August 25, 2023

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
South Texas Nuclear Operating Company	)	Docket Nos. 50-498-LT
NRG South Texas LP and its parent companies,	)	50-499-LT
and Constellation Energy Generation, LLC	)	72-1041-LT
	)	
(South Texas Project, Units 1 and 2)	)	

NRG's Answer Opposing the City of San Antonio's and City of Austin's Petition to Intervene and Supplemental Contention

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i), NRG South Texas LP ("NRG South Texas") and its parent companies (collectively, "NRG") hereby answer and oppose the petition to intervene[1] and supplemental contention[2] filed by the City of San Antonio and City of Austin ("Cities") in this proceeding for the Nuclear Regulatory Commission's ("NRC") consent to an indirect transfer of control of NRG South Texas' licenses. To be admitted as a party and granted a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.[3] The Commission should deny the Cities' hearing and intervention requests because the Cities have neither demonstrated standing in this proceeding nor proffered any admissible contention.

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[1] Motion to Dismiss License Transfer Application, Immediately Stay NRC Proceedings, and Petition to Intervene City of San Antonio, Texas Acting By and Through The City Public Service Board of San Antonio and the City of Austin, Texas (July 31, 2023) ("Petition"). NRG has previously answered the Cities' motion. *See* NRG's Answer Opposing the Motion by the City of San Antonio and the City of Austin to Dismiss or Suspend License Transfer Proceeding (Aug. 4, 2023). This answer now responds to the petition to intervene, including the Cities' claim to standing and proposed contentions.

[2] Supplemental Contention to Petition to Intervene of San Antonio, Texas Acting By and Through The City Public Service Board of San Antonio and the City of Austin, Texas (Aug. 14, 2023) ("Supplemental Contention").

[3] 10 C.F.R. § 2.309(a).

This proceeding involves the application, submitted by STP Nuclear Operating Company ("STPNOC") on behalf of NRG and Constellation Energy Generation, LLC ("Constellation"), for NRC consent to the indirect transfer of control of NRG South Texas' licenses resulting from Constellation's acquisition of NRG South Texas.[4] Those licenses authorize NRG South Texas to possess an ownership interest in the South Texas Project Energy Generating Station ("STP").[5] NRG South Texas holds a 44-percent undivided ownership interest in the station, as well as interests in nuclear decommissioning trust funds and various contracts related to investment and management of such trust funds. After the acquisition, it will remain the licensed owner of this interest (renamed "Constellation South Texas" but remaining the same legal entity[6]).

Constellation has the largest fleet of nuclear power plants in the United States, owning and operating or co-owning twenty-three nuclear reactors at thirteen sites in five states.[7] It has total assets of more than $46 billion[8] and investment grade bond ratings[9]

In support of the request for NRC consent to this indirect transfer of control, the Application includes a projected income statement demonstrating that Constellation South Texas' annual market revenues will cover its share of the estimated total annual operating costs

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4 South Texas Units 1 and 2, Application for Order Approving the Indirect Transfer of Control of Licenses (June 12, 2023) (ADAMS Accession No. ML23163A176).

5 STPNOC, which is the licensed operator of STP, submitted the Application on behalf of the Applicants in accordance with the South Texas Project Operating Agreement among the Participants (owners), which provides for STPNOC to act on behalf of the Participants in all matters related to licensing, and to assist a Participant in discharging its responsibilities to regulatory authorities. South Texas Project Operating Agreement ("Owners Agreement," attached as Exhibit B to the Petition), §§ 2.1, 9.3.

6 Application at 2 n.1.

7 *Id.*, at Encl. 1 p.4.

8 *Id.*, at Encl. 1 p.9.

9 *Id.*, at Encl. 1 p.7.

for each of the five years following the indirect license transfer,[10] thus demonstrating that Constellation South Texas will remain financially qualified under the NRC standard in 10 C.F.R. § 50.33(f)(2). Although not required by the NRC rules, the Application also includes a commitment by Constellation to provide up to $90 million in credit, if necessary, to Constellation South Texas,[11] to fund approximately six months' worth of the average projected obligations of Constellation South Texas for its share of the fixed operations and maintenance costs, if supplemental funding were required.[12]

As the NRG parent companies will no longer own NRG South Texas after the acquisition, the Application also requests NRC's consent to terminate their support agreements currently in place.[13] The Application notes that the current support agreements were previously sized at $120 million to provide for one year's worth of the fixed operations and maintenance costs at the time of prior license transfers, which exceeded NRC's guidance.[14]

The Cities are licensed co-owners of STP. The City of San Antonio holds a 40-precent undivided ownership interest in STP, while the City of Austin holds a 16-percent undivided ownership interest. They have initiated litigation in Texas state court claiming that they have a

[10] *Id.*, at Encl. 1 p.8 and Encl. 5A. The confidential proprietary projections in Enclosure 5A to the Application were provided by Counsel for Constellation to Counsel for the City of San Antonio on July 26, 2023, and to Counsel for the City of Austin on August 7, 2023.

[11] *Id.*, at Encl. 1 p.8 and Encl. 6.

[12] *Id.*, at Encl. 1 pp.8-9.

[13] *Id.*, at Encl. 1 p.9.

[14] *Id.*, at Encl. 1 p.9 n.4.

right of first refusal which has been ignored.[15] NRG maintains that there is no right of first refusal applicable to Constellation's acquisition of NRG South Texas.[16]

The Cities' Petition appears predominantly an attempt to embroil the NRC in a contractual commercial dispute and thus obtain greater leverage to extract commercial concessions from NRG and Constellation. Proposed Contention 2 asserts that NRG does not have authority to transfer its ownership interest to Constellation until the Cities have had an opportunity to determine whether to exercise their claimed right of first refusal. As discussed later in this Answer, the Commission has stated that it will not be drawn into such commercial contractual disputes having no link to safety or security.

Perhaps recognizing the infirmity of this contention as a matter beyond the scope of this proceeding, the Petition grasps at other far-fetched assertions – that STPNOC lacked authority to submit the Application (Contention 1), and that STPNOC and NRG do not have the authority to diminish NRG's current support agreements (Contention 3). In addition, their Supplemental Contention asserts that the request to reduce the existing support agreement is unjustified (Contention 4). But none of the Cities' proposed contentions satisfies the NRC's standards for an admissible contention. None of the contentions genuinely disputes that Constellation South Texas will remain qualified to own its interest in STP following the acquisition, which is the focus of the NRC's review of the Application, defining the scope of this proceeding. None of the contentions is supported by facts, expert opinion, references or other sources that demonstrate a genuine dispute with the Application on a material issue of law or fact. The

[15] Petition, Exhibits J and M.

[16] NRG has filed answers in the state court proceeding denying the allegations and claims in the Cities' complaints. NRG has also moved for summary judgment, and Constellation has joined in that motion.

agreements that Cities claim limit STPNOC's authority to submit the Application or to request termination of NRG's current support agreements do not support those claims. To the contrary, on their face, those agreements clearly authorize STPNOC to act on NRG's behalf in all matters related to licensing and require no further approval by the co-owners. Similarly, the right of first refusal in the Participation Agreement among owners,[17] on which the Cities rely, is on its face inapplicable to the current transaction, and supplemental agreements to which the Cities refer do not alter it. And *no* parent support agreement is required under the NRC rules or guidance where, as here, the projected income statement demonstrates considerable positive annual net income.

