

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

In the Matter of:)	
)	License Nos. NPF-41, 51, and 74
El Paso Electric Company)	Docket Nos. 50-528, 529, and 530
Indirect License Transfer)	Docket No. 72-44
)	

**APPLICANTS’ ANSWER OPPOSING PUBLIC CITIZEN’S
PETITION FOR LEAVE TO INTERVENE AND HEARING REQUEST**

Pursuant to 10 C.F.R. § 2.309(i)(1), El Paso Electric Company (“EPE”) and IIF US Holding 2 LP (“IIF US 2,” together with EPE, the “Applicants”) hereby answer and oppose the petition for leave to intervene and request for hearing filed by Public Citizen, Inc. (“Public Citizen”) on November 18, 2019 in the above-captioned license transfer proceeding (“Petition”). The Petition should be denied because Public Citizen has failed both to establish standing and to propose an admissible contention.

I. BACKGROUND

On August 13, 2019, Applicants filed an application for Nuclear Regulatory Commission (“NRC” or “Commission”) consent to the indirect transfer of control of EPE’s possession-only non-operating interests in Renewed Facility Operating License Nos. NPF-41, NPF-51, and NPF-74 for the Palo Verde Nuclear Generating Station, Units 1, 2, and 3 (“PVNGS”), as well as the general license for the PVNGS Independent Spent Fuel Storage Installation (“ISFSI”) (collectively the “NRC Licenses”), to IIF US 2 as a result of a proposed transaction in which IIF US 2 indirectly acquires 100% of the shares in EPE (the “Proposed Transaction”).¹

¹ *El Paso Elec. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3, and Independent Spent Fuel Storage Installation), Docket Nos. 50-528, 50-529, 50-530, & 72-44; NRC-2019-0214, Application for Order

As explained in the Application, EPE currently owns a 15.8% tenant-in-common interest in, and holds possession-only rights in the NRC license with respect to, each of PVNGS Units 1, 2, and 3 while Arizona Public Service Company (“APSC”) owns a 29.1% tenant-in-common interest in, and holds both operating and possession rights in the NRC license with respect to, each of PVNGS Units 1, 2, and 3.² The Proposed Transaction implicates only an indirect upstream change in control over EPE’s possession-only rights in the NRC Licenses; it does not involve or implicate any change in the rights and obligations of EPE, APSC, or any of the other Possession-Only Co-Owners under any of the NRC Licenses or the participation agreement pursuant to which APSC operates each of PVNGS units.

The Application provided information pertaining to the Proposed Transaction, including information required under 10 C.F.R. § 50.80(b), and demonstrated that the Proposed Transaction will not (i) implicate or affect the technical qualifications of APSC as the licensed operator of PVNGS Units 1, 2, and 3; (ii) have any material adverse impact on EPE’s financial qualifications to hold its possession-only rights in PVNGS Units 1, 2, and 3; (iii) affect decommissioning funding assurance for each of PVNGS Units 1, 2, and 3 or the ISFSI; or (iv) result in foreign ownership, control, or domination over EPE or any of the NRC Licenses or other PVNGS NRC licensees.

As explained in the Application,³ the Proposed Transaction will result in EPE becoming a direct, wholly-owned subsidiary of Sun Jupiter Holdings and an indirect, wholly-owned subsidiary

Approving Indirect Transfer of Control of Renewed Facility Operating License Nos. NPF-41, NPF-51, and NPF-74 (filed Aug. 13, 2019) (“Application”).

² Like EPE, the remaining tenant-in-common co-owners of PVNGS hold possession-only rights in the NRC Licenses for, and equal interests in each of, the PVNGS Units 1, 2, and 3. The other possession-only tenant-in-common owners and their respective ownership interests are: Salt River Project Agricultural Improvement and Power District (17.49%); Southern California Edison Company (15.8%); Public Service Company of New Mexico (10.2%); Southern California Public Power Authority (5.91%); and Los Angeles Department of Water and Power (5.7%) (together with EPE, the “Possession-Only Co-Owners”).

³ See Application at 1, 5-6.

of IIF US 2. IIF US 2 is a limited partnership that is a private, open-ended infrastructure investment vehicle. IIF US 2's limited partners constitute the investors providing capital for IIF US 2's activities. IIF US 2's limited partners are passive and do not have the ability to direct the management or control of IIF US 2 or any of its subsidiaries. IIF US 2 is managed and controlled by its general partner, IIF US Holding 2 GP, LLC ("IIF US 2 GP"). IIF US 2 GP is owned and controlled by three private individuals—Rita J. Sallis, Christopher Ward, and Dennis Clarke—each of whom is a U.S. Citizen (the "IIF US 2 GP Owners").

Because Applicants are aiming to consummate and close the Proposed Transaction in the first half of 2020, Applicants requested that the NRC review the Application and consent to the indirect transfers of control no later than February 1, 2020.

On October 28, 2019, the NRC published a notice regarding the Application in the *Federal Register*.⁴ The Notice provided an opportunity to any person whose interest may be affected to request a hearing and file a petition for leave to intervene in the indirect license transfer proceeding within 20 days of the Notice. The Notice explained that any such petitions should be filed in accordance with the Commission's Rules of Practice and Procedure, including 10 C.F.R. § 2.309(d) and 10 C.F.R. § 2.309(f), which provide the standards for establishing standing and proposing admissible contentions.⁵ The Notice also set forth the standard for evaluating indirect license transfer applications, explaining that "[t]he Commission will approve an application for the indirect transfer of a license if the Commission determines that the proposed transaction will

⁴ Palo Verde Nuclear Generating Station Units 1, 2, and 3, and Independent Spent Fuel Storage Installation; Consideration of Approval of Transfer of License, 84 Fed. Reg. 57,774 (Oct. 28, 2019) ("Notice").

⁵ *Id.* at 57,775.

not affect the qualifications of the licensee to hold the license and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission.”⁶

On November 18, 2019, Public Citizen filed a petition for leave to intervene and request for hearing on the Application.⁷

II. LEGAL FRAMEWORK

A. Indirect License Transfer Proceedings

Under section 184 of the Atomic Energy Act (“AEA”), no NRC-granted license or rights thereunder “shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person” without prior written consent from the Commission.⁸

License transfer applications must include information that allows the NRC to understand “the identity and technical and financial qualifications of the proposed transferee.”⁹ NRC regulations applicable to the proposed license transfers at issue in this proceeding further require that the applicant describe “the purpose for which the transfer of the license is requested, the nature of the transaction necessitating or making desirable the transfer of the license,” and “the financial assurance that will be provided for . . . decommissioning.”¹⁰ The NRC also reviews license transfer applications to ensure continued compliance with relevant provisions of the AEA, such as those

⁶ *Id.*

⁷ On November 18, 2019, Texas State Senator José Rodríguez submitted a letter supporting Public Citizen’s request for hearing. Applicants do not understand this letter to be an independent petition to intervene and request for hearing. To the extent it may be treated as such, Applicants note that the letter does not establish Mr. Rodríguez’s standing to intervene in this proceeding and does not propose any admissible contention, as required by 10 C.F.R. § 2.309(a).

⁸ 42 U.S.C. § 2234; *see also* 10 C.F.R. §§ 50.80(a), 72.50(a).

⁹ 10 C.F.R. §§ 50.80(b)(1), 72.50(b)(1).

¹⁰ *Id.* §§ 50.80(b)(2), 72.50(b)(1), 72.50(b)(3).

that require that (i) a licensee may not be “owned, controlled, or dominated” by a foreign individual or entity¹¹ and (ii) certain insurance and indemnification arrangements will remain in place.¹² The NRC will approve a license transfer application if it determines that the “proposed transferee is qualified to be the holder of the license” and the “[t]ransfer of the license is otherwise consistent with applicable provisions of the law, regulations, and orders issued by the Commission.”¹³

Pursuant to its rules governing license transfer applications, the NRC “is expected to promptly issue approval or denial of license transfer requests,” notwithstanding the pendency of any hearing.¹⁴ These rules further specify that the NRC’s “generally applicable intervention provisions” apply to license transfer applications.¹⁵ Those generally applicable intervention provisions are found in sections 2.309 and 2.311 of the Commission’s regulations and are discussed in greater detail below.¹⁶

B. Intervention and Requests for Hearings

AEA section 189(a) allows for hearings upon the request of a “person whose interest may be affected by the proceeding.”¹⁷ It “is well-established” that the AEA “does not provide an unqualified right to a hearing. Rather, the Commission is authorized to establish reasonable

¹¹ See 42 U.S.C. § 2133(d); 10 C.F.R. § 50.38.

¹² See 42 U.S.C. § 2210; 10 C.F.R. § 50.54(w).

¹³ 10 C.F.R. §§ 50.80(c), 72.50(c); see also Notice at 57,775 (explaining the applicability of this standard to this proceeding).

¹⁴ 10 C.F.R. § 2.1316(a).

¹⁵ *Id.* § 2.1300.

¹⁶ See *infra* Parts II.B, III.A, and IV.A.

