

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF BRIEF IN OPPOSITION TO THE APPEAL OF LBP-16-12

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December 23, 2016

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this brief in opposition to the appeal filed by Mr. Sabatini Monatesti (Appeal)¹ of Atomic Safety and Licensing Board (Board) Memorandum and Order LBP-16-12, which affirmed the Staff's denial of a request by Mr. Monatesti for access to sensitive unclassified non-safeguards information (SUNSI).² The Commission should deny Mr. Monatesti's Appeal because, as affirmed by the Board, the Staff was correct to determine that Mr. Monatesti's access request did not satisfy the "need" prong of the test for access to SUNSI. The Commission also has an independent alternative basis to deny Mr. Monatesti's Appeal because, although not ultimately ruled on by the Board, the Staff was also correct to determine that Mr. Monatesti's access request did not satisfy the "likelihood of standing" prong of the test for access to SUNSI.

¹ "Basis for Appeal - NRC SUNSI Denial" (Dec. 2, 2016) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML16337A238) (Appeal).

² *Susquehanna Nuclear, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-16-12, 84 NRC __, __ (Nov. 21, 2016) (slip op. at 2) (LBP-16-12).

BACKGROUND

On June 29, 2016, Susquehanna Nuclear, LLC (Susquehanna Nuclear), on behalf of itself and Riverstone Holdings LLC (Riverstone), submitted to the NRC an application for NRC consent to the indirect transfer of Susquehanna Nuclear's 90% interest in the Susquehanna Steam Electric Station, Units 1 and 2 (SSES) renewed facility operating licenses and the SSES independent spent fuel storage installation (ISFSI) general license (License Transfer Application).³ At that time, the ultimate parent of Susquehanna Nuclear was Talen Energy Corporation (Talen Energy).⁴ Approximately 65% of Talen Energy common stock was held by public shareholders and approximately 35% was held by portfolio companies ultimately controlled by Riverstone (*i.e.*, Raven Power Holdings, LLC (Raven), C/R Energy Jade, LLC (Jade), and Sapphire Power Holdings, LLC (Sapphire)).⁵ The License Transfer Application discussed a merger agreement by which Raven, Jade, and Sapphire would convert their ownership of approximately 35% of the shares of Talen Energy common stock to 100% ownership.⁶ Since each of these portfolio companies is ultimately controlled by Riverstone, the merger would result in Riverstone becoming the new ultimate parent of Susquehanna Nuclear and, thus, would amount to an indirect transfer of Susquehanna Nuclear's interest in the SSES licenses.⁷

³ Letter from Timothy S. Rausch, President and Chief Nuclear Officer, Susquehanna Nuclear, to NRC, Susquehanna Steam Electric Station, Request for Order Approving Indirect Transfer of Control (June 29, 2016) (ADAMS Accession Nos. ML16181A415, ML16181A417, ML16181A419, ML16181A420) (License Transfer Application).

⁴ *Id.* at Enclosure, p. 1.

⁵ *Id.* at 1-2.

⁶ *Id.* at 2-3.

⁷ License Transfer Application at 1.

As part of its License Transfer Application, Susquehanna Nuclear provided an Attachment 3 and an Attachment 4 to demonstrate, in accordance with 10 C.F.R. § 50.33(f), that its income would provide reasonable assurance of an adequate source of funds to meet its share of the SSES's anticipated expenses.⁸ Attachment 3 consists of tables containing, for each year from 2017 to 2021, the projected income, including revenues and expenses, for SSES Units 1 and 2, combined and individually, as well as sensitivity studies for each of these cases and the projected six-month fixed operating costs for each unit.⁹ Attachment 4 consists of a table containing, for each year from 2017 to 2021, the projected capacity factor¹⁰ for SSES Units 1 and 2, combined and individually.¹¹

Susquehanna Nuclear stated that the information in the tables in Attachment 3 and Attachment 4, such as the dollar amounts for revenues and expenses, was confidential commercial and financial information and, therefore, requested that it be withheld from public disclosure pursuant to 10 C.F.R. § 2.390.¹² Susquehanna Nuclear provided non-proprietary versions of these attachments, Attachment 3NP and Attachment 4NP, from which this information was redacted (*i.e.*, the titles and column and row headings of the tables are visible but the individual cells of the tables are blank).¹³

⁸ *Id.* at Enclosure, p. 11-12.

⁹ *Id.* at Enclosure, Attachment 3.

¹⁰ Capacity factor is the ratio of the available capacity (the amount of electrical power actually produced by a generating unit) to the theoretical capacity (the amount of electrical power that could theoretically have been produced if the generating unit had operated continuously at full power) during a given time period. See <https://www.nrc.gov/reading-rm/basic-ref/glossary/capacity-factor.html>. The effect of capacity factor on projected income is discussed in the License Transfer Application at Enclosure, p. 12-14.

¹¹ License Transfer Application at Enclosure, Attachment 4.

¹² *Id.* at Enclosure, Attachment 6.

¹³ *Id.* at 2. The designation "NP" refers to "non-proprietary."