In addition, the Petition fails to establish the Cities' standing. The Cities claim to be injured by submittal of the Application without approval of the Owners Committee and without NRG honoring their alleged right of first refusal, but these claims represent contractual commercial disputes outside the zone of interests of the Atomic Energy Act ("AEA") and are therefore insufficient to establish standing. Further, the existence of these alleged contractual rights is not supported, and the alleged deprivation of a right of first refusal is at this point, and at most, conjectural and speculative, as its existence depends on the outcome of the ongoing state court litigation. The Cities' claim to being injured by the reduction in the parent support obligation, which they assert would increase the risk of their being forced to assume a greater than expected share of STP's costs, is likewise insufficient to establish standing. The Cities do not dispute that Constellation South Texas meets the NRC's projected income test (which shows that Constellation South Texas' annual market revenues will exceed its share of estimated annual

[17] Amended and Restated South Texas Project Participation Agreement between City of San Antonio, Central Power and Light Co., Houston Lighting & Power Co., and City of Austin (Nov. 17, 1997) ("Participation Agreement" attached as Exhibit A to the Petition).

operating costs by a considerable margin – over $100 million annually on average), thereby establishing its continued financial qualifications under the NRC rules following the acquisition. Therefore, the Cities' claimed risk of having to assume a greater share of cost is entirely speculative and conjectural, and not concrete, "certainly impending," and "real and immediate" as is required. Further, the Cities make no claim regarding any risk of radiological harm to their property, making their alleged injury purely economic – beyond the AEA's zone of interest.

Because the Cities have neither submitted an admissible contention nor established standing, their hearing request must be denied.

II. LEGAL STANDARDS FOR ADMISSIBILITY OF CONTENTIONS

To intervene in a license transfer proceeding, petitioners must set forth an admissible contention that fulfills the requirements set forth in 10 C.F.R. § 2.309(f)(1)(i)-(vi). 10 C.F.R. § 2.309(f)(1) requires that contentions must be "set forth with particularity"[18] and that each contention must do *all* of the following:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
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> (ii) Provide a brief explanation of the basis for the contention;
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> (iii) Demonstrate that the issue raised is within the scope of the proceeding;
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> (iv) Demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
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> (v) Provide a concise statement of the alleged facts or expert opinions, including references to the specific sources and documents that support the petitioner's position and upon which the petitioner intends to rely; and
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> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[19]

[18] 10 C.F.R. § 2.309(f)(1).

[19] 10 C.F.R. § 2.309(f)(1)(i)-(vi).

These standards are enforced rigorously. "If any one . . . is not met, a contention must be rejected."[20]

The Commission's contention admissibility requirements are "strict by design."[21] They seek "to ensure that NRC hearings 'serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.'"[22] The requirements thus reflect a "deliberate effort to prevent the major adjudicatory delays caused in the past by ill-defined or poorly-supported contentions that were admitted for hearing although 'based on little more than speculation.'"[23] To warrant an adjudicatory hearing, proposed contentions thus must have "some reasonably specific factual or legal basis."[24] The petitioner alone bears the burden to meet the standards of contention admissibility.[25]

Under 10 C.F.R. § 2.309(f)(1), a petitioner must explain the basis for each proffered contention by stating alleged facts or expert opinions that support the petitioner's position and on

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[20] *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 N.R.C. 149, 155 (1991) (citation omitted); *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 437 (2006) ("These requirements are deliberately strict, and we will reject any contention that does not satisfy the requirements.") (citations omitted).

[21] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 N.R.C. 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 N.R.C. 1 (2002).

[22] *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 N.R.C. 207, 213 (2003) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 N.R.C. 328, 334 (1999)) (emphasis added) (internal citation omitted).

[23] *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 &2), CLI-15-8, 81 N.R.C. 500, 504 (2015) (quoting *Oconee*, CLI-99-11, 49 N.R.C. at 334).

[24] *Id.* (quoting Millstone, CLI-03-14, 58 N.R.C. at 213).

[25] *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 N.R.C. 321, 325, 329 (2015) ("[I]t is Petitioners' responsibility . . . to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission") (internal citation omitted).

which the petitioner intends to rely in litigating the contention at hearing.[26] To be admissible, the issue raised must fall within the scope of the proceeding and be material to the findings that the NRC must make with respect to the application.[27] The Commission has defined a "material" issue as meaning one where "resolution of the dispute *would make a difference in the outcome* of the licensing proceeding."[28] Contentions that challenge NRC regulations,[29] seek to impose requirements stricter than those imposed by the agency,[30] or opine on the manner in which Staff should conduct its review[31] are all outside the scope of NRC adjudicatory proceedings.

A contention also must provide sufficient information to show a genuine dispute with the applicant on a material issue of law or fact.[32] The contention must refer to the "specific portions of the application . . . that the petitioner disputes," along with the "supporting reasons for each dispute; or, if the petitioner believes that an application fails altogether to contain information required by law, the petitioner must identify each failure, and provide supporting reasons for the

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[26] 10 C.F.R. § 2.309(f)(1)(ii), (v).

[27] 10 C.F.R. § 2.309(f)(1)(iii)-(iv); *Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 and 2), CLI-17-4, 85 N.R.C. 59, 74 (2017).

[28] Final Rule, Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) (emphasis added).

[29] 10 C.F.R. § 2.335(a).

[30] *See Entergy Nuclear Vt. Yankee, LLC* (Vt. Yankee Nuclear Power Station), LBP-15-4, 81 N.R.C. 156, 167 (2015); *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 N.R.C. 301, 315 (2012); *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 N.R.C. 193, 206 (2000); *Curators of the Univ. of Missouri* (TRUMP-S Project), CLI-95-1, 41 N.R.C. 71, 170 (1995).

[31] *See, e.g., Fla. Power & Light Co*. (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 N.R.C. 3, 25 (2001) (quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 N.R.C. 325, 350 (1998), *aff'd sub nom. Nat'l Whistleblower Ctr. v. NRC*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) ("[I]t is the license application, not the NRC staff review, that is at issue in our adjudications.")).

[32] 10 C.F.R. § 2.309(f)(1)(vi); *Susquehanna*, CLI-17-4, 85 N.R.C. at 74.

petitioner's belief."[33] To demonstrate that a genuine material dispute exists, "'[b]are assertions and speculation,' even by an expert, are insufficient to trigger a full adjudicatory proceeding."[34]

III. THE CITIES FAIL TO SET FORTH ANY ADMISSIBLE CONTENTION

The Cities proffer four contentions. None of them is admissible.

A. Contention 1 Is Not Set Forth with Particularity, and Is Outside the Scope of the Proceeding, Not Material to the Findings the NRC Must Make, and Not Supported by Information Demonstrating a Genuine Material Dispute with the Application

The Cities' Contention 1, which alleges that STPNOC did not have the authority to submit the Application,[35] is inadmissible because it is not within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii), and is not material to the findings the NRC must make to support the action that is involved in the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iv). Contention 1 is also inadmissible because it is not set forth with particularity, as required by 10 C.F.R. § 2.309(f)(1), and is not supported by any information demonstrating a genuine, material dispute with the Application, as required by C.F.R. § 2.309(f)(1)(vi).

1. Contention 1 Is Not Set Forth with Particularity

As a threshold matter, Contention 1 consists of a single sentence, with no attempt to address the standards in 10 C.F.R. § 2.309(f)(1), and no reference to any specific source or documents supporting the Cities' position.[36] Instead, it refers to the "reasons set forth herein,"[37] referring perhaps to the background section of its Petition or perhaps to its motion to dismiss the

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[33] *Susquehanna*, CLI-17-4, 85 N.R.C. at 74 (citing 10 C.F.R. § 2.309(f)(1)(vi)).

[34] *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 N.R.C. 704, 714 (2012) (citation omitted).

[35] Petition at 21.

[36] *See id*.

[37] *Id.*

proceeding. This vague reference is insufficient[38] and does not meet the requirement that contentions must be set forth with particularity.

2. Contention 1 Is Not Within the Scope of this Proceeding or Material to the Findings that the NRC Must Make

In any event, Contention 1 is not within the scope of this proceeding[39] or material to the findings that the NRC must make to consent to the indirect transfer of control of NRG South Texas' licenses. Under the NRC rules governing license transfers, "the Commission will approve an application for the transfer of a license, if the Commission determines: (1) That the proposed transferee is qualified to be the holder of the license; and (2) That transfer of the license is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto."[40] The NRC Staff's review to make this determination examines technical and financial qualifications of the owner (although technical qualifications is generally not an issue in reviewing indirect transfers, where the licensee remains the same),

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[38] *See Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 N.R.C. 234, 240-41 (1989) ("The Commission expects parties to bear their burden and to clearly identify the matters on which they intend to rely with reference to a specific point. The Commission cannot be faulted for not having searched for a needle that may be in a haystack."). The Commission has refused to "sift through the parties' pleadings to uncover and resolve arguments not advanced by the litigants themselves." *Pacific Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2)*, CLI-02-16, 55 N.R.C. 317, 337 (2002) (quoting *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), CLI-99-4, 49 N.R.C. 185, 194 (1999)).

