orders, PASNY retained all rights, title, and legal and beneficial interest in the PASNY Trust, though the funds remained committed to the decommissioning of the Units.[12] This arrangement was reflected in an amendment to the PASNY Trust Agreement,[13] as well as newly created decommissioning agreements to define the parties' obligations (collectively, the "Decommissioning Agreements").[14] As further explained in Section V.B., below, these documents have always contemplated the possible transfer of the beneficial interest of the PASNY Trust to the Units' respective owners at the end of the initial terms of the Units' operating licenses.

On September 8, 2008, the NRC approved a renewed operating license for FitzPatrick, valid through October 17, 2034.[15] The initial FitzPatrick operating license expired on October 17, 2014.[16] The initial IP3 operating license was set to expire at midnight on

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12 *See* IP3 License Transfer Order, Attach. 3 at 2; FitzPatrick License Transfer Order, Attach. 3 at 2.

13 *See* First Amendment to Master Decommissioning Trust Agreement (November 21, 2000). A form of this document was submitted to the NRC as part of the May 2000 license transfer application. *See* Letter from M. Kansler, Entergy, to NRC Document Control Desk, Transfer of Facility Operating License and Proposed License Amendment, Encl. 4, Exh. P (May 12, 2000) (ML003743634) ("May 2000 LTA") (PDF pages 149-158).

14 *See* Decommissioning Agreement (Indian Point 3) (Nov. 21, 2000) ("IP3 Decommissioning Agreement"); Decommissioning Agreement (FitzPatrick) (Nov. 21, 2000) ("FitzPatrick Decommissioning Agreement"). Forms of the Decommissioning Agreements were submitted to the NRC as part of the May 2000 license transfer applications. *See* May 2000 LTA, Encl. 4, Exh. O-1 & O-2 (PDF pages 119-148). The Decommissioning Agreements were amended (as to Section 5.2) on August 8, 2016; however, these amendments are not relevant to issues raised in the Hearing Request.

15 *See* Entergy Nuclear Fitzpatrick, LLC, and Entergy Nuclear Operations, Inc.; The James A. Fitzpatrick Nuclear Power Plant; Notice of Issuance of Renewed Facility Operating License No. DPR–59 for an Additional 20-Year Period; Record of Decision, 73 Fed. Reg. 53,285 (Sept. 15, 2008).

16 *See* Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing and Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process for Facility Operating License No. DPR–59 for an Additional 20-Year Period, Entergy Nuclear Operations, Inc., James A. Fitzpatrick Nuclear Power Plant, 71 Fed. Reg. 55,032, 55,033 (Sept. 20, 2006).

December 12, 2015, but continues in force pursuant to the NRC's "timely renewal" regulation (10 CFR § 2.109) until the NRC makes a final determination on the pending application to renew the IP3 operating license.[17]

Accordingly, PASNY and Entergy have proposed a transaction that will facilitate the transfer of PASNY's beneficial interests in the PASNY Trust, as amended, to Entergy, and whereby Entergy would assume PASNY's responsibilities and obligations under the Decommissioning Agreements ("Proposed Transaction").

B. The Application

On August 16, 2016, Entergy and PASNY submitted the Application to the NRC seeking the following actions necessary to complete the Proposed Transaction:

1. an order to transfer the beneficial interest in the PASNY Trust from PASNY to Entergy;
2. consent to amendments to the PASNY Trust Agreement to facilitate this transfer; and
3. approval of an administrative license amendment to modify the existing trust-related license conditions to reflect the Proposed Transaction and update the conditions in order to apply the NRC's more recent requirements of 10 CFR § 50.75(h)(1).[18]

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17 *See* Indian Point Timely Renewal, NRC.GOV, http://www.nrc.gov/info-finder/reactors/ip/ip-timely-renewal.html.

18 *See* Application at 1-2. The proposed license amendments will (i) modify certain license conditions related to the PASNY Trust to reflect the proposed transfer, and (ii) delete other specific license conditions that govern the PASNY Trust Agreement, so that the trust can instead be governed by the requirements of 10 CFR § 50.75(h)(1). *See* Application at 3. Contrary to Ms. Shapiro's petition, however, these administrative changes to the Units' licenses will not lessen the applicable decommissioning funding requirements. Instead, they will merely update the rules governing the PASNY Trust by electing to apply

The Application is being reviewed by the NRC Staff.