In an August 26, 2016 letter, the Staff stated that it had reviewed the Susquehanna Nuclear request to have the information in the tables in Attachment 3 and Attachment 4 withheld from public disclosure.¹⁴ On the basis of the statements in the affidavit provided by Susquehanna Nuclear, the Staff determined that the submitted information sought to be withheld contained proprietary commercial information and should be withheld from public disclosure.¹⁵ Therefore, the Staff only made publicly available the non-proprietary versions of Attachment 3 and Attachment 4.¹⁶

On October 4, 2016, the Staff published a notice in the Federal Register stating that it had received and was considering approving the License Transfer Application.¹⁷ The Staff provided the location of the publicly available version of the License Transfer Application, which included only the redacted versions of Attachment 3 and Attachment 4.¹⁸ The Staff also provided in an attached “Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information for Contention Preparation” (SUNSI Order) that any person who intended to participate as a party to the proceeding for the SSES indirect license transfer by demonstrating standing and filing an admissible contention under 10 C.F.R. § 2.309 may request access to the License Transfer Application documents containing SUNSI (*i.e.*, the un-

¹⁴ Letter from NRC to Timothy S. 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).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Susquehanna Nuclear, LLC; Susquehanna Steam Electric Station, Units 1 and 2; Consideration of Indirect License Transfer, 81 Fed. Reg. 68462 (Oct. 4, 2016).

¹⁸ *Id.* at 68463.

redacted versions of Attachment 3 and Attachment 4).¹⁹ The deadline for requesting access to SUNSI was October 14, 2016.²⁰

According to the SUNSI Order, a request for access to SUNSI has to include:

- (1) A description of the licensing action with a citation to [the] Federal Register notice;
- (2) The name and address of the potential party and a description of the potential party's particularized interest that could be harmed by the [licensing] action . . . ; and
- (3) The identity of the individual or entity requesting access to SUNSI and the requestor's basis for the need for the information in order to meaningfully participate in [the] adjudicatory proceeding. 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.²¹

The Staff will determine within 10 days of receipt of an access request whether:

- (1) There is a reasonable basis to believe the petitioner is likely to establish standing to participate in [the] NRC proceeding; and
- (2) The requestor has established a legitimate need for access to SUNSI.²²

If the Staff determines that the requestor satisfies both of these requirements, then the Staff will notify the requestor that access has been granted and instruct the requestor on how it may obtain copies of the requested documents, including any conditions that may apply to this access.²³ If the Staff determines that the requestor does not satisfy both of these requirements,

¹⁹ *Id.* at 68465.

²⁰ *Id.* at 68463.

²¹ 81 Fed. Reg. at 68465.

²² *Id.*

²³ *Id.*

then the Staff will notify the requestor and briefly state the reasons for the denial of the access request.²⁴

The Federal Register notice also provided that a request for access to SUNSI must be made by letter, delivered either through standard mail or email; whereas a hearing request must be filed in accordance with the NRC's E-Filing rule.²⁵

On October 11, 2016, Mr. Monatesti submitted an email to the NRC with an attachment entitled "Request for Hearing and Information – License Transfer."²⁶ In this attachment, in part, Mr. Monatesti appeared to request access to the information redacted from Attachment 3 and Attachment 4.²⁷ Specifically, Mr. Monatesti stated that he "wish[ed] to receive access to sensitive business documents filed by Talen Energy" in order to "discern whether [Riverstone] includes provisions and capital available for decommissioning of the [SSES]" and for "continued support of Salem Township property and recreational facilities."²⁸ Mr. Monatesti stated that he "also wish[ed] to know if sufficient, trained work force will be available to ensure a successful transfer of responsibilities, and if [Riverstone] staffing adjustments exist in the planning for the transfer and subsequent operation of the [SSES]."²⁹ Mr. Monatesti asserted that Talen Energy had a "2015 loss of \$341 Million" and that there was a "continued downturn in energy prices."³⁰

²⁴ *Id.*

²⁵ *Id.* at 68464-65. *See also id.* at 68455 n.3.

²⁶ See Memorandum from Annette L. Vietti-Cook, Secretary, NRC, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Appeal from a Determination of the NRC Staff to Deny a Request for Access to Sensitive Unclassified Non-Safeguards Information (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), at 7-9 (unnumbered) (Oct. 25, 2016) (ADAMS Accession No. ML16299A438) (Referral Memorandum).

²⁷ *Id.* at 8 (unnumbered).

²⁸ *Id.*

²⁹ *Id.* at 9 (unnumbered).

³⁰ *Id.*

Mr. Monatesti asked, “[w]ho will be responsible for decommissioning cost, i.e., Pennsylvania Power and Light, Talen Energy or [Riverstone], i.e., if the license holder goes bankrupt? Who holds the liability?”³¹ Mr. Monatesti stated that he lives two miles from the SSES and asserted that “Talen Energy . . . [is] increasing nuclear waste storage on site” and that “there are health and safety issues outstanding” at the SSES.³²

On October 12, 2016, the Office of the Secretary responded via email to Mr. Monatesti’s October 11 email and attachment, acknowledging its receipt of his October 11 email and attachment.³³ The Office of the Secretary stated that Mr. Monatesti’s request for access to SUNSI was under review.³⁴ The Office of the Secretary also informed Mr. Monatesti that, to the extent that he wished to file a hearing request, he must obtain a digital identification certificate.³⁵ The Office of the Secretary then provided Mr. Monatesti with instructions on how to obtain a digital identification certificate.³⁶

On October 17, 2016, the Office of the Secretary again emailed Mr. Monatesti reiterating that his SUNSI access request was under review and stating that

Because it does not appear you have taken steps to obtain a digital certificate I want 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, 2016.³⁷

³¹ Referral Memorandum at 9 (unnumbered).

³² *Id.*

³³ *Id.* at 11-12 (unnumbered).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Referral Memorandum at 10-11 (unnumbered).

