

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

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In the Matter of)	
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FirstEnergy Nuclear Operating Company)	
)	
Application for Order approving direct)	Docket No. NRC-2019-0137
transfer of renewed facility operating)	
license and general license and proposed)	
conforming license amendment)	
)	

**THE ENVIRONMENTAL LAW & POLICY CENTER
PETITION TO INTERVENE AND HEARING REQUEST**

On April 26, 2019, Licensee FirstEnergy Nuclear Operating Company (“FENOC”) and operating subsidiary FirstEnergy Nuclear Generation, LLC (“FENGen”), filed an application with the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) for transfer of licenses for its four nuclear power plant units and their associated Independent Spent Fuel Storage Installations (“ISFSI”) and for conforming amendments to the licenses (“Application”).¹ Licensee FENOC, operator FENGen, and parent company FirstEnergy Solutions (“FES”), are all in bankruptcy proceedings, and this license transfer is a key element of the Debtors’² Proposed Plan of Reorganization.³ Because the proposed transferee and proposed financial guarantors are all new entities that are predicted to emerge from the bankruptcy proceedings, they do not yet have names. As a result, FENOC refers to the proposed transferee as “OpCo” (the new FENOC)

¹ Application for Order Consenting to Transfer of Licenses and Conforming License Amendments, April 26, 2019, Accession No. ML18235A194, published at 84 Fed. Reg. 30775. Citations to the “Application” are to Enclosure A, which is the Application with Exhibits. Citations to the Cover Letter for the Application so state.

² The Debtors in the chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: FE Aircraft Leasing Corp. (9245), case no. 18 50759; FirstEnergy Generation, LLC (0561), case no. 18 50762; FirstEnergy Generation Mansfield Unit 1 Corp. (5914), case no. 18 50763; FirstEnergy Nuclear Generation, LLC (6394), case no. 18 50760; FirstEnergy Nuclear Operating Company (1483), case no. 18 50761; FirstEnergy Solutions Corp. (0186) case no. 18-80757; and Norton Energy Storage LLC. (6928), case no. 18 50764.

³ Application Cover Letter at 2.

and “OwnerCo” (the new FENGen), and to their parent as “New HoldCo” (the new FES).⁴ The bankruptcy proceedings have involved a number of intensely litigated issues, and it is likely that there will be a number of objections to the Plan of Reorganization. FENOC is clear that none of these new entities will be affiliated with FES’ parent company, FirstEnergy Corp. (who did not file for bankruptcy), or FES.⁵

The closure dates for the four nuclear units has been dramatically accelerated, and the proposed transferees – “OwnerCo” and “OpCo” – will operate the plants for a short period of time before initiating decommissioning. On March 28, 2018, FENOC and FES notified the NRC that they “intend to permanently cease operation of the four reactors over the next three years.”⁶ Davis-Besse is scheduled for shutdown by May 31, 2020, followed by Perry and Beaver Valley Unit 1 by May 31, 2021, and Beaver Valley Unit 2 by October 31, 2021. Days after notifying the Commission of the permanent cessation of these units, on March 31, 2018, FES and FENOC filed for bankruptcy in the Northern District of Ohio.

In this license transfer Application, FENOC must demonstrate that OwnerCo and OpCo are “qualified to be the holder of the license” and that the license transfer is “consistent with applicable provisions of law, regulations and orders issued by the Commission.” 10 C.F.R. § 50.80. The requirements applicable to original applicants for an operating license are also applicable in a license transfer proceeding. *See generally Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, CLI-02-16, 55 NRC 317, 340 (2002). Under 10 C.F.R. § 50.33(f)(2), a non-electric utility applicant or transferee such as OwnerCo or OpCo must demonstrate that it has reasonable assurance of obtaining the funds necessary to cover the

⁴ Application at 4.

⁵ Application Cover Letter at 3.

⁶ Accession No. ML18094A834.

plant’s estimated operating costs. The Commission has broad discretion to request “additional or more detailed information respecting [the proposed licensee’s] financial arrangements and status of funds . . . This may include information regarding a licensee’s ability to continue the conduct of the activities authorized by the license and to decommission the facility.” 10 C.F.R. § 50.33(f)(5).

