UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	
Entergy Nuclear Operations, Inc.	)	Docket No. 50-255
Application for Order Consenting to Transfers of Control of Licenses and Approving Conforming License Amendments	)	NRC-2021-0036 March 29, 2021

THE ENVIRONMENTAL LAW & POLICY CENTER'S
REPLY TO APPLICANTS' ANSWER

Although ensuring the adequacy of applicants' financial qualifications "lie[s] at the core of the NRC's license transfer inquiry,"[1] Licensee Entergy Nuclear Operations, Inc. ("ENOI") would have the Commission ignore the genuine legal disputes about whether the proposed transfer satisfies the Commission's regulatory requirements. On December 23, 2020, ENOI filed an application on behalf of itself and operating subsidiary Entergy Nuclear Palisades, LLC ("ENP"), Holtec International ("Holtec"), and Holtec Decommissioning International, LLC ("HDI") to transfer the licenses for two of ENOI's nuclear units and their associated Independent Spent Fuel Storage Installations ("ISFSI") licenses. On February 24, 2021, the Environmental Law & Policy Center ("ELPC") filed a timely Petition for Leave to Intervene and Hearing Request ("Petition"). ELPC's Petition focuses on the legal shortcomings of the Applicants' financial assurances, specifically identifying material disputes of law and ways in which the Application does not meet NRC regulations. In evaluating the Petition, the Commission need not find that the contentions will ultimately succeed on the merits. Instead, the standard is only

[1] *In re N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1)*, 49 N.R.C. 201, 219, Dkt. No. 50-443 (Mar. 5, 1999).

whether ELPC's Petition presents reasonable, supported claims about the existing legal disputes. The Applicants' March 22, 2021, Answer in opposition to ELPC's Petition asks the Commission to set an unjustified higher bar that would allow the transfer application to proceed without a Commission hearing, and would deny impacted parties and the NRC the opportunity to scrutinize the substantial shift in decommissioning responsibility to newly formed entities. ELPC now files this timely reply in support of its Petition. Contrary to the Applicants' arguments, ELPC has standing to intervene in the license transfer proceeding and presents four admissible contentions that raise material issues of law and fact.

A. ELPC Has Standing to Intervene in this License Transfer Proceeding.

ELPC has standing to participate in the proceeding under the Atomic Energy Act of 1954, which requires the Commission to allow those "whose interest may be affected by the proceeding" to intervene in NRC licensing proceedings.[2] In evaluating standing under 10 C.F.R. § 2.309(d)(1), the Commission applies judicial concepts of standing and "construe[s] the petition in favor of the petitioner."[3] As shown in its Petition, ELPC meets these requirements through its demonstration that the proposed license transfer will cause an injury-in-fact to ELPC members and that those injuries are within the zone of interests protected by the Atomic Energy Act.[4] ELPC's petition shows much more than "a mere 'interest in a problem.'"[5] The Applicants' arguments to the contrary minimize the substantial interests of ELPC and its members in the license transfer. ELPC and its members will suffer specific, concrete harm from the license

[2] 42 U.S.C. § 2239(a).
[3] *In re Ga. Inst. of Tech. (Georgia Tech Research Reactor)*, 42 N.R.C. 111, 115, Dkt. No. 50-160 (Oct. 12, 1995) (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)).
[4] Pet. at 4–7; *see In re Cogema Mining, Inc. (Irigaray & Christensen Ranch Facilities)*, 70 N.R.C. 168, 178, Dkt. No. 40-08502 (July 23, 2009) (describing tests for organizational and representational standing).
[5] *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

transfer, which could be prevented if the NRC grants ELPC's requested relief to require reasonable and sufficient financial assurances before granting the license transfer.