C. September 15, 2016 Pleading

On September 15, 2016, Ms. Susan Shapiro—on behalf of Petitioners—filed a letter purporting to be a request for a public hearing on the Application.[19] Contrary to the NRC's e-filing requirement set forth in 10 CFR § 2.302(a), Ms. Shapiro did not electronically file her petition through the NRC's Electronic Information Exchange system; rather, she emailed her petition to the Office of the Secretary.[20] Additionally, as of September 15, 2016, the notice of opportunity to request a hearing on the Application had not yet been published in the *Federal Register*.[21]

Ms. Shapiro's pleading was dismissed by the Office of the Secretary[22] pursuant to a standing Commission order directing summary rejection of all nonconforming pleadings signed by Ms. Shapiro.[23] Such action is extraordinarily rare; the Commission has only issued such an order on two occasions in the history of the agency.[24] The Commission found this extraordinary action was justified based on counsel's "consistent abuse of the adjudicatory process," "repeated

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the more recent comprehensive provisions governing decommissioning trust agreements set forth in Section 50.75(h), as permitted by Section 50.75(h)(5). *See infra* note 87 and accompanying text.

19 *See* Initial Hearing Request Dismissal Order at 1-2.

20 *See id*.

21 *See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 81 Fed. Reg. 66,301 (Sept. 27, 2016) ("Hearing Opportunity Notice").

22 *See* Initial Hearing Request Dismissal Order at 2.

23 *Shapiro Sanctions Order*, CLI-08-29, 68 NRC at 903.

24 *Id*.

misrepresent[ations of the] facts," and "appalling lack of candor" in the Indian Point license renewal proceeding.[25]

Notwithstanding, the dismissal order was issued "without prejudice."[26] The Secretary referenced the intervening publication of a notice of opportunity to request a hearing on the Application[27] and offered Ms. Shapiro an opportunity to "re-file her petition by November 28, 2016, in accordance with the NRC's procedural rules, including 10 CFR § 2.302(a)."[28]

D. November 1, 2016 Hearing Request

The Hearing Request, which is styled as a letter and signed by Ms. Shapiro, was resubmitted "on behalf of" Petitioners on November 1, 2016. The letter is dated September 15, 2016, unchanged from the submission rejected by the Secretary on October 3, 2016. The letter was not accompanied by a certificate of service. The letter also was not accompanied by a notice of appearance. The document is single spaced and begins with a bold heading—unrelated to the current proceeding—that reads: "Request for Public Hearing on Indian Point 2 License Amendment: Docket ID NRC-2015-0038." The Hearing Request seeks a "public hearing[] in White Plains, NY,"[29] but does not otherwise explicitly identify a proposed contention or request any specific remedy.

On November 15, 2016, the Secretary of the Commission referred the Hearing Request to the Atomic Safety and Licensing Board Panel,[30] which established an Atomic Safety and

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25 *Id*. at 900-03.

26 *See* Initial Hearing Request Dismissal Order at 2.

27 *See* Hearing Opportunity Notice, 81 Fed. Reg. at 66,301.

28 *See* Initial Hearing Request Dismissal Order at 2.

29 Hearing Request at 3.

30 Memorandum from A. Vietti-Cook, Secretary, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Indian Point Nuclear Generating Unit No. 3 and James A. FitzPatrick

Licensing Board on November 18, 2016.[31] NRC regulations at 10 CFR § 2.309(i)(1) provide that parties may file answers within 25 days after service of a hearing request. Therefore, this Answer is timely filed.

III. THE HEARING REQUEST DOES NOT SATISFY THE NRC'S RULES OF PRACTICE AND PROCEDURE

The NRC's procedural requirements are codified at 10 CFR Part 2. Ms. Shapiro has been repeatedly cautioned by previous Atomic Safety and Licensing Boards, and the Commission, regarding submission of pleadings that do not comply with these requirements.[32] The Hearing Opportunity Notice explained that interested persons may request a hearing and petition to intervene, and explicitly stated that "Petitions shall be filed in accordance with the Commission's 'Agency Rules of Practice and Procedure' in 10 CFR part 2."[33] Additionally, the Secretary directly cautioned Ms. Shapiro (in the Initial Hearing Request Dismissal Order) that any pleading submitted in response to the Hearing Opportunity Notice must be filed "in accordance with the NRC's procedural rules."[34]

