

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

In the Matter of)	
)	
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’S
REPLY TO APPLICANTS’ ANSWER**

On April 26, 2019, FirstEnergy Nuclear Operating Company (“FENOC”), on behalf of itself and FirstEnergy Nuclear Generation Company (“FENGen”) (together, the “Applicants”) applied to transfer the license for four of their nuclear reactors (the “Application”). On July 17, 2019, the Environmental Law & Policy Center (“ELPC”) filed a timely Petition for Leave to Intervene and Hearing Request (“Petition”). Applicants filed an Answer opposing ELPC’s Petition on August 9, 2019 (“Answer”). ELPC now files this timely reply in support of its Petition. ELPC has standing to intervene in the license transfer proceeding and presents three admissible contentions that raise material issues of law and fact.

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

ELPC has standing to participate in the proceeding in its own right, as an affected organization. ELPC has established organizational standing under 10 C.F.R. § 2.309(d)(1), because it has demonstrated that the action at issue will cause an injury-in-fact to ELPC’s interests or the interests of its members, and that injury is within the zone of interests protected by the Atomic Energy Act. *See In the Matter of Cogema Mining, Inc.* (Irigaray & Christensen

Ranch Facilities), 70 N.R.C. 168, 178 (July 23, 2009) (describing test for organizational standing). ELPC's injury is more than "a mere 'interest in a problem.'" *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). ELPC will suffer from a specific, concrete harm from the license transfer, which could be prevented if the NRC grants ELPC's requested relief. 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)).

ELPC and its members have a longstanding interest in protecting public health and safety when it comes to nuclear power plant operation and decommissioning in the Midwest and Great Lakes region. In particular, ELPC and its members have a longstanding interest in protecting the Great Lakes and access to safe, clean water. The Applicants' two nuclear units are on the Lake Erie shoreline. ELPC was engaged in the events and issues leading to the 1998 permanent shutdown and subsequent decommissioning of the Zion 1 and Zion 2 nuclear plants located on the shores of Lake Michigan in Northern Illinois. ELPC has worked in various ways to protect the Great Lakes from potential radiological damage by advocating for safe operation and expedited decommissioning of nuclear power plants that are sited proximal to – and sometimes literally on the shores of – the Great Lakes. ELPC has regularly engaged in Ohio on issues involving safe, clean drinking water and other Great Lakes issues.

Not all proposed nuclear license transfers affect ELPC's interests, but this one does. The 2010 license transfer from Exelon to Zion Solutions for the express purpose of expediting the decommissioning of the site actually supported ELPC's organizational interests by providing for

decommissioning to be completed within about a 20-year period after the plants shut down.¹ In contrast, Applicants' proposed license transfer harms ELPC's interests by allowing parent FirstEnergy Corp. to escape responsibility for operational and decommissioning costs, preventing ELPC from protecting its and its members' interests in Great Lakes and Lake Erie water quality. Moreover, Applicants have indicated their intention to defer the timing of decommission for about 60 years after shut down by adopting the SAFESTOR approach. Perry and Davis-Besse are located literally on the shores of Lake Erie, which could be impacted by radiological harm caused by inadequate decommissioning.

Applicants argue that any future decommissioning trust fund inadequacy or increased radiological risk does not create a current safety issue, and could be addressed in a future petition by ELPC. (Answer at 17). But the NRC has recognized that the failure at any time 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).

ELPC is currently engaged in other dockets to protect water quality in Lake Erie, and the increased radiological risk caused by the license transfer injures the gains made by ELPC in advancing its interests. For example, ELPC is currently a plaintiff in litigation in the United States District Court for the Northern District of Ohio related to remedies to phosphorus

¹ <https://www.nrc.gov/info-finder/decommissioning/power-reactor/zion-nuclear-power-station-units-1-2.html>

pollution causing toxic algae blooms in western Lake Erie, *Environmental Law & Policy Center, et al., v. United States Environmental Protection Agency*, 3:19-cv-295 and 3:19-cv-873 (cons.).

The harm to ELPC is caused by the license transfer, which is “a direct, isolated and judicially reviewable Commission action . . . unlike the broad, agency-wide, programmatic activity which failed to form the basis for the petitioner's standing in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).” *In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, No. 50-322-OLA-2, 1991 WL 203247, at *3 (July 18, 1991). This proposed license transfer would remove FirstEnergy Corp. from its financial guarantee for the four nuclear units. It is the license transfer that results in companies with no financial history and no restrictions on how they spend their forecasted cash flow, briefly operating and then fully decommissioning four nuclear units. The new companies have no rate-regulated distribution utilities that could seek to access decommissioning trust fund shortfalls from utility ratepayers. The NRC’s rejection of the license transfer application would prevent injury to ELPC’s interest in protecting public health and safety and safe, clean water in Lake Erie and the other Great Lakes.

