

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kristine L. Svinicki, Chairman
Jeff Baran
Annie Caputo
David A. Wright

In the Matter of

FIRSTENERGY NUCLEAR OPERATING
CO. and FIRSTENERGY NUCLEAR
GENERATION, LLC

(Beaver Valley Power Station, Units 1 and 2;
Davis-Besse Nuclear Power Station, Unit 1;
Perry Nuclear Power Plant, Unit 1)

Docket Nos. 50-334-LT
50-412-LT
50-346-LT
50-440-LT

CLI-20-05

MEMORANDUM AND ORDER

This license transfer proceeding concerns an application filed by First Energy Nuclear Operating Company (FENOC) on behalf of itself and First Energy Nuclear Generation, LLC (FENGen) (collectively, the Applicants).¹ The Applicants seek NRC approval of direct and indirect transfers of the renewed facility operating licenses for Beaver Valley Power Station, Units 1 and 2, and Davis-Besse Nuclear Power Station, Unit 1; the facility operating license for

¹ See Application for Order Consenting to Transfer of Licenses (Application), attached to Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Apr. 26, 2019) (Cover Letter). The cover letter, Application, and associated enclosures (referred to in the Application as "Exhibits") can be found at ADAMS accession number ML19116A087. FENOC submitted supplements to the Application on May 31, 2019 (ML19151A531); August 2, 2019 (ML19214A099 (package)); August 29, 2019 (ML19241A461 (package)); September 25, 2019 (two submissions: ML19268A053 and ML19268B132 (package)); and October 17, 2019 (ML19290D432).

Perry Nuclear Power Plant, Unit 1; and the general licenses for the independent spent fuel storage installations (ISFSIs) associated with each of these plants (collectively, the Facilities).

We consider today the petition for leave to intervene and request for a hearing submitted by the Environmental Law and Policy Center (ELPC). For the reasons discussed below, we find that ELPC has not established standing to intervene. We therefore deny the petition and terminate this proceeding.²

I. BACKGROUND

At the time the Application was filed, FENOC and FENGen were, respectively, the operator and owner of the Facilities. FENGen sold the entire power output of the Facilities to FirstEnergy Solutions Corp. (FES), the parent company of FENOC and FENGen. FES, in turn, sold power to retail and wholesale customers. All three entities—FENOC, FENGen, and FES—were wholly-owned subsidiaries of FirstEnergy Corporation (FE Corp).³

On March 31, 2018, FES, together with FENOC, FENGen, and FES's other subsidiaries, filed voluntary petitions for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Ohio, Eastern Division (Bankruptcy Court).⁴ Shortly thereafter, FES submitted a certification of permanent cessation of operations to the NRC and stated its intention to deactivate all four plants between May 2020 and October 2021.⁵ In July 2019, while the Application was pending, FES reversed its decision to cease

² Because of this finding, we need not reach the question of whether ELPC has submitted at least one admissible contention. See 10 C.F.R. § 2.309(a) (requiring intervenors to demonstrate standing and submit an admissible contention).

³ Application, Exhibit B.

⁴ Letter from Donald A. Moul, President and Chief Nuclear Officer, FES, to NRC Regional Administrators for Regions I and III (Apr. 2, 2018), at 1-2 (ML18094A661) (April 2018 Letter); Application at 4. FE Corp did not file for Chapter 11 bankruptcy protection. See April 2018 Letter at 1-2; Application at 4 (naming entities filing for bankruptcy).

⁵ Letter from Donald A. Moul, President and Chief Nuclear Officer, FES, to NRC Document Control Desk (Apr. 25, 2018), at 1 (ML18115A007). According to this letter, FES intended to

operations at Davis-Besse and Perry and withdrew the certification of permanent cessation of operations for those units.⁶ In March 2020, the successor to FES withdrew the certification of permanent cessation of operations for Beaver Valley Power Station, Units 1 and 2.⁷