Later on October 17, 2016, Mr. Monatesti replied to this email with an email of his own stating that, "I plan to submit request for CERT tomorrow."³⁸ He also listed "a few areas of investigation."³⁹

On October 20, 2016, the Staff transmitted to Mr. Monatesti by email its response to his request for access to SUNSI.⁴⁰ The Staff's response denied Mr. Monatesti's request for access to SUNSI because, based on the information provided in the access request, the Staff had found that there was not a reasonable basis to believe that Mr. Monatesti was likely to establish standing to participate in the NRC proceeding and that Mr. Monatesti did not establish a legitimate need for access to the SUNSI.⁴¹ Specifically, the Staff stated that there was not a reasonable basis to believe that Mr. Monatesti was likely to establish standing because Mr. Monatesti appeared to be relying on a presumption of standing due to the asserted proximity of his residence to the SSES, but had failed to connect the proposed indirect license transfer with an obvious potential for offsite radiological consequences.⁴² Additionally, the Staff found that none of Mr. Monatesti's arguments demonstrated that he was subject to an increased risk of radiological harm that was fairly traceable to the proposed indirect license transfer.⁴³ The Staff also stated that Mr. Monatesti had not established a legitimate need for access to the SUNSI

³⁸ *Id.* at 10 (unnumbered).

³⁹ *Id.*

⁴⁰ *Id.* at 14 (unnumbered).

⁴¹ Letter from NRC 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, at 1 (Oct. 20, 2016) (ADAMS Accession No. ML16294A385) (Denial Letter).

⁴² *Id.* at 4-5.

⁴³ *Id.* at 5-6.

because none of his arguments explained why the publicly available version of the License Transfer Application would not be sufficient to provide the basis for his claims.⁴⁴

On October 24, 2016, the deadline for filing hearing requests, Mr. Monatesti filed two emails related to his request for access to SUNSI.⁴⁵ In the first email, Mr. Monatesti challenged the Staff's denial of his access request.⁴⁶ He stated various concerns with the License Transfer Application. First, Mr. Monatesti stated that, "[no] public hearing [has] occurred within the 10 mile Plume Exposure Zone, nor in the 50 mile Ingestion Pathway Zone"⁴⁷ Second, Mr. Monatesti stated that Talen Energy is losing, and will continue to lose, money.⁴⁸ Third, Mr. Monatesti stated that the plans for onsite storage at the SSES go beyond a "1,900 metric ton limit"⁴⁹ Fourth, Mr. Monatesti stated that he "believe[s that] the decommissioning dollars allotted are inadequate"⁵⁰ Mr. Monatesti concluded that, "[w]ithout access to 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

⁴⁴ *Id.* at 6-7.

⁴⁵ Referral Memorandum at 20, 28 (unnumbered). These emails were not hearing requests. See *infra* note 74 and accompanying text.

⁴⁶ Referral Memorandum at 20 (unnumbered).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

transfer.”⁵¹ In the second email, Mr. Monatesti supplemented his challenge to the Staff’s denial of his access request.⁵²

On October 25, 2016, the Secretary of the NRC, in accordance with the SUNSI Order, referred the issue of Mr. Monatesti’s appeal of the Staff’s denial of his access request to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel,⁵³ who then established an Atomic Safety and Licensing Board (Board) to preside over the issue.⁵⁴

On October 31, 2016, the Staff filed an answer to Mr. Monatesti’s appeal in which it argued that the appeal should be denied because it did not demonstrate that the Staff’s denial of Mr. Monatesti’s access request was incorrectly decided under the standards set forth in the SUNSI Order.⁵⁵

On November 1, 2016, Mr. Monatesti emailed the Board and the parties.⁵⁶ In this email, Mr. Monatesti stated that he was “very concerned that [the Talen Energy/Riverstone merger] is fraught with unmitigated risk.”⁵⁷ Mr. Monatesti attached to this email a document entitled “Talen

⁵¹ *Id.* Mr. Monatesti attached to this email a document that he referred to as a “draft letter [dated] May 18, 2016.” *Id.* This document is identical to a document submitted by Mr. Monatesti to Representative Barletta, 11th District of Pennsylvania, on May 19, 2016, and which Representative Barletta then submitted to the NRC on May 23, 2016. See Letter from Louis J. Barletta, Representative, 11th District of Pennsylvania, to NRC, Re: Sabatini Monatesti (May 23, 2016) (ADAMS Accession No. ML16146A153). The NRC responded to this document on July 28, 2016. Letter from NRC to Louis J. Barletta, Representative, 11th District of Pennsylvania (July 28, 2016) (ADAMS Accession No. ML16203A200).

⁵² Referral Memorandum at 28 (unnumbered).

⁵³ *Id.* at 1 (unnumbered).

⁵⁴ Order (Establishment of Atomic Safety and Licensing Board) (Oct. 26, 2016) (unpublished) (ADAMS Accession No. ML16300A413) (Establishment Order).

⁵⁵ NRC Staff Answer to Appeal of NRC Denial of Access Request (Oct. 31, 2016) (ADAMS Accession No. ML16306A022).

⁵⁶ Email from Sabatini Monatesti (Nov. 1, 2016) (ADAMS Accession No. ML16312A437) (Nov. 1 Filing).