The injuries detailed in Jody G. Flynn's and Charles M. Brand's declarations are sufficient to show injury-in-fact.[6] The Applicants, however, assert that because the declarations focus on future harms, ELPC has not established standing.[7] The Applicants' argument misapplies standing doctrine, which the Supreme Court has explained "does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness."[8] Standing requires only that "there is a 'substantial risk' that the harm will occur."[9] Here, the legal deficiencies of the Application create the substantial risk that there will be an inadequately funded decommissioning of the Palisades Nuclear facility. Moreover, the Applicants themselves concede that both Ms. Flynn and Mr. Brand live for substantial parts of the year close to the Palisades facility. This proximity creates a presumption of injury-in-fact.[10] The Applicants' protestations that neither Ms. Flynn nor Mr. Brand live in their Lake Michigan cabins year-round do not alter this presumption.[11]

The Applicants also wrongly assert that ELPC and its members failed to show that their injuries are redressable.[12] The Applicants claim that even if the transfer or exemption were

---

[6] The Applicants assert that because Ms. Flynn's and Mr. Brand's declarations do not state that they are ELPC members, ELPC cannot establish representational standing. Answer at 20. The Applicants, however, fail to acknowledge the Petition's discussion of the declarants' status as ELPC members or that the declarants each state that ELPC is permitted to represent them. *See* Pet. at 5; Flynn Declaration ¶ 10; Brand Declaration ¶ 18. To address any lingering doubts, ELPC has attached amended declarations to this reply, confirming, as clearly stated in ELPC's Petition, that Ms. Flynn and Mr. Brand are indeed ELPC members and were members as of the filing of their original declarations. *See* Exhibits 1 & 2. ELPC requests that the Commission grant it leave to file these amended declarations along with its reply.

[7] *See* Answer at 22.

[8] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

[9] *Kanuszewski v. Mich. Dep't of Health & Human Servs.*, 927 F.3d 396, 405 (6th Cir. 2019) (quoting *Clapper v. Amnesty, Int'l USA*, 568 U.S. 398, 414 n.5 (2013)).

[10] *Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, 64 N.R.C. 257, 270, Dk. No. 50-293 (Oct. 16, 2006)); *see Hous. Lighting & Power Co. (S. Tex. Project, Units 1 & 2)*, 9 N.R.C. 439, 443, Dk.t Nos. 50-498, 50-499 (Apr. 3, 1979).

[11] *See Ne. Nuclear Energy Co. (Millstone Nuclear Power Station, Unit 3)*, 51 N.R.C. 25, 28, Dkt. No. 50-423 (Feb. 9, 2000) (finding standing for an individual with a part-time residence within 10 miles of ISFSI).

[12] Answer at 24.

denied, "site restoration and spent fuel management would still be funded pursuant to an exemption, because [Entergy Nuclear Palisades, LLC] too is a limited liability company that would be dependent on its NDT and DOE recoveries to fund these expenses."[13] This analysis misses the point of ELPC's Petition. As the Petition explains, ELPC seeks a Commission order that would guard against insufficiently funded decommissioning.[14] The license transfer will give the Holtec Companies permission to begin rapid radiological decommissioning, which is not the status quo at this point in time. A denial of the transfer application would redress ELPC members' injuries in that the Applicants would be required to provide adequate support for their financial qualifications. Because adequate financial qualifications are necessary to effective decommissioning, ELPC's members could feel confident in the decommissioning process.

Moreover, ELPC has shown that discretionary standing is warranted under 10 C.F.R. § 2.309(e). Applicants focus on the fact that ELPC did not list all six of the factors under § 2.309,[15] but this narrow view ignores how the Petition addressed the relevant factors. The Petition explained how ELPC's extensive work on nuclear issues throughout the Midwest and its energy work in Michigan would assist the Commission "in developing a sound record."[16] The Petition also explained that its members have property and health interests in the proceeding, which ELPC detailed through the declarations of Ms. Flynn and Mr. Brand.[17] ELPC's explanation of the risks of improperly financed decommissioning went to "[t]he possible effect of any decision or order that may be issued in the proceeding."[18] The Petition's standing arguments articulated ELPC's unique perspective on these issues, going to show that its interests