Notwithstanding, the Hearing Request fails to satisfy at least five different procedural regulations. While technical in nature, these procedural nonconformances collectively reflect a disregard for the NRC's Rules of Practice and Procedure, which is precisely the type of conduct addressed in the Commission's prior order. The Commission has directed summary rejection of "any" pleading signed by Ms. Shapiro that does not comply with "*all* procedural

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Nuclear Power Plant, Request for Hearing Regarding Entergy Nuclear Operations, Inc.'s Amendment Request (Docket Nos. 50-286 AND 50-333) at 1 (Nov. 15, 2016) (ML16320A205).

31 Establishment of Atomic Safety and Licensing Board, ASLBP No. 16-950-01-LA-BD01 (Nov. 18, 2016) (ML16323A322).

32 *See Shapiro Sanctions Order*, CLI-08-29, 68 NRC at 903.

33 *See* Hearing Opportunity Notice, 81 Fed. Reg. at 66,302.

34 *See* Initial Hearing Request Dismissal Order at 2.

requirements"—it does not grant discretion to overlook certain procedural nonconformances.[35] Accordingly, the Hearing Request must be summarily rejected.

The procedural nonconformances of the Hearing Request are summarized below.

NRC Procedural Regulation	Hearing Request Nonconformance
10 CFR § 2.302(c) states, in relevant part: "All documents offered for filing must be accompanied by a certificate of service."	Contrary to this requirement, the Hearing Request, which was offered for filing, was not accompanied by a certificate of service.
10 CFR § 2.304(a) states: "*Docket numbers and titles*. Each document filed in an adjudication to which a docket number has been assigned must contain a caption setting forth the docket number and the title of the proceeding and a description of the document (e.g., motion to quash subpoena)."	Contrary to this requirement, the Hearing Request, which was filed in a proceeding to which a docket number was assigned,[36] does not contain a caption.[37]
10 CFR § 2.304(c) states, in relevant part: "*Format*…Text must be double-spaced."	Contrary to this requirement, the Hearing Request is single spaced.
10 CFR § 2.304(d) states, in relevant part: "each document…must state the capacity of the person signing…and the date of signature."	Contrary to these requirements, the Hearing Request, which was signed by Ms. Shapiro, states neither her capacity nor the date of her signature.[38]
10 CFR § 2.314(d) states, in relevant part: "Any person appearing in a representative capacity shall file with the Commission a written notice of appearance."	Contrary to this requirement, Ms. Shapiro, if she is appearing in a representative capacity,[39] did not file a written notice of appearance.

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35 *Shapiro Sanctions Order*, CLI-08-29, 68 NRC 899, 903 (2008) (emphasis added).

36 *See, e.g.*, Initial Hearing Request Dismissal Order at 1 (providing a proper caption and denoting "Docket Nos. 50-286 and 50-333.")

37 To the extent the bold heading on the Hearing Request, which reads "Request for Public Hearing on Indian Point 2 License Amendment: Docket ID NRC-2015-0038," could be considered a caption, it fails to provide the docket number and title for *this* proceeding. *See* Hearing Request at 1. It refers to a different proceeding on a different license for a different reactor. *See id*.

38 The letter was submitted November 1, 2016, and contains a typed date of September 15, 2016; however, it is unclear whether either date is also the date of Ms. Shapiro's signature.

39 The Hearing Request is signed by Ms. Shapiro, who includes the post-nominal letters "Esq." behind her name indicating she is an attorney at law, and states that the document is submitted "on behalf of" seven entities. *See* Hearing Request at 2, 3. This suggests she may be appearing in a representative capacity, though her exact capacity is unclear.

As the Hearing Request fails to satisfy at least one procedural regulation, it must be summarily rejected pursuant to Commission order.

IV. PETITIONERS HAVE NOT DEMONSTRATED STANDING

Petitioners have not demonstrated standing as required by 10 CFR § 2.309(d)(1). The Hearing Request offers a vague reference to proximity-based standing, but fails to provide even the most basic details regarding Petitioners (address, contact information, *etc.*) or any individuals who may belong to these organizations. In any event, proximity-based standing is not available in the instant proceeding, the Hearing Request does not even begin to plead injury in fact, and does not satisfy any requirements for representational standing. Accordingly, the Hearing Request must be denied.