¹⁷ 42 U.S.C. § 2239(a)(1)(A).

regulations on procedural matters like the filing of petitions to intervene and on the proffering of contentions.”¹⁸

Under 10 C.F.R. § 2.309(a), the NRC will only grant a petition to intervene and request for hearing if the petitioner has both established standing pursuant to 10 C.F.R. § 2.309(d) and proposed at least one admissible contention that meets the requirements of 10 C.F.R. § 2.309(f). The petitioner must set forth with particularity its right to intervene and the contentions it seeks to litigate¹⁹ and “[t]he burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner.”²⁰

III. PUBLIC CITIZEN HAS NOT DEMONSTRATED STANDING TO INTERVENE

While Public Citizen’s Petition includes a brief section purporting to establish its right to intervene, the organization has not in fact established standing to intervene in this proceeding. Public Citizen has neither provided the information required in the Commission’s rule on standing, 10 C.F.R. § 2.309(d)(1), nor has it made fact-specific standing allegations that demonstrate the elements necessary to satisfy judicial concepts of standing (*i.e.*, an injury-in-fact that is reasonably traceable to the challenged action, likely to be redressed by a favorable decision, and within the zone of interests protected by the statute governing the proceeding).²¹

¹⁸ *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

¹⁹ *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-04, 2017 WL 1160843 at *9 (NRC Mar. 24, 2017) (quoting 10 C.F.R. § 2.309(f)) (“A petition to intervene must ‘set forth with particularity’ the contentions a petitioner seeks to have litigated in a hearing.”); *Wolf Creek Generating Station; Consideration of Approval of Transfer of License*, 81 Fed. Reg. 81,176-01, 81,177 (Nov. 17, 2016) (“As required by 10 CFR 2.309, a petition shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding.”).

²⁰ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-04, 49 NRC 185, 194 (1999) (“*Zion Nuclear*”); *see also Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 331 (1983) (“*Three Mile Island*”) (“The burden is on the petitioner to satisfy these requirements.”).

²¹ *See infra* Parts III.A and III.B.

While Public Citizen’s Petition suggests that the organization may be attempting to assert a right to intervene as a representative of its members who are EPE ratepayers or live in the same zip code as PVNGS, Public Citizen fails to establish representational standing.²² Neither economic interests as a ratepayer nor mere proximity to a nuclear facility establish standing in a proceeding regarding indirect license transfers like those at issue here. Additionally, Public Citizen has failed to provide the information that would be required to demonstrate representational standing, such as the names and addresses of the members it purports to represent and proof that those members have standing in their own right and that Public Citizen is authorized to represent their interests in this proceeding.

Public Citizen also fails to establish organizational standing based on its own institutional interests.²³ As such, Public Citizen is not entitled to intervene as a matter of right. And there are no grounds for allowing discretionary intervention, either.²⁴ Accordingly, Public Citizen’s Petition should be denied for failure to establish standing.

A. The Requirement to Demonstrate Standing

Standing is “an essential element in determining whether there is any legitimate role for a court or an agency adjudicatory body in dealing with a particular grievance.”²⁵ Under 10 C.F.R. § 2.309(d)(1), a petitioner seeking to establish standing must state:

- (i) The name, address and telephone number of the . . . petitioner;

²² See *infra* Part III.C.

²³ See *infra* Part III.D.

²⁴ See *infra* Part III.E.

²⁵ *Westinghouse Elec. Corp.* (Nuclear Fuel Export License for Czech Republic – Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994).

- (ii) The nature of the . . . petitioner’s right under the [AEA] to be made a party to the proceeding;
- (iii) The nature and extent of the . . . petitioner’s property, financial or other interest in the proceeding; and
- (iv) The possible effect of any decision or order that may be issued in the proceeding on the . . . petitioner’s interest.²⁶

These requirements reflect the factors to be considered in determining whether a petitioner has established standing.²⁷ The petitioner bears the burden of proving that it has standing to intervene in a given proceeding.²⁸

In determining whether a petitioner has established standing, “the Commission has long applied contemporaneous judicial concepts of standing.”²⁹ These judicial concepts require that the petitioner demonstrate (i) an injury-in-fact that is (ii) reasonably traceable to the challenged action, (iii) likely to be redressed by a favorable decision, and (iv) within the zone of interests protected by the statute governing the proceeding.³⁰ To qualify as an injury-in-fact, the “alleged injury, which may be either actual or threatened, must be both concrete and particularized, not

²⁶ 10 C.F.R. § 2.309(d)(1); *see also* Notice at 57,775 (explaining these requirements).

²⁷ *See, e.g., S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), LBP-16-5, 83 NRC 259, 267 (2016) (“*Vogtle I*”) (“The Commission’s regulation implementing the standing requirement, 10 C.F.R. § 2.309(d), directs a licensing board to consider (1) the nature of the petitioner’s right under the AEA or the National Environmental Policy Act (NEPA) to be made a party to the proceeding; (2) the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest.”).

²⁸ *See, e.g., S. Nuclear Operating Co.* (Vogtle Elec. Generating Plant, Units 3 & 4), ASLBP No. 09-873-01-COL-BD01, 71 NRC 165, 178 (2010) (“*Vogtle II*”) (“Petitioner bears the burden of providing sufficient relevant, specific information, whether by good-faith estimate or otherwise, to establish the basis for their standing claims.”).

²⁹ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993). As discussed in greater detail below in Part II.C.2, the Commission may presume standing based on proximity to the nuclear facility at issue if the proceeding raises an obvious potential for offsite consequences. However, the proximity presumption does not apply in indirect license transfer proceedings like this one.

³⁰ *See, e.g., id.; Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

‘conjectural,’ or ‘hypothetical.’”³¹ The Commission has explained that a “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.”³² Likewise, “mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing.”³³ Furthermore, “[i]t must be demonstrated that the injury is fairly traceable to the proposed action,”³⁴ meaning that it is “incumbent upon” the petitioner to provide “some ‘plausible chain of causation,’ some scenario suggesting how [the proposed licensing action] would result in a distinct new harm or threat to him.”³⁵ Satisfying “[t]he third element of standing requires that ‘it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.’”³⁶ Finally, “[i]n order to assess whether an interest is within the ‘zone of interests’ of a statute, it is necessary to ‘first discern the interests ‘arguably . . . to be protected’ by the statutory provision at issue,’ and ‘then inquire whether the plaintiff’s interests affected by the agency action are among them.’”³⁷

³¹ *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Okla. Site), CLI-94-12, 40 NRC 64, 72 (1994) (“*Gore*”) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)); *id.* (noting that “standing has been denied when the threat of injury is too speculative”).

³² *Three Mile Island*, 18 NRC at 333.

³³ *Exelon Generating Co. and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580 (2005) (“*Peach Bottom*”).

³⁴ *Gore*, 40 NRC at 75.

³⁵ *Zion Nuclear*, 49 NRC at 192.

³⁶ *Gore*, 40 NRC at 76 (quoting *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), internal quotations omitted).

³⁷ *U.S. Enrichment Corp.* (Paducah, Ky.), CLI-01-23, 54 NRC 267, 272-73 (2001) (quoting *Nat’l Credit Union Admin. v. First Nat’l Bank*, 522 U.S. 479, 492 (1998)); *see also Va. Elec. & Power Co.* (N. Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 107 (1976) (“*North Anna*”) (“[T]he pivotal inquiry in applying [the zone of interests] test is whether, assuming the existence of a reasonable possibility of harm to an interest possessed by the would-be intervenor, that interest can be said to be among those interests which Congress was protecting or regulating.”).

There are two ways in which an organization like Public Citizen may establish standing: representational standing and organizational standing.³⁸ An organization may establish *representational* standing based on the interests of its members. In order to establish representational standing in a license transfer proceeding, the organization (i) “must . . . show that at least one of its members may be affected by the Commission’s approval of the transfer” and “qualif[ies] for standing in his or her own right;” (ii) “must identify that member;” (iii) “must demonstrate that the member has (preferably by affidavit) authorized the organization to represent him or her and to request a hearing on his or her behalf;” (iv) must show that “the interests that the representative organization seeks to protect [are] germane to its own purpose;” and (v) must demonstrate that “neither the asserted claim nor the requested relief . . . require an individual member to participate in the organization’s legal action.”³⁹ Alternatively, an organization may establish *organizational* standing by demonstrating that the challenged action will injure the organization’s own interests in a way that satisfies the standard standing requirements.⁴⁰ An organization seeking to establish organizational standing must show a “risk of ‘discrete

³⁸ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) (“An organization may satisfy the standing criteria . . . in either of two different ways—based either upon the licensing action’s effect upon the interests of the petitioning organization itself (*i.e.*, organizational standing) or upon the interest of at least one of its members who has authorized the organization to represent him or her (*i.e.*, representational standing).”); *Ga. Institute of Tech.* (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) (“An organization may base its standing on either immediate or threatened injury to its organizational interests, or to the interests of identified members.”).

³⁹ *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007) (“*Palisades I*”); *see also Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-12-10, 75 NRC 633, 637-38 (2012) (“For an organization to establish representational standing, the organization must: (1) show that at least one of its members may be harmed by the licensing action and, accordingly, would have standing to sue in his or her own right; (2) identify that member by name and address; (3) show that the organization is authorized to request a hearing on behalf of that member, and (4) show that the interests that the representative organization seeks to protect are germane to its own interests.”).

⁴⁰ *See, e.g., Palisades I*, 65 NRC at 411 (“Organizations seeking to intervene in their own right must satisfy the same ‘standing’ requirements as individuals seeking to intervene.”); *Vogtle I*, 83 NRC at 268 (“To demonstrate organizational standing, the petitioner must show ‘injury-in-fact’ to the interests of the organization itself.”).

institutional injury *to itself*, other than the general environmental and policy interests of the sort [the Commission] repeatedly [has] found insufficient for organizational standing.”⁴¹

B. Public Citizen Has Not Provided the Information Necessary to Demonstrate Standing to Intervene in This Proceeding

Under 10 C.F.R. § 2.309(d)(1)(ii)-(iv), petitioner seeking to establish standing must state the nature of their right to be made a party to the proceeding under the AEA; the nature and extent of their property, financial, or other interest in the proceeding; and the possible effect of any order in the proceeding on such interests. These requirements were specifically explained in the Notice regarding this proceeding.⁴² Yet Public Citizen’s Petition fails to provide this necessary information. For instance, Public Citizen’s Petition does not include any mention of or reference to the AEA whatsoever, much less an explanation of the nature of the group’s right to be made a party under that Act, as required by 10 C.F.R. § 2.309(d)(1)(ii). Accordingly, Public Citizen has failed to establish its standing to intervene in this proceeding.

