

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
Ronald M. Spritzer
Dr. Michael F. Kennedy

In the Matter of

ENTERGY NUCLEAR OPERATIONS, INC.

(Indian Point Nuclear Generating Unit No. 3
and James A. Fitzpatrick Nuclear Power Plant)

Docket Nos. 50-286 and 50-333

ASLBP No. 16-950-01-LA-BD01

December 13, 2016

MEMORANDUM AND ORDER

(Ruling on Petition to Intervene and Request for a Hearing)

Before the Board is a Petition filed on behalf of Indian Point Safe Energy Coalition, Hudson River Sloop Clearwater, Council on Intelligent Energy and Conservation Policy, Sierra Club Hudson Valley, Nuclear Information and Resource Service, Alliance for Green Economy, and Radiation and Public Health Project (collectively Petitioners).¹ Petitioners seek a hearing on an application by Entergy Nuclear Operations, Inc. (Entergy) to transfer the beneficial interest in the Master Decommissioning Trust for Indian Point Nuclear Generating Unit No. 3 (Indian Point) and James A. FitzPatrick Nuclear Power Plant (FitzPatrick).

¹ Request for Public Hearing on Indian Point 2 License Amendment: Docket ID NRC-2015-0038 (Sept. 15, 2016) [hereinafter Petition].

Because Petitioners have failed to demonstrate that they have standing, we deny the request for a hearing and dismiss the Petition.

I. BACKGROUND

On August 16, 2016, Entergy submitted an application to transfer to itself the beneficial interest in the Master Decommissioning Trust for Indian Point and FitzPatrick held by the Power Authority of the State of New York (PASNY).² To facilitate the transfer, Entergy requested the approval of amendments to the Master Decommissioning Trust Agreement.³ Entergy also requested license amendments to modify existing trust-related license conditions to reflect the proposed transfer and to adopt the regulatory requirements of 10 C.F.R. § 50.75(h)(1).⁴

On September 15, 2016, Susan Shapiro, acting as attorney for Petitioners,⁵ emailed a letter to the NRC's Office of the Secretary requesting a hearing regarding Entergy's application.⁶ Pursuant to a standing order of the Commission, directing the Secretary to reject summarily any nonconforming pleadings submitted by Ms. Shapiro,⁷ her filing was rejected by the Secretary

² 81 Fed. Reg. 66,301, 66,305–06 (Sept. 27, 2016). The proposed transfer requires Entergy to assume PASNY's responsibilities and obligations. Application for Order to Transfer Master Decommissioning Trust From PASNY to [Entergy], Consenting to Amendments to Trust Agreement, and Approving Proposed License Amendments to Modify and Delete Decommissioning Trust License Conditions Upon the Transfer of Trust Funds (Aug. 16, 2016) at 2 (ADAMS Accession No. ML16230A308). PASNY agrees to the transfer and joins in Entergy's approval request. Id.

³ 81 Fed. Reg. at 66,306.

⁴ Id.

⁵ Petition at 3.

⁶ See Secretary of the Commission Order (Oct. 3, 2016) at 1 (unpublished) [hereinafter Secretary Order].

⁷ Entergy Nuclear Operations, Inc. (Indian Point, Units 2 & 3), CLI-08-29, 68 NRC 899, 903 (2008). The Commission issued this Order because, in an earlier proceeding, Ms. Shapiro was repeatedly unable or unwilling to comply with the Licensing Board's instructions or NRC rules. Id. at 901–03.

because it did not comply with the NRC's E-filing requirements.⁸

In rejecting Ms. Shapiro's pleading, the Secretary referenced the intervening Federal Register notice of an opportunity to request a hearing regarding Entergy's application,⁹ and advised of the opportunity to refile.¹⁰ Ms. Shapiro refiled her letter through the NRC's E-filing system on November 1, 2016.¹¹ Finding the document responsive to the Federal Register notice, the Secretary referred the matter to the Atomic Safety and Licensing Board Panel¹² and this Board was established to preside over the proceeding on November 18, 2016.¹³

The NRC Staff and Entergy oppose Petitioners' request for a hearing.¹⁴ Petitioners have not exercised their right to reply.¹⁵

⁸ Secretary Order at 1–2.