[39] The Commission has stated that the scope of review under its rules determines the scope of admissible contentions. "Adjudicatory hearings . . . will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff's review) necessarily examines only the questions our safety rules make pertinent." *Turkey Point*, , CLI-01-17, 54 N.R.C. at 10.

[40] 10 C.F.R. § 50.80(c). For indirect license transfers, the Commission will approve an application if the Commission determines that the proposed transaction will not affect the qualifications of the licensee to hold the license. *See* STP Nuclear Operating Company; South Texas Project, Units 1 and 2, and the Associated Independent Spent Fuel Storage Installation; Consideration of Approval of Indirect Transfer of Licenses and Conforming Amendments, 88 Fed. Reg. 46,192, 46,193 (July 19, 2023); LIC-107, Revision, Procedures for Handling License Transfers (Dec. 8, 2008) at 1 (ADAMS Accession No. ML081910478).

decommissioning funding assurance, absence of foreign ownership, and continued compliance with insurance and indemnity requirements.[41] Whether the STP Owners Committee's approval was required before STPNOC could assist NRG South Texas and Constellation submit the Application is not within the scope of, or relevant to, any of the findings that the NRC must make to consent to the indirect transfer of control. At most, it represents a contractual dispute between the co-owners, beyond the Commission's purview. Faced with similar facts, the Commission has stated:

> This case, at its core, is a commercial dispute between regulated parties, The Commission will not be drawn into such disputes absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders and regulations.[42]

Furthermore, the Cities' meritless claim that STPNOC did not have authority to submit the Application is immaterial because (a) NRG and Constellation are also identified as applicants in the license transfer application, (b) the license transfer application requests consent only for the indirect transfer of control of the licenses held by NRG South Texas, and (c) the Application includes an affirmation from Constellation attesting to the accuracy of Constellation's representations. Regardless of whether STPNOC should have assisted NRG and Constellation in submitting the Application, a complete application by both the transferor and transferee is before the NRC. The Cities point to no NRC regulation that requires more. Because NRG and Constellation are both applicants for the required NRC consent, resolution of any dispute over whether STPNOC should have assisted in submitting the Application would make no difference in the outcome of the proceeding.

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[41] NRC Backgrounder, "Reactor License Transfers," at 2-3 (Apr. 2016) (ML040160803).

[42] *CBS Corp.* (Waltz Mill Facility), CLI-07-15, 65 N.R.C. 221, 234 (2007).

3. Contention 1 Is Not Supported by Any Information Demonstrating a Genuine, Material Dispute with the Application

In any event, the Cities' assertion that STPNOC lacked authority to submit the Application is based on mischaracterization of certain agreements and thus fails to demonstrate any genuine dispute with the Application. Documents cited by petitioners should be examined to confirm that they support a proposed contention.[43] Here, they do not.

Mischaracterizing Section 2.1 of the Operating Agreement, the Cities first assert:

> The Operating Agreement authorizes STPNOC to "act on behalf of Participants [owners] in all matters related to NRC licensing of the South Texas Project . . . in accordance with . . . Participants' Direction," which is expressed in the form of Owners Committee approval.[44]

Reading the entirety of the quotation from Section 2.1 of Operating Agreement provision reveals a very different meaning:

> Opco shall act on behalf of Participants in all matters related to NRC licensing of the South Texas Project and, on behalf of the Participants, shall Operate, and make Capital Improvements at, the South Texas Project in accordance with the Operating Licenses and applicable laws and regulatory requirements and Participants' Direction from time to time; provided that Opco shall have sole authority, as the Operator of the South Texas Project pursuant to the Operating Licenses, to make all decisions to protect the public health and safety as required by the Operating Licenses and applicable laws and regulations and as are necessary to comply with applicable laws and regulations.[45]

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[43] *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-22, 82 N.R.C. 310, 320 n.68 (2015); *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 457 (2006)); *Vermont Yankee Nuclear Power Corp*. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 N.R.C. 29, 48 (1989*), vacated in part on other grounds and remanded*, CLI-90-04, 31 N.R.C. 333 (1990). A petitioner's documents may be examined both for statements that support and oppose its position. *See Virginia Elec. and Power Co.* (North Anna Power Station, Unit 3), LBP-08-15, 68 N.R.C. 294, 334 n.207 (2008); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 N.R.C. 720, 750 (2010); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 N.R.C. 61, 90 (1996), *rev'd in part on other grounds,* CLI-96-7, 43 N.R.C. 235 (1996).

[44] Petition at 4-5, citing Operating Agreement, Sections 1.5 and 2.1.

[45] Operating Agreement, Section 2.1.

As edited by Cities, the language suggests that STPNOC may only act upon Participants' Direction. However, as the text omitted by the Cities shows, STPNOC is given broad authority to act on behalf of the Participants subject to the modest requirement that when, "from time to time," the Participants provide direction, STPNOC is to act consistent with that direction. Further, when the entire provision is presented, the reference to "Participants' Direction" pertains only to STPNOC's operation of the facility and making of capital improvements, not to all matters related to NRC licensing. In fact, the provision provides STPNOC with the "sole authority" to make decisions necessary to comply with applicable laws and regulations, such as those requiring NRC consent to an indirect transfer of control.

In addition, the Cities err in asserting that "Participants' Direction" is expressed in the form of Owners' Committee *approval*.[46] Under Section 1.5 of the Operating Agreement, direction and approval are distinct actions. Further, a decision to provide direction would require agreement by representatives of two or more co-owners having in excess of a sixty percent interest in the facility,[47] so the Cities could provide no direction prohibiting STPNOC from assisting NRG South Texas submit the Application, even if such a decision were within the purview of the Owners' Committee (which it was not).

Moreover, the Cities entirely ignore Section 9.3 of the Operating Agreement, which provides:

> Assistance to Individual Participants: At the request of any Participant from time to time, Opco shall provide such Participant with data and assistance as may be requested by such Participant to enable such Participant to satisfactorily discharge, as a co-owner of the South Texas Project, such Participant's responsibilities with regard to the South Texas

[46] Petition at 4-5.

[47] Participation Agreement, § 9.4.

> Project, including such Participant's responsibilities to its security holders, to regulatory authorities and others.[48]

This provision obligates STPNOC to assist NRG South Texas, as a Participant, to discharge its obligation to the NRC to obtain prior written consent to the indirect license transfer associated with its transaction with Constellation. This requirement for STPNOC's assistance is invoked by a request of an individual Participant and does not require any involvement of or approval by the Owners Committee.

Similarly misrepresenting the authority of STPNOC and the STP Owners Committee, the Cities assert:

> Pursuant to the Participation Agreement, "[t]he Owners Committee shall . . . [a]pprove and join, where necessary, any application or amended application to the Nuclear Regulatory Commission or other regulatory authority."[49]

In fact, this Section of the Participation Agreement states:

> [The Owners Committee shall] [a]pprove and join, where necessary, any application or amended application to the Nuclear Regulatory Commission or other regulatory authority *as appropriate to provide for the reliable, safe and efficient operation of the South Texas Project by OPCO pursuant to the Operating Agreement*.[50]

Read in its entirety, Section 9.3.6 does not require Owners Committee approval before any application may be filed at the NRC. Rather, it *prohibits* the Owners Committee from *withholding* its approval of any application *that provides for Opco's (STPNOC's) reliable, safe and efficient operation of the nuclear plant*.[51]

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[48] Operating Agreement, Section 9.3.

[49] Petition at 5, citing Participation Agreement, Section 9.3.6.

[50] Participation Agreement, Sections 9.3 and 9.3.6 (emphasis added).

[51] In any event, the Participants' rights in the Participation Agreement cannot override STPNOC's unequivocal authority over compliance with applicable law and regulations pursuant to the Operating Agreement, as explained in greater detail below.