While the Petition includes a brief section that purports to explain Public Citizen’s “Right To Intervene,” this section provides only vague and conclusory assertions about the interests of the organization and its (unidentified) members.⁴³ But the Commission “require[s] fact-specific

⁴¹ *Palisades I*, 65 NRC at 411-12 (quoting *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001)).

⁴² Notice at 57,775.

⁴³ See Petition at 2 (asserting without evidence or specific identification that Public Citizen members in El Paso, Texas “pay monthly utility bills to El Paso Electric, and are therefore affected by any change in ownership of El Paso Electric”); *id.* (asserting without evidence or specific identification that “at least one Public Citizen dues-paying member lives in the same zip code as the Palo Verde nuclear power station” and thus “has substantial interest in the outcome of the proceeding”); *id.* (omitting any claim of institutional injury but nevertheless asserting that “Public Citizen’s participation in this proceeding is essential” based on the group’s research regarding IIF US 2).

standing allegations, not conclusory assertions.”⁴⁴ Public Citizen’s Petition falls far short of this mark.

Notwithstanding the patent inadequacies of Public Citizen’s Petition, Applicants endeavor to respond to the potential grounds on which Public Citizen may seek to establish standing. As detailed below, even if the Petition’s failure to comply with 10 C.F.R. § 2.309(d) were excused, Public Citizen has demonstrated neither representational standing nor organizational standing.

C. Public Citizen Has Not Established Representational Standing

1. Public Citizen Cannot Establish Representational Standing Based on the Interests of Members as EPE Ratepayers

Public Citizen’s first apparent attempt to establish representational standing rests on the assertion that “Public Citizen has at least 69 dues-paying members in the City of El Paso, TX” and the group’s “members pay monthly utility bills to El Paso Electric, and are therefore affected by any change in ownership of El Paso Electric.”⁴⁵

However, economic interests as a ratepayer do not confer standing in NRC licensing proceedings since it is not within the zone of interests protected by the AEA.⁴⁶ Indeed, as explained in a prior proceeding involving PVNGS, assertions that petitioners have the right to intervene “as customers of the Palo Verde owners . . . will not establish standing to intervene”

⁴⁴ *Palisades I*, 65 NRC at 410.

⁴⁵ Petition at 2.

⁴⁶ *See, e.g., Portland General Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 614 (1976) (“[T]hese ratepayer petitioners seek a complete economic analysis of nuclear power as part of the licensing proceeding in order to avoid even the possibility of increased future electric rates. While this ‘interest’ is understandable, it does not come within the ‘zone of interest’ protected by the Atomic Energy Act.”); *Three Mile Island*, 18 NRC at 332 n.4 (“Nor does economic interest as a ratepayer confer standing.”); *Puget Sound Power & Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 & 2), LBP-82-26, 15 NRC 742, 744 (1982) (“It is well established that the interest of ratepayers is not within the ‘zone of interests’ protected by the Atomic Energy Act or NEPA.”); *N. States Power Co.* (Pathfinder Atomic Plant, Byproduct Material License No. 22-08799-02), LBP-89-30, 30 NRC 311, 313 (1989) (“Economic interest as a ratepayer does not confer standing in NRC licensing proceeding. . . Those economic concerns are more properly raised before state economic regulatory agencies.”).

because “[i]t has been long established that economic interests as rate payers do not fall within the ‘zone of interests[.]’ protected by the Atomic Energy Act.”⁴⁷ Similarly, the Commission has explained that “[r]atepayers’ economic interests, without specific ties to radiological risk, are not cognizable in an NRC license transfer proceeding.”⁴⁸

As NRC precedent clearly establishes, Public Citizen cannot establish standing to intervene in this proceeding merely based on the interests of its members who may be customers of EPE.⁴⁹

2. Public Citizen Cannot Rely on the Proximity Presumption to Establish Standing in This Indirect License Transfer Proceeding

In its second apparent gambit to establish representational standing, Public Citizen asserts that “at least one Public Citizen dues-paying member lives in the same zip code as the Palo Verde nuclear power station” and thus “has substantial interest in the outcome of the proceeding.”⁵⁰ Public Citizen does not provide the name or address of the one or more members who allegedly live in the same zip code as PVNGS, much less make an individualized showing of injury-in-fact, causation, and redressability. Instead, Public Citizen seems to be asserting standing based solely on the proximity of “at least one” of its members. Public Citizen “seems to assume that living or

⁴⁷ *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2 & 3), LBP-91-4, 33 NRC 153, 158 (1991) (“*Palo Verde I*”).

⁴⁸ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 345 (2002).

⁴⁹ And, as discussed below in Part III.C.3, even if status as a ratepayer could establish standing in this NRC license transfer proceeding—which it does not—Public Citizen (i) fails to identify the specific members it purports to represent, (ii) never establishes that it is authorized to represent the referenced members in this proceeding, and (iii) provides no evidence that its members in El Paso, Texas are in fact customers of EPE.

⁵⁰ Petition at 2.

working near or around a reactor justifies standing in and of itself – even in an indirect license transfer case.”⁵¹ But, as the Commission has explained, “[i]t does not.”⁵²

While the NRC generally applies judicial concepts of standing,⁵³ “[i]n certain circumstances, . . . the Commission has adopted a proximity presumption that allows a petitioner living, having frequent contacts, or having a significant property interest within 50 miles of a nuclear power reactor to establish standing without the need to make an individualized showing of injury, causation, and redressability.”⁵⁴ However, this “particular kind of standing rests on the presumption that an accident associated with the nuclear facility could adversely affect the health and safety of people working or living offsite but within a certain distance of that facility.”⁵⁵ While such a threat reasonably can be assumed in the context of construction permits and operating license proceedings for power reactors, in other proceedings, the NRC determines “on a case-by-case basis whether the proximity presumption should apply, considering the ‘obvious potential for offsite [radiological] 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.’”⁵⁶ Where a petitioner “fails to show that a particular licensing action raises an ‘obvious potential for offsite consequences,’ then [the] standing inquiry reverts to a ‘traditional standing’

⁵¹ *Entergy Nuclear Operations, Inc. & Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 (2008) (“*Palisades II*”).

⁵² *Id.*

⁵³ *See supra* Part III.A.

⁵⁴ *Vogtle I*, 83 NRC at 267 (footnotes omitted).

⁵⁵ *Peach Bottom*, 62 NRC at 580; *see also Gore*, 40 NRC at 75 n.22 (“[A] presumption based on geographic proximity . . . may be applied where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”).

⁵⁶ *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-19, 65 NRC 423, 426 (2007) (“*Big Rock*”) (quoting *Peach Bottom*, 62 NRC at 580-81).

analysis of whether the petitioner has made a specific showing of injury, causation, and redressability.”⁵⁷

The Commission has repeatedly found that a proximity-based presumption of standing does not apply in indirect license transfer proceedings like this one. For instance, the Commission in 2000 found that a group purporting to represent members “residing within 5 to 10 miles” of the Millstone Nuclear Power Station had not established standing based on proximity alone, noting that the indirect license transfer would involve “no change in the . . . licensees, no change in the . . . facility, no change in its operation, no change in its personnel, and no change in its financing” and thus it was “far from obvious how [the proposed] corporate restructuring would affect petitioners’ interests.”⁵⁸ Five years later, the Commission “conclude[d] that the risks associated with the transfer of the non-operating 50% ownership interest [in Peach Bottom Atomic Power Station, Units 2 and 3] are *de minimis* and therefore justify no ‘proximity standing’ at all” and explained that the prior license transfer cases in which the NRC had applied the proximity presumption “involved the transfer of both a *100% ownership interest* in the plant and the *operating authority* for the plant—a kind of transfer implicating more significant safety issues than are present here.”⁵⁹ The Commission once again declined to allow proximity-based standing in an indirect license transfer proceeding in 2008, explaining:

[The] proposed license transfer is an *indirect* one in that it does not involve transfer of either ownership or operating rights to the subject facilities. Nor does it entail

⁵⁷ *Peach Bottom*, 62 NRC at 581; *see also Fla. Power & Light Co.* (St. Lucie, Units 1 & 2), CLI-89-21, 30 NRC 325, 329-30 (1989) (“Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific ‘injury in fact’ which will result from the action taken”); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), LBP-17-7, 86 NRC 59, 77 (2017) (“Without this [obvious] potential for offsite consequences, the standing inquiry reverts to the traditional standing analysis.” (internal quotations omitted)).

⁵⁸ *Ne. Nuclear Energy Co. & Consolidated Edison Co. of N.Y., Inc.* (Millstone Nuclear Power Station, Units No. 1, 2, & 3), CLI-00-18, 52 NRC 129, 132-33 (2000) (“*Millstone P*”); *id.* at 133 (“Given petitioners’ failure to advance a plausible claim of harm, we cannot recognize their standing to seek an agency hearing.”).