⁵⁷ *Id.*

Energy Corp. - Riverstone Holdings, LLC - Transfer Order 10 CFR 50.80,” in which he expanded upon this concern.⁵⁸

Later on November 1, 2016, the Board informed the parties of this unsolicited communication and stated that it “[did] not appear to have been properly filed through the Commission’s E-filing system as required by 10 C.F.R. § 2.305(c).”⁵⁹ The Board provided Mr. Monatesti with direction on how to get help with the E-filing system and stated that, should the parties wish to respond to this filing, they may do so by November 7, 2016.⁶⁰

On November 3, 2016, Susquehanna Nuclear filed a motion for leave to respond to Mr. Monatesti’s challenge to the Staff’s denial of his access request.⁶¹ In its accompanying response, Susquehanna Nuclear argued, in part, that the Board should affirm the Staff’s denial of Mr. Monatesti’s access request because a presumption of standing based on proximity does

⁵⁸ See *id.* at Attachment.

⁵⁹ Order (On Communication Received and Providing Opportunity to Respond) (Nov. 1, 2016) (unpublished) (ADAMS Accession No. ML16306A452).

⁶⁰ *Id.*

Mr. Monatesti subsequently made numerous additional filings that were not consistent with the process set forth in the SUNSI Order and for which he did not seek the leave of the Board. On November 3, 2016, he submitted a “Vulnerability-Threat Assessment using the material provided by Talen Energy’s, 2015 Securities and Exchange Commission filing,” which he stated “confirms my suspicion that significant risks exist, that vulnerability and threat are real and measurable, and that these risks, to date I believe, [Riverstone] may not have addressed in the license transfer process.” Letter from Sabatini Monatesti to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Talen Energy – Riverside Holdings, LLC Vulnerability-Threat Matrix (Nov. 3, 2016) (ADAMS Accession No. ML16308A165) (Nov. 3 Filing). On November 4, 2016, Mr. Monatesti filed a response to Susquehanna Nuclear’s pleading. Letter from Sabatini Monatesti to E. Roy Hawken, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Walsh Response - Talen Energy Corp. - Riverstone Holdings, LLC - Transfer Order 10 CFR 50.80 (Nov. 4, 2016) (ADAMS Accession No. ML16309A341) (Nov. 4 Filing). On November 21, 2016, shortly after the issuance of the Board’s decision, Mr. Monatesti filed a response to the Staff’s pleading. Letter from Sabatini Monatesti to Jeremy L. Wachutka, counsel for the NRC Staff, Jeremy L. Wachutka Response – Counsel for the NRC Staff – Reference Letter: November 7, 2016 (Nov. 21, 2016) (ADAMS Accession No. ML16326A359) (Nov. 21 Filing).

⁶¹ 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; 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 (Nov. 3, 2016) (ADAMS Accession No. ML16308A453).

not apply to indirect license transfer proceedings since such proceedings do not entail an obvious potential for offsite consequences.⁶² Susquehanna Nuclear also argued that Mr. Monatesti had not demonstrated standing under a traditional standing analysis because he had not traced a cognizable harm to the proposed indirect license transfer.⁶³ Susquehanna Nuclear argued that Mr. Monatesti had failed to demonstrate a legitimate need for the SUNSI because Mr. Monatesti had failed to explain how the financial information redacted from the License Transfer Application was needed to formulate a contention.⁶⁴ Furthermore, Susquehanna Nuclear stated that the redacted information was not related to the “\$341 million” Talen Energy loss that Mr. Monatesti had cited.⁶⁵ Susquehanna Nuclear explained that this 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.”⁶⁶

On November 7, 2016, the Staff replied to the additional information submitted by Mr. Monatesti on November 1, 2016.⁶⁷ The Staff stated that the Board should not consider this information because it was not related to the issue of the Staff’s denial of Mr. Monatesti’s access request and because its filing was procedurally improper.⁶⁸

On November 21, 2016, the Board issued an order affirming the Staff’s denial of Mr. Monatesti’s access request because it agreed with the Staff that Mr. Monatesti had not

⁶² *Id.* at 12-14.

⁶³ *Id.* at 14-16.

⁶⁴ *Id.* at 19-20.

⁶⁵ *Id.* at 21.

⁶⁶ *Id.* at 16 n.13.

⁶⁷ NRC Staff Reply to Additional Information Filed by Mr. Monatesti (Nov. 7, 2016) (ADAMS Accession No. ML16312A084).

⁶⁸ *Id.* at 1-2.

demonstrated a legitimate need for the requested SUNSI.⁶⁹ The Board found that the arguments in Mr. Monatesti's access request were either unrelated to the redacted information or insufficient.⁷⁰ Whereas Mr. Monatesti questioned the financial stability of Riverstone and Talen Energy, he did not connect this concern with any specificity to the redacted information regarding Susquehanna Nuclear's revenues and expenses or explain how having this information would have aided his challenge to the financial status of Riverstone and Talen Energy.⁷¹ With respect to his arguments regarding decommissioning funding, the Board found that the "indirect license transfer will have no bearing on [decommissioning] funds."⁷² With respect to his arguments regarding Salem Township property and recreational facilities, the Board found that this issue was "outside the general interests protected by the Atomic Energy Act and . . . not within the scope of this proceeding."⁷³ Although a majority of the Board outlined concerns with the Staff's analysis regarding Mr. Monatesti's likelihood of establishing standing, the Board ultimately determined that it did not need to decide the matter of whether Mr. Monatesti's assertions provided a basis for proximity standing in an indirect license transfer proceeding because of its otherwise dispositive finding that Mr. Monatesti had failed to demonstrate a need for the SUNSI.⁷⁴

⁶⁹ LBP-16-12 at 9.

⁷⁰ *Id.* at 13-15.