In sum, neither of the agreements supports the claim that STPNOC lacked authority to submit the Application or that Owners Committee approval was required. And the Cities provide no other information – no other documents, references or expert opinion – supporting their claim, and thus provide no support demonstrating a genuine dispute. Although there have been more than a half dozen previous applications involving direct or indirect license transfers relating to changes in ownership interests in the South Texas Project, the Cities do not identify a single instance in which Owners' Committee approval was required or the Owners' Committee joined in the Application.[52] Nor do the Cities provide any indication that they informed STPNOC that Owners Committee approval was required before STPNOC could submit the Application (which presumably they would have done if they really believed that such approval was required), and indeed, they did not.[53] Thus, Contention 1 lacks any support demonstrating a genuine dispute with the Application.

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[52] Neither the Owners Committee nor unaffected owners joined in any of these previous license transfer applications. *See* Application for Order and Conforming Administrative Amendments for Transfer of Licenses (June 28, 2001) (ADAMS Accession No. ML011830446); Application for Order and Conforming Administrative Amendments for Transfer of Licenses (May 31, 2001) (ADAMS Accession No. ML011560180); Application for Order Approving Indirect Transfer of Control of Licenses (Sep. 29, 2003) (ADAMS Accession No. ML032760227); Application for Order Approving Transfers of Control of Licenses and Conforming License Amendments (Oct. 21, 2004) (ADAMS Accession No. ML043030240); Application for Order Approving Indirect Transfer of Control of Licenses (Oct. 12, 2004) (ADAMS Accession No. ML042890380); Application for Order Approving Indirect Transfer of Control of Licenses (Oct. 14, 2005) (ADAMS Accession No. ML052930153); Application for Order Approving Indirect Transfer of Control of Licenses (May 3, 2007) (ADAMS Accession No. ML071340049).

[53] STP Nuclear Operating Company's Answer Opposing Motion to Dismiss License Transfer Application and Immediately Stay NRC Proceedings Submitted by the City of San Antonio, Texas Acting By and Through the City Public Service Board of San Antonio and City of Austin, Texas (Aug. 7, 2023) at 8-9 ("Cities never questioned, much less challenged, STPNOC's authority or duty to file.").

B. Contention 2 Is Not Set Forth with Particularity, and Is Outside the Scope of This Proceeding, Not Material to the Findings the NRC Must Make, and Not Supported by Information Demonstrating a Genuine Material Dispute with the Application

Contention 2, which alleges that NRG does not have authority to transfer its ownership interest to Constellation until the Cities determine whether to exercise a claimed right of first refusal,[54] is inadmissible because it is not within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii), and is not material to the findings the NRC must make to support the action that is involved in the proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iv). Contention 2 is also inadmissible because it is not set forth with particularity, as required by 10 C.F.R. § 2.309(f)(1), and is not supported by sufficient information demonstrating a genuine, material dispute with the Application, as required by C.F.R. § 2.309(f)(1)(vi).

1. Contention 2 Is Not Set Forth with Particularity

As a threshold matter, Contention 2 consists of a single paragraph, with no attempt to address the standards in 10 C.F.R. § 2.309(f)(1), and no reference to any specific source or documents supporting the Cities' position.[55] Instead, like the previous contention, Contention 2 refers vaguely to the "reasons set forth herein,"[56] referring perhaps to the background section of its Petition or perhaps to its motion to suspend the proceeding. Again, such a vague reference is insufficient[57] and does not meet the requirement that contentions must be set forth with particularity.

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[54] Petition at 22.

[55] *See id.*

[56] *Id.*

[57] *See supra* note 38.

2. Contention 2 Is Not Within the Scope of This Proceeding or Material to the Findings that the NRC Must Make

As previously discussed, the scope of this proceeding and the findings that the NRC must make are limited to whether the proposed transferee is qualified to be the holder of the license (i.e., the proposed transaction will not affect the qualifications of the licensee to hold the license), and whether the transfer of the licenses is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto.[58] In making these findings for consent to an indirect transfer of control of an owner's license, the NRC examines whether the licensee remains financially qualified, the technical qualifications of the licensed operator are unaffected, decommissioning funding assurance is maintained, no prohibited foreign ownership is created, and insurance and indemnity requirements are maintained.[59]

Whether the Cities have any right of first refusal is not within the scope of, or relevant to, any of the findings that the NRC must make to consent to the indirect transfer of control. Instead, it represents a contractual dispute between the co-owners, beyond the Commission's purview. As previously stated, "[T]he Commission will not be drawn into [a commercial contractual dispute between regulated parties] absent a concern for the public health and safety or the common defense and security, except to carry out its responsibilities to act to enforce its licenses, orders and regulations."[60] Here, there is no nexus to concern with the public health and safety or the common defense and security. Nor does Contention 2 have any bearing on the Commission's ability to enforce its requirements.

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[58] 10 C.F.R. § 50.80(c); *see also supra* 40 note.

[59] *See supra* notes 40 and 41 and accompanying text.

[60] *Waltz Mill*, CLI-07-15, 65 N.R.C. at 234.

3. Contention 2 Is Not Supported by Sufficient Information Demonstrating a Genuine, Material Dispute with the Application

Even if this Contention were within the scope of this proceeding (which it is not), it would be inadmissible because it is unsupported by sufficient information demonstrating a genuine dispute with the Application. The only agreement specifically identified earlier in the Petition as allegedly providing a right of first refusal is the Participation Agreement. On its face, the Participation Agreement does not provide any right of first refusal in connection with the acquisition of the equity in a participant (a direct owner),[61] and NRG South Texas's parent companies are not party to, and therefore not bound by, the Participation Agreement. Further, even setting aside this fatal flaw, no right of first refusal applies where, as here, Constellation is acquiring all the business of NRG South Texas.[62]

The vague reference in the background section of the Petition[63] and motion to suspend[64] to supplemental agreements described in the Cities' complaints[65] in state court litigation do not

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[61] Section 17.1 of the existing Participation Agreement provides:

> Except as provided in Section 16 hereof, should any Participant, prior to the expiration of the period described in Section 17.12 hereof, desire to transfer its ownership, or any part thereof, in the [STP] to any person, entity or another Participant, ready, able and willing to acquire same, the Participant desiring to make such transfer shall obtain a written offer from the prospective transferee, setting forth the consideration and other terms of the offer, and each of the other Participants shall have the right of first refusal to acquire such interest on the basis of the following consideration …"

NRG South Texas is the Participant under this Agreement, and it is not transferring any part of its ownership in the South Texas Project to another person.

[62] Section 17.1 of the Participation Agreement applies "[e]xcept as provided in Section 16"; and Section 16.3 of the existing Participation Agreement provides that "[e]ach Participant shall have the right to transfer or assign its ownership share … without the need for prior written consent of any other Participant … [t]o any entity acquiring all or substantially all of the electric utility properties and business, or of the electric generating facilities, of such Participant."

[63] Petition at 4, n.6.

[64] *Id.* at 8.

[65] Petition, Exhibits J and M.

cure the Cities' failure to support its claim. San Antonio's complaint purports to rely on a 2007 STP Supplemental Agreement between NRG South Texas and San Antonio in connection with the proposed (now canceled) development of additional nuclear generation (Units 3 and 4), but the Cities have no broader rights under that agreement. The City of Austin was not even a party to the 2007 Supplemental Agreement and therefore can have no rights under it.[66] Section 9.4 of the Supplemental Agreement stated that a Party desiring to dispose of its ownership interest shall have the obligations of a Participant under Section 17 of the Participation Agreement.[67] As already discussed, Section 17 of the Participation Agreement does not apply to the acquisition of the equity in a participant and in any event does not apply where an entity is acquiring all the business of a participant. Nor does the last sentence of Section 9.4 referring "[f]or avoidance of doubt" to upstream transfer of corporate assets, stock, or by other means, modify any rights under the Participation Agreements. Section 29 of the Participation Agreement provides that it may not be amended except in a written agreement executed by all Participants, and the City of Austin—a Participant in STP—was not a party to and did not execute the 2007 Supplemental

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[66] Indeed, Austin's complaint in the state court litigation makes no claim of any right of first refusal under any supplemental agreement. *See* Petition, Exhibit M.

