UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
EXELON GENERATION COMPANY, LLC; EXELON CORPORATION; EXELON FITZPATRICK, LLC; NINE MILE POINT NUCLEAR STATION, LLC; R.E. GINNA NUCLEAR POWER PLANT, LLC; and CALVERT CLIFFS NUCLEAR POWER PLANT, LLC (Braidwood Station, Units 1 and 2; Byron Station, Unit Nos. 1 and 2; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Clinton Power Station, Unit No. 1; Dresden Nuclear Power Station, Units 1, 2, and 3; James A. FitzPatrick Nuclear Power Plant; LaSalle County Station, Units 1 and 2; Limerick Generating Station, Units 1 and 2; Nine Mile Point Nuclear Station, Units 1 and 2; Peach Bottom Atomic Power Station, Units 1, 2, and 3; Quad Cities Nuclear Power Station, Units 1 and 2; R. E. Ginna Nuclear Power Plant; Salem Nuclear Generating Station, Unit Nos. 1 and 2; Three Mile Island Nuclear Station, Unit 1; Zion Nuclear Power Station, Units 1 and 2; and Associated Independent Spent Fuel Storage Installations)	)	Docket Nos.: STN 50-456, STN 50-457, 72-73, STN 50-454, STN 50-455, 72-68, 50-317, 50-318, 72-8, 50-461, 72-1046, 50-10, 50-237, 50-249, 72-37, 50-333, 72-12, 50-373, 50-374, 72-70, 50-352, 50-353, 72-65, 50-220, 50-410, 72-1036, 50-171, 50-277, 50-278, 72-29, 50-254, 50-265, 72-53, 50-244, 72-67, 50-272, 50-311, 72-48, 50-289, 72-77, 50-295, 50-304, and 72-1037 -LT August 6, 2021

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

Ensuring the adequacy of applicants' financial qualifications "lie[s] at the core of the NRC's license transfer inquiry."[1] The NRC's review of transfer applications, therefore, must do more than simply rubber stamp a transfer applicant's optimistic projections. Nevertheless, the Applicants—Exelon Generation Company, LLC ("Exelon Generation"); Exelon Corporation; Exelon FitzPatrick, LLC; Nine Mile Point Nuclear Station, LLC; R.E. Ginna Nuclear Power Plant,

[1] *In re N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), 49 N.R.C. 201, 2019, Dkt. No. 50-443 (Mar. 5, 1999).

LLC; and Calvert Cliffs Nuclear Power Plant, LLC (collectively, "Exelon" or "Applicants")—ask the Commission to overlook the serious gaps in their Application and deny the Environmental Law & Policy Center's ("ELPC") petition for leave to intervene and request for a hearing. ELPC urges the Commission instead to grant its requests and subject the Applicants' transfer proposal to the serious scrutiny necessary for a transaction of its size and scope. Therefore, in accordance with 10 C.F.R. § 2.309, the Environmental Law & Policy Center ("ELPC") hereby submits this reply to Exelon's Answer Opposing the Petition of ELPC for Leave to Intervene and Request for a Hearing ("Answer"), filed on July 30, 2021 in the above-captioned proceeding.

A. ELPC's Contentions Are Admissible.

ELPC offers two admissible contentions. The Applicants challenge each contention, asserting that ELPC's petition does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1).[2] In making their challenge, the 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.'"[3] 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."[4] Because ELPC's contentions meet this

[2] *See* Answer at 13.
[3] *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 Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989)).
[4] *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).

standard, they are admissible contentions and sufficient to support ELPC's intervention in this proceeding.

1. The Proposed Transaction Is More Than A "Name Change"

Applicants claim that ELPC "fundamentally misunderstands" the various corporate entities discussed in the transaction.[5] But while Applicants seek to characterize the proposed transaction as a simple name change, Applicants' own description of the transaction affirms that "neither the new ultimate parent company nor Exelon Generation nor its subsidiaries will be affiliated with Exelon Corporation."[6] That is a profound change.