The Environmental Law & Policy Center (“ELPC”) timely files this Petition to Intervene and Request for a Hearing under Subpart M, 10 C.F.R. § 2.1300 *et seq.* The Licensing Board should grant ELPC’s Petition and Request, because ELPC has standing and has proposed three admissible contentions that meet the requirements of 10 CFR § 2.309(f).

A. ELPC Has Standing To Intervene In This License Transfer Proceeding

The Atomic Energy Act of 1954 § 1 *et seq.*, as amended, 42 U.S.C. § 2011 *et seq.*, (“Atomic Energy Act”) allows individuals “whose interest may be affected by the proceeding” to intervene in NRC licensing proceedings. 42 U.S.C. § 2239(a). In evaluating standing, the Commission applies contemporaneous judicial concepts of standing. *In the Matter of Fla. Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4)*, 82 N.R.C. 389, 394 (Dec. 17, 2015). A petition must (1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision. When evaluating a petitioner’s standing, the Commission construes the petition in favor of the petitioner. *In the Matter of Georgia Inst. of Tech. (Georgia Tech Research Reactor)*, 42 N.R.C. 111, 115 (Oct. 12, 1995) (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)). With respect to injury in fact, the cause of the injury need not flow directly from the challenged action – the chain of causation need only be plausible. *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-94-12, 40 NRC 64, 75 (1994) (citing *National Wildlife Federation v. Hodel*, 839 F.2d 694, 705 (D.C. Cir. 1992)).

ELPC is a non-profit, public interest environmental legal advocacy and eco-business innovation organization working throughout the Midwest states to improve environmental quality and protect natural resources in the Midwest on behalf of our organization, members and clients. ELPC works to avoid risks and injuries to public health, clean water, clean air and landscapes in ways that are good for the environment and good for the economy. ELPC has been engaged in both nuclear power plant safety and nuclear plant economic issues in many cases over the past 25 years.

Here, ELPC's members who reside in Ohio suffer an injury in fact in the form of increased radiological risk as a result of inadequate decommissioning funding and a failure by the proposed licensee to establish appropriate financial qualifications. These members will be injured by this increased radiological risk. This injury is traceable to the challenged action, because a license transfer from FENOC to a newly formed entity with no financial history, where decommissioning trust funds continue to remain below NRC requirements, increases radiological health risks.

The Atomic Energy Act requires the NRC to ensure financial assurance to protect public health, safety, and the environment. The requirements for financial assurance were issued because "inadequate or untimely consideration of decommissioning, specifically in the areas of planning and financial assurance, could result in significant adverse health, safety and environmental impacts." *General Requirements for Decommissioning Nuclear Facilities*, 53 FR 24018, 24019 (June 27, 1988). Under both the Atomic Energy Act and the Energy Reorganization Act, "the NRC has determined that there is a significant radiation hazard associated with nondecommissioned nuclear reactors." *Id.* at 24033. These safety concerns are addressed, in part, by requiring licensees "to use methods which provide reasonable assurance

that, at the time of termination of operations, adequate funds are available so that decommissioning can be carried out in a safe and timely manner and that lack of funds does not result in delays that may cause potential health and safety problems.” *Id.* “The purpose of financial assurance is to provide a second line of defense, if the financial operations of the licensee are insufficient, by themselves, to ensure that sufficient funds are available to carry out decommissioning.” *Financial Assurance Requirements for Decommissioning Nuclear Power Reactors*, 63 FR 50465, 50473 (September 22, 1998). In sum, “assuring adequate funds for a reactor owner to meet its decommissioning obligations is part of the bedrock on which NRC has built its judgment of reasonable assurance of adequate protection for the public health and safety and protection of the environment.” *In re Entergy Nuclear Vermont Yankee, LLC*, Dkt. No. 50-271-LA-3, LBP15-24, at 22 (Aug. 31, 2015) (citation omitted), *vacated as moot*, CLI-16-8, 93 N.R.C. 463 (June 2, 2016).