[67] Section 9.4 of the Supplemental Agreement, quoted in San Antonio's complaint (Exhibit J to the Petition), provides:

> Except as provided in Sections 9.1, 9.2 or 9.3 hereof, should either Party hereto desire to Dispose of all or any part of its Ownership Interest, together with its related rights under the Participation Agreement, the Operating Agreement, and its related rights as an owner of the [STP] under any agreement of which all Participants are parties (as any of those may be amended), to any Person (including another Participant), ready, able and willing to acquire same, the Party desiring to make such Disposition shall have the obligations, and the other Party shall have the rights, of a Participant under Section 17 of the Participation Agreement with respect to the Ownership Interest sought to be transferred. For avoidance of doubt, the Party not disposing of its interest in the Existing Units or in the Project shall have a right of first refusal with respect to a Disposition of an interest in the [STP], whether that interest is transferred directly or as an upstream transfer of corporate assets, stock, or by other means, except as provided herein. …

Petition, Exhibit J, at 7.

Agreement. Similarly, Section 9.4 could not apply to this transaction involving NRG South Texas's parent companies, because they also are not parties to the 2007 Supplemental Agreement and therefore cannot be bound by that agreement.

In any event, the Supplemental Agreement is no longer in force. It was terminated by an STP 3 & 4 Owners Agreement and by a Project Settlement Agreement in 2010;[68] and while those 2010 Agreements stated that the rights and obligations of San Antonio and NRG South Texas under Section 9 of the Supplemental Agreement (which included the right of first refusal language) would survive,[69] a subsequent agreement in 2018[70] provided that "*the rights of the Participants in connection with the South Texas Project shall be as they existed prior to the execution of the Supplemental Agreement, Project [Settlement] Agreement and [STP 3 & 4] Owners Agreement . . .*"[71] Thus, no surviving right under the *2007* Supplemental Agreement existed thereafter.

Accordingly, neither of the agreements on which San Antonio purports to rely establishes a right of first refusal applicable to Constellation's acquisition of NRG South Texas (and again, Austin was not even a party to the 2007 Supplemental Agreement). Thus, the Cities fail to demonstrate any genuine dispute. Further, consistent with its practice, the Commission should not get embroiled in this commercial contractual dispute, particularly when it is not germane to

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[68] Petition, Exhibit J, at 8.

[69] *Id.*, quoting STP 3 & 4 Owners Agreement (Mar. 1, 2010), Section 5.11, and Project Agreement, Settlement Agreement and Mutual Release (Mar. 1, 2010), Section 5.2.

[70] Assignment and Assumption Agreement and Mutual Release (Oct. 1, 2018), attached as Exhibit A hereto. This agreement was entered into by NRG South Texas, the City of San Antonio, the City of Austin and the NINA Entities.

[71] *Id.* at Recital J; *see also id.* at Sections 3 and 4. San Antonio's complaint in the Texas state court litigation (Petition, Exhibit J, at 9) quotes Recital F to the 2018 Agreement but ignores Recital J and Sections 3 and 4.

any of the findings that the NRC must make to consent to the indirect transfer of control of NRG South Texas' licenses. Rather, whether or not a right of first refusal applies is a matter for the Texas state court to decide – a matter beyond the NRC's jurisdiction – and the state court litigation provides ample means for the Cities to protect their interests.

C. Contention 3 Is Not Material to the Findings the NRC Must Make, Not Within the Scope of This Proceeding, and Not Supported by Information Demonstrating a Genuine Material Dispute with the Application

Contention 3, which alleges that STPNOC and NRG do not have authority to diminish the parental support commitments associated with NRG South Texas' 44% share,[72] is inadmissible because it is: (1) not material to the findings that the NRC must make to consent to the indirect transfer of control of NRG South Texas' licenses, as required by 10 C.F.R. § 2.309(f)(1)(iv); (2) not within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii), in that it impermissibly challenges the NRC's rules governing financial qualifications; and (3) not supported by any information demonstrating a genuine dispute with the Application on a material issue of law or fact, as required by C.F.R. § 2.309(f)(1)(vi).

1. Contention 3 Is Not Material to the Findings that the NRC Must Make and Is Not Within the Scope of This Proceeding

As the Commission has held, the adequacy of a pledge of financial support from a parent organization is "not an issue in our license transfer inquiry and, consequently, it cannot constitute a basis for granting a hearing."[73] A parent support agreement "is supplemental information and not material to the financial qualifications requirements of 10 C.F.R. § 50.33(f)(2)."[74] Under the

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[72] Petition at 22.

[73] *Oyster Creek*, CLI-00-6, 51 N.R.C. at 205.

[74] *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point Unit 3), CLI-00-22, 52 N.R.C. 266, 299-300 (2000); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 N.R.C. 151, 175 (2000) (citing *Oyster Creek*, CLI-00-6, 51 N.R.C. at 205).

NRC rules at 10 C.F.R. § 50.33(f), the financial qualifications of a licensee is demonstrated by submitting a five-year income statement estimating the total annual operating costs for each year and the sources of funds to cover those costs. "[A] license transfer applicant satisfies our financial qualifications rule if it provides a cost-and-revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs."[75] The Application in this proceeding provided just such an income statement demonstrating that Constellation South Texas' projected annual revenues will exceed its share of the projected annual operating costs (and by very considerable margins, even if a ten-percent reduction in market revenues were assumed).[76] The Cities do not dispute that Constellation South Texas' projected annual income exceeds its share of the estimated annual costs by large amounts "[A]bsent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent's supplemental commitment is not material to [the NRC's] license transfer decision."[77]

Citing 10 C.F.R. § 50.33(f)(2) and the NRC Staff's Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance,[78] the Cities

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A contention attempting to impose a requirement more stringent than that imposed under the NRC rules is an impermissible challenge to the NRC rules, barred by 10 C.F.R. § 2.335(a) in NRC adjudicatory proceedings. *Oyster Creek*, CLI-00-6, 51 N.R.C. at 206 (citing *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 N.R.C. 193, 217 n.8, 220-21 (1999)).

[75] *Vermont Yankee,* CLI-00-20, 52 N.R.C. at 176 (citing *Oyster Creek*, CLI-00-6, 51 N.R.C. at 206-08).

[76] Application, at Encl. 5A.

[77] *Vermont Yankee*, CLI-00-20, 52 N.R.C at 177; *see also Fitzpatrick*, CLI-00-22, 52 N.R.C. at 300 n.22 ("[A]lthough AmerGen's $200 million reserve fund provides significant assurance of sufficient operating and decommissioning funds in the event of a problem, the fund is not[, strictly speaking,] required by our rules. It therefore lies outside the bounds of our license transfer hearing process — which focuses on whether AmerGen Vermont meets the required financial and technical qualifications.") (*quoting Vermont Yankee*, CLI-00-20, 52 N.R.C. at 178).

[78] NUREG-1577, Rev. 1, Standard Review Plan on Power Reactor Licensee Financial Qualifications and Decommissioning Funding Assurance (Dec. 2001) (ADAMS Accession No. ML013330264) ("Standard Review Plan").

incorrectly assert that "[b]ecause NRG and Constellation are not "electric utilities" subject to cost of service ratemaking, Applicants must demonstrate *Constellation's* financial wherewithal after the transfer to cover facility operating costs."[79] Under the Atomic Energy Act, it is the license applicant (i.e., the entity that will be licensed to possess or operate the facility) that must be financially qualified.[80] Consistent with this statutory requirement, the financial qualification requirements in 10 C.F.R. § 50.33(f)(2) pertain to an applicant for an operating license.[81] The Cities cite page 10 of the Standard Review Plan,[82] but there is no mention at that page of any requirement to demonstrate the wherewithal of a parent company to cover facility operating costs.[83] As the Federal Register Notice in this proceeding makes clear, "[t]he Commission will approve an application for the indirect transfer of a license, if the Commission determines that the proposed transaction will not affect the qualifications *of the licensee to hold the license*."[84]

Elsewhere, the Standard Review Plan provides that "[t]he reviewer will confirm that non-electric utility *OL applicants* have submitted estimates for total annual operating costs for each

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[79] Petition at 22 (emphasis added).