[13] *Id.*
[14] Pet. at 6.
[15] Answer at 24–25.
[16] Pet. at 7; 10 C.F.R. § 2.309(e)(1)(i).
[17] Pet. at 5–6; *see* 10 C.F.R. § 2.309(e)(1)(ii).
[18] 10 C.F.R. § 2.309(e)(1)(iii); *see* Pet. at 7.

would not be represented by existing parties and the necessity of ELPC addressing those issues in this proceeding.[19] Finally, the Petition did not seek to or suggest that ELPC's participation could "inappropriately broaden the issues or delay the proceeding."[20]

Indeed, ELPC's participation would benefit the Commission given ELPC's unique perspective and intimate knowledge of the affected region. ELPC and its members have a longstanding interest in protecting public health and safety when it comes to nuclear power plant operation and decommissioning in the Midwest and Great Lakes region. In particular, ELPC and its members have a longstanding interest in protecting the Great Lakes and access to safe, clean water. The Applicants' Palisades nuclear unit is on the Lake Michigan shoreline. ELPC was engaged in the events and issues leading to the 1998 permanent shutdown and subsequent decommissioning of the Zion 1 and Zion 2 nuclear plants located on the shores of Lake Michigan in Northern Illinois. ELPC has worked in various ways to protect the Great Lakes from potential radiological damage by advocating for safe operation and expedited decommissioning of nuclear power plants that are sited proximal to—and sometimes literally on the shores of—the Great Lakes.

B. ELPC's Four Contentions Are Admissible.

ELPC offers four admissible contentions. The Applicants challenge each contention, asserting that none offer a "genuine dispute with the Application or any material issue of law" that would satisfy 10 C.F.R. § 2.309(f)(1).[21] The Applicants further assert that ELPC fails to provide supporting documentation, ignoring that ELPC's contentions are legal, not factual, disputes and that ELPC concisely supports its positions.[22] In making their challenge, the

[19] 10 C.F.R. § 2.309(e)(2)(i)–(ii); *see* Pet. at 7.
[20] 10 C.F.R. § 2.309(e)(2)(iii).
[21] Answer at 6.
[22] *Id.*

Applicants mischaracterize ELPC's contentions and misapply the Commission's standard for a genuine dispute with an Application. The Commission has explained that a genuine dispute on a material issue of law or fact is "a dispute that actually, specifically, and directly challenges and controverts the application, with regard to a legal or factual issue, the resolution of which 'would make a difference in the outcome of the licensing proceeding.'"[23] To show a genuine dispute on a material issue of law, a petitioner need only provide either "references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute or" an identification and explanation of the application's "fail[ure] to contain information on a relevant matter as required by law."[24] Because ELPC's contentions meet this standard, they are admissible contentions and sufficient to support ELPC intervention in this proceeding.

1. ELPC's First Contention Establishes a Genuine Dispute of Law as to Whether the Applicants Can Meet Financial Assurance Requirements Under 10 C.F.R. §§ 50.54(bb) and 72.30(b) Through Reliance on an Exemption to Use the Nuclear Decommissioning Trust Fund for Non-Radiological Decommissioning Activities.

ELPC's first contention raises the disputed legal question of whether the Commission can approve the Application given that Holtec Palisades' proffered financial assurance relies on the Applicants receiving an exemption to use the nuclear decommissioning trust fund ("NTD") for site restoration and spent fuel management.[25] ELPC's Petition explains how the Application improperly presumes that the Applicants will receive the requested exemption for purposes of establishing financial assurances under 10 C.F.R. §§ 50.54(bb) and 72.30(b).[26] ELPC does not