The rejection of FENOC’s application would redress injuries because it would prevent the licenses from being transferred to a newly formed entity with uncertain and potentially insufficient financial qualifications, it would ensure that decommissioning trust funds meet their minimum requirements. ELPC’s members’ injuries would be redressed if NRC leaves current parent company FE Corp. in place as a “second line of defense” in the event that post-bankruptcy entities are unable to meet their financial obligations.

ELPC has established representational standing because the interests ELPC seeks to protect are germane to its own purpose, ELPC has at least one member who qualifies for standing in his or her own right, ELPC’s membership expects that the organization will request hearings on important safety issues, and neither the claim asserted or the relief requested requires an individual members participation in the legal action. Central to ELPC’s organizational

purpose are efforts to reduce risk to the environment and to public health. Insufficient decommissioning or unsafe operation as a result of inadequate financial assurances or qualifications present risks to the environment that ELPC regularly acts to reduce. ELPC has regularly engaged in Ohio on issues related to FES' and its subsidiaries' safe operation of nuclear power plants. The proposed license transfer raises significant health, safety, environmental, and financial concerns for ELPC and its members that ELPC seeks to mitigate through participation in a public hearing. ELPC has members who qualify for standing, and their participation is not required in this action.

In the alternative, ELPC should be granted standing to intervene because its participation may reasonably be expected to assist in developing a sound record. 10 C.F.R. § 2.309(e) (allowing for discretionary intervention). ELPC's participation will assist in developing a sound record because ELPC is engaged in the FES bankruptcy proceeding and has familiarity with the proposed plan of reorganization. In the bankruptcy proceeding, ELPC submitted the expert report of former NRC Commissioner Peter Bradford regarding decommissioning of the FENOC units. See Exhibit 1, July 12, 2019 Expert Report of Peter A. Bradford. ELPC's members have significant property and health interests in the proceeding. If the requested license transfer is granted, ELPC and its members' interests in the proceeding will be adversely impacted because there will be increased risk of radiological harm from FENOC's nuclear plants. There are no other means by which ELPC and its members' interests will be protected.

FENOC has taken the strong position that license transfer issues should not be raised in the bankruptcy court. In response to ELPC and other parties' request that FENOC's Disclosure Statement for its Plan of Reorganization include additional information on the NRC license transfer process, FENOC's counsel explained "[t]hat license transfer process, Your Honor, will

be underway at some point and the Debtors recognize that we're going to be filing that application with the NRC and our assumption is that other parties who are in this courtroom are going to show up in front of the NRC on the license transfer issues." Exhibit 2, Tr. of March 19, 2019 Hr'g at 27. There are no existing parties that can represent ELPC and its members' interests, and ELPC's participation will neither broaden the issues nor delay the proceeding.

B. ELPC Presents Three Admissible Contentions

1. Contention 1: The Application Does Not Contain Sufficient Information Regarding the Proposed Licensee's Decommissioning Funding Assurance Obligations Under Section 182(a) of the Atomic Energy Act (42 U.S.C. 2232(a))

FENOC's Application is not in compliance with applicable provisions of law because it does not provide information sufficient to conclude that the proposed licensees, OwnerCo and OpCo, will have sufficient funds in Decommissioning Trust Funds. The NRC's requirement that licensees decommission nuclear plants after ceasing power operations is "based on the need to reduce the amount of radioactive material at the site to ensure public health and safety as well as protection of the environment."⁷ The Atomic Energy Act requires financial assurances for decommissioning costs to ensure that licensees have sufficient funding to fully decommission plants. 10 C.F.R. § 50.33(f)(5). A failure to provide adequate financial assurance is itself a risk to public health and safety. *See In the Matter of Safety Light Corp. (Bloomsburg, Pennsylvania Site)*, 61 N.R.C. 53, 58 (Jan. 24, 2005) (concluding that failure to make required scheduled payments into decommissioning trust fund as required by licenses created lack of reasonable assurance that the health and safety of the public will be protected).