A. Governing Legal Standards for Standing

Section 189a of the Atomic Energy Act of 1954, as amended ("AEA"), states that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding."[40] The Commission's regulations implementing this requirement include the standing requirements in 10 CFR § 2.309(d)(1), which require a petitioner to address: (1) the nature of the petitioner's right under the AEA to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest.

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[40] AEA § 189a(1)(A), 42 USC § 2239(a)(1)(A).

In assessing these factors, the NRC has "long applied contemporaneous 'judicial concepts of standing.'"[41] First, a petitioner's injury in fact showing "requires that the party seeking review be himself among the injured."[42] The injury must be "concrete and particularized," not "conjectural" or "hypothetical."[43] As a result, standing will be "denied when the threat of injury is too speculative."[44] Second, a petitioner must establish that the injuries alleged are "fairly traceable to the proposed action."[45] Finally, each petitioner must demonstrate that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[46]

Under some circumstances, a petitioner may be presumed to have standing based on his or her geographic proximity to a facility.[47] In certain proceedings involving power reactors, "proximity" standing has been found for petitioners who reside within 50 miles of the facility in question.[48] The Commission has explained, however, that this proximity presumption only applies to proceedings involving applications for "construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of a spent fuel pool."[49] The presumption applies because "those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the

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41 *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (internal citation omitted); *see also Nuclear Mgmt. Co., LLC* (Monticello Nuclear Generating Plant), CLI-06-6, 63 NRC 161, 163 (2006).

42 *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

43 *Sequoyah Fuels Corp*. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (citations omitted).

44 *Id.*

45 *Id*. at 75.

46 *Id*. at 76 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotations omitted)).

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

48 *See, e.g.*, *Calvert Cliffs*, CLI-09-20, 70 NRC at 915-16.

49 *Fla. Power & Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (citing *Va. Elec. Power Co.* (N. Anna Nuclear Power Station, Units 1 & 2), ALAB-522, 9 NRC 54 (1979)).

facility with a clear potential for offsite consequences."[50] Thus, in license amendment proceedings, absent an "obvious potential for offsite consequences," a petitioner must satisfy the traditional standing requirements.[51]

Finally, an organization that wishes to intervene in a proceeding may do so either in its own right (by demonstrating injury to its organizational interests), or in a representational capacity (by demonstrating harm to the interests of its members).[52] To establish standing in its own right, the organization must demonstrate a discrete institutional injury to the organization itself.[53] To establish representational standing, an organization must: (1) show that at least one of its members has standing in his or her own right; (2) identify that member; and (3) show, "preferably by affidavit," that the organization is authorized by that member to request a hearing on behalf of the member.[54]

B. Petitioners Have Not Demonstrated Standing

As a threshold matter, Petitioners bear the burden of showing standing.[55] Generally speaking, the Hearing Request claims that Petitioners (without mentioning their members) reside

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50 *St. Lucie*, CLI-89-21, 30 NRC at 329.

51 *Id.* at 329-30; *see also Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999); *Fla. Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), LBP-08-18, 68 NRC 533, 539 (2008).

52 *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (citing *Ga. Inst. of Tech*. (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995)).

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

54 *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-10 (2007); *see also N. States Power Co.* (Monticello Nuclear Generating Plant, Prairie Island Nuclear Generating Plant, Units 1 & 2; Prairie Island Indep. Spent Fuel Storage Installation), CLI-00-14, 52 NRC 37, 47 (2000); *GPU Nuclear Inc., Jersey Cent. Power & Light Co., & Amergen Energy Co. LLC.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

55 *See PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 139 (2010).

within 50 miles of the Units.[56] As explained below, these statements are far too vague to demonstrate standing.

First, Petitioners cannot rely on the proximity presumption absent an "obvious potential for offsite consequences." Petitioners cite no authority for proximity-based standing here. Nor do they even recognize or attempt to address the "obvious potential for offsite consequences" standard.

