

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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In the Matter of

EL PASO ELECTRIC CO.

(Palo Verde Nuclear Generating Station,
Units 1, 2, and 3)

Docket Nos. 50-528-LT
50-529-LT
50-530-LT
72-44-LT

CLI-20-07

MEMORANDUM AND ORDER

This license transfer proceeding concerns an application filed by El Paso Electric Company (EPE) on behalf of itself and IIF US Holding 2 LP (IIF US 2) (collectively, the Applicants).¹ The Applicants seek NRC approval of an indirect transfer of EPE's non-operating interest in the renewed facility operating licenses for Palo Verde Nuclear Generating Station (PVNGS) Units 1, 2, and 3 and the associated general license for the independent spent fuel storage installation (ISFSI) to IIF US 2.

¹ See Application for Order Approving Indirect Transfer of Control of Renewed Facility Operating License Nos. NPF-41, NPF-51, and NPF-74 (Application), attached (Encl. 3) to Letter from Adrian J. Rodriguez, Interim Chief Executive Officer, General Counsel, and Assistant Secretary, EPE, to NRC Document Control Desk (Aug. 13, 2019) (Cover Letter). The Cover Letter, Application, and associated enclosures can be found at ADAMS accession number ML19225D197.

Public Citizen, a non-profit research and advocacy organization, has filed a petition for leave to intervene and request for hearing in this proceeding.² For the reasons discussed below, we find that Public Citizen has not established standing to intervene.³ We therefore deny the petition and terminate this proceeding.

I. BACKGROUND

EPE, a public utility that generates, transmits, and distributes electricity in western Texas and southern New Mexico, owns a 15.8% non-operating interest in the operating licenses for PVNGS Units 1, 2, and 3 and the general license for the PVNGS ISFSI. Arizona Public Service Company (APS) owns a 29.1% interest in PVNGS and holds sole operating authority under the PVNGS licenses.⁴ EPE seeks NRC approval of an indirect transfer of its interest in the PVNGS licenses to IIF US 2 as part of a merger and acquisition transaction in which IIF US 2 would indirectly acquire 100% of the shares in EPE.⁵ IIF US 2 is an infrastructure investment fund that is managed and controlled by its general partner, IIF US Holding 2 GP, LLC (IIF GP).⁶ As a

² See generally *Public Citizen's Request for Hearing and Petition for Leave to Intervene* (Nov. 18, 2019) (Petition).

³ Because of this finding, we do not reach the question of whether Public Citizen has met the requirement in 10 C.F.R. § 2.309(a) to submit at least one admissible contention.

⁴ Application at 1-2, 9. In addition to EPE, the other owners of PVNGS with non-operating 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%). *Id.* at 2 n.2.

⁵ Cover Letter at 1; Application at 1, 3.

⁶ Application at 5. According to the Application, IIF GP is owned and controlled by three private individuals who are U.S. citizens. *Id.* The IIF US 2 limited partners are investors who provide capital for the fund's activities but "do not have the ability to manage or control IIF US 2 or any of its subsidiaries." *Id.*

result of the transaction, EPE would cease to be publicly owned and would become an indirect, wholly owned subsidiary of IIF US 2.⁷

Under the proposed license transfer, APS would continue to operate PVNGS and the ISFSI.⁸ The transaction and license transfer would have no effect on APS's operating authority or technical qualifications; would not require or result in any changes to APS's management, staffing, or procedures; and would not require any amendments to the PVNGS licenses.⁹ According to the Applicants, EPE would continue to generate, transmit, and distribute electricity and recover the costs associated with those activities from ratepayers.¹⁰ EPE would also remain responsible for the decommissioning funding assurance associated with its 15.8% ownership interest in PVNGS and would continue to provide decommissioning funding as required by 10 C.F.R. § 50.75.¹¹

⁷ *Id.* at 1; *id.*, Attach. 2. According to the Application, EPE would become a direct subsidiary of Sun Jupiter Holdings LLC and an indirect subsidiary of several intermediate companies, with IIF US 2 as the ultimate parent company. See *id.*, Attach. 2.