ELPC is not concerned about what Applicants will eventually name "SpinCo"; ELPC is concerned about the impact of SpinCo's divestiture of liability from the existing, and much more diversified, Exelon Corporation. The existence of HoldCo as a publicly traded company sitting above SpinCo does not resolve these concerns, because Exelon Corporation will also be divested of any obligation for HoldCo's liabilities.[7] Regardless of the fact that Exelon Generation has "maintained its own investment grade rating," the fundamental fact remains that after the transaction is consummated, Exelon Generation—whatever it is renamed—will henceforth be separate from and unable to access the support of Exelon Corporation's rate-regulated business. As the Applicants themselves emphasize, Exelon Generation will no longer be affiliated with Exelon Corporation.[8]

ELPC's concerns about this specific impact of Exelon's proposed corporate reorganization have come to fruition for other sources of energy generation. Exelon's proposed corporate reorganization bears a clear—and presumably intentional—resemblance to the reorganization

[5] Answer at 13.
[6] Application at 2.
[7] Answer at 13.
[8] Application at 2.

strategies employed by coal companies as the coal market continues its inevitable decline. As described in a 2019 *Stanford Law Review* article examining the use of bankruptcy to avoid environmental obligations, coal companies have used corporate reorganization to shield themselves from environmental cleanup obligations:

> [P]arent companies repeatedly spin off subsidiaries comprised of depleted mining assets and significant liabilities, either through divestiture or liquidation. The leading coal companies have embraced a strategy of depleting the value of assets by extracting all of the easily accessible coal, incurring significant environmental and retiree liabilities at the mine sites, and then disposing of the assets through divestiture or liquidation. When a successor company inevitably liquidates, the company that originally incurred these liabilities is shielded from the obligations.[9]

Regardless of the context in which the spin-off of assets occurs, there can be no question that "[o]ne of the most effective ways coal companies have been able to evade regulatory obligations is by spinning off burdensome assets to affiliates that cannot possibly make good on those obligations."[10] Exelon's proposed reorganization is the first step in this familiar process, with one material difference: because Exelon cannot complete this reorganization without license transfer approval from the NRC, federal regulators have the opportunity to closely scrutinize the transaction to ensure that Exelon cannot shirk its decommissioning obligations.[11]

2. ELPC's First Contention—The Application Fails to Meet Financial Qualification Requirements—Is Admissible.

ELPC argues in its first contention that the Application does not satisfy the NRC's stringent financial qualification requirements.[12] ELPC's Petition detailed the myriad ways in which the Application and its supporting documents rely on overly optimistic assumptions and do not engage

[9] Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 Stan. L. Rev. 879, 934 (2019).
[10] *Id.* at 952.
[11] The Petition filed by the People of the State of Illinois provides numerous suggestions for how the Commission may condition the transfer to protect the public. *See, e.g.*, Illinois Petition at 7, 17, 22.
[12] *See* Petition at 12.

in sufficient detail with the likely liabilities facing Exelon Generation's nuclear generation fleet.[13] 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"[14] and must offer a "reasonable assurance that sufficient funds will be available for" decommissioning[15] based on "plausible assumptions and forecasts."[16] By detailing financial issues that the Application did not sufficiently address, ELPC's Petition raised an admissible contention.

The Applicants assert that ELPC's arguments are "meritless" and "fail to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)" such that the Commission should deny ELPC's hearing request.[17] However, as detailed below, each of ELPC's arguments supports the admissibility of its first contention. The Applicants' insistence to the contrary is an attempt to shift their burden of proof in this proceeding and further gloss over the risks of the transaction for which they seek Commission approval.

The Applicants' statement that "ELPC fundamentally misunderstands the various corporate entities discussed in the LTA" exemplifies their approach to ELPC's concerns.[18] Specifically, the Applicants state that ELPC's refences to "SpinCo" as a "new corporate entity" are "incorrect" because "SpinCo is Exelon Generation."[19] The Applicants claim that this mischaracterizes SpinCo and "appears to conflate SpinCo with 'HoldCo'"[20] But this is a clear misrepresentation of ELPC's core argument about SpinCo. While the Applicants may insist that SpinCo is simply a continuation of Exelon Generation, ELPC's petition points out how the spin

[13] *See id.*
[14] 10 C.F.R. 50.33(f).
[15] *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).
[16] *In re N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), 49 N.R.C. 201, 222, Dkt. No. 50-443 (Mar. 5, 1999).
[17] Answer at 13.
[18] *Id.*
[19] *Id*.
[20] *Id*.

transaction will remove SpinCo from the Exelon corporate structure in a way that fundamentally alters the company and the chain of corporate liability. SpinCo is an opaque new entity in that it will lack the financial and structural backing of Exelon Corporation, and the uncertainty of the market for nuclear generation leaves significant questions about how such an entity can operate. As explained below, the Commission should accept ELPC's first contention and conduct a more thorough review of how the Applicants can satisfy the NRC's stringent financial qualifications requirements.

a. The License Transfer Application Does Not Provide Sufficient Information on Key Potential Liabilities.