⁷¹ *Id.* at 14-15.

⁷² *Id.* at 15 n.70.

⁷³ *Id.*

⁷⁴ *Id.* at 9-12, 17.

The Board decision also included statements suggesting that Mr. Monatesti had a hearing request pending before the Commission. LBP-16-12 at 2, n.6 and 8, n.44. However, Mr. Monatesti has never filed a hearing request consistent with the rules for filing hearing requests. The Federal Register Notice announcing the Staff's consideration of the License Transfer Application explained that a requestor must set forth with particularity its standing as well as provide specific contentions and must file via the NRC's E-Filing system or request an exemption from filing via the NRC's E-Filing system. 81 Fed. Reg. at 68463-65. Mr. Monatesti did none of these things by the October 24, 2016 filing deadline. The Federal

On November 30, 2016, the Staff issued an order approving the indirect transfer of the 90 percent interest of Susquehanna Nuclear in the renewed facility operating licenses for the SSES, as well as the general license for the SSES ISFSI, from the then parent holder, Talen Energy, to Riverstone.⁷⁵

On December 1, 2016, and updated on December 2, 2016, Mr. Monatesti filed the instant appeal of LBP-16-12.⁷⁶

DISCUSSION

I. Legal Standards

Pursuant to 10 C.F.R. § 2.311(c), an order denying a request for access to SUNSI is appealable by the requestor on the question as to whether the request should have been granted. The Commission reviews Board determinations of appeals of Staff access request decisions *de novo*.⁷⁷

Register Notice also explained that any hearing request filed after this deadline would not be entertained absent a demonstration of good cause. 81 Fed. Reg. at 68464. None of Mr. Monatesti's filings after the October 24, 2016 filing deadline addressed the good cause criteria of 10 C.F.R. § 2.309(c)(1). For these reasons, notwithstanding the statements by the Board, there is no pending hearing request before the Commission.

⁷⁵ Letter from NRC to Timothy S. Rausch, President and Chief Nuclear Officer, Susquehanna Nuclear, Order Approving Indirect Transfer of Licenses Related to Susquehanna Steam Electric Station, Units 1 and 2 (CAC Nos. MF8056 and MF8057) (Nov. 30, 2016) (ADAMS Accession No. ML16320A078).

⁷⁶ On December 15, 2016, Mr. Monatesti filed an additional argument asserting that, as a consequence of the Talen Energy/Riverstone merger, the planned modification of a Talen Energy/Riverstone asset, the Montour Steam Electric Station, from coal-fired to natural gas-fired was being delayed. Letter of Concern Regarding November 21st Decision (Dec. 15, 2016) (ADAMS Accession No. ML16350A196). The Commission should not consider this argument because its filing was not consistent with the Commission's regulations. Additionally, because this argument is not related to the operations of Susquehanna Nuclear or the SSES, it is outside the scope of this proceeding. Mr. Monatesti also stated that the SUNSI at issue in this proceeding "most likely included" evidence that Riverstone "intended to walk away from the Montour upgrade." *Id.* at 5 (unnumbered). However, given that the information redacted from the SSES License Transfer Application was only dollar amounts and that the non-redacted headings for the rows and columns describing these dollar amounts do not refer to the Montour facility, Mr. Monatesti has failed to identify how this information could provide support for his statement.

⁷⁷ *South Texas Project Nuclear Operating Co.* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 461 (2010).

In order to be granted access to SUNSI, a potential party must (1) show a likelihood of establishing standing and (2) explain how the requested SUNSI is necessary for meaningful participation in the proceeding.⁷⁸ The Commission has explained that the “need” prong of this test for access to SUNSI means that a request for access should include:

(1) an explanation of the importance of the requested information to the proceeding, i.e., how the information relates to the license application or to NRC requirements or guidance, 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.⁷⁹

Whether a request for SUNSI sufficiently demonstrates a “need” for the SUNSI will depend on “the particular facts and circumstances presented.”⁸⁰

With respect to appeals generally, it is improper to raise issues for the first time on appeal.⁸¹ Conversely, an argument made before the presiding officer but not reiterated or explained on appeal is considered abandoned.⁸² Furthermore, the mere recitation of a petitioner’s prior position and its general dissatisfaction with the outcome is no substitute for an appeal brief that identifies and explains the petitioner’s arguments with the outcome.⁸³

⁷⁸ *Id.* at 465.

⁷⁹ *Id.*

⁸⁰ *Id.* at 465-66.

⁸¹ See, e.g., *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-1, 75 NRC 39, 59 (2012); *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 468 n.104 (2006).

⁸² *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001).

⁸³ *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-03, 35 NRC 63, 67 (1992).

II. Mr. Monatesti's Appeal Should Be Denied Because the Staff Was Correct to Determine that his Access Request Did Not Demonstrate a Legitimate Need for the SUNSI

The Commission should deny Mr. Monatesti's Appeal because, as affirmed by the Board, the Staff was correct to determine that Mr. Monatesti's access request did not satisfy the "need" prong of the test for access to SUNSI.