⁸ *Id.* at 9.

⁹ *Id.* at 9, 11.

¹⁰ *Id.* at 9. Because EPE would remain an "electric utility" as defined in our regulations, see 10 C.F.R. § 50.2, EPE is not required to demonstrate its financial qualifications in a license transfer application. Application at 9-10; see 10 C.F.R. § 50.33(f).

¹¹ Application at 10.

In March 2020, the NRC Staff issued an order approving the requested transfer.¹² In July 2020, EPE consummated the merger and acquisition transaction proposed in its Application.¹³

II. DISCUSSION

A. Legal Standards for Standing

To intervene in any NRC licensing proceeding, including a license transfer proceeding, a petitioner must demonstrate standing by showing that its “interest may be affected by” the proceeding.¹⁴ “[W]e have long applied contemporaneous ‘judicial concepts of standing’” to assess whether a petitioner has set forth a sufficient interest to qualify for a hearing.¹⁵ Under this framework, a petitioner must “identify an interest in the proceeding” by claiming an actual or threatened injury that is fairly traceable to the challenged action, is likely to be redressed by a favorable decision, and arguably falls within the “zone of interests” protected by the AEA.¹⁶ The

¹² Arizona Public Service Co.; El Paso Electric Co.; Palo Verde Nuclear Generating Station, Units 1, 2, and 3, and Independent Spent Fuel Storage Installation; Indirect Transfer of Licenses; Order, 85 Fed. Reg. 13,943 (Mar. 10, 2020). 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. We retain the authority, however, to rescind, modify, or condition an approved transfer based on the outcome of any pending adjudicatory proceeding.

¹³ See Letter from Adrian J. Rodriguez, EPE, to NRC Document Control Desk (Jul. 29, 2020), at 1-2.

¹⁴ See Atomic Energy Act of 1954, as amended (AEA), § 189.a., 42 U.S.C. § 2239(a); 10 C.F.R. § 2.309(d)(1).

¹⁵ *Calvert Cliffs 3 Nuclear Project, LLC, and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) (quoting *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 363 (2004)).

¹⁶ *E.g., Entergy Nuclear Operations, Inc. and Entergy Nuclear Palisades, LLC* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 (2008). The petitioner must also “specify the facts pertaining to that interest.” *Id.*

injury “must be both concrete and particularized, not ‘conjectural,’ or ‘hypothetical.’”¹⁷ It is the petitioner’s burden to provide sufficient facts to establish standing.¹⁸

An organization seeking to intervene may demonstrate standing based on an asserted harm to the interest of one or more of its individual members, representational standing, or based on an asserted harm to its own organizational interest.¹⁹ To demonstrate representational standing, the organization must show that at least one of its members may be affected by the NRC’s approval of a licensing action and qualifies for standing in his or her own right.²⁰ The organization must also identify the member by name and demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf.²¹ And finally, the interests that the organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor the requested relief must require an individual member to participate in the organization’s legal action.²²

An organization seeking to intervene in its own right must satisfy the same standing requirements as an individual seeking to intervene.²³ To address the “injury” requirement, the

¹⁷ *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (internal citation omitted) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

¹⁸ *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010); *U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001).

¹⁹ *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 18 (2014); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995).

²⁰ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Consumers Energy Co.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007).

²¹ *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409.

²² *Palisades*, CLI-08-19, 68 NRC at 258-59; *Palisades*, CLI-07-18, 65 NRC at 409; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

²³ *Palisades*, CLI-07-18, 65 NRC at 411.

organization must show that the licensing action would constitute “a threat to its organizational interests.”²⁴ We do not recognize standing for an organization that seeks to raise environmental or safety matters that are of general concern but do not directly affect the organization’s own interests.²⁵

Moreover, “in certain circumstances—such as construction permit and operating license proceedings for power reactors—we recognize a ‘proximity’ . . . presumption” under which “we presume that a petitioner has standing to intervene if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor.”²⁶ In these cases, we have found standing based solely on proximity when a petitioner lives within approximately fifty miles of the facility in question.²⁷ But in other cases, including license transfers, “[w]e determine 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.”²⁸ If a petitioner fails to show an obvious potential for harm from a proposed action, the inquiry reverts to a traditional standing analysis, in which the petitioner

²⁴ *Crow Butte*, CLI-14-2, 79 NRC at 18; see also *Georgia Tech*, CLI-95-12, 42 NRC at 115.

