

August 9, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

_____)	
In the Matter of)	
)	Docket Nos. 50-346
FIRSTENERGY NUCLEAR OPERATING COMPANY)	50-440
FIRSTENERGY NUCLEAR GENERATION, LLC)	50-334
)	50-412
(Davis Besse Nuclear Power Station, Unit 1))	
(Perry Nuclear Power Plant, Unit 1))	
(Beaver Valley Nuclear Power Station, Unit 1))	
(Beaver Valley Nuclear Power Station, Unit 2))	
_____)	

**APPLICANTS’ ANSWER OPPOSING THE ENVIRONMENTAL LAW & POLICY
CENTER’S PETITION TO INTERVENE AND HEARING REQUEST**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), FirstEnergy Nuclear Operating Company (“FENOC”), on behalf of itself and FirstEnergy Nuclear Generation Company (“FENGen”) (together the “Applicants”), submits this Answer opposing the Petition for Leave to Intervene and Hearing Request (“Petition”) filed by the Environmental Law & Policy Center (“ELPC” or “Petitioner”) on July 17, 2019.¹ Petitioner seeks leave to intervene in the proceeding involving the Applicants’ license transfer application filed on April 26, 2019 (the “Application”).² For the reasons set forth herein, the Petition should be denied.

¹ *The Environmental Law & Policy Center Petition to Intervene and Hearing Request* (July 17, 2019) (ADAMS Accession No. ML19198A329); *Exhibit 1 to Petition, Expert Testimony of Peter A. Bradford* (dated July 12, 2019, filed July 17, 2019) (ADAMS Accession No. ML19198A330) (“Bradford Report”).

² *See Application for Order Consenting to Transfer of Licenses and Conforming License Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (April 26, 2019) (ADAMS Accession No. ML19116A087). The Application was supplemented prior to acceptance by the NRC Staff for review, and recently additional information was provided by the Applicants in response to an NRC Staff request for additional information (“RAI”). *See Supplemental Information Needed for Acceptance of Requested Licensing Action RE: Application for Order Consenting to Transfer of Licenses and Conforming License Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (May 31, 2019) (ADAMS Accession No. ML19151A531)

In the Application, the Applicants requested that the U.S. Nuclear Regulatory Commission (“NRC”) approve the transfer of control of the NRC licenses (“Licenses”) for Beaver Valley Power Station, Unit Nos. 1 and 2 (collectively “BVPS”, individually “BVPS-1” and “BVPS-2”), Davis-Besse Nuclear Power Station, Unit No. 1 (“DBNPS”), and Perry Nuclear Power Plant, Unit No. 1 (“PNPP”), and their respective generally licensed independent spent fuel storage installation facilities (“ISFSIs”) (collectively the “Facilities”). In accordance with a plan of reorganization submitted in an ongoing bankruptcy proceeding, ownership of the Applicants will be transferred at emergence from bankruptcy to a newly created ultimate parent company, which would be owned by creditors that convert debt holdings to equity pursuant to the bankruptcy restructuring process.³ FENOC and FENGen will be reorganized and renamed as part of the restructuring, but aside from changing names and states of incorporation they will remain essentially the same companies. Post-emergence, a reorganized and renamed FENOC will remain the licensed operator, and a reorganized and renamed FENGen will remain the licensed owner, of the Facilities subject to the Application. The FENOC operating organization, operating procedures, and the plants themselves will not be materially affected by the reorganization and license transfers.

In order to be granted, a petition to intervene must demonstrate standing and also offer at least one admissible contention. The Petitioner does neither. As demonstrated in Section III, the Petitioner fails to establish standing to intervene. The NRC recognizes four forms of standing: judicial, proximity, organizational, and discretionary. The Petitioner fails to establish any form of standing, and therefore the Petition should be denied. Additionally, as shown in Section IV, the

(“Supplement”); *Response to Request for Additional Information Regarding an Application for Order Consenting to Transfer of Licenses and Conforming License Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (Aug. 2, 2019) (not available on ADAMS at the time of this filing) (“RAI Response”).

³ See Application at 8.

Petitioner has failed to put forth any admissible contentions as part of the three proposed contentions.⁴

In summary, Contention 1 alleges that the Application does not contain sufficient information to demonstrate that the Applicants have adequate funds for decommissioning, specifically relating to a decommissioning funding shortfall identified for BVPS-1.⁵ ELPC, however, fails to demonstrate a genuine dispute of fact or law. ELPC acknowledges that the Applicants have already made a commitment and offered a proposed condition to the NRC consent order to address the shortfall in the BVPS-1 decommissioning funding as projected in the Application (which assumes deactivation of the plant in 2021).⁶ But ELPC provides no legal or factual argument why such a commitment is insufficient, especially when the NRC will have a chance to review the funding mechanism before the license transfer occurs to assure that it is in one of the forms allowed by NRC regulations. This is not grounds for a hearing.

Contention 2 generally challenges the Applicants' financial qualifications. The contention disregards most of the financial qualifications discussion in the Application, which includes information showing that upon emergence from bankruptcy the licensees' costs will be covered for all years of operation, and that the new parent company over the licensees will have close to \$2 billion in assets.⁷ Rather, the Petition relies on blanket statements that the Applicants'

⁴ The Petitioner also provides three exhibits from the Applicants' bankruptcy proceeding. The first is the Bradford Report. The latter two are hearing transcripts from the bankruptcy proceeding. The Petitioner, however, relies on these exhibits in very limited contexts and without specific, detailed discussion of relevance to the proposed contentions. Accordingly, this Answer focuses on the arguments actually raised in the Petition, and not on the additional issues raised in the report or bankruptcy hearing transcripts. Indeed, the first and most significant of the three exhibits, the Bradford Report, is written for the bankruptcy proceeding and not geared for this NRC proceeding. *See, e.g.*, Bradford Report ¶ 15.

⁵ *See* Petition at 7; Application at 15-16.

⁶ Petition at 8.

⁷ Application at 13-15.

pro forma income statements and the new parent company's post-bankruptcy financial position cannot be relied on before the bankruptcy process has run its course.⁸

But the Petitioner fails to point to any filing in the bankruptcy proceeding or any facts in their exhibits that explain why these entities are not financially qualified. Nor does Petitioner explain how the reorganization plan would be confirmed in the bankruptcy proceeding if the reorganized entities would not be financially viable. The Petitioner also disregards the NRC Staff's ongoing participation in the bankruptcy proceeding to help ensure the Applicants' plan of reorganization is sufficient to meet NRC requirements. Petitioner's contention thus does not present a material dispute of fact or law.

Contention 3 claims that a \$400 million support agreement for the benefit of FENGen (that applies during the period of plant operations) should not be transferred from FirstEnergy Corp. ("FE"). But the Petitioner fails to recognize that FE does not currently provide a support agreement to FENGen. Rather the FE support agreement for the FENGen units was terminated and replaced in 2016 with a support agreement from FirstEnergy Solutions Corp. ("FES") as part of a license transfer that was approved by the NRC.⁹ Additionally, the support agreement is in place to provide further assurance that funds will be available, if needed, in the case of an unexpected extended outage, a future obligation. That agreement will continue after the license transfer, provided by FES's successor in the reorganized corporate structure. It would not be appropriate (nor are there legal or factual bases in the proposed contention) to require FE, as an unaffiliated and non-licensed company, to provide such support. The Petitioner fails to put

⁸ Petition at 9-10.