As explained by the SUNSI Order and Commission precedent, a request for access to SUNSI must establish a legitimate need for access to the SUNSI by stating how the SUNSI will assist the requestor in seeking intervention.⁸⁴ In this case, the SUNSI is the information provided by Susquehanna Nuclear to demonstrate, pursuant to 10 C.F.R. § 50.33(f), that its income would provide reasonable assurance of an adequate source of funds to meet its share of the SSES's anticipated expenses.⁸⁵ Specifically, the SUNSI includes the dollar amounts redacted from the cells of a series of tables that provide the value for such items as "Revenue from Energy," "Revenue for Ancillary Services," "Revenue from Capacity," "Fuel Expense," "Decommissioning Accretion Expenses," "Direct O&M," "Taxes (Non Income)," "Depreciation," and "Other Expenses."⁸⁶ Therefore, in order to satisfy the "need" prong of the test for access to SUNSI, Mr. Monatesti was required to state in his access request his concerns with the proposed indirect license transfer and why he needed the redacted dollar amounts related to the Susquehanna Nuclear revenues and expenses in order to formulate contentions based on these concerns. However, not only did Mr. Monatesti not state in his access request why he needed the redacted dollar amounts, but it is unclear how any of the concerns expressed in his access request are even related to these redacted dollar amounts.⁸⁷

⁸⁴ 81 Fed. Reg. at 68465; *South Texas Project*, CLI-10-24, 72 NRC at 465.

⁸⁵ See License Transfer Application at Enclosure, p. 11-12.

⁸⁶ See *id.* at Enclosure, Attachment 3 and Enclosure, Attachment 4.

⁸⁷ To the extent that Mr. Monatesti made additional arguments after the October 14, 2016 deadline for filing access requests, see 81 Fed. Reg. at 68463, such as in his filings dated November 1, November 3, November 4, and November 21, 2016, the Commission should not consider these

Mr. Monatesti expressed a concern that there would be insufficient funding to decommission the SSES.⁸⁸ The issue of decommissioning funding, however, is not related to the redacted SSES revenue and expense dollar amounts because, as explained in a publicly available portion of the License Transfer Application,⁸⁹ the SSES decommissioning trust is pre-paid and outside of Susquehanna Nuclear's administrative control such that the indirect license transfer will have no bearing on it.⁹⁰ Mr. Monatesti expressed a concern that the proposed indirect license transfer could endanger Susquehanna Nuclear's "continued support of Salem Township property and recreational facilities."⁹¹ This concern, though, could not form the basis of an admissible contention, let alone a contention related to the redacted SSES revenue and expense dollar amounts, because it is in regards to a matter that falls outside the general interests protected by the Atomic Energy Act.⁹² Mr. Monatesti speculated that there could be staffing adjustments as a result of the proposed indirect license transfer,⁹³ but did not explain why he would need the redacted SSES revenue and expense dollar amounts in order to formulate a contention based on this concern. Similarly, Mr. Monatesti did not connect his concerns regarding a "storage expansion plan," "past safety performance," and "[outstanding]

arguments because these filings were not permitted by the governing procedure, see 81 Fed. Reg. at 68465-66, or by the presiding officer. To the extent that Mr. Monatesti made additional arguments in his October 24, 2016 appeal to the Board or his December 2, 2016 Appeal to the Commission, the Commission should not consider these arguments because it is improper to raise issues for the first time on appeal. See, e.g., *Pilgrim*, CLI-12-1, 75 NRC at 59. However, even if the Commission were to consider these additional arguments, the Commission should find that they too are unavailing because they are also unrelated to the SUNSI at issue in this proceeding.

⁸⁸ Referral Memorandum at 8-9 (unnumbered). See also *id.* at 10, 20 (unnumbered).

⁸⁹ See License Transfer Application at Enclosure, p. 15-16 and Enclosure, Attachment 5.

⁹⁰ See LBP-16-12 at 15 n.70.

⁹¹ Referral Memorandum at 8 (unnumbered). See also *id.* at 10 (unnumbered).

⁹² See LBP-16-12 at 15 n.70.

⁹³ Referral Memorandum at 9 (unnumbered).

health and safety issues”⁹⁴ to a need for the redacted SSES revenue and expense dollar amounts.

In his access request and appeal to the Board, Mr. Monatesti also addressed the financial status of Riverstone and Talen Energy. He discussed a “Talen Energy 2015 loss of \$341 Million” and a “continued downturn in energy prices,” that the “revenue stream for nuclear is under severe strain,” and that maintenance costs and outage times are increasing, to speculate that Talen Energy or, after the proposed merger, Riverstone will go bankrupt.⁹⁵ However, Susquehanna Nuclear and Talen Energy/Riverstone are distinct entities⁹⁶ and Mr. Monatesti did not specifically explain how the redacted Susquehanna Nuclear revenue and expense dollar amounts were related to his concern that Talen Energy/Riverstone would fail as a business.⁹⁷ Therefore, Mr. Monatesti’s challenge to the financial status of Riverstone and Talen Energy did not satisfy the “need” prong of the test for access to SUNSI and, thus, the Staff, as affirmed by the Board, was correct to deny Mr. Monatesti’s access request.⁹⁸

⁹⁴ *Id.*

⁹⁵ Referral Memorandum at 9, 20 (unnumbered).

⁹⁶ See LBP-16-12 at 14 n.67 (stating that Talen Energy/Riverstone has power plants in eight different states, a workforce of some 3000 employees, and total operating expenses of \$1.5 billion for the first six months of 2016); Nov. 1 Filing at Attachment, p.1-2 (stating that “400 management personnel reside in Allentown and 3,000 Technical staff are situated at plant facilities” and that Talen Energy has “24 [other] generating plants” that “generate 16 GW of capacity”).

⁹⁷ See LBP-16-12 at 15 (“Mr. Monatesti does not indicate how having the specific information set forth under [the Attachment 3 and Attachment 4] headings relative to Susquehanna Nuclear’s operation of the [SSES] will aid his challenge regarding the financial status of Riverstone and Talen Energy.”).