⁵⁹ *Peach Bottom*, 62 NRC at 581, 583.

any changes in the facilities themselves or in their operation. Given these facts, we can see no ‘obvious potential for offsite consequences’ stemming from this *indirect* license transfer. And without such potential consequences, proximity-based standing cannot be demonstrated. Indeed, to date, we have never granted proximity-based standing to a petitioner in an indirect license transfer adjudication.⁶⁰

Similarly, the NRC has declined to apply the proximity presumption to an ISFSI license transfer, explaining that “[l]icense transfers even for *operating* nuclear power 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” and noting that the “potential radiological risks associated with an ISFSI license transfer are even lower, because an ISFSI is essentially a passive structure rather than an operating facility, and there therefore is less chance of widespread radioactive release.”⁶¹

Much like the indirect license transfers at issue in *Millstone I*, *Peach Bottom*, and *Palisades II*, the Proposed Transaction involves no change in the operator or direct owners of PVNGS and no change to the physical plant itself, its operating procedures, design basis accident analysis, management, or personnel. Indeed, EPE’s 15.8% possession-only interest in PVNGS is even more limited than the 50% non-operating ownership interest at issue in *Peach Bottom*, which the Commission found to present “*de minimis*” risks that did not justify any proximity standing whatsoever.⁶² Similarly, there is “no ‘obvious potential for offsite consequences’” from the indirect transfer of EPE’s general license for the PVNGS ISFSI that would be “sufficient to justify

⁶⁰ *Palisades II*, 68 NRC at 269; *see id.* at 260 (“In an indirect license transfer case like this one, the plant continues to operate much as before: there is no change in the operator, no change in the direct owner, and no change in the physical plant. In other words, the indirect transfer creates no obvious source of actual or potential harm.”).

⁶¹ *Big Rock*, 65 NRC at 426; *id.* (“There is simply no ‘obvious potential for offsite consequences’ from this ISFSI transfer sufficient to justify applying a presumption of standing based on proximity. [The petitioner] therefore fails to qualify for standing.” (footnote and citation omitted)).

⁶² *Peach Bottom*, 62 NRC at 581.

applying a presumption of standing based on proximity.”⁶³ This component of Public Citizen’s petition to intervene “rests on proximity alone” and “simply does not explain how the indirect license transfer at issue . . . will harm” the member(s) it purports to represent—and thus is not sufficient to establish standing.⁶⁴

3. Public Citizen Has Not Provided Sufficient Support for a Claim of Representational Standing

Setting to one side the significant substantive problems with Public Citizen’s attempts to establish its right to intervene based on the interests of its members, Public Citizen also fails to provide sufficient support for a claim of representational standing.

An organization seeking to establish representational standing must identify with specificity the member(s) it purports to represent. This includes disclosing the name and address of at least one member with personal standing so as to afford other litigants the means to verify that a member with standing in fact exists.⁶⁵ Public Citizen claims to have “at least 69 dues-paying members in the City of El Paso, TX” as well as “at least one . . . dues-paying member [who] lives in the same zip code as the Palo Verde nuclear power station.”⁶⁶ But Public Citizen does not

⁶³ *Big Rock*, 65 NRC at 426 (citation omitted).

⁶⁴ *Palisades II*, 68 NRC at 260-61.

⁶⁵ *See Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393 (1979) (“*Allens Creek*”) (“Absent disclosure of the name and address of one such member [residing in close proximity to the facility site], it is not possible to verify the assertion that such members exist. . . . [B]oth the Board and the other parties were entitled to be provided with sufficient information to enable them to determine *for themselves*, by independent inquiry if thought warranted, whether a basis existed for a formal challenge to the truthfulness of the assertions in the Guild’s petition.”); *Palo Verde I*, 33 NRC at 158 (“At a minimum, if [petitioners] claim standing because one or more . . . members live or engage in activities in close proximity to the Palo Verde Station, those members should be identified by name and exact location of the members residence or activities with respect to the station.”).

⁶⁶ Petition at 2.

provide the names or addresses any of these members, making it impossible to verify that they are customers of EPE or to assess where they live in relation to PVNGS.

Indeed, while Public Citizen seemingly attempts to assert proximity-based standing by alleging that “at least one Public Citizen dues-paying member lives in the same zip code as the Palo Verde nuclear power station,”⁶⁷ the Petition does not explain where within the zip code this member lives or specify the distance between this member’s residence and PVNGS. Even if this were the type of proceeding in which standing could be established based on proximity alone, which it is not, “[t]o establish the requisite proximity . . . a petitioner must clearly indicate where he lives and/or what contact he has with the site.”⁶⁸ As such, “Petitioners’ failure to provide physical addresses precludes the Board from evaluating the proximity presumption’s potential applicability.”⁶⁹

Furthermore, an organization asserting representational standing must demonstrate the members it purports to represent would have standing in their own right.⁷⁰ Public Citizen fails to establish that any of the members it purports to represent (i) will suffer an injury-in-fact that is (ii) fairly traceable to the indirect license transfers at issue here, (iii) likely to be redressed by a favorable determination, and (iv) within the zone of interests protected by the AEA. Nor has

⁶⁷ *Id.* at 2.

⁶⁸ *Vogle II*, 71 NRC at 176.

⁶⁹ *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Unit No. 3 & James A. Fitzpatrick Nuclear Plant), LBP-16-14, 84 NRC 444, 449 (2016); *see id.* at 449 n.29 (noting that when “ruling on claims of proximity standing, we decide the appropriate radius on a case-by-case basis” and explaining that “the Petition does not contain the information needed to make this determination” (internal quotations and citation omitted)); *Palisades I*, 65 NRC at 410 (“Petitioners assert that many of their members . . . ‘live, work, or engage in recreation, *adjacent and near* the [Palisades and Big Rock] facilities.’ But to demonstrate an interest based on proximity, a petitioner must provide greater specificity than this regarding the distance from a plant.” (citation omitted)); *Atlas Corp.* (Moab, Utah Facility), LBP-07-9, 45 NRC 414, 426-27 (1997) (explaining that “vague” and “cryptic references” to activities being conducted “near,” in “close proximity,” or “in the vicinity” of the facility are not “adequate to establish the required nexus with any facility radiological impacts”).

⁷⁰ *See, e.g., Palisades I*, 65 NRC at 411-12.

Public Citizen shown that the interests it seeks to protect are germane to the organization's own purpose, as is required to establish representational standing.⁷¹

Additionally, an organization claiming representational standing “must provide proof that one of its members has actually authorized the organization to represent his or her interests in [the] proceeding.”⁷² Yet Public Citizen has provided no proof that it is authorized to represent any of the (unnamed) members who are referenced in general terms in its Petition.⁷³ Such authorization should have been provided in the form of an affidavit or supporting declaration that identified the member and explained his or her interest in the proceeding.⁷⁴ Public Citizen failed to provide any such supporting documentation with its Petition. And any potential efforts to “backstop elemental deficiencies in [Public Citizen's] original petition to intervene”—for instance by providing the

⁷¹ *Id.* at 409; *see also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 29 (1991) (“*Shoreham*”) (“Secure Energy has not stated that its organizational purpose provides authority to represent members in adjudicatory proceedings such as this one. . . . Secure Energy has not satisfied the requirements for representational standing.”).

⁷² *Palisades II*, 68 NRC at 268; *see also Allens Creek*, 9 NRC at 396 (“Where an organization's standing hinges upon its being the representative of a member who has the requisite affected personal interest, it is obviously important that there be some concrete indication that, in fact, the member wishes to have that interest represented in the proceeding. . . . [M]ere membership in [an organization] does not ordinarily constitute blanket authorization for the organization to represent any of the member's personal interests it cares to without his or her consent.”).

⁷³ Nor has Public Citizen established that it is the type of organization for which authorization to represent members in NRC proceedings may be presumed. *See Allens Creek*, 9 NRC at 397 (explaining that authorization cannot be presumed for an organization that “was not formed for the specific purpose of advancing opposition to nuclear power in general or the . . . facility [at issue] in particular” and does not include “anything in its articulated objectives . . . which might lead one to conclude that, by acquiring membership in the [organization], a person was perforce authorizing it to represent whatever interest he might have with regard to” nuclear facilities).

⁷⁴ *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 178 n.6 (2012) (“[I]f this claim is intended as a basis for representational standing, it lacks the necessary supporting declarations from the unnamed members identifying themselves, outlining their interests, and authorizing Joint Petitioners to represent them in this proceeding.”); *see Shoreham*, 33 NRC at 29 (“For an organization to rely upon injury to the interests of its members, it must provide, with its petition, identification of at least one of the persons it seeks to represent, a description of the nature of injury to the person, and demonstrate that the person to be represented has in fact authorized such representation. . . . No supporting statement containing that information was submitted from any member sought to be represented, as is required.”).

requisite affidavit as an attachment to a reply brief—would be untimely and should not be accepted or considered.⁷⁵

“[A]n organization seeking representational standing must demonstrate how at least one of its members may be affected by the licensing action (such as by activities on or near the site), must identify that member by name and address, and must show (preferably by affidavit) that the organization is authorized to request a hearing on behalf of that member.”⁷⁶ Public Citizen has satisfied none of these basic, “essential”⁷⁷ requirements for representational standing. Even if the grounds on which Public Citizen sought to establish representational standing were valid—which they are not—these deficiencies preclude a finding that Public Citizen has demonstrated standing to intervene in this proceeding in a representational capacity.

D. Public Citizen Has Not Established Organizational Standing

As detailed above, Public Citizen has not established representational standing. It also has failed to establish organizational standing.

“Organizations seeking to intervene in their own right must satisfy the same ‘standing’ requirements as individuals seeking to intervene.”⁷⁸ Public Citizen’s Petition does not identify any injury-in-fact to the organization’s own institutional interests, much less establish that such

⁷⁵ *Palisades II*, 68 NRC at 261-62 (internal quotations and citation omitted); *id.* at 262 (explaining that “acceptance and consideration of such belatedly submitted evidence regarding standing would deprive [the applicant] of the opportunity to challenge the substantive sufficiency of the affidavit – an opportunity [the applicant] could have exercised had [the petitioner] submitted a timely affidavit with its petition to intervene” (footnote omitted)).