²⁵ See *Palisades*, CLI-08-19, 68 NRC at 269-70; *Palisades*, CLI-07-18, 65 NRC at 411-12; *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252 (2001).

²⁶ *Calvert Cliffs*, CLI-09-20, 70 NRC at 915.

²⁷ *Id.* at 915-16 (citing *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007)). In construction permit and operating license cases, we have found that “persons living within the roughly 50-mile radius of the facility ‘face a realistic threat of harm’ if a release from the facility of radioactive material were to occur.” *Calvert Cliffs*, CLI-09-20, 70 NRC at 917 (quoting LBP-09-4, 69 NRC 170, 183 (2009)).

²⁸ *Big Rock Point*, CLI-07-19, 65 NRC at 426; see *Exelon Generation Co., LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580-81 (2005).

must explain how the action will harm his interests by demonstrating injury, traceability, and redressability.²⁹

B. Finding on Standing

Public Citizen first asserts representational standing based on the interests of “at least [sixty-nine] dues-paying members” in El Paso, Texas, who “pay monthly utility bills to [EPE], and are therefore affected by any change in ownership of [EPE].”³⁰ These general statements, which represent the entire discussion of these members’ standing in the Petition, do not demonstrate that one of the El Paso members “qualif[ies] for standing in his or her own right.”³¹ Public Citizen has not explained how the interests of one or more of these members could be affected by the indirect transfer of licenses for a nuclear plant that is located hundreds of miles from El Paso. Further, the interest Public Citizen alludes to—the effect of the change in ownership on its El Paso members’ monthly utility bills—is an economic interest that falls outside the “zone of interests” protected by the AEA.³² In order to support standing in an NRC

²⁹ *Palisades*, CLI-08-19, 68 NRC at 268-69; *Peach Bottom*, CLI-05-26, 62 NRC at 581.

³⁰ Petition at 2.

³¹ *E.g.*, *Palisades*, CLI-08-19, 68 NRC at 259. The standing discussion also does not identify a member by name or provide an affidavit or other documentation showing that a member has authorized Public Citizen to represent his or her interests in this matter. *See, e.g., id.* at 258-59. In its reply, Public Citizen attempts to remedy the first deficiency by providing the name and address of a member who “has volunteered to go on the record for the purposes of this proceeding.” *Answer of Public Citizen, Inc.* (Dec. 17, 2019), at 2 (Reply). However, our precedent explains that “it is not acceptable in NRC practice for a petitioner to claim standing based on vague assertions, and when that fails, to attempt to repair the defective pleading with fresh details” at a later juncture. *Palisades*, CLI-08-19, 68 NRC at 261-62. In any event, the Reply does not provide evidence of authorization. When an organization relies on representational standing, there must be a “concrete indication” that the member wants the organization to represent his or her interests in a proceeding. *Palisades*, CLI-07-18, 65 NRC at 410 (quoting *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 (1979)).

³² *See Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976) (zone of interests created by the AEA is avoidance of a threat to health and safety of the public as a result of radiological releases); *see also Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-02-16, 55 NRC 317,

proceeding, an economic harm must be “directly related to environmental or radiological harm.”³³ Public Citizen has not shown such a connection or identified a potential environmental or radiological harm that would result from this license transfer. Accordingly, Public Citizen has not demonstrated representational standing on behalf of its El Paso members.