⁹ *Order Approving Direct Transfer of License and Conforming Amendment Related to Perry Nuclear Power Plant, Unit 1*, Docket No. 50-440 (April 15, 2016) (ADAMS Accession No. ML16078A092).

forward any reason why the new parent company holding the support agreement is itself insufficient.

Accordingly, the request should be denied because Petitioner does not have standing to intervene and has failed to submit any admissible contentions.

II. BACKGROUND TO PROCEEDING

FES, FENGen, and FENOC are currently wholly owned subsidiaries of FE. FES sells power and provides energy-related products and services to retail and wholesale customers. FENOC is the licensed operator of BVPS-1 and BVPS-2, DBNPS, and PNPP. The Facilities are owned by FENGen, which is a wholly owned subsidiary of FES. FENOC operates the facilities pursuant to an operating agreement with FENGen. FENGen, in turn, sells the entire output of the Facilities (approximately 4,048 megawatts) to FES under the terms of a power supply agreement.¹⁰

BVPS is a two-unit facility located in Shippingport, Pennsylvania. BVPS-1 and BVPS-2 are licensed to operate under their operating licenses until 2036 and 2047, respectively.¹¹ DBNPS is a single unit facility located in Oak Harbor, Ohio (21 miles east/southeast of Toledo, Ohio), licensed to operate until 2037.¹² PNPP is a single unit facility located in Perry, Ohio (about 35 miles northeast of Cleveland, Ohio), licensed to operate until 2026.¹³

FENOC previously informed the NRC that it planned to permanently shut down the Facilities before the end of their full license terms.¹⁴ However, on July 23, 2019, Ohio passed

¹⁰ See Application at 5.

¹¹ See *id.* BVPS-1 operates under NRC License No. DPR-66 and BVPS-2 operates under NRC License No. NPF-73.

¹² See *id.* DBNPS operates under NRC License No. NPF-3.

¹³ See *id.* PNPP operates under NRC License No. NPF-58.

¹⁴ *Certification of Permanent Cessation of Power Operations for Beaver Valley Nuclear Power Station, Unit Nos. 1 and 2, Davis-Besse Nuclear Power Station, Unit No. 1, and Perry Nuclear Power Plant Unit No. 1*, Docket Nos. 50-334, 50-412, 50-346, & 50-440 (April 25, 2018) (ADAMS Accession No. ML18115A007).

legislation that provides nuclear resource credits to in-state nuclear generation facilities.¹⁵ Based on the new legislation, FES reversed its decision to permanently cease operations at its Ohio facilities, DBNPS and PNPP. FES withdrew its certification of permanent cessation for these facilities on July 26, 2019.¹⁶ The certification of permanent cessation of operations remains for BVPS. BVPS-1 is scheduled for deactivation by May 31, 2021, and BVPS-2 is scheduled for deactivation by October 31, 2021.¹⁷ The license transfer application will be supplemented accordingly.¹⁸

On March 31, 2018, FES and its subsidiaries, together with FENOC, filed voluntary petitions for bankruptcy under Chapter 11 of the United States Bankruptcy Code (“Chapter 11”) in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division (“Bankruptcy Court”). Pursuant to 10 C.F.R. § 50.54(cc)(1), FENOC notified the NRC of the bankruptcy filing on April 2, 2018.¹⁹ Chapter 11 will allow FES and its affiliates FENOC and FENGen to restructure their operations, balance sheet, and capital structure in order to emerge from bankruptcy as a well-capitalized business.²⁰ The details of the reorganization are set forth in the Joint Plan of Reorganization (“Plan”), which FES and affiliates filed with the Bankruptcy Court on February 11, 2019.²¹ The Plan has since been amended.²²

¹⁵ Ohio House Bill 6 as enrolled, along with additional summaries of the legislation, can be found at the Ohio Legislature website at: <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-6>.

¹⁶ *Withdrawal of Certification of Permanent Cessation of Power Operations for Davis-Besse Nuclear Power Station, Unit No. 1, and Perry Nuclear Power Plant, Unit No. 1*, Docket Nos. 50-334, 50-412, 50-346, & 50-440 (July 26, 2019) (ADAMS Accession No. ML19207A097).

¹⁷ See Application at 6-7. As stated in the Application, the Applicants continue to explore the possibility of continuing to operate the Facilities beyond the planned deactivation dates if sufficient legislative support or meaningful market reforms can be obtained. *Id.*

¹⁸ The Applicants have already committed to submit a supplement to the NRC providing updated information by August 30, 2019. RAI Response, Attachment 6.

¹⁹ *Notification of Petition for Bankruptcy*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (April 2, 2018) (ADAMS Accession No. ML18094A661).

²⁰ See Application at 4.

²¹ *Sixth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code*, Docket No. 18-507574 (Bankr. N.D. Oh. July 23, 2019), ECF No. 2934.

NRC license transfer approval is necessary to effectuate the corporate restructuring pursuant to the Plan. Accordingly, on April 26, 2019, the Applicants submitted the present Application to the NRC.²³ As described in the Application, upon NRC approval and emergence from bankruptcy, the Applicants will be reorganized and separated from their current ultimate parent company, FE, and become subsidiaries of a newly created ultimate parent company, currently termed New HoldCo.²⁴ New HoldCo will be owned by entities that are currently creditors of the Applicants and FES.²⁵

As explained in the Application, FENOC and FENGen, the licensed operator and owner of the Facilities, will be reorganized as part of the restructuring, but aside from changing their names and states of incorporation, they will remain essentially the same. The license transfer will have essentially no impact on the Facilities, day-to-day operations of the Facilities, or their onsite organizations and management.²⁶ FENOC's technical capabilities as operator and its safety practices and procedures will not change as a result of the license transfer described in the Application.

²² The Fourth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code, dated April 18, 2019, was provided in Exhibit A of the Application. Since the Application was filed, the Plan was amended twice, but remains substantially similar for purposes of this adjudication. The most recent Plan is the Sixth Amended Joint Plan of Reorganization, filed July 23, 2019. Further amendments to the Plan will be brought to the NRC's attention during the pendency of the license transfer application.

²³ See Application at 4. As provided in footnote 2, the Application has since been updated through filing of a Supplement, provided on May 31, 2019, and RAI Response, provided on August 2, 2019.

²⁴ See *id.* As part of the Application, and as updated in the RAI Response, the Applicants have committed to the NRC to update the name of New HoldCo and the reorganized Applicants when available. See *id.*; RAI Response at 2, Attachment 6. A pre- and post-restructuring organizational chart is set forth in Exhibits B and C to the Application.

²⁵ See Application at 8-10. The parent company's common stock will be widely held following consummation of the restructuring, with no single shareholder expected to hold a majority of voting shares or otherwise have a controlling interest in New HoldCo. See *id.*

²⁶ See *id.* at 12.

On May 31, 2019, the Applicants filed a Supplement in response to a request for supplementary information from the NRC Staff.²⁷ The Supplement addresses a potential shortfall in radiological decommissioning funding for BVPS-1, as identified in FENOC’s March 15, 2019 decommissioning funding status report to the NRC.²⁸ The decommissioning funding status and the shortfall were premised upon deactivation of the plant in 2021. In the Supplement, the Applicants committed to rectifying the potential shortfall for the BVPS-1 nuclear decommissioning trust (“NDT”) prior to the closing of the license transfer transaction utilizing an authorized funding assurance mechanism under NRC regulations at 10 C.F.R. § 50.75. The Applicants proposed a condition to the requested NRC Order consenting to the license transfer confirming the commitment to ensure that sufficient funding assurance as required by NRC regulations is in place before the transfer is consummated.²⁹

Following receipt of the Supplement, on June 11, 2019, the NRC Staff notified the Applicants that it had completed its acceptance review of the Application and concluded that Applicants have provided sufficient information for the NRC Staff to perform its detailed technical review.³⁰ Subsequently, on June 27, 2019, the NRC published in the *Federal Register* a notice informing the public of its consideration of the Application, seeking written comments on

²⁷ *Supplemental Information Needed for Acceptance of Requested Licensing Action RE: Application for Order Consenting to Transfer of Licenses and Conforming Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (May 31, 2019) (ADAMS Accession No. ML19151A531).