There simply is no "obvious" potential for offsite consequences here. Petitioners make wild assertions that the proposed action—administrative changes to transfer the beneficial interest of a trust fund from the Units' former owner to its current licensed operator—"significantly increases risk," "significantly increases [] hazards," and would "significantly reduce the margin of public safety."[57] But Petitioners offer no support for—or even an explanation of—these statements. Accordingly, the Hearing Request fails to satisfy Petitioners' burden to demonstrate standing.

In 1998, a petitioner similarly offered a vague challenge to a license amendment request for the Millstone Nuclear Power Station, Unit 3.[58] The *Millstone* licensing board found that such vague claims "do[] not demonstrate, without a great deal more, how an accident with offsite consequences results from" a requested amendment.[59] In rejecting the petitioner's claim of standing due to vagueness, the *Millstone* board held that, "even assuming the instant amendment . . . *somehow* presents the potential for offsite . . . consequences, that potential is anything but

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56 Hearing Request at 2.

57 Hearing Request at 2-3.

58 *See generally Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-98-22, 48 NRC 149 (1998).

59 *Id.* at 156.

obvious."[60] Although the *Millstone* petitioner challenged a different type of action, the same premise applies here—assuming that granting the Application could somehow present the potential for offsite consequences, that potential is "anything but obvious." As Petitioners have neither pled nor demonstrated such potential, they have failed to demonstrate proximity-based standing.

Likewise, Petitioners' bald assertions are far too vague to establish traditional standing. Petitioners offer no explanation for how their claims are fairly traceable to the challenged action, and thus fail to satisfy the causation element of traditional standing.[61] Aside from the factual inaccuracy of Petitioners' claims, they offer no discussion of how their claims are "fairly traceable" to the requested license amendment.[62] Petitioners' vague concerns also are not "concrete and particularized," but are "conjectural" or "hypothetical" and must be denied as "too speculative."[63] Accordingly, Petitioners have not demonstrated traditional standing.

Finally, the Hearing Request pleads organizational style standing, but Petitioners have demonstrated neither standing in their own right nor representational standing. The Hearing Request does not mention the organizational intent of each entity, much less does it demonstrate some harm thereto. As the pleading fails to even discuss this basic information, Petitioners fail to demonstrate standing in their own right.

And the Hearing Request fails to demonstrate representational standing because it does not show that at least one member from each organization has standing in his or her own right.

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60 *Id*. at 155-56 (emphasis added).

61 *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

62 *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

63 *Id*. at 72.

Petitioners fail to even list a single member. Furthermore, representational standing requires a demonstration, "preferably by affidavit," that the organization is authorized by each member to request a hearing on behalf of the member.[64] Yet, the Hearing Request does not even plead such authorization from its unnamed members. Accordingly, Petitioners have not demonstrated representational standing.

As Petitioners cannot rely on the proximity presumption, which does not apply here, and have not demonstrated a causal link between their alleged "concerns" and the Application, the Hearing Request fails to demonstrate standing, contrary to 10 CFR § 2.309(a) and (d). Thus, the Hearing Request should be rejected.

V. PETITIONERS HAVE NOT PROPOSED AN ADMISSIBLE CONTENTION

Even assuming for the sake of argument that Petitioners had demonstrated standing, they still have not submitted an admissible contention, as required by 10 CFR § 2.309(f)(1). The Hearing Request tenders a number of disjointed arguments and patently false assertions, but does not explicitly state a proposed contention.[65] To the extent Petitioners' general arguments could be considered proposed contentions, individually or collectively, these arguments fail to satisfy the criteria in 10 CFR § 2.309(f)(1). Accordingly, the Hearing Request should be denied.

A. Governing Legal Standards for Contention Admissibility

Under 10 CFR § 2.309(f)(1), a hearing request "must set forth with particularity the contentions sought to be raised." Section 2.309(f)(1)(i) through (vi) identify the six admissibility criteria for each proposed contention:

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64 *Palisades*, CLI-07-18, 65 NRC at 408-10; *see also Monticello & Prairie Island*, CLI-00-14, 52 NRC at 47; *Oyster Creek*, CLI-00-6, 51 NRC at 202.

65 Hearing Request at 3.

i. provide a specific statement of the legal or factual issue sought to be raised;

ii. provide a brief explanation of the basis for the contention;

iii. demonstrate that the issue raised is within the scope of the proceeding;

iv. demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;

v. 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

vi. provide sufficient information to show that a genuine dispute exists with regard to a material issue of law or fact.