⁹ 81 Fed. Reg. at 66,302–03.

¹⁰ Secretary Order at 2.

¹¹ Memorandum from Annette Vietti-Cook, NRC Secretary, to E. Roy Hawkens, ASLBP Chief Administrative Judge (Nov. 15, 2016) at 1 (ADAMS Accession No. ML16320A205).

¹² Id.

¹³ Establishment of Atomic Safety and Licensing Board (Nov. 18, 2016); see also 81 Fed. Reg. 85,645 (Nov. 28, 2016).

¹⁴ NRC Staff Answer to Hearing Request (Nov. 28, 2016) [hereinafter NRC Staff Answer]; Entergy's Answer Opposing Request for Hearing (Nov. 28, 2016) [hereinafter Entergy Answer]. In its Answer, Entergy argues, inter alia, that, under the Commission's Standing Order regarding filings by Ms. Shapiro, the Petition should be summarily rejected because of her failure to comply with numerous procedural regulations, including failure to provide a certificate of service and a written notice of appearance. See Entergy Answer at 8–9. The Commission's Order, however, was directed to the Secretary, not to the Atomic Safety and Licensing Board Panel. Indian Point, CLI-08-29, 68 NRC at 903. The Board therefore relies for its decision on its analysis of standing and contention admissibility, and not on Ms. Shapiro's failure to comply with other, more technical procedural regulations.

¹⁵ 10 C.F.R. § 2.309(i)(2).

II. DISCUSSION

To obtain a hearing, a petitioner must establish standing and propose at least one admissible contention.¹⁶ A petitioner must demonstrate standing in each proceeding in which it seeks to intervene, even if granted standing in another case concerning the same or a nearby facility.¹⁷

A. Standing

The Commission must grant “a hearing upon the request of any person whose interest may be affected by the proceeding.”¹⁸ “An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members.”¹⁹ An organization may establish representational standing by showing that at least one member has standing to intervene in their own right and has authorized the organization to request a hearing on their behalf.²⁰ Alternatively, an organization may establish organizational standing if it demonstrates a risk of “discrete institutional injury to itself.”²¹

The Petition identifies seven organizations as “reactor community Stakeholders.”²² These “Stakeholders” are described as “residents of the Indian Point and FitzPatrick Reactor

¹⁶ Id. § 2.309(a); see also id. § 2.309(d) (listing standing requirements); id. § 2.309(f)(1) (listing contention admissibility requirements).

¹⁷ PPL Bell Bend, LLC (Bell Bend Nuclear Power Plant), CLI-10-07, 71 NRC 133, 138 (2010).

¹⁸ 42 U.S.C. § 2239(a)(1)(A).

¹⁹ Ga. Inst. of Tech. (Ga. Tech. Research Reactor, Atlanta, Ga.), CLI-95-12, 42 NRC 111, 115 (1995).

²⁰ Id.

²¹ Consumers Energy Co. (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 411–12 (2007) (quoting Int’l Uranium (USA) Corp. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)) (emphasis omitted).

²² Petition at 3.

Communities residing within 50 miles of Indian Point 3 or Fitzpatrick.”²³ The Petition, however, does not provide further detail regarding the specific locations or organizational interests of the listed organizations. Nor do Petitioners clarify whether they claim organizational or representational standing. Because the Petition defines the listed organizations as stakeholders and residents for purposes of this proceeding (and does not identify any organizational members), the Board assumes that they are asserting organizational standing.²⁴

The Commission has stated that “[o]rganizations seeking to intervene in their own right must satisfy the same ‘standing’ requirements as individuals seeking to intervene.”²⁵ Pursuant to 10 C.F.R. § 2.309(d)(1), a petition must state:

- (i) The name, address and telephone number of the requestor or petitioner;
- (ii) The nature of the requestor’s/petitioner’s right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor’s/petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor’s/petitioner’s interest.²⁶

The Petition fails to address these threshold requirements for any of the seven listed organizations.