NRC regulations require transfer applicants to provide "information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out, in accordance with regulations in this chapter, the activities for which the permit or license is sought."[21] The Applicants insist that they "fully complied with [§ 5.33(f)(2)] by submitting five-year *pro forma* consolidated financial statements as enclosures to the LTA."[22] While the Applicants are correct that § 50.33(f)(2) requires submission of "estimates for total annual operating costs for each of the first five years of operation of the facility" and "the source(s) of funds to cover these costs," the filing of that information is merely necessary, not sufficient.[23] As ELPC's Petition explained, the Commission's inquiry into whether there are reasonable assurances of covering estimated operating costs should extend beyond the optimistic estimates and projections that applicants provide.[24] Historically, this has meant that the Commission considers financial obligations market projections, credit ratings, and long-term power purchase contracts.[25]

[21] 10 C.F.R. § 50.33(f).
[22] Answer at 14.
[23] 10 C.F.R. § 50.33(f)(2).
[24] Petition at 12; *see* 10 C.F.R. § 50.33(f)(5).
[25] *See* Final Financial Qualifications for Nuclear Reactor Licensing Rulemaking, Regulatory Basis Document, Dkt. No. NRC-2014-0161, ML15322A185 at 6 (Oct. 14, 2016).

ELPC's Petition explained how the assumptions and data provided in the Application did not sufficiently account for, or explain how the Applicants would address, liabilities impacting their ability to cover operating costs. The Applicants insist that these arguments are "variously unsupported, immaterial, out-of-scope, or fail to raise a genuine dispute with the Application."[26] But in their defense of their Application, the Applicants continue to provide only the most cursory explanations of how SpinCo can fulfill its financial qualifications. For example, ELPC's Petition raised Exelon Generation's recent credit rating downgrade in the wake of the spin-off announcement and explained how this weak credit rating and eroding corporate revenues will place SpinCo in a precarious financial position.[27] The Applicants' response is to double down on their assertion that SpinCo "anticipates investment grade credit ratings" and explain that "[a] downgrade in its credit rating does not mean that Exelon Generation is no longer investment grade."[28] This response essentially insists that ELPC prove a negative while shirking the Applicants' responsibility to *demonstrate*—rather than simply anticipate—that they will have sufficient creditworthiness.

Similarly, the Applicants' provide only dismissive responses to ELPC's discussion of how early retirements, the complete disaffiliation from the Exelon utilities, and nuclear support services cut against the Applicants' financial qualifications. The Applicants assert, for example, that the Application provides sufficient information on how the Nuclear Operating Services Agreements [NOSAs] will impact SpinCo's financials because "the NOSAs clearly specify that SpinCo will 'provide corporate and administrative services necessary for the operation of the Facilit[ies] as the NRC license operator'" and "the *pro formas* . . . *include* corresponding costs."[29] But ELPC's

[26] Answer at 15.
[27] Petition at 15.
[28] Answer at 16.
[29] *Id.* at 17.

contention is not that the Applicants have not included a perfunctory analysis of SpinCo's NOSA requirements in their analysis. Instead, ELPC's Petition explained that the Applicants fail to adequately support the impact of the NOSA requirements and "base their asserts regarding SpinCo's financial strength exclusively on their own projections regarding the financial conditions of the generating assets."[30] The Applicants misrepresent ELPC's point entirely. The Applicants have the burden of establishing their financial qualifications, and their perfunctory treatment of the NOSA obligations in the Application does not adequately address those likely liabilities.

The Applicants present a similar misreading of ELPC's Petition in their assessment of ELPC's concern about the absence of Exelon Corporation as a financial backstop for SpinCo.[31] ELPC is not, as the Applicants suggest, claiming that Exelon Corporation's regulated utilities directly subsidize the nuclear fleet. Rather, ELPC's point is that Exelon Corporation, as parent company to both regulated utilities and nuclear facilities, had the diverse assets needed to provide a reliable financial backstop for the nuclear facilities. As ELPC pointed out, Exelon Corporation could provide parental guarantees and other financial assistance that a new holding company simply cannot.[32]

Yet in response to ELPC's concerns about the current obligor's extrication from any future liability for decommissioning of the largest nuclear fleet in the U.S., the Applicants insist that the Commission take at face value their optimistic projections of the next five years that SpinCo has the financial ability to meet its financial obligations.[33] Plausibility requires more than simply asserting financial qualification in one filing and insisting that it is irrefutable fact in

[30] Petition at 15.
[31] *See* Answer at 18.
[32] *See* Petition at 15–17.
[33] Answer at 19.

subsequent briefs. A more in-depth analysis from the Commission is necessary to ensure that SpinCo can meet its financial obligations even in the absence of a parent company backstop.

b. ELPC Has Raised a Material Issue with Its Argument that the Application Does Not Adequately Address the Cumulative Impact of Early Retirement.