²⁸ *Submittal of the Decommissioning Funding Status Report for Beaver Valley Nuclear Power Station, Unit Nos. 1 and 2, Davis-Besse Nuclear Power Station, and Perry Nuclear Power Plant*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 50-440, & 72-69 (March 15, 2019) (ADAMS Accession No. ML19074A242).

²⁹ See Supplement at 3-4. As noted in the Application and Supplement, the Applicants ordinarily would have until the next annual decommissioning status report to correct the shortfall. See Regulatory Guide 1.159 (Rev. 2), *Assuring the Availability of Funds for Decommissioning Nuclear Reactors*, at 13-14 (Oct. 2011) (ADAMS Accession No. ML112160012) (“[S]hortfalls identified in a biennial report must be corrected by the time the next biennial report is due”). This would in FENOC’s case require resolving the funding shortfall by March 2020. However, here the shortfall will be resolved by consummation of the transfer, which is expected to occur sooner than March 2020. Supplement at 3.

³⁰ *Acceptance of Requested Licensing Action Subsequent to Submission of Supplemental Information RE: Application for Order Consenting to Transfer of Licenses and Conforming License Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (June 11, 2019) (ADAMS Accession No. ML19151A370).

the Application, and offering an opportunity for persons who may be affected by the transfer to file, within 20 days of the notice, hearing requests and intervention petitions.³¹

On July 17, 2019, Petitioner filed a petition to intervene and request for hearing. FENOC timely files this Answer opposing the Petition in accordance with the provisions of 10 C.F.R. § 2.309(i)(1).

III. REGULATORY FRAMEWORK

Before addressing the Petition, Applicants provide a brief overview of the NRC regulations governing license transfers, including the scope of the NRC's review of financial qualifications, which are the core of the Petitioner's proposed contentions.

Under Section 184 of the Atomic Energy Act and 10 C.F.R. § 50.80, an NRC license, or any right thereunder, may not be transferred, assigned, or in any manner disposed of, directly or indirectly, unless the NRC first gives its consent in writing.³² Before approving a license transfer, the NRC reviews, among other things, the financial qualifications of the proposed transferee.³³

The NRC's financial qualification review considers both operational financial qualifications as well as the adequacy of decommissioning funding assurance. The NRC's regulations at 10 C.F.R. § 50.33 guide the NRC's review of operational financial qualifications and 10 C.F.R. § 50.75 guides its review of decommissioning funding assurance. The applicable

³¹ *Consideration of Application Containing Sensitive Unclassified Non-Safeguards Information Regarding Approval of Transfer of Licenses and Conforming Amendments*, 84 Fed. Reg. 30,775 (June 27, 2019). On July 18, 2019, the NRC Staff issued an RAI. *Request for Additional Information Regarding an Application for Order Consenting to Transfer of Licenses and Conforming License Amendments*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (July 18, 2019) (ADAMS Accession No. ML19192A222). Applicants provided their RAI Response on August 2, 2019. See *supra* note 2. The RAI and RAI Response address matters such as the names of the reorganized entities, corporate governance, and Plan updates, and do not appear to materially impact the contentions raised in the Petition.

³² 42 U.S.C § 2234. Hearings involving license transfer applications are subject to a streamlined hearing process. See *Streamlined Hearing Process for NRC Approval of License Transfers; Final Rule*, 63 Fed. Reg. 66,721, 66,722 (Dec. 3, 1998).

³³ See 10 C.F.R. § 50.80(b)(1), (c)(1); see also NUREG-1577 (Rev. 1), *Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance*, available at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1577/r1/sr1577r1.pdf>.

guidance document to support the NRC’s review is NUREG-1577, “Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance.”

Under 10 C.F.R. §50.80(b), the applicant for a license transfer must include as much of the information with respect to financial qualifications as required in 10 C.F.R. § 50.33(f).³⁴ Pursuant to 10 C.F.R. § 50.33(f), the applicant must submit its estimated operating costs for a five-year period of operation (presuming the licensee will operate for five years) and indicate the source of funds it will use to cover the operating costs.³⁵ The NRC then reviews the information for reasonableness and compares it with data for other plants of similar size, design, and location. On the basis of this information, the NRC will issue findings with respect to the applicant’s financial qualifications. For merchant plants (i.e., plants operated by entities that are not an “electric utility” as defined in NRC regulations), like the Facilities, the NRC also reviews whether the licensee will have access to sufficient funds to cover “fixed operating costs during an outage of at least six months.”³⁶

In its review of decommissioning funding in a license transfer, the NRC looks to the adequacy of the NDT funds set aside pursuant to 10 C.F.R. § 50.75(c)(1) to ensure they are adequate to meet NRC requirements at the time of the license transfer.

Outside the license transfer process, the NRC has a robust framework of regulations governing the decommissioning of a nuclear reactor. NRC regulations require that licensees provide reasonable assurance that funds will be available for the decommissioning process in

³⁴ 10 C.F.R. § 50.80(b)(1)(i).

³⁵ 10 C.F.R. § 50.33(f)(2). Information on the source of funds should include any long-term contracts that the applicant has for the plant, such as power supply and operating agreements, projections of the market price of power, corporate revenues from other sources that may be used for the nuclear plant, and any other information relevant to the source of revenues. NUREG-1577 (Rev. 1), at 10.

³⁶ NUREG-1577 (Rev. 1), at 10.

order to ensure the safe and efficient decommissioning of nuclear facilities.³⁷ The most common method of providing financial assurance, which is used by the Applicants, is an NDT funded via the prepayment to a nuclear decommissioning trust fund.

The NRC closely monitors licensees' decommissioning funding status throughout the license term, including the ongoing sufficiency of decommissioning funding compared with minimum funding requirements established by NRC regulations.³⁸ As part of this oversight, licensees must submit periodic reports to the NRC on the status of decommissioning funds; and for Facilities approaching permanent cessation of operations, as here, these reports must be submitted on an annual basis.³⁹ Those reports must include, among other things: the decommissioning funds available, a schedule of amounts to be collected, and justification that funds available meet NRC funding assurance requirements.⁴⁰ If the licensee or the NRC identifies a shortfall between the remaining funds and the updated cost to complete decommissioning, then the licensee must provide additional financial assurance.⁴¹

III. THE PETITIONER HAS NOT DEMONSTRATED STANDING

In order to intervene in a proceeding, the petitioner must establish standing.⁴² The four types of standing the NRC recognizes are judicial standing, proximity standing, organizational standing, and discretionary intervention. The Petitioner has met none of these and the Petition should be denied.

³⁷ 10 C.F.R. § 50.75.

³⁸ *See generally Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-19-06, Docket No. 50-219-LT, 72-015-LT, 2019 WL 26328751, at *2-3 (NRC June 18, 2019).

³⁹ 10 C.F.R. § 50.75(f)(1).

⁴⁰ 10 C.F.R. § 50.82(a)(8)(v)(A)-(B).