⁹⁸ The Staff’s denial of Mr. Monatesti’s access request was also consistent with Commission precedent. In the *Indian Point* proceeding, information regarding the expected costs of operation and maintenance was redacted from the application for the direct transfer of the licenses for Indian Point Nuclear Generating Unit Nos. 1 and 2 from Consolidated Edison to Entergy. *Consolidated Edison Co. et al.* (Indian Point, Units 1 and 2), CLI-01-08, 53 NRC 225, 230 (2001). A participant subsequently requested, and was granted, access to this redacted information after claiming that it “need[ed] access to the unredacted version of the . . . license transfer application if [it] is to prepare sufficiently specific and supported issues regarding [Entergy’s] qualifications to own and operate the plant. *Id.* at 228. As explained above, however, Mr. Monatesti’s arguments are distinct from this argument because they do

On appeal, Mr. Monatesti asserted that LBP-16-12 was incorrect in finding that he had not connected his concerns regarding the financial stability of Riverstone and Talen Energy with a need for the redacted information.⁹⁹ Mr. Monatesti based this assertion on the apparent belief that the redacted information consisted of five-year projections of revenue and expense for Talen Energy/Riverstone and, thus, that his arguments regarding the viability of Talen Energy/Riverstone were indeed connected to this redacted information.¹⁰⁰ However, in fact, the redacted information consists of the five-year projections of revenue and expense for Susquehanna Nuclear and not for Talen Energy/Riverstone.¹⁰¹ Since the basis for Mr. Monatesti's argument on appeal is contrary to the SSES License Transfer Application, it is not responsive to the LBP-16-12 finding that Mr. Monatesti did not demonstrate how the Susquehanna Nuclear revenue and expense dollar amounts were related to his concerns regarding a Talen Energy/Riverstone bankruptcy.¹⁰² Accordingly, the Commission should find that this argument is not persuasive and does not indicate any deficiency in the Staff's access determination.

Additionally, although Mr. Monatesti's access request and appeal to the Board were focused only on the financial stability of Talen Energy/Riverstone and not on the financial

not raise any concerns specific to the financial qualifications of Susquehanna Nuclear to continue to own and operate the SSES.

⁹⁹ Appeal at 4.

¹⁰⁰ *Id.* at 4-5, 14 ("I contend that the 5-year business model presented by Talen Energy and [Riverstone] is naïve").

¹⁰¹ See License Transfer Application at Enclosure, p.11-15 (explaining that Attachment 3 and Attachment 4 provide the five-year projected income of Susquehanna Nuclear in order to demonstrate, pursuant to 10 C.F.R. § 50.33(f), that Susquehanna Nuclear will remain financially qualified to operate and possess its interest in the SSES).

¹⁰² LBP-16-12 at 14-15.

stability of Susquehanna Nuclear,¹⁰³ for the first time on appeal, Mr. Monatesti has rephrased his argument as challenging “the financial status of Riverstone and Talen Energy to operate SSES Unit 1 and 2 effectively and efficiently over the 20-year licensing period.”¹⁰⁴ Since an appellant cannot raise new claims for the first time on appeal,¹⁰⁵ the Commission should not consider Mr. Monatesti’s argument, as revised.

Finally, other than its mistaken characterization of the redacted information and its new phrasing of its challenge to the License Transfer Application, the remainder of the Appeal simply repeats Mr. Monatesti’s previous filings.¹⁰⁶ Since a mere recitation of a petitioner’s prior position is insufficient for purposes of an appeal,¹⁰⁷ the Commission should deny Mr. Monatesti’s Appeal.

In conclusion, Mr. Monatesti’s access request did not specifically connect its arguments to the redacted information to which it was requesting access. Without such an explanation, it was not clear how Mr. Monatesti’s arguments were connected to the redacted information and, consequently, why the redacted information would be necessary in order for Mr. Monatesti to formulate a contention. Therefore, the Commission should find that the Staff, as affirmed by the Board, was correct to deny Mr. Monatesti’s access request for failing to satisfy the “need” prong of the test for access to SUNSI.

¹⁰³ See, e.g., Appeal at 5-14 (reciting all of Mr. Monatesti’s earlier arguments, none of which have to do with the financial qualification of Susquehanna Nuclear to continue to operate and possess its interest in the SSES).

¹⁰⁴ Appeal at 4. See also *id.* at 14.

¹⁰⁵ *Pilgrim*, CLI-12-1, 75 NRC at 59.

¹⁰⁶ See Appeal at 5-14.

¹⁰⁷ *Vogtle*, CLI-92-03, 35 NRC at 67.

III. Mr. Monatesti's Appeal Should Be Denied Because the Staff Was Correct to Determine that his Access Request Did Not Demonstrate a Likelihood of Establishing Standing

The Commission also has an independent alternative basis to deny Mr. Monatesti's Appeal because, although not ultimately ruled on by the Board, the Staff was also correct to determine that Mr. Monatesti's access request did not satisfy the "likelihood of standing" prong of the test for access to SUNSI.

As explained by the SUNSI Order and Commission precedent, a request for access to SUNSI must demonstrate the existence of a "reasonable" basis for the Staff to believe that the requestor is likely to establish standing to participate in the proceeding.¹⁰⁸ Specifically, the access request must provide "a description of the potential party's particularized interest that could be harmed by the [licensing action.]"¹⁰⁹ In this case, though, Mr. Monatesti did not provide a description of his particularized interest that could be harmed by the proposed SSES indirect license transfer such that the Staff could reasonably believe that he would be likely to establish standing.