Failure to comply with any one of the six admissibility criteria is grounds for rejecting a proposed contention.[66] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing."[67]

The scope of a license amendment proceeding is defined by the agency's hearing notice.[68] Of particular relevance here is the longstanding principle that a contention that challenges an NRC rule is outside the scope of the proceeding under 10 CFR § 2.309(f)(1)(iii) and, therefore, inadmissible. This is because, absent a waiver, "no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding."[69] This includes contentions that advocate stricter requirements than agency rules impose, or that otherwise seek to litigate a generic determination established by a Commission rulemaking.[70]

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66 *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

67 Changes to Adjudicatory Process, 69 Fed. Reg. at 2202.

68 *See N. Ind. Pub. Serv. Co.* (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 565 (1980).

69 10 CFR § 2.335(a).

70 *See Crow Butte Res., Inc.* (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 284 (2013), *aff'd*, CLI-14-2, 79 NRC 11 (2014); *see also Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996).

"[T]he Commission has defined a 'material' issue as meaning one in which 'resolution of the dispute would make a difference in the outcome of the licensing proceeding.'"[71] 10 CFR § 50.92(a) states that, "[i]n determining whether an amendment to a license…will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses." Thus, in a license amendment proceeding, an issue is not material unless it pertains to considerations which govern the issuance of initial licenses.

With respect to factual information or expert opinion proffered in support of a contention, the presiding officer "is not to accept uncritically the assertion that a document or other factual information or an expert opinion supplies the basis for a contention."[72] "[A]n expert opinion that merely states a conclusion (*e.g.*, the application is 'deficient,' 'inadequate,' or 'wrong') without providing *a reasoned basis or explanation* for that conclusion is inadequate because it deprives the Board of the ability to make the necessary, reflective assessment of the opinion" as it is alleged to provide a basis for the contention.[73] Furthermore, a petitioner's imprecise reading of a document cannot be the basis for a litigable contention.[74]

B. Petitioners Fail to Present an Admissible Contention

The Hearing Request submits several disjointed arguments and unsupported assertions—but does not otherwise propose a specific contention. As discussed below, none of these statements raise issues that are within the scope of the present proceeding or material to any

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71 *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 354 (2006) (citing 54 Fed. Reg. at 33,172).

72 *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998), *aff'd*, CLI-98-13, 48 NRC 26, 37 (1998).

73 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006) (emphasis added) (quoting *Private Fuel Storage*, LBP-98-7, 47 NRC at 181).

74 *See Ga. Inst. of Tech.* (Ga. Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 300 (1995), *aff'd*, CLI-95-12, 42 NRC 111, 124 (1995).

finding the NRC must make to grant the Application. In addition, the Hearing Request, in its entirety, lacks support in alleged facts or expert opinion, and fails to raise a genuine dispute on a material issue of law or fact.

First, Petitioners lodge several bare assertions contending that granting the application would increase risks and hazards and would reduce safety.[75] Petitioners also make the inexplicable assertion that private companies lack the "incentive to…remediate to the highest standards."[76] In reality, NRC regulations and ongoing oversight—not the abstract concept of "incentive"—ensure proper remediation.[77] The remainder of Petitioners' conjectural harm statements lack any basis, are not accompanied by any proffered support, and fail to demonstrate a genuine dispute on a material issue of law or fact. Accordingly, these statements do not satisfy the strict standards of 10 CFR §§ 2.309(f)(1)(ii), (iv), and (vi), and do not form an admissible contention.

Second, Petitioners assert, without any factual support, that Entergy "is neither the reactor operator nor licensee," and is "essentially a shell corporation."[78] But, Entergy is, in fact, the licensed operator of both FitzPatrick and IP3. This is evident from the plain language of the facility operating licenses.[79] Furthermore, as of December 31, 2015, Entergy employed over

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75 *See, e.g.*, Hearing Request at 2 ("[t]he proposed transfer of decommissioning funds to [Entergy] significantly increases risk to New York State resources and residents"); *id*. (claiming that granting the requested license amendments "significantly increases the hazards to New York State Resources and is hardly in the interest of the citizens of New York and the [Petitioners]"); *id*. at 3 (suggesting the proposed changes would "significantly reduce the margin of public safety and trust").