⁴¹ *See* 10 C.F.R. § 50.82(a)(8)(vi); *see also* 10 C.F.R. § 50.75(f)(2) (cost estimates submitted near the time of reactor deactivation must include plans for adjusting levels of funding to assure adequate funds are available at the time of decommissioning).

⁴² *See* 10 C.F.R. § 2.309(d).

A. Standards for Demonstrating Standing

1. Judicial Standing

In evaluating standing the Commission must determine whether the Petitioner has an interest affected by the proceeding. “The Commission has long looked for guidance to current judicial concepts of standing” to perform its standing review.⁴³ To demonstrate judicial standing in an NRC proceeding, the Petitioner must allege (i) a particularized injury, (ii) that is fairly traceable to the challenged action, and (iii) that is likely to be redressed by a favorable decision.⁴⁴ To establish an injury-in-fact, the Petitioner must show it suffered or will suffer a particularized injury that is actual or eminent, that is, there must be a concrete demonstration that harm could flow from a result of the proceeding.⁴⁵ The injury cannot be simply conjectural or hypothetical.⁴⁶ This means that the Petitioner must demonstrate that it “will in fact be perceptibly harmed by the challenged agency action, not that [it] can imagine circumstances in which [it] could be affected by the agency’s action.”⁴⁷

Additionally, the Petitioner must show that their injury is traceable to the agency action, if not directly then through a plausible chain of causation.⁴⁸ Lastly, the Petitioner must show that its alleged injury can be redressed by a favorable outcome in the proceeding.⁴⁹

⁴³ *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998), *aff’d sub nom. Envirocare of Utah, Inc .v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (citations omitted).

⁴⁴ *Id.* at 6 (citing *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993)).

⁴⁵ *Nuclear Eng’g Co., Inc.* (Sheffield, III. Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

⁴⁶ *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 (1998) (citing *Steel Co. v. Citizens for a Better Env’t*, 118 S. Ct. 1003, 1016 (1998); *Warth v. Seldin*, 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994)).

⁴⁷ *Nuclear Fuel Services, Inc.* (Erwin, Tennessee) CLI-04-13, 59 NRC 244, 248 (2004) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973)). *Accord Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1339 (D.C. Cir. 1999).

⁴⁸ *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 NRC 216, 228 (2010) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75).

2. Proximity Standing

In certain cases petitioners may be presumed to have established judicial standing because of their geographic proximity to the facility.⁵⁰ This type of proximity standing is based on the assumption that accidents at the facility will affect the health and safety of people living and working within a certain distance.⁵¹ The appropriate distance from the facility to establish proximity standing is determined on a case-by-case basis.⁵²

The NRC has held that the proximity presumption may be sufficient to confer standing on individuals or groups within specific distances of a reactor in proceedings for initial construction permits and operating licenses or for significant license amendments.⁵³ But the NRC has applied a stricter standard in proceedings that lack a “clear potential for offsite damages.”⁵⁴ Such proceedings include license transfers, where the NRC “determine[s] on a case-by-case basis whether the proximity presumption should apply, considering the ‘obvious potential for ‘offsite consequences,’ or lack thereof, from the application at issue, and specifically ‘taking into account the nature of the proposed action and the significance of the radioactive source.’”⁵⁵ The Commission has further explained that “[l]icense transfers even for *operating* nuclear power

⁴⁹ *Florida Power and Light* (Turkey Point Nuclear Generating Plant Units 3 and 4), LBP-15-13, 81 NRC 456, 466-67 (2015).

⁵⁰ See *Exelon Generation Co., LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (citations omitted); see also *Boston Edison Co.* (Pilgrim Nuclear Power Station), LBP-85-24, 22 NRC 97, 98-99 (1985), *aff'd on other grounds*, ALAB-816, 22 NRC 461 (1985) (residence 43 miles from the plant is inadequate for standing with respect to a spent fuel pool expansion).

⁵⁴ *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 (2004), citing *St. Lucie*, CLI-89-21, 30 NRC at 329-30).

⁵⁵ *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co.*, CLI-05-26, 62 NRC at 580-81).

plants typically involve little if any radiological risk, as there are generally no changes to the physical plant, its operating procedures, or its design basis accident analysis.”⁵⁶

Where the Commission has considered the application of the proximity presumption in license transfer cases, it has only relied on the presumption “at such close distances where a petitioner *frequently* engages in *substantial* business and related activities in the vicinity of the facility, engages in normal everyday activities in the vicinity, has regular and frequent contacts in the area near a licensed facility, or otherwise has visits of a length and nature showing an ongoing connection and presence.”⁵⁷ The NRC has denied petitioners the benefit of proximity standing where they have limited contact in the area surrounding the licensed facilities. “[M]ere occasional trips to areas located close to the reactors” are insufficient.⁵⁸

Generally, in license transfer proceedings, the NRC has only granted proximity standing in cases where the petitioner lives within a small radius of the plant.⁵⁹ For example, the NRC has denied proximity standing to petitioners living within five to ten miles of the plant.⁶⁰ Additionally, the NRC has denied proximity standing in a license transfer proceeding where (as here) there are “no changes to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel.”⁶¹ The key inquiry is the radius beyond which the NRC believes the requested action cannot present an “obvious potential for offsite consequences.”⁶²

⁵⁶ *Id.*

⁵⁷ *Consumers Energy Co. (Big Rock Point)*, CLI-07-21, 65 NRC 519, 523-24 (2007) (internal quotation marks and citations omitted).

⁵⁸ *Id.*

⁵⁹ *Exelon Generation Co.*, CLI-05-26, 62 NRC at 583.

⁶⁰ *Consumers Energy Co.*, CLI-07-21, 65 NRC at 523-24 (internal quotation marks and citations omitted).

⁶¹ *Exelon Generation Co.*, CLI-05-26, 62 NRC at 582.

⁶² *Id.* at 580-81.

3. Organizational Standing

If an organization seeks to intervene, it may establish standing in one of two ways. First, the organization can establish standing in its own right.⁶³ Thus, like an individual petitioner, the organization must demonstrate an injury-in-fact that is traceable to the agency action and redressable by a favorable decision or establish proximity standing.⁶⁴ Second, organizations can establish standing in a representational capacity.⁶⁵ To establish representational standing, the organization must demonstrate that at least one of its members has standing to participate, identify that member by name and address, and demonstrate that the member has authorized the organization to serve as his or her representative.⁶⁶

4. Discretionary Intervention

Under 10 C.F.R. § 2.309(e), the Commission “may consider a request for discretionary intervention when at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held.”⁶⁷ A petitioner seeking discretionary intervention, in addition to addressing the factors in 10 C.F.R. § 2.309(d)(1), must also address the factors set forth in 10 C.F.R. § 2.309(e). When considering discretionary intervention, the primary consideration is the first factor, assistance in developing a sound record.⁶⁸

⁶³ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (citing *Ga. Inst. of Tech.* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See, e.g., 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.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

⁶⁷ 10 C.F.R. § 2.309(e).

⁶⁸ *See Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 716 (2006).

B. Petitioner has Not Demonstrated Standing to Intervene

The Petitioner requests that it be admitted as a party to the proceeding in its own right, as an affected organization, and as a representative of its members. The Petitioner, however, does not make the requisite showing to support any form of standing in this proceeding.

ELPC has failed to provide the necessary information to establish representational standing. NRC precedent requires organizations to provide the name and address of the members who have authorized the organization to serve as their representative.⁶⁹ Although ELPC asserts that its members “expect[] that the organization will request hearings on important safety issues,”⁷⁰ it does not provide the name of any member who specifically authorizes ELPC to serve as his or her representative. Additionally, ELPC has failed to provide any facts demonstrating that a specific one of its members has standing in their own right.⁷¹

In addition to this significant procedural deficiency, ELPC has substantively failed to establish judicial or proximity based standing in its own right or in a representational capacity.