FENOC's April 26, 2019, Application relies on its March 15, 2019, decommissioning funding status report submitted pursuant to 10 C.F.R. § 50.75(f), which reveals a \$78 million

⁷ <https://www.nrc.gov/waste/decommissioning/faq.html>

shortfall in the decommissioning trust fund for Beaver Valley Unit 1.⁸ On May 29, 2019, the NRC informed Debtors that they required additional information before accepting the license transfer application for review.⁹ In particular, the NRC noted a decommissioning trust fund shortfall of \$78 million for Beaver Valley Unit 1. Before accepting the application, the Commission required FENOC to explain whether those funds would be available at the time of the license transfer, because “any shortfall in decommissioning funding must be corrected by the time of the transfer to demonstrate compliance with NRC decommissioning financial assurance requirements.”¹⁰ FENOC informed the NRC that it would remedy the shortfall, but did not explain how. Rather, FENOC assured the NRC that they would “submit a supplement to the license transfer application describing the proposed funding mechanism to address any shortfall once that mechanism has been selected.”¹¹ Debtors have not yet submitted any supplement.

Debtors’ promise that it will fully fund decommissioning trust funds before the license transfer may have been sufficient for NRC Staff to accept the application as complete, but it is not sufficient or certain enough information to demonstrate that OwnerCo and OpCo can meet their decommissioning obligations. The only information contained in FENOC’s current application is that the licensee promises to comply with NRC regulations through an as-yet unspecified vehicle. If FENOC intends to deposit an additional \$78 million in the Beaver Valley Unit 1 Decommissioning Trust Fund, then FENOC should explicitly so state. This information is all the more important because OwnerCo and OpCo are newly formed entities.

⁸ May 29, 2019, Request for Supplemental Information, Accession No. ML19143A73 at Enclosure p. 2. Application at 15-16.

⁹ May 29, 2019, Request for Supplemental Information, Accession No. ML19143A73 at Enclosure p. 2.

¹⁰ *Id.*

¹¹ May 31, 2019, Supplemental Information, Accession No. ML19151A531.

2. Contention 2: OwnerCo Does Not Meet Financial Qualifications Under 10 CFR 50.33(f)(2)

FENOC asserts that OpCo is financially qualified by virtue of the fact that it is funded by OwnerCo, and that OwnerCo is financially qualified for two reasons. First, FENOC maintains that OwnerCo is financially qualified based on its pro forma income statement contained in the Plan of Reorganization.¹² Second, FENOC argues that OwnerCo meets financial qualifications because New HoldCo will serve as guarantor, and New HoldCo has a strong post-bankruptcy financial outlook.¹³ Both of these assertions are flawed, and transferring the licenses to financially unqualified OwnerCo threatens public health and safety.

Safety concerns are the foundation of the financial qualifications rule. *See Gulf States Utilities Co. (River Bend Station, Unit 1)*, CLI-94-10, 40 NRC 43, 48 (1994). See also Final Rule, “Elimination of Review of Financial Qualifications of Electric Utilities in Operating License Review and Hearings for Nuclear Power Plants,” 49 Fed. Reg. 35747, 35749 (Sept. 12, 1984) (“The Atomic Energy Commission, in drafting the [original financial qualifications] rule, must have intuitively concluded that a licensee in financially straitened circumstances would be under more pressure to commit safety violations or to take safety ‘shortcuts’ that one in good financial shape”).

OwnerCo’s reliance on the pro forma income statement is premature prior to plan confirmation. Parties in the bankruptcy proceeding are currently engaged in discovery, with expert reports exchanged on July 12, 2019. Depositions of these experts will occur over the coming weeks, objections to the proposed Plan of Reorganization are due on August 2, 2019, and the Plan Confirmation hearings will be held on August 20, 2019. The NRC should not conclude

¹² Application at 13.

¹³ Application at 14-15.

that OwnerCo meets financial qualifications based on its pro forma income statement without first allowing a hearing in which evidence regarding the validity of that statement is presented.¹⁴

OwnerCo's reliance on RetailCo (the retail arm of the reorganized company) and New HoldCo as guarantors is misplaced. RetailCo and New HoldCo have no financial history on which to evaluate them as guarantors. Moreover, there are no restrictions on the projected income available to OwnerCo following emergence from bankruptcy. This leaves the liquidity upon which OwnerCo relies to be uncertain at best.