[23] *In re Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2)*, 59 N.R.C. 129, 148, Dkt. Nos. 50-413, 50-414 (Mar. 5, 2004) (quoting Rules of Practice for Demextic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)).
[24] *Id.* (citing *Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1& 2)*, 55 N.R.C. 49, 67–68, Dkt. Nos. 50-369, 50-370, 50-413, 50-414 (Jan. 24, 2002) (emphasis omitted)).
[25] Pet. at 8; *see* Request for Exemption from 10 C.F.R. 50.82(a)(8)(i)(A) and 10 C.F.R. 50.75(h)(1)(iv), Palisades Nuclear Plant, Dkt. Nos. 50-255, 72-007, Accession No. ML20358A239 (Dec. 23, 2020).
[26] Pet. at 8–11.

dispute that Applicants may receive an exemption allowing them to pull funds from the NDT for site restoration and spent fuel management. However, ELPC does dispute that, as a matter of law, Applicants may rely on a possible regulatory exemption—before obtaining a final, non-appealable order actually granting that exemption—to meet financial assurance requirements. Applicants fail to recognize this distinction, and as a result, their argument misses the mark.

Although the Applicants assert that the Commission "squarely" addressed the legal issue ELPC has raised in its Indian Point proceeding, they overstate the reach of that holding.[27] In that proceeding, the State of New York asserted that the Holtec Applicants could not rely on a regulatory exemption to use NDT funds because at the time of the application "the Holtec LLCs have neither sought nor received" the regulatory exemptions.[28] The Applicants emphasize the Commission's conclusion that "the exemption request" in Indian Point was "intertwined with, and constitute[d] an integral part of, the license transfer application."[29] The Applicants present this conclusion as directly rejecting the assertion that an applicant cannot rely on receiving a hypothetical exemption when establishing its financial qualifications.[30] However, the Applicants omit crucial context from this quoted language. Rather than addressing the merits of whether a genuine legal dispute existed, the quoted language was part of the Commission's conclusion about the scope of its own review. In the Indian Point proceeding, Entergy and the other applicants argued that the Commission could not even consider the exemption issues, which the Commission rejected, finding that "New York's exemption-related arguments . . . [fell] within

[27] Answer at 7.
[28] Petition of the State of New York for Leave to Intervene and for a Hearing at 12, *In re Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station, Units 1, 2, and 3)*, Dkt. No. 50-003, Accession No. ML20043F273 (Feb. 12, 2020) (emphasis added).
[29] Answer at 7 (quoting *In re Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station, Units 1, 2, and 3)* [hereinafter *Indian Point*], 92 N.R.C. __, Dkt. No. 50-003, Accession No. ML21015A201 (Jan. 15, 2021) (slip op. at 18)).
[30] Answer at 7.

the scope of th[e] proceeding."[31] In other words, the Commission was explaining that it could consider the exemption argument, not asserting that any exemption argument would fail because the exemption request is closely related to the financial assurances issue.

According to the Applicants, ELPC's argument is merely "a general argument that an applicant cannot rely on an exemption to support its cost estimates," which the Commission found "does not raise a genuine dispute with the application" in the Indian Point.[32] This statement attempts to frame ELPC's alternative reading of the regulations as mere "alleg[ations] that some matter ought to be considered."[33] However, ELPC's contention is a genuine dispute of law. It is clear that federal regulations prohibit licensees from using decommissioning funds for purposes other than decommissioning.[34] Because the Holtec LLCs had not received an exemption from this requirement when they applied for the permit transfer, their assertion that they meet the financial assurances requirement is deficient as a matter of law. The Holtec LLCs essentially ask the Commission to premise its financial assurances on funding that is by default unavailable for the purposes the Holtec LLCs propose to use it. Federal regulations require that transfer applicants establish their financial qualifications to hold the licenses, including having sufficient means to fund spent fuel management activities and decommissioning.[35] Read together, these regulatory requirements make clear that transfer applicants may not rely on an exemption they have yet to receive. As this offers a genuine dispute of how the Commission should interpret its regulations, ELPC's first contention is valid.