In order to establish judicial standing, ELPC must show that it has suffered an injury-in-fact that is traceable and redressable.⁷² But ELPC has failed to establish that, even if it is right on the merits (which it is not), either it or its members will suffer an actual or imminent injury that is fairly traceable to the license transfer. ELPC bases its injury on “increased radiological risk as a result of inadequate decommissioning funding and failure by the proposed licensee to establish appropriate financial qualifications.”⁷³ ELPC then cites a number of NRC documents and cases

⁶⁹ See, e.g., *N. States Power Co.*, CLI-00-14, 52 NRC at 47; *GPU Nuclear Inc.*, CLI-00-6, 51 NRC at 202.

⁷⁰ Petition at 5.

⁷¹ In order to establish the factual predicates of the standing elements it is generally necessary for the individuals to set forth specific claims in a sworn affidavit. *Shieldalloy Metallurgical Corp.*, LBP-99-12, 49 NRC 155, 158 (1999).

⁷² *Quivira Mining Co.*, CLI-98-11, 48 NRC at 5-6.

⁷³ Petition at 4.

discussing the general importance of financial assurance,⁷⁴ but critically, does not specifically show how there would be an increased risk due to the license transfers, identify the persons or entity to whom that increased risk would apply, or explain how ELPC would itself experience such a risk of offsite consequences. As the Commission has previously held, license transfers “involve little if any radiological risk,” in particular when the changes are financial in nature, and there are “no changes to the physical plant, its operating procedures, or its design basis accident analysis”—a finding ELPC fails to rebut.⁷⁵

As the Petitioner emphasized, the NRC established its financial assurance requirements to protect public health and safety. The Applicants meet these requirements. ELPC’s vague and unsubstantiated claims about increased radiological risk are not sufficient to establish an injury-in-fact or standing to intervene.⁷⁶ Further, to the extent injuries are alleged due to inadequate decommissioning funding in the future, Petitioner fails to demonstrate how those injuries could be redressed in this license transfer proceeding where the Applicants will meet all NRC decommissioning funding assurance requirements.⁷⁷

The Petitioner has also failed to establish a presumption of standing based on proximity. As a threshold matter, the physical proximity of ELPC’s office in Columbus, Ohio, or its members’ residences in Ohio do not by themselves establish proximity-based injury. As

⁷⁴ *Id.* at 4-5.

⁷⁵ *Consumers Energy Co.*, CLI-07-19, 65 NRC at 426; *Exelon Generation Co.*, CLI-05-26, 62 NRC at 582; *Commonwealth Edison Co. (Zion nuclear Power Station Units 1 & 2)*, CLI-99-4, 49 NRC 185, 191 (1999) (adding that in the decommissioning context, to which much of ELPC’s Petition relates, “the spectrum of accidents and events that remain credible is significantly reduced”).

⁷⁶ The alleged injury, which may be either actual or threatened, must be concrete and particularized, not “conjectural” or “hypothetical.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

⁷⁷ The Bradford Report undercuts the Petitioner’s claims as to standing. The Bradford report sets forth a general discussion of NRC decommissioning rules and regulations, with no clear tie to injuries to be incurred by ELPC. *See, e.g.*, Bradford Report at 5-16. Where it does discuss potential injuries, it argues that the harms to be incurred by any alleged decommissioning shortfall will fall upon *ratepayers*, who will “be called on to make up shortfalls” in funding. *See id.* ¶ 52. Thus ELPC’s own expert acknowledges that even if harms would be incurred, they would not be radiological but financial in nature.

discussed above, the Petitioner cannot base its standing simply upon a residence or visits near the plant, unless the proposed transfer “quite obvious[ly] entails an increased potential for offsite consequences.”⁷⁸ In this case, the license transfer and conforming amendments do not impact the Facilities or the technical qualifications of the Applicants to operate the plants or meet the requirements of the Facilities’ licenses, and therefore do not “on their face present any ‘obvious potential of offsite radiological consequences.’”⁷⁹ The license transfer does not impact the operational plans or strategies of any of the Facilities or the financial, technical, and safety standards they are required to meet. Additionally, the transfer does not impact the scope of nuclear activities or power production authorized or performed at the Facilities. It is incumbent on the Petitioner to establish a plausible “‘chain of causation’, some scenario suggesting how these particular license [transfers and] amendments would result in a distinct new harm or threat to [it].”⁸⁰ The Petitioner has not met its burden to make this showing.

Additionally, the Petitioner should not be granted discretionary intervention. Under 10 C.F.R. § 2.309(e), the Commission may consider a request for discretionary intervention when at least one petitioner has established standing and at least one contention has been admitted.⁸¹ In this case, ELPC is the only petitioner and thus is not eligible for discretionary intervention.

IV. PETITIONER HAS FAILED TO PUT FORTH ADMISSIBLE CONTENTIONS

For the reasons set forth below, the Petitioner has not presented an admissible contention.

⁷⁸ *Commonwealth Edison Co.*, CLI-99-4, 49 NRC at 191 (citing *St. Lucie*, CLI-89-21, 30 NRC at 329-30) (internal quotation marks omitted); see also *Exelon Generation Co.*, CLI-05-26, 62 NRC at 580-81 (explaining how the Commission considers proximity-based standing in license transfer cases, and stating that “[i]f the petitioner fails to show that a particular licensing action raises an *obvious potential for offsite consequences*, then our standing inquiry reverts to a traditional standing analysis of whether the petitioner has made a specific showing of injury, causation, and redressability”).

⁷⁹ *Commonwealth Edison Co.*, CLI-99-4, 49 NRC at 191.

⁸⁰ *Id.*

⁸¹ 10 C.F.R. § 2.309(e).

A. Admissibility Standards

Petitions to intervene must “set forth with particularity” the contentions the petitioner wants to have litigated in a hearing.⁸² The Commission’s requirements for admissibility are laid out in 10 C.F.R. § 2.309(f)(1)(i)-(vi).⁸³ These standards are “strict by design”⁸⁴ and help ensure NRC hearings adjudicate “genuine, substantive safety and environmental” issues.⁸⁵ Under 10 C.F.R. § 2.309(f)(1), the contentions must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention 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 which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;
- (vi) In a proceeding other than one under 10 CFR 52.103, provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.

⁸² *PPL Susquehanna, LLC* (Susquehanna Steam. Elec. Station, Units 1 & 2), CLI-15-8, 2015 WL 7444391, at *2 (NRC April 14, 2015) (quoting 10 C.F.R. § 2.309(f)(1)).

⁸³ 10 C.F.R. § 2.309(f)(1)(i)-(vi).

⁸⁴ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁸⁵ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

10 C.F.R. §§ 2.309(f)(1)(i)-(vi). If any one of these standards is not met, the contention must be excluded.⁸⁶ As the Commission has explained, “[t]hese requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.”⁸⁷

The NRC contention admissibility requirements are strict in order to “screen out ill-defined, speculative, or otherwise unsupported claims.”⁸⁸ They do this by “requir[ing] a petitioner to explain the basis for each contention, providing supporting facts or expert opinion on which the petitioner intends to rely in litigating the contention.”⁸⁹ This “ensure[s] that adjudicatory proceedings are triggered only by substantive safety or environmental issues, rooted in a ‘reasonably specific factual or legal basis,’”⁹⁰ rather than conjecture and generalizations.