⁷⁶ *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 202 (2000) (“*Oyster Creek*”).

⁷⁷ *Cogema Mining, Inc.* (Irigaray & Christensen Ranch Facilities), ASLBP No. 09-887-01-MLR-BD01, 70 NRC 168, 189 (2009) (“In order to establish representational standing, it is essential for an organization to identify at least one member of the organization who is shown to have standing in his or her own right and to present an affidavit or declaration from that person wherein he or she authorizes the organization to represent him or her in the proceeding.”).

⁷⁸ *Palisades I*, 65 NRC at 411.

injury is readily traceable to the indirect license transfers at issue, likely to be redressed by a favorable decision, and within the zone of interests protected by the governing statute, the AEA. Accordingly, Public Citizen has not established standing to intervene in this proceeding in its own right.

The Petition notes that “Public Citizen has full-time staff in [its] Texas office,”⁷⁹ but the Austin, Texas address provided is roughly 900 miles away from PVNGS. Even if this were the type of proceeding in which standing could be established solely based on geographic proximity—which it is not—Public Citizen’s Texas office is significantly “further than 50 miles from the [facility] site and thus outside even the radius within which [the NRC] normally presume[s] standing for those actions that may have significant offsite consequences”⁸⁰

Finally, Public Citizen claims that, based on its “extensive, independent research,” its “participation in this proceeding is essential to assist the Commission in its review of the Application.”⁸¹ But Public Citizen’s claim that its participation in this proceeding will contribute to the Commission’s decisionmaking process does not bolster its attempt to establish a right to intervene because “standing to intervene as a matter of right has never been regarded as hinging to any extent upon an appraisal of how much or little assistance the would-be intervenor might rend[e]r in the decisional process.”⁸²

⁷⁹ Petition at 2.

⁸⁰ *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994); *see also Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175, 179 (1981) (“Without a showing that a plant has far greater than ordinary potential to injury those outside a 50 mile limit, a person living further away has a weak claim to the costly protection of a full adjudicatory proceeding.”).

⁸¹ Petition at 2.

⁸² *North Anna*, 4 NRC at 107 n.12.

E. There Is No Basis to Allow Discretionary Intervention

Public Citizen has failed to establish standing as a matter of right, either on its own behalf or as an authorized representative of members who themselves would have standing to intervene. Public Citizen's Petition does not include a request for discretionary intervention, nor does it discuss the six factors set forth in 10 C.F.R. § 2.309(e) that bear on such requests. Moreover, the NRC may consider requests for discretionary intervention only "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."⁸³ No other potential party has sought to establish standing or to propose an admissible contention in this proceeding. As such, discretionary intervention would not be available even if Public Citizen had requested it.⁸⁴

IV. PUBLIC CITIZEN HAS NOT PROPOSED AN ADMISSIBLE CONTENTION

Public Citizen's Petition also should be denied because the organization fails to propose any admissible contention. Public Citizen makes no effort to comply with the Commission's strict contention admissibility requirements as set forth in 10 C.F.R. § 2.309(f)(1).⁸⁵ Public Citizen's Petition fails to explain with specificity the legal or factual issues it seeks to litigate.⁸⁶ To the

⁸³ 10 C.F.R. § 2.309(e).

⁸⁴ *Palisades II*, 68 NRC at 267 ("Because we find today that no petitioner has demonstrated standing, these prerequisites are not present in this proceeding. We therefore deny the [petitioner's] request for discretionary intervention."); *id.* at 270 ("All members of the Petitioners' Group request discretionary standing under 10 C.F.R. § 2.309(e), but they do not address the six factors set forth in that regulation. Nor is there a hearing in which the Petitioners' Group could participate. We therefore deny their request for discretionary intervention." (citations omitted)); *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-11-29, 74 NRC 612, 620 n.34 (2011) ("*St. Lucie*") ("[D]iscretionary standing under 10 C.F.R. § 2.309(e) is unavailable to [petitioner] because we have not admitted any other party to this proceeding."); *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-15-14, 2015 WL 7444739 at *5 n.41 (NRC May 21, 2015) ("[I]ntervention as a matter of discretion is permitted only where at least one petitioner has established standing and at least one admissible contention has been admitted, and a petitioner is required to address six factors in its initial petition.").

⁸⁵ See *infra* Part IV.A.

⁸⁶ See *infra* Part IV.B.

extent Public Citizen’s main arguments can be discerned, they are unsupported and lack any legitimate factual or legal basis.⁸⁷ Public Citizen also fails to explain how its potential contentions are within the scope of the proceeding or material to the findings the Commission must make.⁸⁸ As such, Public Citizen has failed to show that a genuine dispute exists on a material issue of law or fact.⁸⁹ Accordingly, Public Citizen’s Petition fails to propose an admissible contention and should be denied.

A. Contention Admissibility Standards

In addition to establishing standing—which Public Citizen has failed to do—a petitioner requesting a hearing also must propose at least one admissible contention that satisfies each of the requirements of 10 C.F.R. § 2.309(f)(1).⁹⁰ That provision requires that:

For each contention, the request or petition 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; [and]

⁸⁷ See *infra* Part IV.C.

⁸⁸ See *infra* Part IV.D.

⁸⁹ See *infra* Part IV.E.

⁹⁰ See 10 C.F.R. § 2.309(a).

(vi) [P]rovide 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 belief⁹¹

Each of these requirements is mandatory: "If any one of these requirements is not met, a contention must be rejected."⁹² The petitioner bears the burden of proposing a contention that satisfies these pleading requirements.⁹³ This burden must be met at the outset: NRC rules "do not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions."⁹⁴ And the requirements of 10 C.F.R. § 2.309(f) apply with full force to license transfer proceedings.⁹⁵

The NRC's "contention rule is strict by design."⁹⁶ Indeed, it was "toughened" by the Commission in 1989 "in a conscious effort to raise the threshold bar for an admissible contention and ensure that only intervenors with genuine and particularized concerns participate in NRC

⁹¹ *Id.* § 2.309(f)(1)(i)-(vi).

⁹² *Arz. Pub. Serv. Co.* (Palo Verde Nuclear Station, Unit Nos. 1, 2 & 3), CLI-91-12, 34 NRC 149, 155 (1991) ("*Palo Verde II*").

⁹³ *See Zion Nuclear*, 49 NRC at 194 ("The burden of setting forth a clear and coherent argument for standing and intervention is on the petitioner.").

⁹⁴ *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) ("*Nat'l Enrichment*"); *id.* ("[S]uch a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions."); *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-09-14, 2009 WL 1883741 at *6 (NRC June 30, 2009) (explaining that petitioners are "confined to the contention as initially filed and may not rectify its deficiencies through [a] reply brief or on appeal").

⁹⁵ *Palisades I*, 65 NRC at 405 n.7 ("[T]he 'issues' in license transfer proceedings constitute 'contentions' under section 2.309(f) and must therefore meet the standards for admissibility set forth in that regulation.").

⁹⁶ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001) ("*Millstone II*").

hearings.”⁹⁷ The strict contention rule is intended to (i) “focus[] the hearing process on real disputes susceptible of resolution in an adjudication”; (ii) “put[] other parties in the proceeding on notice of the petitioners’ specific grievances”; and (iii) “assure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.”⁹⁸ In short, the NRC’s strict contention requirements “seek to ensure that NRC hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.”⁹⁹

B. Public Citizen’s Petition Lacks the Requisite Specificity

The Commission “does not permit the filing of a vague, unparticularized contention”¹⁰⁰ Accordingly, “[i]t is incumbent upon the Petitioner to . . . set forth contentions which are sufficiently detailed and specific to demonstrate that the issues are admissible and that further inquiry is warranted, and to put the other parties on notice as to what they will have to defend against or oppose”¹⁰¹ In particular, 10 C.F.R. § 2.309(f)(1)(i), requires that a petitioner must provide a “specific statement of the issue of law or fact to be raised or controverted.”

Contrary to this command, the Petition fails to specifically identify the contentions that Public Citizen seeks to litigate. Instead, the Petition is a jumbled mix of conclusory and ill-defined

⁹⁷ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999).

⁹⁸ *Id.*; *see also N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (“*Seabrook*”) (“[W]e require parties to come forward at the outset with sufficiently detailed grievances to allow the adjudicator to conclude that genuine disputes exist justifying a commitment of adjudicatory resources to resolve them.”).

⁹⁹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (“*Millstone III*”) (internal quotations and citation omitted).

¹⁰⁰ *Seabrook*, 49 NRC at 219 (internal quotations and citation omitted); *see also Millstone II*, 54 NRC at 359 (“[P]residing officers may not admit open-ended or ill-defined contentions lacking in specificity or basis.”).

¹⁰¹ *Me. Yankee Atomic Power Co.* (Maine Yankee Power Station), LBP-82-4, 15 NRC 199, 206 (1982).

allegations. Public Citizen begins and ends its Petition by characterizing IIF US 2's structure as "highly unusual and complicated" and claiming that "only a hearing can adequately untangle the complex ties between IIF US Holdings 2 GP LLC and JP Morgan Chase & Co."¹⁰² But other than underscoring Public Citizen's desire for additional information about IIF US 2's structure and its relationship with J.P. Morgan Investment Management Inc. ("JPMIM"), the Petition does little to explain with any degree of specificity the factual and/or legal positions that Public Citizen would adopt in the requested hearing or how those positions relate to the Application at issue in this proceeding or warrant further inquiry by the NRC. As the Commission has explained, neither "the filing of a vague, unparticularized issue,' nor the submission of 'general assertions or conclusions,' suffices to trigger a license transfer hearing."¹⁰³

The NRC's contention admissibility rules require more than mere "notice pleading."¹⁰⁴ But Public Citizen's Petition does not provide even that, impermissibly forcing Applicants to "speculate about what [the] pleading is supposed to mean"¹⁰⁵ and falling far short of what is required under NRC rules and precedent.¹⁰⁶

¹⁰² Petition at 1, 6.