[31] *Indian Point* at 18.
[32] Answer at 7.
[33] *Id.* at 7 n.27 (quoting *In re Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 N.R.C. 200, 246 (1993), *petition for review denied*, CLI-94-2, 39 N.R.C. 91 (1994)).
[34] *See* 10 C.F.R. §§ 50.2, 50.82(a)(8)(i)(A).
[35] *See* 10 C.F.R. §§ 50.54(bb), 50.82(a)(8)(vii), 72.30(b).

2. ELPC's Second Contention Establishes a Genuine Dispute of Law as to Whether the Applicants May Rely on a 2% Rate of Return to Show That They Meet Financial Assurance Requirements.

ELPC does not here attack the NRC's decommissioning funding assurance requirements. Rather, ELPC seeks a hearing to show that an applicant may not assume a 2% rate of return on a decommissioning trust when not using the SAFSTOR decommissioning approach. However, Applicants characterize ELPC's petition as an attempted collateral attack on NRC regulations.[36] If successful, Applicants' argument would make virtually any legal dispute to a transfer application impossible to present to the Commission without presenting a "collateral attack." By disagreeing with the Applicants' interpretation of regulatory requirements, ELPC has, according to the Applicants, challenged the very rule itself. Such a twisting of 10 C.F.R. § 2.335 would undermine the ability of petitioners to raise genuine disputes of law, and the Commission should reject such an interpretation of ELPC's second contention.

ELPC's argument is not that the regulatory language is flawed or that a new rule would better serve statutory aims. Instead, ELPC's second contention asserts that the Application's reliance on the 2% rate of return violates 10 C.F.R. §§ 50.75(b)(1) and (e)(1)(i) as written because the regulatory language limits the use of the 2% rate of return assumption to SAFSTOR decommissioning proposals. Specifically, the regulatory language states that only licensees proposing "a period of safe storage" may take advantage of the 2% rate of return assumption.[37] The Commission describes the SAFSTOR approach as a decommissioning approach that involves "a period of safe storage of the stabilized and defueled facility followed by final decontamination [and] dismantlement and license termination."[38] Logically, this language

[36] Answer at 9.
[37] 10 C.F.R. §§ 50.75(e)(1)(i).
[38] NRC, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1 437, supp. 1, vol. 1, pt. 7 at § 7.2.2 (Nov. 2002) (emphasis added).

connects the situations in which an applicant may use the 2% rate of return assumption to the SAFSTOR method. Although the timeframe required for the SAFSTOR approach is "variable,"[39] Applicants do not present their 10-year dormancy period as the SAFSTOR method. And while they also resist characterizing their decommissioning process as using the DECON method,[40] the Application makes clear that the Applicants seek to rapidly decommission the Palisades facility. Merely packaging the 10-year dormancy period as "safe storage" is insufficient to qualify them for the 2% rate of return assumption. At the least, the regulatory language raises the question of how many years is considered to be a "period of safe storage" and whether 10 years is sufficient.

3. ELPC's Third Contention Establishes a Genuine Dispute of Law as to Whether the Decommissioning Trust Fund Alone Is Sufficient to Establish Financial Qualifications Under 10 C.F.R. § 50.33(f)(2).

The Applicants urge the Commission to find ELPC's third contention inadmissible, asserting that there is "no legal or factual basis for this contention" and that it "simply repeats arguments that the Commission has rejected in the Indian Point proceeding."[41] These assertions show only that the Applicants have failed to engage with the genuine legal dispute ELPC raises in its Petition.