B. Contention 1 in Inadmissible

In Contention 1, the Petitioner alleges that the Application does not contain sufficient information regarding the proposed licensees’ decommissioning funding assurance, specifically related to the decommissioning funding shortfall for BVPS-1 identified in the Application.⁹¹ ELPC asserts that the regulatory commitment by the Applicants in the Supplement, to provide a financial assurance mechanism to address the shortfall acceptable to the NRC prior to the license transfer, is insufficient.⁹² For the reasons set forth below, Contention 1 fails to satisfy the NRC’s contention admissibility standards.

⁸⁶ *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991) (citation omitted).

⁸⁷ *USEC, Inc.* (Amer. Centrifuge Plant), CLI-906-9, 63 NRC 433, 437 (2006); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁸⁸ *Exelon Generation Company, LLC*, CLI-19-06, 2019 WL 2632851 at *3.

⁸⁹ *Id.*

⁹⁰ *Id.*; *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003).

⁹¹ Petition at 7-8.

⁹² *Id.*

1. Contention 1 Fails to Establish a Genuine Dispute of Law or Fact

Contention 1 is inadmissible because it fails to establish a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi). ELPC fails to present any facts to demonstrate the Applicants' inability to fulfill their regulatory commitment as to the BVPS-1 shortfall, or point to any NRC requirements the Applicants fail to satisfy.

As part of a license transfer application, applicants are required to provide information indicating how reasonable assurance will be provided that funds will be available to decommission the facility.⁹³ The funding assurance can be provided by any method set forth in 10 C.F.R. § 50.75(e) or a combination thereof.⁹⁴ The NRC reviews the information provided to make sure it is in compliance with 10 C.F.R. § 50.75(c), which sets forth the minimum funding requirements. Additionally, the NRC has established a comprehensive and rigorous regulatory regime, including annual reports of the facilities' decommissioning funding and restrictions on withdrawals from NDTs, that provides continued assurance throughout the life of nuclear facilities.⁹⁵

The Applicants provided all of the required information in their Application.⁹⁶ Specifically, the Applicants relied on their annual decommissioning funding status report, which was submitted on March 15, 2019.⁹⁷ The decommissioning funding status report demonstrated sufficient funding for decommissioning three of the four facilities, but a potential shortfall was identified for BVNPS-1 given the near-term deactivation date.⁹⁸ Pursuant to Regulatory Guide 1.159 (Revision 2), the March 15, 2019 status report provided a regulatory commitment to

⁹³ 10 C.F.R. §§ 50.33(k), 50.80(b).

⁹⁴ 10 C.F.R. § 50.75(e).

⁹⁵ 10 C.F.R. §§ 50.75, 50.82.

⁹⁶ See Application at 15-16.

⁹⁷ *Id.*

⁹⁸ *Id.*

reconcile the shortfall in accordance with the methods described in 10 C.F.R. § 50.75 (such as a lump-sum prepayment to the NDT, or a parent guarantee if certain financial tests are met).⁹⁹

Additionally in their Supplement to the Application, the Applicants proposed a condition to the NRC order approving the license transfer that states, “[o]n or by the closing date of the license transfer transaction, the Applicants shall take all necessary steps to ensure that the decommissioning funding assurance mechanism to address any shortfall identified for BVNPS-1 is implemented and maintained consistent with the Safety Evaluation supporting this order.”

The Petitioner does not dispute any of these facts and even acknowledges the Applicants’ commitment to reconcile the shortfall, which should be set forth in a condition to the NRC order approving the license transfer. Rather, the Petitioner merely provides a conclusory statement that the commitment is insufficient, ignoring the fact that the NRC will review the funding assurance mechanism before the license transfer is approved to confirm that the commitment/order has been met. Pursuant to the proposed order condition, the license transfer cannot occur without NRC acceptance. To the extent the Petitioner takes issue with the NRC Staff’s confirmatory review, this serves as a challenge to the NRC Staff’s conduct of its ongoing regulatory duties and is well outside the scope of an NRC hearing.¹⁰⁰

Additionally, the Petitioner fails to point to any NRC rule or regulation to support its claim that a condition is insufficient to provide adequate assurance of funding. Such conclusory statements, without more, are insufficient to establish a genuine dispute of a material fact or law

⁹⁹ *Submittal of the Decommissioning Funding Status Report for Beaver Valley Nuclear Power Station, Unit Nos. 1 and 2, Davis-Besse Nuclear Power Station, and Perry Nuclear Power Plant*, Docket Nos. 50-334, 50-412, 72-1043, 50-346, 72-14, 50-440, & 72-69 (March 15, 2019) (ADAMS Accession No. ML19074A242).

¹⁰⁰ See *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 470 (2001) (Petitioners in NRC hearings cannot challenge NRC Staff regulatory reviews.); see also *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 NRC 62, 67 (2004) (indicating that the adjudicatory context is an inappropriate forum to evaluate NRC Staff non-adjudicatory activities).

and do not warrant a hearing. Confirmation that the condition has been satisfied will be a ministerial act based on objective criteria in the regulation.

Contention 1 is thus inadmissible because it fails to establish a genuine dispute on a material issue of fact or law. As shown here, the Applicants meet the NRC requirements pertaining to decommissioning funding assurance.

2. Contention 1 Impermissibly Challenges NRC Regulations

To the extent the Petitioner is arguing that the NRC decommissioning funding assurance requirements are inadequate to address future decommissioning costs, Contention 1 is an impermissible attack on NRC regulations and is inadmissible. The NRC has a comprehensive, regulation-based, framework to ensure ongoing compliance with health and safety standards and provide oversight of licensees' decommissioning funding and financial assurance.¹⁰¹ Insofar as the Petitioner is challenging the adequacy of this regulatory scheme to provide reasonable assurance of the adequacy of funding for decommissioning, it is impermissibly attacking NRC regulatory authority.¹⁰² There is a long line of Commission and Licensing Board precedent denying contentions that attack the NRC regulations.¹⁰³ This extends to contentions that seek to

¹⁰¹ *Exelon Generation Co.*, CLI-19-06, 2019 WL 2632851 at *5-*6.

¹⁰² See 10 C.F.R. § 2.335.

¹⁰³ See, e.g., *Vermont Yankee Nuclear Power Corp. & AmerGen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 165-66 (2000); *Carolina Power and Light Co. and North Carolina Eastern Mun. Power Agency* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 544 (1986); *Kansas Gas and Elec. Co.* (Wolf Creek Generating Station, Unit 1), ALAB-784, 20 NRC 845, 846 (1984); *Tennessee Valley Auth.* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 949 (2009); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Stations, Units 2 & 3), LBP-01-10, 53 NRC 273, 286 (2001); *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-98-29, 48 NRC 286, 296 (1998); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 & 2), LBP-80-30, 12 NRC 683, 692-93 (1980).

impose requirements above and beyond those set forth in NRC regulations,¹⁰⁴ and attacks on regulations specifically relating to decommissioning funding assurance.¹⁰⁵

Specifically, under NRC precedent, “a contention must be rejected where it constitutes an attack on applicable statutory requirements; it challenges the basic structure of the Commission’s regulatory process or is an attack on the regulations.”¹⁰⁶ Contentions present impermissible challenges to regulations when they seek to impose requirements above and beyond those set forth in NRC regulations.¹⁰⁷ In these cases, however, where the Petitioner’s contentions are outside the scope of the adjudicatory hearing, the Petitioner can still seek relief by filing a petition for rulemaking under 10 C.F.R. § 2.802 or a request for the NRC Staff to take an enforcement action under 10 C.F.R. § 2.206.¹⁰⁸

Contention 1 does not explicitly address or even cite the decommissioning funding issues discussed in Bradford Report that Petitioner submitted along with the Petition. But to the extent the Petitioner is relying on that report to support Contention 1, it also presents an impermissible attack on NRC regulations. The Bradford Report focuses on alleged uncertainties inherent in the decommissioning process and the inability of the NRC’s financial assurance requirements to

¹⁰⁴ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001).