Public Citizen also asserts representational standing on behalf of an unidentified member who “lives in the same zip code as the Palo Verde nuclear power station.”³⁴ Public Citizen states that this person, by virtue of “close proximity” to PVNGS, has a “substantial interest in the outcome” of this license transfer proceeding and that, for a person so situated, “[c]larifying the exact ownership of an operating license of a nuclear power plant is essential.”³⁵

The information provided about this member is insufficient to support standing. Public Citizen did not provide the name of this member and an affidavit or other documentation showing that Public Citizen is authorized to represent this member. And Public Citizen cannot rely on this member’s “close proximity” to PVNGS to support standing. We have consistently held that indirect license transfers involving “no change in the operator, no change in the direct owner, and no change in the physical plant . . . create[] no obvious source of actual or potential harm.”³⁶ Consequently, we have not extended proximity standing in such cases, and we see no

336 n.23 (2002) (citing *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 n.4 (1983)) (“[T]he Commission has long held that ratepayer interests do not confer standing.”).

³³ *Diablo Canyon*, CLI-02-16, 55 NRC at 336.

³⁴ Petition at 2.

³⁵ *Id.*

³⁶ *Palisades*, CLI-08-19, 68 NRC at 260. Even in a case involving the direct transfer of a non-operating interest under similar circumstances (i.e., no change in operator, and no change in physical plant, procedures, management, or personnel), we have found the risks associated with such a transfer to be “de minimis.” See *Peach Bottom*, CLI-05-26, 62 NRC at 581-82. In such cases, proximity alone does not demonstrate how the license transfer would cause harm,

reason to deviate from our practice here.³⁷ If a petitioner cannot show an “obvious potential for offsite consequences” from a proposed action, the petitioner must explain how the action will harm its interests by claiming an injury under traditional standing requirements.³⁸ Other than stating that this member has an interest in “clarifying the ownership” of the operating licenses for PVNGS, Public Citizen provides no further basis for this member’s standing. Therefore, Public Citizen has not demonstrated representational standing on behalf of this member.

Finally, Public Citizen states that it has “conducted extensive, independent research into the corporate structure” of IIF US 2 that provides “important facts” about the Application.³⁹ Public Citizen asserts that its participation in a hearing is therefore “essential to assist the Commission in its review of the Application.”⁴⁰ But Public Citizen’s interest in IIF US 2’s corporate structure, in and of itself, does not demonstrate injury.⁴¹ Our standing determinations do not “hing[e] to any extent upon an appraisal of how much or little assistance the would-be

and thus does not show standing. See *Palisades*, CLI-08-19, 68 NRC at 260-61 (internal citations omitted).

³⁷ See *Palisades*, CLI-08-19, 68 NRC at 269. For example, in *Peach Bottom*, we found that the direct transfer of a fifty percent non-operating interest did not warrant proximity standing. *Peach Bottom*, CLI-05-26, 62 NRC at 581. Even if we were to recognize proximity standing here, Public Citizen’s general statements that a member lives “in the same zip code” and in “close proximity” to the facility, without more, are insufficient to demonstrate the requisite “interest.” See *Palisades*, CLI-07-18, 65 NRC at 410.

³⁸ *Palisades*, CLI-08-19, 68 NRC at 268-69.

³⁹ Petition at 2.

⁴⁰ *Id.*

⁴¹ See *Peach Bottom*, CLI-05-26, 62 NRC at 580; see also *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (“[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 render the organization ‘adversely affected’ . . . within the meaning of the [Administrative Procedure Act].”).

intervenor might rend[e]r in the decisional process.”⁴² Accordingly, we do not find that these statements provide a sufficient factual basis to grant Public Citizen organizational standing.

III. CONCLUSION

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

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of September 2020.

⁴² *North Anna*, ALAB-342, 4 NRC at 107 n.12.

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In the Matter of)
)
EL PASO ELECTRIC COMPANY) Docket Nos. 50-528, 50-529, 50-530
) and 72-44-LT
Palo Verde Nuclear Generating Station)
(Units 1, 2, and 3 and ISFSI))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **COMMISSION MEMORANDUM AND ORDER (CLI-20-07)** have been served upon the following persons by Electronic Information Exchange.

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Dated at Rockville, Maryland,
this 15th day of September 2020.