B. ELPC’s Three Contentions Are Admissible

1. Contention 1 Establishes A Genuine Dispute of Law

ELPC raises a genuine dispute of fact about how the Applicants will remedy an existing \$78 million shortfall in the Beaver Valley Unit 1 Decommissioning Trust Fund. Applicants’ Answer suggests that their failure to identify the method they will use to eliminate this \$78 million shortfall does not raise a disputed issue of fact or law. (Answer at 21). ELPC disagrees. ELPC does not dispute the fact that Applicants’ decommissioning trust fund has a shortfall. Nor does ELPC dispute that Applicants have made a “commitment” to reconcile that shortfall. ELPC

does dispute that, as a matter of law, Applicants' commitment is sufficient to comply with NRC regulations. ELPC filed its Petition to raise that dispute of law and have it adjudicated before the Commission in a hearing.

Applicants' argument that a regulatory commitment is sufficient for a license transfer proceeding creates a slippery slope. If regulatory commitments are sufficient for approval of license transfers, then licensees could submit transfer applications with any number of shortfalls and errors, but still gain approval of the transfer on the condition that by the time the license is transferred, it somehow comes into compliance using unspecified methods.

In reviewing the Applicants' license transfer application, the "NRC must make a finding that the Applicants have demonstrated that there is reasonable assurance that funds will be available to decommission the facility in accordance with 10 CFR 50.33(k)(1) and 10 CFR 50.75."² Until Applicants remedy this \$78 million shortfall in the Beaver Valley Unit 1 decommissioning trust fund, the NRC cannot make a finding that there is reasonable assurance that funds will be available for decommissioning.

ELPC does not challenge the NRC Staff's ability to conduct a review of the Applicants' nuclear decommissioning funding, as Applicants' insinuate. (Answer at 22). But in order to conduct a timely and thorough review, Staff should be provided with information explaining how the applicant meets regulatory requirements, rather than promises that one day the Applicants will.

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

2. Contention 1 Does Not Impermissibly Challenge NRC Regulations

ELPC does not here attack the NRC's decommissioning funding assurance requirements. Rather, ELPC seeks a hearing to demonstrate that: (1) FENOC's Application is not in compliance with those requirements; and (2) FENOC's Application should not be granted until FENOC has so complied. Applicants point to the Bradford Report in an attempt to argue that ELPC is attempting to attack NRC regulations. (Answer at 24). ELPC's citation to the Bradford report serves a very different purpose – it provides context and information on the potential harms to ELPC's interests.

3. Contention 2 Establishes A Contested Issue Of Fact And Law

Applicants themselves identify the two mixed issues of fact and law raised by Contention 2 in ELPC's Petition: (1) whether the Applicants can rely upon a financial forecast with no restraints on future expenditures; and (2) whether a parent guarantor can utilize a bankruptcy proceeding to escape from its financial obligations. First, the Applicants' financial forecasts rely not only on their Power Supply Agreement with their retail arm, but also on a guarantee provided by the new parent company, who Applicants describe as having a "strong post-bankruptcy cash position." (Answer at 26). That new parent company, however, owns no rate-regulated distribution utility companies, and it has no recourse enabling it to provide additional funds for decommissioning if it's financial projections turn out to be too rosy, and if there is otherwise a shortfall.

Second, while Applicants characterize ELPC's presentation of disputed facts as "vague assertions" about the liquidity of the plant owner, ELPC's Petition clearly sets forth facts and legal positions that Applicants dispute. As a matter of law, the NRC should consider in

reviewing the Application that the Plan of Reorganization places no restriction on how the post-bankruptcy cash position is used.

Third, ELPC argues that the new parent company cannot be made a financial guarantor because it will have no financial history on which to establish financial qualifications. Applicants' criticism that ELPC does not point to specific documents from the bankruptcy proceedings that lay out these disputed facts is misplaced. Applicants ask ELPC to point to documents *included* in the bankruptcy record when the dispute hinges on what Applicants *excluded* – restrictions on Applicants' post-bankruptcy cash position and recognition of the lack of financial history for the reorganized entities.

Applicants are correct of course that the NRC is represented in the bankruptcy proceedings. (Answer at 28). While the NRC has made clear that the Debtors in the bankruptcy proceedings must comply with all NRC regulations, the NRC's role in the bankruptcy is not to evaluate Debtors' Application for a License Transfer. Plan confirmation hearings begin on August 20, 2019, and ELPC continues to object to the feasibility of the Debtors' Plan of Reorganization.

Applicants assert in a footnote that the NRC is "more than capable" of overseeing licensees through the bankruptcy process while providing for the public health and safety. (Answer at FN 128). That is an entirely different matter than the NRC making a reasoned determination about whether or not a proposed new licensee is financially qualified to operate – and decommission – the nuclear units. Applicants cite to no case in which the NRC has grappled with the transfer of a license to a wholly new entity, with no financial history, that potentially intends to decommission all of its generating units within the next decade.