¹⁰⁵ *Vermont Yankee Nuclear Power Corp. et al.*, CLI-00-20, 52 NRC at 165-66 (“Inasmuch as [the petitioner’s] argument generally attacks our formula for estimating decommissioning costs, it constitutes an impermissible collateral attack on our regulations. As we explained in an earlier license transfer proceeding, ‘a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings.’” (citation omitted)).

¹⁰⁶ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), LBP-82-76, 16 NRC 1029, 1035 (1982), (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20-21 (1974)); *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), LBP-09-18, 70 NRC 385, 2009 WL 8519332, at *12 (2009), *aff’d*, CLI-10-7, 71 NRC 133 (2010).

¹⁰⁷ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 159 (2001).

¹⁰⁸ *Carolina Power & Light Company* (Shearon Harris Nuclear Power Plant, Unit 1), 50-400-LR, 65 NRC 41, 56 (2007).

fully address them.¹⁰⁹ Such sweeping attacks on the sufficiency of NRC regulations are outside the scope of this specific license transfer proceeding and constitute impermissible attacks on NRC regulations.

Finally, issues such as these that focus on NRC regulatory processes are more appropriately addressed in a Section 2.206 proceeding. The Petitioner filed a Section 2.206 petition in 2018 to address similar concerns about the Applicants' decommissioning funding.¹¹⁰ In the Director's Decision denying ELPC's enforcement petition, the NRC Staff addressed and rejected the issues presented in this Contention.¹¹¹ A second hearing to adjudicate many of these same issues is not warranted.

C. Contention 2 is Inadmissible

Contention 2 is inadmissible because it fails to establish a genuine dispute on a material issue of law or fact. In Contention 2, the Petitioner challenges the Applicants' financial qualifications.¹¹² In particular, ELPC challenges the Applicants' reliance on the plant owner's pro forma income statements and its new parent company's post-emergence balance sheet, before the bankruptcy process has concluded.¹¹³

Under NRC regulations an applicant for a license transfer must submit its estimated operating costs and indicate the source of funds it will use to cover those costs.¹¹⁴ Information on the source of funds should include any long-term contracts, market projections, corporate revenues from other sources, and any other information that may be useful.¹¹⁵ The NRC reviews

¹⁰⁹ See, e.g., Bradford Report at 13-17.

¹¹⁰ *FirstEnergy Nuclear Operating Company Director's Decision Under 10 CFR 2.206*, Docket Nos. 50-334, 50-412, 50-346, and 50-440, at 1 (April 3, 2019) (ADAMS Accession No. ML19052A040).

¹¹¹ *Id.* at 10-11.

¹¹² Petition at 9-10.

¹¹³ *Id.*

¹¹⁴ 10 C.F.R. § 50.33(f).

¹¹⁵ NUREG-1577 (Rev. 1), at 10.

this information to determine if the applicants have the ability to cover operating costs on an ongoing basis. In addition, NRC reviews the financial information to determine whether there is sufficient funding assurance to cover fixed operating costs during an outage of at least six months if the plants are shut down and not producing revenues.¹¹⁶ And in such cases, the NRC often expects a licensee’s parent company to provide a financial support instrument to help cover the safe shutdown costs. This is the purpose of the \$400 million financial support agreement – to provide an additional source of funding, if ever needed, to assure adequate funding through a six-month period of safe shutdown during plant operations.¹¹⁷

As outlined in the Application, the Applicants meet these requirements. Upon emergence from bankruptcy, the licensed owner will enter into a Power Supply Agreement (“PSA”) with the retail arm of the newly reorganized companies.¹¹⁸ The form of the PSA was provided as Exhibit I to the Application.¹¹⁹ As the pro forma income statements show, the projected revenues from the sales under the PSA will fully cover the owner’s operating costs.¹²⁰ Additionally, under the PSA the retail company is required to cover all costs incurred by the owner for operation of the Facilities for compliance with NRC regulations.¹²¹ The PSA also provides that the new parent company will serve as a guarantor for the retail company’s obligations under the agreement.

In addition to the PSA and pro forma income statements, the parent company is providing a support agreement, which is bolstered by its strong post-bankruptcy cash position.¹²² The

¹¹⁶ *Id.*

¹¹⁷ *See, e.g., Order Approving Direct Transfer of License and Conforming Amendment Related to Perry Nuclear Power Plant, Unit 1*, Docket No. 50-440 (April 15, 2016) (ADAMS Accession No. ML16078A092); *Beaver Valley Power Station, Unit 2 – Order Approving Transfer of License and Conforming License Amendment*, Docket No. 50-412 (April 14, 2017) (ADAMS Accession No. ML17081A433).

¹¹⁸ Application at 13-14.

¹¹⁹ *Id.* at 13.

¹²⁰ *Id.*

¹²¹ *Id.* at 14.

¹²² *Id.* at 13-14.

support agreement provides additional assurance that the Facilities' owner will have access to funds sufficient to cover fixed operating costs in the event of unanticipated outages affecting all the Facilities.

According to the Plan of Reorganization, which was provided as Exhibit A of the Application, upon emergence the new ultimate parent company will have approximately \$2.0 billion in assets, with \$1.56 billion in cash and cash equivalents, a portfolio of diverse generation assets, including a fossil generation asset and retail company, and is expected to generate positive operating earnings.¹²³ Together, these assets and revenue streams provide assurance that the parent company will be able to meet its obligations under the support agreement if ever called upon, and provide further assurance that the Applicants are financially qualified to hold the Licenses after the license transfer.

The Petitioner provides no evidence to dispute any of these facts and conclusions. It points to no bankruptcy filings challenging the financial projections. Rather than provide facts to dispute the financial qualifications of the Applicants, it makes a generalized claim that reliance on filings made in the bankruptcy process prior to Plan confirmation are “premature,”¹²⁴ loosely coupled with vague assertions about the liquidity of the plant owner¹²⁵ and the reorganized Applicants' lack of financial history until after emergence.¹²⁶

Petitioner's belief that the bankruptcy process cannot accurately project the post-emergence financial position of the reorganized Applicants is also belied by the fact that the

¹²³ *Id.* at 14.

¹²⁴ Petition at 9.

¹²⁵ *Id.* at 9-10.

¹²⁶ *Id.* at 10. Furthermore, to the extent Contention 2 takes issue with the NRC making a determination on the license transfer application prior to Plan confirmation (i.e., approval) by the bankruptcy court (Petition at 9), it is highly likely that Plan confirmation will occur during the course of the NRC's review. Currently, the Plan confirmation hearing in the bankruptcy proceeding is scheduled for August 20, 2019.

NRC is a participant in the bankruptcy proceeding. Through this engagement, the NRC Staff acts to ensure that the Plan of Reorganization is sufficient to meet NRC regulations. The Petitioner's vague claims do not address this important feature of the bankruptcy process.¹²⁷

Because Petitioner's contention does not raise a genuine dispute with the Application, but instead challenges NRC financial assurance regulations, asserting without support that they are insufficient in the bankruptcy context, it must be rejected.¹²⁸

D. Contention 3 in Inadmissible

Contention 3 is inadmissible because it fails to establish a genuine dispute on a material issue of fact or law. In Contention 3, the Petitioners challenge the alleged transfer of the parental financial support agreement from FE to the new parent company.