ELPC also raised in its Petition how cumulatively, the early retirement of much of Exelon Generation's nuclear fleet will undermine its financial qualifications.[34] The Applicants dismiss ELPC's arguments by stating that the Application addresses the issue and "*assume*[s] the early retirement of eight units."[35] The Applicants assert that "ELPC does not identify any particular units, much less provide a reasoned analysis as to why it is 'implausible' for Exelon Generation to assume such units will or will not continue to operate."[36] Once again, the Applicants mischaracterize ELPC's arguments and misrepresent the plausibility standard.

The Applicants insist that ELPC "conflates its preferred standard of 'concrete evidentiary support' with NRC's *actual* standard for reasonable assurance, which requires a demonstration that financial projections are 'plausible.'"[37] However, this misunderstands the applicable standard. As the Commission has explained, "[a]n applicant's mere proffering of 5-year cost and revenue projections will not be sufficient in the face of plausible and adequately supported claims that those projections are inaccurate or otherwise do not provide adequate assurance of financial qualifications."[38] In other words, it is ELPC's argument that need be merely plausible. The Applicants, on the other hand, must do more than "mere[ly] proffer[]" their cost and revenue projections to meet their burden.

[34] Petition at 17–18.
[35] Answer at 20.
[36] *Id.* at 21.
[37] *Id.* at 22.
[38] *In re GPU Nuclear, Inc. Jersey Cent. Power & Light Co. & Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), 51 N.R.C. 193, 194 (May 3, 2000).

ELPC's argument easily meets this plausibility standard. Not only does ELPC point to the declaration of former NRC Commissioner Peter Bradford to explain how decommissioning costs are rising, but it also points to financial analysis showing that a significant amount of nuclear capacity is likely retire before license expiration.[39] The Application and the Applicants' Response fail to engage with how these factors combined will financially stress an entity so dependent on revenue from nuclear facilities. Applicants submit that considering a scenario in which eight nuclear units retire early is sufficient engagement with very real concerns about the future of large nuclear generating facilities. That is not the case. Without addressing the likely escalation in decommissioning cost, the significant uncertainty inherent in the decommissioning process, and the possibility of much more significant early retirement of its units, the Application cannot show that SpinCo will have the necessary financial qualifications to satisfy NRC regulations.

c. Exelon's $1.208 Billion in Nuclear Spent Fuel Fees and Nuclear Electric Insurance Limited ("NEIL") Liability Raise Material Issues with the Application.

The Applicants also challenge ELPC's arguments that the financial risks of Exelon's $1.208 billion in nuclear spent fuel fees and NEIL liability undermine the Application's rosy picture of SpinCo's financial qualifications.[40] The Applicants insist that because their financial projections show "substantial assets and revenues" and their financial statements "account for the one-time fee obligations," the nuclear spent fuel fees are not a material issue.[41] They also assert that "it is not possible to predict" the risk of a retrospective premium to SpinCo's finances, and, regardless, the required annual compliance filings remove any issue with NEIL liability.[42]

[39] Petition at 17–18.
[40] *See* Answer at 22–25.
[41] *Id.* at 23.
[42] *Id.* at 24–25.

The Applicants' response does little to address the core issue that ELPC raises: the Application does not provide sufficient explanation of how SpinCo—a company lacking a strong backstop from a parent company and facing the decline of its nuclear fleet—can respond to the significant financial risks of spent fuel fees and NEIL liability. Mere references to these expenses on financial statements and projections is not an explanation of SpinCo's ability to marshal resources to address such expenses. Moreover, the fact that the NRC will have a continuing oversight of the licensees, including their compliance with required guarantees of payment for NEIL liabilities, does not obviate the need for the NRC to assess that issue now. The Applicants' argument to the contrary rests on the Commission's decision that issues of ongoing regulatory compliance were outside the scope of a hearing on an application to *renew* a license.[43] Here, the Commission is considering a transfer application to what is, fundamentally, a new entity given its severed association with its former parent company. These financial liabilities are ripe for the Commission to consider, and the Applicants should not be permitted to evade substantively engaging with how those risks will impact the licensees after transfer.

d. The Lack of In-Depth Discussion of Non-Radiological Shutdown Obligations Creates a Material Issue with the Application.