76 Hearing Request at 3.

77 *See generally* 10 CFR § 50.83 (specifying requirements for releasing power reactor sites for unrestricted use).

78 Hearing Request at 2.

79 *See* James A. FitzPatrick Nuclear Power Plant, Renewed Facility Operating License No. DPR-59 at 2 (ML052720287) ("This renewed operating license applies to the James A. FitzPatrick Nuclear Power Plant, a boiling water nuclear reactor and associated equipment (the facility), owned by ENF and operated by

3,000 personnel—far from being a "shell corporation."[80] In any event, trust assets are—and would continue to be—held by The Bank of New York Mellon, a New York state bank having trust powers, pursuant to the terms of an NRC-approved trust agreement.[81] Ultimately, these claims are not within the scope of the instant proceeding, do not raise an issue material to any finding the NRC must make to approve the Application, and certainly do not identify a genuine dispute with one. Thus, contrary to 10 CFR §§ 2.309(f)(1)(ii)-(vi), these statements do not support an admissible contention.

Third, the Hearing Request claims that the November 21, 2000 Decommissioning Agreements "guaranteed to the public that the New York State Power Authority would maintain the decommissioning trust funds for IP3 and FitzPatrick."[82] Given that there has never been a "guarantee" that PASNY would maintain the trust fund, this is simply not true. The Decommissioning Agreements explicitly permit PASNY to transfer the trust funds to private companies—indeed, they *specifically discuss* PASNY's option to transfer them to ENF and ENIP3.[83] Again, contrary to 10 CFR §§ 2.309(f)(1)(ii) and (v), Petitioners do not offer a basis, or any support, for their assertion. Moreover, the fact that the Application seeks the NRC's

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ENO"); Indian Point Nuclear Generating Unit No. 3, Amended Facility Operating License No. DPR-64 at 2 (ML052720273) ("This amended license applies to the Indian Point Nuclear Generating Unit No. 3, a pressurized water nuclear reactor and associated equipment (the facility), owned by ENIP3 and operated by ENO").

80 *See* Entergy Corporation et al., Form 10-K, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 For the Fiscal Year Ended December 31, 2015 at 275, *available at* http://files.shareholder.com/downloads/ETR/3223312681x0xS65984-16-436/65984/filing.pdf

81 *See* PASNY Trust Agreement at 1.

82 Hearing Request at 2.

83 *See* IP3 Decommissioning Agreement at 4-5 (providing PASNY the option to "terminate its obligation to Decommission IP3…conditioned upon [PASNY] assigning to [ENIP3] all of [PASNY]'s right, title and interest in the IP3 Unit Fund"); FitzPatrick Decommissioning Agreement at 5 (providing analogous language).

approval to transfer the trust funds to Entergy, the licensed operator, rather than ENF and ENIP3, the licensed owners, is precisely the reason NRC approval is needed in the first place. Contrary to 10 CFR §§ 2.309(f)(1)(iii), (iv) and (vi), Petitioners' claim in this regard simply is not within the scope of the proceeding, does not identify any issue material to any finding the NRC must make to grant the Application, and fails to demonstrate a genuine dispute. Accordingly, these statements do not form an admissible contention.

Next, Petitioners argue that the proposed license amendment "would allow the Master Trust Agreement to be *materially* modified without further license amendments, or state and public notification."[84] However, this criticism is nonsensical—the current IP3 and FitzPatrick operating licenses also do not require "license amendments, or state and public notification" for material amendments to the trust.[85] Thus, agency action on the Application would have absolutely no effect on Petitioners' grievances in this regard.

Furthermore, Petitioners attack the Application and the proposed license amendment on the ground that it would permit the decommissioning trust funds to be used for legal and accounting expenses.[86] However, Petitioners are attacking aspects of the Application which merely reflect the application of codified regulatory requirements to which the licensees would be subjected if the Application is approved—in particular, the requirements of 10 CFR § 50.75(h).[87] More specifically, 10 CFR § 50.75(h) states the requirements for material changes to

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84 Hearing Request at 2 (emphasis in original).

85 *See* Application, Attach 3 at ¶ L; Attach 4 at ¶ U.