Despite the explicit direction of the SUNSI Order, Mr. Monatesti's access request did not include a description of his standing argument. The only language in Mr. Monatesti's access request that could be construed as even obliquely addressing the issue of standing is the bare statement that Mr. Monatesti "live[s] two miles from the [SSES]."¹¹⁰ However, this statement is not part of a coherent argument in favor of standing;¹¹¹ instead, it is the first sentence of a paragraph outlining Mr. Monatesti's previous concerns with the SSES (*i.e.*, the asserted

¹⁰⁸ 81 Fed. Reg. at 68465; *South Texas Project*, CLI-10-24, 72 NRC at 454-55.

¹⁰⁹ 81 Fed. Reg. at 68465.

¹¹⁰ Referral Memorandum at 9 (unnumbered).

¹¹¹ See LBP-16-12 at 17 (Arnold, J., concurring).

“increasing [of] nuclear waste storage on site” and “[outstanding] health and safety issues”).¹¹²

Therefore, taken in context, this statement does not appear to be the description of standing required by the SUNSI Order.

A majority of the Board opined that, arguably, for a *pro se* petitioner who is generally given some leniency in pleading,¹¹³ the “two miles” statement,¹¹⁴ combined with various otherwise unconnected excerpts from three different filings made by Mr. Monatesti “about the potential impact on facility operations of financial considerations arising from an indirect transfer of control” might provide a basis for proximity standing in an indirect license transfer proceeding.¹¹⁵ Again, though, these disjointed statements “made in an apparently random manner,”¹¹⁶ even when provided by a *pro se* petitioner, cannot satisfy the SUNSI Order’s explicit requirement to provide “a description of the potential party’s particularized interest that could be harmed by the [licensing action.]”¹¹⁷ It is Mr. Monatesti’s responsibility to provide a coherent description of standing in his access request and not the Staff’s or the Board’s responsibility to construe such a description from Mr. Monatesti’s various conclusory and unsupported statements across multiple filings.¹¹⁸

¹¹² Referral Memorandum at 9 (unnumbered).

¹¹³ See, e.g., *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 397 n.53 (2015).

¹¹⁴ Referral Memorandum at 9 (unnumbered).

¹¹⁵ LBP-16-12 at 11-12 (citing the reference to a “2015 [Talen Energy] loss of \$341 Million and [a] continued downturn in energy prices” from Mr. Monatesti’s October 11 access request; the assertion that “[t]he revenue stream for nuclear is under severe strain, energy prices are going down, maintenance costs are increasing” from Mr. Monatesti’s October 24 appeal to the Board; and the assertion that “[Riverstone] plans to reduce Corporate Overhead . . . does this imply [Riverstone] would cut staff in half?” from Mr. Monatesti’s Nov. 1 Filing).

¹¹⁶ LBP-16-12 at 17 (Arnold, J., concurring).

¹¹⁷ 81 Fed. Reg. at 68465.

¹¹⁸ See *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit No. 3 and James A. Fitzpatrick Nuclear Power Plant), LBP-16-14, 84 NRC ___, ___ (Dec. 13, 2016) (slip op. at 8-9) (citing

Moreover, even when considered together and even when accounting for Mr. Monatesti's status as a *pro se* petitioner, these statements cannot amount to a legally sufficient demonstration of standing. In order to qualify for proximity-based standing with respect to a facility undergoing a license transfer, a petitioner must demonstrate, based on the particular circumstances of the transfer, that the transfer entails an "obvious potential for offsite [radiological] consequences."¹¹⁹ Furthermore, the Commission has stated that "to date, [it has] never granted proximity-based standing to a petitioner in an indirect license transfer adjudication."¹²⁰ Contrary to this case law and history, the various statements in Mr. Monatesti's filings do not provide any substantial support for why the proposed SSES indirect license transfer would entail an obvious potential for offsite radiological consequences, let alone support that would be sufficiently convincing to overcome the Commission's history of having never granted proximity-based standing to a petitioner in an indirect license transfer proceeding.¹²¹

Since the Commission does not "expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing,"¹²² the Staff was correct to deny Mr. Monatesti's access request for failing to satisfy the "likelihood of standing" prong of the test for access to SUNSI. Accordingly, although the Board did not make a decision on this matter, Mr. Monatesti's failure to demonstrate a likelihood of

Crow Butte Res., Inc. (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 553-54 (2009) (discussing a board's improper recasting of a contention)).

¹¹⁹ *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005)) (alteration in original).

¹²⁰ *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260-61, 269 (2008) (emphasis added) (finding, in part, that a union representing workers at a facility subject to an indirect license transfer proceeding did not have standing because, absent a demonstration to the contrary, an indirect license transfer creates no obvious source of actual or potential harm).

¹²¹ See *id.* at 269 (concluding that the petitioner had not given the Commission any reason to depart from its precedent of having never granted proximity-based standing in an indirect license transfer proceeding).

¹²² Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

establishing standing constitutes an independent, but equally dispositive, basis in the record for the Commission to deny the Appeal.

CONCLUSION

For the above reasons, the Commission should deny the Appeal of LBP-16-12.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of December, 2016

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF BRIEF IN OPPOSITION TO THE APPEAL OF LBP-16-12," dated December 23, 2016, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 23rd day of December, 2016.

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 23rd day of December, 2016