The NRC's Order approving the transfer of licenses in the Luminant bankruptcy matter, referenced in the Applicants' Answer (at FN 128) is distinguishable from the Applicants' situation in this case. In fact, reference to the Luminant Order only highlights the rarity of Applicants' position – it is not unheard of, but certainly unusual, for the NRC to approve a license transfer to a wholly new company with no financial history. While the structure of the Luminant bankruptcy echoes the Applicants' proposed plan – a regulated parent company spinning off competitive subsidiaries and seeking to extinguish its liabilities for those subsidiaries – the financial character of the company that emerged from bankruptcy in Luminant was markedly different.

In Luminant, the reorganized companies operated a far more diverse fleet of generation facilities than these Applicants will. Of reorganized Luminant's approximately 17,000 MW of generation in Texas, only 2,300 MW was nuclear power plants, with 8,000 MW fueled by coal and 6,000 MW fueled by natural gas. In contrast, Applicants' generation is mostly nuclear power plants with some fossil-fueled plants. In 2018, Applicants announced the closure of all of their coal-fired plants by 2022. Applicants recently announced that Ohio legislation, HB6, will allow them to operate the Sammis coal plant longer than anticipated. Some advocates in Ohio have announced that they will work towards a public referendum preventing HB6 from financially supporting the Sammis coal plant. If the referendum is not successful, and HB6 goes into effect, the subsidy for Sammis will be available for only six years. Even if Sammis continues to run, its future is uncertain.

Applicants' nuclear units face a similarly uncertain future. The two Beaver Valley units in Pennsylvania are scheduled for deactivation in May 2021 and October 2021. Applicants' Ohio plants similarly benefit from the HB6 subsidy, should it become effective, but will enjoy

that subsidy for at most six years. The primary source of Applicants' revenues going forward will be competitive (not rate-regulated) retail operations, which are subject to considerable volatility.

NRC approval of a license transfer for one bankrupt company does not mean that the NRC can rubber-stamp all such license transfer applications. The NRC has no financial history on which to rely, making the specific characteristics of the reorganized company extremely important. ELPC disputes that Applicants' financial projections satisfy the level of review necessary for the NRC.

4. Contention 3 Establishes A Disputed Issue Of Fact

ELPC contends, based on documents submitted by Applicants to the NRC, that the parent FirstEnergy Corp. remains the guarantor on a financial support agreement for the owner of the nuclear plants, FENGen. In doing so, ELPC disputes Applicants' contention that "there is currently no such support agreement between FE [FirstEnergy Corp.] and the facility owner FENGen." (Answer at 28). ELPC also disputes Applicants' assertion that the FirstEnergy Corp. support agreement was transferred to FES.

It is undisputed that prior to May 16, 2016, FirstEnergy Corp. provided a \$400 million support agreement for each of the four nuclear units operated by FENOC. It is undisputed that language in each of Applicants' four nuclear operating licenses stated that this financial support agreement could not be voided, cancelled or modified without the "prior written consent of the NRC staff." *See* August 23, 2018 Letter, Accession No. ML18235A194. It is disputed whether the NRC provided such consent for all four of Applicants' nuclear units. While Debtors cite to documents demonstrating the written consent of the NRC staff for the Perry and Beaver Valley Unit 2 licenses, Applicants provide no evidence of the "prior written consent of the NRC staff" to change the identity of the guarantor in the Davis-Besse or Beaver Valley Unit 1 licenses.

Applicants' characterization of this as a "mistaken assumption" by ELPC only underscores the existence of a factual dispute over the identity of the guarantor for these two licenses. (Answer at 29).

This factual dispute is material. If ELPC's contention prevails, the NRC has clearly maintained the authority to require non-Debtor parent FirstEnergy Corp. to remain as guarantor for the Davis-Besse and Beaver Valley Unit 1 licenses. While Applicants find it "unusual" that a third party might be liable for future obligations at these two plants, they gloss over the fact that this is precisely the function of the consent requirement for changing the identity of the guarantor. (Answer at 30). A guarantee that can be eliminated at the whim of the guarantor provides no assurance at all. When FirstEnergy Corp. agreed to be the guarantor, it did so with eyes wide open to the fact that it could not escape that obligation without the prior, written consent of the NRC. The NRC should reject Applicants' request to change the identity of the guarantor for Davis-Besse and Beaver Valley Unit 1.

C. Conclusion

ELPC has organizational standing to intervene in Applicants' request to transfer licenses for its nuclear power plants. ELPC sets forth three admissible contentions, each of which raise disputed issues of fact and law, that should be considered by the NRC at an oral hearing under Subpart M.

DATED: August 16, 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 ENVIRONMENTAL LAW & POLICY CENTER’S REPLY TO APPLICANTS’ ANSWER, dated August 16, 2019 has been filed through the Electronic Information Exchange, the NRC’s E-Filing System, in the above-captioned proceeding, this 16th day of August, 2019.

Respectfully submitted,

/Signed (electronically) by/

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