[80] Atomic Energy Act, § 182(a), 42 U.S.C. § 2232(a).

[81] 10 C.F.R. § 50.33(f)(2) ("*If the application is for an operating license*, the applicant shall submit information that demonstrates the applicant possesses or has reasonable assurance of obtaining the funds necessary to cover estimated operation costs for the period of the license.") (emphasis added). Under the NRC rules, information on the financial arrangements that a licensee may have with its owners is only required when a newly formed entity is being organized for the primary purpose of constructing or operating a nuclear plant. 10 C.F.R. § 50.33(f)(4).

[82] Petition at 22 n.68.

[83] Page 10 of the Standard Review Plan discusses decommissioning funding and makes no mention of parent companies. Perhaps the Cities are citing to some unformatted version of the Standard Review Plan.

[84] Consideration of Approval of Indirect Transfer of Licenses and Conforming Amendments, 88 Fed. Reg. 46,192, 46,193 (July 19, 2023) (emphasis added).

of the first 5 years of operation of their facilities, and have also indicated the source(s) of funds to cover operating costs."[85] The Standard Review Plan continues,

> If applicable, the reviewer will also use information from *Moody's, Standard and Poors,* and *Value Line* or other widely accepted rating organizations to assist in his or her review. If a license applicant has an "investment-grade" rating or equivalent from at least two of these sources, *or has demonstrated that it has met the electricity supply and demand test described above*, the reviewer will find such applicants financially qualified. *If an applicant cannot meet these criteria*, the reviewer will also consider other relevant financial information (i.e., information on cash or cash equivalents that would be sufficient to pay fixed operating costs during an outage of at least 6 months, the amount of decommissioning funds collected or guaranteed for the plant in relation to the current estimated decommissioning cost, and any other relevant factors).[86]

Thus, under the Standard Review Plan, supplemental funding from a parent is not a consideration if the 5-year projected income statement shows that projected annual revenues will exceed projected annual operating costs, which the current Application does.

Consequently, neither the NRC rules nor the NRC Staff's guidance provide any basis to challenge the replacement of NRG's current parent support agreements with Constellation's proposed support agreement. A support agreement is not even required, as the sufficiency of the projected income statement on which financial qualifications is based is undisputed.

The Cities' assertion that Constellation's proposed support agreement does not conform to the conditions in the NRC Staff's April 2005 order[87] likewise fails to raise any issue material

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[85] Standard Review Plan at 4 (emphasis added).

[86] *Id.* at 5 (emphasis added).

[87] Order Approving Application Regarding Proposed Acquisition (Apr. 4, 2005) (ADAMS Accession No. ML050800505). The April 2005 order approved an indirect transfer of control of Texas Genco LP (which later became NRG South Texas) to Texas Genco LLC, owned at the time by several investment funds; *see also* Safety Evaluation by the Office of Nuclear Reactor Regulation Related to the Indirect License Transfers Resulting from Indirect Transfer of Ownership of Texas Genco, LP, South Texas Project, Units 1 and 2, Facility Operating Licenses NPF-76 and NPF-80, at 1-2 (Apr. 4, 2005) (ADAMS Accession No. ML050950286) ("2006 Safety Evaluation").

to the findings that the NRC must now make or demonstrate any genuine material dispute with the Application. The condition in the April 2005 order currently applies to NRG's support agreements,[88] but not to the support agreement that Constellation proposes to provide. Under the April 2005 order, NRG's existing support can be terminated with the consent of the Director of the Office of Nuclear Reactor Regulation ("NRR"). The Application properly requests this consent to terminate the existing support agreement,[89] after which the condition in the 2005 order will no longer have any effect.

2. Contention 3 Is Not Supported by Information Demonstrating a Genuine Material Dispute

The Cities offer no reason why a support agreement in the amount of $120 million needs to be maintained. They do not dispute the explanation in the Application that NRG's existing support agreement was size to provide one year's worth of fixed operating and maintenance costs, and they provide no reason why that same commitment needs to be made by Constellation.

Further, the underlying reason for a $120 million support agreement no longer applies. The support agreement put originally in place in 2005 was sized to provide for one year's worth of the fixed operations and maintenance costs because the 2005 transfer of control involved a limited group of equity investors whose interests might be shorter term than a traditional utility.[90] The current Application involves an acquisition by a company whose business is energy generation with the largest fleet of nuclear power plants in the United States, owning twenty-

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[88] Letter from M. Thadani, NRC, to J. Shepard, STPNOC (Jan. 12, 2006), Encl. 2, Safety Evaluation by the Office of Nuclear Reactor Regulation Related to the Indirect Transfer of Control of Ownership of Texas Genco, LP, South Texas Project, Units 1 and 2, Facility Operating License Nos. NPF-76 and NPF-80, at 5 (Jan. 12, 2006) (ADAMS Accession No. ML053630163).

[89] Application, at Encl. p.9.

[90] *See* 2006 Safety Evaluation at 6; *see also* Application, at Encl. 1 p.9 n.4.

three nuclear reactors at thirteen sites in five states.[91] The Cities provide no explanation why a support agreement covering the licensee's ownership share of six months of fixed O&M costs is insufficient under current circumstances.

In the end, Contention 3 devolves to the meritless claim that "neither STPNOC nor NRG had the authority to terminate NRG's regulatory commitment set forth in the current Support Agreements and the 2005 Order without Owners Committee approval."[92] As previously discussed, Section 9.3.6 of the Participation Agreement, on which the Cities rely in making this claim,[93] does not require Owners Committee approval before any application may be filed at the NRC. For all the reasons previously discussed,[94] the Cities' claims regarding the need for Owners Committee approval are: (1) not material to the findings the NRC must make; (2) at best a contractual dispute not within the scope of this proceeding; and (3) in any event unsupported by any references or other information demonstrating a genuine, material dispute with the Application.

D. Contention 4 Is Not Material to the Findings the NRC Must Make, Not Within the Scope of This Proceeding, and Not Supported by Information Demonstrating a Genuine Material Dispute with the Application

Contention 4, which alleges that reducing the amount of parental support is not adequately justified,[95] is inadmissible because it is: (1) not material to the findings that the NRC must make to consent to the indirect transfer of control of NRG South Texas' licenses, as required by 10 C.F.R. § 2.309(f)(1)(iv); (2) not within the scope of this proceeding, as required

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[91] Application, at Encl. 1 p.4.

[92] Petition at 24.

[93] *Id.*

[94] Rather than repeating its arguments responding to Contention 1 Sections III.A.1-3, *supra*), NRG incorporates those arguments by reference in this response to Contention 3.

[95] Supplemental Contention at 2.

by 10 C.F.R. § 2.309(f)(1)(iii), in that it impermissibly challenges the NRC's rules governing financial qualifications; and (3) not supported by any information demonstrating a genuine dispute with the Application on a material issue of law or fact, as required by C.F.R. § 2.309(f)(1)(vi).

1. Contention 4 Is Not Material to the Findings the NRC Must Make and Not Within the Scope of This Proceeding,

As previously discussed, the adequacy of a pledge of financial support from a parent organization is "not an issue in [NRC's] license transfer inquiry and, consequently, it cannot constitute a basis for granting a hearing."[96] A parent support agreement "is supplemental information and not material to the financial qualifications requirements of 10 CFR 50.33(f)(2)."[97]

> [A] license transfer applicant satisfies our financial qualifications rule if it provides a cost-and-revenue projection for the first five years of operation that predicts sufficient revenue to cover operating costs.[98]

As previously stated, the Application in this proceeding provided just such an income statement demonstrating that Constellation South Texas' projected annual revenues will exceed its share of the projected annual operating costs (and by very considerable margins, even if a ten-percent reduction in market revenues were assumed).[99] The Cities do not dispute that Constellation South Texas' projected annual income exceeds its share of the estimated annual costs by large amounts. "[A]bsent a demonstrated shortfall in the revenue predictions required

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[96] *Oyster Creek,* CLI-00-6, 51 N.R.C. at 205.