ELPC's first contention also raises the issue that the Application inadequately considers non-radiological costs, which the licensees will have to bear in addition to radiological decommissioning costs.[44] Despite their acknowledgement that many of their nuclear facilities face premature closure, the Applicants waive away this concern. They assert that "the financial ability

[43] *See Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI011-11, 74 N.R.C. 427, 429 (2011).
[44] Petition at 21.

of an entity to engage in activities with no nexus to radiological health and safety is squarely outside the scope of this proceeding and, indeed, beyond the NRC's jurisdiction."[45]

However, ELPC's petition demonstrates the connection between non-radiological costs and the ability of SpinCo to fulfill its operating cost obligations. ELPC cites to Mr. Bradford's explanation of the high cost of non-radiological decommissioning. Because SpinCo will be obligated to provide for non-radiological decommissioning costs for its fleet, the early decommissioning of a substantial portion of that fleet would undermine its ability to provide adequate financial assurances for the operating facilities. Non-radiological decommissioning costs fall outside the NRC's jurisdiction, but financial qualifications remain squarely within the agency's purview. Applicants cannot escape the fact that early decommissioning of a substantial portion of the fleet will also accelerate SpinCo's obligations under state and federal environmental laws. The NRC is well within its authority to consider how those non-radiological environmental obligations will impact SpinCo's overall financial qualifications and ability to safely operate those units that have not retired. Based on this issue and the others discussed above, ELPC has raised an admissible contention.

3. ELPC's Second Contention—The Application Fails to Provide Reasonable Assurances of Adequate Decommissioning Funds—Is Admissible.

ELPC's second contention focuses on the licensee's obligation under 10 C.F.R. § 50.33(k)(1) to provide reasonable assurance of sufficient funding for decommissioning. ELPC, relying on both its expert and the substantial likelihood of numerous early nuclear retirements, explains how the Application fails to show that "sufficient funds will be available to

[45] Answer at 26.

decommission" the transferred nuclear facilities.[46] ELPC looks to both the decommissioning funds for the entire fleet and specifically Byron Units 1 & 2.

The Applicants insist that ELPC's arguments are "baseless" because they do not explicitly cite to specific decommissioning portions of the Application and instead refer to Exelon's public statements on its decommissioning liabilities.[47] The Applicants claim that the Application "squarely addresses the anticipated early shutdown" of much of its nuclear fleet and its approach to the Byron Units 1 & 2 decommissioning shortfalls.[48]

The Applicants once again avoid addressing the core of ELPC's contention. Despite the Application's cursory discussion of decommissioning, ELPC's contention is that the decommissioning scenario the Applicants present is overly optimistic at best and implausible at worst. The Applicants ask the Commission to take their word that their estimates are "conservative," meaning that any concern about the adequacy of decommissioning funding must be overblown.[49] Similarly, they assert that their simple statement that "SpinCo plans to provide surety bonds in the full amount(s) of the remaining shortfall(s)" for the Byron Units 1 & 2 is enough to satisfy NRC financial assurance requirements.[50] Such conclusory statements leave essential details unanswered, especially given that the Applicants provide little evidence beyond their own optimistic projections that SpinCo will have the significant financial means necessary to provide those bonds. Given the seriousness of the decommissioning, a deeper review of how SpinCo will address the bleak financial landscape for its nuclear fleet while simultaneously

[46] *In re Exelon Generation Co., LLC* (Oyster Creek Nuclear Generating Station), 89 N.R.C. 465, 471 (2019) (citing 10 C.F.R. §§ 50.33(f), 50.33(k)(1), 50.80(b)(1)(i), 50.82(a), 72.30(b)–(c)).
[47] Answer at 29.
[48] *Id.* at 30, 33.
[49] *Id.* at 31.
[50] *Id.* at 32.

providing sufficient decommissioning funding and lacking access to parent company resources is necessary.