²³ Id. at 2.

²⁴ In any event, Petitioners have not established representational standing because they do not identify any organizational member, show that any member authorized representation, or state how any member is affected by the proposed action. See Ga. Tech., CLI-95-12, 42 NRC at 115; Palisades, CLI-07-18, 65 NRC at 409–10.

²⁵ Palisades, CLI-07-18, 65 NRC at 411.

²⁶ 10 C.F.R. § 2.309(d)(1)(i)–(iv).

Petitioners' failure to satisfy the procedural requirements of section 2.309(d)(1) also creates substantive challenges for the Board in evaluating Petitioners' standing.²⁷ For example, if Petitioners' brief reference to residency within 50 miles of Indian Point or FitzPatrick is intended to trigger the proximity presumption,²⁸ then Petitioners' failure to provide physical addresses precludes the Board from evaluating the proximity presumption's potential applicability.²⁹ Similarly, Petitioners' failure to identify their interests in this proceeding or the possible effect of any decision on their interests prevents the Board from evaluating any

²⁷ Id. § 2.309(d)(2) ("In ruling on a request for hearing or petition for leave to intervene, . . . the Atomic Safety and Licensing Board designated to rule on such requests must determine, among other things, whether the petitioner has an interest affected by the proceeding considering the factors enumerated in paragraph (d)(1) of this section.").

²⁸ In license amendment proceedings, a petitioner may claim standing based on the proximity presumption, if the proposed action "quite 'obvious[ly] entails an increased potential for offsite consequences." Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 191 (1999) (quoting Fla. Power & Light Co. (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329–30 (1989)). There are limits to proximity standing, however, when there are no changes to "the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel." See Exelon Generation Co., LLC (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 582 (2005) (stating that the license transfer did not implicate these concerns). Therefore, "the Commission has rejected proximity standing for license transfers, license amendments associated with shutdown and de-fueled reactors, and certain changes to worker-protection requirements." So. Nuclear Operating Co., Inc. (Vogtle Electric Generating Plant, Units 3 & 4), LBP-16-05, 83 NRC 259, 274–75 (2016) (footnotes omitted). In this case, Petitioners arguably have not satisfied their burden to show that the presumption should apply in the context of a decommissioning trust transfer. See Peach Bottom, CLI-05-26, 62 NRC at 581. Because of other deficiencies in Petitioners' attempt to demonstrate standing, however, the Board need not decide this issue.

²⁹ See Palisades, CLI-07-18, 65 NRC at 413 (noting that "[a]lthough [local school and hospital organizations] suggest geographic proximity as a basis for a presumption of harm in support of standing, they fail to provide any individual addresses as required by 10 C.F.R. § 2.309(d)(1) and do not specify their respective distances to the . . . facility" (footnote omitted)). To demonstrate an interest based on proximity, a petitioner must provide more than general assertions of proximity. See id. at 410. For example, the Commission has stated that "[i]n ruling on claims of 'proximity standing,' we decide the appropriate radius on a case-by-case basis." Peach Bottom, CLI-05-26, 62 NRC at 580. In this proceeding, the Petition does not contain the information needed to make this determination.

possible “discrete institutional injury” to the listed organizations.³⁰ Petitioners therefore fail to demonstrate how any of their interests may be affected and redressed by this proceeding.

For these reasons, Petitioners have not demonstrated standing.