As described in the Application and supplements, FENOC and FENGen would emerge from bankruptcy as “OpCo” and “OwnerCo,” respectively, which would be wholly-owned subsidiaries of a newly-formed, privately-held company, “NewHoldCo.”⁸ NewHoldCo would be a legally separate entity from the current parent company, FE Corp.⁹ To effectuate this restructuring, FENOC and FENGen have requested a direct transfer of operating authority for the Facilities from FENOC to OpCo; a direct transfer of ownership of the Facilities from FENGen to OwnerCo; and an indirect transfer of ownership of the Facilities from FE Corp to NewHoldCo.¹⁰ The proposed transfers of control would not result in any physical changes to the Facilities or significant changes to their day-to-day operations.¹¹ In addition, the senior

permanently cease operations at Davis-Besse by May 31, 2020; at Beaver Valley Unit 1 and Perry by May 31, 2021; and at Beaver Valley Unit 2 by October 31, 2021. *Id.*

⁶ Letter from John W. Judge, President and Chief Executive Officer, FES, to NRC Document Control Desk (July 26, 2019), at 1 (ML19207A097).

⁷ Letter from Darin M. Benyak, Vice President, Energy Harbor Nuclear Corp., to NRC Document Control Desk (Mar. 13, 2020), at 1 (ML20073N415).

⁸ Application at 5-6; Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Oct. 17, 2019), at 2 (ML19290D432) (October 2019 Letter). The names OpCo, OwnerCo, and NewHoldCo were placeholders for as-yet unnamed companies. Application at 4, 7. The Applicants requested approval of the transfer using these generic names and stated that they would provide updated conforming license pages reflecting the final names when known. October 2019 Letter at 2-3.

⁹ October 2019 Letter at 2.

¹⁰ Letter from Darin M. Benyak, Vice President, Nuclear Support and Regulatory Affairs, FENOC, to NRC Document Control Desk (Aug. 2, 2019), Attach. 1 at 1 (ML19214A100).

¹¹ Application at 12.

managers at the Facilities and the onsite organizational structures would not be affected by the transfers.¹²

In October 2019, the Bankruptcy Court issued an order confirming the debtors' reorganization plan, which includes the restructuring and transfers described above.¹³ FENOC and FENGen must obtain NRC approval of the requested license transfers for the reorganization plan to become effective.¹⁴ In December 2019, the NRC Staff issued an order approving the requested transfers and conforming license amendments.¹⁵ The Staff order specifically states that the approval of the license transfers is "subject to the Commission's authority to rescind, modify, or condition the approved transfers based on the outcome of any post-effectiveness hearing on the license transfer application."¹⁶

On February 27, 2020, the Applicants emerged from Chapter 11 bankruptcy and implemented the approved plan of reorganization.¹⁷

¹² *Id.*

¹³ Order Confirming the Eighth Amended Joint Plan of Reorganization of FirstEnergy Solutions Corp., *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code (Oct. 16, 2019) (Confirmation Order), attached to October 2019 Letter. The Eighth Amended Joint Plan of Reorganization (Reorganization Plan) is Exhibit A of the Confirmation Order.

¹⁴ Reorganization Plan at 105-06.

¹⁵ FirstEnergy Nuclear Operating Co.; Beaver Valley Power Station, Unit Nos. 1 and 2, and Independent Fuel Storage Installation (ISFSI); Davis-Besse Nuclear Power Station, Unit No. 1 and ISFSI; and Perry Nuclear Power Plant, Unit No. 1 and ISFSI; Direct and Indirect Transfer of Licenses; Order, 84 Fed. Reg. 66,936, 66,937-38 (Dec. 6, 2019) (Staff Order). Under our regulations, the Staff is "expected to promptly issue approval or denial of license transfer requests" even if a hearing has been requested. See 10 C.F.R. § 2.1316.

¹⁶ Staff Order, 84 Fed. Reg. at 66,938.