[97] *Fitzpatrick,* CLI-00-22, 52 N.R.C. at 300; *Vermont Yankee*, CLI-00-20, 52 N.R.C. at 75 (citing *Oyster Creek*, CLI-00-6, 51 N.R.C. at 205).

[98] *Vermont Yankee,* CLI-00-20, 52 N.R.C. at 176 (citing *Oyster Creek*, CLI-00-6, 51 N.R.C. at 206-08).

[99] Application, at Encl. 5A.

by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent's supplemental commitment is not material to [the NRC's] license transfer decision."[100]

The Cities allege that "[b]y excluding or departing from costs in STPNOC's Business Plan, without explanation, Constellation has not demonstrated its financial qualifications in accordance with NUREG-1577 and has not justified the 25% reduction in NRG's financial support obligation."[101] Presumably, this statement relates only to the Cities' quarrel with the amount of Constellation's proposed support agreement. The Cities' statement of Contention 4 is limited to the parental support,[102] and the Cities make absolutely no claim that Constellation South Texas' annual revenues will not exceed its share of the estimated operating costs. While the Cities quarrel with the line items that have been considered in calculating the amount of Constellation's parental commitment, neither Contention 4 nor the accompanying affidavit provides any facts, expert opinion, reference or other source demonstrating that the estimated annual operating costs in the projected income statement are incorrect in any material respect.[103] In fact, a comparison of NRG's share of the Total Resource Requirements derived by the Cities

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[100] *Vermont Yankee*, CLI-00-20, 52 N.R.C at 177; *see also Fitzpatrick*, CLI-00-22, 51 N.R.C. at 300 n.22 ("[A]lthough AmerGen's $200 million reserve fund provides significant assurance of sufficient operating and decommissioning funds in the event of a problem, the fund is not[, strictly speaking,] required by our rules. It therefore lies outside the bounds of our license transfer hearing process — which focuses on whether AmerGen Vermont meets the required financial and technical qualifications.") (*quoting Vermont Yankee*, CLI-00-20, 52 N.R.C. at 178).

[101] Supplemental Contention at 11.

[102] *Id.* at 2 ("Contention 4: Applicants Request to Reduce the Existing $120 Million Support Agreement is Not Adequately Justified").

[103] "[The Commission] will admit for hearing only those 'adequately supported assertions that a transfer applicant's financial assumptions and forecasts are implausible or unrealistic in a way that is material to our assessment of reasonable assurance.'" *Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 N.R.C. 1, 18 (2022) (quoting *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-20-12, 92 N.R.C. 351, 368 (2020).

from the 2023 Business Plan[104] against the Total Operating Expense in the projected income statement in the Application[105] shows that the estimates in the Application exceed the requirements in the Business Plan in four of the five years, and in every year, the projected revenues exceed the resource requirements in the Business Plan by very large amounts.

Further, the Cities' assertion that Constellation has not demonstrated its financial qualifications in accordance with NUREG-1577 (the Standard Review Plan) ignores relevant provisions in that guidance. As previously discussed, the Standard Review Plan states that the NRC will find an applicant to be financially qualified if it meets the supply and demand test and will consider the need for supplemental funding only if the applicant neither meets this test nor has investment grade bond ratings.[106] Consequently, the Standard Review Plan provides no support for any claim that Constellation South Texas has not demonstrated its financial qualifications. In short, a parent support agreement is not required under either the NRC rules or under the guidance in the Standard Review Plan, so any dispute with the amount of Constellation's commitment is immaterial to the findings that the NRC must make, outside the scope of this proceeding, and an impermissible challenge to the NRC rules.

2. Contention 4 Is Not Supported by Sufficient Information Demonstrating a Genuine Material Dispute with the Amount of Constellation's Support Agreement

Even if the amount of Constellation's support agreement were germane to a finding of financial qualifications in this proceeding (which it is not), the Cities fail to demonstrate any genuine material dispute with the proposed $90 million amount. The Contention questions

[104] *See* Supplemental Contention at 5, Table 2.

[105] Application, at Encl. 5A; *see also* Supplemental Contention at 4, Table 1.

[106] Standard Review Plan at 5.

whether two O&M items – Plant Investment Plan and 24-Mo Fuel Cycle – should have been included in calculating the amount of parental support.[107] The Contention provides no information showing that the Plant Investment Plan represents fixed operating costs that would be considered under the Standard Review Plan (if parental support were required because the applicant failed to meet the supply and demand test). Further, as the table in Contention 4 shows, the amount allocated to the Plant Investment Plan is small and its inclusion, therefore, would not materially alter the parent support commitment. The 24-Mo Fuel Cycle line items are also small and would not materially alter Constellation's parent support commitment, but Constellation's answer to the Cities' hearing request is now committing to add these line items to its calculation of six-months of fixed operating costs,[108] so this issue is moot.

The Contention also questions the exclusion of "Purchased Fuel and Energy and Cost of Sales" from the calculation of the parental support commitment, which it assumes represents fuel amortization expense[109] but does not demonstrate that this line item represents fixed operating costs. The Cities assert only that payments to vendors for fuel would "ostensibly continue during an extended outage"[110] (meaning that this may not actually be the case). They provide no explanation why fuel procurement should be considered a "fixed" cost. They make no effort to

[107] Supplemental Contention at 7. The Cities note that while the projected income statement was based on STPNOC's approved 2023-2028 Business Plan dated December 15, 2022, and information obtained from due diligence activities, as stated in the Application, there is a more recent Business Plan approved in February 2023. Supplemental Contention at 4 (citing Application, at Encl. 5A p.1 n.1). The Cities do not discuss the difference between these two plans. In fact, the only difference in the resource target projections is the addition of the 24-Mo Fuel Cycle line items, which were not part of the December 2022 plan.

[108] As indicated in Constellation's answer to the Cities' hearing request, Constellation is also making an additional adjustment, increasing the total parent support commitment to $95 million.

[109] *Id.* at 9-10.

[110] *Id.* at 10.

quantify any recurring or baseline amount that they think should be considered. They provide no meaningful discussion of relevant provisions in STPNOC's fuel contracts. No expert opinion is provided in support of this assertion. In short, the Cities fail to provide sufficient information demonstrating a genuine material dispute with the amount of Constellation's parent support agreement, as is their burden.[111]

IV. LEGAL STANDARDS GOVERNING STANDING

To assess whether a petitioner has set forth a sufficient interest to qualify for a hearing, the Commission has long applied contemporaneous "judicial concepts of standing."[112] Under this framework, to demonstrate standing, a petitioner must show (1) an actual or threatened "concrete and particularized injury" (2) to an interest within the zone of interests protected by the Atomic Energy Act (3) caused by the proposed licensing action and (4) capable of being redressed by a favorable decision.[113] In an indirect license transfer proceeding, which involves no direct changes to the licensed owner or operator or to the operation of the physical plant, the Commission does not employ any "proximity presumption" but requires the petitioner to explain how the licensing action will harm its interests.[114] The petitioner bears the burden to provide facts sufficient to establish standing.[115]

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[111] *See supra* note 25.

[112] *El Paso Electric Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-20-7, 92 N.R.C. 225, 230 (2020).

[113] *Exelon Generation Co. LLC* (Braidwood Station, Units 1 and 2, et al.), CLI-22-1, 95 N.R.C. 1, 8 (2022).

[114] *Id.* at 9; *see also Entergy Nuclear Operations, Inc.,* (Palisades Nuclear Plant), CLI-08-19, 68 N.R.C. 251, 269 (2008) ("[W]e have never granted proximity-based standing to a petitioner in an indirect license transfer adjudication."); *Palo Verde*, CLI-20-07, 92 N.RC. at 233.

[115] *See U.S. Enrichment Corp.* (Paducah, Kentucky Gaseous Diffusion Plant), CLI-01-23, 54 NRC 267, 272 (2001) (citing *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000)).