B. 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.[51] 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."[52] As shown in its Petition, ELPC meets these requirements through its demonstration that the proposed license transfer will cause an injury-in-fact to an ELPC member, Robert L. Vogl, and that those injuries are within the zone of interests protected by the Atomic Energy Act.[53] ELPC's petition shows much more than "a mere 'interest in a problem.'"[54] The Applicants' arguments to the contrary minimize the substantial interests of ELPC and Mr. Vogl in the license transfer. ELPC and its members will suffer specific, concrete harm from the license 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 Mr. Vogl's declaration are sufficient to show injury-in-fact. The Applicants' argument to the contrary misunderstands the basis upon which ELPC is arguing standing.[55] Rather than Mr. Vogl's proximity to the Byron Nuclear Generating Station being the sole basis for standing, it is instead additional evidence of his risk of injury-in-fact from a rushed transfer process. The Applicants' argument misapplies standing doctrine, which the Supreme

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[51] 42 U.S.C. § 2239(a).
[52] *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)).
[53] 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).
[54] *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).
[55] *See* Answer at 38.

Court has explained "does not mean . . . that the risk of real harm cannot satisfy the requirement of concreteness."[56] Standing requires only that "there is a 'substantial risk' that the harm will occur."[57] Here, the legal deficiencies of the Application create the substantial risk that there will be an inadequately funded decommissioning of Exelon's nuclear facilities. Mr. Vogl's proximity to the Byron Nuclear Generating Station means that the likelihood of inadequate funding and decommissioning will substantially impact his daily life. As Mr. Vogl explains, financial problems related to decommissioning could not only delay the decommissioning process—putting him and his family at greater risk of radiological exposure—but also undermine its sufficiency.[58] Mr. Vogl also details how the specific landscape makes adequate decommissioning particularly important to avoid contaminated water in the area in which he and his family live.[59] This is not "attenuated speculation."[60] Mr. Vogl's experience with the Byron Nuclear Generating Station and, by association Exelon, is longstanding and influenced by his professional background.[61] Here, the deficiencies of the Application create the substantial risk that there will be an inadequately funded decommissioning of the Byron nuclear facilities, putting an ELPC member, Mr. Vogl, at substantial risk.

Moreover, ELPC has shown that discretionary standing is warranted under 10 C.F.R. § 2.309(e). As explained in the Petition, ELPC's "participation may reasonably be expected to assist in developing a sound record."[62] ELPC's extensive work on nuclear issues throughout the Midwest would assist the Commission in assessing the Application. The Petition also explained

[56] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).
[57] *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)).
[58] Vogl Declaration ¶ 8.
[59] *Id.* ¶ 11.
[60] Answer at 39.
[61] Vogl Declaration ¶¶ 2, 3.
[62] Petition at 11 (citing 10 C.F.R. § 2.309(e).

that its members have property and health interests in the proceeding, which ELPC detailed through the declaration of Mr. Vogl.[63] 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."[64] The Petition's standing arguments articulated ELPC's unique perspective on these issues, going to show that its interests would not be represented by existing parties and the necessity of ELPC addressing those issues in this proceeding.[65] Finally, the Petition did not seek to or suggest that ELPC's participation could "inappropriately broaden the issues or delay the proceeding.[66] The Commission should find that ELPC has standing to participate in this proceeding.

C. Conclusion

The Applicants' Answer fails to resolve the fundamental flaw with their proposed indirect transfer of the largest nuclear fleet in the United States. The Applicants, despite devoting over forty pages to challenging ELPC's petition, do not provide an adequate explanation of how SpinCo and its newly created parent company will be able to meet NRC financial requirements given the numerous challenges facing their nuclear fleet. In fact, the Applicant's opposition reinforces ELPC's concern that the purpose of the corporate reorganization necessitating the license transfer is to divest the existing corporate entities from future liability for decommissioning. ELPC sets forth two admissible contentions—each of which raise disputed issues of fact or law—that should be considered by the NRC at an oral hearing under Subpart M. ELPC has standing to intervene in Applicants' request to transfer licenses for its nuclear power plants, and the Commission should grant ELPC leave to intervene in this proceeding and the request for a hearing.

DATED: August 6, 2021

Respectfully submitted,
/Signed (electronically) by/

[63] 10 C.F.R. § 2.309(e)(1)(i); Petition at 10–11.
[64] 10 C.F.R. § 2.309(e)(1)(iii); *see* Petition at 12–28.
[65] 10 C.F.R. § 2.309(e)(2)(i)–(ii); Petition at 11–12.
[66] 10 C.F.R. § 2.309(e)(2)(iii).

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