¹⁷ *Applicants' Notification of Emergence from Chapter 11 Bankruptcy* (Feb. 27, 2020). On the same day, in accordance with its order approving the license transfer, the Staff issued conforming amendments reflecting that the final legal entity names of New HoldCo, OwnerCo, and OpCo would become Energy Harbor Corp., Energy Harbor Nuclear Generation LLC, and Energy Harbor Nuclear Corp., respectively. See Letter from Bhalchandra K. Vaidya, NRC, to David B. Hamilton, Energy Harbor Nuclear Corp. (Feb. 27, 2020) (ML20030A440) (enclosing

II. DISCUSSION

A. Standards for Standing

To intervene as of right in any NRC licensing proceeding, a petitioner must demonstrate standing (i.e., that its “interest may be affected by” the proceeding).¹⁸ In assessing whether a petitioner has set forth a sufficient interest to qualify for a hearing as a matter of right in a licensing proceeding, the Commission has long applied judicial concepts of standing.¹⁹ Thus, to demonstrate traditional standing in a license transfer proceeding, a petitioner must identify an interest in the proceeding by alleging a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.²⁰ The petitioner must specify the facts pertaining to that interest.²¹

An organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene.²² In addressing the injury requirement, the

conforming amendments); Staff Order, 84 Fed. Reg. at 66,938 (approving conforming amendments).

¹⁸ See Atomic Energy Act of 1954, as amended (AEA), § 189a., 42 U.S.C. § 2239(a); 10 C.F.R. § 2.309(d)(1).

¹⁹ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *accord Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015); *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 322-23 (1999).

²⁰ *Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 (2008); *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408-09 (2007). We have also required petitioners to show that the alleged injury lies arguably within the “zone of interests” protected by the governing statute—here, the AEA. See *Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 408-09; *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 26 (2003).

²¹ *Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 408-09; *Diablo Canyon*, CLI-03-2, 57 NRC at 26.

²² *Palisades*, CLI-07-18, 65 NRC at 411.

organization must show that the licensing action would constitute “a threat to its organizational interests.”²³ We do not recognize standing for an organization that seeks to act as a “private attorney general” in order to raise environmental or safety matters that are of general concern.²⁴

Alternatively, an organization may obtain standing as a representative of one or more of its individual members.²⁵ To demonstrate representational standing, the organization must show that at least one of its members may be affected by the Commission’s approval of the transfer (such as by the member’s domicile, work, or activities on or near the site), must identify that member by name, and must demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf.²⁶ The member seeking representation must qualify for standing in his or her own right; the interests that the representative organization seeks to protect must be germane to its purpose; and neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action.²⁷

²³ *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014); *Georgia Tech*, CLI-95-12, 42 NRC at 115; see also *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

²⁴ See *Palisades*, CLI-08-19, 68 NRC at 269-70; *Palisades*, CLI-07-18, 65 NRC at 411-12; see also *Curators of the University of Missouri* (TRUMP-S Project), LBP-90-30, 32 NRC 95, 103 (1990) (“[I]ntervenors may not act as private attorneys-general and raise issues that are of concern to them but do not affect them directly.”).

²⁵ *Crow Butte*, CLI-14-2, 79 NRC at 18; see *Palisades*, CLI-08-19, 68 NRC at 258; *Palisades*, CLI-07-18, 65 NRC at 409.

²⁶ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409.

²⁷ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409; see *Private Fuel Storage*, CLI-99-10, 49 NRC at 323.

B. Finding on Standing

1. Representational Standing

ELPC has not met the requirements for representational standing. ELPC states that it “has at least one member who qualifies for standing in his or her own right” and makes general assertions concerning injuries its Ohio members would suffer from the license transfer and why such injuries are traceable to the challenged action.²⁸ However, contrary to our long-established requirements, ELPC has neither identified any such member by name nor addressed how a particular member would be affected by the Commission’s approval of the license transfer. In addition, ELPC has provided no evidence, such as a supporting affidavit, demonstrating that ELPC has been authorized to represent any of its members’ interests in this proceeding.²⁹ Our case law on representational standing is clear regarding the need to demonstrate authorization, and ELPC’s failure to provide evidence of authorization is on its own a sufficient basis to reject its bid for representational standing.³⁰ In sum, because ELPC has neither identified the members it purports to represent nor provided proof of authorization to represent them, we find that ELPC has not demonstrated representational standing.

2. Organizational Standing

ELPC also seeks to intervene in its own right, based on its organizational purposes.³¹ ELPC is a non-profit legal advocacy organization with the mission of “improv[ing] environmental

²⁸ *The Environmental Law & Policy Center Petition to Intervene and Hearing Request* (July 17, 2019), at 4-5 (Petition).