To receive a transferred license, the proposed licensee must show that it has the financial means to "carry out . . . the activities for which the permit or lease is sought."[42] The licensee, therefore, must offer a "reasonable assurance that sufficient funds will be available"[43] for decommissioning based on "plausible assumptions and forecasts."[44] As ELPC explains in its

[39] NRC, Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities at 2012, NUREG-0586, Accession No. ML20151A155 (Oct. 1987).
[40] Answer at 10.
[41] *Id.* at 11.
[42] 10 C.F.R. § 50.33(f); *see id.* § 50.80(b)(1)(i).
[43] *In re Exelon Generation Co., LLC (Oyster Creek Nuclear Generating Station)*, 89 N.R.C. 465, 471, Dkt. Nos. 50-219, 72-015 (June 18, 2019).
[44] *In re N. Atl. Energy Serv. Corp. (Seabrook Station, Unit 1)*, 49 N.R.C. 201, 222, Dkt. No. 50-443 (Mar. 5, 1999).

Petition, the Applicants are attempting to base their financial qualification on the Palisades nuclear decommissioning trust fund ("NDT").[45] The Applicants attempt to soften this fact, asserting that "the NDT is not the only financial means that Holtec Palisades will have" because there are the potential recoveries from DOE's reimbursement of spent fuel management expenses.[46] But this argument only reinforces ELPC's point: Holtec Palisades lacks the existing financial means to undertake decommissioning.[47] A plain reading of the relevant regulatory language shows that proposed transferees must show their financial qualifications at the time of the application. An applicant must either show that it currently "possesses or has reasonable assurance of obtaining the funds necessary" for the license.[48] Here, Holtec Palisades currently has neither the NDT nor a concrete date for reimbursements from DOE. While granting the transfer will give Holtec Palisades access to the NDT, ELPC's first contention explains why that does not offer a reasonable assurance for decommissioning purposes. Therefore, the Application has failed to meet the legal requirements for financial qualification.

The Applicants argue that because they do not plan to operate the Palisades facility, ELPC's financial qualification argument must fail.[49] This is an obvious misreading of both the regulatory language and past NRC proceedings. The NRC has frequently stated that financial qualifications are meant to ensure adequate funding for decommissioning.[50] Ensuring such financial qualifications gets to the heart of the NRC's mission: "if the licensee cannot handle the financial burden of construction, operating, and decommissioning costs, public safety could be

[45] Pet. at 15 (citing Application for Order Consenting to Transfers of Control of Licenses and Approving Conforming License Amendments (Palisades Nuclear Plant and Big Rock Point), Dkt. Nos. 50-255, 72-007, 50-155, 72-043, Accession No. ML20358A075 (Dec. 23, 2020)).
[46] Answer at 13.
[47] *See* Pet. at 16.
[48] 10 C.F.R. § 50.33(f)(2).
[49] Answer at 11.
[50] *See, e.g., In re Entergy Nuclear Operations, Inc. et al. (Pilgrim Nuclear Power Station)*, CLI-20-12, Dkt Nos. 50-293, 72-1044 (Nov. 12, 2020) (slip op. at 11).

compromised."[51] The regulatory language requires a showing of financial qualification for an application to transfer an operating license[52]—as is the case in this proceeding. That the Holtec Companies do not intend to "operate" the Palisades facility does not change the applicable law. The Applicants must show that the transferee is financially qualified to carry out decommissioning. The decommissioning fund is insufficient proof of that qualification.

4. ELPC's Fourth Contention Is Admissible.

For the reasons discussed above, ELPC has independently met the Commission's requirements for participation. Therefore, so long as the Commission finds that the Michigan Environmental Groups' contentions are admissible, ELPC may adopt them. ELPC's fourth contention is admissible.

C. Conclusion

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

DATED: March 29, 2021

Respectfully submitted,
/Signed (electronically) by/

Margrethe Kearney
Counsel for ELPC
Environmental Law & Policy Center
35 E. Wacker Drive, Ste. 1600
Chicago, IL 60601
(312) 673-6500
mkearney@elpc.org

[51] *In re Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation)*, 61 N.R.C. 129, 149, Dkt. No. 72-22 (Mar. 16, 2005) (emphasis added).
[52] *See* 10 C.F.R. § 50.80(b)(1)(i).