B. Contention Admissibility

Initially, there is some question whether we should address the admissibility of Petitioners’ contentions, given our ruling that they fail to demonstrate standing. Both the Atomic Energy Act and the Commission’s regulations permit intervention only by a “person whose interest may be affected by the proceeding.”³¹ The Commission applies judicial concepts of standing to determine whether petitioners have such an interest,³² and when petitioners fail to establish that they have an interest that may be affected by the proceeding there is arguably no statutory or regulatory basis for a licensing board to proceed further in the matter. As the Commission has stated, standing is “an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance.”³³ Thus, given our ruling that the Petitioners fail to demonstrate standing, our legitimate role in adjudicating their grievance arguably has come to an end.³⁴

³⁰ See Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 270 (2008) (noting that general environment and policy interests have been repeatedly found insufficient).

³¹ 42 U.S.C. § 2239(a)(1)(A); 10 C.F.R. § 2.309(a), (d).

³² Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (“In assessing whether a petitioner has standing, we have long applied contemporaneous ‘judicial concepts of standing.’”).

³³ Westinghouse Elec. Corp. (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-07, 39 NRC 322, 331–32 (1994).

³⁴ This interpretation is analogous to the longstanding rule of federal court jurisdiction that, absent standing, a federal court “cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” See Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998) (quoting Ex parte McCordle, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). This

In any event, even assuming we have the discretion to rule on the admissibility of Petitioners' contentions, we decline to do so in this instance.³⁵ Just as they have failed to attempt to satisfy standing requirements, Petitioners do not even acknowledge the Commission's contention admissibility requirements.³⁶ They do not identify, much less "set forth with particularity," any contention.³⁷ Tellingly, Entergy and the NRC Staff do not even agree on the number of proffered "contentions" to which they are responding.³⁸ That is not surprising. Absent any guidance from Petitioners, reasonable persons might struggle to identify any number of "contentions" among Petitioners' various objections.

We decline to undertake the task of creating "contentions" out of Petitioners' various conclusory and unsupported objections, and then determining whether the "contentions" we have created satisfy the contention admissibility requirements. If we were to create contentions for Petitioners, we would be taking on a task that properly belongs to them or to their counsel, not to the Board.³⁹ The Commission has explained that it does not wish 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"—as demonstrated by compliance with all six contention

rule is not directly applicable to NRC adjudications, because the NRC is not strictly bound by federal judicial standing doctrines. Calvert Cliffs, CLI-09-20, 70 NRC at 915.

³⁵ In cases where the failure to establish standing is less clear than it is here, it might be appropriate for a licensing board to rule on the admissibility of the petitioner's contentions in order to present the Commission with a complete board ruling on appeal. If the Commission were to reverse the board's ruling on standing, it could review the board's ruling on contention admissibility at the same time, thereby avoiding a potential second appeal on contention admissibility.

³⁶ 10 C.F.R. § 2.309(f)(1).

³⁷ Id.

³⁸ Compare Entergy Answer at 17–22 (identifying six arguments), with NRC Staff Answer at 17–25 (identifying five arguments).

³⁹ See Crow Butte Res., Inc. (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 553 (2009).

admissibility requirements.⁴⁰ Here, given Petitioners' failure to even attempt to demonstrate compliance with those requirements, we need do no more than dismiss the Petition for lack of standing.

III. CONCLUSION

Petitioners have not demonstrated standing to intervene. Therefore, the Petition is denied. Petitioners may appeal this decision to the Commission, pursuant to 10 C.F.R. § 2.311, within twenty-five (25) days of service of this Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Ronald M. Spritzer
ADMINISTRATIVE JUDGE

/RA/

Dr. Michael F. Kennedy
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2016

⁴⁰ Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

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(Indian Point Nuclear Generating Unit No. 3;)
James A. Fitzpatrick Nuclear Power Plant))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Petition to Intervene and Request for a Hearing) – LBP-16-14** have been served upon the following persons by Electronic Information Exchange.

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- LBP-16-14

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[Original signed by Herald M. Speiser ____]
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Dated at Rockville, Maryland
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