²⁹ In support of its Petition, ELPC submitted the Expert Report of Peter A. Bradford. Petition at 6 & Attach. 1 (Bradford Report); *The Environmental Law & Policy Center’s Reply to Applicant’s Answer* (Aug. 16, 2019), at 6 (Reply). This report, initially submitted by ELPC in the Applicants’ bankruptcy proceeding, is offered solely for the purpose of “provid[ing] context and information on the potential harms to ELPC’s interests.” Reply at 6. The Bradford Report does not purport to authorize EPLC to act on behalf of its members nor does it supply the essential information we find lacking regarding injuries to any of ELPC’s individual members that may be traceable to granting this license transfer application.

quality and protect[ing] natural resources in the Midwest,” including “protecting the Great Lakes and access to safe, clean water” through its work to “avoid risks and injuries to public health, clean water, clean air and landscapes in ways that are good for the environment and good for the economy.”³² ELPC also states that it is concerned with protecting public health and safety with respect to nuclear plant operation and decommissioning in the Midwest/Great Lakes region.³³ ELPC explains that it “has been engaged in both nuclear power plant safety and nuclear plant economic issues in many cases over the past 25 years” and points to its involvement in the shutdown and decommissioning of Zion Units 1 and 2.³⁴ These interests, however, are “broad interests shared with many others” and are no different from the “general environmental and policy interests” we have repeatedly found insufficient to establish standing.³⁵

Acknowledging that “not all proposed nuclear license transfers affect ELPC’s interests,” ELPC asserts that in this case it will suffer a “specific, concrete harm” if the license transfer application is granted.³⁶ ELPC identifies this injury as the potential for radiological harm stemming from the risk of inadequate decommissioning of the Facilities, two of which are

³⁰ See *Palisades*, CLI-07-18, 65 NRC at 409-10 (“If an organization does not identify the members it purportedly represents, we cannot ‘determine whether the organization actually does represent members who consider that they will be affected by [the licensing action] . . . or rather, [i]s simply seeking the ‘vindication of its own value preference.’” (quoting *Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1)*, ALAB-535, 9 NRC 377, 389-90 (1979))).

³¹ Reply at 1-4.

³² Petition at 4; Reply at 2.

³³ Petition at 4; Reply at 2.

³⁴ Petition at 4; Reply at 2.

³⁵ *Palisades*, CLI-07-18, 65 NRC at 411-12.

³⁶ Reply at 2.

located on the shores of Lake Erie, due to the indirect and direct transfers of control the Applicants seek through the license transfer application.³⁷ ELPC specifies that the “increased radiological risk” is attributable to “inadequate decommissioning funding and a failure by the proposed licensee to establish appropriate financial qualifications” as a result of transferring the license from FENOC to a newly formed entity with no financial history, “where decommissioning trust funds continue to remain below NRC requirements.”³⁸ ELPC argues that the potential increase in radiological risk from this licensing action would, in turn, affect ELPC as an organization by “injur[ing] the gains made by ELPC in advancing its interests” in other proceedings in which ELPC participates.³⁹ ELPC points to its contemporaneous participation as a plaintiff in a federal court proceeding in Ohio regarding “remedies to phosphorus pollution causing toxic algae blooms in western Lake Erie.”⁴⁰

These arguments are not sufficient to establish that this license transfer constitutes a “threat to [ELPC’s] organizational interests.”⁴¹ First, to the extent that ELPC claims a direct radiological injury to itself from the license transfer, ELPC has not explained how the license transfer would be expected to threaten a Chicago-based organization.⁴² Second, ELPC has not

³⁷ *Id.* at 2-3. ELPC also appears to express a concern about radiological harm from the Applicants’ “intention to defer the timing of decommission for about 60 years after shut down by adopting the SAF[]STOR approach.” *Id.* at 3. This latter concern, which is not otherwise referenced in ELPC’s Petition or Reply, is outside the scope of this license transfer proceeding.

³⁸ Petition at 4.

³⁹ Reply at 3.

⁴⁰ *Id.* at 3-4.

⁴¹ *Crow Butte*, CLI-14-2, 79 NRC at 18.