The asserted injury must be "distinct and palpable, particular and concrete, as opposed to being conjectural or hypothetical."[116] Also, "when future harm is asserted, it must be 'threatened,' 'certainly impending,' and 'real and immediate.'"[117] Although a petitioner is not required to show that the injury flows directly from the challenged action, it must nonetheless show that the "chain of causation is plausible."[118] Finally, a petitioner must show that "its actual or threatened injuries can be cured by some action of the tribunal."[119]

V. THE CITIES FAIL TO DEMONSTRATE STANDING

The Cities allege two injuries as the basis for their standing, but neither meets the applicable standards. First, the Cities allege that they have been injured by submittal of the Application without approval of the Owners Committee and without NRG honoring their alleged right of first refusal.[120] As previously discussed, the Cities have no such rights. The Participation Agreement and Operating Agreement to which they refer do not, on their face, establish a right of first refusal applicable to the current transaction or require Owners Committee approval for the submittal of the Application. The Cities have not met their burden of providing *facts* sufficient to establish standing. Further, the alleged injuries to contractual rights are not within the zone of interest protected by the Atomic Energy Act. The Atomic

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[116] *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 N.R.C. 116, 117-18 (1998) (citing *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016 (1998); *Warth v. Seldin*, 422 U.S. 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 N.R.C. 64, 72 (1994)).

[117] *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 N.R.C. 344, 349 (2001), *aff'd*, CLI-01-21, 54 N.R.C. 247 (2001) (citations omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401-02, 409-10 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 564 (1992); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976); *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969).

[118] *Sequoyah Fuels*, CLI-94-12, 40 N.R.C. at 75; *see also Crow Butte Res., Inc.* (In-Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 N.R.C. 331, 345 (2009).

[119] *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 N.R.C. 9, 14 (2001).

[120] Petition at 20.

Energy Act protects radiological health and safety and the common defense and security. The Cities' claim to an alleged deprivation of rights under the Participation Agreement and Operating Agreement is a commercial contract dispute unrelated to the Commission's responsibilities under the Atomic Energy Act. Moreover, whether there has been any deprivation of the Cities' alleged right of first refusal is at this point, at most, conjectural and speculative, as the existence of any such right depends on the outcome of the ongoing state court litigation. For the same reason, this alleged injury is not redressable before the NRC, but is a matter for the Court to decide.

Second, the Cities allege that the reduction in the parent support obligation by $30 million would increase the risk of the Cities being forced to assume a greater than expected share of operating and decommissioning costs.[121] The Cities, however, do not explain how they would be at risk of assuming additional decommissioning costs, as NRG South Texas has (and the renamed Constellation South Texas will continue to have) the ability to recover decommissioning costs from ratepayers through a non-bypassable charge.[122] Further, the claim that the Cities would be at future risk of bearing a greater share of operating costs is entirely conjectural – too speculative to establish standing.

In this regard, the *Nine Mile Point* and *Seabrook* decisions on which the Cities rely[123] are readily distinguishable. In both those proceedings, the co-owners made sufficient, adequately supported assertions that the license transferee would not be financially qualified.[124] In the *Seabrook* case, the co-owner's assertion of increased risk was supported by detailed affidavits

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[121] Petition at 20-21.

[122] Application at 10.

[123] Petition at 21 n.65 (citing *Niagara Mohawk Power Corp*. (Nine Mile Point, Units 1 and 2), CLI-99-30, 50 N.R.C. 333, 341 (1999) (quoting *Seabroo*k, CLI-99-6, 49 N.R.C. at 215).

[124] *See Nine Mile Point*, CLI-99-30, 50 N.R.C. at 339-40, 341; *Seabroo*k, CLI-99-6, 49 N.R.C. at 219.

and evidentiary exhibits;[125] and while the allegations in *Nine Mile Point* were not supported by affidavits, they "were sufficiently concrete and particularized to pass muster for standing."[126] In contrast, the Cities do not dispute that Constellation South Texas' projected revenues will exceed its share of STP's estimated costs by very considerable amounts, thereby satisfying the financial qualifications requirements in the NRC's rules. The Cities provide no affidavits or assertions challenging the projected income statement in any material manner. Without any supported or particularized facts calling the licensee's financial qualifications into question, the Cities' speculative and conjectural assertion of some future risk of needing to assume a greater share of operating cost flounders. It is neither "real and immediate" nor "certainly impending."

Nor is this vague and speculative risk within the zone of interest protected by the Atomic Energy Act (or the National Environmental Policy Act under which the NRC also operates). "The 'zone of interests' test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm,"[127] Underlying the Commission's decisions in both *Nine Mile Point* and *Seabrook* was an alleged increase in the risk of radiological harm to the co-owners' property if the licensed operator were not funded adequately to maintain safe operations of the facility.[128] Here, the Petition includes no claim of

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[125] *Seabroo*k, CLI-99-6, 49 N.R.C. at 215.

[126] *Nine Mile Point*, CLI-99-30, 50 N.R.C. at 341.

[127] *Diablo Canyon*, CLI-02-16, 55 N.R.C. at 336; *see also International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 N.R.C. 259, 265 (1998) ("It has long been our practice as an agency to reject standing for petitioners asserting a bare economic injury, unlinked to any radiological harm.").

[128] In both proceedings, the co-owners asserted harm to their property. *Nine Mile Point*, CLI-99-30, 50 N.R.C. at 341 (claim of "harm to their property"); *Seabroo*k, CLI-99-6, 49 N.R.C. at 215 (alleged "risk of radiological harm to its property"). In both cases, the Commission found a claim of radiological harm to property to be within the zone of interest of the Atomic Energy Act. "[T]he AEA protects not only human health and safety *from radiologically-caused injury*, but also the owners' property interests in their facility." *Seabrook*, CLI-99-06, 49 N.R.C. at 216 (citing *Gulf States Util. Co.* (River Bend Station, Unit 1), CLI-94-10, 40 N.R.C. 43, 48 (1994), and AEA §§ 103b, 161b, 42

any radiological risk to its plant. Instead, it claims a purely economic harm, unlinked to radiological harm and thus beyond the AEA's zone of interest.

Finally, the alleged, speculative risk that the Cities might have to assume a greater share of operating costs is not redressable in this proceeding. As previously discussed, the Cities' claim that the $120 million parent support agreement for NRG South Texas cannot be replaced with the $90 million support agreement proposed by Constellation represents an impermissible challenge to the NRC's rules governing the financial qualifications of its licensees. Such a challenge is barred in this proceeding[129] and therefore beyond its scope.

VI. CONCLUSION

For all the reasons discussed above, none of the Cities' proposed contentions is admissible, and the Cities have failed to establish standing. Therefore, the Cities' contentions should be rejected and their hearing and intervention requests should be denied.

Respectfully submitted,

/signed electronically by David R. Lewis/

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Dated: August 25, 2023

U.S.C. §§ 2133(b), 2201(b); *Nine Mile Point*, CLI-99-30, 50 N.R.C. at 341-42 (quoting *Seabrook* and referring to its cited authority) (emphasis added). In *River Bend*, the alleged injury was radiological harm to the co-owner's property (*see River Bend*, CLI-94-10, 40 N.R.C. at 46, 48); and Sections 103(b) and 161(b) of the Atomic Energy Act provide for the minimization of danger to property. In short, the conclusion in *Seabrook* and *Nine Mile Pointt* that the alleged injury fell within the zone of interests of the Atomic Energy Act both relate back to the *River Bend* decision and the cited sections of the Atomic Energy Act, which in turn pertain only to alleged radiological harm to property.

[129] *See supra* note 74.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)		
	)		
South Texas Nuclear Operating Company	)	Docket Nos.	50-498-LT
NRG South Texas LP and its parent companies,	)		50-499-LT
and Constellation Energy Generation, LLC	)		72-1041-LT
	)		
(South Texas Project, Units 1 and 2)	)		

CERTIFICATE OF SERVICE

I hereby certify that the foregoing NRG's Answer Opposing the City of San Antonio's and City of Austin's Petition to Intervene and Supplemental Contention has been served through the E-Filing system on the participants in the above-captioned proceeding this 25th day of August, 2023.

/signed electronically by /
David R. Lewis