¹⁰³ *Millstone I*, 52 NRC at 132 (citation omitted).

¹⁰⁴ *St. Lucie*, 74 NRC at 618 ("[T]o be admissible, contentions must include specific grievances beyond mere notice pleading."); *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005) ("Mere 'notice pleading' does not suffice.").

¹⁰⁵ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010).

¹⁰⁶ Even if Public Citizen were deemed to have proposed an adequately specific, supported, and material contention, the scope of such a contention would be significantly limited by 10 C.F.R. § 2.309(f)(1)(vi), which requires a petitioner to provide "references to specific portions of the application. . . . that the petitioner disputes and the supporting reasons for each dispute . . ." The Petition includes only two references to specific portions of the Application. See Petition at 2 (questioning the owners of IIF US 2 as identified in "Enclosure 3 of the NRC Application"); *id.* at 5 (asserting that the authorized signatory of the sworn affidavit in "Enclosure 2 of the August 13 Application" should have been identified as an executive of JPMIM). While Public Citizen claims that there are "numerous obfuscations and inaccuracies in the August 13 Application," Petition at 1, 6, this type of sweeping assertion cannot be used to expand the scope of potential contentions. If Public Citizen were deemed to have proposed any admissible contention regarding alleged "inaccuracies" in the Application, the scope of the contention would be

The NRC’s contention admissibility requirements “state that the proponents of contentions must indicate with specificity the claims they wish to litigate.”¹⁰⁷ Public Citizen’s Petition fails to do so and thus fails to propose an admissible contention. Notwithstanding this threshold-level shortcoming, Applicants endeavor to respond to what they believe to be Public Citizen’s two main arguments. First, Public Citizen appears to allege that the true ownership and/or control of IIF US 2 GP is held by JPMIM, not the IIF US 2 GP Owners. Second, Public Citizen seems to claim that the Application improperly omitted certain information.

C. Public Citizen’s Allegations Are Baseless and Unsupported

Under the NRC’s contention admissibility rules, a petitioner is required “to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset.”¹⁰⁸ Pursuant to 10 C.F.R. § 2.309(f)(1)(ii), petitioners must explain the basis for each contention they propose. Additionally, 10 C.F.R. § 2.309(f)(1)(v) requires a petitioner to provide a “concise statement of the alleged facts or expert opinions which support the . . . 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.” Similarly, 10 C.F.R. § 2.309(f)(1)(vi) requires that petitioners explain “the supporting reasons for each dispute” with the applicant and specifies that any petitioner who believes an applicant has failed to provide “information on a relevant matter as required by law” must explain “the supporting reasons for the petitioner’s belief.” The Commission has explained that these

limited to the discrete issues for which Public Citizen provided references to specific disputed portions of the Application.

¹⁰⁷ *Blue Ridge Envtl. Def. League v. NRC*, 716 F.3d 183, 186 (D.C. Cir. 2013).

¹⁰⁸ *Nat’l Enrichment*, 60 NRC at 623; *see also Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), CLI-15-20, 82 NRC 211, 221 (2015) (“Contentions cannot be based on speculation but must have ‘some reasonably specific factual or legal basis.’” (quoting *Millstone III*, 58 NRC at 213)).

requirements “are designed to raise the Commission’s threshold for admissible contentions and to require a clear statement as to the basis for the contentions and the submission of more supporting information and references to specific documents and sources which establish the validity of the contention.”¹⁰⁹

As discussed in greater detail below, Public Citizen has failed to satisfy these requirements with regard to either of what appear to be its main allegations. Instead of explaining the factual and legal bases of specific contentions and providing support for such contentions, Public Citizen simply asserts that “[a] hearing is necessary to resolve contested facts about the true ownership and control over” IIF US 2 and to “untangle the complex ties between” IIF US 2 and JPMIM.¹¹⁰ Lacking specific facts or legal authority to support its allegations, Public Citizen seemingly seeks to use the requested hearing “as a fishing expedition which might produce relevant supporting facts”—and that is not permitted under the NRC’s contention admissibility rules.¹¹¹ Because Public Citizen has failed “to provide sufficient alleged factual or legal bases to support” any contention, its Petition should be denied.¹¹²

1. Public Citizen’s Allegations Regarding the IIF US 2 GP Owners and JPMIM Are Unfounded

Public Citizen’s Petition seems to suggest that JPMIM—rather than the IIF US 2 GP Owners—is the “true” owner of and/or has control over IIF US 2 GP.¹¹³ However, Public Citizen

¹⁰⁹ *Palo Verde II*, 34 NRC at 155-56.

¹¹⁰ Petition at 1, 6.

¹¹¹ *Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process*, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) (“*Rules of Practice for Domestic Licensing Proceedings*”).

¹¹² *Nat’l Enrichment*, 60 NRC at 623.

¹¹³ See Petition at 1 (claiming that there are “contested facts about the true ownership and control over IIF US Holdings 2”); *id.* at 2-3 (“Public Citizen believes [the IIF US 2 GP Owners] are not actually ‘owners’ of [IIF US 2

has not provided any legitimate factual or legal basis for this apparent argument. And, in fact, there is no valid basis for this allegation because it is false. Instead, Public Citizen misunderstands or mischaracterizes aspects of IIF US 2's organizational structure and relies on assertions unsupported by any legal authority.

As explained in the Application, IIF US 2 GP is the general partner of IIF US 2,¹¹⁴ which will become the ultimate upstream owner of EPE upon consummation of the Proposed Transaction. As the general partner of IIF US 2, IIF US 2 GP is vested with the sole power and discretion to manage and make decisions regarding IIF US 2, subject to certain limited partner consent rights. IIF US 2 GP, in turn, is owned and controlled *pro rata* by the three individual IIF US 2 GP Owners.¹¹⁵

By virtue of their respective ownership interests in IIF US 2 GP, the IIF US 2 GP Owners also constitute and act as the board of managers ("Board") of IIF US 2 GP. Thus, the IIF US 2 GP Owners hold ultimate control over IIF US 2 as both the "owners" and "managers" of IIF US 2 GP. IIF US 2 GP has engaged JPMIM to act as the investment advisor to IIF US 2. None of the IIF US 2 GP Owners are employed by, or otherwise affiliated with, JPMIM. Each independently owns his or her respective general partner interest, and each votes in accordance with his or her individual views of how best to promote the interests of IIF US 2 and its limited partners.

Public Citizen asserts that "[o]wners are usually determined by the financial price they are willing to pay to buy or own shares of a company" and claims that it is therefore "misleading" to characterize the three IIF US 2 GP Owners as "owners" because they "appear to have invested no

GP]. Rather, they are individuals recruited by [JPMIM] to serve as a triumvirate committee of a company that is staffed, operated, and managed by [JPMIM]."); *id.* at 1, 6 (arguing that JPMIM has "an outsized management role" and "actually runs" IIF US 2 GP).

¹¹⁴ Application at 5.

¹¹⁵ *See id.* at 5-6.

meaningful capital of their own.”¹¹⁶ However, Public Citizen provides no explanation of what would qualify as a “meaningful” capital contribution or the basis for such a determination and points to no legal authority to substantiate its apparent claim that capital investment alone dictates ownership and control, particularly in the context of a limited partnership like IIF US 2. As explained in the Application, while IIF US 2 GP manages and controls IIF US 2 as its general partner, the *limited partners* in IIF US 2 own all of the economic interests in IIF US 2 and “constitute the investors providing capital for IIF US 2’s activities.”¹¹⁷ However, the limited partners in IIF US 2 do not have the ability to direct the management or control of IIF US 2 or any of its subsidiaries. Additionally, none of the limited partners of IIF US 2 directly or indirectly owns or controls 10% or more of the outstanding voting securities (in aggregate with any of its affiliates) of IIF US 2.

As noted above, IIF US 2 GP caused IIF US 2 to engage JPMIM as investment advisor to IIF US 2 and has delegated to JPMIM certain of IIF US 2 GP’s functions and responsibilities, subject to the ultimate oversight and authority of IIF US 2 GP. JPMIM is a registered investment adviser subject to the requirements of the Investment Advisers Act of 1940, which imposes on JPMIM a fiduciary duty to act at all times in the best interest of its clients, IIF US 2 and its limited partners. JPMIM’s advisory services include fundraising, sourcing and recommending potential investments, administration, and financial management of IIF US 2’s portfolio of investments. JPMIM owns no direct or indirect interest in IIF US 2 GP and owns less than 0.01% of the passive limited partnership interests in IIF US 2.

¹¹⁶ Petition at 4.

¹¹⁷ Application at 5.

Public Citizen makes a variety of unsupported assertions suggesting that IIF US 2 and/or IIF US 2 GP are affiliated with or controlled by JPMIM. For instance, emphasizing that “IIF appears to have no employees independent of [JPMIM’s],” Public Citizen alleges that “[a] company with no employees that relies on a Wall Street bank for all of its staffing needs sounds like a dependent—and affiliated—shell company.”¹¹⁸ But Public Citizen provides no legal authority supporting its apparent view that engaging an investment advisor to perform functions like those performed by JPMIM gives rise to an affiliate relationship or renders a company that delegates certain functions to the investment advisor a mere “shell” company.