3. Contention 3: If the License Transfer Is Granted, the Commission Should Not Consent To a Change in The Operating Support Agreement And Should Require FE Corp. to Serve As Guarantor.

FENOC fails to provide sufficient evidence supporting a transfer of the \$400 million operating guarantee from FE Corp. to New HoldCo in the licenses that will be held by OwnerCo and OpCo. FE Corp. should continue to serve as guarantor, and the NRC cannot conclude that New HoldCo has sufficient financial qualifications to serve as guarantor. Unless the NRC specifically retains the responsibility of the parent for operating and decommissioning costs, there is a likelihood of radiological harm.

Parent and non-debtor FirstEnergy Corp. continues to provide a government-mandated parental financial support agreement on two of Debtors' nuclear operating licenses. FENOC's Chief Restructuring Officer explained the support agreement in sworn testimony to the bankruptcy court. Prior to May 16, 2016, FirstEnergy Corp. (FES' parent company) provided a \$400 million support agreement for each of the four units operated by FENOC. Exhibit 3, Tr. of September 25, 2018 Hr'g at 77-78. The financial support agreement provided by FirstEnergy

¹⁴ ELPC does not here raise specific concerns regarding the pro forma income statement because that pro forma income statement has not been made publicly available. As directed, ELPC reached out to Mr. Thomas A. Lentz, Manager, Nuclear Licensing and Regulatory Affairs, at 330-315-6810.

Corp. could not be voided, cancelled or modified without the “prior written consent of the NRC staff.” *See* Exhibit 3, Hr’g Exhibit 1 (August 23, 2018 Letter, Accession No. ML18235A194), at L-19. On April 15, 2016, the NRC approved a license amendment under 10 CFR 50.80 for the Perry Nuclear Power Plant Unit 1. This amendment replaced the FirstEnergy Corp. parental financial support agreement for Perry with a parental financial support agreement from FES. FENOC made a similar request for Beaver Valley Unit 2, which was approved on April 14, 2017. However, FENOC’s May 18, 2017 request to similarly amend the operating licenses for Beaver Valley Unit 1 and Davis-Besse has not been approved by the NRC. FENOC renewed its request on August 23, 2018, but the NRC did not approve that request either. FENOC later withdrew its request and filed a request to amend the license as part of this license transfer application.¹⁵

A financial support agreement is a condition of the license for each of the four nuclear units. *See* Exhibit 3, Hr’g Exhibit 1 (August 23, 2018 Letter, Accession No. ML18235A194), at L-19. FENOC’s application glosses over the fact that the existing \$400 million support agreement was never transferred from FE Corp. to FES in the Beaver Valley Unit 1 and Davis-Besse licenses. When the NCR reviewed FENOC’s prior requests to transfer the \$400 million support agreement from FE Corp. to FES, the Commission engaged in careful analysis of the financial qualifications of FES. By simply assuming that this conforming amendment requires no evaluation of the financial health of the new guarantor, FENOC provides little evidence as to why such a transfer would be appropriately protective of public health and safety. The NRC should not now transfer the financial support agreement from non-debtor FE Corp. to New HoldCo.

¹⁵ Application at 7.

C. Conclusion

ELPC has standing to intervene and participate in a hearing and has timely filed its petition. FENOC's Application has failed to demonstrate that OwnerCo and OpCo are qualified to hold the licenses and that the transfer is consistent with applicable law and regulations. OwnerCo and OpCo fail to demonstrate that they have reasonable assurance of obtaining the funds necessary to cover the plants' estimated operating or decommissioning costs. The Commission should require FE Corp. to remain as guarantor on the licenses to provide an important safety backstop to the reorganized OwnerCo and OpCo.

DATED: July 17, 2019

Respectfully submitted,

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing PETITION TO INTERVENE AND HEARING REQUEST OF THE ENVIROMENTAL LAW & POLICY CENTER dated July 17, 2019 has been filed through the Electronic Information Exchange, the NRC’s E-Filing System, in the above-captioned proceeding, this 17th day of July, 2019.

Respectfully submitted,

/Signed (electronically) by/

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