As a factual matter, there is currently no such support agreement between FE and the facility owner FENGen. While FE in the past maintained such an agreement, in 2016 the

¹²⁷ ELPC states in footnote 14 of the Petition that it did not raise issues regarding the Applicants' pro forma income statements because it did not have the opportunity to see the proprietary version of those statements. According to Applicants' records, ELPC left a message with the Applicants' licensing manager when he was out of the office, but did not contact Applicants' counsel. In addition, it appears that ELPC has not made an effort to contact the NRC about access to proprietary information, although instructed to in the Federal Register notice. *Notice, Application for Transfer of License; Opportunity to Comment, Request a Hearing, and Petition for Leave to Intervene*, 84 Fed. Reg. 30,775, 30,778 (June 27, 2019). ELPC is an active participant in the bankruptcy proceeding. *See, e.g., Objection of the Environmental Law & Policy Center, Ohio Citizen Action, Ohio Environmental Council and Environmental Defense Fund to Debtors' Initial Disclosure Statement for their Initial Joint Plan Of Reorganization*, Docket No. 18-507574 (Bankr. N.D. Oh. Mar. 11, 2019), ECF No. 2258. It has had more than enough information on the reorganized Applicants' and new parent company's financial position, the PSA, and other financial disclosures made in bankruptcy proceeding to support its claims. ELPC cannot withhold timely filing of a contention, or an explanation of the basis for a contention, based on a vague request for proprietary information.

¹²⁸ *Florida Power & Light Co*, LBP-01-6, 53 NRC at 159. The NRC has proven itself more than capable of overseeing licensees through the bankruptcy process while providing for the public health and safety. For example, in 2016 the NRC reviewed and approved a license transfer application permitting Luminant Generation Company LLC and the Comanche Peak Nuclear Power Plant to emerge from bankruptcy, in reliance on the financial statements generally based on the plan of reorganization set forth in the Luminant bankruptcy proceeding. Petitioner provides no facts to explain how the review undertaken in that proceeding would fail to meet NRC regulatory requirements. *See* Letter from Margaret M. Watford, NRC, to Ken J. Peters, Luminant Generation Company LLC, Enclosing Order Approving Transfer of Licenses and Conforming Amendments, Docket Nos. 50-445, 50-446, & 72-74 (May 6, 2016) (ADAMS Accession No. ML16096A266). In the Luminant proceeding, the NRC Staff was able to fully evaluate the financial qualifications of the debtor companies even during the pendency of the bankruptcy proceeding. *See id.*, Enclosure 4 (Safety Evaluation Report), at 2-3, 5-8.

agreement was terminated and replaced with a new support agreement between FES and the facility owner.¹²⁹ At the time, the NRC was formally notified of the planned cancellation of the FE support agreement. The NRC approved the conforming license amendment for two of the licenses in 2016 and 2017, constituting NRC written approval of the termination of the agreement.¹³⁰ The NRC re-affirmed the replacement of the support agreement in its review and approval of a later 2017 license transfer concerning BVPS-2, which discussed only the revised support agreement with FES.¹³¹

ELPC's contention, is, therefore, based on the mistaken assumption that FE currently provides a \$400 million support agreement for any of the Facilities.¹³² The Petitioner's proposed contention that FE should remain obligated for the support agreement therefore lacks factual basis.¹³³

Moreover, the Petitioner does not provide any other factual or legal support for a contention that FE, as a non-licensee and non-affiliated entity, should be obligated to provide financial support for ongoing plant operations. (As noted above, the support agreement does not

¹²⁹ *Perry Nuclear Power Plant, Application for Order Consenting to Transfer of Licenses and Approving Conforming License Amendment*, Docket No. 50-440, at 7 (June 30, 2015) (ADAMS Accession No. ML15181A366) ("In connection with the proposed transfer, FENGen proposes to terminate the existing agreement with FE, and enter into a new financial support agreement with FES in the amount of \$400 million. . . . This Application constitutes the 30 days prior notice required by Section 4 of the termination of the existing FE support agreement upon FES's execution of the Form of Support Agreement.").

¹³⁰ *Order Approving Direct Transfer of License and Conforming Amendment Related to Perry Nuclear Power Plant, Unit 1*, Docket No. 50-440 (April 15, 2016) (ADAMS Accession No. ML16078A092).

¹³¹ *See Beaver Valley Power Station, Unit 2 – Order Approving Transfer of License and Conforming License Amendment*, Docket No. 50-412, Enclosure 4 (Safety Evaluation Report), at 5 (April 14, 2017) (ADAMS Accession No. ML17081A433) ("FENGen has maintained a financial support agreement with FES in the amount of \$400 million.").

¹³² Moreover, contrary to the Petition, none of the prior FE, the current FES, nor the planned new parent company support agreements concern decommissioning costs. The agreements all terminate after permanent cessation of operations of the Facilities.

¹³³ The pending conforming administrative amendment to reflect the change in the licenses for the other two units, DBNPS and BVPS-1, was superseded by the restructuring and withdrawn. Application at 7. As an additional note, contrary to the Petitioner's assertion, the financial support agreement is not a parent guarantee, and thus FE cannot "continue to serve as guarantor." Petition at 10.

relate to decommissioning costs and is not required after permanent cessation of operations.) There is no support in the proposed contention that the licensees' new parent company will not be able to meet its obligations under the support agreement. The Petitioner appears to assert that somehow FE is a "better" place for the support agreement than the new parent company. This position ignores the strong financial position of the new parent company. As also noted above, upon emergence from bankruptcy, the new parent company will have approximately \$2.0 billion in assets, including \$1.56 billion in cash or cash equivalents.

Additionally, it does not make sense to have an unaffiliated third party provide a support agreement for the Facilities. The Support Agreement is meant to cover fixed operating costs in the event of an unanticipated outage lasting up to six months at the Facilities. This is a future obligation with respect to plant operations. No legal support is provided for the unusual proposition that a company that is no longer affiliated with the Facilities or the licensees should be liable for a future financial obligation for plant maintenance and operations. While it may seem prudent to make more parties liable for contingent support to the licensees under some vague "more is more" philosophy, there simply is no factual or legal basis provided for why that should be required in this case.

Therefore, the Petitioner has failed to provide factual or legal support for its claim that FE should be obligated to provide a support agreement for the Facilities. Accordingly, the contention is inadmissible.

V. CONCLUSION

For the foregoing reasons, the Petitioner has failed to demonstrate standing and to proffer an admissible contention. Consequently, the Commission should deny ELPC's Petition.

Respectfully Submitted,

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August 9, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

_____)	
In the Matter of)	
)	Docket Nos. 50-346
FIRSTENERGY NUCLEAR OPERATING COMPANY)	50-440
FIRSTENERGY NUCLEAR GENERATION COMPANY)	50-334
)	50-412
(Davis Besse Nuclear Power Station, Unit 1))	
(Perry Nuclear Power Plant, Unit 1))	
(Beaver Valley Nuclear Power Station, Unit 1))	
(Beaver Valley Nuclear Power Station, Unit 2))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019 copies of the above **Applicants’ Answer Opposing the Environmental Law & Policy Center’s Petition to Intervene and Hearing Request** have been served through the U.S. Nuclear Regulatory Commission E-Filing system on the participants of the above-captioned proceeding.

Respectfully Submitted,

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August 9, 2019