In fact, in performing its functions as investment advisor to IIF US 2 and exercising authority delegated to it by IIF US 2 GP, JPMIM remains subject to the ongoing oversight and ultimate control of IIF US 2 GP and the IIF US 2 GP Owners. To this end, JPMIM meets frequently with the IIF US 2 GP Owners to consider potential investment decisions and/or to discuss and review the activities conducted by JPMIM on behalf of IIF US 2 GP. The IIF US 2 GP Owners, among other things, decide whether to approve and/or ratify JPMIM’s advice and actions.

Public Citizen further asserts that IIF US 2 “literally cannot function” without JPMIM and alleges that “[t]he logistical inflexibility of IIF to shed itself of [JPMIM’s] domineering role in managing IIF’s day-to-day affairs renders IIF unable to effectively dislodge itself from [JPMIM]—evidenced, in part, by the fact that since its very founding in 2006, IIF has only employed [JPMIM].”¹¹⁹ This claim is unfounded and inaccurate. The IIF US 2 GP Owners have the ability to revoke or limit JPMIM’s delegated responsibility and, with the consent of a majority of the

¹¹⁸ Petition at 4.

¹¹⁹ *Id.* at 5.

unaffiliated limited partners, terminate and replace JPMIM as investment advisor. Public Citizen acknowledges that this was explained in a filing made with the Federal Energy Regulatory Commission, but nonetheless questions whether it is “really” accurate.¹²⁰ The only bases provided for this skepticism are the assertions that “[s]ince its founding in 2006, IIF has never had any advisor other than [JPMIM]” and “IIF has no employees” and thus “literally cannot function” without JPMIM.¹²¹ However, the mere fact that JPMIM has served as investment advisor to IIF US 2 in the past and continues to occupy that role does not undermine the fact that the IIF US 2 GP Owners do in fact have authority (with the consent of a majority of the unaffiliated limited partners) to terminate and replace JPMIM as investment advisor.

Public Citizen also alleges that two of the IIF US 2 GP Owners “obtained their IIF positions on the formal recommendation of [JPMIM]” and JPMIM “therefore wields influence over the selection of IIF ‘owners.’”¹²² Public Citizen then leaps to the conclusion that “[t]his fact alone renders [IIF US 2 GP] an affiliate of [JPMIM].”¹²³ Once again, Public Citizen fails to provide any legal sources substantiating its apparent claim that making recommendations regarding the owners and/or directors of another company *ipso facto* creates an affiliate relationship.

Contrary to the suggestion in Public Citizen’s Petition, JPMIM has no control over the nomination of the IIF US 2 GP Owners and who may become an IIF US 2 GP Owner, and consequently, who may control IIF US 2 GP and sit on its Board. Only the IIF US 2 GP Owners can approve the acquisition by, or transfer to, another individual of interests in IIF US 2 GP, and

¹²⁰ *Id.* at 4-5.

¹²¹ *Id.* at 5.

¹²² *Id.* at 3.

¹²³ *Id.*

therefore, only the IIF US 2 GP Owners control the appointment and replacement of an IIF US 2 GP Owner and member of the Board.¹²⁴

JPMIM can neither appoint nor replace an IIF US 2 GP Owner or member of the Board of IIF US 2 GP. The fact that an employee of JPMIM suggested, for example, that the former head of the Port Authority of New York and New Jersey (Mr. Ward), who has no affiliation with JPMIM, as a potential candidate for IIF US 2 GP to consider when determining the skills necessary to fulfill IIF US 2 GP's obligations to IIF US 2 in no way conflicts with the premise that the IIF US 2 GP Owners are responsible for the ultimate selection of IIF US 2 GP's members.

While JPMIM did help “identif[y]” Mr. Clarke and Mr. Ward as potential “candidate[s]” to replace, in each case, an existing IIF US 2 GP Owner, IIF US 2 GP now has in place a Nominating and Governance Committee that is charged with undertaking a search process and skills assessment in connection with the anticipated replacement of an IIF US 2 GP Owner.¹²⁵ It is this Committee—not JPMIM—that identifies qualified candidates to replace an IIF US 2 GP Owner and presents its recommendations to the IIF US 2 GP Owners for consideration and approval. Consistent with this practice, the Nominating and Governance Committee—not JPMIM—identified, presented, and recommended Ms. Sallis as a candidate and has identified potential successors to Mr. Clarke.¹²⁶ Moreover, the Nominating and Governance Committee is independent of JPMIM; none of the Nominating and Governance Committee members is employed by or associated with JPMIM.

¹²⁴ Accordingly, Public Citizen's claim that “the individuals on [the Nominating and Governance] Committee have the power to select new owners for [IIF US 2 GP]” and thus “wield control over [IIF US 2 GP],” *id.* at 3-4, is also unfounded.

¹²⁵ *Id.*, Ex. B at 6.

¹²⁶ *Id.*

Public Citizen also discusses the fact that IIF US 2 or other IIF master partnerships,¹²⁷ as the ultimate controlling shareholders, appointed to the board of directors of certain portfolio companies individuals that are associated with JPMIM.¹²⁸ While Public Citizen claims that “[t]his implies a significant oversight and management role for [JPMIM] that appears to extend beyond a simple ‘advisory’ role,”¹²⁹ Public Citizen offers no legal authority indicating that these appointments are inconsistent with JPMIM’s role as an investment advisor to IIF US 2. Moreover, Applicants note that any individuals appointed by IIF US 2 ultimately serve at the pleasure of the IIF US 2 GP Owners, who control IIF US 2 and therefore can remove or replace such appointees.

Public Citizen claims that the “three IIF [US 2 GP] ‘owners’ appear to be an elaborate mirage to give the appearance of legal separation between [IIF US 2 GP] and [JPMIM] when none effectively exists” and suggests that describing the IIF US 2 GP Owners as “owners” may be part of an attempt to “evade scrutiny” regarding JPMIM’s role.¹³⁰ However, JPMIM’s role as an investment advisor to IIF US 2 is not hidden or secret.¹³¹ Moreover, as detailed above, Public Citizen’s allegations regarding the IIF US 2 GP Owners and JPMIM have no legitimate factual or

¹²⁷ IIF is not an actual legal entity; instead, it is an umbrella name used to refer to three master partnerships that hold all of IIF’s investments. These three master partnerships are: IIF US 2; IIF US Holding LP (IIF US Holding), a U.S. limited partnership; and IIF Int’l Holding L.P., a non-U.S. limited partnership.

¹²⁸ *See id.* at 5-6.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.* at 3.

¹³¹ For example, JPMIM’s role as an investment advisor was identified in the Form 8-K that EPE publicly filed with the SEC on June 3, 2019 (*see* Form 8-K, Item 1.01, available at <https://www.sec.gov/Archives/edgar/data/31978/000114036119010234/0001140361-19-010234-index.htm>) and was described in the Joint Report and Application publicly filed on August 13, 2019 with the Public Utility Commission of Texas (“PUC”) to seek authorization of the transaction that is the subject of this proceeding (*see Joint Report and Application of El Paso Elec. Co., Sun Jupiter Holdings LLC, and IIF US Holding 2 LP for Regulatory Approvals under PURA §§ 14.101, 39.262, and 39.915*, Docket No. 49849, Direct Test. and Exs. of Andrew E. Gilbert on Behalf of Sun Jupiter Holdings LLC and IIF US Holding US 2 LP at 12-15, available at <http://interchange.puc.texas.gov/Search/Documents?controlNumber=49849&itemNumber=1>).

legal bases and rely on unsupported assertions. “If there is information to support the allegations, at least some reasonably specific basis or source is necessary – and should not be difficult to provide or describe specifically, if it exists.”¹³² Instead, what Public Citizen has provided as the “basis for [its allegations] consists essentially of bare assertions, and this is insufficient to support admission of a contention.”¹³³ To the extent Public Citizen purports to propose a contention regarding the roles of IIF US 2 GP Owners and/or JPMIM, such a contention is “unsupported” and “has no foundation in the law” and therefore is “inadmissible for failure to satisfy” the Commission’s contention admissibility requirements.¹³⁴

2. There Is No Requirement to Provide the Information That Public Citizen Claims Was Improperly Omitted from the Application

Under 10 C.F.R. § 2.309(f)(1)(vi), a contention based on the petitioner’s “belie[f] that the application fails to contain information on a relevant matter as required by law” must include “identification of each failure and the supporting reasons for the petitioner’s belief.” As such, a “contention of omission must describe the information that should have been included and provide the legal basis that requires the omitted information to be included.”¹³⁵

Public Citizen accuses the Applicants of failing to include in the Application certain information regarding IIF US 2. Specifically, Public Citizen asserts that the Application should be considered deficient until information is provided regarding the terms of the IIF US 2 GP Owners, the amount of money the IIF US 2 GP Owners paid to become owners, and the identities

¹³² *Dominion Nuclear Ct., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 91 (2004).

¹³³ *Id.*

¹³⁴ *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), ASLBP No. 08-868-04-COL-BD01, 68 NRC 554, 566 (2008).

¹³⁵ *Vogtle I*, 83 NRC at 280-81.

of the individuals serving on the Nominating and Governance Committee.¹³⁶ However, Public Citizen provides no legal basis for its apparent belief that such information was required to be included in the Application. Because Public Citizen has “failed to point to any legal authority or regulatory requirement mandating” that the information demanded be provided, Public Citizen has “fail[ed] to create a genuine dispute that would warrant admission of this contention.”¹³⁷

Indeed, the NRC has explained that “transfer applicants need provide only information bearing on the inquiry at hand, and not more extensive information that may be required in other contexts.”¹³⁸ Public Citizen has provided no explanation for how the information it claims was improperly omitted bears on the NRC’s inquiry in this proceeding—*i.e.*, the Applicants’ financial and technical qualifications and whether the transfers are consistent with applicable law and NRC regulations and orders—which is a necessary prerequisite to establishing that the information was improperly omitted.