86 Hearing Request at 3.

87 As explained in 10 CFR § 50.75(h)(5), licensees with decommissioning trust agreements governed by specific license conditions as of December 24, 2003, as is the case here, have not been required to apply the more recent requirements of Section 50.75(h)(1) through (h)(3). However, NRC regulations give licensees the option to amend their licenses to delete these trust-related license conditions in favor of being subjected

trusts and disbursements for administrative and legal expenses. Petitioners' challenge to this regulation is explicitly forbidden by 10 CFR § 2.335(a), which prohibits collateral attacks on Commission regulations in adjudicatory proceedings. Accordingly, this entire line of argument is beyond the scope of this proceeding, contrary to 10 CFR § 2.309(f)(1)(iii). These criticisms also lack any identified basis or support, are not material to any finding the NRC must make to grant the Application, and fail to demonstrate a genuine dispute. Accordingly, these statements do not fulfill the requirements of 10 CFR §§ 2.309(f)(1)(ii), (iv), (v) and (vi), and do not support an admissible contention.

Finally, the Hearing Request alleges that "amendments to Indian Point 3's expired license are procedurally defective and violate the Administrative Procedures [sic] Act."[88] Again, however, Petitioners' assertions are false. Indeed, the APA itself provides that:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature *does not expire* until the application has been finally determined by the agency.[89]

Additionally, the NRC's own regulations restate this "timely renewal" provision.[90]

Here, although the original term of the IP3 license was scheduled to end on December 12, 2015, Entergy made timely and sufficient application for renewal. The application was submitted more than five years before the scheduled expiration of the existing license; thus, it

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to the more standardized set of trust-related requirements codified in the regulations in Section 50.75(h)(1)-(3); such amendments involve "no significant hazards consideration" pursuant to a generic Commission determination. *See* 10 CFR § 50.75(h)(4)-(5).

88 Hearing Request at 3.

89 5 U.S.C. § 558(c) (emphasis added); *see also Pan-Atlantic Steamship Corp. v. Atl. Coast Line*, 353 U.S. 436, 439 (1957).

90 *See* 10 CFR § 2.109

was timely.[91] And the NRC Staff reviewed the application and determined it was sufficient under NRC regulations.[92] As the NRC has not yet made a final decision on the renewal application, the existing license has not expired, and continues in force, by operation of law. Accordingly, Petitioners' assertions are wholly without basis and entirely unsupported, are outside the scope of the proceeding because they improperly challenges the NRC's "timely renewal" regulation (which is prohibited by 10 CFR § 2.335(a)), and fail to raise a material issue of law or fact or a genuine dispute thereto. Accordingly, these arguments fail to satisfy the requirements of 10 CFR §§ 2.309(f)(1)(ii)-(vi), and do not support an admissible contention.

VI. CONCLUSION

As demonstrated above, the Hearing Request is procedurally defective in numerous respects and must be summarily rejected pursuant to a standing Commission order. Furthermore, Petitioners have not satisfied the standing requirements in 10 CFR § 2.309(d) and fail to proffer a contention satisfying the admissibility requirements in 10 CFR § 2.309(f)(1). For these reasons, Entergy respectfully requests that the Hearing Request be rejected in its entirety.

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91 *See id*.

92 *See* Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR–26 and DPR–64 for an Additional 20-Year Period, 72 Fed. Reg. 42,134 (Aug. 1, 2007) ("The Commission's staff has determined that Entergy Nuclear Operations, Inc. has submitted sufficient information in accordance with 10 CFR Sections 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c) to enable the staff to undertake a review of the application, and the application is therefore acceptable for docketing.").

Respectfully submitted,

Executed in Accord with 10 CFR § 2.304(d)

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Dated in Washington, DC
this 28th day of November 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	Docket Nos. 50-286 and 50-333
ENTERGY NUCLEAR OPERATIONS, INC.	)	
(Indian Point Nuclear Generating Unit No. 3 and James A. FitzPatrick Nuclear Power Plant)	)	November 28, 2016

CERTIFICATE OF SERVICE

Pursuant to 10 CFR § 2.305, I certify that, on this date, copies of the foregoing "Entergy's Answer Opposing Request for Hearing" were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above-captioned matter.

Signed (electronically) by Ryan K. Lighty

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