⁴² See Petition at 12 (providing ELPC’s location as Chicago, Illinois); see also *Palisades*, CLI-07-18, 65 NRC at 410 (statement that some of organization’s members live, work, or engage in recreation “adjacent” to or “near” an NRC-licensed facility insufficient for proximity-based standing).

shown how the posited radiological harm from the license transfer would concretely injure its interests in the phosphorus case or any other proceedings in which it is involved or how it would prevent ELPC from protecting its members' interests in these other forums. Other than underscoring ELPC's stated general interest in protecting the Great Lakes environment, ELPC has not explained how its involvement in these other proceedings distinguishes its interest in this license transfer proceeding from that of a "private attorney general" raising issues that are of concern to it but that do not affect it directly.⁴³ In short, ELPC has not established that the license transfer at issue in this proceeding would cause harm to itself as an organization.⁴⁴ "[A] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to establish that ELPC would be harmed by the license transfer.⁴⁵

⁴³ See *Palisades*, CLI-07-18, 65 NRC at 411. See also *Exelon Generation Co., LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005) ("It is well-established that mere intellectual or academic interest in a facility or proceeding is insufficient, in and of itself, to demonstrate standing").

⁴⁴ ELPC also argues that "the NRC has recognized that the failure at any time to provide adequate financial assurance is itself a risk to public health and safety." Reply at 3 (citing *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-2, 61 NRC 53, 58 (2005)). But ELPC refers to an Atomic Safety and Licensing Board decision that concerned the Staff's issuance of an immediately effective order suspending a license for willful failure to make required scheduled payments into a decommissioning trust fund. Such a circumstance is not present here.

⁴⁵ *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). ELPC asserts that the Bradford Report provides context and information on the potential harms it may incur from the licensing action, but it does not cite to any portion of that report to support its claims. Reply at 4. And ELPC does not relate the concerns raised in the report, which was prepared for and submitted in the bankruptcy proceeding, to the injuries it claims to its organizational interests from this license transfer. ELPC has the affirmative obligation to explain how the information in its supporting documents provides a basis for its claim to organizational standing. Cf. *Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 204-05 (2003). We decline to "sift through the parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves." *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317, 337 (2002) (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999)).

3. Discretionary Intervention

ELPC requests that it be granted discretionary intervention because its participation in the associated bankruptcy proceeding and its familiarity with the proposed plan of reorganization would assist the Commission in developing a sound record in this proceeding.⁴⁶ We may consider a request for discretionary intervention when at least one petitioner has established standing and at least one admissible contention has been admitted.⁴⁷ Because no party has satisfied these conditions, discretionary intervention is not available. Therefore, we decline to grant ELPC's request for discretionary intervention.

III. CONCLUSION

For the reasons outlined in this decision, we *deny* ELPC's request for hearing and petition to intervene and *terminate* this proceeding.

IT IS SO ORDERED.

For the Commission

NRC SEAL

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April 2020.

⁴⁶ Petition at 6 (citing 10 C.F.R. § 2.309(e)).

⁴⁷ 10 C.F.R. § 2.309(e).

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(Beaver Valley Nuclear Power Station, Unit 1))
(Beaver Valley Nuclear Power Station, Unit 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-05)** have been served upon the following persons by Electronic Information.

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16B33
Washington, DC 20555-0001
E-mail: hearingdocket@nrc.gov

Environmental Law & Policy Center
35 E. Wacker Drive, Ste. 1600
Chicago, IL 60601
Margrethe Kearney, Esq.
Jocelyn Castro, Legal Assistant
Email: mkearney@elpc.org
jcastro@elpc.org

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop - O-14A44
Washington, DC 20555-0001
Tison Campbell, Esq.
Anita Ghosh Naber, Esq.
David E. Roth, Esq.
Jeremy L. Wachutka, Esq.
Brian Newell, Paralegal
E-mail: tison.campbell@nrc.gov
anita.ghoshnaber@nrc.gov
david.roth@nrc.gov
jeremy.wachutka@nrc.gov
brian.newell@nrc.gov

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
Sachin Desai, Esq.
Amy Roma, Esq.
Daniel Stenger, Esq.
E-mail: sachin.desai@hoganlovells.com
amy.roma@hoganlovells.com
daniel.stenger@hoganlovells.com

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of April 2020