In fact, the information Public Citizen demands is not relevant to the Commission’s inquiry in this proceeding and thus was not required to be included in the Application. The Application provides information on the entities and individuals that will control the NRC Licenses upon consummation of the Proposed Transaction and notes that if the identity of an IIF US 2 GP Owner changes after the closing of the Proposed Transaction, “Applicants will seek and obtain all necessary approvals, including that of the NRC to the extent it may be required, prior to the

¹³⁶ Petition at 3, 4. Public Citizen also argues that the Application should have included information about the expected terms of IIF US 2 GP Owners, JPMIM’s identification of candidates to become owners of IIF US 2 GP, the existence of the Nominating and Governance Committee, and the affiliation of the individual who signed IIF US 2’s sworn affirmation. *Id.* at 3-5. However, Public Citizen was able to find information on these issues through publicly available materials, including filings with the PUCT.

¹³⁷ *S. Tex. Project Nuclear Operating Co.* (S. Tex. Project, Units 3 & 4), LBP-09-21, WL 8519329 at *17 (NRC Aug. 27, 2009).

¹³⁸ *Millstone I*, 52 NRC at 133.

replacement candidate becoming a IIF US 2 GP Owner.”¹³⁹ Accordingly, specific information on the terms of individual IIF US 2 GP Owners is not necessary. Additionally, while Public Citizen argues that the Application was deficient because it did not disclose the amount of money each of the IIF US 2 GP Owners paid to become owners, capital contributions are not dispositive of ownership or control, as discussed above.¹⁴⁰ Similarly, it is not necessary to identify the individuals on the Nominating and Governance Committee because, as discussed above,¹⁴¹ only the IIF US 2 GP Owners can approve the acquisition by, or transfer to, another individual of interests in IIF US 2 GP, and therefore, only the IIF US 2 GP Owners control the appointment and replacement of an IIF US 2 GP Owner and member of the Board. In short, Public Citizen has not proposed an admissible contention of omission because it has not explained why the allegedly omitted information was required to be included in the Application—and, in fact, the information demanded is not relevant to the inquiry here and thus not required.

D. Public Citizen’s Allegations Are Not Within the Scope of or Material to Findings That Must Be Made in This Proceeding

Under the NRC’s contention admissibility rules, petitioners must demonstrate that the issues raised in their contentions are “within the scope of the proceeding” and “material to the findings the NRC must make to support the action that is involved in the proceeding.”¹⁴² An issue

¹³⁹ Application at 6 n.4.

¹⁴⁰ See *supra* at 29-30.

¹⁴¹ See *supra* at 32-33.

¹⁴² 10 C.F.R. § 2.309(f)(1)(iii), (iv).

is “material” if the “resolution of the dispute would make a difference in the outcome of the licensing proceeding.”¹⁴³

As the Commission has explained, the “question in indirect transfer cases . . . is whether the proposed shift in ultimate corporate control will ‘affect’ a licensee’s existing financial and technical qualifications.”¹⁴⁴ Pursuant to its regulations, the NRC will approve a license transfer application if it determines that the “proposed transferee is qualified to be the holder of the license” and the “[t]ransfer of the license is otherwise consistent with applicable provisions of the law, regulations, and orders issued by the Commission.”¹⁴⁵ The standards for this indirect license transfer proceeding were clearly explained in the *Federal Register* Notice regarding the Application.¹⁴⁶ And because the “NRC’s mission is solely to protect the public health and safety”—and “not to make general judgements as to what is or is not otherwise in the public interest”¹⁴⁷—the NRC’s “license transfer hearings under Subpart M are designed solely to adjudicate genuine health and safety disputes arising out of license transfers.”¹⁴⁸

Public Citizen does not raise any questions regarding the Applicant’s financial or technical qualifications, nor does it allege that the license transfers otherwise raise health and safety concerns. Public Citizen also fails to explain how any of the issues raised in its Petition would

¹⁴³ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), LBP-11-23, 74 NRC 287, 307 (2011); *Rules of Practice for Domestic Licensing Proceedings*, 54 Fed. Reg. at 33,172.

¹⁴⁴ *Millstone I*, 52 NRC at 133.

¹⁴⁵ 10 C.F.R. §§ 50.80(c), 72.50(c).

¹⁴⁶ Notice at 57,775 (explaining that “[t]he Commission will approve an application for the indirect transfer of a license if the Commission determines that the proposed transaction will not affect the qualifications of the licensee to hold the license and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission”).

¹⁴⁷ *Consolidated Edison Co. of N.Y.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 149 (2001).

¹⁴⁸ *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant and Indian Point Nuclear Generating Unit No. 3), CLI-00-22, 52 NRC 266, 316 (2000) (“*FitzPatrick*”).

make approval of the license transfers inconsistent “with applicable provisions of law, regulations, or orders issued by the Commission.” Indeed, Public Citizen does not reference *any* provisions of the AEA or specific NRC regulations or orders in its Petition.¹⁴⁹ As such, Public Citizen has not demonstrated that the issues it seeks to litigate—which essentially relate to the organizational structure of IIF US 2 and the role of JPMIM—are either within the scope of this proceeding or material to the findings the NRC must make in order to consent to the proposed license transfers.

To the extent that Public Citizen’s Petition takes issue with the staffing of IIF US 2 and JPMIM’s role as an investment advisor, it bears noting that Commission precedent instructs that a licensee’s personnel decisions are not of interest to the NRC unless they pose a risk to the public health and safety.¹⁵⁰ Yet Public Citizen does not allege that JPMIM’s position as investment advisor to IIF US 2 poses a risk to public health and safety, nor is there any basis to believe that such a risk is possible given (i) EPE’s limited, possession-only interest in PVNGS and (ii) IIF US 2’s commitments that “EPE’s CEO and EPE’s senior management will continue to have day-to-day control over EPE’s operations” and that EPE’s will continue to have a majority independent board of directors.¹⁵¹ Accordingly, this issue is outside the scope of the instant proceeding.

¹⁴⁹ In keeping with Public Citizen’s lack of attention to NRC regulations, the Petition also does not conform to the Commission’s formal requirements for documents. *See, e.g.*, 10 C.F.R. § 2.304(c) (requiring that text be double-spaced).

¹⁵⁰ *See, e.g., Oyster Creek*, 51 NRC at 214 (“[T]he Commission is interested in whether the plant poses a risk to the public health and safety, and so long as personnel decisions do not impose that risk, our regulations and policy do not preclude a licensee from reducing or replacing portions of its staff.”); *FitzPatrick*, 52 NRC at 316 (“We would require personnel claims considerably more concrete than the Association’s—*i.e.*, specific indications of a potential rule violation or of deteriorating safety conditions linked to the license transfer—before we would consider admitting plant staffing questions into an NRC license transfer hearing.”).

¹⁵¹ *See* Joint Report and Application of El Paso Elec. Co., *et al.*, *supra* note 131, Ex. C at 4.

E. Public Citizen Has Failed to Show That a Genuine Dispute Exists on a Material Issue of Law or Fact

Under 10 C.F.R. § 2.309(f)(1)(vi), a petitioner must “provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.” The Commission has explained that NRC rules are “consistent” with federal court decisions including *Connecticut Bankers Association v. Board of Governors*, 627 F.2d 245, 251 (D.C. Cir. 1980), which held that “a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that a dispute exists. The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.”¹⁵²

As detailed above, Public Citizen has not explained its arguments with the requisite specificity, has not provided legitimate factual or legal bases for or sources to support its allegations, and has not demonstrated that the issues it raises are within the scope of the proceeding or material to the findings that the NRC must make.¹⁵³ Instead, Public Citizen’s Petition offers generalized assertions untethered to NRC regulatory requirements or to public health and safety considerations. Indeed, Public Citizen’s filing cites to no AEA requirements or NRC regulations and contains no mention of the term “safety.” But “generalized assertion[s], without specific ties to NRC regulatory requirements, or to safety in general . . . do not provide adequate support demonstrating the existence of a genuine dispute of fact or law”¹⁵⁴ Because Public Citizen

¹⁵² See *Rules of Practice for Domestic Licensing Proceedings*, 54 Fed. Reg. at 33,171.

¹⁵³ See *supra* Parts IV.B, IV.C, and IV.D.

¹⁵⁴ *Va. Elec. & Power Co.* (North Anna Power Station, Unit 3), LBP-09-27, 2009 WL 8519321 at *15 (NRC Nov. 25, 2009) (internal quotations and citation omitted).

has not carried its burden of demonstrating that a genuine dispute exists on a material issue of law or fact, it has not proposed any admissible contentions and is not entitled to a hearing.

V. CONCLUSION

For the foregoing reasons, the Commission should determine that Public Citizen has failed to establish standing or to put forward an admissible contention and should therefore deny Public Citizen's Petition.

Respectfully submitted,

*/Signed (electronically) by
Rob W. Warnement/*

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Dated: December 13, 2019

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

In the Matter of:)	
)	License Nos. NPF-41, 51, and 74
El Paso Electric Company)	Docket Nos. 50-528, 529, and 530
Indirect License Transfer)	Docket No. 72-44
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Applicants' Answer Opposing Public Citizen's Petition for Leave to Intervene and Hearing Request has been served through the E-Filing system on the participants in the above-captioned proceeding this 13th day of December, 2019.

*/Signed (electronically) by
Rob W. Warnement/*

Robert W. Warnement